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NEGOTIATING DIGITAL TRADE AT THE WTO: COMPETING NARRATIVES AND STRATEGIC POLITICS

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NEGOTIATING DIGITAL TRADE AT THE WTO: COMPETING NARRATIVES & STRATEGIC POLITICS

*Kosha Doshi**

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[Abstract: *Digital breakthroughs are causing changes in the world economy. The promise of digital technology is to increase global trade flows, especially exports from poor nations, through the quick creation of new products and markets, the fall in search and information costs, and the rise of new actors. The COVID-19 pandemic acted as a catalyst for society to accept that the world is continuing to go digital. Harnessing benefits of digital trade brings along with its multi-fold policy issues: cross-border data flows, localization, intermediary liability, custom duties on electronic transmissions, data protection, technology transfer and dissemination. The developing and least developed nations are falling behind when it comes to cross-border data flows that influence opportunities for international trade due to the digital divide.*

With GATT and GATS having a technologically neutral approach, and WTO's futile efforts to negotiate on digital trade policies under Work Programme on Electronic Commerce, has anchored it in a pre-digital setup. Furthermore, the G20 summit in 2019, received a setback in resolving differences over the WTO reform for digital trade. All these facts beg the question if the General rules of the WTO Digital Trade Agreement create barriers and challenges for a developing country without taking their stance in account? Based on the existing literature, this research paper aims to open a Pandora's Box for the Global South which critically evaluates the disconnect in digitalization of international trade and the multilateral trading system. This research paper analyses the points of contention surrounding the issue of a moratorium on custom duties and the need for new multilateral trade rules that align with the interests of developing nations, as raised by countries like India and South Africa. It examines the strategic policies and competing narratives surrounding this issue, and considers how existing PTAs and RTAs may need to be re-evaluated to ensure greater equity for developing nations.

Keywords: *Developing Nations, Digital Trade, GATS, GATT, WTO]*

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I

INTRODUCTION

The digital transformation has changed how governments, businesses, and people interact with one another. The twenty-first century has seen the emergence of the information age, in which businesses and consumers deliver bundled goods, services, and ideas across international boundaries using physical devices connected to digital platforms. Although global digital infrastructures like the Internet offer new opportunities for scale, particularly for small and medium-sized enterprises (SMEs), companies in developing economies, and consumer preference matching, they also present significant challenges for international and domestic trade policies in a world where borders between countries still exist.

Falling costs of information sharing are easing some of the restrictions associated with engaging in international trade, enabling more traditional or GVC trade to power a digital trade revolution that is altering what and how we trade, much like lower transportation and coordination costs enabled the fragmentation of production along global value chains (GVCs) (although not why we trade). However, there is no definite agreement on what constitutes digital trade or the activities that fall under its purview. The phrase is regularly used to describe a number of elements of the evolving trade environment, including cross-border sales of goods via e-commerce websites and platforms and cross-border delivery of digital services. Outlining some key ideas for digital trade analysis can help researchers better understand one another and create better policies to deal with current and future trade challenges.

Although the term “digital trade” is not yet widely understood and accepted, there is increasing consensus that it refers to trade in goods and services that can be delivered digitally or physically and involve consumers, businesses, and governments across the world. The cross-border exchange of bits and bytes is the foundation of digital trade. Businesses, machines, and people are all connected by data flows thanks to the Internet of Things (IoT) (via peer-to-peer or social networking). By enabling the delivery of previously non-tradable goods and services and, in the latter case, by obfuscating the distinctions between the modes in which these are delivered, data is increasingly generating significant revenue streams.

In this rapidly changing environment, governments face increasing regulatory challenges, not only in managing issues brought on by digital disruption but also in ensuring that the benefits and opportunities of digital trade can be realised and shared equally. Trade practitioners are increasingly recognizing the impact of digital transformation on global trade and are questioning

whether existing “rules of the road” adequately reflect these changes. Although the existing multilateral trade rules were initially intended to be technologically neutral and were negotiated when digital trade was still in its infancy, concerns have been raised about whether they may need to be updated to reflect new forms and issues arising from digital trade. The work's ultimate objective is to contribute to a better understanding of the policy issues facing trade in the twenty-first century so that proactive regulatory approaches can be used to ensure that the advantages of digital trade are fully realised and that open markets for digital trade can be successfully combined with safeguards to important public interests.

II

LITERATURE REVIEW & RESEARCH GAP

Existing literature depicts the global value chain in the age of the internet.¹ The research examines the digital advancement in compatibility with inclusive growth when the superpower nations are at the brink of block chaining international trade. From a developed nation’s perspective, the threat of privacy and security is visualized; while from a developing nation’s perspective, the lack of tools to compete in the digital environment is professed.² Insights into regional trade agreements of Latin America have been discussed as a backdrop to assess the role of international cooperation when it comes to the WTO or regional agreements. Illustrations of robots and 3D printing showcase the predictability of reshoring of production.³ The literature discusses the need for high tech manufacturing and high-tech services based on the implementation of the Agreement Establishing the African Continental Free Trade Area (AfCFTA).⁴ WTO moratorium on e-commerce and local

¹ Adapting to the Digital Trade Era: Challenges and opportunities Edited by Maarten Smeets, WTO.ORG (2014), *available at* https://www.wto.org/english/res_e/publications_e/adtera_e.htm (last visited 30 Apr., 2023).

² Sacha Wunsch-Vincent & Arno Hold, *Towards coherent rules for digital trade*, CAMBRIDGE UNIVERSITY PRESS EBOOKS 179 (2012), *available at*: <https://www.cambridge.org/core/books/abs/trade-governance-in-the-digital-age/towards-coherent-rules-for-digital-trade/6E6EC39F6031EFEE7F12EFAE02947683> (last visited 30 Apr., 2023).

³ The Digital Trade Agenda of the US: Parallel Tracks of Bilateral, Regional, and Multilateral Liberalization, PIIIE (2016), *available at*: <https://www.piie.com/commentary/speeches-papers/digital-trade-agenda-us-parallel-tracks-bilateral-regional-and> (last visited 30 Apr., 2023).

⁴ Merit E. Janow, and Petros C. Mavroidis, *Digital trade, e-commerce, the WTO and regional frameworks*, 18, no. S1: S1-S7, World Trade Review (2019).

initiatives to develop the digital economy forms the crux of the research whereby e-commerce transactions and its transformative effects have been achieved.

Research⁵ hinges its contention on how the legal architecture is yet in its embryonic stage when it comes to trading in digital services. Digitalization affects trade in varied forms: demand for data related services increases, reduction in proximity burden, facilitation of trade in media content, and enabling servitisation of manufacturing. This consequently raises the trade-off between sovereignty and promoting commerce; which rests on tensions of national security exceptions, privacy, data localization and technical frictions. In light of the US-Gambling case, the authors bring in the contrast of legitimate regulation as opposed to the emerging disguised protectionism. Recommendations such as private standards, mutual recognition agreements, binding international treaties and networked governance have been laid forth with reference to USMCA and the digital services.

