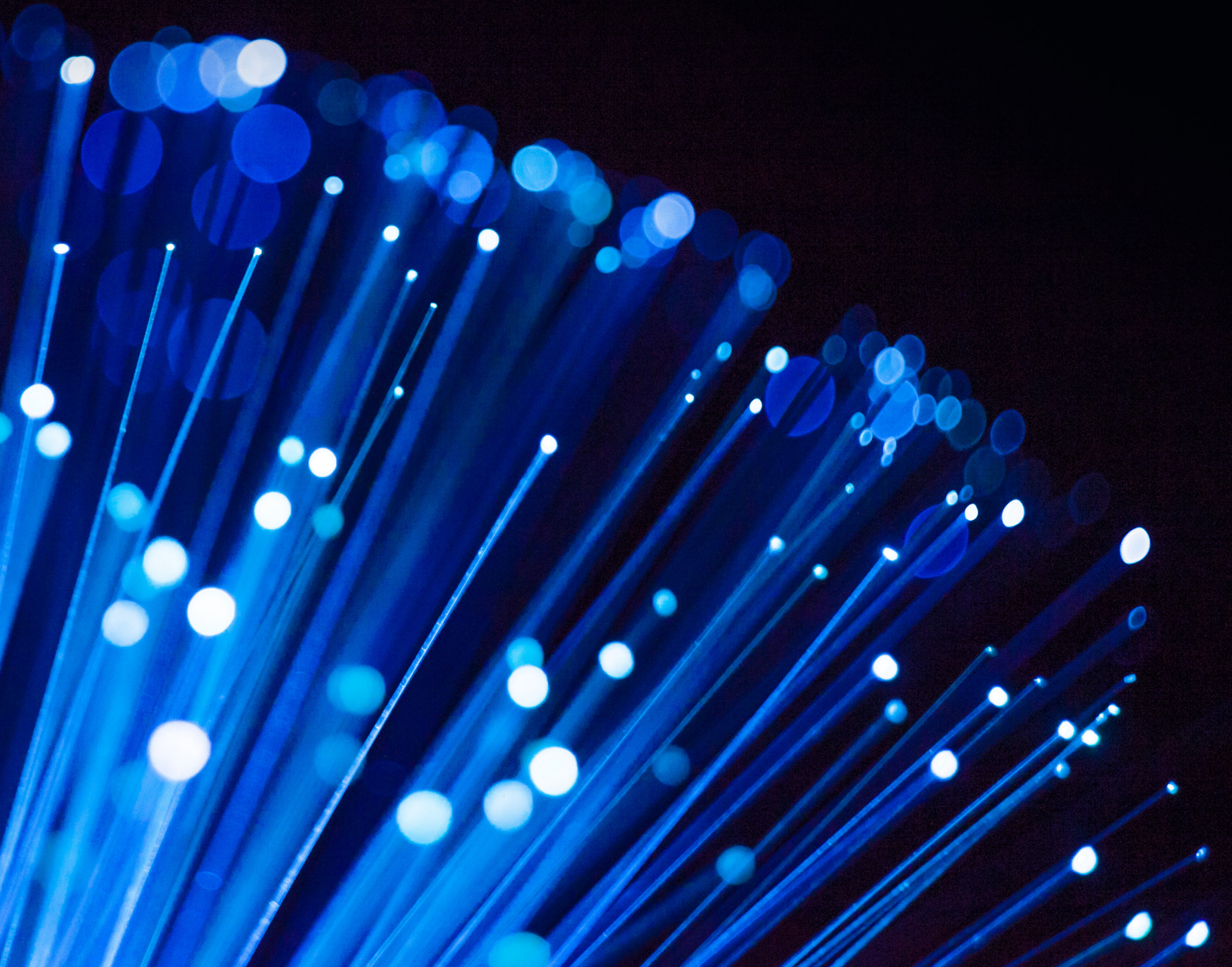

Centre for International
Governance Innovation

SPECIAL REPORT

The Digital Decide

How to Agree on WTO Rules for Digital Trade

James Bacchus



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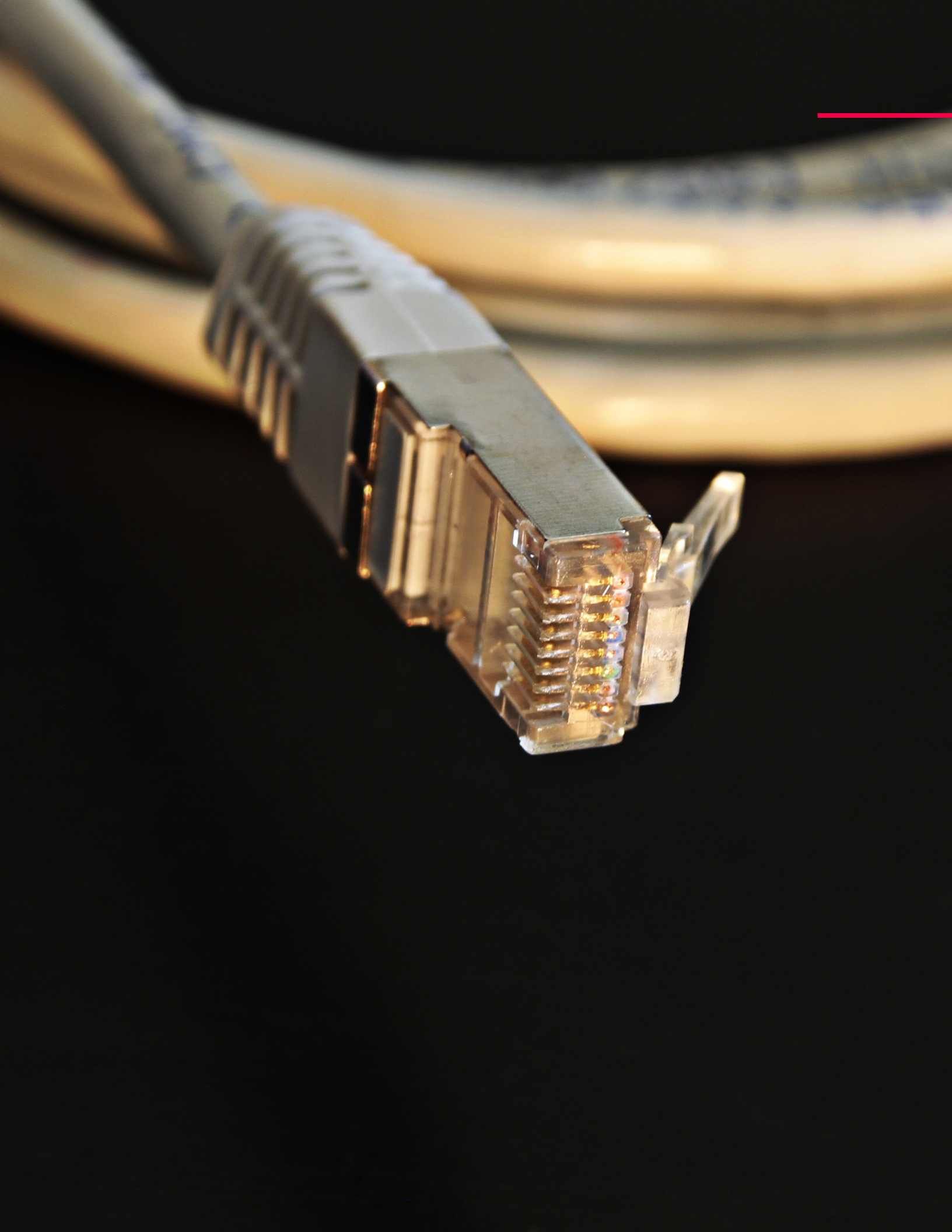
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Acronyms and Abbreviations

AI	artificial intelligence	LDCs	least developed countries
APEC	Asia-Pacific Economic Cooperation	NAFTA	North American Free Trade Agreement
CBPR	Cross-Border Privacy Rules	OECD	Organisation for Economic Co-operation and Development
COVID-19	coronavirus disease 2019	RCEP	Regional Comprehensive Economic Partnership
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership	RTAs	regional trade agreements
CUSMA	Canada-United States-Mexico Agreement	SADEA	Singapore-Australia Digital Economy Agreement
DEPA	Digital Economy Partnership Agreement	SMEs	small and medium enterprises
ECIPE	European Centre for International Political Economy	TBT Agreement	Agreement on Technical Barriers to Trade
fintech	financial technology	TFA	Trade Facilitation Agreement
GATS	General Agreement on Trade in Services	UNCITRAL	United Nations Commission on International Trade Law
GATT	General Agreement on Tariffs and Trade	UNCTAD	United Nations Conference on Trade and Development
ICT	information and communications technology	WTO	World Trade Organization
IP	intellectual property		



Executive Summary

The new Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand and Singapore may be a model for how members of the World Trade Organization (WTO) should proceed in agreeing on global rules for digital trade. The modular approach used in this first ever “digital only” trade agreement may help the 86 WTO members negotiating on e-commerce resolve some of the seemingly intractable digital trade issues that stand in the way of a WTO agreement. For more than two decades, WTO members have been unable to negotiate specific rules for digital trade to include in the WTO treaty. Permitting negotiating countries to select among different digital commitments they are willing to assume at this time while establishing a WTO legal framework in which they can add to their commitments

over time — as modelled in the structure of the DEPA — could enable WTO negotiators to make a breakthrough in current negotiations and conclude a basic agreement by the convening of the Twelfth WTO Ministerial Conference in Geneva, Switzerland, in late November 2021. The digital commitments made in this basic agreement could then be broadened and deepened thereafter to bring the WTO more fully into the twenty-first century by setting out, for the first time, global rules for digital trade. Agreement on digital trade rules could also prove anew that the members of the WTO are not only able to negotiate but they are also able to conclude negotiations successfully. In the absence of such proof, the WTO is at much risk of being sidelined in the global economy as global commerce becomes ever more digital.

Introduction

Although it received little attention at the time, a new agreement that took effect on January 7, 2021, among three trade-minded countries may signal the way forward for successfully negotiating new global rules on digital trade. On that date, the DEPA among Chile, New Zealand and Singapore entered into force (Falak 2021). As the world’s first “digital only” trade agreement, the DEPA was signed in June 2020, fittingly in a virtual ceremony. At a time when a sizeable subset of the 164 member countries of the WTO are negotiating on what they hope will ultimately become multilateral rules for conducting digital trade (International Institute for Sustainable Development 2021), this accord among these three ambitious WTO members features a novel approach to making commitments on digital trade. If embraced by the WTO, this approach could be the key to unlocking agreements on many needed WTO digital trade rules, and it could also help begin to build toward an eventual consensus on some of the most divisive issues that pose the biggest obstacles to a WTO digital trade agreement.

The novel approach in the DEPA is a “modular” approach that permits countries to pick and choose which specific legal commitments on digital trade they are willing to assume immediately while

refraining for the present from assuming other potential commitments that are not currently politically attainable. The “modules” in the DEPA are structured so that they can be adopted and then slotted into other trade agreements in addition to the DEPA, which could have the effect of extending the reach of the broad range of potential digital trade commitments set out in the DEPA harmoniously. In this way, the DEPA puts in place a set of legal building blocks that can be stacked up in different combinations by different countries while establishing a basic framework for the incremental construction of a global legal architecture to promote digital trade.

New leadership at the WTO aspires to revitalize and modernize the WTO to make it more fit for purpose in the twenty-first century. Agreement by the WTO for the first time on rules for digital trade must be a central part of these reforms since, by far, the most significant new dimension of international trade in the twenty-first century is that so much of it is now digital. Indeed, trade “is increasingly defined by flows of data and information” (McKinsey Global Institute 2016, 1). About 12 percent of all goods traded internationally are purchased online (ibid., 7), and about half

of global trade in services is digital (ibid.). The McKinsey Global Institute reports that, since 1990, the global economy is 10 percent larger than it would have been without those increased data and information flows — an added global economic output equivalent to \$7.8 trillion¹ (ibid., 1). Moreover, “Data flows account for \$2.8 trillion of this effect, *exerting a larger impact on growth than traditional goods flows*” (ibid., emphasis added).

Adding to the pressing need for rules on digital trade is the persistence of the coronavirus disease 2019 (COVID-19) pandemic. Even before the pandemic, the trend toward more digital trade seemed likely to continue and to accelerate. Now, spurred by the need for more global connectivity during the pandemic, trade is becoming even more digital. In the pre-COVID-19 world, for example, 41 percent of the interactions between customers and North American companies were digital (Ignatius 2020). In the new pandemic world of more virtual and other digital connections, 65 percent of customer interactions are digital (ibid.). As the Organisation for Economic Co-operation and Development (OECD) has pointed out, “The current crisis has accelerated the digital transformation and underscored its importance for mitigating the economic slowdown, sustaining wellbeing, and speeding up recovery” (OECD 2020, 2).

Although digital trade is growing exponentially internationally, the “regulatory restrictions on international digital trade are growing equally, if not more, rapidly” (Lovelock, 2020). WTO rules are much needed to limit these restrictions on digital trade by drawing agreed lines that clarify which restrictions are appropriate and which are not. If WTO members can agree on rules for digital trade, then the abundant benefits of digital trade will spread more rapidly and more widely throughout the world. If they cannot agree on rules for digital trade, then the WTO will surely be relegated to the periphery of world trade; it will become increasingly irrelevant to the continuing advance of trade through digital connections of all kinds.

The 86 WTO members currently negotiating on possible rules for e-commerce and the facilitation of digital trade must bridge the geographical and geopolitical “digital divide” by producing a “digital decide” that will serve all WTO members while helping ensure the continued centrality of the WTO-based multilateral system to world trade. They must prove anew that they can, in fact, succeed through trade negotiations by concluding at least some rules to liberalize more digital trade by the time of the next WTO Ministerial Conference, which, because of the COVID-19 pandemic, has been delayed and relocated and will be held in Geneva, Switzerland, in late 2021. Employing the new modular approach chosen by Chile, New Zealand and Singapore in the DEPA can help them accomplish this goal.

