

Shin-yi Peng, *Digital Trade*, in D. Bethlehem, D. McRae, R. Neufeld and I. Van Damme (eds) THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, SECOND EDITION. (Oxford University Press, forthcoming) Chapter 29.

Chapter 29
Digital trade

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Abstract

Digital technology has transformed the way trade is conducted, and the need to modernize trade agreements to reflect this reality is long overdue. In terms of market access, WTO case law has confirmed that GATS disciplines and obligations apply to digital means of service delivery that have emerged since the WTO was concluded in 1994. However, judicial interpretation may not be the most appropriate method of clarifying whether the W/120 and the CPC cover certain international trade enabled by digital technologies. GATS classification/scheduling system must be reformed in light of innovative advances and trends toward a data-driven economy. In terms of domestic regulation, governments are facing dilemmas between maximizing opportunities stemming from digital trade by freeing the flow of data and managing the impact of cross-border data flows for other policy objectives, which include among privacy and cybersecurity. Drawing from the experiences of the FTAs, an obvious challenge is the inherent sensitivity of interfering with other parties’ ‘digital sovereignty’. Particular attention should be paid to the soft legal nature of certain provisions and loose exceptions under the digital trade/e-commerce chapters. Furthermore, ‘special and differential treatment’ will eventually be the focal points of digital trade and data governance.

Keywords: digital trade, electronic commerce, mode 1, cross-border data flow, data-driven economy

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I. Introduction

At the time of the Uruguay Round negotiations, mode 1 (cross-border) trade was considered irrelevant for most of the service sectors. Such an understanding was reflected in the distribution of commitments by mode of supply. Thirty percent of all Market Access commitments on cross-border are unqualified, i.e., without limitations, as compared to only 15 % of the commitments on mode 3 (commercial presence).¹ Furthermore, the level of obligations for mode one does not differ significantly between developed and developing countries.² The cross-border supply of services, however, has grown rapidly over the past few decades. The capacity of the broadband Internet to carry 'data' has greatly increased the extent and the types of services that can be traded. Services which once required physical proximity between consumers and suppliers can now be easily traded cross-border by electronic means.³ This is increasingly becoming the norm for almost all service sectors. At the same time, the explosive volume of data collected and processed today is unprecedented. The technological ability to collect, aggregate, and process an ever-greater volume and variety of data continues to grow, which in fact means that we are now living in a world of ubiquitous data collection.⁴ Digital technologies such as the Internet of Things and Artificial Intelligence increasingly influence economy-wide growth and trade.⁵

From the perspective of the GATS,⁶ those economic activities related to the service sectors are far broader and much more varied than was generally perceived in the early 1990s.⁷ Evidently, electronic delivery has added a significant dimension to the international market. Digital trade, or electronic commerce (e-commerce), has posed many challenges to our traditional understanding of international trade.⁸ In particular, there is no single recognized and accepted definition of digital trade.⁹ The concept

¹ WTO Secretariat, *Guide to the GATS: An Overview of Issues for Further Liberalization of Trade in Services*, 1st edition (London: Kluwer Law International, 2001) at 598, 602.

² M. Cossy, 'Cross-Border Supply of Services – Pattern of Specific Commitments,' WTO Symposium on Cross-Border Supply of Services, Geneva, 28-29 April 2005, at < https://www.wto.org/english/tratop_e/serv_e/sym_april05_e/cossy_e.ppt > (last visited 18 February 2021).

³ See Informal Note by the Secretariat, 'Electronic Commerce: Related Elements in Secretariat Background Notes,' Job/Serv/78 (17 June 2011). See generally P. Welfens et al., *Digital Economic Dynamics: Innovations, Networks and Regulations*, 1st edition (New York: Springer, 2010) 1-23.

⁴ See Information Commissioner's Office, 'Big data, Artificial Intelligence, Machine Learning and Data Protection,' September 2017, at < <https://ico.org.uk/media/for-organisations/documents/2013559/big-data-ai-ml-and-data-protection.pdf> > (last visited 8 September 2019).

⁵ ITU, 'Setting the Scene for 5G: Opportunities & Challenges,' 2018, at < https://www.itu.int/pub/D-PREF-BB.5G_01-2018 > (last visited 8 September 2019); European Parliament, 'The Internet of Things: Opportunities and Challenges', May 2015, at < [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557012/EPRS_BRI\(2015\)557012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/557012/EPRS_BRI(2015)557012_EN.pdf) > (last visited 8 September 2019). J. Manyika, M. Chui, 'By 2025, Internet of Things Applications Could Have US\$ 11 Trillion Impact' *Fortune* (22 July 2015), at < <https://fortune.com/2015/07/22/mckinsey-internet-of-things/> >; see J. Meltzer, 'Governing Digital Trade' 18(1) *World Trade Review* (2019) 23, at 25.

⁶ This chapter focuses on Articles XVI and VI of the GATS. It should be noted that the GATS Reference Paper on Basic Telecommunications Services, the ITA, the TBT Agreement and the TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights are also related to digital trade.

⁷ S. Peng, 'Trade in Telecommunications Services: Doha and Beyond' 41(2) *Journal of World Trade* (2007) 293, at 318.

⁸ The Declaration on Global Electronic Commerce adopted by the Second WTO Ministerial Conference on 20 May 1998 urged the General Council to establish a comprehensive work program to examine trade rules arising from e-commerce, at < https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm > (last visited 8 September 2019). See also R. Weber, 'Digital Trade in WTO-Law – Taking Stock and Looking Ahead' 5 *Asian Journal of WTO & International Health Law and Policy* (2010) 11, at 24.