The regime⁶ exhibits the slow progress displayed by WTO in negotiations of digital trade. Countries participating in discussions at WTO are shifting their focus on Preferential Trade Agreements. The existing literature plays on active diplomacy by means of pluralistic Information Technology Agreements. Setting up of 'e-commerce facilitation' by the WTO Secretariat has been discussed as WTO holds its strength from being a member driven and consensus-based organization.⁷ With the tech-neutrality principle having a strong footing in WTO, the adoption of it to the EU-Japan Free Trade Agreement has served to illustrate the need for successful negotiations in the Digital Trading regime.⁸ Supplemented by empirical evidence, the authors depict the journey of Preferential Trade Agreements over the years and impact in developing the framework around digital trade. Surprisingly, the existing research does not portray how the digitalization of international trade opens a Pandora's box for the developing and least developed nations. Research scholars have neglected counterchecking by existing PTAs and RTAs for the establishment of a novel multilateral trade rule. Contemporary blunders at the G20 meetings have escalated points of tension for resolving differences, which

⁵ Gary Winslett, and Taylor Phillips, *The Evolving Legal Architecture Shaping the Digital Trade in Services*, U. Ill. JL Tech. & Pol'y: 257, (2021).

⁶ Manfred Elsig, and Sebastian Klotz, *Digital trade rules in preferential trade agreements: Is there a WTO impact?* 12 Global Policy 25-36, (2021).

⁷ Nigel Cory, *Why China Should Be Disqualified From Participating in WTO Negotiations on Digital Trade Rules*, ITIF.ORG (2019), available at- <https://itif.org/publications/2019/05/09/why-china-should-be-disqualified-participating-wto-negotiations-digital/> (last visited 30 Apr., 2023).

⁸ Mira Burri, *Towards a new treaty on digital trade*, 55 Journal of World Trade, 1 (2021).

require to be addressed in this research aligned with the prevailing digital divide.

III

RESEARCH QUESTIONS

The e-commerce market was 25 trillion dollars or 30% of the global GDP in the year 2017 as reported by UNCTAD.⁹ With the Fourth Industrial Revolution, the digitization of the economy; whereby digitalization has led to dematerialization of products which were prior commercialized as physical objects, there is a need to channel the digital trade benefits. Unfortunately, the legal efforts and architecture around these are at an embryonic stage. The dawdled multilateral negotiations at the WTO, especially the Joint Statement Initiative negotiations on electronic commerce, has led countries to rely on plurilateral negotiations and preferential trade agreements to address the issue of necessary consensus and high standards for digital trade.¹⁰ Based on the existing literature review, this article aims to address the following questions:

1. Does the growth of digital international trade open a Pandora's box for the Global South when viewed from the Digital Divide lens?
2. Whether there is a need for new multilateral trade rules addressing digital trade, despite existing PTAs and RTAs?
3. Why do the successive G20 meetings fail to resolve differences over WTO reform in light of the growing points of tension, competing narratives and strategic politics among the developed, developing and least developing nations?

IV

PANDORA'S BOX & GLOBAL SOUTH

With the advancement of Big Tech from the 1990s, technology companies have received wide freedom across national boundaries. Expansion of digital services have led to surfacing of inequalities between the developed and

⁹ Drake-Brockman, Jane, Gabriel Gari, Stuart Harbinson, Bernard Hoekman, Hildegunn Kyvik Nordås, and Sherry Stephenson, *Digital Trade and the WTO: Top Trade Negotiation Priorities for Cross-Border Data Flows and Online Trade in Services*, 11 Jean Monnet TIIISA Network Working Paper 2 (2021).

¹⁰ The Digital Trade Imbalance and Its Implications for Internet Governance, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (2016), available at- <https://www.cigionline.org/publications/digital-trade-imbalance-and-its-implications-internet-governance/> (last visited 30 Apr., 2023).

developing nations as technologies become concentrated in the hands of a few major platforms.¹¹ In the international economy, Global Value Chains have adopted extensive importance. WTO and GATS through an interdisciplinary approach supplement digital trade, but new challenges require new rules.¹² While there have been attempts to neutralize the surge in capital for technologically advanced nations through lobbying in a regulatory framework, the attempts remain negligible. For instance, with the adoption of US-Chile FTA in 2004, all US FTAs incorporate an individual e-commerce chapter to target digital trade.¹³

The Trans-Pacific Partnership Agreement (TPP), now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), is considered the pioneering step towards digital trade in 2015.¹⁴ Countries were keen to unravel the digital issues and its intricacies under the global digital regulations; while aiming for digital economies. This Agreement took the shape of a 'living agreement' and directed nations to enforce negotiations towards global e-commerce at the WTO level.¹⁵ It took a first shot at setting an international agreement on digital trade having global impact. Merely 5 out of 30 chapters of TPP addressed conventional trade matters like tariff, remedies and customs.¹⁶ It explored new regimes which remained hidden for a long period of time, such as e-commerce, financial services, intellectual property, state-owned enterprises, labor, investment, and pharmaceuticals, to name a few. Serving as a blueprint, the e-commerce chapter dealt with custom duties on digital products, rules on e-signatures, protection of source codes, paperless trade administration and data flows.¹⁷ Aligned with this, MNCs sought to

¹¹ Usman Ahmed, *The Importance of cross-border regulatory cooperation in an era of digital trade*, 18, no. S1 World Trade Review S99-120, (2019).

¹² Shamel Azmeh, Christopher Foster, and Jaime Echavarri, *The international trade regime and the quest for free digital trade*, 22, no. 3 International Studies Review 671-692, (2020).

¹³ SACHA WUNSCH-VINCENT, *THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS* (2006), available at: <https://www.bloomsbury.com/us/wto-the-internet-and-trade-in-digital-products-9781841135731/> (last visited Apr 30, 2023).

¹⁴ Henry Gao, *Digital or trade? The contrasting approaches of China and US to digital trade*, 21, no. 2, Journal of International Economic Law 297-321, (2018).

¹⁵ Andrew D. Mitchell, and Neha Mishra, *A New Digital Economy Collaboration in the Indo-Pacific: Negotiating Digital Trade in the Australia-India CECA*, 57, no. 1, Journal of World Trade (2022).

¹⁶ Rachel F. Fefer, Shayerah Ilias Akhtar, and Wayne M. Morrison, *Digital trade and US trade policy*, 19, no. 1, *Current Politics and Economics of the United States, Canada and Mexico*, 1-52, (2017).