1 All figures in US dollars.



WTO Actions Thus Far to Address Digital Trade

Despite the scope and the speed of the global digital economic transformation, there are no specific WTO rules that apply to international digital trade. Although the internet was invented in 1983,² and commercial internet service providers began to emerge in the late 1980s,³ the World Wide Web was not created until 1990,⁴ and it was not commonly used commercially until the mid-1990s.⁵ Thus, digital trade barely existed during the Uruguay Round⁶ of multilateral trade negotiations, which began in 1986 and concluded with the Marrakesh Agreement⁷ of 1994 that established the WTO in 1995. Digital trade was, therefore, not on the trade agenda several decades ago. As Mark Wu (2017) has written, WTO rules date back to when the internet was still an obscure novelty and “many of today’s digital technologies and applications did not yet exist.”

Mindful of the absence of specific WTO digital trade rules, WTO members have been trying to modernize WTO rules to deal with digital trade since shortly after the WTO was established. At the First WTO Ministerial Conference, held in Singapore in 1996, members agreed on a temporary moratorium⁸ on the application of customs duties for electronic transmissions of digital products and services (which does not prevent internal taxes, fees or charges on content transmitted electronically). This action was taken by consensus of WTO members to prevent the rapid spread of digital trade from being slowed by increased costs resulting from a feared outpouring of border tariffs. At the next Ministerial Conference, held in Geneva in 1998, this temporary moratorium was renewed. Accompanied by much debate,

the moratorium has been renewed repeatedly at each successive Ministerial Conference since. Yet, after all this time, WTO members have still not been able to reach a consensus that would make this moratorium permanent.

Also in Geneva in 1998, WTO members adopted a declaration on global e-commerce,⁹ which called on the WTO General Council to set up a work program to examine all trade-related issues of e-commerce. At the time, this work program was intended to be exploratory; it did not launch formal negotiations. Because of the inherently cross-cutting nature of issues relating to e-commerce, the work program was divided among four different WTO councils: those on goods, services, intellectual property (IP) and development. In June 2001, the General Council held the first of a series of “dedicated discussions”¹⁰ on the work program in e-commerce.

At that time, the council identified seven issues for deliberation by the members that ranged across a number of the existing trade agreements in the WTO portfolio:

- the classification of digital products as goods or services;
- issues concerning developing and least developed countries (LDCs);
- the revenue implications of e-commerce, especially for developing countries;
- the relationship between e-commerce and traditional forms of commerce (to assess short-term disadvantages for developing countries);

2 See www.usg.edu/galileo/skills/unit07/internet07_02.phtml.

3 See https://en.wikipedia.org/wiki/History_of_the_Internet.

4 Ibid.

5 Ibid.

6 See https://en.wikipedia.org/wiki/Uruguay_Round.

7 See www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

8 See www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm.

9 Ibid.

10 See www.wto.org/english/tratop_e/ecom_e/ecom_briefnote_e.htm.

- the impact on developing countries of a continued moratorium on customs duties;
- competition-related issues, including constraints on e-commerce due to concentration of market power; and
- jurisdictional challenges for e-commerce disputes.

Of these seven issues, the two most significant and controversial at the time were the classification of digital products as goods or services and the continued moratorium on customs duties.

Despite many subsequent discussions — “dedicated” and otherwise — in the 16 years that followed, WTO members accomplished little within the WTO toward addressing the mounting and manifold commercial concerns of what was rapidly becoming an increasingly digital global economy. The WTO Secretariat, in an understatement, described the work of the WTO members on e-commerce as “unfinished.”¹¹ The inability of WTO members even to agree to negotiate specific rules on digital trade was a major reason for the seeming indifference of so many in the international business community to the demise of the multilateral Doha Development Round in Nairobi, Kenya, in 2015. Much that was important to them in the new global economy — including multiplying digital trade concerns — was not on the Doha negotiating agenda. The continued absence of specific rules on digital trade in the WTO trade rulebook is emblematic of the near paralysis of the WTO negotiating function thus far in this century.

Real progress did not seem possible until 2017 when, at the Eleventh WTO Ministerial Conference in Buenos Aires, Brazil, 71 WTO members — led by the United States, the European Union and Japan — issued a Joint Statement on Electronic Commerce.¹² In this statement, these 71 countries

announced that they would “initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce.”¹³ At the World Economic Forum in Davos, Switzerland, on January 25, 2019, 76 WTO members issued another Joint Statement, which announced their intention to “commence WTO negotiations on trade-related aspects of electronic commerce.”¹⁴

The 76 countries joining in the second statement said they sought “to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible.”¹⁵ They added that, in the beginning of these negotiations, they recognized and would “take into account the unique opportunities and challenges faced by Members, including developing countries and LDCs, as well as by micro, small and medium sized enterprises, in relation to electronic commerce.”¹⁶ Lastly, these countries pledged to “continue to encourage all WTO Members to participate in order to further enhance the benefits of electronic commerce for businesses, consumers and the global economy.”¹⁷ A notable new participant in the second announcement was China, which, evidently, had noted the progress of the talks and had concluded that it could not afford to remain on the sidelines.

Since then, numerous negotiations have occurred, including virtual sessions during the COVID-19 pandemic. Co-conveners Australia, Japan and Singapore have structured the virtual sessions to include both large and small groups, with many of the group meetings focusing on individual issues relating to digital trade. As these virtual sessions have continued throughout 2020 and 2021, the negotiators have reported progress in these small groups on such digital trade issues as e-signatures and authentication, paperless trading, customs duties on electronic transmissions, open government data, open internet access, consumer protections and source code.

¹¹ Ibid.

¹² WTO, Ministerial Conference, *Joint Statement on Electronic Commerce*, 11th sess, WTO Doc WT/MIN (17)/60, online: WTO <<https://ustr.gov/sites/default/files/files/Press/Releases/Joint%20Statement%20on%20Electronic%20Commerce.pdf>>.

¹³ Ibid.

¹⁴ WTO, *Joint Statement on Electronic Commerce*, WTO Doc WT/L/1056, online: WTO <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True>>.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

In December 2020, the 86 negotiating countries agreed on a consolidated negotiating text¹⁸ for a proposed WTO agreement on digital trade. Topics in the consolidated text included enabling e-commerce, transparency and e-commerce, trust and e-commerce, cross-cutting issues, market access, telecommunications, and scope and general provisions. Although the 90 pages of this text are replete with bracketed language, which denotes that no agreement has yet been reached on most of the major issues, the negotiations' co-convenors have stated nonetheless that they are on pace to deliver on their goal of "successful progress" by the time of the upcoming WTO Ministerial Conference in late 2021 (WTO 2021a).

At this writing, there has been no indication of any intention to depart from the traditional WTO approach of an "all or nothing" agreement, in which WTO members must agree to all the commitments in the agreement as a condition to becoming a party to it. The number of countries participating in the e-commerce negotiations has grown to 86 WTO members, accounting for 90 percent of world trade (Ministry of Economy, Trade and Industry 2020) — a "critical mass" of trade that is sufficient to support the goal of a plurilateral WTO agreement with benefits that would be applied by the negotiating parties on a non-discriminatory "most-favoured-nation" basis to include all the "free riders" that do not sign the agreement.

Importantly, these non-participating WTO members that will become free riders — all of them developing countries and LDCs — would

therefore appear to have no incentive to join the new agreement. However, an incentive can be provided in that becoming a party to the agreement would give them access to much-needed financial and technical assistance to help them ramp up their own participation in digital trade. Furthermore, the initial "down payment" of digital trade commitments by those WTO members that do choose at the start to be parties to a new WTO agreement will be more substantial if they are permitted at the outset to select from among different digital commitments and among different levels of those commitments.

With a critical mass of countries engaged, with the co-convenors pushing hard, with a new and ambitious WTO Director-General in place, with the United States turning more toward multilateralism under a new administration, with China as well as all the other major trading countries at the table, and with the commercial demands for global digital trade rules intensifying, the negotiating countries hope that the limited success they anticipate by the time of the year-end gathering in Geneva will lead to more substantial success beyond that meeting, including on the most difficult issues of digital trade. They hope for as much of a down payment as they can get on digital trade, and they hope the extent of that down payment at the end of 2021 will inspire greater commitments in 2022 and beyond. The fulfillment of this hope could eventually lead to a WTO digital trade agreement that is fully multilateral in fact, if not yet in law.

The Modular Approach of the DEPA

As they strive to turn this hope into reality, the 86 WTO members engaged in negotiations on digital trade should look to the DEPA as their model in structuring a new WTO digital trade agreement. Not only is the DEPA the first stand-alone international agreement that deals exclusively with digital trade but it is also innovative in the modular approach it employs in framing the new digital trade obligations it contains. In the array

of options that the DEPA itself offers and, equally, in the various ways that it aspires to emulation elsewhere, this innovative framing is a promising architectural template for digital trade and is much deserving of multilateral attention by the WTO.

In addition to offering a menu of possible commitments that can be chosen by the parties to it, the DEPA also invites those who are not parties to the new agreement to select from the DEPA

18 WTO, *WTO Electronic Commerce Negotiations: Consolidated Negotiating Text – December 2020*, WTO Doc INF/ECOM/62/Rev. 1 [WTO Consolidated Negotiating Text].

menu. It is not meant to be an isolated accord; instead, it is intended to be an agreement that will “coexist” in legal parallel with other existing international trade agreements while providing portable and variable commitments that can be included in those other agreements. The DEPA was negotiated by Chile, New Zealand and Singapore with the belief that its individual provisions could end up being cut, pasted and tailored for inclusion in other international agreements, potentially including a WTO agreement. The aim of these three WTO members is to use the DEPA as a foundation and a funnel for building, over time, not merely a critical mass of digitally trading countries but also a critical mass of ambitious and largely matching digital trade obligations that can move closer and closer, over time, to being fully multilateral.

The three parties to the DEPA are relatively small countries that are nevertheless major players in world trade. They are heavily engaged in and heavily dependent on trade. They know the immense economic value of freeing trade and shortening long distances, and they are “well-known not just for their openness but also for their creativity when it comes to trade” (TradeWorksNZ 2020). Chile, New Zealand and Singapore are also frequent leaders on cutting-edge issues in the deliberative councils of the WTO. How these three WTO members have chosen to structure the legal commitments in their new digital trade agreement can show the way forward for all of the 86 WTO members engaged in the Joint Statement Initiative on multilateral rules for e-commerce.

The DEPA features several substantive innovations that add to the sum of what has previously been achieved and is already contained relating to digital trade in a growing proliferation of bilateral and regional trade agreements (RTAs) concluded outside the legal framework of the WTO. For instance, the DEPA is the first trade agreement in the world to deal with digital identities (such as national business numbers), which are an important component of the digital economy.¹⁹ It also includes rules on financial technology (fintech) and artificial intelligence (AI).²⁰ Moreover,

it establishes innovative programs to foster the inclusion of women and Indigenous peoples in the digital economy.²¹ These substantive DEPA innovations are noteworthy in their own right.

But what is most distinctive about the DEPA — and what is most conducive to emulation by the WTO — is its distinctive structure. Chile, New Zealand and Singapore have each agreed to the DEPA in its entirety. These three countries have, however, structured their agreement to contain separate subject-specific categories for different topics relating to digital trade. They call these categories “modules.” The DEPA is open to accession by other countries, and, as other countries join, they can choose to accept the different levels of commitments contained in each of these modules. Through this structure, the DEPA “provides countries with more options” (Ramasubramanian 2020). Conceivably, other countries “could join the (DEPA) agreement in its entirety. Alternatively, they could incorporate specific modules either within their domestic policy settings or in different trade negotiations” (ibid.).

Furthermore, the innovative modular design of the DEPA allows negotiators in other arenas to pick and choose among the separate DEPA modules while borrowing from them. Because these modules are separate and distinct, they are each whole unto themselves. The goal of the DEPA participants is to encourage international multiplication of these modules in a variety of legal contexts in which different countries can select different initial levels of commitment that match their current levels of political and technical comfort in taking on different kinds of digital trade commitments. As Giridharan Ramasubramanian of the Australian National University has explained, the DEPA modules²² “cover discrete components within a broader issue area. This modular structure allows policy negotiators to elaborate on the specific characteristics of a component and segment it from other components while ensuring that they all fit within the wider framework of an agreement. It also allows specific parts of an agreement to be transferred to various other contexts” (ibid.).

19 See www.mfat.govt.nz/kr/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/depa-text-and-resources/.

20 See www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement.

21 See www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-at-a-Glance-factsheet.pdf.

22 See www.sice.oas.org/trade/DEPA/DEPA_index_e.asp.

Regarding this novel feature of the DEPA, Debra Elms (2020) of the Asian Trade Centre in Singapore has similarly explained that “these modules are meant to be building blocks. Countries could opt to dock directly onto the DEPA, expanding the agreement with new members. Or governments could decide to pick up and use modules, in whole or in part, in various settings. These include slotting them directly into other trade agreements or opting to align domestic policies to DEPA.” Thus, she adds, “the DEPA represents a promising start to creating harmonized frameworks for the digital economy. It contains flexibility to allow members to adapt the rules to local conditions, when clearly warranted, and should provide conditions for greater adoption of the modules by other members” (ibid.).

The DEPA modules subject to some or all of this picking and choosing in this innovative trade design are:

- initial provisions and general definitions (module 1);
- business and trade facilitation (module 2);
- treatment of digital products and related issues (module 3);
- data issues (module 4);
- wider trust environment (module 5);
- business and consumer trust (module 6);
- digital identities (module 7);
- emerging trends and technologies (module 8);
- innovation and the digital economy (module 9);
- small and medium enterprises cooperation (module 10);
- digital inclusion (module 11);
- joint committee and contact points (module 12);
- transparency (module 13);
- dispute settlement (module 14);
- exceptions (module 15); and
- final provisions (module 16).