⁹ The WTO Electronic Commerce negotiating text contains definitions on digital trade/e-commerce, which, according to the leaked source, may read as: 'Digital trade/e-commerce means the production, distribution, marketing, sale or delivery of goods and services by electronic means.' See [bilaterals.org](https://www.bilaterals.org), at < https://www.bilaterals.org/IMG/pdf/wto_plurilateral_e-commerce_draft_consolidated_text.pdf > (last visited 18 February 2021).

is generally understood in a broad sense that encompasses international trade enabled by digital technologies. The term ‘*digital trade*’ is often used interchangeably with terms such as ‘*electronic commerce*’ or ‘*trade aspects of e-commerce*.’¹⁰ In addition, underpinning digital trade is the movement of data, which can itself be traded and also serve as a means to deliver services. The term ‘*data flow*’ is therefore also a closely connected term with digital trade.¹¹

Despite the existence of the WTO Work Programme on Electronic Commerce for more than 20 years,¹² Members have been wrestling with questions of how e-commerce should be addressed in the WTO. Initiatives since January 2019 appear to indicate that WTO negotiations on e-commerce are back on track. G20 trade negotiators in June 2019 issued a joint statement on digital economic policies that has paved the way for the WTO’s plurilateral e-commerce talks.¹³ There have been intensive discussions among WTO Members for and against a plurilateral agreement on e-commerce. Among others, more than 70 Members – including the United States, the European Union, China and Japan – confirmed their intention to launch WTO negotiations on trade-related aspects of electronic commerce,¹⁴ which, according to the United States, would seek a ‘high-standard agreement that creates strong, market-based rules’ and ‘reduces the barriers around the world that threaten to undermine the growth of the digital economy.’¹⁵ Members have put forward proposals and positions on a variety of topics.¹⁶ At the same time, in an open letter to WTO trade Ministers, business groups called for ‘an ambitious WTO framework’ on e-commerce that should ‘clarify and improve the existing framework of [...] digital trade,’ and the pursuit of goals with high standards, including commitments to the free flow of data across borders and a ban on data localization.¹⁷

The COVID-19 crisis has stimulated a surge in the use of digital services and convincingly demonstrated the pressing need to update the WTO rules. The unprecedented demand for online delivery could be a further incentive for regulatory cooperation in e-commerce.¹⁸ Despite the fact that momentum toward reaching a consensus on e-commerce rules has yet to emerge, a consolidated text had been distributed to Members in December 2020 and would be the basis for the e-commerce discussions in 2021.¹⁹

¹⁰ For example, despite different chapter titles, the texts of USMCA’s Digital Trade Chapter and the CPTPP’s Electronic Commerce Chapter are overwhelmingly similar.

¹¹ See L. González et al., ‘Digital Trade: Developing a Framework for Analysis’ 2017 *OECD Trade Policy Papers* No 205 (Paris: OECD, 2017).

¹² Work Programme on Electronic Commerce, Progress Report to the 45 General Council, adopted by the Council for the Trade in Services on 19 July 1999, S/L/74 (27 July 1999).

¹³ G20 Information Center, Chair’s Statement (8 September 2019), at <
<http://www.g20.utoronto.ca/2019/2019-g20-trade-chairs-statement.html> > (last visited 18 September 2021).

¹⁴ WTO, Joint Statement on Electronic Commerce, WT/L/1056 (25 January 2019) (hereinafter ‘the JSI on E-Commerce’). China, however, has also put forward its ideas for the e-commerce talks, in which China did not endorse the provisions sought by the United States and others, but also stressed that the issues of cross-border data flow and data localization required ‘more exploratory discussions’ before they could be negotiated. Communication from China, Joint Statement on Electronic Commerce, INF/ECOM/19 (24 April 2019).

¹⁵ Inside US Trade, ‘U.S., Others Call for Cross-Border Data Flow, No Localization in WTO E-Commerce Talks’ (3 May 2019); Inside US Trade, ‘Shea: Cross-Border Data Flows ‘Lifblood’ Of Digital Economy’ (16 May 2019).

¹⁶ The topics are inclusive, ranging from electronic contracts, electronic signatures, consumer protection, commercial messages, unsolicited commercial electronic messages, customs duties on electronic transmissions, source code, cross-border data flow, privacy protection, net neutrality, the WTO reference paper on telecommunications services, to market access requests on computer and telecommunications sectors. See, for example, Communication from the European Union, Joint Statement on Electronic Commerce EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce, INF/ECOM/22 (26 April 2019).

¹⁷ Inside US Trade, ‘Global Services Group Urges WTO Ministers to Launch Ecommerce Talks, Forge Deal by 2020’ (24 January 2019).

¹⁸ WTO Secretariat, *E-Commerce, Trade and the Covid-19 Pandemic*, Information Note, (4 May 2020), at 5.

¹⁹ Inside US Trade, ‘WTO E-Commerce Text: Section 230 Language, Exceptions to Data Rules’ (12 February 2021).

II. Market access, classification and scheduling

A. Digitization of services: technological neutrality

Digital trade-related measures have been repeatedly challenged before the DSB. The first WTO ruling concerning e-commerce was on US restrictions on Internet gambling services. Antigua and Barbuda initiated a case against the United States,²⁰ claiming that US Internet gambling restrictions at both the federal and state levels violated its commitments under the GATS. This dispute concerned various US measures relating to gambling and betting services.²¹ The complaining party argued that all of these ‘measures’ constitute a ‘total prohibition’ on the cross-border supply of gambling and betting services.²² To be more specific, the complaining party claimed that the United States violated Article XVI:1 of the GATS because, despite having scheduled a ‘full market access’ commitment for the cross-border supply of gambling and betting services, the United States ‘maintains and enforces measures prohibiting the cross-border supply’ of those services.²³

At stake was whether a prohibition on the cross-border electronic supply of gambling services is a limitation within the meaning of Article XVI of the GATS. The Panel of *US – Gambling*, by citing the ‘Progress Report of the Work Programme on Electronic Commerce,’²⁴ indicated that ‘[it] was the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied.’²⁵ Noting the principle of ‘technological neutrality,’ which, according to the Panel, ‘seems to be largely shared among WTO Members,’ the Panel stressed that ‘where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means.’²⁶ The Panel therefore concluded that a market access commitment for mode one implies the right of other Members suppliers to supply a service through all means of delivery, including the Internet.²⁷

The case of *China – Publications and Audiovisual Products* is another compelling example of how digital trade has inevitably caused challenges to international economic law.²⁸ In its GATS Schedule, China made both market access and national treatment commitments regarding sound recording distribution services. In particular, under market access for mode 3 in Sector 2D, China committed to allowing foreign service suppliers to establish contractual joint ventures with Chinese partners to engage in sound recording distribution.²⁹ The Chinese regulations,³⁰ however, limited the

²⁰ See Appellate Body Report, *US – Gambling*, adopted 20 April 2005, paras 14-20; Panel Report, *US – Gambling*, adopted 20 April 2005, paras 6.19-6.40.

