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Governance of International Trade and the Internet: Existing and Evolving Regulatory Systems

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GOVERNANCE OF INTERNATIONAL TRADE AND THE INTERNET: EXISTING AND EVOLVING REGULATORY SYSTEMS

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TABLE OF CONTENTS

- vi** About the Global Commission on Internet Governance
- vi** About the Author
- 1** Acronyms
- 1** Executive Summary
- 1** Intersection of Trade and Internet Governance: Key Challenges
- 5** The WTO's Role in Addressing These Challenges
- 9** Developing Provisions for Internet Trade Governance: TISA and TPP
- 11** Enhancing SME Trade and Investment: Specific Rules and Regulations
- 12** Conclusion
- 13** Works Cited
- 16** About CIGI
- 16** About Chatham House
- 16** CIGI Masthead

ABOUT THE GLOBAL COMMISSION ON INTERNET GOVERNANCE

The Global Commission on Internet Governance was established in January 2014 to articulate and advance a strategic vision for the future of Internet governance. The two-year project conducts and supports independent research on Internet-related dimensions of global public policy, culminating in an official commission report that will articulate concrete policy recommendations for the future of Internet governance. These recommendations will address concerns about the stability, interoperability, security and resilience of the Internet ecosystem.

Launched by two independent global think tanks, the Centre for International Governance Innovation (CIGI) and Chatham House, the Global Commission on Internet Governance will help educate the wider public on the most effective ways to promote Internet access, while simultaneously championing the principles of freedom of expression and the free flow of ideas over the Internet.

The Global Commission on Internet Governance will focus on four key themes:

- enhancing governance legitimacy — including regulatory approaches and standards;
- stimulating economic innovation and growth — including critical Internet resources, infrastructure and competition policy;
- ensuring human rights online — including establishing the principle of technological neutrality for human rights, privacy and free expression; and
- avoiding systemic risk — including establishing norms regarding state conduct, cybercrime cooperation and non-proliferation, confidence-building measures and disarmament issues.

The goal of the Global Commission on Internet Governance is two-fold. First, it will encourage globally inclusive public discussions on the future of Internet governance. Second, through its comprehensive policy-oriented report, and the subsequent promotion of this final report, the Global Commission on Internet Governance will communicate its findings with senior stakeholders at key Internet governance events.

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ACRONYMS

ASCM	Agreement on Subsidies and Countervailing Measures
CTG	Council on Trade in Goods
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
ICTs	information and communication technologies
IP	intellectual property
IPRs	intellectual property rights
ISPs	Internet service providers
ITU	International Telecommunication Union
KORUS	Korea-US (FTA)
MFN	most-favoured nation
OTT	over-the-top
PTAs	preferential trading agreements
SMEs	small and medium-sized enterprises
TBT	Technical Barriers to Trade
TISA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

EXECUTIVE SUMMARY

Until recently, policy makers and businesses did not adequately focus on the significant overlap between Internet and trade governance, but with a large and increasing presence of the Internet in global trade and investment, there is a growing interest in examining the synergy or conflict arising between these issues. There is a need to identify trade rules and practices that are sufficient to deal with emerging issues, and the new trade rules, modes of common understanding and cooperative mechanisms that would be required as the Internet becomes a larger part of the trade and investment domain.

An important part of this exercise is to examine the relevance and sufficiency of the regulatory provisions in the World Trade Organization (WTO) agreements as well as the emerging major free trade agreements such as the Trans-Pacific Partnership (TPP). This paper discusses these aspects as well as the new trade-related concerns that need to be addressed, including the difficulty of determining jurisdiction and rules of origin, the classification of products and relevant disciplines applicable to them, complications arising for competition policy and regulatory practices

due to bundling of products enabled by Internet and new communications technologies, some intellectual property rights (IPRs) issues, special assistance to small and medium-sized enterprises (SMEs), and a need for effective participation by the private sector in developing appropriate regulatory regimes.

The TPP provides an indication of certain trade-related measures and cooperative initiatives, but there is a need to go beyond that framework and develop a more comprehensive and participative regime that adequately addresses the issues arising due to the overlap between trade and Internet governance. Thus, the multilateral forum of the WTO needs to pay closer attention to these issues. The paper suggests options ranging from soft to hard law that could be considered by the WTO in this context.

INTERSECTION OF TRADE AND INTERNET GOVERNANCE: KEY CHALLENGES

An intense and often controversial debate about Internet governance has taken place at the international level for more than a decade. During this time, however, the intersection between trade and Internet governance was not given significant attention.

This can be explained by several factors, but two are worth highlighting: On the one hand, the Internet governance community has long been arguing about the basic rules, principles and arrangements that should regulate the Internet; the interface with trade norms has received relatively little attention in this context. On the other hand, when the WTO was established in 1995, the Internet was still in its infancy. Subsequent to the launching of the WTO Work Programme on Electronic Commerce in 1998, the trade community then became absorbed with the Doha Round negotiations and, later, with efforts to overcome the stalemate in these negotiations, whose agenda is still dominated by the twentieth-century-era trade concerns prevalent when it was launched in 2001. These concerns largely focused on agricultural subsidies and tariffs on industrial goods.

Nevertheless, this situation is evolving rapidly with the changing nature of global trade flows. The large-scale diffusion of information and communication technologies (ICTs), the phenomenal development of the Internet and the extraordinary expansion of the digital economy are revolutionizing trade. According to a report by the McKinsey Global Institute (Manyika et al. 2014), “digital technologies are transforming global flows in three ways: through the creation of purely digital goods and services, ‘digital wrappers’ that enhance the value of physical flows, and digital platforms that facilitate cross-border production and exchange.” The report points out that

“cross-border Internet traffic grew 18-fold between 2005 and 2012” and could further “increase eightfold by 2025” (*ibid.*, 1 and 113). Cross-border e-commerce retailing has grown to account for more than 10 percent of trade in goods in less than a decade. At the same time, businesses are increasingly moving data across borders as an intrinsic part of their daily operations. Disruptive technologies — such as 3-D printing — are likely to have an even more significant impact on these production modes and trade flows, although the nature and extent of the impact is not yet entirely clear.

