

**E-commerce -
The development implications of
future proofing global trade rules for GAFA**

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E-commerce: the development implications of future proofing global trade rules for GAFA

The World Trade Organization (WTO) General Council established a Work Programme on Electronic Commerce in September 1998 to examine all trade-related issues arising from electronic commerce, taking into account the economic, financial, and development needs of developing countries.¹ Consistent with Article III.2 of the Marrakesh Agreement,² electronic commerce was defined in terms of its trade characteristics, with discussions to be conducted through the bodies responsible for the relevant WTO instruments³ and supplemented by ad hoc dedicated discussions at the General Council. The work programme identified many critical issues, especially on trade in services, but languished in recent years.

In 2016, the issue of electronic commerce was brought to life with gusto as the US, Japan and the European Union initiated moves that were clearly designed to secure a mandate for formal negotiations at the 11th WTO Ministerial Conference (MC11) in Buenos Aires, Argentina. Their proposals go far beyond traditional notions of trade and would see the WTO adopt binding and enforceable rules that restrict how governments can regulate the digital domain. This paper first examines the drivers behind the push for electronic commerce to become the major 'new issue' adopted in a post-Doha round WTO. It then assesses the development implications of the new e-commerce agenda for the WTO acquis, with particular reference to the General Agreement on Trade in Services (GATS).

Four inter-related factors underpin this new focus on electronic commerce. The first is the pre-eminence of the mega-corporations from Silicon Valley, symbolised by the acronym GAFA (Google, Amazon, Facebook, Apple), who by 2010 had displaced the old industrial giants as the world's largest corporations. With their rise in corporate power came greatly enhanced political influence in the US Congress and in the Office of the US Trade Representative (USTR). The industry's wish-list of global rules became the US agenda in the relevant negotiating forums.

The second factor is the growing threat posed by China to the dominance that both GAFA and the US had established over the digital economy, as China refocuses its domestic economy on services and technology and expands internationally through the One Belt One Road initiative and its digital component led by Alibaba. Other countries in the global South are also exploring strategies to close the digital divide and catch-up through digital industrialisation. That strategy commonly includes technology transfer, support for domestic start-ups and attracting joint venture investments, while balancing their social, employment and economic development objectives. The US tech industry has urged the US to prevent other governments, especially from the global South, from pursuing those strategies, in part

¹ Consistent with the Ministerial Declaration on Global Electronic Commerce, adopted on 20 May 1998, WT/MIN(98)/DEC/2.

² Article III.2: 'The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.'

³ The Council for Trade in Goods, Council for Trade in Services, Council for Trade-related Intellectual Property Rights and the Committee on Trade and Development.

by including binding and enforceable rules in new generation trade and investment agreements.⁴

Third, since 2010 a raft of US-led mega-regional negotiations were initiated that were intended to set new rules for the global economy in the 21st century. As with the agenda-setting process in the Uruguay round in the early 1980s, where the US insisted on extending the rubric of 'trade' to include intellectual property rights, services and services-related investment,⁵ the mega-regionals became vehicles for the US to maximise its new areas of economic and strategic advantage in the 21st century. In relation to electronic commerce, the US sought to internationalise its domestic regime which regulates telecommunications, but largely insulates the Internet from government.⁶ The novel text in the TransPacific Partnership Agreement (TPP) provided the template. The mega-regionals could bind some developing countries and over time encircle China and fetter its external operations, while building a base of precedents. Reproducing largely the same text across a number of mega-regionals would support claims of a new normative regime. Multilateralisation of those new norms through the WTO was a desirable, but not essential end game.

However, none of those mega-regional agreements has yet entered into force and several of the negotiations have collapsed. That has raised the stakes of advancing the agenda in the WTO. But doing so requires re-writing the WTO's negotiating mandate, which was to explore the issues through the four existing WTO committees. The bulk of the WTO's e-commerce discussions have taken place in the Council on Trade in Services, which has discussed elements of the GATS that were hard-won by developing countries in the Uruguay round but are obstacles to the ambitions of the US and other demandeurs and their corporations. These contested elements are what can be considered the GATS acquis. Commitments to progressive liberalisation in the GATS text and Doha work programme, and positive list architecture for scheduling commitments, are designed to allow developing countries to control the pace of new liberalisation. The scope of modes 1 and 2 of trading in services is ambiguous, sectoral classifications are unclear and do not expressly include new digital services, and many developing countries have rejected claims that commitments they made in 1994 when the world wide web barely existed are subject to a principle of technological neutrality.

These four factors coincided with the determination of affluent countries to bury the Doha 'Development' round and re-form the WTO into a rule-maker on 'new issues'. In mid-2016 Japan, the US and the European Union initiated a strategy to bypass the Work Programme on electronic commerce and transpose the TPP template into the WTO. Over the next year, they have lowered their ambitions for the mandate from the MC11, but the end goal is clearly the same. Achieving that requires consensus. Many developing countries and least developed countries (LDCs) oppose moves to abandon the promises of the Doha round.

⁴ For example, the submission from the Information Technology Industry Council to the USTR in response to the *Request for Public Comments to Compile the National Trade Estimate Report (NTE) on Foreign Trade Barriers*, 27 October 2016.

⁵ Jane Kelsey (2008) *Serving Whose Interests? The Political Economy of Trade in Services Agreements*, Routledge Cavendish: Oxford; Peter Drahos and John Braithwaite (2003), *Information Feudalism. Who Owns the Knowledge Economy?*, The New Press: New York.

⁶ The stated goals of the US Telecommunications Act of 1996 (Code 47 U.S.C. §230(b)) were to 'promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of telecommunications technologies' but to 'preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation'.

Specifically, they see the e-commerce demands as rich countries once again wanting ‘trade’ rules that work for them and bypassing the promise to redress long-standing asymmetries written into previous agreements.

There is a serious risk that their fears will materialise, whether the outcome is a negotiating mandate on e-commerce, plurilateral e-commerce negotiations as some proponents have threatened, elevation of the Work Programme to a forum that sits above existing agreements,⁷ or seemingly unrelated decisions on domestic regulation of services⁸ or the benign-sounding ‘micro, small and medium enterprises’ (MSMEs)⁹ that provide a Trojan Horse for the bigger agenda.

This paper looks in detail at two aspects of this dynamic: the US-led construction of a new normative framework for governing the digital domain, which reflects the demands of the dominant tech industry; and how pursuing that agenda in the WTO would effectively rewrite the GATS, and remove protections for the policy space of the global South to liberalise at their own pace, while leaving the legal and policy uncertainties and risks unresolved.

The analysis is predominantly concerned with the legal consequences of the proposed normative model for developing countries within the WTO. It does not address the broader adverse development implications of the e-commerce agenda, on which there is a growing literature,¹⁰ or the more specific impacts on trade in goods and fiscal impacts of a permanent ban on customs duties for electronic transmissions.¹¹ Ultimately, it urges those who claim these e-commerce rules would benefit the global South to distinguish the development potential of the digital economy, including the opportunities and challenges of electronic commerce, from the adoption of rules for the digital economy that would constrain their ability to do so.

⁷ General Council, Work Programme on Electronic Commerce. Discussion Draft Decision for MC11, JOB/GC/138, 6 October 2017, circulated at the request of Japan, proposed a Working Group on Electronic Commerce with an open-ended remit.

⁸ Working Party on Domestic Regulation. Disciplines on Domestic Regulation, Communication from Australia, Canada, EU, Japan and 18 other Members, JOB/SERV/272, 26 October 2017; cf. Working Party on Domestic Regulation. Disciplines on Domestic Regulation, African Group Final Statement, 7 November 2017. These proposals are highly relevant to e-commerce, especially for licensing requirements and procedures, technical standards, administration of domestic regulation measures, and transparency, but discussing them would have made the paper unwieldy.