¹⁷ Javier Carrascosa González & Marie-Agnes Jouanjean, *Digital Trade*, OECD TRADE POLICY WORKING PAPERS (2017), available at- <https://www.oecd->

eliminate non-tariff barriers by pushing for a multilateral digital trade aligned with their motives. Eventually, CPTPP raised the floor for standards across the region as it served as a template for regional, multilateral and bilateral deals such as RCEP by ASEAN, DEPA, Japan-Mongolia FTA, Chile-Uruguay FTA, USMCA,¹⁸ Chile-Brazil FTA, Japan-UK Trade Agreement, US-Japan Trade Agreement and Australia-Singapore Digital Economy Agreement.

Figure 1: Comparison of Digital Trade Provisions between DEA, DEPA and CPTPP

NO.	Digital Trade Provisions	DEA	DEPA	CPTPP
1	Commitments to facilitate digital trade	✓	✓	✓
2	No customs duties on electronic transmissions	✓ Article 5	✓ Article 5.2	✓ Article 14.5
3	Non-discrimination of digital products	✓ Article 6	✓ Article 5.5	✓ Article 14.4
4	Domestic electronic transactions framework	✓ Article 8	✓ Article 2.5	✓ Article 14.5
5	Electronic authentication and signatures	✓ ⁽⁺⁾ Article 9	✗	✓ ⁽⁻⁾ Article 14.6
6	Paperless trading	✓ ⁽⁺⁾ Article 12	✓ ⁽⁺⁾ Article 2.2	✓ ⁽⁻⁾ Article 14.9
7	Electronic invoicing	✓ ⁽⁺⁾ Article 10	✓ ⁽⁻⁾ Article 2.5	✗
8	Electronic payments	✓ Article 11	✓ Article 2.7	✗
9	Express shipments	✓ Article 13	✓ Article 2.6	✓ Article 5.7
10	Online consumer protection	✓ Article 15	✓ Article 6.3	✓ Article 14.7
11	Cooperation on competition policy	✓ Article 16	✓ Article 8.4	✗
12	Personal information protection	✓ ⁽⁻⁾ Article 17	✓ ⁽⁺⁾ Article 4.2	✓ ⁽⁻⁾ Article 14.8
13	Unsolicited commercial electronic messages	✓ ⁽⁺⁾ Article 19	✓ ⁽⁻⁾ Article 6.2	✓ ⁽⁻⁾ Article 14.14
14	Submarine telecommunications cable systems	✓ Article 22	✗	✗
15	Location of computing facilities for financial services	✓ Article 25	✗	✗
16	Data innovation	✓ ⁽⁻⁾ Article 26	✓ ⁽⁺⁾ Article 9.4	✗
17	Open government data	✓ Article 27	✓ Article 9.5	✗
18	Source code	✓ ⁽⁺⁾ Article 28	✗	✓ ⁽⁻⁾ Article 14.17
19	Digital identities	✓ Article 29	✓ Article 7.1	✗
20	Standards and conformity assessment for digital trade	✓ Article 30	✗	✗
21	Artificial intelligence	✓ ⁽⁺⁾ Article 31	✓ ⁽⁻⁾ Article 8.2	✗
22	FinTech and RegTech Cooperation	✓ ⁽⁺⁾ Article 32	✓ ⁽⁻⁾ Article 8.1	✗
23	Dispute settlement	✓ ⁽⁺⁾ Article 21	✓ ⁽⁺⁾ Article 14	✓ ⁽⁻⁾ Article 14.18

In 2013, WTO Ministerial Conference took up digital trade issues to understand its existing commitments under GATS, TBT Agreement and the TRIPS. Repercussions to the existing Digital negotiations are the opening of Pandora's box encompassing numerous issues.¹⁹ From data protection, privacy, cyber security, social and economic justice, to competition, human rights issues, labour laws, national security and sustainable development. No doubt the stakes are high for developed countries considering the presence of multinational corporations. Over time, the TPP began receiving criticism on a

[library.org/trade/digital-trade_524c8c83-en](https://www.wto.org/trade/digital-trade_524c8c83-en) (last visited 30 Apr., 2023).

¹⁸ United States Mexico Canada Agreement

¹⁹ Digital trade rules: Big Tech's end run around domestic regulations, Heinrich Böll Stiftung | Brussels office - European Union, HEINRICH-BÖLL-STIFTUNG (2021), available at- <https://eu.boell.org/en/2021/05/19/digital-trade-rules-big-techs-end-run-around-domestic-regulations> (last visited 30 Apr., 2023).

couple of its provisions and was unable to survive the 2016 US election cycle.²⁰ Controversial provisions encompassed cross-border data transfer rules limiting domestic regulatory options; restriction on access to source code; and prohibition from placing restrictions on location of computing facilities along with data processing. For the developing and least developed countries, digitalization has taken the shape of a rat race driven by surveillance capitalism.²¹ The imbalance results in nations lagging from digital transformation such as being excluded from technological breakthroughs. For example: Big Data analytics, cloud computing, artificial intelligence, advanced probiotics, Internet of Things, and additive manufacturing. Big Tech equipped nations consider rule based digital trade as a top economic priority which is asserted under the garb of digital protectionism.²²

Developing and least developed countries face several barriers to digital trade making them sceptical to the negotiations dominated by developed nations. The mere Internet access on which digital trade could potentially rely on is a challenge for the developing world as broadband access is low. Furthermore, the costs behind that broadband are extremely high when a monopoly or duopoly exists in the telecommunication sector as seen in Tanzania.²³ A precondition for broadband access is the access of reliable power supply, and statistics indicate that 1 in 5 people in the world still do not have access to electricity.²⁴ Cross-border Data Flows are hampered by government restrictions eventually impacting the potential for international trade. Adding to the cross-border restrictions are the data localization laws which limit the ability of data to move globally while remaining local. Marketplaces like the European Union and Australia have strict data localization laws which raise

²⁰ Rolf H Weber, *Digital trade and E-commerce: challenges and opportunities of the Asia-Pacific regionalism*, 10, *Asian J. WTO & Int'l Health L & Pol'y*, 321, (2015).

²¹ Philippe Lionnet, *International Economic Dispute Settlement and Digital Trade in Services – Useful Multilateral Principles for the Emerging Global Regulatory Landscape?*, CAMBRIDGE UNIVERSITY PRESS EBOOKS 323 (2021), available at: <https://www.cambridge.org/core/books/abs/international-economic-dispute-settlement/international-economic-dispute-settlement-and-digital-trade-in-services-useful-multilateral-principles-for-the-emerging-global-regulatory-landscape/7B76B0173B1263C34E1E46EDFF599D36> (last visited Apr 30, 2023).

²² Kristina, *Algorithms Off-limits? If digital trade law restricts access to source code of software, then accountability will suffer*, ACM Conference on Fairness, Accountability, and Transparency, 1561-1570, (2022).

²³ Wanda Dugiel, and Ewa Latoszek, *Electronic Trade in the World Trade Organization-Difficulties in Negotiating an Agreement*, 8, no. 1, *International Journal of Economic Behavior*, 133-143, (2018).