Already, the provisions of the DEPA have been largely replicated in another “digital only” deal, the Singapore-Australia Digital Economy Agreement (SADEA),²³ which was signed in August 2020 and entered into force in December 2020. The SADEA mostly borrows the DEPA’s modular approach. It is intended as a modernization of an existing bilateral trade agreement between Singapore and Australia, two close trading partners. Thus, it is more akin to a conventional free trade agreement than is the DEPA. At the same time, the SADEA goes beyond the DEPA in providing for more liberalization of digital trade on electronic authentication and signatures (article 9), submarine telecommunications cable systems (article 22), location of computing facilities for financial services (article 25), source code (article 28), and standards and conformity assessment for digital trade (article 30). As part of the SADEA, Singapore and Australia have also signed a series of memoranda of understanding on areas including e-invoicing, e-certification, personal data protection and digital identity.

Already, too, the DEPA is drawing even wider notice as other countries consider joining the new agreement. Canada has begun public negotiations on joining the DEPA (Global Affairs Canada 2021), and South Korea is also seeking to join (Yonhap 2021). In this, they will be joined soon by still more WTO members. Yet with two of the leading advocates of these two new stand-alone digital trade agreements — Singapore and Australia — serving as two of the co-conveners of the WTO negotiations, they can be expected to encourage the 86 WTO members negotiating on possible WTO rules for digital trade to consider using something akin to the DEPA modular approach.

In contrast to other plurilateral and multilateral WTO agreements, which generally are “all or nothing” in their commitments, individual WTO members could be given the option in a new WTO digital framework of agreeing to digital commitments in one or more modular categories but not in others. Also, as has frequently been the case with other WTO agreements, WTO members could be afforded the option of acceding to different categories and levels of commitments at different times by agreement on transitional periods for implementation for different countries and for different categories of countries based

23 Singapore-Australia Digital Economy Agreement, 6 August 2020 (entered into force 8 December 2020), online: *Ministry of Trade and Industry Singapore* <www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Singapore-Australia-Digital-Economy-Agreement>.

on their stage of development. Also, where a consensus can be reached, some of the categories of new digital commitments could be made multilateral from the outset while others could instead start as plurilateral, with the ambition of evolving them into fully multilateral WTO commitments over time as more WTO members see their usefulness and decide to embrace them.

The WTO negotiations have produced a consolidated negotiating text²⁴ on digital trade, dated December 14, 2020. This text is very much a work in progress. Mostly, as of this writing, it is replete with bracketed language and suggested alternatives on which the negotiators have not yet agreed. With a few exceptions, the individual submissions containing recommendations by the participating WTO members to other participants remain restricted (although they are referenced in the draft text). Chairing the negotiations is Permanent Representative to the WTO and Ambassador George Mina of Australia, a seasoned, insightful trade diplomat well acquainted with the intricacies of complex digital trade issues and with the esoteric nuances of WTO negotiations. The approach thus far in the negotiations has been to build step by step toward a consensus on all those digital trade issues on which it is thought a consensus can be reached at this time. Notably, at this point, the scope of the coverage in the consolidated negotiating text is roughly the same as that of the modular categories in the DEPA.

The consolidated negotiating text is divided into sections on:

- facilitating electronic and other digital transactions and their logistics (including such basic matters as electronic signatures, electronic payment services, paperless trading, customs procedures and enhanced trade facilitation);
- openness (transparency) in e-commerce (including non-discrimination and liability, flow of information, customs duties on electronic transmissions, and access to internet and data);
- trust in e-commerce (consumer protection, privacy and business source codes);
- cross-cutting issues (including domestic regulation, cooperation, capacity building and cybersecurity);

- telecommunications (including network equipment and products and updating the WTO Reference Paper on Telecommunications Services);
- market access (including both goods and services); and
- scope and general provisions (including definitions, principles, general exceptions and a security exception).

On numerous issues, the draft text contains several alternatives drawn from the various and differing submissions of the participants. In February 2021, the negotiating countries celebrated their first success in achieving consensus when they finalized an agreed text on treatment of unsolicited commercial messages (spam) (WTO 2021b). Of course, this was surely the easiest of all digital trade issues on which to reach consensus. Who in the world likes to receive spam? In contrast, the bulk of the issues in the negotiations remain, as of this writing, short of resolution (and, in many cases, distantly so.)

The step-by-step approach taken by the WTO negotiators is, no doubt, the proper approach. The negotiators, however, need a structure to this approach that will help maximize the negotiated results while also establishing a firm core of rules on which additional commitments can be made in the years to come. This structure should be a flexible, modular framework much like the DEPA, which, because it will be put in place by the WTO, will be able to accomplish the goals of the DEPA more quickly and more extensively in many more countries worldwide. This WTO structure could range widely from the easiest issues to resolve, such as spam, to the very hardest to resolve, such as those relating to the cross-border flow of data. Employing this structure would permit different initial outcomes on each issue in different countries while laying the foundation for further incremental progress in supporting digital trade in the future.

²⁴ WTO Consolidated Negotiating Text, *supra* note 18.

General Rules in a WTO Digital Trade Agreement

Before erecting this flexible, modular structure, though, the 86 negotiating members of the WTO should, ideally, agree to include in their new agreement some new general rules that are needed to help maximize the flow of digital trade. First, they should decide what precisely they are negotiating about, and how specifically the existing WTO rules apply to digital trade; they should first define what they mean by “digital trade.” In addition, they should eliminate the lingering global market uncertainty about whether customs duties will be imposed on digital transactions; they should make the WTO moratorium on such taxation permanent. Moreover, they should eliminate some of the current uncertainties in digital trade by clarifying the ways in which a number of existing WTO rules apply to digital trade; otherwise, digital trade will be constrained because many of those uncertainties will be left to resolution in the outcomes of future contentious international trade disputes.

Defining the Scope of Digital Trade

Digital trade is not defined in the current WTO trade rules. Any consideration of WTO rules to govern digital trade should begin by defining it. Only then can WTO members know the scope of what will be covered by the new rules. What is more, the continuing and accelerating technological evolution of digital trade, which involves the ever more varied dimensions of constantly transforming international commerce, suggests that digital trade should be defined in broad terms that will encompass its ever-widening scope, not only now but also in the future.

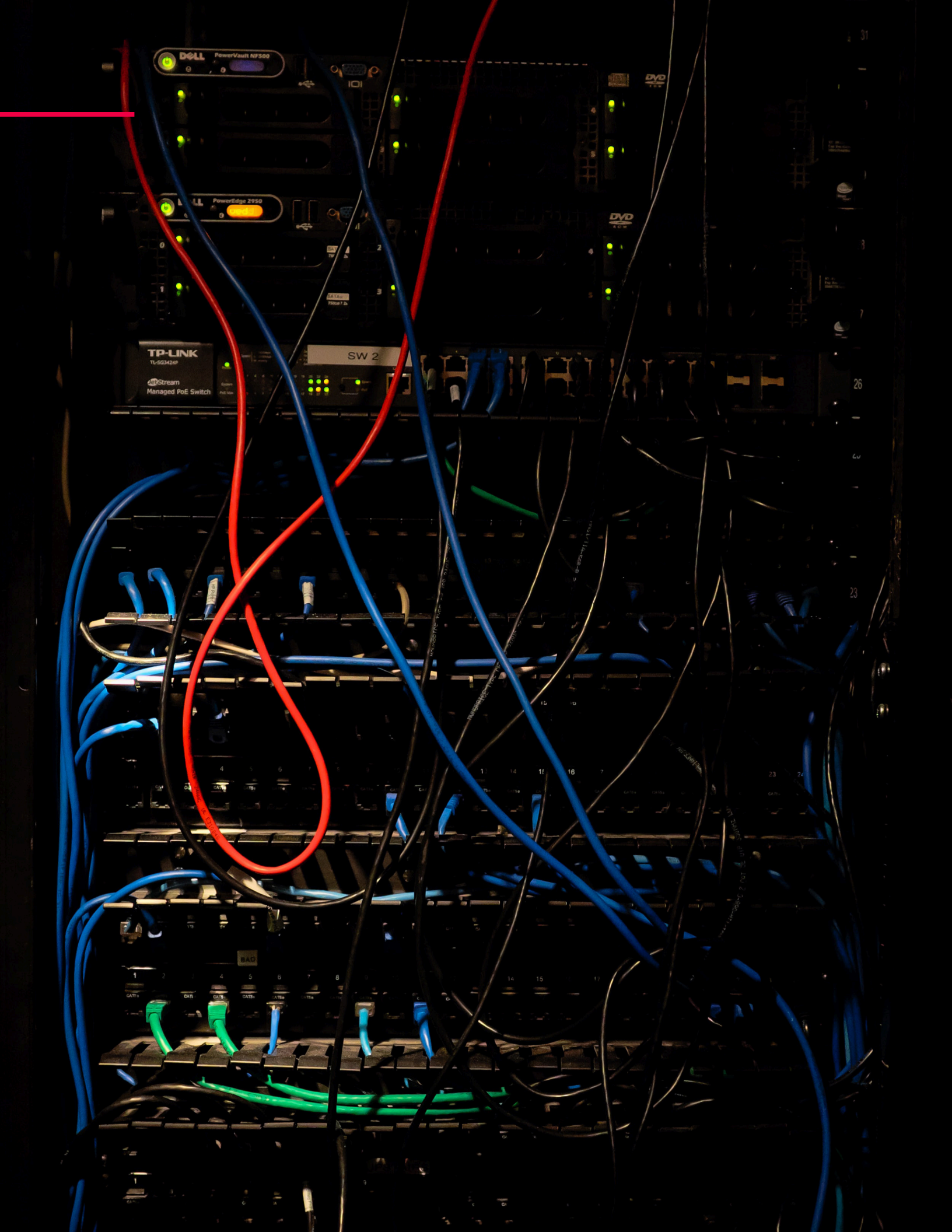
Separate and apart from this current omission in the WTO rules is that worldwide, there is no one recognized and accepted definition of digital trade. Globally, the terms “digital trade” and “e-commerce” are often used interchangeably. Helpfully, but without the force of law, the OECD (2011, 72) describes an e-commerce transaction as “the sale or purchase of goods or

services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations.”

The WTO work program on e-commerce defines it (“without prejudice” to the outcome of the WTO digital trade negotiations) as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”²⁵ The identical phrasing — still in brackets — is used to define “[digital trade/e-commerce]” in Annex 1(2)1 of the WTO consolidated negotiating text. Thus, in defining the scope of the potential new rules as they have done in their work program, these 86 WTO members seem to have taken sides in the long-running debate over whether e-commerce is comprised of only those transactions where the end product or service delivered is digital, or whether e-commerce also includes every part of the global value chain of that end product or service. In effect, the WTO negotiators appear to have embraced much of the second broader view in their negotiations.

To make way for the innovations of the future, these WTO members should consider going further by emulating the scope of coverage in the DEPA. The DEPA does not define digital trade as such; however, module 1, article 1.1.1 of the DEPA defines the scope of that agreement broadly as covering “measures adopted or maintained by a Party that affect trade in the digital economy.” The DEPA makes exceptions in module 1, article 1.1.2 for services made in the exercise of governmental authority, electronic payments through delivery of financial services, government procurement, and — apart from open government data — “information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection.” This

25 See www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.



DEPA approach is arguably more expansive than the one being considered by the WTO negotiators.

Not surprisingly, the broader the definition of digital trade, the more controversy there will be, and the more contentious the negotiations are likely to be. Yet the WTO members negotiating

on digital trade should cross the Rubicon on this central threshold question. Clearly confirming their embrace of an expansive definition of digital trade would help erase remaining uncertainties and help reduce the number of future disputes over this issue in WTO dispute settlement.

Making the Moratorium on Tariffs on Digital Trade Permanent

Since the temporary moratorium on customs duties on electronic transmissions of goods and services was first introduced in Singapore in 1996, the challenge facing those that wish to make it permanent has been the reluctance of some of the developing countries to join in a consensus to do so. While most countries, developed and developing alike, see the assurance of no tariffs as a means of advancing trade, some developing countries are apprehensive of the tariff losses due to the moratorium.

Some developing countries see the customs duties moratorium as benefiting only developed countries. Of course, the growth of digital trade is of great importance to developed countries, but the shift to a digital economy is especially important to developing countries, which continue to suffer “within and across countries” from a “digital divide” (Wu 2017, 1). Ninety percent of the people in the world without internet access are in developing countries (Meltzer 2016). Eighty-eight percent of North Americans, 85 percent of the Japanese and 84 percent of Europeans have internet access (Webb 2019). So do sixty-five percent of the people in the Middle East and North Africa, 63 percent of Latin Americans and 54 percent of the Chinese (ibid.). But only 34 percent of Indians, 33 percent of the inhabitants of the small Pacific Island states and 25 percent of Sub-Saharan Africans can get online to connect with the wider world (ibid.). Most of the people in these developing countries remain outside the productive engine of the digital economy.

If applied along with measures that enhance digital access, new rules that lower the barriers to digital trade can be of disproportionate benefit to developing countries by narrowing the digital divide. As the WTO (2018, 9) has pointed out, “Many trade costs such as logistics and transactions costs or cumbersome customs procedures...are much higher in developing countries.” Thus, developing countries will benefit proportionately the most by the digitalization of these trade procedures. The WTO predicts that developing countries’ share of world trade will increase from 46 percent in 2015 to 51 percent by 2030 (ibid., 3), but if developing countries “catch up on the adoption of digital technologies” (ibid., 11), their share of global trade in 2030 will be 57 percent (ibid.). If, however, developing countries are left behind in the digital economy by the digital divide, then they will be largely bypassed in the global economy of the future.

In March 2020, India and South Africa circulated a communication²⁶ to all WTO members in which they set out what they perceived as the harmful impacts of the moratorium on customs duties on developing countries, including losses of tariff revenue, constraints on industrialization and what they saw as the negative local consequences of the use of digital technologies such as 3D printing in manufacturing. The two countries argued that the moratorium was “equivalent to developing countries giving the digitally advanced countries duty-free access to [their] markets.”²⁷ They cited a research paper published by the United Nations Conference on Trade and Development (UNCTAD),

26 WTO, General Council, *Work Programme on Electronic Commerce: The E-Commerce Moratorium: Scope and Impact*, Communication from India and South Africa, WTO Doc WT/GC/W/798, online: WTO <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W/798.pdf&Open=True>>.