⁹ General Council, Draft Ministerial Decision on Establishing a Work Programme on Micro, Small and Medium Enterprises (MSMEs) in the WTO. Proposal by the Group of Friends of MSMEs, JOB/GC/147, 30 October 2017 includes a mandate to ‘consider ways to promote a more predictable regulatory environment for MSMEs’.

¹⁰ Eg. Rashmi Banga (2017), *Rising Product Digitalisation and Losing Trade Competitiveness*, UNCTAD/GDS/ECIDC/2017/3; Abhijit Das (2017), ‘WTO Negotiations on E-Commerce: Uncertain Gains But Certain Losses for Developing Countries’, Centre for WTO Studies, New Delhi; Parminder Jeet Singh (2017) ‘Digital Industrialisation in Developing Countries: A review of the Business and Policy Landscape’, Commonwealth Secretariat: London; South Centre, ‘WTO MC11: Issues at Stake for Developing Countries, Informal Note on MC11’, 6 November 2017; Biswajit Dhar (2017) *Electronic Commerce and the WTO: The Changing Contours of Engagement*, Madhyam Briefing Paper #21, New Delhi; Parminder Jeet Singh (2017), Report on Developing Countries in the Emerging Global Digital Order – a Critical Geopolitical Challenge to which the Global South Must Respond’, IT for Change: New Delhi; Jane Kelsey (2017a), ‘The Risks for ASEAN of New Mega-Agreements that Promote the Wrong Model of e-Commerce’, ERIA Discussion Paper Series, ERIA-DP-2017-10.

¹¹ Eg. Rashmi Banga (2017) ‘Permanent Moratorium, Trends in Cross-Border E-Commerce and Internet Governance, Commonwealth Secretariat: London

I. Constructing a New Normative Framework

When the US moved to put electronic commerce on the agenda of the newly-established WTO in 1998,¹² the Internet and World Wide Web were still embryonic. Visionaries hailed its potential to revolutionise post-industrial capitalism, social engagement, knowledge creation and dissemination, and political and corporate power, but relatively few grasped its potential. Today, Silicon Valley hosts the world's largest companies by capitalisation: Apple, Alphabet (parent company of Google), Amazon, Microsoft and Facebook.¹³

These tech giants and other first movers own the intellectual property and data, control the platforms and markets, and dominate the multi-stakeholder forums of Internet governance. Google, for example, controls five of the top six billion-user, universal web platforms – search, video, mobile, maps and browser – and leads in 13 of the top 14 commercial web functions.¹⁴ These virtual monopolies over infrastructure, data and market segments have been established in the absence of an effective international, or in many cases domestic, regulation or competition regimes. They want to keep it that way.

As their corporate power has increased, so has their political influence. Google is set to become the highest spender on lobbying of the US Congress in 2017.¹⁵ Individually and through overlapping tech industry lobbies, they enjoy privileged access to the US government through various USTR and State Department advisory committees.¹⁶

1.1 The Industry Strategy

The strategy of US tech companies to use trade agreements to expand their international operations and protect themselves from foreign government regulation dates back at least to the Uruguay round. Geza Feketekuty, who was assistant USTR with responsibility for services from the late 1970s, identified two goals behind what became the GATS: to pre-empt regulation of the technologies that were beginning to revolutionise the cross-border movement of capital, data and related services; and to secure a multilateral agreement on investment.¹⁷ In those days, the lobby was led by giants of the finance sector.

¹² General Council, Global Electronic Commerce. Proposal by the United States, WT/GC/W/78, 9 February 1998. The US proposed the permanent absence of customs duties on electronic transmissions.

¹³ PWC, (2017) 'Global Top 100 Companies by market capitalization', 31 March 2017 update, <https://www.pwc.com/gx/en/audit-services/assets/pdf/global-top-100-companies-2017-final.pdf>

¹⁴ Chapter 15: electronic supply of services (technological neutrality); non-discrimination and no customs duties on digital products; electronic authentication and signatures; online consumer protection; paperless trading; principles of access to and use of the Internet for electronic commerce; cross-border information flows;

¹⁵ Shamel Azmeh and Christopher Foster (2016), 'The TPP and the Digital Trade Agenda: Digital Industry policy and Silicon Valley's influence on new trade agreements', London School of Economics, Working Paper Series 2016, No. 16-175; 'Why is Google Spending Record Sums on Lobbying Washington?', *The Guardian*, 30 July 2017, <https://www.theguardian.com/technology/2017/jul/30/google-silicon-valley-corporate-lobbying-washington-dc-politics>

¹⁶ eg. the USTR Advisory Committee on Trade Policy and Negotiations, USTR Advisory Committee on Intellectual Property, the Industry Trade Advisory Committee on Information and Communications Technologies, Services and e-Commerce, and the US State Department's Advisory Committee on International Communications and Information Policy. <https://ustr.gov/about-us/advisory-committees>

¹⁷ Interview quoted in Kelsey (2008), 157-58

The growing influence of the tech industry on the US trade agenda became evident in the US Korea FTA (KORUS),¹⁸ whose e-commerce chapter was more extensive than the Dominican Republic-Central America Free Trade Agreement (CAFTA)¹⁹ and Australia US FTA (AUSFTA)²⁰. But the peak achievements to date have been the new generation mega-regional trade and investment agreements. Robert Holleyman was appointed deputy USTR from 2014 to 2017, having worked in the tech industry for twenty-three years, most recently as the President and CEO of BSA/Software Alliance.²¹ In 2016 he established a Digital Trade Working Group.²² The tech industry dominated lobbies around individual agreements, notably Team TiSA, which was formed to promote the plurilateral Trade in Services Agreement (TiSA).²³

The industry's overlapping lobby groups sent successive open letters to the USTR with a standard list of demands:²⁴

- no restriction on cross-border data flows;
- no localisation requirements for data and computers;
- protecting copyright, but to ensure safe harbours and exceptions (fair use is critical for search, machine learning, computational analysis, text/data mining, and cloud-based technologies)

¹⁸ The U.S.-Korea Free Trade Agreement, entered into force 15 March 2012. Chapter 15: electronic supply of services (technological neutrality); non-discrimination and no customs duties on digital products; electronic authentication and signatures; online consumer protection; paperless trading; principles of access to and use of the Internet for electronic commerce; cross-border information flows;

¹⁹ The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA/DR) first entered into force between the US and El Salvador on 1 March 2006. CAFTA Chapter 14: electronic supply of services (technological neutrality); non-discrimination and no customs duties on digital products; transparency; cooperation

²⁰ Australia – United States Free Trade Agreement, Entered into force on 1 January 2005. Chapter 16 of AUSFTA is similar to KORUS, but no provisions on principles of access to and use of the Internet for electronic commerce or cross-border information flows.

²¹ Crowell Moring (2017) 'Robert Holleyman' <https://www.crowell.com/Professionals/Robert-Holleyman>

²² 'Ambassador Froman Announced New Digital Trade Working Group', July 2016, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/july/ambassador-froman-announces-new>

²³ Team Tisa website is no longer functional. For a list of the Team TiSA members by sector see Jane Kelsey (2017b) *TiSA - Foul Play*, UNI Global Union: Brussels, p.20 Table 2.2

²⁴ The October 2016 open letter was signed by seven groups: the *Internet Association*, including Airbnb, Amazon, Dropbox, eBay, Expedia, Facebook, Google, Intuit, LinkedIn, Netflix, Pandora, PayPal, Pinterest, Reddit, Spotify, Uber, Twitter, yahoo, TripAdvisor. *Computer and Communications Industry Association*, including Amazon, AOL, BT, Cloudflare, Data Foundry, Dish, eBay, Facebook, Dish, Google, Microsoft, Intuit, Netflix, Pinterest, PayPal, Tivo, Taxslayer, Yahoo, XO Communications, Samsung, redhat, Rabuten, Nvidia, Foursquare, Endurance International, OpenConnect, Pandoro, Netaccesssystem technologies. *Information Technology Industry Council*, including Accenture, Adobe, Amazon, Apple, Brother, Canon, Dell, Dropbox, Facebook, Google, Hewlett Packard, IBM, Intuit, Intel, LinkedIn, Microsoft, Nokia, Oracle, Samsung, Sony, Tata, Visa, Twitter, Yahoo. *BSA/Software Alliance*, including Adobe, Apple, Dell, IBM, Intuit, Microsoft, Oracle, Siemens, Symantec, Trimble. *ACT/The App Association*, an organisation for small tech companies. *Consumer Technology Association*, whose list of 2200 members is not available, but most of the big players belong. *Internet Infrastructure Coalition*, including Amazon and Google. The May 2017 letter was from the Internet Association to Hon Robert Lighthizer, 16 May 2017, <https://cdn1.internetassociation.org/wp-content/uploads/2017/05/Lighthizer-Letter-5.16.pdf>. Its membership at this time included Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.