²¹ In sub-sector 10.D of the U.S. GATS Schedule of Specific Commitments, the United States inscribed the following entry: ‘Other Recreational Services (except sporting).’ Then, next to that column, in the column titled ‘Limitations on market access,’ the United States listed the four modes of supply, and under category 1, for cross-border supply, the United States inscribed the word ‘None. Based on this entry, Antigua argued that the United States has made a full market access commitment for the cross-border supply (mode 1) of gambling and betting services.

²² In this case, the Antiguan gambling and betting services at issue were supplied through the online mode, which, as argued by Antigua, is defined in Article I:2(a) of the GATS and involves a service ‘delivered within the territory of the Member, from the territory of another Member.’

²³ Panel Report, *US – Gambling*, adopted 20 April 2005, paras 5.21-5.24.

²⁴ Council for Trade in Services, above fn 13, para 4.

²⁵ Panel Report, *US – Gambling*, adopted 20 April 2005, fn 836.

²⁶ Ibid.

²⁷ Panel Report, *US – Gambling*, adopted 20 April 2005 paras 6.285-6.287. Note that the United States’ appeal focused on the Panel’s interpretation of sub-paragraphs (a) and (c) of Article XVI:2. The Appellate Body therefore did not review the Panel’s finding that WTO Member does not respect its GATS market access obligations under Article XVI:2 if it restricts any means of delivery under mode 1 with respect to a committed sector. Appellate Body Report, *US – Gambling*, adopted 20 April 2005, paras 218-220.

²⁸ Appellate Body Report, *China – Publications and Audiovisual Products*, adopted 19 January 2010; Panel Report, *China – Publications and Audiovisual Products*, adopted 19 January 2010.

²⁹ Panel Report, *China – Publications and Audiovisual Products*, paras 7.1300-7.1311.

³⁰ China maintains these restrictions through three measures: (i) the Interim Rules on the Management of

ability of foreign-invested enterprises to engage in the distribution of sound recordings by prohibiting these enterprises from engaging in their digital distribution, for example, through the Internet and mobile telecommunications networks.³¹ The United States therefore claimed that China's measures are inconsistent with Article XVII of the GATS.³² China argued, on the other hand, that the music industry landscape has been undergoing major structural changes since its accession negotiations. China repeatedly pointed out in its written submissions that its GATS commitments do not cover digital-enabled music services, and that those commitments are strictly limited to the distribution of sound recordings in a 'traditional' model, *i.e.*, in physical form.³³

The principle of technological neutrality was also central to the United States' claim against China. The United States relied on the principle to argue that the differences between physical and digital distribution are not relevant to the interpretation of the scope of a GATS commitment unless specified in a Member's Schedule.³⁴ China took the opposite view. The United States responded that China's position if accepted, would suggest that GATS commitments must be renegotiated each time a new technology results in a new means of supplying a service.³⁵ In this context, the decisive paragraph of the Appellate Body decision reads as follows:

We consider that the terms used in China's GATS Schedule ('sound recording' and 'distribution') are *sufficiently generic* that what they apply to *may change over time*. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with *continuing obligations* that WTO Members entered into *for an indefinite period of time*. [...] (emphasis added).³⁶

On that basis, the Appellate Body concluded that the Chinese commitments in dispute are generic terms whose content may change over time, namely, from physical to digital. The inscription of 'sound recording distribution services' under the heading of Audiovisual Services (Sector 2.D) of China's services Schedule 'extends to the distribution of sound recordings in non-physical form,' notably through electronic means.

To conclude, the position of the GATS Council on Services is that 'much of e-commerce falls within the GATS' scope' and that 'GATS obligations cover measures affecting the electronic delivery of services.'³⁷ The GATS applies even as technology changes a service's delivery method, namely, from non-digital to digital means.³⁸ WTO case law, as discussed above, has further confirmed that GATS disciplines and obligations extend to services supplied electronically. The reach of existing GATS

Internet Culture; (ii) the Notice of the Ministry of Culture on Some Issues Relating to Implementation of the 'Interim Rules on the Management of Internet Culture'; and (iii) the Several Opinions on the Development and Management of Network Music.

³¹ First Written Submission of the United States of America, *China – Publications and Audiovisual Products*, para 357, at https://ustr.gov/archive/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html > (last visited 18 September 2021).

³² *Ibid* at paras 140-155.

³³ Appellate Body Report, *China – Publications and Audiovisual Products*, adopted 19 January 2010, para 43.

³⁴ First Oral Statement of the United States of America, *China – Publications and Audiovisual Products*, para 54, at < https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file278_14895.pdf > (last visited 18 September 2021).

³⁵ Second Oral Statement of the United States of America, *China – Publications and Audiovisual Products*, para 56, at https://ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file328_14895.pdf > (last visited 18 September 2021).

³⁶ Appellate Body Report, *China – Publications and Audiovisual Products*, adopted 19 January 2010, para 396.

³⁷ Council for Trade in Services, above fn 13.

³⁸ See S. Ariel Aaronson et al., 'Another Digital Divide: The Rise of Data Realms and its Implications for the WTO' 21(2) *Journal of International Economic Law* (2018) 245, at 252.

commitments applies to digital means of service delivery that have emerged since the GATS was concluded in 1994.

B. Classification of ‘new’ services: (re)negotiations needed

In light of the Appellate Body decisions, the question arises whether the GATS is sufficiently dynamic to cover every new technological innovation affecting trade in services? The real question here may be as follows: To what extent can we rely on concepts such as ‘technological neutrality’ or ‘evolutionary interpretation’ to expand the scope of the GATS in order to cope with the rapidly changing landscape of a digital economy? At the heart of the issue is the classification/scheduling logic of the GATS. Under the GATS architecture, classification is the foundation of identifying any service a Member wishes to list in its Schedule of Commitments for increasing market access.³⁹ The GATS was introduced as a positive-list agreement, in which there is no market access for services trade unless it has been listed by name in a Member’s schedule.⁴⁰ The GATS positive-list architecture thus created problems for any digitalized service that now exists but was not explicitly named in the Provisional Central Product Classification (CPC).⁴¹ The rapid development of digital technologies has meant that W/120 classifications (which date back to 1991) have become inadequate, and their correspondence with the CPC is largely out of date.⁴² Are Google services covered by the existing W/120 classification? Is WhatsApp already accommodated by the existing CPC? How are Uber services to be classified under the GATS regime?