27 Ibid.

which concluded that in 2017 alone, the potential tariff revenue loss to developing countries because of the moratorium was \$10 billion (Banga 2019, 17). UNCTAD researcher Rashmi Banga calculated that removing the moratorium could increase policy space for developing countries to enable them to regulate imports by electronic transmissions and thus generate annual tariff revenue of as much as 40 times more than that in developed countries (ibid., 19).

In reply to this communication by India and South Africa, a communication²⁸ circulated to all WTO members in June 2020 by a diverse group of like-minded countries (comprised of Australia, Canada, Chile, China, Colombia, Hong Kong, Iceland, New Zealand, Norway, the Republic of Korea, Singapore, Switzerland, Thailand and Uruguay) highlighted a 2019 paper by the OECD, which concluded that the studies cited by India and South Africa “overestimate the revenue implications” of the moratorium (Andrenelli and López González 2019, 6). According to the OECD, “the opportunity cost of the Moratorium in terms of foregone government revenue is likely to be low,” and “the overall benefits” of duty-free electronic transmissions “outweigh the potential forgone government revenues” due to the moratorium (ibid.).

Similarly, a study by the European Centre for International Political Economy (ECIPE) in 2019 concluded that developing countries and LDCs would lose more in GDP than they would gain in tariff revenues with the withdrawal of the WTO moratorium (Makiyama and Narayanan 2019). According to this study, the annual GDP losses of China, India, Indonesia and South Africa alone would total \$10.6 billion and, furthermore, each of those four countries would lose vastly more than it gained by ending the duty moratorium. For example, for Indonesia, the losses would be 160 times the gains (ibid., 2). Overall, the ECIPE research showed that “if countries ceased to uphold the moratorium and levied import duties on digital goods and services, they would suffer negative economic consequences in the form of higher prices and reduced consumption, which would in turn slow GDP growth and shrink tax revenues” (ibid.). At the same time, “the payoff in tariff revenues would ultimately be minimal relative to the scale

of economic damage that would result from import duties on electronic transmissions” (ibid.).

According to a worldwide group of 40 tech-minded think tanks called the Global Trade & Innovation Policy Alliance (2020), the developing countries that are calling for an end to the moratorium are

often ignoring the larger net negative effect digital tariffs would have on global trade, innovation and competitiveness, domestic output, and productivity....Keeping the moratorium in place fosters certainty and predictability for both domestic digital economic activity and global production networks and supply chains. It is unclear whether it’s even technically feasible to administer a fair, predictable, and efficient system to identify and collect digital duties. Either way, any effort to collect customs on every digital transaction would disrupt the seamless global flow of information and data via software, digital content, and any number of other Internet-based processes, which would inevitably impact broader economic output as well as the levels of global productivity and innovation. (ibid., 7)

Opportunity costs such as these in digital trade are often overlooked in public policy debates of all kinds and, in particular, those that relate to trade. These costs must not be overlooked here. In module 3, article 3.2 of the DEPA, the DEPA parties have barred customs duties on electronic transmissions, including content transmitted electronically, without adding any time limit. Section B.3.2 of the WTO draft text includes three alternatives with essentially the same effect. At a minimum, when writing new rules specifically designed for digital trade, WTO members should at least — and at last — eliminate the trade-constraining uncertainties about the imposition of customs duties on electronic transactions by making the WTO moratorium on such customs duties permanent.

28 WTO, General Council, *Work Programme on Electronic Commerce: Broadening and Deepening the Discussions on the Moratorium on Imposing Customs Duties on Electronic Transmissions*, Communication from Australia, Canada, Chile, Colombia, Hong Kong, China, Iceland, Republic of Korea, New Zealand, Norway, Singapore, Switzerland, Thailand and Uruguay, WTO Doc WT/GC/W/799/Rev.1, online: WTO <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W799R1.pdf&Open=True>>.



Clarifying the Application of Existing WTO Rules to Digital Trade

There is no need for WTO members to start with a blank slate in drafting digital trade rules in the current negotiations; despite the absence of specific WTO rules on digital trade, some existing WTO rules in WTO agreements relate to certain aspects of digital trade and thus already apply to digital transactions. As Dan Ciuriak and Maria Ptashkina (2018, 1) have put it, numerous rules that apply to non-digital trade also apply “by default” to digital trade, even in the absence of specific rules on digital trade. Yet many legal uncertainties remain about whether existing rules apply, which existing rules apply and how these existing rules apply. Ideally, these uncertainties should be eliminated when devising new rules.

For example, there is a threshold question that must be asked and answered in every individual case: Is a particular product that is traded online a good or a service? To illustrate, as economist Robert Staiger has done, it may be asked: “Is a blueprint for use in a 3D printer, when delivered from abroad, a traded good or a traded service?” (WTO 2018, 150). The answer to this question matters, in part, because the national treatment

obligation, which forbids discrimination in favour of domestic over foreign producers of like products, applies automatically to all trade in goods, but it applies to trade in services only when a WTO member has explicitly agreed to it.²⁹ This is the most significant distinction between WTO rules on trade in goods and WTO rules on trade in services.

There is no economic or legal logic for making this distinction; it is simply a consequence of a political compromise made during the Uruguay Round that made it possible to achieve a consensus on including services trade within the scope of the trade rules. No consensus could be reached then to apply the national treatment rule automatically to all trade in services; instead, WTO members agreed to limit the application of national treatment in services trade to those sectors inscribed in a member’s schedule, which leaves out much services trade. As a result, if a particular traded product is deemed a service instead of a good, WTO members are often legally free to discriminate against foreign suppliers of that service. Hence, there are domestic pressures in many places to define as the delivery of services digital trade that also has aspects of the delivery of goods.

Under the existing WTO rules, digital transactions will sometimes give rise to issues under the

29 See www.wto.org/english/res_e/publications_e/ai17_e/gats_art17_jur.pdf.

General Agreement on Tariffs and Trade (GATT)³⁰ relating to trade in goods; however, for the most part, digital transactions will fall within the scope of the General Agreement on Trade in Services (GATS).³¹ The GATS rules are technologically neutral, which “means that GATS disciplines apply to services supplied electronically and that the supply of a service across borders includes all means of delivery, including electronic delivery....As a result, trade restrictions, as well as domestic regulations affecting electronic trade in services, are subject to the GATS” (WTO 2018, 152). Add to this the broad scope of the GATS, which applies to all “measures by Members affecting trade in services.”³² This includes “any service in any sector except services supplied in the exercise of governmental authority”³³ and “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.”³⁴

Beginning with the supply of services in the famous bananas dispute³⁵ in the 1990s, WTO panels and the WTO Appellate Body have rendered a long series of rulings and recommendations that have confirmed the broad scope of the “measures affecting trade in services” that fall within the coverage of article I.1 of the GATS. Likewise, WTO panels and the WTO Appellate Body have discerned broad scope in the meaning of whether a national measure is one “affecting” trade in services under

article I.1 of the GATS, beginning with the *Canada—Autos* dispute.³⁶ Taken together, all this provides ample legal room for concluding that many digital services are currently covered by the GATS.

Also relevant to the conduct of digital trade are two sets of added obligations under the GATS: the Annex on Telecommunications,³⁷ which applies to all WTO members, and the Reference Paper on Regulatory Principles on Basic Telecommunications,³⁸ which applies to the 103 WTO members that have incorporated it into their WTO schedules of GATS commitments. Also clearly relevant to digital trade among the existing WTO rules are provisions of the GATS Annex on Financial Services,³⁹ which states that WTO members will not “prevent transfers of information or the processing of financial information, including transfers by electronic means”; the plurilateral Information Technology Agreement⁴⁰ among 82 WTO members, which reduces tariffs worldwide on information and communications technology (ICT) products; the Agreement on Technical Barriers to Trade (TBT Agreement),⁴¹ which applies to governmental standards and regulations for ICT and electronic products and has “a range of implications for digital trade, including in areas such as standards for broadband networks, regulations on encryption, privacy, and data storage” (Meltzer 2019); the Agreement on Trade-Related Aspects of Intellectual Property Rights,⁴² which “sets out intellectual

30 See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948), online: WTO <www.wto.org/english/docs_e/legal_e/06-gatt_e.htm>.

31 See *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (1994) (entered into force 1 January 1995), online: WTO <www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm>.

32 Ibid.

33 Ibid.

34 Ibid.

35 *European Communities—Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al.)* [2012], WTO Doc WT/DS27, online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds27_e.htm>.

36 *Canada—Certain Measures Affecting the Automotive Industry (Complaint by Japan)*, WTO Doc WT/DS139, online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds139_e.htm>.

37 See www.wto.org/english/tratop_e/serv_e/12-tel_e.htm.

38 See www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

39 See www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm.

40 WTO, *Information Technology Agreement*, 13 December 1996 (entered into force 1 July 1997), online: WTO <www.wto.org/english/tratop_e/inftec_e/inftec_e.htm>.

41 *Agreement on Technical Barriers to Trade*, 15 April 1994 (entered into force 1 January 1995), online: WTO <www.wto.org/english/tratop_e/tbt_e/tbt_e.htm>.

42 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994 (entered into force 1 January 1995), online: WTO <www.wto.org/english/tratop_e/trips_e/trips_e.htm>.

property rights protections for technologies that enable e-commerce, such as computers, software, routers, networks, switches, and user interfaces” (Ismail 2020, 6) and thus arguably applies in the digital arena; and the Agreement on Trade Facilitation,⁴³ which speeds the flow of trade through “the simplification, modernization and harmonization of export and import processes”⁴⁴ and thus has a major impact on digital trade.

The WTO consolidated negotiating text on digital trade does not answer the legal questions about how these existing rules apply to digital trade or, for the most part, even try to answer them.

Ideally, the 86 WTO members negotiating on digital trade should try to answer at least some of these questions in the new rules in a digital trade agreement. If these questions are not answered there, they will ultimately be sought in litigation in WTO dispute settlement. Negotiation is always preferable to litigation in clarifying rules and their application. Litigation should be a last resort. What is more, if WTO members decide to leave these unresolved legal issues to litigation, then, between now and then, the current legal uncertainties and, thus, the current economic uncertainties in conducting digital trade will continue.

Modular Obligations in a WTO Digital Trade Agreement

Apart from negotiating general rules defining digital trade, making permanent the moratorium on customs duties on digital trade and answering some of the questions about the application of some existing rules to digital trade, WTO members should structure the remainder of the potential obligations in a WTO digital trade agreement as optional obligations in the same modular format as the DEPA and by drawing on the substantive obligations in the DEPA. The agreement should include the “low-hanging fruit”: individual modules containing strong obligations on a list of basic commercial obligations that are necessary to facilitate digital trade and are, in most instances, largely uncontroversial. The agreement should also include the “fruit at the top of the digital tree”: individual modules with initially weaker but potentially ascending obligations on the much more difficult issues in digital trade, which, although highly controversial, cannot be ignored.

Within each of these modules, WTO members should be given options to accept a range of new digital obligations incrementally and over different periods of time. At the start, this approach would produce an array of piecemeal obligations in an arrangement that political scientists would call “asymmetrical.” But, over time, with the benefits

of mutual experience and accruing habits of cooperation in dealing with digital trade rules, this initial arrangement could be expected to become more symmetrical; the multicoloured tapestry at the beginning of the WTO digital trade agreement could blend gradually into one colour. What began as a collage of piecemeal plurilateralism could eventually grow into a genuine multilateralism.

One risk of attempting to conclude a WTO digital trade agreement among so many countries is that the result could be a “lowest common denominator” agreement. Such a result would not achieve much globally for digital trade, and it could conceivably have the unintended effect of undermining the DEPA and other ambitious bilateral and regional digital trade initiatives. The best way to prevent such a result is to build the broadest and highest possible base of new obligations on which all the participants can agree at the outset while also putting in place an agreed architectural foundation of rules on which WTO members can erect higher beams through progressively higher commitments on the hardest issues over time.

The hardest issues in digital trade involve opening up closed economies to a freer flow of more

43 *Agreement on Trade Facilitation* (entered into force 22 February 2017) [Trade Facilitation Agreement], online: WTO <www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm>.

44 *Ibid.*

digital data. The DEPA enables this opening to be accomplished selectively and incrementally. As Wendy Cutler and Joshua P. Meltzer (2021) have written of the DEPA, “This approach opens the door for new entrants to sign up for parts of the agreement as a first step, while putting off the more difficult areas until they are ready. If the U.S. and its close partners are serious about promoting a model for the digital economy based on the values of openness and inclusiveness, allowing countries to join certain parts without waiting until they are ready to commit to everything is an innovative way to encourage countries to gravitate to this model over time.”

Models in Other Non-WTO Agreements

In addition to the DEPA, a helpful place where WTO negotiators should look for the basis of a consensus on the digital trade issues that seem to be capable of early resolution is in the proliferation of digital chapters and other digital provisions in the host of bilateral, regional and other preferential trade arrangements that have been agreed outside the WTO since the turn of the century. Frustrated by their inability to negotiate rules on digital trade within the WTO, the United States, the European Union and other countries with a huge stake in the digital economy — developed and developing alike — have ventured outside the WTO legal framework to agree on digital trade rules. By one count, there are 69 RTAs with either a chapter on e-commerce or provisions on e-commerce (Wu 2017, 2). About half of the 164 WTO members are now parties to non-WTO agreements that contain rules on digital trade (*ibid.*, 7).