- no ISP liability for content posted by third parties;
- making the WTO customs moratorium on e-commerce permanent;
- non-discriminatory market access for digital services, including ‘new services’;
- eliminate ‘forced technology transfer’ requirements (includes source codes).

They also wanted a chief digital trade negotiator appointed in the Office of the USTR and the Digital Trade Working Group expanded.

1.2 The US Digital Trade agenda and the mega-regionals

In 2016 the Office of the USTR encapsulated the industry’s base lines in what it called the ‘Digital2Dozen’ principles.²⁵ These principles are couched in the language of freedom and choice versus barriers, discrimination and forced technology transfers or location:

1. promoting a free and open internet
2. prohibiting digital customs duties
3. securing basic non-discrimination principles
4. enabling cross-border data flows
5. preventing localization barriers
6. barring forced technology transfers
7. protecting critical source code
8. ensuring technology choice
9. advancing innovative authentication methods
10. delivering enforceable consumer protections
11. safeguarding network competition
12. fostering innovative encryption products
13. building an adaptable framework for digital trade
14. promoting cooperation on cybersecurity
15. preserving market-driven standardization and global interoperability
16. eliminating tariffs on all manufactured products
17. securing robust market access commitments on investment and cross-border services, including those delivered digitally
18. ensuring faster, more transparent customs procedures
19. promoting transparency and stakeholder participation in the development of regulations and standards
20. ensuring fair competition with state-owned enterprises
21. promoting strong and balanced copyright protections and enforcement
22. advancing modern patent protection
23. combating trade secret theft
24. recognising conformity assessment procedures.

The list encapsulated the US achievement in the Trans-Pacific Partnership Agreement (TPP), signed in February 2016 and which the USTR described as ‘the most ambitious and visionary Internet trade agreement ever attempted’ (USTR, 2016a). The electronic commerce chapter never leaked, so the parties were protected from external pressure. In addition to the most comprehensive chapter yet on e-commerce, the TPP would impose new restrictions on the

²⁵ USTR, The Digital 2 Dozen, 13 April 2016, <https://ustr.gov/sites/default/files/Digital-2-Dozen-Final.pdf>

twelve participating governments' ability to regulate cross-border, financial and telecommunications services. The other eleven parties had agreed with varying levels of enthusiasm.

The TPP e-commerce text provided the template for the TiSA Annex on Electronic Commerce, which was well advanced before negotiations were suspended in November 2016.²⁶ That Annex was supplemented by other proposed annexes on telecommunications, financial services, transparency, domestic regulation, and specific sectors, including express delivery and air transportation. Almost the entire industry wish-list was re-cast as services.

The US engaged in effective coalition building, just as it had when strategically seeding the GATS in the early 1980s.²⁷ Precedents in its legal texts were reinforced by the systematic promotion of the newly created 'norms' in multiple international forums.²⁸ The TPP text was transposed to negotiations that did not involve the US. Japan has emerged as the most vigorous champion of the US template, inserting a virtual copy of the TPP text into its FTA with Mongolia and pushing the agenda in the Regional Comprehensive Economic Partnership (RCEP), involving sixteen non-US countries including China and India.²⁹

Japan's role became especially important once the US withdrew from the TPP in November 2016 and from an active role in multilateral negotiations. The Trump administration has not taken a public position on forwarding the e-commerce template in its negotiations, but the same principles are reflected in the objectives formally identified by the USTR for the renegotiation of NAFTA.³⁰

1.3 A reality check on 'norm creation'

There are two major problems with this norm-creation exercise. First, none of the mega-regional agreements has entered into force. The only agreement that has the TPP e-commerce template to be concluded and ratified is the one-sided FTA that Japan negotiated with Mongolia (its first). The pact was signed in February 2015 after a mere six rounds of negotiations and entered into force in June 2016.³¹ All the real precedents are stalled:

- Since the Trump administration withdrew the US from the TPP, the remaining eleven countries have agreed to proceed with the original text, subject to the suspension of 20 items that would be re-activated if the US re-joined. The entire e-commerce and cross-border services chapters and annexes remain intact. Four matters are unresolved; only Canada's demand for a cultural exception, which is considered the most problematic, might have implications for e-commerce. However, the final deal is not yet agreed. Even

²⁶ TiSA, Annex on Electronic Commerce, undated (November 2016), <http://www.bilaterals.org/?tisa-draft-annex-on-electronic-32465>

²⁷ Kelsey (2008), pp.76-82

²⁸ OECD (2014) Principles for Internet Policy Making, OECD: Paris; G7 (2016) Principles and Actions on Cyber, 27 May 2016; G20 (2016) Digital Economy Development and Cooperation Initiative, Hangzhou, China, 5 September 2016

²⁹ Kelsey (2017a), pp.17-18 and Table 1

³⁰ Principally under the headings 'Trade in Services, Including Telecommunications and Financial Services', 'Digital Trade in Goods and Services and Cross-border Data Flows' and 'Intellectual Property'. USTR (2017), 'Summary of Objectives for the NAFTA Renegotiation, 17 July 2017, pp.7-8', <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>

³¹ Japan Mongolia Economic Partnership Agreement, Entered into force 7 June 2016, Chapter 9: Electronic Commerce. The only TPP provision missing was on cross-border movement of information.

if the four matters are resolved, the necessary ratifications and entry into force are a long way off.³²

- The TiSA negotiations are informally suspended with nothing to suggest an early revival. The draft texts that were leaked from the last round in November 2016 show no consensus on many issues, including the e-commerce annex.³³
- The US-EU Transatlantic Trade and Investment Partnership (TTIP) is off the agenda. Anyway, the EU's e-commerce proposal for TTIP was much more limited in scope than the TPP template.
- The EU TTIP proposal closer to the EU Canada Comprehensive Economic and Trade Agreement (CETA), which is only provisionally in force.³⁴
- The US is seeking to insert the e-commerce agenda into the NAFTA renegotiation,³⁵ given that Canada and Mexico have already accepted it in the TPP. But NAFTA's fate remains a big unknown.
- The Japan EU FTA is not yet concluded. An 'in principle' text published in July 2017 contains the full e-commerce text,³⁶ but has a placeholder on cross-border movement of data, which is a major sensitivity for the EU.³⁷ The financial services chapter includes a bracketed provision on cross-border data flows, which were omitted from the TPP.³⁸
- Japan has apparently proposed the TPP-style template in the RCEP. China, a number of ASEAN countries, and India are unlikely to accept key elements.³⁹ After 20 rounds of negotiations and nine ministerial meetings, the deadline for concluding that agreement has been extended to 2018.⁴⁰

These achievements fall far below any credible threshold for claiming a new normative regime. They are also wrought with power asymmetries. Developing countries who accepted the e-commerce text in the TPP and the Japan Mongolia FTA had minimal leverage on the issue. Vietnam apparently tried to suspend the transfer of information provision in the post-US version of the TPP and failed.⁴¹ Mongolia had no experience and minimal counter-weight in its FTA negotiations with Japan. Because no FTA except that one has entered into force,

³² See Comprehensive and Progressive Agreement on Trans Pacific Partnership, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/>

³³ TiSA, Annex on Electronic Commerce, <https://www.bilaterals.org/?tisa-draft-annex-on-electronic-32465>

³⁴ The European Union proposal for services, investment and e-commerce text: Chapter VI – Electronic Commerce, tabled 12-17 July 2015 and published on 31 July 2015. http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf

³⁵ USTR (2017) pp.7-8

³⁶ Japan EU EPA/FTA Consolidated text, as of 5 July 2017, Title [X] Trade in Services, Investment and E-Commerce: Chapter VI – Electronic Commerce,

http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155727.pdf

³⁷ Article 12; see European Union (2017), Communication on *Exchanging and Protecting Personal Data in a Globalised World*, COM(2017).

