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Digital trade under the law of the WTO

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Digital trade, as an essential element of contemporary economies, has attracted the attention of policymakers in national and international contexts. In the latter, this has translated into an increasingly dense and far-reaching regulatory framework for digital trade that has been shaped by preferential trade agreements (PTAs) of bilateral and regional nature. The multilateral forum of the World Trade Organization (WTO), despite its institutional troubles, has become active on the topic too and there has been a concerted effort, in particular in the past few years, to adopt a new agreement on digital trade. The chapter clarifies first the applicability of extant WTO rules to digital trade, then traces the new initiatives under the umbrella of WTO and discusses the scope and contents of the forthcoming plurilateral agreement on digital trade.

Applying WTO law to digital trade

The WTO membership recognized relatively early the implications of digitization for trade by launching a Work Programme on Electronic Commerce in 1998.[1] This initiative to examine and, if needed, adjust the rules in the domains of trade in services, trade in goods, intellectual property (IP) protection and economic development was far-reaching in scope. Yet, it did not include a negotiation mandate and due to various reasons could not bear any fruit over a period of two decades. As a result, WTO law, despite some adjustments through the Information Technology Agreement (ITA), its update in 2015, and the Fourth Protocol on Telecommunications Services, is still very much in its pre-Internet state. This lack of legal adaptation does not however mean that WTO law is irrelevant. First and foremost, WTO regulates all trade, including all services sectors and IP. WTO law also often tackles issues in a technologically neutral way – for instance, with regard to the application of the basic non-discrimination principles, with regard to standards, trade facilitation, subsidies, and government procurement. WTO's dispute settlement mechanism offers in addition an important path to further legal evolution, and a number of cases, in particular under General Agreement on Trade in Services (GATS), have proven helpful in the digital trade domain and clarified WTO law's application.[2] Despite this utility of the WTO's dispute settlement, which has been substantially curtailed in recent years, political consensus on new digital trade rules was lacking. A number of issues remained thus unresolved and exposed the disconnect between the WTO rules and digital trade practices. An example in this context is the critical question of whether previously not existing digital offerings should be classified as goods or services (and thus whether the more binding General Agreement on Tariffs and Trade [GATT 1994] or the GATS apply). Or, if categorized as services, under the scope of which subsector they would fall. This classification is not trivial, as it triggers very different obligations for the WTO Members, the divergence in commitments being particularly radical between the

[1] WTO, Work Programme on Electronic Commerce, WT/L/274, 30 September 1998.

[2] See Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*US – Gambling*), WT/DS285/R, adopted 10 November 2004; Appellate Body Report, *US – Gambling*, WT/DS285/AB/R, adopted 7 April 2005; Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)*, WT/DS363/R, adopted 12 August 2009; Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 21 December 2009; Panel Report, *China – Certain Measures Affecting Electronic Payment Services (China – Electronic Payment Services)*, WT/DS413/R, adopted 31 August 2012.

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telecommunication and the computer and related services sectors (where commitments are present and far-reaching) and the audiovisual services sectors (which is the least committed for sector). As the WTO membership could not address these and many other pertinent questions, countries used the channel of PTAs to adopt swifter solutions as well as to tackle the new set of issues that the data-driven economy has brought about, such as those with regard to cross-border data flows.[3]

Towards a new agreement on digital trade under the umbrella of the WTO

Considering the substantial progress made in preferential venues, especially after the 2018 Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP), at the beginning of 2019, 76 WTO Members embarked on a new effort to move towards a digital trade agreement.[4] The negotiations under the so-called 'JSI on Electronic Commerce' (now only 'Joint Initiative'; JI) have been co-convened by Australia, Japan and Singapore and conducted through a rounds of talks, plenary and small group meetings in Geneva and virtually during the COVID-19 pandemic. Currently, 90 WTO Members representing over 90% of global trade, all major geographical regions and levels of development, including 5 least developed countries (LDCs), are part of the negotiations. These have also been successful, as it was announced in December 2023 that the negotiations were substantially concluded (although no finalized text has been made public).

As per the latest developments, it is clear that the scope of JI is broad and covers a great number of issues of relevance for the regulation of the data-driven economy. These issues have been categorized in the following bundles of topics: (1) Enabling e-commerce (e-transactions and digital trade facilitation and logistics); (2) Openness and e-commerce (custom duties on e-transmission, access to internet and data); (3) Trust and e-commerce (consumer protection, privacy, business trust, cybersecurity); (4) Cross-cutting issues (flow of information; transparency, domestic regulation and cooperation; capacity building; special and differential treatment); and (5) Telecommunications (updating the WTO Reference Paper on Telecommunications Services). These are followed by an Annex, which includes diverse set of provisions ranging from logistic services, temporary entry of e-commerce related business persons, to goods and services market access as well as a separate rubric of 'Scope and General Provisions', including provisions regarding relationship to other agreements, exceptions, indigenous peoples, taxation and dispute settlement.