The case of Google represents a striking example in which the W/120 classification and its corresponding CPC do not clearly match today’s business realities. Much ink has been spilled about whether search engines like Google are covered by GATS commitments since China blocked Google.com and redirected traffic to local search engines. Commentators argued both for and against in respect of the questions of whether the W/120 and CPC subsectors ‘online information retrieval,’ ‘value-added telecommunications service,’ ‘data processing services,’ ‘online hosting and publication services,’ ‘advertising services’ and ‘database services’ include search engines such as Google.⁴³ At the crux of the matter is the fact that the CPC definitions of those subsectors, which were drafted in the early 1990s, appear rather ambiguous on the issue. In other words, Google cannot perfectly satisfy any definitions or conditions described in the existing CPC system, and as a result, classifying it in either subsector seems illogical from a legal perspective. Obviously, the GATS drafters could not have been aware of the future existence and features of search engines during the Uruguay Round Negotiations.

Similar questions can be raised regarding the classification of endless lists of digital trade activities. How might chat applications (*e.g.*, WhatsApp, Line, WeChat) best be defined? Where may virtual meeting services (*e.g.*, Skype, Zoom) be classified? Might these ‘new’ services be a form of

³⁹ R. Weber and M. Burri, *Classification of Services in the Digital Economy*, 1st edition (New York: Springer, 2012), at 17-20.

⁴⁰ *Ibid* at 45.

⁴¹ Note by the Secretariat, MTN.GNS/W/120 (10 July 1991). For the purposes of the Uruguay Round negotiations, the WTO Secretariat developed the GATS Services Sectoral Classification List (‘the W/120’) to enhance the consistency of the commitments undertaken by Members. The W/120 breaks down the telecoms sector into 14 sub-sectors and an ‘other’ category. Although optional, most Members follow the W/120 classification system, whose 160 sub-sectors are defined as aggregates of the more detailed categories contained in the United Nations provisional CPC. Thus, CPC categories help clarify the scope of the commitments actually undertaken under the GATS, and most Members list the corresponding CPC numbers when scheduling their GATS commitments.

⁴² Peng, above fn 8, at 297-300.

⁴³ See, for example, H. Gao, ‘Google’s China Problem: A Case Study on Trade, Technology and Human Rights under the GATS’ 6 *Asian Journal of WTO & International Health Law & Policy* (2011) 349, at 364; T. Wu, ‘The World Trade Law of Censorship and Internet Filtering’ 7(1) *Chicago Journal of International Law* (2006) 263, at 265. See also R. Weber et al., ‘Tensions between Developing and Traditional GATS Classifications in IT Markets’ 43 *Hong Kong Law Journal* (2013) 77, at 77-85.

‘mobile telephone services’ covered by CPC 75213 or a form of ‘data and message transmission service’ covered by CPC 7523?⁴⁴ Additionally, how about sharing (intermediation) platforms that facilitate peer-to-peer exchanges? To illustrate, at present, Uber’s full market access to several jurisdictions is still being negotiated.⁴⁵ Uber claims it is an ‘information services supplier,’ but relevant authorities in several jurisdictions have decided to support the position of taxi drivers that Uber’s core business is, in fact, hiring drivers to transport passengers for money – it is a transportation service. Do Uber services fall within the scope of ‘information services’ under the GATS regime? By the same token, currently, many cities are struggling to regulate Airbnb, with the possibility of passing strict laws banning the services.⁴⁶ Is market access for Airbnb protected by the GATS commitments? Is Airbnb a hotel service? How might the sharing platforms/intermediaries best be defined under the W/120 system?

As Van den Bossche points out, ‘there has been no evolution in the evolutionary interpretation of WTO law.’⁴⁷ Although both *US – Gambling* and *China – Publications and Audiovisual Products* raised the question of how a schedule of commitments is to be interpreted so as to include a new service not in existence at the time of negotiations,⁴⁸ WTO case law is not entirely clear regarding in what situation and to what extent the ‘state of technology’ that existed at the time of the negotiations is relevant in determining the scope of the commitments. On the one hand, digital technology is organic and technologically innovative, and we must read the existing trade commitments in a dynamic and evolutionary way. On the other hand, judicial interpretation may not be the most appropriate method of clarifying whether the W/120 and the CPC cover certain digital trade-related services. What is covered and what is not covered is an issue that should be (re)negotiated by WTO Members, not by litigation.⁴⁹ At the core of the issue is ‘where treaty interpretation stops’ and ‘where judicial lawmaking begins’ in the digital trade-related dispute settlement process.⁵⁰ It has been broadly acknowledged that the W/120 classification is based on business concepts that do not clearly match today’s business realities. After all, technological innovations have brought about exponential growth in data generation and use. This raises further question of whether the GATS market access commitments, which were made decades ago, remain tenable in the data-driven economy.⁵¹ Members agreed on the need for the W/120 scheme to be replaced or revised.⁵² Negotiating proposals have been submitted to address needed adjustments and to ensure that service classification and scheduling can accommodate modern commercial and technological developments, including technical discussions regarding how to classify platforms for cloud computing services.⁵³ To conclude, the GATS classification/scheduling system must be reformed

⁴⁴ Telex and telegraph services (CPC 7522-7523).

⁴⁵ G. Dickinson, ‘How the World is Going to War with Uber,’ *The Telegraph*, 26 June 2018, at <<https://www.telegraph.co.uk/travel/news/where-is-uber-banned/>> (last visited 9 September 2019).

⁴⁶ R. Minder, ‘To Contain Tourism, One Spanish City Strikes a Ban, on Airbnb,’ 23 June 2018, *The New York Times*, at <<https://www.nytimes.com/2018/06/23/world/europe/tourism-spain-airbnb-ban.html>> (last visited 8 September 2019).