³⁸ Chapter [V] Section [VI] Financial Services, Article [6]. Transfer of Information and Processing of Information.

³⁹ Kelsey (2017a), esp.17-18

⁴⁰ 'RCEP Likely to be Signed in November Next Year', *United News of India*, 16 November 2017, <http://www.uniindia.com/rcep-likely-to-be-signed-in-november-next-year/world/news/1049020.html#g58XTJw3dEbSZldU.99>

⁴¹ Confidential communication to author.

there is also no actual experience of how those rules would operate outside the US regime on which they are based, especially in the global South.

2. REWRITING OF THE 'GATS ACQUIS'

Under Article III.2 of the Marrakesh Agreement a negotiating mandate can only be granted in relation to matters dealt with under the existing Agreements or that concern their multilateral trade relations if the Ministerial Conference so decides. Spam, e-signatures, e-contracts, source codes, cyber-security, free data flows and consumer protection are not 'matters that concern multilateral trade relations'. Instead, the TPP template is fundamentally about Internet governance. Much of what it covers has previously been raised in more appropriate forums like the International Telecommunications Union and the United Nations, only to be blocked by those now advocating rules in the WTO.⁴²

Provisions that can make a legitimate claim to fall within the WTO's jurisdiction mainly involve the regulation of services. As Aaditya Mattoo and Ludger Schuknecht acknowledged early in the discussions, most e-commerce is services and the relevant *trade* regime is the GATS.⁴³ The GATS allows Members to decide what commitments to make on market access and national treatment. Many have not done so in a large number of services sectors where electronic delivery is feasible.

The GATS architecture is considered an obsolete impediment by countries and companies who want to impose stricter constraints on the right of governments to decide how best to regulate services in their national interest. As the Really Good Friends of Services they sought to bypass the GATS altogether, and define the broad spectrum of e-commerce rules as 'services' for the purposes of the TiSA. That has failed, at least for now. The current e-commerce proposals are an attempt to do the same from inside the WTO. But they cannot simply rewrite the GATS rights and obligations without the Members' consent.

2.1 The GATS *acquis*

This paper refers to 'what has been acquired or achieved so far'⁴⁴ as the 'GATS *acquis*'. The Uruguay round negotiations were hard fought. There were many concessions and compromises.⁴⁵ Developing countries, led initially by India and Brazil, fought hard to retain some control over their exposure to rules that they believed were skewed in favour of wealthy countries and multinational corporations.

The notion of a mutually beneficial bargain was fundamental to the final consensus. Progressive liberalisation under Part IV is to be achieved through periodic negotiations of sectoral commitments involving an exchange of requests and offers. The balance of concessions negotiated by the parties is set out in positive list schedules that define the Member's legal obligations.

⁴² Hill, Richard (2013) *The New International Telecommunications Regulations and the Internet: A Commentary and Legislative History*, Schulthess/Springer: New York

⁴³ Aaditya Mattoo and Ludger Schuknecht (2000) 'Trade Policies for Electronic Commerce', World Bank Policy Research Working Paper 2380, p.2

⁴⁴ See WTO, 'Doha round: what are they negotiating?', https://www.wto.org/english/tratop_e/dda_e/update_e.htm

⁴⁵ Many are critical that the GATS intrudes too far into the domestic regulatory autonomy of sovereign states. I am one of those: see Kelsey (2008), but I accept the reality of its existence.

The GATS acquis includes mandatory development obligations in Article IV to make commitments in activities of commercial interest to developing countries, with special attention to LDCs. Article IV.3 and Article XIX.3 require particular sensitivity to the serious difficulty of LDCs in 'accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs'. That instruction was strengthened by Paragraph 26 of the Hong Kong ministerial declaration 2005 acknowledging that LDCs are not expected to undertake new commitments in the Doha round.

GATS Article V sets conditions for regional trade agreements to be exempt from Article II (most-favoured-nation treatment), with mandatory flexibility for countries in accordance with their level of development. That is routinely ignored, with developing countries making by far the higher levels of new liberalisation in North-South free trade agreements.⁴⁶ Guidelines on LDC Accession adopted by the General Council in 2002 required Members 'to exercise restraint in seeking market access concessions from acceding LDCs, in return for offers of 'reasonable concessions commensurate with their individual development, financial, and trade needs'.⁴⁷

To date, these development flexibilities have been largely honoured in the breach. A further unheeded element of the GATS acquis is the obligation in Article X to agree on emergency safeguard measures within three years of the Agreement entering into force – the only one of four unfinished GATS rules that had a deadline for completion written into the text.⁴⁸ That deadline has been extended twice and remained moribund.⁴⁹

The early academic writings of those seeking to advance the e-commerce agenda recognised the need to respect the acquis as they did so. Emad Tinawi and Judson Berkey proposed four criteria that any solution to e-commerce should meet:

1. Allow for the expansion of e-Services;
2. Be unambiguous and transparent;
3. Not change the bargains struck within the existing GATS commitments;
4. Not require substantial re-writing of the GATS.⁵⁰

2.2 E-commerce at the WTO

The proponents of e-commerce negotiations in the WTO have run roughshod over that acquis. Shortly after the Work Programme was established in late 1998 the US tabled a paper that asserted the most positive possible interpretation of the GATS, as it signalled the potential 'shortcomings of traditional approaches'.⁵¹ The US said all service sectors were already covered by the GATS; however, it might be useful for Members' to review the extent of their and others' commitments. There was 'no question' that commitments encompassed

⁴⁶ Jane Kelsey (2016) 'From GATS to TISA. Pushing the Trade in Services Regime Beyond the Limits', in Marc Bungenberg et al (eds), *European Yearbook of International Economic Law*, 138-139

⁴⁷ ICTSD, 'An Analysis of the WTO Accession Guidelines for Least Developed Countries', ICTSD, Information Note, November 2012, p.10

⁴⁸ Art XIII required negotiations on government procurement to begin within two years of GATS entering into force. Article XV negotiations on trade-distorting subsidies had no time frame. Article VI.4 negotiation on certain forms of domestic regulation were to develop 'any necessary' disciplines, again with no time frame.

⁴⁹ Eg. WTO, Report of the Chairperson of the Working Party on GATS Rules, S/WPGR/21, 14 April 2011, pp.1-2

⁵⁰ Emad Tinawi and Judson Berkey (2000) 'E-Services and the WTO: The adequacy of the GATS Classification Framework', OECD Forum on E-Commerce, p.9

⁵¹ Work Programme on Electronic Commerce, Submission by the United States, WT/GC/16, G/C/2, S/C/7, IP/C/16, WT/COMTF/17, 12 February 1999, p.2

delivery of services through electronic means, ‘in keeping with the principle of technological neutrality’.⁵² The moratorium on customs duties on electronic transmissions should be made permanent. Other parts of the paper addressed services classifications, procurement, intellectual property, domestic regulation, standards, and access to and use of telecommunications networks. Potential conflicts with the development acquis were dealt with by asserting that developing countries could ‘leap frog’ into the information age’ by liberalising market access and strategies to attract investment in building an infrastructure.⁵³ Most developing countries remained unconvinced.