These non-WTO agreements lack the inherent advantages of multilateral agreements, in which a balance of mutual obligations can be secured based on weighing all global points of view. The RTAs also lack the global coverage that comes with multilateral agreements and apply only in those countries that are parties to these less-than-multilateral agreements. Multilateral agreements lower barriers to trade globally; other agreements do not. As well, these bilateral agreements and RTAs can also be unbalanced in their effects, including digitally; they can reflect the “take-it-or-leave-it” approach typical of the larger countries in negotiating with smaller ones.

What is more, as with all non-multilateral trade agreements, a commitment by the parties to a bilateral agreement or an RTA to discriminate in favour of the digital products of other parties to that agreement is, by definition, a commitment to discriminate against the digital products of all those countries that are not parties to that agreement. Such bilateral or regional discrimination is permissible under long-standing WTO rules as an exception to the basic legal obligation of most-favoured-nation treatment only if that agreement meets the requirements of article XXIV.8(a)(i) of the GATT,⁴⁵ including the elimination of the “duties and other restrictive regulations of commerce” on “substantially all the trade” between and among the parties to the non-WTO trade agreement.

To the extent that a digital-only agreement such as the DEPA covers matters that fall within the scope of the existing WTO rules, any trade discrimination within it is vulnerable to a potential challenge in WTO dispute settlement for not covering “substantially all the trade” between and among its parties. This is, however, true also of many RTAs, yet such challenges have not previously been made. The WTO jurisprudence offers little guidance in foreseeing the outcome of such a dispute, which is best avoided, of course, by making the DEPA rules multilateral.

As it stands, the digital provisions in some of these non-WTO agreements besides the DEPA offer templates for crafting digital trade rules within the WTO. The language about various aspects of digital trade has increasingly been shared across these agreements so that the makings of a potential global consensus on some of the less contentious issues are already in place. Plus, some of these agreements have now been in force long enough to offer the benefit of useful experience with their implementation and application. Learning by doing on a bilateral and regional basis can inform negotiations on a global basis. In short, although the WTO has so far been unsuccessful in negotiating specific multilateral rules on digital trade throughout the digital age, there is, nevertheless, no need now for WTO members to begin from the very beginning on global digital governance.

In addition to the DEPA, several of these many other non-WTO agreements can be especially helpful to the WTO negotiators. Notable, for example, are the rules on digital trade in what is

45 See www.wto.org/english/tratop_e/region_e/region_art24_e.htm.

now named the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁴⁶ Although, in one of his first acts as president, former US President Donald Trump pulled the United States out of what was then the Trans-Pacific Partnership; the 11 remaining member countries in the Pacific Basin regional agreement retained the digital trade rules the United States had negotiated in the slightly revised agreement they rechristened as the CPTPP. In several respects, the DEPA builds on the innovations on digital trade in chapter 14 of the CPTPP.

The Canada-United States-Mexico Agreement (CUSMA)⁴⁷ — a 2020 update of the North American Free Trade Agreement (NAFTA) — is more recent than the CPTPP, and it adds to the template of the CPTPP in establishing rules for digital trade among those three North American countries. Both the internet and digital trade were new when the original NAFTA was concluded in 1994. Chapter 19 on digital trade, which is new in CUSMA, is more precise in some places than the CPTPP in broadening the scope of protections for digital trade. The United States is also a party to the US-Japan Digital Trade Agreement⁴⁸ of 2020, which parallels CUSMA and includes prohibitions on customs duties, data localization and other protectionist measures that restrict trade in digital products.

Patrick Leblond (2020) has suggested that a “good harbinger” of what he worries will be the “lowest common denominator” rules that could emerge from the WTO digital trade negotiations, could be the digital chapter in the new Regional Comprehensive Economic Partnership (RCEP),⁴⁹ a regional agreement signed by Australia, China, Japan, New Zealand, the Republic of Korea, and the 10 member states of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) in November 2020. As he has written, “This is because [this new agreement] showcases what China, the RCEP’s dominant

member state, is willing to accept in terms of e-commerce/digital trade provisions” (ibid.).

Chapter 12 of the RCEP, on e-commerce, differs in some respects from the digital trade provisions in the CPTPP, to which some RCEP members are also parties. In contrast, however, to CUSMA, which adds to the digital obligations in the CPTPP, some of the digital provisions in the CPTPP are missing in the RCEP, and other RCEP provisions do not go as far as those in the CPTPP in liberalizing digital trade. In addition, as Leblond (ibid.) has noted, “The RCEP and the CPTPP diverge on provisions covering the location of computing facilities, cross-border transfer of information by electronic means, source code and dispute settlement. In all these cases, the RCEP’s chapter 12 is much weaker than the CPTPP’s chapter 14, to the point of rendering the provisions meaningless in terms of liberalizing cross-border digital trade and data flows. The RCEP’s language is such that it allows member states to impose whatever national regulatory restrictions they wish, as long as they are applied in a non-discriminatory way (are applied equally to domestic and foreign businesses).”

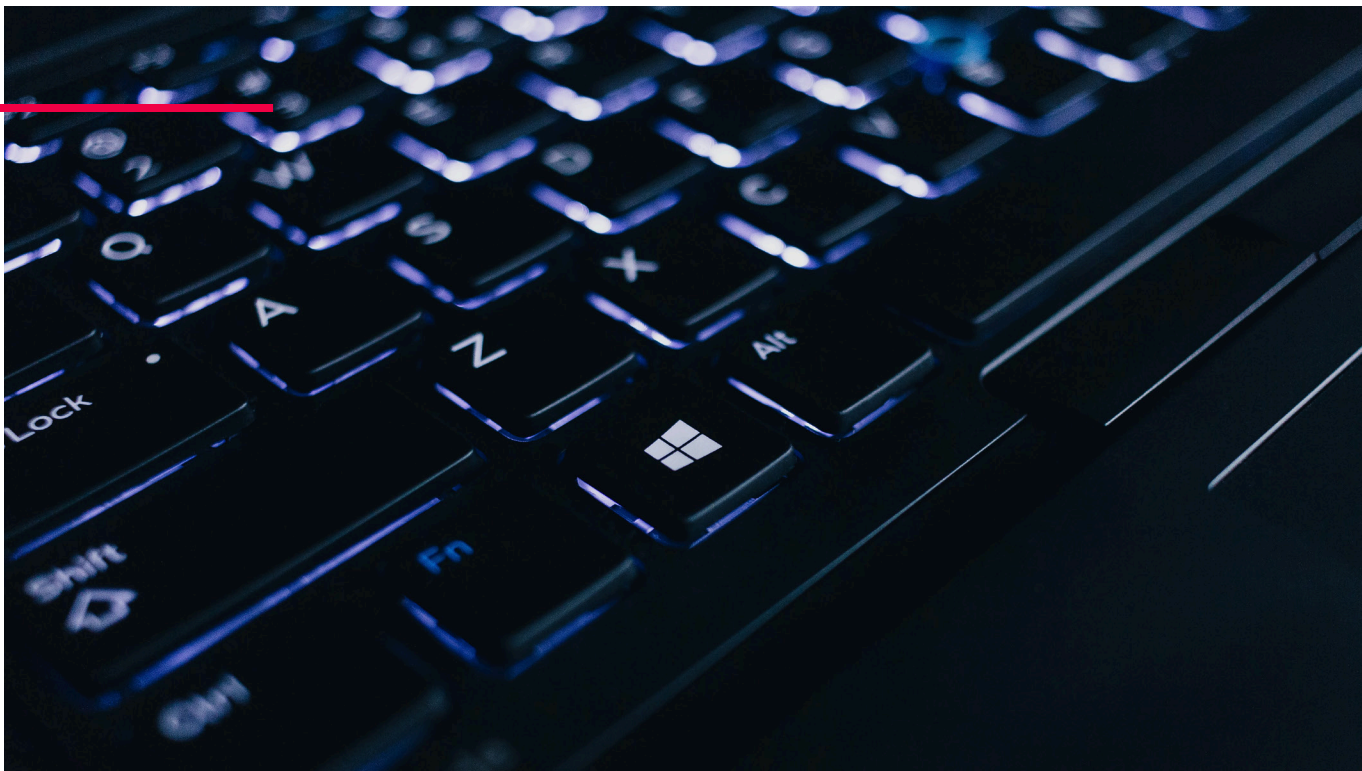
The presence of China at the negotiating table is clearly visible in these less ambitious RCEP provisions. China is also present now in the WTO negotiations on digital trade. One question in avoiding agreement on the lowest common denominator in the WTO negotiations is: How far will China be willing to go toward global governance of digital trade under the aegis of the WTO? Another question — the central negotiating question — is: How should a legal framework for WTO rules on digital trade be structured to secure the maximum in commitments from China and other developing countries while also accomplishing the maximum attainable now in liberalizing digital trade? In sum, in confronting the complex technical and geopolitical dimensions of the digital divide in writing new digital rules for world trade, what, for the WTO members, should be the “digital decide”?

46 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force 30 December 2019), online: *New Zealand Foreign Affairs & Trade* <www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/>.

47 *Canada-United States-Mexico Agreement*, 30 November 2018 (entered into force 1 July 2020), online: *Office of the United States Trade Representative* <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>>.

48 *Agreement between the United States of America and Japan Concerning Digital Trade Agreement*, 7 October 2019 (entered into force 1 January 2020), online: *Office of the United States Trade Representative* <<https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-digital-trade-agreement-text>>.

49 *Regional Comprehensive Economic Partnership Agreement*, 15 November 2020 (not yet entered into force), online: *Regional Comprehensive Economic Partnership Agreement* <<https://rcepsec.org/legal-text/>>.



The Low-Hanging Fruit of Digital Trade

Despite the many brackets and blank spaces in the current consolidated text of a proposed WTO digital trade agreement, some of the pressing commercial issues relating to digital trade seem conducive to a negotiated WTO solution in the near term. Many of these issues involve the establishment of the foundational legal infrastructure needed to facilitate the day-to-day commerce of digital trade. On these issues, there seems to be common ground on which a framework of rules on digital trade can be based in the WTO. This low-hanging fruit of digital trade issues that should be addressed by the WTO in separate modules, offering a range of additional commitments over varying lengths of time, includes a long list of topics that are mostly the same as those of the DEPA modules. The WTO digital modules of possibly low-hanging fruit should include, but not be limited to, the following:

→ **Facilitation of digital trade through electronic transaction frameworks:** Whatever else may be in other modules, in a WTO digital trade agreement, there should be a module

committing countries to facilitate additional trade through electronic means. An unqualified obligation to “maintain a legal framework governing domestic electronic transactions consistent with the principles of the UNCITRAL [United Nations Commission on International Trade Law] Model Law on Electronic Commerce” of 1996 — perhaps “taking into account, as appropriate, other relevant international standards” — is in section A.1(1) of the WTO consolidated negotiating text. Module 2, article 2.3 of the DEPA provides that these rules and frameworks should be consistent with the UNCITRAL Model Law on Electronic Commerce⁵⁰ or the United Nations Convention on the Use of Electronic Communications in International Contracts⁵¹ of 2005, which promotes the validity and the enforceability of electronically exchanged communications and provides for even-handedness in the conduct of cross-border digital transactions.

⁵⁰ See https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce.

⁵¹ United Nations Convention on the Use of Electronic Communications in International Contracts, 23 November 2005 (entered into force 1 March 2013), online: UNCITRAL <https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications>.

- **Transparency:** The transparency of all measures relating to digital trade may well be required by article X of the GATT (for trade in goods) and by article III of the GATS (for trade in services). Nevertheless, it makes sense to include in a WTO digital trade agreement a module that specifically requires transparency in digital trade. Different versions of a requirement of transparency — allowing for temporary exceptions for “emergency situations” — are currently bracketed in section D.1(1)1 of the WTO draft text. Module 13, article 13 of the DEPA and article 14 of the SADEA offer useful language to include in a WTO module on transparency in digital trade.
- **Non-discriminatory treatment of digital products:** Equal treatment of digital products is necessary to increase the amount of digital trade through competition while also enhancing consumer choices based on quality and on price. Section B.1.2 of the WTO draft text echoes article III.4 of the GATT in mandating no less favourable treatment for imported than for domestic like digital products (while excepting government subsidies). Similarly, module 3, article 3.3.1 of the DEPA provides, “No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.”
- **Enforcement of domestic laws on online consumer protection:** Digital trade requires trust, and trust requires consumer protections against fraud and other forms of commercial digital abuse. There must be a module containing domestic protections for online consumers that are equivalent to those provided to other consumers. Module 6, articles 6.3.3 and 6.3.4 of the DEPA mandate, respectively, that each DEPA party shall adopt or maintain laws or regulations “to proscribe fraudulent, misleading or deceptive conduct that causes harm, or is likely to cause harm, to consumers engaged in online commercial activities,” and to “(a) require, at the time of delivery, goods and services provided to be of acceptable and satisfactory quality, consistent with the supplier’s claims regarding the quality of the goods and services; and (b) provide consumers with appropriate redress when they are not.” Section C.1(1) of the WTO draft text includes a range of suggested options for ensuring online consumer protection.
- **Electronic signatures, electronic invoicing and payments, and paperless trading:** To make digital trade possible, there must be mutual recognition of electronic signatures to verify and to validate online transactions, assurance of the interoperability and security of electronic invoicing and payments, and sanction for cross-border trading through paperless transactions. In the WTO draft text, section A.1(1) authorizes electronic signatures, section A.1(4) electronic invoicing, section A.1(5) electronic payments and section A.2(1) paperless trading. Likewise, in the DEPA, module 2, article 2.2 provides for paperless trading, article 2.5 allows electronic invoicing and article 2.7 permits electronic payments. Article 9 of the SADEA provides for electronic signatures, article 10 for electronic invoicing, article 11 for electronic payments and article 12 for paperless trading.
- **Logistics services and express shipments:** As the current WTO text explains in section A.2(6), logistics services are important to “the development of cross border electronic commerce and even the economic development at large.” The language in that provision in the current text sets out a range of specific commitments on improvements in logistics services. Commitments on logistics services are also in module 2, article 2.4 of the DEPA. In addition, while maintaining appropriate customs control, expedited customs procedures should be made available for express shipments, which have proven critical in delivering medical goods during the COVID-19 pandemic. Module 2, article 2.6.2 of the DEPA provides for “expedited customs procedures for express shipments while maintaining appropriate customs control and selection.” In similar language, so does article 13 of the SADEA.
- **Cooperation on cybersecurity:** The WTO consolidated negotiating text recognizes in alternative bracketed versions of section D.2(1) the threats that cybercrime and fraud pose to cybersecurity and thus to digital trade. Several versions of section D.2(3) contemplate capacity building and cooperation in countering these threats; another, however, counsels that, in these efforts, WTO members “should respect

internet sovereignty.” Section D.2(3), proposed by the United States and the United Kingdom, calls for employing risk-based over regulatory-based approaches in addressing cybersecurity threats. In the DEPA, module 5, articles 5.1.1 and 5.1.2 set out the “shared vision” of the DEPA parties for furthering digital trade by ensuring cybersecurity. They “recognise the importance of” national capacity building, cooperation under existing collaborative mechanisms for online safety and security, and workforce development in cybersecurity. But, like the WTO draft text, the DEPA does not include any “hard” legal obligations, nor does article 34 of the SADEA, which also deals with cybersecurity.