⁴⁷ P. Van den Bossche, ‘Is There Evolution in the Evolutionary Interpretation of WTO Law’ in G. Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (New York: Hart Publishing, 2019), at 221 and 228. (explaining that the evolution in the evolutionary interpretation of WTO law was ‘neither called for nor desirable.’)

⁴⁸ See S. Helmersen, ‘The Evolutionary Treaty Interpretation by the WTO Appellate Body in G. Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (New York: Hart Publishing, 2019) 210-212.

⁴⁹ S. Peng, ‘Regulating New Services through Litigation? Electronic Commerce as a Case Study on the Evaluation of “Judicial Activism” in the WTO’ 48(6) *Journal of World Trade* (2014) 1189, at 1222. Wu, above fn 44, at 283. Gao, above fn 44, at 361-367.

⁵⁰ I. Van Damme, ‘The Non-Politics of Interpreting Silences in the WTO Covered Agreements’ 102 *American Society of International Law Proceedings* (2008) 420, at 423.

⁵¹ See D. Ciuriak, ‘Do WTO Commitments Remain Tenable in the Age of Data? Renegotiating the Rules-Based System for the Data-Driven Economy’ *Opinion, Centre for International Governance Innovation* (July 2, 2021).

⁵² See, e.g., Communication from Australia and Canada, Understanding on the Scope of Coverage of CPC 84 – Computer and Related Services, TN/S/W/60, S/CSC/W/51 (26 January 2007). See also Non-Paper for the Discussions on Electronic Commerce, Work Programme on Electronic Commerce, JOB/GC/100 (25 July 2016).

⁵³ See, e.g., Communication from the United States, Work Programme on Electronic Commerce: Ensuring that Trade Rules Support Innovative Advances in Computer Applications and Platforms, S/C/W/339 (20 September

in light of innovative advances and trends toward a digital economy.⁵⁴ The legal certainty of market access for digital trade cannot be ensured until classifications can be unambiguously defined.

III. Trade barriers, data governance and regulatory autonomy

A. Regulatory barriers to digital trade

As digital trade expands, governments are facing dilemmas between, on the one hand, maximizing opportunities stemming from digital trade by freeing the flow of data, which is essential for innovation and economic growth, and, on the other, managing the impact of cross-border data flows for other policy objectives, which include among privacy and cybersecurity.⁵⁵ Domestic regulations regarding the latter have proliferated in recent years, resulting in a complex domestic legal landscape for digital trade. USTR, in its 2021 National Trade Estimate (NTE) Report, continues to focus on barriers to digital trade.⁵⁶ The key barriers to digital trade identified in the 2021 NTE include China's cybersecurity law, which restricts routine cross-border transfers of data; the digital services taxes adopted by a number of the European Union Member States, which levy an interim tax on revenues from digital services; and India's data localization measures, which require payment service suppliers to store all information related to electronic payments by Indian citizens within India, to name just a few.⁵⁷ The alleged digital trade barriers, ranging from personal data protection to data localization measures, and from data flow regulation to cybersecurity standards, from tariffs on digital products to digital tax, indicate that global governance of digital trade is more important to the international economic legal order than ever.⁵⁸

Regulatory protectionism may impose disadvantages on services in a manner that is not necessary to fulfill a genuine public policy objective. Excessive standards and arbitrary licensing requirements and procedures may seriously limit trade, just as tariffs, quotas, or other protectionist measures do.⁵⁹ Overreaching regulations on digital trade may become more significant as unnecessary trade barriers. Service suppliers will confront significant challenges when attempting to comply with diverse national 'behind-the-border measures.'⁶⁰ For example, a heavily regulated legal privacy framework may prevent cross-border trade or consumption abroad altogether, as well as create costly and burdensome tasks for service suppliers that engage in cross-border transfers of personal data. This is especially when such data is transferred from a service supplier operating in a country with weaker data protection regulations to one with stronger regulations.⁶¹ Moreover, an over-restrictive data localization measure, which requires personal data to be stored in facilities located within a specific jurisdiction, will most certainly

2011); Communication from the European Union, An Enabling Environment to Facilitate Online Transactions, TN/S/W/64 (23 May 2017).

⁵⁴ L. Tuthill and M. Roy, 'GATS Classification Issues for Information and Communication Technology Services' in M. Burri and T. Cottier (eds), *Trade Governance in the Digital Age* (Cambridge: Cambridge University Press, 2012), at 157.

⁵⁵ Meltzer, above fn 6, at 1.

⁵⁶ USTR, Fact Sheet on 2021 National Trade Estimate: Key Barriers to Digital Trade, at <<https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>> (last visited 18 September 2021).

⁵⁷ Ibid.

⁵⁸ A. Porges et al., 'Data Moving Across Borders: The Future of Digital Trade Policy' Strengthening the Global Trade and Investment System for Sustainable Development, the E15 Initiative, World Economic Forum (2016), at <<https://www.tralac.org/images/docs/9554/data-moving-across-borders-the-future-of-digital-trade-policy-e15-initiative-april-2016.pdf>> (last visited 18 February 2021).

⁵⁹ T. Bollyky, 'Regulatory Coherence in the TPP Talks' in C.L. Lim et al. (eds), *The Trans-Pacific Partnership: A quest for a Twenty-first Century Trade Agreement* (Cambridge: Cambridge University Press, 2012), at 172.

⁶⁰ M. Krajewski, *National Regulation and Trade Liberalization in Services*, 1st edition (London: Kluwer Law International, 2003), at 140.