In 2016, the US supported by Japan and the EU, pursued the same sentiments through a new avenue. On 4 July, the US circulated a non-paper setting out sixteen proposed rules that reflected its ‘Digital2Dozen’ principles.⁵⁴ Soon afterwards Japan, supported by several other countries, tabled a paper designed to ‘reinvigorate’ discussions on e-commerce in the WTO with a list of questions that Members were invited to address.⁵⁵ Soon afterwards, Japan responded to its own questions with a paper that annexed a table of the common coverage of e-commerce provisions in recent FTAs and mega regionals, which was presumably to convey the impression of a growing consensus around such rules. Simultaneously, an EU-led group that included Canada, Chile, South Korea and Cote d’Ivoire, tabled an even more comprehensive paper.⁵⁶ All presented the core TPP template in one form or other.

Those demands were refined and revised down over a year of discussions,⁵⁷ in the face of sustained resistance from Africa and the LDCs,⁵⁸ and alternative proposals from China that focused on cross-border customs facilitation⁵⁹. The EU-led proposals restricted their scope, appealing to the rubric of ‘trade facilitation’.⁶⁰ But that was clearly intended as a wedge to open negotiations that can subsequently expand to embrace the new ‘norms’. Japan remained hard-line.⁶¹ The proposed Draft Ministerial Decision on Electronic Commerce tabled by the EU et al in November 2017 would establish a Working Party on Electronic Commerce to enable that, with a mandate to ‘conduct preparations for and carry out negotiations on

⁵² WT/GC/16, 12 February 1999, p.3

⁵³ WT/GC/16, 12 February 1999, p.2

⁵⁴ Prohibiting digital customs duties; securing basic non-discrimination principles; enabling cross-border data flows; promoting a free and open internet; preventing localization barriers; barring forced technology transfers; protecting critical course code; enduring technology choice; advancing innovative authentication methods; safeguarding network competition; fostering innovative encryption products; building an adaptable framework for digital trade; preserving market-driven standardization and global interoperability; ensuring faster, more transparent customs procedures; promoting transparency and stakeholder participation in the development of regulations and standards; recognizing conformity assessment procedures.

⁵⁵ Work Programme on Electronic Commerce. Reinvigorating Discussions on Electronic Commerce, circulated at the request of Japan, JOB/GC/96/Rev 1, 14 July 2016

⁵⁶ Work Programme on Electronic Commerce, Trade Policy, the WTO, and the Digital Economy, JOB/GC/97, 14 July 2016

⁵⁷ For a useful summary of the 2016 proposals see South Centre (2017), ‘The WTO’s Discussions on Electronic Commerce’, Analytical Note SC/AN/TDP/2017/2, January 2017; see also South Centre, WTO MC11: Issues at Stake for Developing Countries, Informal Note on MC11, 6 November 2017

⁵⁸ Work Programme on Electronic Commerce, Report of Panel Discussion on “Digital Policy and Development”. Communication from the African Group, JOB/GC/133, 21 July 2017

⁵⁹ General Council, Work Programme on Electronic Commerce, Aiming at the 11th Ministerial Conference. Communication from the People’s Republic of China and Pakistan, JOB/GC/110/Rev.1, 16 November 2016

⁶⁰ Council for Trade in Services, Special Session, Communication from the European Union. An enabling environment to facilitate online transactions’, TN/S/W/64, May 2017

⁶¹ General Council. Possible Way Forward on Electronic Commerce. Communication from Japan, JOB/GC/130, 14 July 2017

trade-related aspects of electronic commerce on the basis of proposals by Members'.⁶² Despite a small group of Friends of E-commerce for development,⁶³ the battle lines were drawn largely over the development agenda.

However, the argument of this paper is whatever the outcome at the MC11, the right of developing countries to determine their own strategies for digital industrialisation and Internet governance is equally at risk from redefining the GATS by stealth, or by leaving unresolved the uncertainties identified by the e-commerce discussions in the Council on Trade in Services. That may involve an overlay of e-commerce rules on these unresolved matters, or US-style assertions of the meaning of GATS rules in obligations. Particular risks arise from expansive reading of services classifications, the blurred borderline between mode 1 (cross-border services) and mode 2 (consumption abroad), and assertions of technological neutrality of commitments.

2.3 Modes 1 and 2

The GATS was an experiment. The two existing 'trade in services' agreements – the Canada US Free Trade Agreement (1988) and the services protocol to the Australia New Zealand Closer Economic Relations Trade Agreement (1989) - did not differentiate the delivery of services by 'mode'. They covered a service provided 'within or into the territory' of the other party. When the four modes of delivery were concretised in the early 1990s, mode 1 (cross-border delivery) was assumed to be delivery by post, telephone or telegram, and mode 2 (consumption abroad) involved activities like foreign tourism or ship repairs in a foreign country. While the offshore location of the supplier is the defining feature of both, it cannot be assumed that the consumer is in their home country for mode 1 and offshore for mode 2. Indeed, elements of a single transaction may combine several modes.⁶⁴ The distinction was not a major issue when the GATS was first designed. The main demands and defensive interests in the request and offer process focused on rights of foreign investment through mode 3.

Digital trade (think Amazon) is blurring the already grey boundary between mode 1, mode 2 and services provided through foreign presence (mode 3).⁶⁵ That lack of clarity now causes problems for the GATS acquis. Laura Altinger and Alice Enders' analysis of GATS commitments by mode show that Members have extremely high levels of full commitments on mode 2, but an almost equivalent lack of commitments on mode 1.⁶⁶ If a transaction is classified as mode

⁶² General Council, Work Programme on Electronic Commerce, JOB/GC/140/Rev5, 30 November 2017, supported by Australia, Canada, Chile, Colombia, the EU, Israel, South Korea, Mexico, Montenegro, New Zealand, Norway, Paraguay, Peru, Ukraine.

⁶³ General Council, Work Programme on Electronic Commerce, Electronic Commerce and Development, JOB/GC/117, 14 February 2017, non-paper from Brunei, Colombia, Costa Rica, Hong Kong China, Israel, Malaysia, Mexico, Pakistan, Panama, Qatar, Seychelles, Singapore and Turkey. Their main focus was on practical matters of e-commerce readiness and strategy, ICT infrastructure, trade logistics, and payment systems, but that was accompanied by calls for legal and regulatory frameworks that would constraint their regulatory autonomy to help achieve those goals.

⁶⁴ A bank transfer from one country to another is mode 1, but the foreign bank account in which the funds are then held, invested and earn interest is likely mode 2.

⁶⁵ OECD (2016), Towards a G20 initiative on measuring Digital Trade: mapping challenges and framing the way forward, OECD: Paris, p.1-2, <http://www.oecd.org/g20/summits/hamburg/Towards-a-G20-Initiative-on-Measuring-Digital-Trade.pdf>

⁶⁶ Laura Altinger and Alice Enders, 'The Scope and Depth of GATS Commitments', *The World Economy*, May 1996, p. 320 Table 5.