In this context, the trade community is taking a growing interest in the digital economy, beyond the narrower notions of e-commerce, and grappling with whether existing global trade rules are sufficient to support the expansion of global e-business and digital trade. The trade community is increasingly looking into whether new trade rules are needed and, if so, which ones. It is also becoming aware of the linkages with the broader Internet governance discussions. For its part, the Internet governance community is realizing that trade negotiations are not only about goods and services, but are also moving toward governing deeper regulatory issues extending beyond national borders, which include intellectual property, data protection, privacy and cross-border data flows. The Internet governance community is also interested in better understanding the WTO and trade governance more broadly, and in examining whether lessons could be drawn from trade rules for the ongoing discussions about Internet governance. These discussions focus on “the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programs that shape the evolution and use of the Internet” (Working Group on Internet Governance 2005).

Thus, there is a pressing need to bridge the policy and knowledge gaps between the trade and Internet governance communities, and to foster a better understanding between them. Doing so could lead to identifying possible linkages and synergies, as well as to ensuring that normative developments in these two communities are mutually supportive and contribute to the overall goal of ensuring the open and participatory nature of the Internet, which underpins the digital economy. This paper seeks to contribute to this objective by mapping issues at the intersection of trade and Internet governance.

Issues at the Nexus of International Trade and the Internet

The Internet is a vehicle or platform for sharing information and, increasingly, for promoting or concluding commercial transactions. Trade is the exchange of goods and services that the Internet platform facilitates in multiple ways.

The Internet being a general purpose technology, and an evolving one in terms of its use and technological complexities, its linkages across sectors and the scope of its use are increasing. Normally, trade involves the crossing of national borders by the product, producer or consumer. Today, goods trade is increasingly viewed in terms of value chains, with products crossing borders more than once, and with services and data flows playing a growing role in the operation of these value chains. Services trade is analyzed in terms of four modes of supply: border crossings by goods, consumers, commercial entities and persons supplying services. The Internet extends trade by allowing transfer of information, which then converts into intra-company operations, or sales to other producers or final consumers, including repair and maintenance services or facilitating supply chain operations. Although Internet-based trade is dealt within the General Agreement on Trade in Services (GATS), primarily in terms of mode 1 (i.e., cross-border supply of service), it can also concern establishment-related issues (such as commercial presence). It therefore raises a wide variety of issues linked with regulation of trade.

Another important point is that the Internet is not a chain, but rather a web. Thus, production and consumption of any particular service on the Internet could take place at any point or points within this web, and involve multiple participants and locations (countries) through activities that are either a direct part of the transactor or flanking support. This creates issues of jurisdiction, and a need for collecting relevant information, expanding the scope of existing regulations, developing new forms of trade regulation and addressing cross-jurisdictional issues through international cooperation. As mentioned by the World Economic Forum (2009, 6) in a publication on ICT: “The behaviors of networked economies are non-linear. They are marked by increased velocity, systemic interdependencies and hyper-personalization. In such a dynamic sector environment, it is essential to fully embrace the concept of innovation...such topics as open trade, effective competition, privacy, security and quality of service will all require innovative approaches and policy.”

Tensions can often emerge between the objectives and policies underpinning trade regulation; for example, the goal of maintaining open trade versus the objectives of promoting privacy or security. The latter types of objectives are covered by WTO carve-outs under articles allowing for “general exceptions” and “security exceptions.” However, many other regulatory policies not necessarily permitted under the WTO exceptions are in flux insofar as global and national governance of the Internet is concerned (see the following section on “Principles for Trade Regulation”). In the context of Internet policy, therefore, governments are faced with the need to address new situations arising from changes in technologies and business models, in some cases leading to a need to manage smooth transitions to a

new, more stable set of regulatory measures (for example, competition and pricing used by over-the-top [OTT] services).

When potentially WTO-inconsistent policies are adopted, trade governance takes into consideration whether the measures concerned are:

- specifically allowed or not under the WTO system for justifiable objectives;
- disguised forms of trade restrictions or deliberately creating anticompetitive situations in favour of domestic industry (for example, through certain localization requirements), and whether there are disciplines within the WTO to address them;
- unduly restrictive policies in terms of their effects (such as standards or taxation); and
- addressing some form of market failure or externality.

Such assessments can require consideration of how policies may or may not contribute to a level playing field, how best to address market failures and whether certain disciplines should be imposed on regulators or regulatory regimes to achieve the objectives of open trade under pro-competitive conditions.

Important questions in this context also include:

- Is it *feasible* to regulate the trade under consideration?
- Is it *necessary* to regulate?
- If it is necessary to regulate, is there a relatively less trade-restrictive manner to regulate it, and whether the regulation be mandatory or voluntary?
- In a transboundary environment, how can interoperability between national approaches in this area be achieved?
- Since some governments and industry players suggest industry self-regulation, when should rules be developed by the government or by industry itself?

Regarding the final point, additional issues would arise if industry were to self-regulate. For example, which industry body/bodies should be considered relevant for providing the appropriate regulatory framework, and even international standards, for operations? Also, to the extent that industry bodies establish international standards or codes of conduct, how might their work relate to that of relevant international institutions, such as the WTO, the International Telecommunication Union (ITU) or the World Intellectual Property Organization (WIPO)?

Principles for Trade Regulation

Trade regulation, as reflected in the WTO, has some established principles and disciplines. Due to the evolving nature of technology and products traded on the Net, some new issues are under consideration or are still a work in progress. Some others are yet to be considered in any meaningful way.

The structure of trade regulation in WTO includes:

- Most-favoured nation (MFN) treatment, national treatment, agreement to limit use of trade restrictions and possibility of deviating from the aforesaid binding principles, provided there are legitimate and justifiable reasons to do so (for example, environment, food security, natural resource depletion, unfair trade).
- Transparency and inquiry points, possible review of actions and changes in law/regulations, forums to address concerns regarding policies of other WTO members, and accountability of members through the committee processes and dispute settlement.
- Agreed-upon disciplines for addressing unfair trade, imports causing injury to domestic industry, and applying standards for reasons of health, safety, environment, national security, prevention of fraud and deceptive practices.