- **Interoperability of data protection regimes:** A module is needed to increase the efficiency and efficacy of national data protection schemes by making them work in concert. In section A.2(5) of the WTO draft text, WTO negotiators contemplate interoperability between national single window systems, including the exchange of data through single window systems by authorized private entities. The SADEA is the first agreement calling for interoperability of national data protection regimes. Article 19.7 of the SADEA states, “Each Party shall encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks.”
- **Unsolicited commercial electronic messages (spam):** The worldwide clutter of spam undermines the efficiency of digital trade while increasing the likelihood that digital trade will be conducted in fraudulent ways. Already, WTO negotiators have agreed to regulate spam, which is addressed in section C.1(2) of the draft WTO text. In module 6, article 6.2 of the DEPA, the parties have agreed to regulate unsolicited commercial electronic messages by requiring the consent of recipients to receive it, requiring spam suppliers to enable recipients to opt out of receiving it and otherwise minimizing it. A like obligation is in article 19 of the SADEA.
- **Data innovation:** New in the DEPA and the SADEA is a provision that underscores the significance of being digital by encouraging collaborative cross-border projects that share practices relating to data innovation. Such

collaboration can spread innovation and add to digital trade. In module 9, article 9.4.3 of the DEPA, the DEPA parties agree that, “to promote data-driven innovation,” they shall “endeavour to collaborate on data-sharing projects and mechanisms, and proof of concepts for new uses of data, including data sandboxes” (in which data, including personal information, is shared among businesses in accordance with applicable laws and regulations). A similar obligation is in article 26 of the SADEA. To further innovation in ICT, the European Union has suggested that the WTO agreement include updates in the WTO Reference Paper on Telecommunications Services, which are in section E.1 of the WTO draft text.

- **Open government data:** As explained by the parties to the DEPA in module 9, article 9.5.1, “facilitating public access to and use of government information may foster economic and social development, competitiveness and innovation.” For this reason, the DEPA parties have committed, in module 9, article 9.5.2 of the DEPA, to “endeavour to ensure” that any government information, including data, that is made available to the public “is made available as open data,” and, in module 9, article 9.5.3 to “expand access to and use of open data, with a view to enhancing and generating business opportunities.” Like obligations are in article 27 of the SADEA. Bracketed language on open government data — replete with many options — is in section B.4(1) of the WTO draft text.
- **Cryptography:** One form of forced technology transfer is a requirement that a manufacturer or a supplier of an ICT product either transfer or provide access to proprietary information relating to the encryption of that product as a condition of manufacture, sale, distribution, import or use in a market. Such requirements undermine IP rights and impede digital trade. Detailed provisions prohibiting such requirements as conditions of market access and use are in section C.3(2) of the WTO draft text. Similar provisions are also in article 3.4 of the DEPA and article 7 of the SADEA.
- **Digital identities:** A digital identity is the entire compilation of information that exists about an individual or an organization in digital form. A digital identity is thus comprised of multiple characteristics, or data attributes, such as username and password; date of birth; Social

Security number; online search history, including electronic transactions; medical history; and purchasing history — any or all of which may be linked to one or more digital identifiers, such as an email address, a URL or a domain name. Principal concerns with digital identities are privacy and security. In part because identity theft is rampant online, digital identity authentication and validation measures are critical to ensuring online security. In module 7, articles 7.1.1 and 7.1.1(c) of the DEPA, the parties to that agreement commit that “each Party shall endeavour to promote the interoperability between their respective regimes for digital identities,” including through establishment of best practices, technical interoperability, common standards and “broader international frameworks.” A similar obligation to facilitate the compatibility of parties’ respective digital identity regimes is in article 29 of the SADEA. At present, there is no language on digital identities in the WTO draft text.

- **AI:** Machine learning is an intrinsic part of innovation in the digital technologies that are employed to conduct digital trade. Advances in digital trade are often made possible by advances in machine learning, which is often called AI. In module 8, article 8.2.2 of the DEPA, the DEPA parties “recognise the economic and social importance of developing ethical and governance frameworks for the trusted, safe and responsible use of AI technologies.” In the same article, the parties “further acknowledge the benefits of developing mutual understanding and ultimately ensuring that such frameworks are internationally aligned, in order to facilitate, as far as possible, the adoption and use of AI technologies across the Parties’ respective jurisdictions.” Toward this end, in article 8.2.3, the parties affirm that they “shall endeavour to promote the adoption of ethical and governance frameworks that support the trusted, safe and responsible use of AI technologies.” Similar commitments are found in article 31 of the SADEA. There is nothing on AI in the WTO draft text.
- **Fintech cooperation:** Globally, a rapidly growing component of digital commerce is “fintech” — computer programs and other technologies used to support or enable online banking and financial services in competition with the traditional means of delivering those services.

Digital trade is increased if these technologies and the regulations that apply to them are compatible. In module 8, article 8.1 of the DEPA, the parties agree to promote cooperation within the fintech industry consistent with national laws and regulations. A parallel provision is in article 32 of the SADEA. There is no comparable provision in the WTO draft text.

- **Small and Medium Enterprises:** As noted in module 10, article 10.1 of the DEPA, the role of small and medium enterprises (SMEs) “in maintaining dynamism and enhancing competitiveness in the digital economy” is “fundamental.” Thus, the DEPA parties have agreed in module 10, article 10.2 to seek “more robust cooperation between the Parties to enhance trade and investment opportunities for SMEs in the digital economy.” This will be done by exchanging information and best practices and by encouraging SMEs to participate in platforms that can help them “link with international suppliers, buyers and other potential business partners.” Toward this end, per module 10, article 10.4, the parties are to start by convening a “Digital SME Dialogue” to promote awareness and collaboration. Similar language is in article 36 of the SADEA. In section A.2.4, the WTO draft text acknowledges that, through digital trade, “micro, small and medium-sized enterprises...have acquired unprecedented opportunities of direct access to international markets”; however, there are no specific obligations relating to SMEs in the draft.
- **Prudential measures:** Some of the WTO members negotiating on digital trade have stressed the importance of specially reserving in a WTO digital trade agreement the right to apply prudential measures with respect to digital financial services. Annex 1(8) of the WTO draft text provides that nothing in the proposed digital trade agreement “shall prevent a [party/member] from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositor, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the [party’s/member’s] financial system.” Nearly identical language is in article 2(a) of the GATS Annex on Financial Services. Similar language is also in module 15, article 15.4 of the DEPA.

→ **Digital inclusion:** Although digital trade has made it possible for many millions of people worldwide to link up to the global economy and to share in its bounty, many more millions are still not connected and are thus denied the opportunity to benefit from digital trade. Mindful of the persistence of the digital divide, especially in developing countries, the parties to the DEPA, in module 11, article 11.3, have agreed to “cooperate on matters relating to digital inclusion, including participation of women, rural populations, low socio-economic groups and Indigenous Peoples in the digital economy.” The DEPA parties envisage, in module 11, article 11.1.4, that cooperation “relating to digital inclusion may be carried out through the coordination, as appropriate, of the Parties’ respective agencies, enterprises, labour unions, civil society, academic institutions and non-governmental organisations, among others.” At present, there is no similar provision in the WTO draft text.

→ **Dispute settlement:** A WTO digital trade agreement will begin as a plurilateral agreement with the expectation that, over time, it will become fully multilateral. Like other plurilateral WTO agreements, the digital trade agreement should be subject to binding WTO dispute settlement. In the absence of a dispute settlement system, disputes arising under the agreement would go unresolved and, if a dispute settlement system is not binding, then

rulings against a party could go unenforced, thereby undermining the agreement. Module 14, article 14 of the DEPA creates a dispute settlement system, but it is limited in scope by article 14A.1 to issues relating to non-discriminatory treatment of digital products, ICT products that use cryptography, cross-border transfer of information by electronic means and location of computer facilities.

A cautionary example of what WTO members should not do on dispute settlement in digital trade is the RCEP. As Leblond (2020) has pointed out, “even with respect to the non-discrimination provisions (in the RCEP), a member state could get away with discriminating against specific foreign firms since the RCEP’s dispute settlement mechanism does not apply to chapter 12. If the RCEP’s member states cannot resolve a dispute on their own through consultation, then it moves to the RCEP Joint Committee (ministerial level) for further discussion but without the power to impose any decision.” Reminiscent of the early days of the GATT, this could lead to a lot of talk and perhaps even, from time to time, some progress, but in the absence of binding rulings, it is unlikely to lead to genuine and effective dispute resolution, which will be required to ensure and enhance the flow of digital trade. A WTO digital trade agreement should refer disputes to binding WTO dispute settlement — without the qualifications in the dispute settlement provisions of the RCEP.

Financial and Technical Assistance

Not even this low-hanging fruit in digital trade can be picked if WTO members do not have the capacity and the capability to pick it. The reality is, many of them do not. Clearly, financial and technical assistance from developed countries is needed by developing countries — and especially by the LDCs. Agreement to commitments by developing countries in some of these modules for the low-hanging fruit of digital trade should be conditioned on the provision of financial and technical assistance by

developed countries, ideally through international institutions that focus on development.

A similar approach has been previously taken multilaterally by the members of the WTO in the Trade Facilitation Agreement (TFA),⁵² which was concluded at the WTO Ministerial Conference in Bali, Indonesia, in 2013, and entered into force in 2017. The innovative TFA is “the first WTO agreement in which...WTO members can determine their own implementation schedules and in which progress in implementation is explicitly linked to technical and financial capacity. In addition,

52 Trade Facilitation Agreement, *supra* note 43.

the Agreement states that assistance and support should be provided to help them achieve that capacity.”⁵³ Significantly, “A Trade Facilitation Agreement Facility (TFAF) was created at the request of developing and least-developed countries to help ensure that they receive the assistance needed to reap the full benefits of the TFA and to support the ultimate goal of full implementation of the new agreement by all WTO members.”⁵⁴

Agreement on the TFA was the first time the acceptance of additional WTO obligations was specifically linked to technical assistance and capacity building. Technical assistance and capacity building are needed equally — if not more — by developing countries if new WTO

rules on digital trade are to begin to eliminate the digital divide. In return for WTO commitments by developing countries to assume new obligations to liberalize digital trade, developed countries should agree to provide sufficient financial and other support for technical assistance and for capacity building. In the current WTO digital negotiations, criteria should be agreed for establishing where such help may be needed by developing countries (Bacchus and Manak 2021). (The LDCs and many other developing countries need it; China, for one, does not.) As with the TFA on digital trade, the WTO should work in concert with other international institutions to make certain the needed help is forthcoming.

The Fruit at the Top of the Digital Trade Tree

Ideally, in a WTO digital trade agreement, there should be modules, too, for picking the fruit at the top of the digital trade tree — modules for each of the intractable issues relating to the international transfer of data, freedom in the flow and location of data, protections against mandatory technology transfer, safeguards on the use of personal data, competition policies, and the assurance of appropriate domestic policy space and the protection of national security in the national treatment of data. Also needed is a module that addresses how global standards will be established and employed in digital trade.

The expectation of the negotiators should be that the modules for some of these issues on which consensus is harder to reach will be filled over time and, perhaps, a lengthy period of time. A WTO digital trade agreement will be only a beginning, but it can be the basis for establishing a global framework for what — it can be hoped — will one day become a global consensus on these most difficult issues. With mutual effort, it can also be, from the outset, more than merely the lowest common denominator on digital trade.

⁵³ See www.wto.org/english/tratop_e/tradfa_e/tradfa_introduction_e.htm.

⁵⁴ Ibid.



Cross-Border Data Flows

Essential to framing the trade rules required to help secure more innovation by supporting and speeding the shift to a digital economy, is understanding the role of data in this historic shift. The source of the many innovations flowing from the digital economy is the free flow of data, and “underpinning digital trade is the movement of data.”⁵⁵ The European Political Strategy Centre — the in-house “think tank” of the European Union — has explained that “data is rapidly becoming the lifeblood of the global economy. It represents a key new type of economic asset.”⁵⁶ Or, as Richard Waters (2020) of the *Financial Times* has pithily put it, “In the digital world, data is destiny.”

Being able to move data across borders is indispensable to digital trade. Wu (2017), formerly of Harvard Law School and now an adviser to the United States Trade Representative, has explained that, as the digital economy transitions more and more toward the Internet of Things, AI, virtual reality and autonomous vehicles, an even greater economic premium will be placed on the free movement of data. “Beyond this economic impact,” the World Economic Forum has added, “the free flow of data is, itself, a significant driver of innovation. It allows the sharing of ideas and information and the dissemination of knowledge as well as collaboration and cross-pollination among individuals and companies” (Pepper, Garrity and LaSalle 2016). The success of myriad economic actions, including innumerable digital actions that affect international trade, depends on the free flow of data.