2, rather than mode 1, it could massively expand a country's commitments far beyond the original bargain that it believed it was making in the 1990s. The offshore, rather than domestic regulatory regime, would probably apply. A mode 1 market access commitment carries an obligation not to restrict cross-border movement of capital that is an essential part of the service.⁶⁷ No similar obligation applies for mode 2.⁶⁸

Some might argue that an expansive interpretation in the context of new technology would liberalise market access and be consistent with the progressive liberalisation objectives of the GATS. But Tinawi and Berkey suggest that may be 'troublesome', because it would expand those commitments beyond what the Members originally agreed. The GATS acquis requires that new market access commitments are matched by similar concessions from other countries, with the mandated development flexibilities. Realigning the classifications 'would alter by fiat the GATS commitments that countries made during the Uruguay round and subsequent accession negotiations' and be

tantamount to changing the deals reached among countries without further trade negotiations. This seems contrary to GATS itself which calls for "successive negotiations with a view to promoting the interest of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations."⁶⁹

Further, countries may have made full commitments to mode 2 on the assumption they had no ability to control their offshore consumption. Expanding that 'may again constitute a renegotiation of the GATS commitments'.⁷⁰

2.4 Services Classification

A similar dilemma applies to classifications that are used to identify the services sectors committed in a schedule. The voluntary approach to scheduling adopted in the GATS has seen some Members use the WTO classification list (W/120),⁷¹ some record digits from the UN provisional Central Product Classification (UNPC) 1991 that is referenced in W/120, some have no description, and some have a mix of each. More recent agreements may use later versions of UNPC or the International Standard Industrial Classification (ISIC)⁷².

Digital services add multiple new problems. Some 'new services', such as social media like Facebook, have no obvious classifications. Those wanting to argue they are covered by the GATS, as the US did in 1999, will read existing classifications expansively in ways that were never envisaged when a commitment was made. Mattoo and Schuknecht compiled a table of original GATS commitments in mode 1 for sectors related to e-commerce.⁷³ This shows around half of Members have full or partial mode 1 commitments in Computer and related services. Applying those commitments to computer and related services that exist in 2017 would expand obligations on developing countries that are totally incompatible with the GATS

⁶⁷ GATS Article XVI, footnote 8

⁶⁸ Many contemporary FTAs combine the modes, which simplifies the boundary for the purpose of that agreement, but makes it difficult to compare those obligations with other agreements that use the four modes, including in the application of MFN.

⁶⁹ Tinawi and Berkey (2000) p. 6 (original emphasis)

⁷⁰ Tinawi and Berkey (2000), pp.6-7

⁷¹ WTO, Services Sectoral Classification List. Note by the Secretariat, MTN.GNS/W/120, 10 July 1991

⁷² https://unstats.un.org/unsd/publication/seriesm/seriesm_4rev4e.pdf

⁷³ Mattoo and Schuknecht, p.14 and Table 4.

acquis. Even higher levels of mode 1 commitments have been made in financial, professional, other business, and travel agency services, so similar considerations apply.

In situations where an existing CPC cannot be read expansively, the alternative is the opaque or open-ended classification of 'other'. Again, applying commitments to services that did not exist at the time they were made expands obligations far beyond the original bargain. Mattoo and Schuknecht observe that a positive listing approach makes it 'questionable whether the "other" category that exists within most clusters of services activities could legitimately be considered to encompass new services'.⁷⁴

The service supply chain has also become much more complex. Multiple functions of digital operators have become highly fungible, allowing firms to designate themselves opportunistically for tax, labour or regulatory purposes. Is Uber, Google, Expedia or Airbnb supplying a computer service, or transportation, advertising, travel agency or accommodation service? This ambiguity cross-fertilises with the modal uncertainties discussed above to place governments at an unacceptable degree of legal risk. Developing countries are most exposed, as many are still developing rudimentary regulatory regimes to address these issues.

Problems of classification are intensified by the increasing servicification of production through digitally delivered manufacturing (sometimes referred to as additive manufacturing or 3D printing⁷⁵). The OECD notes that a 'digitally delivered design service rendered into a product in the country of delivery' is cross-border service transaction,⁷⁶ which might fall under commitments on all or any of design, software engineering, marketing, advertising, printing and distribution services.

2.5 Technological neutrality⁷⁷

The script on technological neutrality has been written by those whose interests it serves. The US asserted as early as 1999 that 'there should be no question that where market access and national treatment commitments exist, they encompass the delivery of services through electronic means, in keeping with the principle of technological neutrality'. It was less certain about the state of 'new services'.⁷⁸ In 1999 Australia unsuccessfully proposed that the Seattle ministerial declaration should 'reiterate the precept of technological neutrality which applies to commitments made under the GATS'.⁷⁹

In similar vein, the WTO Secretariat's note from a meeting in December 1998 recorded that:

On the basis of the informal meeting the Chairman provided the following summary under his own responsibility: . . . Members agreed that the GATS applied to all services regardless of the means of technology by which they were delivered. This was further reinforced by the fact that in no area of the WTO were there different rules for different techniques of delivery. It was noted that the principle of technological neutrality also applied to scheduled commitments, unless the schedule specified

⁷⁴ Mattoo and Schuknecht, p.17

⁷⁵ for the challenges this poses to developing countries and LDCs see UNCTAD (2017), *Rising Product Digitalisation and Losing Trade Competitiveness*, UNCTAD, UNCTAD/GDS/ECIDC/2017/3

⁷⁶ OECD (2016), p.6,

⁷⁷ I am indebted to Sanya Reid Smith for her research on the WTO history of technological neutrality in the GATS.

⁷⁸ WT/GC/16, 12 February 1999, p.3

⁷⁹ General Council, Preparations for the 1999 Ministerial Conference. WTO Services Negotiations. A Communication from Australia, WT/GC/W/353, S/C/W/126 11 October 1999, para 15.

otherwise: it was therefore possible for Members to schedule commitments in a non-technologically neutral manner. It was suggested that consideration should be given to how technological neutrality in electronic commerce would apply to existing commitments and to certain new services.⁸⁰

The WTO Secretariat (which has no authority to interpreting the texts) referred back to this document as authority for technological neutrality as recently as 2014: ‘Referring to a Services Council document on e-commerce in 1990s, he noted that the principle of technological neutrality had been established for quite some time’;⁸¹ and again, in 2015, noting ‘a report of the Services Council, contained in document S/L/74 dated 27 July 1999, which examined how different GATS provisions would apply to e-commerce. It was there that Members had agreed to the concept of technological neutrality’.⁸² The document actually said that was the ‘general view’ and some delegations said the issue needed further discussion.⁸³ Yet, the Secretariat’s inaccurate version has been repeated as true.⁸⁴

There is a long history of WTO documentation that shows otherwise. The oft-cited minutes of the Council on Trade in Services meeting in 1998 recorded that: ‘Several delegations said that it was important to affirm the technological neutrality of the GATS *but some delegations wished to see more discussion of this notion*’.⁸⁵ The draft Interim report of the Council for the meeting on 9 February 1999 actually said:

Members *generally agreed* that the principle of technological neutrality applied to GATS commitments, meaning that market-access commitments cover the supply of the committed service by all technological means, including electronic means. . . . It was the *general view* that the principle of technological neutrality applied to all specific commitments, including all market access and national treatment aspects.⁸⁶

The progress report from the Work Programme on Electronic Commerce to the General Council, adopted by the Council for Trade in Services on 19 July 1999, records that ‘*Some delegations expressed a view that these issues were complex and needed further examination*’.⁸⁷ This note was quoted by the panel in *US–Gambling* when it noted that the principle of ‘technological neutrality ... seems to be *largely shared* among WTO Members’.⁸⁸ The Council’s report on the e-commerce discussions from March 1999 observed that: ‘Issues on which *a common understanding appeared to be emerging* include . . . The technological

⁸⁰ Council for Trade in Services, Report of The Meeting Held On 14 and 15 December 1998. Note by the Secretariat, S/C/M/32, 14 January 1999, p.4

⁸¹ Committee on Specific Commitments, Report of the Meeting held on 18 September 2014, S/CSC/M/71, 15 October 2014, para 1.13

⁸² Committee on Specific Commitments. Report of the Meeting held on 14 October 2015, S/CSC/M/74, 27 November 2015, para 2.35

⁸³ Council for Trade in Services, Interim Report to the General Council: Work Programme on Electronic Commerce, S/C/8, 31 March 1999

⁸⁴ Tinawi and Berkey (2000), p.4

⁸⁵ Council for Trade in Services, Report of The Meeting Held On 23 and 24 November 1998. Note by the Secretariat, S/C/M/31, 9 December 1998, p.2

⁸⁶ Council for Trade in Services, Draft: Interim Report on Electronic Commerce, S/C/W/100, 17 March 1999, para 16.