One of the most important issues that the Internet has raised in terms of trade governance relates to classification of Internet-enabled trade in goods and services. If a product is not unambiguously classified, then it is not clear which legal rules apply to that product. All governance, in terms of trade regulation, thus depends on classification. This is a major issue in the WTO for services, including for Internet-based services, because many of the most fundamental principles of trade are linked to whether a product is covered under the goods or the services agreements. Further, classification often determines whether or not a GATS commitment or General Agreement on Tariffs and Trade tariff concession has been taken on a particular product, and, if a dispute arises, which products would be the directly competing products affected. This aspect — i.e., the determination of “like products” — is of great significance in dispute settlement deliberations. This determination of “like product” is also required to assess whether or not WTO’s non-discriminatory treatment provision is being violated and thus is crucial for the enforcement of MFN or national treatment obligations under the WTO.

Definition or classification of goods/services involves two distinct strains of analysis:

- One is to determine whether or not a product is a good or a service, because that will affect the disciplines applying to its trade, since trade rules in WTO differ

for goods and services. This complication arises because products whose trade previously required physical transportation (such as books, recorded music or films) can now also be traded digitally over the Internet via electronic access or downloads by the consumer. At present, there is no unanimity in the WTO as to whether such digital products are goods or services.

- The second classification issue is whether some of the services available over the Internet today are *new* services or an *existing* classified service being delivered through the Internet — i.e., is it simply a different way of delivering the same service. While existing services are already classified and may be subject to disciplines incorporated in the schedules of the GATS, a new service would need to be classified. In the WTO, how to determine whether a service is new or how to assign a classification is an issue under discussion and for which there is not yet a common view or conceptual solution.

With technological advances, the same technology can deliver more than one service — for example, radio, telephony, mobility, storage of information, education, films and medical services — which is described as a process of convergence of multiple services on the same technology platform. Convergence makes regulation difficult because the regulatory issues may not be the same across these different products. Convergence also implies that there would be multiple types of users, possibly creating additional regulatory issues to be addressed for a general purpose technology or platform. An important feature of the Internet as a general purpose technology is that it allows for a continuing enhanced possibility of convergence and multiple linkages. Thus, the scope and impact of existing policy considerations will keep expanding as new issues for regulation arise. These issues could include:

- Considering how to determine location of the exported product and thus the rules of origin. This issue could become quite complicated due to many different free trade agreements (FTAs) with dissimilar regulatory regimes that may differ across nations or even across product categories.
- Evolving business and pricing models are very different from traditional models for goods and services. Several products can be bundled together and it may be difficult to have a specific, predetermined, single price for any particular product in the bundle. Further, many Internet business models today gain revenue wholly or largely via advertising revenue rather than by charging the end consumer. For regulators, regulatory issues covering pricing and anticompetitive activities may become more difficult to determine in such situations where hitherto unconventional pricing

mechanisms are used to cover costs and increase market presence. New business models make it easy to cross-subsidize, and make it difficult for the regulator to determine whether competitive conditions are being adversely affected. Further, with cross-subsidization or even “dumping” of a product, the combination of new pricing models and products with the possibility of significant bundling makes it difficult to determine the extent of the breach and to specify a remedy that will not go beyond the extent of the breach.

- Since the Internet and Internet-using technological developments allow for a growing convergence of activities, it is difficult to determine which regulations and/or trade commitments are relevant for the converged activities, and also whether new approaches are needed to address the issue. As mentioned above, with growing convergence, the Internet can be used to provide a variety of products and services. The key issue is how to regulate in cases where different types of products can be produced from the same source, and where one does not know the scope and limit of such sets of products or activities.
- Judging where to draw the line with regulatory intervention. Since it is sometimes technologically possible to bypass the regulatory safeguards, when is it necessary or cost-effective to continue to impose the same regulatory requirements on traditional business and trade, and how?
- Issues relating to personal data, privacy, security or managing social concerns assume a much larger dimension in view of the ubiquitousness of the Internet. Means to address these concerns may have positive or negative implications for the supply of services in general, as well as development options based on taking advantage of new technologies, and on foreign direct investment and technology transfer.
- Determining which IPR issues need to be addressed and the best way of doing so.
- Deciding how to manage issues that may arise with the possible changes in existing legal standards for work, as tasks such as home-based work become a larger component of the work force. This is especially important because Group of Seven countries are now emphasizing sustainable development and striving to implement social standards throughout the supply chain.
- Considering what are the ways that governments can achieve greater coherence with respect to regulatory principles or conditions that apply across different countries or different product categories as Internet technologies enable trade and value chains to become truly global.

- How to build trade-related information technology capacity in countries that have yet to catch up?

The European Union and the United States have emphasized a set of principles for ICT trade through a joint submission in the WTO (2011). The proposed principles include: transparency; open networks, network access and use; governments not preventing cross-border information flow; no restriction for infrastructure to be established locally or that local infrastructure should be used, nor preferential treatment to national suppliers of ICT; allowance of full foreign ownership; maximizing the availability and use of spectrum, in line with ITU recommendations where possible; legally distinct and functionally independent regulatory authorities; authorizing provision of competitive telecommunications services; ensuring interconnection on commercial terms; and international cooperation to increase the level of digital literacy globally.

Industry in large markets has also emphasized similar principles, as well as promotion of international standards, dialogues and best practices, and the need to address emerging legal and policy issues on the open nature of the Internet, security and privacy, and jurisdiction. Industry seeks to ensure that trade agreements cover all relevant aspects of digital trade in the future and also notes that developments on disciplines or common understanding could take place through various mechanisms, including bilateral, regional and multilateral trade agreements, or through development of a completely new treaty on digital goods, services and information flows.