⁶¹ G. Shaffer, 'Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbor Agreements' 9 *Columbia Journal of European Law* (2002) 29, at 29-56.

impact cross-border data flow.⁶²

Another commonly cited rationale for protectionist digital trade regulations – cybersecurity – is also an outstanding example of the competing interests between digital trade liberalization and domestic public policies. We are now living in a hyper-connected world, with myriad devices continuously linked to the Internet. Our ever-growing reliance upon cyberspace places all governments, businesses and individual users at the risk of computer-enabled fraud and vandalism.⁶³ Indeed, cybersecurity has been a central concern, and appropriate domestic regulation should be in place to prevent cyber threats.⁶⁴ However, unique cybersecurity standards, such as information security testing and certification may create barriers to international trade. In this regard, business groups from all over the world in recent years have been questioning whether the Cybersecurity Law of China is consistent with WTO obligations.⁶⁵ China's complex and strict cybersecurity regime, which restricts data flows, 'has effectively erected trade barriers and thus adversely impacted cross-border trade,' as alleged by the relevant private sector.⁶⁶

The GATS Council on Services has noted that governments are free to regulate services but must do so in a way that does not constitute unnecessary barriers to trade.⁶⁷ The key question, however, remains: How can a balance be struck between digital trade liberalization and national policy objectives? When and under what conditions can legitimate policy objectives trump digital trade interests? After all, the GATS contains few disciplines on domestic regulation. In part because of the chaotic status of multilateral services trade negotiations, further disciplines for digital trade have been realized in recent FTAs. In particular, significant and welcome achievements have been shaped by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States–Mexico–Canada Agreement (NAFTA 2.0). Moreover, the Digital Economy Partnership Agreement (DEPA) between Singapore, Chile and New Zealand represents innovative approaches and collaborations in digital trade issues.⁶⁸ Furthermore, the Electronic Commerce Chapter (Chapter 12) of the Regional Comprehensive Economic Partnership (RCEP) and Part Two - Title III (Digital Trade) of the EU-UK Trade and Cooperation Agreement (EU-UK TCA) are also indicators for future trade negotiations.⁶⁹

B. New Developments in Data Governance under the FTAs

The CPTPP went into force in December 2018, with 'state of the art' digital trade rules found in Chapter 14. The primary goal of the CPTPP Electronic Commerce Chapter is to address potential impediments

⁶² While some of these measures generally follow the traditional model of privacy protection, others are more intrusive, requiring the (re)location of computing facilities. S. Peng et al., 'The Legality of Data Residency Requirements - How Can the Trans-Pacific Partnership Help?' 51(2) *Journal of World Trade* (2017) 183, at 194-204.

⁶³ ITU, 'The Global Cybersecurity Index (GCI)', at < <http://www.itu.int/cybersecurity/> > (last visited 8 September 2019).

⁶⁴ Ibid.

⁶⁵ Inside US Trade, 'China Issues Draft Regulation Law That Would Restrict Outbound Data Flows' (20 June 2019).

⁶⁶ Ibid.

⁶⁷ See Aaronson et al., above fn 39, at 525. According to the fourth paragraph of the GATS preamble, WTO Members recognize 'the right of Members to regulate,' and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives. This explicit recognition of the right to regulate and to introduce further regulation suggests that WTO Members realized the potential conflict between trade liberalization and national regulation.

⁶⁸ Digital Economy Partnership (DEPA) between Singapore, Chile and New Zealand, signed in June 2020, at < <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement> > (last visited 18 February 2021).

⁶⁹ The Regional Comprehensive Economic Partnership (RCEP), at < <https://rcepsec.org/> > (last visited 18 September 2021). The EU-UK Trade and Cooperation Agreement, at < [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN) > (last visited 18 February 2021).

to both consumers and businesses embracing digital trade.⁷⁰ As its core functions, parties of the CPTPP have agreed to a set of rules that will facilitate economic growth through the use of the Internet and prevent barriers to digital trade. Toward this end, key provisions in the chapter include commitments to protect the free flow of information across borders, to minimize data localization requirements, and to ensure that firms of the CPTPP parties can capitalize on data and digital opportunities on a global scale. More specifically, the chapter contains three disciplines addressing the linkage between digital trade and data flow. Article 14.8 underscores the role of personal data protection by encouraging CPTPP parties to adopt measures in a manner that is in harmony with one another and consistent with the principle of non-discrimination. Article 14.11 requires CPTPP parties to ensure free information flow ‘when the activity is for the conduct of the business of a covered person.’⁷¹ Finally, Article 14.13 prohibits parties from mandating firms to ‘use or locate computing facilities’ in their territory ‘as a condition to conduct business’⁷² – representing the first time that an FTA has explicitly touched upon the data localization issue.⁷³

NAFTA 2.0, which effectively updates NAFTA to reflect changes in trade practices since 1994, is the first US free trade agreement to include a chapter on digital trade.⁷⁴ The agreement includes ‘the most advanced digital trade rules ever negotiated’, which USTR hopes will ‘serve as a template for similarly strong and comprehensive rules’ in other trade negotiations.⁷⁵ Building on the framework of the CPTPP e-commerce chapter,⁷⁶ NAFTA 2.0’s digital trade chapter requires the parties to ensure free movement of data across borders and to prohibit parties from adopting restrictive data measures in the future. More specifically, like the CPTPP, Article 19.8 of NAFTA 2.0 addresses issues encountered by online consumers and businesses, including protection of consumers’ personal information and data. The most important provisions borrowed from the CPTPP are those that bar data localization – with Article 19.11 prohibiting discriminatory treatment of cross-border data transfers and Article 19.12 barring forced localization of computing facilities. Other key provisions include a ban on import duties or other discriminatory customs measures on digital products.⁷⁷ NAFTA 2.0 parties have also agreed to cooperate on cybersecurity threats, including building the capacity to identify and respond quickly to intrusions and strengthen existing collaboration on threats and cybersecurity best practices.⁷⁸

Overall, despite different chapter titles, the texts of NAFTA 2.0’s Digital Trade Chapter and the CPTPP’s Electronic Commerce Chapter are overwhelmingly similar. Nevertheless, minor differences remain. It is fair to say that when compared to the CPTPP version, the NAFTA 2.0 version offers

⁷⁰ See Chapter 14 (Electronic Commerce). The Text of the CPTPP is available at, for example, the website of the New Zealand Foreign Affairs and Trade, at < <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources> > (last visited 8 September 2019).

⁷¹ Article 14.8 of the CPTPP.

⁷² Article 14.11 of the CPTPP.

⁷³ Article 14.13 of the CPTPP. It should be noted that the Japan-Mongolia Economic Partnership Agreement, signed in 2015, also contains similar provisions, although less straightforward. See Agreement Between Japan and Mongolia for an Economic Partnership, 10 February 2015, Article 9.12, at < <https://www.mofa.go.jp/policy/economy/fta/mongolia.html> > (last visited 18 September 2021).

⁷⁴ See Chapter 19 (Digital Trade).