⁸⁷ Council for Trade in Services, Revised Draft. Work Programme on Electronic Commerce, Progress Report to the General Council, S/C/W/115/Rev.1, 20 July 1999, para 4

⁸⁸ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 10 November 2004, para 6.285

neutrality of the Agreement would also mean that electronic supply of services is permitted by specific commitments unless the schedule states otherwise.⁸⁹

Developing country members became increasingly insistent that there was no such agreement. The report of the meeting in June 1999 implied a near consensus: 'In summarising the outcome of previous discussions, the Chairman recalled that delegations *generally agreed* that the principle of technological neutrality applied to specific commitments and underlined that it was important not to undermine existing commitments by suggesting that electronic delivery of services was not covered by the GATS. *However it had been pointed out that it was necessary to discuss how restrictions on the technical means of delivery should be treated.* The emergence of electronic commerce should not provide a reason to schedule new restrictions. *Rather, the specification of some modes in the schedules as unbound due to lack of technical unfeasibility may need to be reviewed in the light of technological developments.*'⁹⁰

In fact, India insisted at that meeting that '*it could not be presumed that the principle of technological neutrality applied automatically to all specific commitments of Members, as this would have legal and political consequences arising out of negotiations in the Uruguay Round and resulting commitments. According to India a full consideration of the negotiating history of the GATS would be useful in this respect.*'⁹¹

Similar dissent was expressed in other forums where e-commerce was being discussed. In the Committee on Trade and Development in December 2000, India's representative objected to statements in briefings on e-commerce by the Secretariat (and international organisations), saying:

in particular, she had heard it stated that the GATS guaranteed the right to do business electronically, that this was neither accidental nor incidental, and that this had been in the mind of some negotiators involved in the GATS. She had also heard it said that technological neutrality was fundamentally important and that this was an issue which had emerged from the work programme. She said that she had revisited the reports made by the subsidiary bodies to the General Council, and *could not find any agreement by Members that these were conclusions that had been collectively reached.*⁹²

In May 2001, Mercosur set out a number of horizontal and sectoral issues that required more analysis in a communication to the General Council regarding the Work Programme on e-commerce. The list included 'the scope of the GATS with respect to the electronic delivery of services, in particular the issues relating to the so-called concept of technological neutrality of the Agreement and the distinction between modes of supply 1 and 2'.⁹³ Venezuela echoed that call, on behalf of a number of Latin American countries.⁹⁴ At the next General Council Saint Lucia 'challenged the notion of technological neutrality, as it could have far-reaching impact on future commitments, including across-the-board adoption of commitments in

⁸⁹ S/C/8, 31 March 1999, para 4

⁹⁰ Council for Trade in Services, Report of the Meeting held on 22 and 24 June 1999, S/C/M/37, 20 July 1999, para 25

⁹¹ S/C/M/37, 20 July 1999, para 28

⁹² Committee on Trade and Development, Note on the meeting of 27 October and 8 November 2000, WT/COMTD/M/31, 14 December 2000, para 57

⁹³ Electronic Commerce. Horizontal and Sectoral Issues which Require Further Analysis. Communication from MERCOSUR, WT/GC/W/434, 7 May 2001, para 8

⁹⁴ General Council, Minutes of Meeting of 8 and 9 May 2001, WT/GC/M/65, 18 June 2001, para 116

terms of the removal of barriers, the extension of commitments in one sector to a complimentary [sic] sector, or the adoption of regulatory principles without regard to the discretion built into the GATS'.⁹⁵ Several months later Cuba stressed the development implications of the interpretation.⁹⁶

Similar dissent was recorded in relation to financial services. India advised the Committee on Financial Services in 2001 that 'its capital was in the process of examining the issue of technological neutrality vis-à-vis financial services', and that 'India's preliminary view was that given the bottom-up approach of the GATS, the commitments for new services delivered through new technologies would have to be taken afresh and existing commitments would not apply to them'.⁹⁷ Several years later Uruguay rebutted an assertion from Switzerland that 'Even though there was no precise reference to technological neutrality in the GATS, that was assumed by the Agreement'. Uruguay said '*the concept of "technological neutrality" was not in the GATS. That was a legal interpretation by the Swiss delegation, but there was no agreement among Members on that issue*'.⁹⁸ The Philippines⁹⁹ and Malaysia¹⁰⁰ supported Uruguay.

The Marrakesh agreement sets out a process for resolving questions of interpretation.¹⁰¹ That process has not been pursued to clarify whether the GATS requires technological neutrality.

Aside from the lack of consensus, there are sound legal grounds for rejecting the notion. It is a logical consequence of progressive liberalisation and request and offer bargaining of schedules that Members are only bound by what they could foresee at the time of negotiating their commitments. Technological neutrality would mean that commitments negotiated in the early 1990s that came into force in 1995 apply, whatever new technology is invented to deliver that service via that mode in future, even if it was totally unforeseeable and the government would not have made the commitment, or at least limited its application, had they known.

Secondly, there is no reference to the alleged principle in the original Scheduling Guidelines, or their revised version in 2001,¹⁰² which provide detailed but non-binding

⁹⁵ Council for Trade in Services, Special Session, Report of the Meeting held on 9 to 12 July 2001, S/CSS/M/10, 21 September 2001, para 204

⁹⁶ Council for Trade in Services, Special Session, Report of the Meeting held on 5, 8, and 12 October 2001, S/CSS/M/12, 28 November 2001: 'the definition of technological neutrality was not included in the GATS, as it had been introduced in the negotiation on basic telecom in a very specific context. Developing countries could consider when that concept would affect their flexibility and their right to condition entry to their markets depending on the technology to be used, and perhaps transferred', para 143

⁹⁷ Committee on Trade in Financial Services, Report of the Meeting Held on 9 May 2001, S/FIN/M/31, 1 June 2001, para 11

⁹⁸ Committee on Trade in Financial Services, Report of the Meeting Held on 16 May 2003, S/FIN/M/40, 30 June 2003, para 28

⁹⁹ S/FIN/M/40, 30 June 2003: 'There was no reference to technological neutrality in the GATS, and such a concept had not really been assumed by the GATS. In any case, that was only Switzerland's interpretation', para 34; see also Committee on Trade in Financial Services, Report of the Meeting Held on 6 October 2003, S/FIN/M/42, 12 November 2003: 'technological neutrality was not a basic assumption of the GATS. It was not provided for, either explicitly or implicitly, in the GATS', para 16.

¹⁰⁰ S/FIN/M/40, 30 June 2003: 'There was no agreement among Members on the actual meaning of technological neutrality. The Malaysian delegation did not share Switzerland's views on that issue.', para 35;

¹⁰¹ Article XIX vests the Ministerial Conference and the General Council with exclusive authority to adopt interpretations of the WTO agreements.

¹⁰² Scheduling of Initial Commitments on Trade in Services. Explanatory Note, GNS/W/164, 3 September 1993 and Addendum of 30 November 1993; and WTO, Guidelines for the Scheduling of Specific Commitments under

guidance to Members. For example, the scheduling guidelines explicitly advise Members who inscribe mode 1 as 'Unbound due to technical infeasibility' that the entry reverts to being Unbound if cross-border delivery of the service becomes feasible.¹⁰³ They are silent on the more significant matter of technological neutrality.

Mattoo and Schuknecht identified three other legal arguments why the principle of technological neutrality 'cannot be taken for granted'¹⁰⁴ (arguments that India used, albeit without attribution, in the General Council in 2001¹⁰⁵). First, classifications under the UNPCP sometimes provide exhaustive definitions of the means of delivery, meaning they are not technology neutral.