Moreover, amid the pandemic, the importance of intangible assets is increasing. The need for

physical assets is decreasing as businesses everywhere realize that their employees need not congregate in expensive office space to be productive (Haag 2021). As Greg Ip (2020) of *The Wall Street Journal* has observed, “Value is increasingly derived from digital platforms, software and other intangible investments rather than physical assets and traditional relationships.” In this altered commercial landscape, “the future arrives early” (Thomas 2020), and the necessity for quick and effective communications is greater than ever before, which shifts more and more of day-to-day business online. The businesses that are the most engaged in the digital economy are most likely to lead the way in the economic recovery from the COVID-19 pandemic.

Section B.2(1)5 of the WTO draft text includes several versions of a proposed prohibition on restrictions on the flow of information through the free flow of data. The most liberal is the version submitted by the European Union, which states specifically that cross-border data flows shall not be restricted by requiring the localization of computing facilities, network elements or data; prohibiting data storage or processing elsewhere; or making the cross-border transfer of data contingent on some form of localization. Module 4, article 4.3.2 of the DEPA states that each party to the agreement “shall allow the cross-border transfer of information by electronic means, including personal information,” when it is done to conduct business. Likewise, chapter 14, article 14.11.2 of the CPTPP provides in similar terms for the cross-border transfer of information by electronic means. Chapter 19, article 19.11.1 of CUSMA includes identical language.

Data Localization

Data localization is a requirement that the data generated in a country be stored on a server or other storage device located within that country. Ostensibly taken for security

reasons, data localization measures are often imposed for protectionist reasons that can impede the free flow of digital trade. This is an increasing concern for large global companies

⁵⁵ See www.oecd.org/trade/topics/digital-trade/.

⁵⁶ See <https://euagenda.eu/publications/enter-the-data-economy-eu-policies-for-a-thriving-data-ecosystem>.

that deal with data worldwide. Module 4, article 4.4 of the DEPA, article 24.1 of the SADEA, article 14.13 of the CPTPP and article 19.12 of CUSMA all include a general restriction on data localization. Article 25.2 of the SADEA includes a specific restriction on data localization of computing facilities for financial services.

In stark contrast are the data localization provisions in the RCEP. Article 12.14.1 of the RCEP — perhaps influenced by the participation of China — recognizes that “each Party may have its own measures regarding the use or location of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.” Moreover, article 12.14.3(b) of the RCEP states that no party to the agreement is prevented from taking “any measure that it considers necessary for the protection of its essential security interests” (ibid.). What is more, “Such measures shall not be disputed by other Parties” (ibid.). The combined effect of these two provisions makes data localization requirements relating to computer facilities self-judging under the RCEP — perhaps a sign of the preference of China, and certainly an unwelcome outcome that should be avoided in a WTO digital trade agreement.

Section B.2(2)5 of the WTO draft text offers two alternatives that have been submitted so far that prohibit the use or location of computing facilities in a WTO member’s territory as a condition for conducting business in that territory. More submissions may be forthcoming. It is important to put an end to mandatory data localization measures. Yet it is not at all clear that WTO negotiators will be able to reach a consensus on an outright prohibition on data localization requirements at the outset of a WTO digital trade agreement. China, in particular, may prove willing to agree at this time to quite a few other digital trade obligations — but not this one.

Thus, this is one of the issues on which the WTO negotiators may benefit in concluding a digital trade agreement from taking a modular approach, which will prevent the absence of a consensus on one issue from holding up the entire agreement. The cumulative refusal of traders and investors from other countries to comply with data localization requirements could help, over time, to alter the commercial circumstances, and could thereby impose an escalating economic price on the continued insistence on such requirements, which could, in turn, change the political atmosphere of future WTO negotiations on this divisive issue in digital trade.

Permitted Limits on Cross-Border Data Flows

As advantageous as the free flow of data surely is, data cannot be expected to cross borders entirely without limits. There must be some room for discretionary domestic decision making where other public policy goals are at stake. Inevitably, discerning the appropriate scope of such domestic latitude becomes a line-drawing exercise in international rulemaking. What is needed is an identification of the right “in between” separating too much from too little scope for domestic actions that constrain data flows. Thus far, negotiating countries have fallen short in clearly identifying that right dividing line in other digital trade agreements in allowing for restrictions based on “legitimate public policy objectives,” general exceptions and national security exceptions. WTO negotiators must strive for more clarification.

Legitimate Public Policy Objectives

Module 4, article 4.3.3 of the DEPA specifies that nothing in that agreement “shall prevent a Party from adopting or maintaining measures inconsistent with [the general obligation to prevent the cross-border transfer of information by electronic means] to achieve a legitimate public policy objective, provided that the measure (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.” Identical language is in article 14.11.3 of the CPTPP. Illustrating the diverging views of the United States and China on the proper scope of such an exception, such restrictions on the

free flow of data across borders are allowed, in article 19.11.2 of CUSMA, only for those measures “necessary to” achieve legitimate public policy objectives while, in article 12.15(a) of the RCEP, they are all allowed for “any measure” limiting cross-border transfer of information by electronic means that a party itself “considers necessary” to achieve a legitimate public policy objective. A legitimate public policy objective is not defined in the DEPA, the CPTPP, CUSMA or the RCEP.

The WTO consolidated negotiating text offers four varying alternatives in section B.2(1)6 that limit the cross-border flow of data as a legitimate public policy objective. These alternatives largely track the language in the previous non-WTO agreements on digital trade. Notably, the first of the four current alternatives adds a proportionality standard in that the allowance of a restriction to achieve a legitimate public policy objective is available only to a measure that “does not impose restrictions of information greater than are [necessary/required] to achieve the objective.” Similarly, section B.2(2)6 of the WTO draft text states that parties to the proposed WTO digital trade agreement cannot be prevented from adopting or maintaining measures contrary to the prohibition on data localization in order to pursue a legitimate public policy objective, so long as these measures are not “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade” and do not “impose restrictions on transfers of information greater than are required to achieve the objective.”

Like the digital trade provisions in other agreements, the WTO agreement does not define a legitimate public policy objective. This creates the potential for an open-ended exception. The WTO negotiators may wish to look to the non-exclusive list of “legitimate objectives” of technical regulations set out in article 2.2 of the WTO TBT Agreement, which may provide a starting point in defining a legitimate public policy objective for the purposes of a WTO digital trade agreement. Without a definition, much that is otherwise established in a WTO agreement to free cross-border data flows may be undone in application.

General Exceptions

The 86 WTO members engaged in negotiations on digital trade are contemplating including “general exceptions” to digital trade obligations in Annex 1(6) of the WTO draft text. One submitted alternative is simply to incorporate by reference article XX of the GATT⁵⁷ and article XIV of the GATS,⁵⁸ *mutatis mutandis*. Some of the WTO members participating in the digital negotiations have suggested supplementing these traditional provisions with additional exceptions, including exceptions that would safeguard “cyberspace sovereignty” and achieve “other legitimate public policy objectives.” At this writing, an open question is whether any of these proposed additional exceptions will end up in the final WTO text.

Elsewhere, article 3 of the SADEA incorporates article XX of the GATT and article XIV of the GATS, *mutatis mutandis*. In contrast, module 15, article 15.1.3 of the DEPA incorporates article XIV of the GATS *mutatis mutandis* while making no mention of article XX of the GATT. (Interestingly, article 15.1.4 of the DEPA also makes an exception for “measures necessary to protect national treasures or specific sites of historical or archaeological value, or to support creative arts of national value.”) Article 29.1.3 of the CPTPP also incorporates by reference article XIV of the GATS but not article XX of the GATT for the purposes of chapter 14 on digital commerce. Under article 32.1 of CUSMA, only article XIV of the GATS is incorporated for the purposes of chapter 19 on digital trade. In the RCEP, article 17.12.1 incorporates article XX of the GATT, and article 17.12.2 incorporates article XIV of the GATS, both *mutatis mutandis*.

The best decision would probably be to incorporate both article XX of the GATT and article XIV of the GATS, *mutatis mutandis*. Although some exceptions to digital trade obligations are necessary as a matter of public policy, the risk is that if there are too many exceptions, and if they are too broad, then the exceptions will have the effect of erasing those obligations altogether. Thus, here is one example of where caution is needed in drawing the right line “in between” that will provide appropriate exceptions while also ensuring the overall efficacy of the obligations. This is the challenge that must be confronted by the WTO

57 See www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf.

58 See www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf.



negotiators in crafting options to include in a module in a WTO digital trade agreement on general exceptions to digital trade obligations.

National Security

Exceptions from trade obligations for reasons of national security are already among the most divisive issues in the WTO-based trading system. Some countries contend that their national security decisions are beyond the jurisdiction of the WTO and cannot be second-guessed by the WTO. Other countries rightly point to the existence of article XXI in the GATT⁵⁹ and article XIV *bis* in the GATS,⁶⁰ both dealing with national security, and insist that those two treaty provisions must have meaning and must be given effect. The little jurisprudence⁶¹ there is, so far, in WTO dispute settlement strongly supports the latter view. For nearly seven decades, up until recently — first under the GATT and then under the WTO — countries engaged in the mutual restraint of avoiding confrontations on this issue in dispute settlement, but now the national security issue faces the WTO-based trading system squarely, including in digital trade.

The wide gulf among WTO members on this issue is reflected in the current negotiations over the appropriate scope of a national security exception to proposed digital trade obligations. At present, three bracketed alternatives are in Annex 1(7) of the WTO consolidated negotiation text. Two of these alternatives illustrate the extent of the current gulf. Alternative 1 in Annex 1(7) would incorporate GATS article XIV *bis*, for services, and GATT article XXI, for goods, *mutatis mutandis* in a WTO digital trade agreement, without further qualification. This incorporation would include three conditions in GATS article XIV *bis* 1(b) and in GATT article XXI(b) that limit recourse to the national security exception by providing that the security interests asserted must be related to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment, related to fissionable and fusionable materials or the materials from which they are derived, or taken in time of war or other emergency in international relations. In addition, it would include the identical language in GATS article XIV *bis* 1(c) and GATT article XXI(c), providing that nothing in the rules “shall be construed...to prevent any Member from

59 See www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf.

60 See www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_bis_oth.pdf.

61 *Russia—Measures Concerning Traffic in Transit (Complaint by Ukraine)* (2019), WTO Doc WT/DS512, online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm>.

taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

In sharp contrast, Alternative 2 would enlarge the scope of the security exception by removing the three conditions in GATS article XIV *bis* 1(b) that limit the circumstances in which a WTO member may take “any action which it considers necessary for the protection of its essential security interests.” It would also omit the language in article XIV *bis* 1(c) dealing with the maintenance of international peace and security. If this alternative becomes part of the final text of a WTO digital trade agreement, then any measure that limits the cross-border flow of data and digital trade would be permitted if a party to the agreement asserts that “it considers” that the measure is necessary to protect its national security. In the absence of conditions akin to those in both GATT article XX and GATS article XIV *bis*, the phrase “it considers” makes the assertion of a national security interest essentially self-judging.

Module 15, article 15.2 of the DEPA poses concerns similar to these two alternatives in the WTO draft text by providing, “Nothing in this Agreement shall be construed to: (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” It attaches no conditions, thus rendering the assertion of a national security interest likewise self-judging. The DEPA echoes identical language in article 29.2 of the CPTPP and in article 32.2 of CUSMA.

There is similar language in article 17.13 of the RCEP — but with conditions. In a variation and elaboration on the GATT and GATS conditions, article 17.13(B)(i)–(iv) requires that the action taken by a party “which it considers necessary” for the protection of an essential security interest must be “(i) relating to fissionable and fusionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment; (iii) taken so as to protect critical public infrastructures including

communications, power, and water infrastructures; [or] (iv) taken in time of national emergency or war or other emergency in international relations.” RCEP article 17.13(c) provides that nothing in the agreement shall be construed “to prevent any Party from taking any action in pursuance of its obligations under the *United Nations Charter* for the maintenance of international peace and security” (*italics in original*).

Finding the right line “in between” will be even more difficult for the WTO negotiators on an exception for national security than on general exceptions and exceptions for legitimate public policy objectives. This issue is the fruit at the very top of the digital trade tree. Nevertheless, taking a modular approach here, too, could be helpful in setting out different options that may be acceptable to different WTO members at this time — in the hope that another time may yet come that will be more conducive to achieving a broader consensus.

Source Code

Source code is a collection of digital code that is written in a language that can be read by human computer programmers and is used by them to specify the actions to be performed by a computer. One form of forced technology transfer is the requirement that source code be disclosed or transferred as a condition for market access. Such a requirement limits digital trade by putting traders at risk of losing their IP. For this reason, section C.3(1)2 of the WTO draft text provides that no member of the proposed digital trade agreement “shall require the transfer of, or access to, source code of software...as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.” One alternative in the draft text would extend this prohibition to the algorithms expressed in the source code — to the defined sequence of digital steps set out in it. Similar language is in article 28 of the SADEA and in article 14.17 of the CPTPP, which prohibit forced transfer or disclosure of software source code as a condition to use or trade. Going further, article 19.16 of CUSMA includes a prohibition on the forced transfer or disclosure not only of software source code, but also of the algorithms that are the basic ingredients of digital commerce and communications.

In striking contrast, the RCEP contains no restriction whatsoever on requiring the transfer of software source code as a condition for market

access. Nor does it contain any provision relating to source code at all. This leaves the parties to the RCEP free — if they are not constrained by other digital trade commitments in other agreements — to impose any source code transfer requirements they may wish. This also illustrates the polar extremes that currently prevail among WTO members in confronting this issue. Other WTO negotiators are highly unlikely to agree to such a formulation if it is submitted by China in the WTO talks, but the remaining division on this issue is another example of why they may be more likely to conclude a WTO digital trade agreement if they take the modular approach.