THE WTO'S ROLE IN ADDRESSING THESE CHALLENGES

In large part, WTO discussions relating to e-commerce and Internet concerns have taken place under the auspices of the WTO Work Programme on Electronic Commerce, established in 1998 by trade ministers. The WTO Decision establishing the program adopted a wide-ranging definition to encompass all potentially relevant goods and services and any other issues that might arise in the WTO context: "Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term 'electronic commerce' is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means" (WTO 1998, paragraph 1.3).

Thus the WTO's definition of "e-trade" covers anything from online sales of merchandise later delivered by post, to online hotel or plane reservations, to online sales of insurance policies, e-banking, and electronic reports by architects, engineers or consultants. It would also include promotional websites, Internet advertising, downloading of music or videos, long-distance medical diagnoses,

online university courses or connection with foreign call centres for customer service inquiries. However, diverse views on many issues covered by the Work Programme on Electronic Commerce are yet to be resolved.

A number of WTO agreements become relevant in case of trade in goods resulting in commerce through the Internet. WTO e-commerce discussions on Internet-related trade have taken place under the General Council, the Council for Trade in Services, the Council for Trade in Goods (CTG), Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Committee on Trade and Development. Further, WTO trade policy reviews cover some aspects of Internet trade under services. Other major efforts that have an impact on Internet-related trade and the use of the Internet are the two Information Technology Agreements, which open up trade for a large part of global trade in the ICT products identified in the agreed-upon lists.¹

The TRIPS Agreement provides minimum intellectual property (IP) standards that all WTO members have agreed to apply and enforce. These standards may differ for groups of countries; for example, least developed countries most notably do not have the same applicable obligations under the agreement. Certain issues examined by the CTG include: market access conditions for products relating to e-commerce; customs valuation; import licensing; customs duties and other duties and charges; standards in relation to e-commerce; rules of origin; and tariff classification. The most relevant agreement is the GATS because a great many services are information-intensive and, hence, digitizable. For this reason, most of the in-depth discussions on Internet-related issues have taken place in the Council for Trade in Services.

GATS

A significant feature of the GATS disciplines is that all provisions of this agreement are relevant for the Internet — for example, MFNs, national treatment and market access provided under the four modes in the schedules of individual members; transparency provisions; dispute settlement, and possibility of discussing concerns within committees and the council.

In this context, it is also worth noting that most of the above-mentioned principles emphasized by the United States and the European Union for ICT are already covered by the framework of GATS disciplines.

A very useful document to guide the understanding on this issue is a progress report by the Council for Trade in Services on the Work Programme on Electronic Commerce, adopted by the WTO's General Council in 1999 (WTO 1999). This clarifies the scope of the GATS

¹ For a summary discussion, see www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_ita_e.htm.

provisions that are significant for the electronic delivery of services. These include MFN (Article II), transparency (Article III), increasing participation of developing countries (Article IV), domestic regulation, standards and recognitions (Articles VI and VII), competition (Articles VIII and IX), protection of privacy and public morals and the prevention of fraud (Article XIV), market access commitments on electronic supply of services (Article XVI), national treatment (Article XVII), and access to and use of public telecommunications transport networks and services (Annex on Telecommunications).

Importantly, issues relating to anticompetitive activities or discriminatory access could be addressed through the GATS Annex on Telecommunications, and the principles in the WTO Reference Paper on telecommunications (WTO 1996). This paper is the basis of disciplines committed in the schedules notified by many WTO members on addressing good regulatory practice and anticompetitive practices. The first paragraph of GATS Article VI on domestic regulation is also pertinent: “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”

Additional insight into Internet-related services is also provided by the WTO’s dispute settlement panel and Appellate Body reports of the WTO. In 2000, the United States brought a dispute pertaining to the telecom-related regulatory practices of Mexico, which *inter alia* also affected Internet services (WTO 2004a has the Panel Report). In fact, most GATS-related dispute settlement cases have involved online or networked services. For example, the case brought by Antigua and Barbuda against the United States concerned gambling services provided over the Internet (WTO 2004b, 2005). Two important disputes relating to China litigated, respectively, an element related to online music downloads (WTO 2009a; 2009b), and electronic payment services (WTO 2012). Panel findings have confirmed that GATS disciplines and commitments apply to services supplied electronically. The panel report in WTO (2004b), for example, found that supply of a service through mode 1 includes all means of delivery (including the Internet). In one excerpt, the panel summed up this view, saying,

we conclude that mode 1 includes all means of delivery. We are of the view that when a Member inscribes the word “None” in the market access column of its schedule for mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector. This is especially so in sectors and sub-sectors where cross-border supply is affected essentially if not

exclusively through the Internet. (*Ibid.*, paragraph 6.287)

In WTO (2009a, paragraph 7.1209), the panel found that the scope of China’s commitment in its GATS schedule on “sound recording distribution services” extends to sound recordings distributed in non-physical form, through technologies such as the Internet.

A closer look at the WTO framework of disciplines in the area of services does, however, suggest three gaps:

- First, although the framework of disciplines exists, substantive content of disciplines or interpretative tools need to be developed through further negotiations to enable that framework to specifically address many of the concerns.
- Second, the framework itself is lacking in terms of having not yet developed disciplines in areas such as subsidies, safeguards and government procurement.
- Third, the complex and constantly evolving nature of Internet-based transactions, together with new business models, creates conditions where enduring trade disciplines may become difficult both to devise and to implement. In this situation, either new forms of trade disciplines may need to be developed, or some enhanced forms of international cooperation would be needed to address overlapping new issues.

TRIPS

The WTO Council for TRIPS has discussed IPRs and the Internet, but its discussions did not yield concrete results. When the WTO Work Programme on Electronic Commerce was adopted in 1998 (WTO Document WT/L/274), the TRIPS Council was requested to “examine and report on the intellectual property issues arising in connection with electronic commerce,” including “protection and enforcement of copyright and related rights; protection and enforcement of trademarks,” and “new technologies and access to technology” (WTO 1998, paragraph 4.1). E-commerce was addressed by the council as a standing item on its agenda from 1998 to 2003; however, the council’s discussions were largely inconclusive and no specific follow-up actions emerged. The need for further study to understand the issues involved was highlighted in some of the reports of the TRIPS Council to the WTO General Council.