Second, the decision to treat electronic delivery of software services differently from delivery of software services through another means, such as postal delivery, for the purposes of imposing customs duty undermines the notion of technological neutrality and the presumption of 'likeness' required for national treatment.

Third, the extended negotiations on telecommunications that were concluded in 1997 stated explicitly that technological neutrality applied. This resulted from an interpretive note proposed by the Chair of the Group on Basic Telecommunications that said the listed services could be applied through any technology; the group adopted the chair's report and it was attached to its report to the Services Council.¹⁰⁶ There is no equivalent statement for the GATS. Furthermore, the Chair's note says explicitly that it was not intended to have or acquire any binding legal status.¹⁰⁷

A stronger inference could be drawn from the explicit application of technological neutrality in the e-commerce chapters of recent US FTAs, notably KORUS, CAFTA and AUSFTA. In these, 'The Parties affirm that measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapters [...] through [...] (Investment, Cross-Border Trade in Services, and Financial Services), which are subject to any exceptions or non-conforming measures set out in this Agreement that are applicable to such obligations.'¹⁰⁸ This provision would not be necessary if there was genuinely a consensus that technological neutrality automatically applies to commitments in trade in services schedules, unless stated otherwise. Even with a negative list approach to scheduling, the US felt it necessary to make the principle explicit.

2.6 Ineffectual safeguards

Proposals to adopt new e-commerce disciplines would overlay these unresolved legal complexities. There is a strong likelihood that the proponents would proceed with an assumption that their self-interested interpretation applies, irrespective of the documented record and the integrity of the GATS acquis logic. That prospect highlights a further failure to adopt any emergency safeguard mechanism in the GATS.

the General Agreement on Trade in Services. Adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001

¹⁰³ SL/92, 28 March 2001, para 47

¹⁰⁴ Mattoo and Schuknecht (2000), pp.16-17

¹⁰⁵ WT/GC/M/65, 18 June 2001, para 205

¹⁰⁶ General Council, WTO Agreements and Electronic Commerce, WT/GC/W/90, 14 July 1998, para 8.

¹⁰⁷ Group on Basic Telecommunications, Report of the Group on Basic Telecommunications, S/GBT/4, 15 February 1997, p.3

¹⁰⁸ KORUS Article 15.2

Article X required safeguards to be agreed three years after the GATS was signed. That deadline was first extended to 31 June 1999. A week before that expired it was extended again until 15 December 2000. It remains a phantom GATS obligation with which developed countries have never engaged. Ironically, domestic regulation disciplines that have the least strong mandate is the only unfinished business they have pursued with vigour.

Tinawi and Berkey suggest that not extending the scope of existing commitments, and hence preserving members regulatory space, amounts to a disguised safeguard regime for e-services.¹⁰⁹ As the preceding analysis shows, that alternative protection is far from secure.

Mattoo and Schuknecht rather casually remark that 'In the context of electronic commerce, Article XIV would provide any necessary legal cover for measures required to protect privacy, prevent dissemination of socially undesirable material, and to deal with fraud'.¹¹⁰ That seriously overstates the protection from the general exception, which is even more contingent and circumscribed for privacy and consumer protection than for health, environment, public order or public morals.¹¹¹ Moreover, as an exception it is likely to 'be interpreted narrowly, and its scope cannot be expanded to cover other regulatory objectives from those listed therein'.¹¹² Again, developing countries are most vulnerable when relying on the exception, as they have the least sophisticated regulatory regime already in place and new measures are most likely to be challenged on the grounds of necessity or disguised trade protection.

E-commerce raises the additional concern about measures taken to protect national security. The security exception (Article XIV*bis*) allows a state to judge for itself whether a measure is 'necessary' in its 'essential security interests'. However, the defence is only available in specific circumstances. The most relevant situation is an 'emergency in international relations'. That might apply to cyber-security in a particular context. But it seems to exclude general longer-term and precautionary measures to protect data, require source disclosure or restrict new technologies whose implications are unknown.

The US and several other countries implicitly recognised the problem when they proposed a specific security exception for the e-commerce annex in TiSA that gives governments stronger rights: a government could define what are its 'essential security interests' and what action it considers is necessary to protect them.¹¹³

3. Where to from here?

The WTO is paralysed, for good reason. Its foundations were laid by powerful actors seeking to make rules that benefit their strategic and commercial interests. They promised that multilateralism would blunt the abuse of raw power through a rules-based system negotiated and conducted on the basis of one state one vote and consensus. They set the agenda of the Uruguay round on agriculture, intellectual property rights and services. In return, resistance from developing countries secured concessions and promises that remained largely undelivered. The Doha 'Development' Round was meant to address them. It didn't. Now the same powerful players want to bury it and move on with a new agenda that serves their

¹⁰⁹ Tinawi and Berkey (2000), p.7

¹¹⁰ Mattoo and Schuknecht (2000), p.19

¹¹¹ Discussed in Kelsey (2017b), pp.39-40

¹¹² Trade in Services, Work Programme on Electronic Commerce. Progress Report to the General Council, S/L/74, 27 July 1999, para 14.

¹¹³ TiSA, Article 13, Annex on Electronic Commerce, undated (November 2016)

strategic and economic interests and those of their corporations. But they are facing a principled response from a number of developing countries that have a much greater political mass and for whom the stakes are sufficiently high to fight back.

Electronic commerce is the principal 'new issue' behind which the more fundamental question about the future direction of the WTO is being played out at the MC11. Focusing on the specific proposals of e-commerce blunts the more direct, systemic challenge and creates potential to divide and rule. All the developed WTO members seem to support the agenda. Some are threatening to negotiate a plurilateral agreement if there is no consensus at the MC11. But, as TiSA showed, that may be easier said than done, and even if they succeed it may have a minimal negative impact on those who do not participate.

The South is not so homogenous. China, India, Russia and Brazil have their own, different positions. A group of less influential countries support 'e-commerce for development', focusing on its facilitation dimensions, rather than the impacts of the proposed rules. The LDCs and the Africa group have been more strongly opposed. In their pre-ministerial statement, the Africa group put the onus on those proposing a negotiating mandate to justify new rules that 'would entrench existing imbalances and further constrain the ability of our governments to implement industrial policy and catch-up'.¹¹⁴ India proposed the continuation of the Work Programme based on the existing mandate and guidelines in the relevant WTO bodies, subject to periodic reviews by the General Council of reports from the councils.¹¹⁵

Whether or not there is a new negotiating mandate on e-commerce, or a new institutional forum through which one can eventuate, WTO Members will still need to address the unresolved questions and unfinished business of the GATS in a manner that is faithful to its development obligations. The dominant players from the global North have so far been unwilling to do that. But the WTO is not supposed to be an arena where the most powerful can say 'yeah, I agreed to that back then because it was the only way to get a deal, but it doesn't suit me any more so I'm changing the rules'. The stakes are too high.

No-one denies the opportunities and challenges the digital age presents. But equally, no-one can deny the realities of the digital divide that mean the vast majority of people, communities and businesses in poor countries cannot participate in local e-commerce, let alone internationally through platforms that GAFA (or Alibaba) controls. Rules on Internet governance should not be shoe-horned into the concept of 'multilateral trade relations', any more than monopoly rights over intellectual property should have been in the Uruguay round. The WTO has a formal mandate and an informal *acquis* that requires a genuine commitment to real development. That mandate and *acquis* must be govern, and circumscribe, its operations. If the WTO fails to do so, its future is truly in jeopardy.

¹¹⁴ General Council, The Work Programme on Electronic Commerce, Statement by the Africa Group, JOB/GC/144, 20 October 2017, para 3.2.

¹¹⁵ General Council, Work Programme on Electronic Commerce, Communication from India, JOB/GC/153, 20 November 2017

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