The JI negotiations can be directly linked to the advanced rulemaking on digital trade in PTAs and largely represent a common denominator of their achievements. This comes with both advantages and a number of setbacks. In the former sense, it appears that PTAs as well as the new dedicated Digital Economy Agreements (DEAs) have worked as regulatory laboratories – not only in terms of mapping the relevant issues but also in terms of treaty language. Yet, the stakeholder positioning, as reflected in these treaties, has also been translated in the JI negotiations. This has been helpful with regard to agreeing on multiple digital trade facilitation issues and progress has been made in particular on open government data; electronic contracts; online consumer protection; e-invoicing; cybersecurity; open Internet access; and paperless trading, although with varying levels of normative value. While these developments hint at some important lines of convergence as to the creation of an enabling environment for digital trade and certainly are of value in providing for legal certainty for business and reducing non-tariff barriers to trade. Yet, there are also points of divergence, in particular on the critical issue of cross-border data flow and whether and under what conditions to permit the free flow of data. In the latter context, while a number of countries align with Japan's proposal for data free flows with trust (DFFT), the policy choices regarding data governance vary widely among the JI participants and reflect their PTA approaches – along the distinct models of the European Union (EU), the United States (US) and

[3] See M. Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021); S. Peng, C. Lin and T. Streinz (eds), *Artificial Intelligence and International Economic Law* (Cambridge: Cambridge University Press, 2021).
[4] WTO, Joint Statement on Electronic Commerce, WT/L/1056, 25 January 2019.

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China. Whether real commitments on data flows would materialize appears at this point unlikely, as there has been a recent shift in the negotiation position of one of the most proactive data flows supporters, the United States, as it announced not to further pursue provisions on data flows, data localization and source code, so as to safeguard policy space for a 'digital trade rethink'.

The definition of carve-outs and escape clauses to the commitments made is also unclear – this is on the one hand critical for the political feasibility of a WTO Agreement on Digital Trade and on the other hand, for its normative effect, in particular if parties deviate from the conventional general and security exceptions (under Articles XX GATT and XIV GATS; Articles XXI GATT and XIV*bis* GATS) and include unilateral self-judging exceptions.

An important aspect that will follow the outcome in the context of the JI is the legal nature and the means of incorporation of such an agreement into WTO law. The negotiations thus far have evolved as in an 'open plurilateral' format without discussing this matter directly, so as not to obstruct the substantive debates. Some countries, in particular, India and South Africa (not parties to the JI), have expressed strong opposition. They maintain that the JI negotiations are inconsistent with WTO law, as the outcome of any plurilateral agreement under the WTO legal framework must be adopted by the Ministerial Conference '*exclusively by consensus*'.[5] This opposition is linked to the impact of the forthcoming agreement on digital trade, which is hard to subsume exclusively under the GATS and would affect many of the WTO Agreements. The backlash towards far-reaching digital trade rules is related also to discussions about the benefits that less developed countries can extract from an open digital economy and the need to preserve their digital sovereignty. This plays out also in the WTO Work Programme on Electronic Commerce and in particular with regard to the question of whether the WTO moratorium on customs duties on electronic transmissions should be extended.[6] The insufficient involvement of developing and LDCs in the digital discussions could not be soften through the inclusion of provisions on special and differential treatment (SDT) in the JI that ties its implementation with funding and capacity building mechanisms, as well as provide for longer implementation periods.

Concluding remarks and outlook

The regulation of the data-driven economy has demanded international cooperation, and this has unfolded not only in preferential forums but also under the umbrella of the WTO. At same time, as the pertinent issues are highly complex as well as clearly impinging on domestic regimes and the policy space that countries have to adopt measures in the broader domain of data governance, solutions have not been easy. In this sense, the forthcoming WTO plurilateral agreement on digital trade will not entail any major overhaul adding substantial new rights and obligations. Excluding many of the 'difficult' issues, it strives to facilitate digital trade and provide legal certainty for many of the countries and their businesses. This effort is certainly welcome. Yet, it is unlikely to radically reduce regulatory heterogeneity in digital trade rulemaking, as states progress at different speeds and might wish to address newer issues, such as artificial intelligence (AI) or digital identities, through more advanced frameworks – as the DEAs do. On the positive side, reaching an agreement on digital trade, whatever its ultimate form, sends an important signal that the WTO can deliver and that the WTO membership has the political motivation and the legal means to move forward and address the pertinent issues in the area of global trade.

[5] WTO, Legal Status of Joint Statement Initiatives and Their Negotiated Outcomes, WT/GC/W/819, 19 February 2021, at para. 2 (emphasis in the original). For a full discussion, see M. Burri, 'A WTO Agreement on Electronic Commerce: An Enquiry into its Substance and Viability', *Georgetown Journal of International Law* 53 (2023), 565–625.
[6] WTO, Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2 (25 May 1998). The customs duty moratorium has been extended but not made permanent at subsequent WTO Ministerial Conferences. According to the last MC12 Decision, if MC13 is delayed beyond 31 March 2024, the moratorium will expire on that date unless it is extended by consensus.

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