In addition to the lack of consensus in discussions at the TRIPS Council, large copyright-based industries and many industrialized countries considered TRIPS’ provisions to be inadequate and insufficient to address violations of IPRs in the digital environment. The elaboration of more effective norms for this purpose was pursued in a number of other forums and venues.

In 1996, WIPO adopted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, known together as the Internet Treaties. The Copyright Treaty updates the Berne Convention and provides further extensions to distribution and rental rights, as well as including rights for interactive downloading and for the distribution of copies and protection against the circumvention of technology measures. The Performances and Phonograms Treaty refines the Rome Convention and provides an updated set of international rights for performers and record producers. The treaty effectively updates the Rome Convention to accommodate certain forms of interactive downloading and distribution, as well as protection against the circumvention of technical protection measures.

These treaties were implemented in the United States by the Digital Millennium Copyright Act (1998) and in the European Union by the Copyright Directive (2001). Both the United States and the European Union have proposed to incorporate the key provisions of the WIPO Internet Treaties into the TRIPS Agreement, but this proposal did not garner broad support when it was tabled at the TRIPS Council.

Apart from WIPO, “TRIPS Plus” provisions — which go beyond the minimum standards of the WTO TRIPS Agreement — have been incorporated in many bilateral, regional and plurilateral trade agreements for the purpose of achieving more effective IPR enforcement in the digital environment. This was also one of the key objectives of the Anti-Counterfeiting Trade Agreement, which was ultimately rejected by the European Parliament in 2012.

Ultimately, the TRIPS Council can again take up the discussion on IPRs and the Internet if it wishes. According to Article 71 (1) of the WTO TRIPS Agreement, the Council “may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.” Given that more than a decade has elapsed since the TRIPS Council discussed these issues, it might be time to revisit them in light of the drastic changes in the digital economy described above and the new studies and empirical evidence available since then. This could be one of the items to discuss at WTO; the WTO’s 2015 Ministerial Declaration at Nairobi, stated that new issues may be raised for discussion.²

Finally, one aspect of the TRIPS-related WTO regime that can impact IP protection on the Internet, and which is often overlooked, is the exercise of cross-retaliation involving TRIPS. The WTO Dispute Settlement

Understanding contemplates the possibility for WTO members to suspend concessions in the field of TRIPS to redress an injury suffered with respect to trade in goods or services. WTO arbitrators have thus far approved TRIPS cross-retaliation on three occasions: in favour of Ecuador against the European Communities, of Antigua against the United States, and of Brazil against the United States. In 2013, the WTO awarded Antigua the right to impose annual sanctions worth US\$21 million against US patents, copyrights, trademarks and other IPRs. News reports indicated that Antigua was considering setting up a website to sell US copyrighted movies and songs, but the move ultimately did not materialize.

The WTO’s Future Role in Governance of Internet

The WTO concept of standards, as captured in the WTO’s Technical Barriers to Trade Agreement (TBT), was established in a pre-globalization and pre-digital era and does not adequately take into account the open standards that have been developed by globally open communities. There is a possibility of bringing in these standards bodies within the WTO system through observership in meetings, informal meetings or other appropriate means. This is important because the development and evolution of technologies on which the Internet is based exemplifies the success of this bottom-up, globally open, market-driven system of standardization.

It thus needs to be examined whether there is a need for the WTO to update its concepts and definitions of standards, and the underlying processes, to the twenty-first-century reality so as to encompass more inclusiveness and openness in an era of global challenges that require increased innovation. This can be realized through an explicit acknowledgement by the WTO of the value of the standards-setting and developing bodies that follow a globally open, market-driven paradigm (Karachalios and McCabe 2013). Analysis of the TBT Agreement might show that it is congruent with the relevant principles of, for example, the Internet Engineering Task Force. Clarity on this aspect, however, including application to the area of services, would help limit potential uncertainty relating to the Internet.

Lessons from WTO Governance for Internet Governance

The WTO regime encompasses a number of useful rules, mechanisms and arrangements that could be worthwhile to consider in the context of Internet governance and are relevant in the context of Internet- and trade-related developments. These include:

- **Binding principles:** An established set of principles and disciplines for “good governance,” such as non-discrimination and technological neutrality.

² The Ministerial Declaration states: “While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members” (WTO 2015, paragraph 34).

- **Transparency:** It is imperative that trade regulations and policies are transparent so individuals and companies involved in trade can know as much as possible about the conditions of trade. To achieve this, governments have to inform the WTO and other members of specific measures, policies or laws through regular “notifications.” The WTO conducts regular reviews of individual countries’ trade policies — the trade policy review — with the objectives of increasing transparency and understanding of countries’ trade policies and practices through regular monitoring, and improving the quality of public and intergovernmental understanding of these policies and practices. Finally, deliberations at different WTO bodies and the availability of the minutes of such deliberations contribute to this objective of transparency.
- **Policy flexibility:** The ability to meet legitimate policy objectives even if the policy required for this purpose is contrary to the primary rules. Thus, flexibility is provided in WTO, subject to specific disciplines, including the criteria of necessity and meeting the relevant conditions (Articles XIV and XIV bis of GATS). The types of conditions under which flexibilities are allowed reduce the scope for discrimination or disguised form of protectionism. Further, they provide a predictable and agreed basis to address two different types of issues: those relating to governance *on* the Internet — limiting and controlling what goes on online — and governance *of* the Internet — regulating the operation of the physical infrastructure of the system.
- **Mechanisms for exchange of information:** Enquiry points and committees for discussing trade-related concerns.
- **Cooperation and mutual support:** Governments identify issues that cannot be addressed adequately by any single government or jurisdiction, but rather need several governments that cooperate or collaborate to establish mutually supportive systems. Similar systems are also used to provide capacity improvement possibilities for those who require them to come up to a more informed and efficient level of performance.
- **Coherence:** Regulatory policies are not always the same across countries, and differences in them could cause difficulties in connecting markets, for example, difference in encryption laws or addressing competition or certain public policy-related issues. The WTO provisions give a basis for greater coherence among such differences in the content of relevant policies.
- **Dispute settlement:** An established body of judicial decisions that provides greater certainty to trade policy governance.