²⁴ Karishma Banga, Jamie Macleod, and Max Mendez-Parra, *Digital trade provisions in the AfCFTA*, Supporting Economic Transformation, (2021).

the costs of moving data globally impacting economies of the Internet.²⁵ Conventional barriers (tariff and non-tariff barriers) also play a role to hamper the service-based trade. Reluctance by developing countries is based on the low value of trade in IT products which fail to depict quantifiable advantage on lower duties; negative impact due to loss of tariff revenues and unlikelihood of using tariff to protect its domestic market.²⁶

Existing regulatory frameworks and precedents highlight that GATS does not distinguish between technical means of service delivery and the traditional modes of services. The *US Gambling Case*²⁷ and *China publications and audiovisual products case*²⁸ provide that unless explicit exclusion by WTO members, their specific commitments extend to services provided by electronic means. TRIPS agreement based on technology neutrality principle provides mere protection of intellectual property extending to online digital content without any concrete rules.²⁹ As of today, the WTO framework lags in regulating e-commerce as it fails to address product categorization, trade facilitation, market access and data flow. Digital trade possesses legal challenges on 2 fronts: conceptual and practical. In the former, the classification of a certain item as a good or service determines which WTO agreement is applicable with its legal protections. The lack of a formal definition to classify digital trade under the 'Harmonized Commodity Description and Coding System' is highlighted in the *Canada-Certain Measures Concerning Periodicals case*.³⁰ From a practical perspective, the difficulty arises where GATS falls short to deal with

²⁵ Edward Elgar Publishing, E-ELGAR.COM (2020), available at- <https://www.elgar.com/shop/gbp/economic-analysis-for-international-trade-negotiations-9781840645354.html> (last visited 30 Apr., 2023).

²⁶ Azmeh, Shamel, and Christopher Foster, *The TPP and the digital trade agenda: Digital industrial policy and Silicon Valley's influence on new trade agreements*, 16-175. Working Paper Series, 2016.

²⁷ WTO, "United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services," WTO, April 25, 2013, available at - https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

²⁸ WTO, "China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products," WTO, May 11, 2012, available at-https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited 30 Apr., 2023).

²⁹ Joshua P Meltzer, *Maximizing the Opportunities of the Internet for International Trade*, SSRN.COM (2016), available at- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841913 (last visited 30 Apr., 2023).

³⁰ Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, 21 *Journal of International Economic Law*, 297, (2018).

trade in digitally delivered services. For example, an integrated platform providing varied services like Google cannot be classified under computer, telecommunications, advertising and similar services simultaneously.

The rapid advancement of technology in the global North has created a growing gap between the developed and developing world. The least developed countries have been left behind in the technological revolution, as they have limited access to artificial intelligence, big data analytics, cloud computing, the Internet of Things (IoT), advanced robotics, and additive manufacturing. This disparity threatens to exacerbate the already-existing technological divide between the North and South. While some countries have implemented policies to regulate and protect their digital economies, the addition of these policies as “trade barriers” under WTO rules could potentially leave developing countries exposed to direct challenges. Trade negotiators who lack an understanding of the complexities of digital trade are ill-equipped to negotiate on behalf of their countries, putting them at a disadvantage.

The risk of allowing Big Tech companies to capture digital trade talks is also concerning, as they may prioritize their own interests over privacy and the interests of the developing world. The digital trade policies promoted by Big Tech could potentially inhibit the growth of the developing world, as they may prioritize global competitiveness over the protection of privacy and regulation of the tech industry. This could create a Pandora’s box scenario where the developing world is left behind in the digital revolution, as trade agreements may prioritize the interests of the global North at the expense of the developing world. As such, it is crucial that policymakers consider the potential impacts of digital trade policies on the developing world and promote policies that support their growth and inclusion in the global digital economy.

V

NEED FOR NEW MULTILATERAL TRADE RULES FOR THE CURRENT REGIME

International trade has been significantly impacted by digital trade, but international trade law has not kept up with the rapid advancement of technology. The World Trade Organization (WTO), which is the main body of law governing international trade, is still based on a pre-digital framework that is becoming less and less relevant to the digital economy.³¹ Under the auspices

³¹ William Drake – Forced data localization and barriers to cross-border data flows: toward a multistakeholder approach – Pre 07 2017 - EuroDIG Wiki, EURODIGWIKI.ORG (2017), *available*

of the Work Programme on Electronic Commerce, members of the WTO have been negotiating digital trade (or “electronic commerce,” to use the official term) since 1998. However, ideological and policy disagreements among WTO members on a number of issues, most notably how to incorporate specific digital products into the pre-existing WTO legal framework, have stymied the Work Programme.

There are several issues with the law that is meant to control digital trade. The two categories of these challenges are conceptual and practical. As it does not easily fit within the conceptual framework of international trade law, digital trade poses a significant challenge to that body of law. Which WTO agreement is in effect and what legal protections are available directly depend on whether an item is categorized as a good or a service.³² Although there are no official definitions, common usage offers some fundamental understandings of what is considered a good and what is considered a service under WTO law. One typical distinction is that while services are not tangible, goods are.³³ A Canadian excise tax on split-run editions of periodicals with advertisements primarily aimed at the Canadian market was found to be exempt from the GATS because the editorial and advertising contents of the periodicals “combine to form a physical product—the periodical itself,” according to a decision made by the WTO Appellate Body, which partially supported this distinction in one dispute settlement proceeding, Canada—Certain Measures Concerning Periodicals.³⁴ On the basis of tangibility, there are no simple ways to include digital products³⁵ in the goods-services dichotomy. Digital goods lack the same level of tangibility as traditional ones. However, using physical media or devices is required for the production, distribution, and storage of digital products.

at- https://eurodigwiki.org/wiki/William_Drake_%E2%80%93_Forc%20data_localizati%20and_barriers_to_cross-border_data_flows:_toward_a_multistakeholder_approach_%E2%80%93_Pre_07_2017 (last visited 30 Apr., 2023).

³² A goods classification would trigger all of the legal protections afforded by the GATT, while a service classification would only trigger legal protections for services for which member states have made specific commitments under the GATS; Stewart A. Baker, *E-Products and the WTO*, 35 INT’L LAW. 5, 7 (2001); Sam Fleuter, *The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification*, 17 CHI. J. INT’ L L. 153-156 (2016).

³³ U.C.C. § 2-105(1) (AM. LAW INST. & UNIF. LAW COMM’N 2002).

³⁴ Appellate Body Report, Canada—Certain Measures Concerning Periodicals, at 17, WTO Doc. WT/DS31/AB/R (adopted Jul. 30, 1997).

³⁵ To avoid prejudgment, this article uses the neutral term digital products to refer to digital items that could be classified as either digital goods or digital services.