⁷⁵ USTR Fact Sheet on 2019 National Trade Estimate: Key Barriers to Digital Trade, at < <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/march/fact-sheet-2019-national-trade-estimate> > (last visited 8 September 2019). The scope of the chapter, indeed, is comprehensive, covering Customs Duties, Non-Discriminatory Treatment of Digital Products, UNCITRAL Model Law on E-Commerce, Paperless trading, E-Signature/E-Authentication, Cross-Border Transfer of Information by Electronic Means, Location of Computing Facilities, Internet Interconnection Charge Sharing, Online Consumer Protection, Personal Information Protection, Unsolicited email, Access to and Use of the Internet for Digital Trade, Cybersecurity, Source Code, Interactive Computer Services, Cooperation, Open Government Data.

⁷⁶ Despite the Trump administration withdrawing from the TPP, NAFTA negotiators used the CPTPP’s electronic commerce chapter as the basis for negotiations.

⁷⁷ Articles 19.8, 19.11, and 19.12 of NAFTA 2.0.

⁷⁸ Article 19.15 of NAFTA 2.0.

several innovations. First, with respect to data localization, the NAFTA 2.0 version is stronger than the CPTPP's version in terms of coverage, as the NAFTA 2.0 version does not exclude financial services.⁷⁹ More importantly, the data localization provision of NAFTA 2.0 is a straightforward ban, whereas the CPTPP version is linked to a loose Article XX GATT 1994-like exception, emphasizing 'legitimate public policy objectives.'⁸⁰ Second, the NAFTA 2.0 version has an additional 'Interactive Computer Services' provision, under which no Party shall adopt or maintain measures that treat Internet platforms, in particular, social media sites, as an information content provider in determining civil liability for harms related to information services supplied by the platforms.⁸¹ Third, the NAFTA 2.0 version includes an 'Open Government Data' provision, which stipulates the importance of facilitating public access to and use of government information that fosters economic and social development, competitiveness, and innovation. The Parties also agree to 'endeavor to ensure that the information is in a machine-readable and open format.'⁸² Finally, with respect to cybersecurity, NAFTA 2.0 parties also agree to 'encourage enterprises within its jurisdiction' to adopt risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks.⁸³ There is no counterpart to this provision in the CPTPP.

C. Regulatory autonomy and further disciplines for digital trade

Can the CPTPP and NAFTA 2.0 help to reverse the trend of data protectionism? A central, preliminary question is: how significant are the implications of these new developments on digital trade? We must first evaluate the impact of the two chapters. How extensive is their strength? The next line of inquiry will then be: To what extent can these new developments serve as a reference for future trade negotiations? To what extent will the ongoing WTO JSI on e-commerce follow in the steps of these two chapters of these FTAs? And, what lessons can be learned from regional experiences? Are there any additional considerations beyond the regional level which should be taken into account in future trade negotiations?

First, an obvious challenge is the inherent sensitivity of interfering with other parties' sovereign rights. FTA negotiators have drawn from legal concepts tied to the exceptions language found in the WTO agreements, such as 'legitimate policy objective', to manage the tension between the free flow of data and national regulatory autonomy.⁸⁴ The data localization provision in the CPTPP, for example, is seriously complicated, if not weakened, by the exceptions clause. Article 14.13, which states that '[n]o Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory' is the core provision that specifically confronts typical data localization requirements. However, the same Article also allows parties to maintain a data localization measure in order to achieve a legitimate public policy objective, as long as the measure 'does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.'⁸⁵ Furthermore, it is worth noting that, unlike the GATT/GATS general

⁷⁹ The CPTPP adopts a more relaxed approach in Chapter 11 (Financial Services) in the sense that data localization requirements concerning the financial sector fall outside the data localization provision of the CPTPP. This carve-out has raised concerns about potential trade barriers.

⁸⁰ Article 19.12 of NAFTA 2.0.

⁸¹ Article 19.17 of NAFTA 2.0.

⁸² Article 19.18 of NAFTA 2.0.

⁸³ Article 19.15 of NAFTA 2.0.

⁸⁴ See, generally, M. Wu, 'Digital Trade Related Provisions in Regional Trade Agreements Existing Models and Lessons for the Multilateral Trade System' ICTSD (2017).

⁸⁵ Article 14.13 of the CPTPP: Location of Computing Facilities

1. The Parties recognize that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
3. Nothing in this Article shall prevent a Party from adopting or maintaining

exceptions in which the policy objectives are exhaustively listed, the data localization exceptions under the CPTPP contain an open-ended list of legitimate objectives and require an initial determination regarding whether an objective is legitimate.⁸⁶ In fact, without such a ‘flexible’ exception, most CPTPP parties would not have made the commitments on data transfer and computing facilities.⁸⁷ CPTPP negotiators created ‘constructive ambiguity’ around this politically sensitive issue. The limited reach of the CPTPP’s data localization provision, therefore leaves much ambiguity about how far that article can go to curb national protectionist practices. That being said, Article DIGIT.3 of the EU-UK TCA, which reaffirms the Parties’ right to regulate to achieve legitimate policy objectives ‘such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity,’ represents another striking example of safeguarding the cyberspace sovereignty by creating an open and inclusive list of legitimate objectives.⁸⁸

Second, particular attention should be paid to the soft legal nature of several provisions under the two chapters. For the same reason that led to a loose exception, several other key provisions contain imprecise and non-binding ‘obligations,’ with little institutionalized enforcement for non-compliant behaviour.⁸⁹ For example, the NAFTA 2.0 parties merely ‘recognize the importance’ and ‘endeavor to’ comply with certain rules in the areas of the Domestic Electronic Transactions Framework (Article 19.5), Personal Information Protection (Article 19.8), Paperless Trading (Article 19.9), Cooperation (19.14), Cybersecurity (Article 19.15) and Open Government Data (Article 19.18). The softness of these provisions reflects less political ambition. Indeed, as argued by some commentators, new trade agreements should address digital trade in a flexible way. To maintain global standards, such as privacy standards, as many countries as possible must accept trade agreements.⁹⁰ While not immediately legally binding, soft law provides a useful means of reducing the impact to avoid a political nightmare and hopefully gradually affect the conduct of parties. Over-reliance on the soft law mechanism, however, may substantially reduce the level of ambition and may also swallow overall achievements. The strategic use of hard and soft law in further disciplines will have profound implications for digital trade. It will be a challenging task for trade negotiators to employ soft law to balance trade and its competing values effectively.