However, as mentioned above, there are three types of gaps to be addressed in making WTO governance more effective. The architecture of GATS is flexible and anything could be negotiated within the framework by limited groups or by all WTO members. Nonetheless, such discussions are currently not yielding results within the WTO, with the stalemate in Doha Round negotiations creating a trust deficit among members. Thus, negotiations on the Trade in Services Agreement (TISA) are being held using the GATS framework, but as a plurilateral outside the WTO.

There may be a possibility, however, to consider certain categories of steps ranging from “soft” to “hard” agreements among WTO members. Based on the discussion above, these could include the following options:

- Form a platform to exchange views on digital trade and governance for discussions between government and business, with track-two initiatives among major stakeholders included in the process.
- Examine the implication of Internet-based trade requiring coherent policies in multiple sectors. This could be part of the continuing program on e-commerce under the GATS, with a wider mandate to discuss important service sectors.
- Examine how some industries, such as finance, have dealt with local hosting requirements.
- Examine how the principles of WTO’s TBT Code of Good Practices can be applied to reduce regulatory uncertainty for Internet-based trade. A number of private standards bodies have accepted these principles and notified the WTO as well. This could be done by all the relevant standards bodies pertaining to the Internet.
- Examine how “good offices” by the chairperson of a committee or the director general could be used to address concerns of all parties.
- Add information to the existing WTO trade databases on measures affecting digital trade so that the factual basis could become clearer for policy makers.
- Develop voluntary guidelines or codes of conduct on important digital trade issues, for example, focusing on best practice or means of addressing concerns such as privacy, security, jurisdictional issues, etc.
- The growth of supply chains has led to a trade facilitation agreement to deal with a number of customs matters within the WTO. The interlinked and complex nature of the Internet would suggest a need to go beyond that and consider whether some agreement could be made on facilitation of Internet-based trade.

Five currently promising areas that cut across different WTO committees or councils are:

- Discussion on SMEs, a topic which has been emphasized in more than one WTO committee. In such discussions, members could share experience on e-commerce success cases, particularly with respect to SMEs. To some degree, such exchanges have been featured in e-commerce seminars held by the Committee on Trade and Development and the Services Council. The latter has recently approved information exchange as an e-commerce agenda item for its meetings that will focus on SMEs, among other issues of members' choosing. Such discussion could be generalized across the WTO within its bodies more widely. Enhanced discussions could also address some of the regulatory issues affecting SMEs, which often have crosscutting relevance for all enterprises.
- Sharing information on the experience of individual WTO members about their efforts at policy coherence and regulatory initiatives designed to address digital trade. Sharing of experience is an established practice in WTO bodies. For instance, Chinese Taipei tabled a paper in the WTO's Council for Trade in Services where it presented its data protection legislation and opened the discussion among members on this issue.
- The increasing overlap between goods and services and the impact of new technologies on conventional concepts of trade regulation — such as rules of origin, unfair trade, application of the four modes of supply (currently only in GATS) to trade in goods — and a possible need to examine the sufficiency of safeguards mechanisms for goods with Internet-based trade allowing easy shift in location.
- Identifying the specific requirements for least developed countries and other economies in terms of upgrading their capacities for digital trade and the possibility of prioritizing the relevant policy response.
- Improved data collection, both within the WTO and interagency groups, so as to clarify specific issues and create a better basis for policy consideration. This exercise is ongoing, and closer attention could be given to issues arising with respect to digital trade.

In general, these suggestions largely do not focus on negotiations of new disciplines because the conditions for doing so in the WTO are not presently encouraging. However, negotiations in FTAs are ongoing on and many Internet-related concerns are part of the issues being addressed there. Some of these are mentioned below.

It is quite possible that some of the softer topics, including initiation of more substantive discussions unlinked to negotiations, may not easily yield tangible results in the WTO. Therefore, WTO efforts need to be supplemented

by more coordinated outside work — for example, by academic or research institutes in both developed and developing countries — that can be widely shared with trade and Internet governance communities. One avenue of useful research might be to focus on the kinds of regulatory guidelines and codes of conduct needed to facilitate the smooth functioning of the Internet as a trade highway, as well as possible means of securing barrier-free Internet-enabled trade.

Other examples of issues that have yet to be dealt with include: addressing concerns on jurisdiction and liability; clarifying the classification of new services that arise, for example, in social media or various OTT services and mobile apps; and considering whether investment or competition policy-related provisions or agreements could provide a basis for a wider set of relevant disciplines on digital trade. It also remains to be seen whether it will be possible for some of the e-commerce provisions in plurilaterals to be brought into the WTO through scheduling or other means.

DEVELOPING PROVISIONS FOR INTERNET TRADE GOVERNANCE: TISA AND TPP

Increasingly, regional and plurilateral trade agreements are addressing e-commerce and digital matters, such as cross-border data flows and IPR enforcement in the digital environment. For instance, the 2011 Korea-US FTA (KORUS) was the first international treaty to include rules on cross-border data flows. However, to the chagrin of the private sector, the provision only requires that parties should "*endeavor* to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders" (emphasis added) and is not more strongly worded in terms of its mandatory nature.

Among the mega-regionals, negotiations of the TPP have concluded and TISA is the most advanced. The TISA negotiations are being held under secrecy, but indications about the content of its chapter on e-commerce are available online. Considering the issues being addressed in TISA, we can see the areas where higher disciplines will be developed. These include movement of information or cross-border information flows, online consumer protection, personal information protection, unsolicited commercial electronic communications, transfer of access to secure code, interoperability, open networks, network access and use, local infrastructure/local presence, electronic authentication and electronic signatures, customs duties on electronic deliveries, international cooperation and security exceptions. Given the major importance of the United States in both TPP and TISA, and the fact that the concerns of another large economy in TISA, i.e., the European Union, are similar to those of the United States, the results of the TPP on electronic commerce give a good

indication of the likely evolution of disciplines in this area within TISA.