A more complex classification of digital products is required due to the difficulties associated with their tangibility. For instance, the “Harmonized Commodity Description and Coding System” adopted by the World Trade Organization enables member nations to categorize electricity—which, whether present or absent, resembles digital goods—as “intangible good.” The two main practical issues are the GATS’ inadequacy in dealing with trade in digitally delivered services and the absence of specific legal provisions on various barriers to digital trade.

The structure of the GATS is primarily to blame for the misalignment between it and digitally delivered services. The GATS obligations, in contrast to the GATT, only apply to the service sectors listed in a WTO member’s “Schedule of Commitments,” the document in which members make specific commitments.³⁶ The GATT obligations apply to all goods. A service can only be categorized under one of the GATS’ service sectors because they are mutually exclusive. However, many services that are delivered digitally have multiple uses. Exploiting the resurgence of interest and using it to negotiate new, comprehensive multilateral rules is one avenue for multilateral efforts on digital trade. Academics and policymakers have made numerous requests for doing just that. For instance, Hosuk Lee-Makiyama argues that a new “horizontal discipline” should be developed for all trade-related aspects of data transfers, whether they involve the transfer of goods or services. The World Trade Organization should adopt a “clear, technologically neutral definition of digital products,” extend the ban on customs duties on electronic transmissions, and recognise all facets of digital trade. Ziyang Fan, the director of the World Economic Forum’s digital trade initiative, has also urged WTO participants to come to terms with a fresh set of international rules for electronic trade.

In light of this, more multilateral discussions on digital trade are required. WTO marked a change in the focus of international economic relations from one that was “power-oriented” to one that is “rule-oriented”. This rule-based framework currently seems to be in great danger. First, while the WTO’s digital trade agenda has focused on classification thus far, the majority of digital products are relatively easy to categorize. There is “widespread consensus” that tangible goods purchased online should be treated as goods and governed by GATT regulations. Similarly, it is not debatable to classify services provided over the Internet as services covered by the GATS, despite some disagreements over which mode of supply under the GATS should apply. However, the line

³⁶ GATS, arts. XVI:1, XVII:1.

between products and services starts to blur for some new technologies. Examples include 3D printing and “additive manufacturing.”³⁷

VI

MORATORIUM ON CUSTOMS DUTIES ON DIGITAL TRANSMISSIONS

Customs duties on digital transmissions are levied by imposing tariffs on digital products and services that are imported into a country. However, this is a contentious issue, as digital transmissions are intangible goods that are transmitted electronically, and thus are difficult to quantify and tax in the same way as physical goods. Levying customs duties on digital transmissions can be counterproductive for LDC or developing countries in international trade, for several reasons.

First, digital transmissions are increasingly important to modern economies, as they represent a growing share of international trade. Many developing countries have a comparative advantage in digital services, such as software development or IT support, which they may seek to export to other countries. If these exports are subject to customs duties, it can make them less competitive in global markets, reducing the growth potential of these economies. Second, customs duties on digital transmissions can increase the cost of accessing information and communication technologies (ICTs), which are critical for economic development and growth. This is because many developing countries rely on imported ICTs, such as computers and smartphones, to expand their digital economies. Imposing customs duties on these imports can increase their cost, making them less accessible to consumers and businesses in these countries. Third, levying customs duties on digital transmissions can also hamper the growth of cross-border data flows, which are critical for digital trade and economic growth. This is because customs duties can create barriers to entry for digital service providers, and reduce the efficiency of cross-border transactions.

For countries who are pushing for new multilateral negotiations on e-commerce, the moratorium continues to be a top priority.³⁸ First off, despite the fact that the moratorium forbids customs taxes on any electronic transmissions, it goes against the widely acknowledged idea of technology neutrality. Secondly, it is unnecessary for developing and developed nations to argue over

³⁷ Additive manufacturing “operates by applying consecutive layers of a specific material onto a flat surface until those layers form a three-dimensional object.”

³⁸ General Council Chairman, *Work Programme on Electronic Commerce—Review of Progress*, 1.8, WTO Doc. WT/GC/W/756 (Dec.17, 2018).

the financial effects of the moratorium. Last but not least, the moratorium's narrow scope prevents it from lowering trade barriers for electronic transmission. Although the WTO is "in favour of barrier-free electronic trade," the customs duty moratorium for electronic transmissions does serve a signalling purpose and is not necessary for the multilateral digital trade agenda.

VII

HOW EXISTING WTO AGREEMENTS GOVERN DIGITAL TRADE

The most significant agreement for digital trade is the General Agreement on Trade in Services. The GATS divides service trade into four different supply modes. Technology-neutral Mode 1 covers the delivery of cross-border services from one territory to another. In addition, Mode 2 covers the delivery of a service from one WTO member to a consumer in the territory of another WTO member. Modes 3 and 4 of GATS commitments are particularly significant. Whether a foreign service provider is allowed to establish a commercial presence in the territory in order to offer such a service is covered by Mode 3 commitments. If a single foreigner from a specific WTO member is allowed to temporarily occupy the territory to provide such a service, it is made clear in Mode 4 commitments.

The WTO has confirmed in a number of cases that the GATS obligations and restrictions also apply to electronic services. For instance, the Panel report in the US-Gambling case confirmed that Mode 1 covers all delivery methods, including online ones.³⁹ The Panel learned from China - Audio visual Products that service commitments cover services provided virtually, such as online.⁴⁰ Since new online methods of providing services have emerged since the GATS was signed in 1994, the WTO dispute resolution process has confirmed that the scope of existing GATS commitments can include them.

The various multilateral agreements listed in Annex 1A of the WTO Agreement are also pertinent, in addition to the GATT 1994. The most significant of these is the Agreement on Technical Barriers to Trade (TBT), which handles rules and regulations pertaining to technical matters. A wide range of governmental actions, including digital trade, are affected by these obligations. Standards for broadband networks and telecommunications, standards for interoperability

³⁹ *Measures Affecting the Cross-Border Supply of Gambling and Betting*, Services Panel Report, United States –WT/DS285/R, (10 Nov., 2004).

⁴⁰ *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, Panel Report, WT/DS363/R, (12 Aug., 2009).

and portability across carriers and networks, rules for encryption and security, rules for privacy, rules for data storage, and so on are a few examples.