Privacy (Personal Information Protection)

One decidedly unresolved issue in digital trade is the extent to which personal information should be protected. Preventing a consensus on this issue are the differing positions of the European Union, the United States and China. In broad terms, the European Union and the United States favour the free flow of data across borders while, for the most part, China seeks digital rules that permit governments to restrict data flows in exercise of what China describes as “digital sovereignty.” However, the European Union and the United States have taken different approaches to personal privacy protections on the internet. The European Union favours strong protections that preserve the privacy of personal information. While not opposed to privacy protections, the United States has not yet gone so far as the European Union in supporting them. These different approaches to personal privacy have prevented the two of them from presenting an entirely united front on their general mutual desire for free flows of data and information in their dealings with China and its touted “Great Firewall” against digital and other free flows of information.

These differences are reflected in the WTO negotiations on digital trade and will make it hard for negotiators to agree on the contents of a module providing for the protection of personal information. As of this writing, section C.2 of the WTO draft text relating to “privacy” is filled with bracketed submissions from numerous WTO members. In Alternative 2, section C.2(3), the

European Union has proposed language describing the protection of personal data and privacy as a “fundamental right.” In Alternative 2, section C.2(4), the European Union has also suggested language stating that “nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the [parties’/members’] respective safeguards.” The European Union has proposed identical language in Alternative 4, section B.2(1)6 of the WTO draft text.

WTO members may not be able to reach a consensus on the language proposed by the European Union. All the same, it could be included as one option in a module on personal information protection in a WTO digital trade agreement. What is more, there are a number of issues relating to privacy protection on which a consensus could be reached: a recognition of the economic and social benefits of protecting personal information and of the contribution it makes to building consumer trust in digital trade; a commitment to create and maintain legal frameworks and safeguards for protecting personal data and privacy; a commitment to take OECD guidelines⁶² on privacy protection into account and, in doing so, a commitment to require the consent of individuals for cross-border transfer and processing of their personal data; and more. At the outset, China, and perhaps some others among the 86 negotiating countries, will be unlikely to agree to such commitments, but most WTO members engaged in the digital negotiations will be likely to agree.

In trying to find the right line “in between” on digital privacy, other agreements offer a variety of approaches for consideration. Many of the submissions currently bracketed in the WTO draft text are found in module 4, article 4.2 of the DEPA, which does not go as far as the European Union does in declaring digital privacy a “fundamental right,” but also does not include any language permitting digital restrictions to “digital sovereignty.” In protecting personal digital information, the DEPA emphasizes cooperation and the construction of compatible and interoperable data systems. Article 17 of the SADEA contains similar provisions, including recommending use of the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) System,⁶³ a government-backed data

62 See www.oecd.org/digital/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm.

63 See www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System.

privacy certification that private companies can join to demonstrate their compliance with internationally recognized data privacy protections.

In the CPTPP, article 14.8.2 states that “each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.” Article 14.8.3 adds that “each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.” Similarly, articles 19.8.2 and 32.8.2 of CUSMA require that CUSMA parties adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. CUSMA goes beyond the language in the CPTPP by mentioning by name in article 32.8.2 both the APEC CBPR and the OECD guidelines as “principles and guidelines of relevant international bodies” to shape a legal framework for protecting personal information. Article 19.8.3 of CUSMA adds an element of proportionality by stating that the parties “recognize the importance of...ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.”

Competition Policies

Much needed in a WTO digital trade agreement is a module containing a commitment to cross-border cooperation in the development and enforcement of competition rules. Competition policy (in the United States, antitrust policy) is not generally viewed as an international trade issue; however, it has a major impact on digital trade. By cooperating, countries can become better prepared for potential anti-competitive practices across borders. In addition, harmonized substantive and procedural rules on competition can help reduce costs and thus prices. With WTO rules on competition in digital trade would come increased legal certainty and decreased risks of inconsistent regulations and divergent findings by different competition authorities.

In section B.4(4)1 of the WTO draft text, WTO negotiators recognize that “some characteristics of digital trade, such as platform-based business models, multi-sided markets, network effects

and economies of scale, may pose additional challenges on competition policy.” With this in mind, the draft text would include a commitment to “endeavour to...develop adequate approaches to promoting and protecting competition in digital market[s]” and “strengthen collaboration mechanisms for cooperating to identify and mitigate market distortions arising from abuses of market dominance.”

In module 8, article 8.4 of the DEPA, the parties recognize that they “can benefit by sharing their experiences in enforcing competition law and in developing and implementing competition policies to address the challenges that arise from the digital economy.” Accordingly, the parties undertake to exchange information and experiences in developing competition policies for digital trade, share best practices, build capacity through training and exchanges of officials, and cooperate on enforcement. In addition to these undertakings, article 16.1(d) of the SADEA adds that there will also be “any other form of technical cooperation agreed by the Parties.”

Of course, these are soft obligations that go not much beyond “best efforts.” Considerably more than these best efforts will be needed to adapt WTO digital and other trade rules to the new challenges of ensuring fair competition in the twenty-first century. This said, though, the current language in the WTO draft text may be about as far as WTO members may be willing to go at the outset in a module on competition policies.

Digital Standards

Amid “widespread concerns...about the fracturing of the global economy into walled-off and possibly warring data realms” (Ciuriak 2019, 3), seemingly irresolvable divisions over central issues relating to the free flow of data appear far from resolution. In the face of these divisions, Patrick Leblond and Susan Ariel Aaronson (2019, 1) have contended that Canada, the European Union, Japan and the United States should — separate and apart from the WTO e-commerce negotiations — “develop a single data area that would be managed by an international data standards board. The envisioned single data area would allow for all types of personal and non-personal data to flow freely across borders while ensuring that individuals, consumers, workers, firms and governments are protected from potential harm arising from activities such as the collection, processing, use, storage or purchase/sale of data.”

One reason the authors think a new international standard-setting arrangement outside the WTO is necessary, is because the WTO negotiations include “China and Russia, two countries that have, to a large extent, walled off their digital realm with very different standards of data protection than Canada or other Western countries. As a result, it is highly unlikely that the WTO process will produce anything (if it does at all) close to what is found in the CPTPP and CUSMA. As such, should there ever be a WTO agreement on trade-related aspects of e-commerce, it would likely be a superficial accord based on general principles with emphasis on the ‘legitimate public policy objective’ general exception” (ibid., 9). The authors perceive their proposed separate arrangement as “an alternative to China’s Digital Silk Road” (ibid., 10), which is part of China’s Belt and Road Initiative on infrastructure and, as they see it, features “very different standards for governing data than what individuals and businesses can expect in liberal democracies” (ibid.). As they see it, because of this international push by the Chinese government, the possibility looms that, in the absence of a non-Chinese alternative, a Chinese standard that is inconsistent with the norms of human rights and with other aspects of human freedom could come to dominate global cyberspace.

There is merit to their proposal. Admittedly, if this approach is taken, it could move the world toward rival technical digital standards, which could slow the acceleration of global digital trade and could reinforce the current trend toward digital line-drawing between China and its environs, and the rest of the trading world. Yet, if this approach is not taken, fundamental values of human freedom that are vital to all in the world could be put further at risk. Unquestionably, the world would be best served by having a single digital standard, but, alas, geopolitical forces are not currently trending toward such unity. Nor should the currently insurmountable geopolitical hurdles to such a single standard — one that would serve human freedom and not suppress it — be allowed to stand in the way of all that currently can be accomplished multilaterally on digital trade, and of all that currently can be done to create a legal framework for attaining global digital unity on some future brighter day.

As in all public policy making — and particularly in international policy making — second-best solutions are often the only solutions that can be achieved within a given context, and the perfect must not be permitted to be the enemy of the good.

Furthermore, as Leblond and Aaronson (2019) have stated, the WTO is not qualified to develop technical data protection standards, nor should it try. Rather, the inclination of the WTO on digital standards should be the same as that taken in the WTO TBT Agreement: that of relying on other relevant standard-setting organizations that are qualified to do so. The digital board they propose could be one of them. Without doubt, WTO negotiations would stumble to a standstill if the 86 negotiating countries tried to agree on the precise technical terms of data protection standards. Instead, separate plurilateral efforts by the WTO members that Leblond and Aaronson have listed — and others — to set out the arcane details of internationally agreed technical standards could proceed simultaneously and not inconsistently with the WTO negotiations on e-commerce.

But a word of advice here to those engaged in any such undertaking: to be recognized by the WTO, these plurilateral efforts should be structured so that the separate arrangement will qualify as a source of “relevant international standards” within the meaning of article 2.4 of the TBT Agreement. As the WTO Appellate Body ruled in the appeal in the *US—Tuna II* dispute, “a required element of the definition of an ‘international’ standard for the purposes of the TBT Agreement is the approval of the standard by an ‘international standardizing body,’ that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members.”⁶⁴ With respect to the requirement in Annex 1.4 of the TBT Agreement that the membership in an international standardizing body must be “open to the relevant bodies of at least all Members,” the Appellate Body noted in that appeal that “the term ‘open’ is defined as ‘accessible or available without hindrance,’ ‘not confined or limited to a few; generally accessible or available.’”⁶⁵ Thus, a body will be open if membership to the body is not restricted. It will not be open if membership is a priori limited to the relevant bodies of only some WTO members.

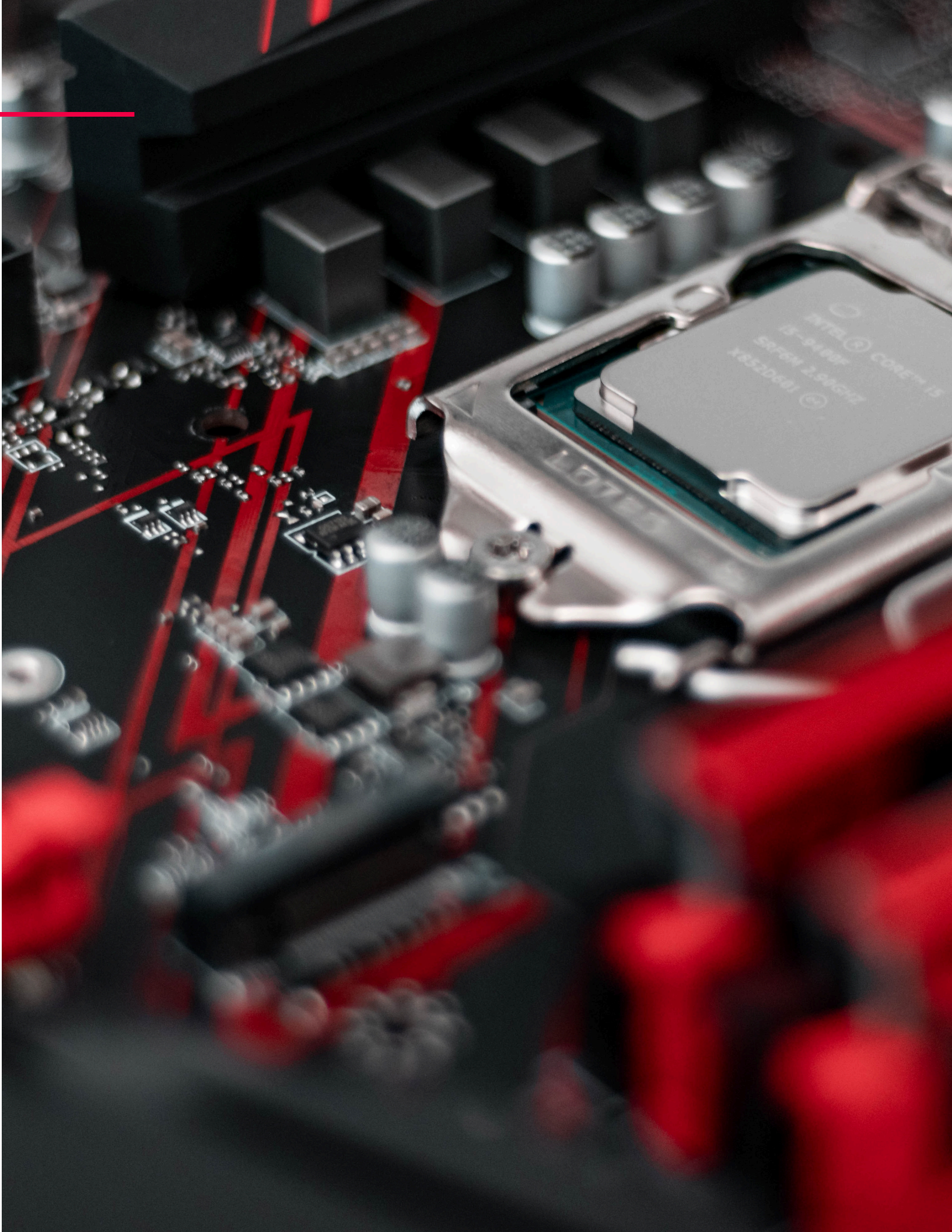
64 *United States—Measures Concerning the Importation, Marketing and Sale of Tuna (Complaint by Mexico)* (2019), WTO Doc WT/DS381, online: WTO <www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm>.

65 Ibid.

Conclusion

It should be a relatively simple matter for the 86 WTO members negotiating on a WTO digital trade agreement to achieve a consensus on some of the most basic issues, such as has already been done with spam. Indeed, much of the low-hanging fruit of digital trade seems ripe to be picked. In contrast, though, much of the fruit at the top of the digital tree seems to be beyond our current grasp. This is why a modular approach to a WTO digital trade agreement would be best. It would enable WTO members to agree on what they can agree on now while offering options for incremental agreement on the harder issues on which they cannot currently agree. A consensus on the most that can be achieved now is more likely to be reached with a flexible approach that permits WTO members to agree to different levels of commitments at different times within different modular categories of digital trade.

With the benefit of such a flexible approach, the members of the WTO that are working diligently to negotiate rules on “trade-related electronic commerce” may be able to conclude an initial plurilateral WTO digital trade agreement that could help spur more digital trade now and that could ultimately become more fully multilateral and more fully responsive to the evolving needs of the new digital economy. Failure to conclude a digital trade agreement by the time of the upcoming WTO Ministerial Conference in Geneva should not be considered an option if WTO members hope to sustain the credibility of the WTO and to maintain the centrality of the WTO to world trade.



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