TPP and E-commerce

Conditions affecting digital trade can be found in several parts of the TPP, such as the services-related chapters on cross-border trade in services, financial services, temporary entry for business persons, telecommunications and e-commerce.³ Of course, the provisions relating to goods also impact Internet-based commerce since international supply chains comprise both goods and services, including the use of Internet-based services.

Provisions relating to telecommunications are very significant for Internet because they affect the conditions for access and use of the network for providing Internet services. The most evident impact, however, is through the provisions relating to e-commerce (see below). In addition, as discussed earlier in this paper, the IPR-related provisions are also important (see the following section on “TPP and IPRs”).

Chapter 14 of the TPP⁴ contains provisions specifically relating to e-commerce. They cover several issues, such as:

- no customs duties, fees or other charges on digital products;⁵
- establishing certainty of market conditions in terms of the principle of non-discrimination generally applying to e-commerce;
- avoiding any unnecessary regulatory burden on electronic transmissions;
- facilitating electronic authentication and electronic signatures;
- facilitating use of cloud-computing services;
- protection of personal information;
- online consumer protection, including means for consumer redress and building consumer confidence, and allowing cross-border transfer of information by electronic means, including personal information, when the activity is for the conduct of business (this is not binding if the government needs to use a policy

³ For the text of the TPP’s chapter 14 on electronic commerce, see www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/.

⁴ As in other parts of the TPP Agreement, this chapter also has some exceptions to the disciplines agreed in general.

⁵ In the WTO, the decision on imposing no duty on e-commerce is validated by the ministers at each WTO Ministerial Meeting, and remains in force only until the subsequent meeting.

for legitimate public policy objectives, subject to the policy meeting certain conditions⁶);

- members do not require location of computing facilities in another member’s territory as a condition for conducting business in that territory;
- interconnection charge sharing;
- addressing unsolicited commercial electronic messages;
- cooperation among the members of the TPP Agreement on sharing experiences,⁷ exchanging information, assisting SMEs to overcome obstacles, encouraging self-regulation by the private sector and building capabilities to address cyber-security matters;
- prohibition, with limited justifiable exceptions, on requiring the transfer of, or access to, software source code as a condition for the import, distribution, sale or use of such software or products containing such software in the TPP member’s territory;
- when a TPP country requires assurance that information technology equipment complies with a technical regulation or standard for electromagnetic compatibility, the requirement is that the TPP member accept a supplier’s declaration of conformity with the specified standard or technical regulation for unintentional electromagnetic disturbances with respect to any other device or system in that environment;⁸ and
- e-commerce provisions being subject to dispute settlement.

It is noteworthy that several of the principles emphasized by the European Union and the United States in their above-mentioned submission to the WTO have been addressed by the TPP, an agreement whose members account for about 40 percent of global GDP and about one-quarter of world trade.

⁶ The policy should not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and should not impose restrictions on transfers of information greater than are required to achieve the objective.

⁷ The list of topics for exchanging information and sharing experiences is open ended, but the TPP text specifically mentions: personal information protection; online consumer protection, including means for consumer redress and building consumer confidence; unsolicited commercial electronic messages; security in electronic communications; authentication; e-government; and consumer access to products and services offered online among the members of TPP.

⁸ This provision is in Section B of the TPP’s chapter on TBT.

TPP and IPRs

Following the model of previous FTAs concluded by the United States, particularly KORUS, the TPP has strong IP and enforcement provisions in the digital environment.

Chapter 18 of the TPP includes several provisions that pertain to Internet-related transactions. Transparency provisions specifically mention the Internet as a means of providing information to the public. Article 18.28 provides disciplines relating to country code top-level domain names. Section J in the chapter specifically addresses Internet service providers (ISPs) and includes a number of provisions on legal remedies and safe harbours, including several connected with copyright infringement. The digital environment is mentioned in several places, and the Internet is covered through the use of terms such as "transmission to the public by any medium" (New Zealand Foreign Affairs & Trade 2016, article 18.57) or "by wire or wireless means" (*ibid.*, articles 18.59; 18.62). This enhances the scope of the IPR provisions to include services provided through the Internet. In this context, two aspects of the TPP are especially noteworthy:

- Strengthened technological protection measures: Article 18.68 of the TPP provides for a strengthened set of provisions compared to earlier preferential trading agreements (PTAs), but along the lines of KORUS, to avoid the circumvention of technological protection measures that authors, performers and producers of phonograms may use in connection with the exercise of their rights in order to protect the unauthorized use of their works.
- Detailed provisions on liability for ISPs: Such provisions entail incentives for ISPs to cooperate with copyright owners in deterring any unauthorized storage and transmission of copyrighted materials (*ibid.*, article 18.82.1[a]). They also limit the scope of remedies that may be available against online service providers for copyright infringements that they do not control and take place through systems or networks controlled or operated by services providers (articles 18.82.1[b], 18.82.2).