VIII

THE LIMITATIONS OF EXISTING WTO RULES

What is the problem if the existing WTO agreements are cross-cutting, technology-neutral, and can evolve to cover new technologies? Why are some WTO members attempting to impose additional legal obligations to govern digital trade through RTAs? Several issues exist:

- **Definitional:** The influence of digital technologies on goods traded over the internet can range from simply acting as the interface between a producer and consumer (as on an e-commerce platform) to the means through which a specific good is created, produced, stored, and transmitted (such as for digital video or software).
- **Classification:** Since 1994, there have been significant technological advancements that have paved the way for a number of services that are crucial to digital trade. Despite the existence of search engine technology at the time, their pervasive nature in the digital economy only became apparent in the second half of the 1990s.
- **Market access:** Several WTO members have been hesitant to grant additional multilateral market access commitments until legacy Doha Round issues, such as agricultural subsidies, are resolved. As a result, RTAs have emerged as the primary means of extending trading partners' market access commitments.
- **Data transmission across borders:** With the emergence of big data and developments in artificial intelligence, data is becoming more and more crucial from a business perspective. Many WTO members have enacted laws dictating how businesses that gather this data from their citizens should handle it. This may involve data localization policies that demand that data be kept on its soil and/or not be transmitted outside of its territorial boundaries.
- **Consumer-related regulatory measures:** These cover a range of laws aimed at safeguarding consumers, such as safeguards for personal information provided by users of internet services and safeguards against unsolicited electronic messages like spam.
- **Regulations pertaining to security:** These actions, such as cybertheft, cyberattacks, and cyberespionage, may only take place online. They might also deal with the use of technology to support terrorism and conventional criminal activity. Relevant regulations include those governing electronic signatures and other electronic authentication methods, as well as those

requiring the disclosure of source code for examination by national authorities or, in certain situations, the disclosure of specific data to law enforcement authorities.

- Trade facilitation: Although the TFA makes numerous allusions to electronic documentation and other technological aids for facilitating trade at the border, e-commerce was not specifically discussed during the WTO trade facilitation negotiations.

It might be helpful to distinguish between two different sub-questions that can be raised in order to decide whether new multilateral trade rules addressing digital trade are necessary. Each of these sub-questions calls for a different kind of reform. The first is concerned with gradually amending WTO Agreements to address current inadequacies, inconsistencies, and legal ambiguities in electronic commerce. The second set of inquiries requires more inventive legal engineering since they are riskier.

IX

MAPPING KEY ISSUES AND IDENTIFYING CHALLENGES

WTO law has inherent flexibility and resilience, both in substance and procedural mechanisms, that could appropriately accommodate some, if not all, of the changes brought about by digital trade, despite a lack of response in the short to medium term. Despite discussions about “cultural exceptions” during the Uruguay Round, the GATS appear to be the most pertinent set of regulations in cases involving online trade.

Additionally, there are provisions that are horizontally applicable, such as transparency provisions (Article III GATS) and domestic regulation provisions (Article VI GATS), which may have the (untapped) potential to address a number of issues with digital trade. However, painting a positive picture of the WTO’s “adaptive governance” capabilities and its capacity to address new developments, including profound transformations brought on by digitalization, does not imply that the multilateral trade regime is prepared to handle the challenge of digital trade. There are many reasons to be sceptical and concerned, in fact.

X

WHERE ACTION IS NEEDED

Starting small, one can first make a list of the concerns that have been brought up in WTO discussions, primarily under the auspices of the WTO Work

Programme on E-Commerce, but which, for a variety of reasons, have not been satisfactorily addressed to yield definitive solutions. The WTO E-Commerce Programme, as previously mentioned, has been a significant initiative in recognising both the significance of digital trade and its myriad effects on multilateral trade rules.

For instance, there is still no agreement on a long-term duty-free ban on electronic transmissions and their content. A 2013 decision made at the Bali Ministerial Conference led to the most recent temporary extension of the moratorium for two years. Additionally, there is some debate over the precise parameters of the moratorium, specifically whether it covers the transmissions' content, which includes any songs, videos, or movies that are purchased or downloaded via the Internet. Since the start of the E-commerce Work Programme, 6 diverse classification issues have been particularly divisive. On the one hand, WTO participants have been unable to reach consensus on whether digital goods traded electronically fall under the GATT's umbrella of goods, the GATS' umbrella of services, or some other, distinct category. Certainly, this is not a technical decision, but rather a highly political one with important ramifications for all industries connected to the Internet. The GATS, with its positive list commitments, allows for greater state flexibility, including forms of protectionism, whereas the GATT calls for a much more liberalized regime. This puts a lot on the line.

There is a lot of room for speculation on the applicability of a specific classification category because existing commitments are made based on the W/120 list (WTO 1991) by reference to the Central Product Classification (CPC) List in its provisional, and now largely obsolete, 1991 version. This creates a great deal of uncertainty. The same is true for discussions about the relevance of GATS Mode 1 (cross-border supply) and Mode 2 (foreign consumption), the application of the principle of technological neutrality, and whether the "likeness" test⁴¹ criteria should be applied to both online and offline goods and services.

XI

SKETCHING WAY FORWARD

⁴¹ The "likeness" test under GATT (General Agreement on Tariffs and Trade) is a legal principle used to determine whether a product from a foreign country competes with a similar product produced domestically. The test aims to assess whether a foreign product is "like" a domestic product in terms of its characteristics, uses, and consumer preferences.

The use of a negative list approach to service liberalisation in the GATT style (everything is committed to except what is excluded) is a crucial element that renders many politically delicate and complex classification debates irrelevant. This is the case, for instance, when members broadly schedule entire service sectors at the two-digit CPC level, covering both the services that are currently offered and those that will be created in the future. The second tier of more difficult, “deeper integration” issues, like privacy, data, and consumer protection, have also been addressed by PTAs.

Overall, PTA experiments currently in place offer a meagre amount of geographically constrained harmonisation, but they are unable to address the main issue with digital trade and guarantee unrestricted global digital flows. On the other hand, they show that trade agreements can be a suitable forum for dealing with the bigger problems brought on by digital trade. PTAs, however, are frequently the result of asymmetrical power deals, and developing nations may be significantly harmed by such agreements, the adoption of US-centric models, or the unintentional reduction of future regulatory space in important areas. More recently, there has been a growing understanding among different stakeholders that the WTO framework offers the most suitable setting for developing rules, if not for all aspects of digital trade, then at least for those that are important.

In light of the analysis, the top priority for businesses engaged in or willing to engage in digital trade appears to be the need for greater legal certainty. This will require, at the very least, a declaration that the duty-free moratorium will be extended or made permanent and that all WTO rules apply to online trade in goods and services. Legal certainty and predictability are particularly at risk from the classification jungle.