Finally, drawing from the experiences of the CPTPP and NAFTA 2.0, ‘special and differential treatment’ and ‘developing’ status will eventually be the focal points of the WTO JSI on e-commerce talks. In the CPTPP, Vietnam is given a transition period in which existing data localization measures are not subject to dispute settlement. A similar grace period is also provided to both Vietnam and Malaysia for existing measures concerning the cross-border transfer of information by electronic means.⁹¹ By the same token, under NAFTA 2.0, obligations concerning interactive computer services will not apply to Mexico until three years after the date of entry of the Agreement into force.⁹² In this regard, how to tackle the issue of digital trade and development will continue to be the center of debate in future trade negotiations. One primary challenge facing the ongoing WTO plurilateral e-commerce

measures inconsistent with paragraph 2 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 the use or location of computing facilities greater than are required to achieve the objective.

⁸⁶ Peng, above fn 56, at 195-196.

⁸⁷ Ibid.

⁸⁸ Article DIGIT.3 ‘Right to regulate’ of the EU-UK TCA.

⁸⁹ See, generally, J. Galbraith et al., ‘Soft Law as Foreign Relations Law’ 99 *Cornell Law Review* (2014) 735, 745. G. Shaffer et al., ‘Hard Versus Soft Law in International Security’ 52 *Boston College Law Review* (2011) 1147, 1148-49.

⁹⁰ Inside US Trade, ‘Analysts: Trade Deals Must Include ‘Flexible’ Rules on Evolving Digital Trade’ (14 February 2019).

⁹¹ Article 14.18 of the CPTPP.

⁹² Chapter 19 ANNEX 19-A to NAFTA 2.0.

talks is the allegation that the proposed trade rules will benefit ‘Big Tech’ companies at the expense of workers and small businesses, hurt developing countries.⁹³ Civil society groups have been pressing for ‘development-focused digital industrialization’, indicating that instead of digital liberalization, the most important is the need to ensure the universal benefits of the digital economy.⁹⁴ At the same time, China has urged WTO e-commerce talks to ‘take into account the special constraints that developing countries faced’⁹⁵ in a way to echo the position expressed by India and South Africa that developing countries need to be able to impose customs duties on electronic transmissions to protect infant domestic industries.⁹⁶ The asymmetrical nature of the global digital economy points to the need to strike a balance between trade efficiency and digital inclusion. As revealed in *Brazil – Taxation*, the Panel was reluctant to draw a firm conclusion on how ‘digital divide’ should be dealt with within the context of Article XX of the GATT.⁹⁷ Although, in the Panel’s view, Brazil had not demonstrated that the measures at issue were ‘necessary’ to achieve social inclusion and access to information, within the meaning of Article XX(a) of the GATT 1994,⁹⁸ the Panel, by recognizing that Brazil’s concern regarding the need to bridge the digital divide and promote social inclusion may fall within the scope of public moral exceptions, has stretched the scope of public morals rather far in this dispute.⁹⁹ In this regard, the module on Digital Inclusion in the DEPA between Singapore, Chile and New Zealand establishes new collaborations in the area of digital divide, including reduced disparities between developed and developing countries.¹⁰⁰ Such approaches may serve as a useful reference for how to balance digital trade liberalization and digital inclusion.

IV. Conclusion and outlook

Digital technology has transformed the way trade is conducted, and the need to modernize trade agreements to reflect this reality is long overdue. Moving ahead, plurilaterally seems to be necessary to facilitate digital trade. It remains to be seen whether the WTO JSI on e-commerce will be economically attractive enough to achieve a credible ‘critical mass’ of major players in the digital economy, whether China, which has opted in on the talks, will eventually stay on board, and whether there will be a sufficient level of ambition to yield a high-standard broad agreement with relatively deeper commitments for digital trade.

⁹³ See, e.g., Non-Paper from Brazil, Work Programme on Electronic Commerce, JOB/GC/98 (20 July 2016). Communication from the African Group, Report of Panel Discussion on ‘Digital Industrial Policy and Development,’ Work Programme on Electronic Commerce, JOB/GC/133 (21 July 2017). Communication from the African Group, Report of Panel Discussion on ‘Digital Industrial Policy and Development,’ Work Programme on Electronic Commerce, JOB/GC/133 (21 July 2017).

⁹⁴ ‘Civil Society Letter Against Digital Trade Rules in the World Trade Organization’, 1 April 2019, at <http://www.ourworldisnotforsale.net/2019/Digital_trade_2019-04-01-en.pdf> (last visited 8 September 2019).

⁹⁵ Communication from China, Joint Statement on Electronic Commerce, INF/ECOM/19 (24 April 2019).

⁹⁶ Communication from India and South Africa, The E-Commerce Moratorium and Implications for Developing Countries, Work Programme on Electronic Commerce WT/GC/W/774 (4 June 2019).

⁹⁷ Panel Report, *Brazil – Taxation*, adopted 11 January 2019, paras 7.544 -7.568.

⁹⁸ *Ibid* at paras 7.618-7.622.

⁹⁹ The finding of the panel in this case raised a critical question as to what constitutes public morals and how to distinguish public policies which fall under public morals and which do not. Unfortunately, in the appeal, while the European Union and Japan each appealed certain issues of law and legal interpretations developed in the Panel Reports, both parties did not appeal the issue of Article XX(a). The key questions remain unanswered. Appellate Body Report, *Brazil – Taxation*, adopted 11 January 2019.

¹⁰⁰ See Module 11 Digital Inclusion of the DEPA. The parties acknowledge ‘the importance of digital inclusion to ensure that all people and businesses have what they need to participate in, contribute to, and benefit from the digital economy.’ The parties also recognize ‘the importance of improving access for women, rural populations and low socio-economic groups.’

Further Reading

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- L. Tuthill and M. Roy, 'GATS Classification Issues for Information and Communication Technology Services' in M. Burri and T. Cottier (eds.), *Trade Governance in the Digital Age* (Cambridge University Press, 2012) 157
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