Regarding strengthened technological protection, WTO TRIPS Plus provisions have long attracted criticism from civil society groups for their potentially negative effects on access to knowledge and the broad dissemination of information in the digital environment. Emphasized by the United States, article 18.66 of the TPP — a new provision that does not feature in previous US PTAs — relates to limitations and exceptions to copyright:

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions

that are consistent with Article 18.65 (Limitations and Exceptions), including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

The US press release on this matter in 2012 elaborated on how US consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives and mentions specifically that under its Digital Millennium Copyright Act, the United States provides "safe harbors limiting copyright liability, which help to ensure that legitimate providers of cloud computing, user-generated content sites, and a host of other Internet-related services who act responsibly can thrive online."⁹ The objective is to achieve an appropriate balance between IP protection measures and dissemination of knowledge and information, but such IPR provisions will likely remain a source of tension in trade and IP governance arrangements in the digital economy.¹⁰

ENHANCING SME TRADE AND INVESTMENT: SPECIFIC RULES AND REGULATIONS

Provisions relevant to SMEs would need to address the specific shortcomings or difficulties faced by SMEs. These could include technical assistance for SMEs, or introducing certain flexibilities in the form of exceptions to certain disciplines that are perceived as creating obstacles to their participation in trade. Examples include the kind of SME support policies that are in the TPP, that are envisaged in the Transatlantic Trade and Investment Partnership and the provision in footnote 2 of the WTO Agreement on Subsidies and Countervailing Measures (ASCM).¹¹ Two major constraints faced by SMEs are finance and market

⁹ This was the first time that the United States sought to include such provision in an FTA. See <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/ustr-introduces-new-copyright-exceptions-limitations-provision>.

¹⁰ Internet intermediaries such as ISPs and Internet platforms are particularly keen not to see the "safe harbor" and limited liability provisions they have enjoyed under the Copyright Act be undermined by overly broad IP rules in trade agreements that increase transaction costs and risks for their operations.

¹¹ Under this footnote, subsidy support provided *inter alia* to SMEs would be outside the scope of the disciplines specified by the ASCM because such subsidies would not be considered "specific" subsidies. The subsidy disciplines of the ASCM exempt subsidies that are not specific. It is noteworthy that the GATS does not have any disciplines on subsidies.

information. While financial support would require specific initiatives, market information could be made available together with developing policy coherence in different jurisdictions.

In today's global markets with supply chains and lead firms, it is very important to develop capabilities for meeting international standards. There are two types of standards to consider in this context, namely product standards and process standards. The latter also increase efficiency. There may be a need to emulate and learn from certain existing programs aimed at enhancing the capacities of SMEs. One example is a modular approach to improve capacities of SMEs, focused on incremental and step-wise improvement in a standards-related capacity of the firm. This training, after completing the fourth or fifth module of incremental training, would enable the enterprise to meet international standards.¹² Another example is a recent program in Rwanda, where the existing links with local supply chains are being strengthened by training enterprises to meet standards that are required by the importers in their key export markets. This program includes developing better links and commercial connections with regional value chains to export the "regionally produced products" to major global markets.

Many SMEs operating in new technology areas are relatively efficient and provide niche products for the market. Others, however, need to identify segments of the value chain where their entry is most feasible and efficient. Links to supply chains depend on market information, timely policy facilitation and the creation of hubs for small-scale industry to link up or operate with others that are connected in the value chain through forward and backward linkages.

Another aspect of assisting SMEs is to enable them to climb up the value chain and produce higher value-added products. This requires specific training and skill generation, and collaborative dialogue between industry and government. An important supplementary process could include training programs conducted by private industry to better link up with markets and meet the relevant standards. In this regard, it is also useful to consider the provisions on supporting SMEs, which are now part of the TPP, primarily in chapter 24, as well as some other chapters, such as that on e-commerce.

It is also important to supplement the above-mentioned efforts by collecting and disseminating information on examples of success cases of SMEs using Internet-based business opportunities. This could be done at the national level or even at the regional level, including by establishing a permanent platform for this purpose.

CONCLUSION

The futures of the multilateral trading system and Internet governance are at critical crossroads. Governance arrangements in both areas aim to maintain openness and avoid a drift toward national measures that might unduly restrict global trade and digital flows, leading to fragmentation and balkanization of the markets of these global public goods. There is thus much at stake, and it is extremely important to develop a more coordinated dialogue and interaction between trade governance and Internet governance as they seek to achieve their common objectives. There is also much that each community can learn from one another regarding the way norms, procedures and decision making have developed in their respective areas.

This said, trade governance is more established and more institutionally mature than Internet governance, as reflected in the WTO regime and the FTAs with their set of treaties, soft norms and dispute settlement mechanisms. The growing importance of digital trade for global trade makes it, imperative for the WTO to consider how to best address it, and a number of suggestions have been made in the paper for this purpose. In the meantime, the scope for norm setting and institutional innovation on these issues seems greater in FTAs, especially in the plurilaterals such as the TPP and TISA. Nonetheless, it is still possible to consider several initiatives within the WTO, including some which are part of recently concluded mega-regional FTAs.

In this context, it is also important for the trade community not to lose sight of the broader trends and developments occurring in the context of the Internet governance arrangements and of the possible implications of trade-related negotiations and measures on such frameworks. It will also be incumbent on the Internet governance community to improve its understanding of key trade principles and disciplines, to ensure that their efforts are consistent with, and mutually supportive of, trade governance affecting the Internet.

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¹² An example is the ZED training module of the Quality Council of India, aimed specifically at SMEs.

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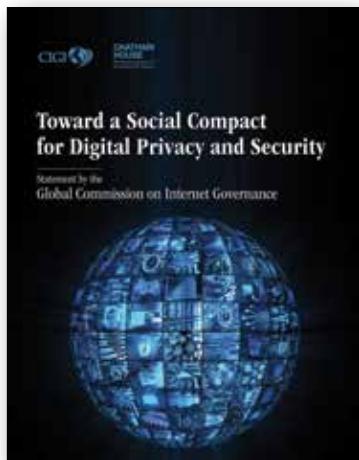
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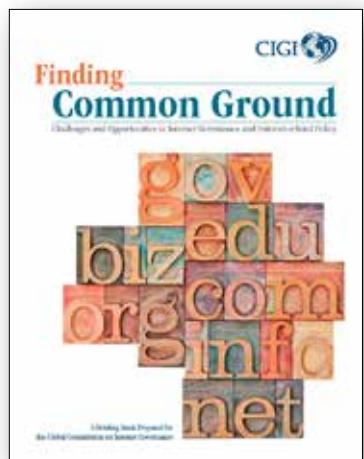
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Toward a Social Compact for Digital Privacy and Security

Statement by the Global Commission on Internet Governance

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