XII

FRUITLESS DIALOGUE

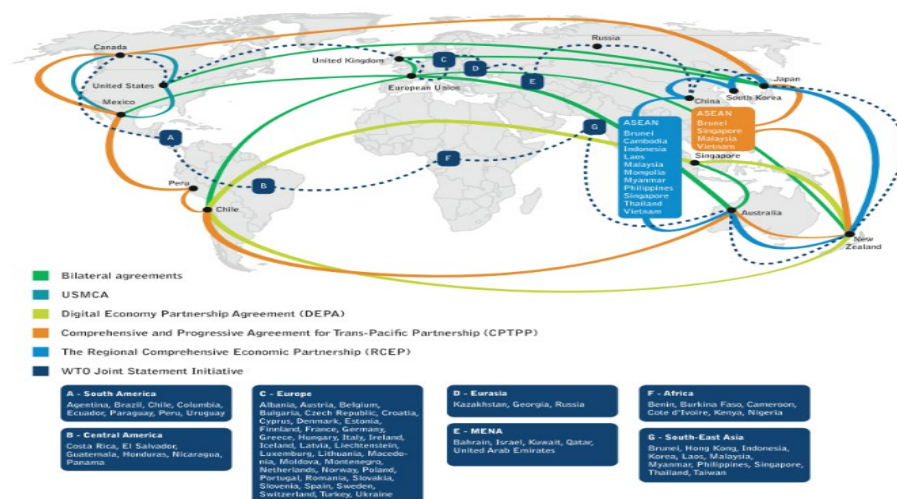
WTO members agreed on a Work Program on Electronic Commerce to have an interplay between e-commerce and development.⁴² Multilateral trade rules have been slow from the Doha Round where all FTAs US or EU are part of encompass e-commerce chapters. The WTO Information Technology Agreement (ITA) served as a plurilateral agreement which reduced tariffs to 0 on a range of ICT goods.⁴³ Unfortunately, the ITA was concluded in 1996 and

⁴² Neha Mishra, *Digital Trade in the Australia–EU FTA: A Future-Forward Perspective*, The Australia-European Union Free Trade Agreement, 79-115, (2022).

⁴³ Should There Be New Multilateral Rules for Digital Trade?, E15 INITIATIVE (2013), available at- <https://e15initiative.org/publications/should-there-be-new-multilateral->

required to be updated as per modern times to include coded key cards, software, machines of optical fibers, and semiconductor machines.⁴⁴ Post this, GATS Telecoms Annex and WTO Telecoms Reference Papers served to avoid monopoly operators and the abuse of market power which undermines competitive opportunities. This was adapted in the KORUS FTA for economic and efficient use of spectrum.⁴⁵ The 2nd WTO Ministerial Conference in 1998 took a step to adapt ‘Global E-Commerce Declaration’ demarcated electronic transmissions with tariffs and duty-free categories.⁴⁶ 76 WTO members have launched ‘E-commerce plurilateral negotiations’ in 2019 to adapt to globalization and digital development of the economy at the Economic Forum in Davos.⁴⁷

In 2017, when the US withdrew from TPP and participated in the 11th WTO Ministerial Conference, it aimed to formulate a mandate on e-commerce eliminating barriers to digital trade. Supplementing this, a group of countries signed the Joint Statement on Electronic Commerce towards negotiations for



[rules-for-digital-trade/](#) (last visited Apr. 30, 2023).

⁴⁴ Neha Mishra, *Data Governance and Digital Trade in India: Losing Sight of the Forest for the Trees*, 21, ANU College of Law Research Paper, 16 (2021).

⁴⁵ Nigel Cory, *Why China Should Be Disqualified From Participating in WTO Negotiations on Digital Trade Rules*, ITIF.ORG (2019), available at <https://itif.org/publications/2019/05/09/why-china-should-be-disqualified-participating-wto-negotiations-digital/> (last visited Apr 30, 2023).

⁴⁶ Kallummur Murali, *Global Digital Trade and Implications for Trade Negotiation: Deciphering the Data Flows and Implications on Revenues Losses*, SOCIAL SCIENCE RESEARCH NETWORK (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527690 (last visited Apr 30, 2023).

⁴⁷ Henry Gao, *Regulation of digital trade in US Free Trade Agreements: From trade regulation to digital regulation.*, 45, *Legal Issues of Economic Integration*, 1, (2018).

trade-related aspects of e-commerce. JSI nations have taken efforts to define global rules covering issues of e-commerce, consumer trust, market access, trade openness, telecommunications and cross-cutting issues. Unfortunately, these proposals were juxtaposed with varied visions of developed nations, especially USA, EU and China.⁴⁸ From the US's perspective, the policy promoted competitiveness with an intent to merely reduce compliance costs, and achieve unrestricted cross-border data flows. It falls short to address consumer protection or privacy regulations when it comes to digital trade rules, which is a reflection of clauses from the USMCA.⁴⁹ China's proposal dealt with government dominance in networks to uphold societal control by prioritizing a sound environment for e-commerce, taking into account the need to bridge the digital divide.⁵⁰ The EU with a strong backing of the GDPR has a footing of data privacy in its proposal for digital trade, visioned towards a data protection-based outcome to the negotiations.⁵¹ Canada's proposal emphasized on consumer and privacy protection with a backdrop of prohibitions on data localization. Singapore took a softer approach to the US, while Australia took a simple approach for facilitating e-commerce based on its RTA experiences.

India is a staunch supporter of WTO and its multilateral trading system considering that it is a member driven and consensus-based organization. The WTO process being inclusive, addresses the developmental concerns of developing and least developed countries, which would be redundant in a PTA, FTA or RTA.⁵² WTO affords provisions of Special and Differential Treatment to developing countries, something which accords India with a level-playing field in e-commerce capacities. India has opposed the global rules on e-commerce as the aforementioned are not in consonance with the mandate of the multilateral trading regime. It aims to have policies preserving the flexibility of imposing customs duty on electronic transmission by providing a level playing field to the domestic market for leveraging technology.⁵³ India

⁴⁸ Sherzod Shadikhodjaev, "Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?" 32, no. 4, *European Journal of International Law*, 1221-1247, (2021).

⁴⁹ Keman Huang, Stuart Madnick, Nazli Choucri, and Fang Zhang, "A Systematic Framework to Understand Transnational Governance for Cybersecurity Risks from Digital Trade," 12, no. 5, *Global Policy*, 625-638, (2021).

⁵⁰ Andrew D. Mitchell, and Neha Mishra, *Data at the docks: Modernizing international trade law for the digital economy*, 20 *Vand. J. Ent. & Tech. L.*, 1073, (2017).

⁵¹ Ines Willems, *Agreement forthcoming? A comparison of EU, US, and Chinese RTAs in times of plurilateral E-Commerce negotiations*, 23, no. 1, *Journal of International Economic Law*, 221-244, (2020).

⁵² A. Collins, and Yoshinori Abe, *The CPTPP and Digital Trade: Embracing E-Commerce Opportunities for SMEs in Japan and Canada*, *Transnational Dispute Management* (2018).

⁵³ Pierre Sauvé, and Marta Soprana, *The Evolution of the EU Digital Trade Policy*, *Law*

aims to balance the potential sacrifice of revenue and the distribution of loss among members with intake of additive manufacturing by digital printing. India's 2019 Draft encompasses 6 key areas: infrastructure development, e-commerce market, data, regulatory issues, domestic digital economy and export promotion through e-commerce.⁵⁴ India positively relies on WTO principles such as rule-based consensual decision making, multilateralism, MFN Treatment principle, National Treatment Principle, credible dispute resolution, security exemptions, centrality of development, justifications and special and differential treatment for developing nations.⁵⁵

In the recent Ministerial Conferences, a moratorium on imposing custom duties on electronic transmissions was extended for 2 years, supplemented by a moratorium on TRIPS non-violation complaints. USA has made it evident that the Doha Work Programme of trade negotiations is no longer yielding beneficial results to it and similarly negotiations on new issues place developing countries at a relative disadvantage.⁵⁶ In a communication distributed to all WTO members in March 2020, India and South Africa outlined what they believed to be the negative effects of the moratorium on customs duties on developing countries, including lost tariff revenue, limitations on industrialization, and what they believed to be the local negative effects of the use of digital technologies like 3D printing in manufacturing. Legally speaking, India and South Africa are on the right. The Marrakesh Agreement included Article X to forbid secret and exclusive negotiations by a small number of nations.⁵⁷ However, despite their adamant opposition, the JSI's initiatives are still going strong. Data sovereignty, or the right of states to manage the data generated by residents within their physical borders, has

and Practice of the Common Commercial Policy, 285-304, (2020).

⁵⁴ Mira Burri, *Approaches to digital trade and data flow regulation across jurisdictions: implications for the future ASEAN-EU agreement*, 49, no. 2, *Legal Issues of Economic Integration*, (2022).

⁵⁵ Michitaka Nakatomi, *Cross-border digital trade, e-commerce governance, and necessary actions ahead*. *Developing the Digital Economy in ASEAN*, 31-55, (2019).

⁵⁶ WAYNE MORRISON, *Digital Trade and U.S. Trade Policy* Rachel F. Fefer, *Coordinator Analyst in International Trade and Finance Shayerah Ilias Akhtar Specialist in International Trade and Finance*, (2019), available at https://www.everycrsreport.com/files/20190521_R44565_f85046cbda1da2da518437872bd1d00405de5e21.pdf (last visited 30 Apr., 2023).

⁵⁷ Patrick Leblond, *Uploading CPTPP and USMCA Provisions to the WTO's Digital Trade Negotiations Poses Challenges for National Data Regulation*, *CAMBRIDGE UNIVERSITY PRESS EBOOKS* 301 (2021), available at <https://www.cambridge.org/core/books/big-data-and-global-trade-law/uploading-cptpp-and-usmca-provisions-to-the-wtos-digital-trade-negotiations-poses-challenges-for-national-data-regulation/59483E5412CA936C31F6EBCF9CD97FDF> (last visited 30 Apr., 2023).

become the rallying cry for the developing world. The concept of “data colonialism,” which refers to the techniques used by technology businesses to harvest data in order to cement their worldwide market power at the expense of customer welfare, has been used to support this narrative.

XIII

RECOMMENDATIONS & CONCLUDING REMARKS

Data liberalization in entirety is not a feasible solution when it comes to FTAs or multilateral agreement under the WTO. It needs to be coupled with international cooperation in consensus with locally tailored solutions transcending the rigid global trade rules.⁵⁸ Meaningful technical assistance programs for the developing and least developed countries could help bridge the gap and strengthen the infrastructure, thereby enabling nations to prioritize domestic legislations towards digital trade. As professed by Hosuk Lee-Makiyama, a new horizontal discipline could be developed to accommodate trade related aspects of data transfers under goods or services.⁵⁹ The following recommendations could be afforded to the existing issue of failed negotiations:⁶⁰

1. Ensure that the JSI on E-recommendations Commerce’s are formally integrated into the GATS schedules of particular commitments for WTO members. The G20 members should make sure that the extra commitments do not infringe upon the rights and obligations of non-participants, violate the terms of the GATS, or fall outside of its purview.
2. Provide developing nations with the technical help they need to enhance their data protection laws and regulations in light of increased digitalization.
3. The G20 should encourage the creation of mechanisms to improve interoperability given that different nations are pursuing various ways

⁵⁸ Li Sheng, *The World Trade Organization and the Digital Economy Partnership Agreement: Analog Trade Rules in a Digital Era*, Big Tech Firms and International Relations Springer, 93-114, (2022).

⁵⁹ Eunjung Oh, *Digital Trade Regulation in the Asia-Pacific: Where Does It Stand? Comparing the RCEP E-commerce Chapter with the CPTPP and the JSI*, 48 LEGAL ISSUES OF ECONOMIC INTEGRATION (2021), available at: <https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/48.2/LEIE2021032> (last visited 30 Apr., 2023).

⁶⁰ Hoekman, Bernard, and Charles Sabel, *Plurilateral cooperation as an alternative to trade agreements: Innovating one domain at a time*, 12, *Global Policy*, 49-60, (2021).

to protect personal data.⁶¹ This should begin with making sure legislative frameworks clearly state that businesses with a legal connection to a particular jurisdiction are accountable for managing data in a particular way, regardless of where the data is transported to and stored.

4. Support the establishment of international standards based on consensus in order to secure the interoperability of cybersecurity frameworks and lower the costs associated with regulatory friction.
5. Avoid applying digital standards unilaterally and extraterritorially and declare shared commitments to international regulatory cooperation, dialogue, and regulatory sandbox experimentation.
6. The onus will fall squarely on G20 members to, at the very least, mobilize WTO members to extend the moratorium at MC12 for longer than the conventional two-year period that persisted throughout the first two decades of the WTO Work Program on E-Commerce.⁶²

This is because, in the event that an agreement to extend the moratorium indefinitely is not forthcoming at MC12, it will be up to them to mobilize WTO members to do the same.

While ‘e-commerce’ rhetoric emphasizes prospects for entrepreneurs in developing countries, having legally binding regulations on the still-emerging digital economy would significantly limit those nations’ ability to grow their economies in the future. Although the goals of this FTA on digital trade are unclear, the participation of significant developing nations like China, India, and Indonesia makes it another potentially significant route for adopting new regulations on the subject. Global governance is crucially upheld by the WTO’s guiding principles and organizational structure. The forum undoubtedly has flaws and has frequently fallen victim to the hegemonic inclinations of the powerful. Nevertheless, it continues to be the closest the global trade system can get to ensuring a level playing field. These institutional structures must be improved upon as nation states navigate the uncharted waters of the digital age. The time has come for clever consensus building rather than wilful abstention.

⁶¹ Mira Burri & Thomas Cottier, *Trade Governance in the Digital Age (Preface)*, SSRN.COM (2012), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021035 (last visited 30 Apr., 2023).

⁶² Mira Burri, and Rodrigo Polanco, *Digital trade provisions in preferential trade agreements: introducing a new dataset*, 23, no. 1, *Journal of international economic law*, 187-220, (2020).