

Background Paper

Dynamic Coalition on Trade & the Internet

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LIST OF ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
EU	European Union
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
ICANN	Internet Corporation for Assigned Names and Numbers
IP	Internet Protocol
IPRs	intellectual property rights
ISPs	Internet service providers
IT	information technology
ITA	Information Technology Agreement
MNEs	multinational enterprises
OECD	Organisation for Economic Co-operation and Development
PCs	personal computers
RCEP	Regional Comprehensive Economic Partnership
SMEs	small and medium enterprises
TBT	Technical Barriers to Trade
TiSA	Trade in Services Agreement
TRIPS	Trade Related Intellectual Property Rights
TPP	Trans Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UPICC	Uniform Principles of International Commercial Contracts
US	United States
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Preface

Proliferation of digital technologies and cross-border flow of information has created social, economic and cultural growth. Nations now face the challenge of ensuring that the opportunities and benefits driven by Internet and communications technologies (ICT) are shared by all. With the development of national standards and the emergence of digital players transforming production processes and industries, there is increased push for centrally controlled regulatory environment for the Internet and Internet related services. This is driven by both economic and strategic interests.

The pace of ICT adoption and its impact on national economies has raised concerns about the legitimacy of control and civic participation. Issues that were considered purely technical have transformed into areas for strategic governance and tools for foreign policy. While the Internet was conceived as a technology that would defy national borders, the historical imbalance of the United States' domination of ICTs and growing fears of surveillance has created the political momentum for increased state control on regulatory aspects of the Internet.

The evolution of the Internet from a research network to a platform for commerce presents challenges for trade law. The World Trade Organization (WTO) agreements were developed more than two decades ago and are inadequate in dealing with complex issues of present day digital economy. While the role of nation states in regulating physical goods and services has been established in global trade order, the role of nation states with respect to cross-border flow of information is less understood.

This is partly due to the novelty of digital technologies and the associated unorthodox processes that have evolved in the context of its governance. Existing Internet governance (IG) frameworks—many of which are still evolving—are led by multistakeholder decision-making where state and non-state actors address issues through open and transparent arrangements of rulemaking. This is in contrast to conventional regulatory domains which feature state-led processes for the development of global norms and treaties.

In the absence of global binding norms on Internet related issues, and in light of fears of rising 'digital protectionism', states are seeking to draw up rules and frameworks for regulation of the digital economy through conventional mechanisms for international cooperation such as trade agreements. Although trade and Internet governance appear to be disconnected, with the growing significance of the Internet for international trade, a tenuous and complex relationship between the fields is emerging that will have repercussions on the development of the digital economy.

Direct or indirect inclusion of contemporary issues related to the Internet are being included in plurilateral and multilateral arrangements with the aim to counter restrictive measures on data flows that hinder cross-

border trade. For example, the Electronic Commerce Chapter of the Trans-Pacific Partnership Agreement (TPP) contains provisions that ban data localization. Such provisions are accompanied by other legal obligations on cybersecurity, spam and intellectual property. Similar provisions are also being proposed in other ongoing plurilateral trade negotiations including the the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TISA), the Regional Comprehensive Economic Partnership (RCEP) and most recently the North American Free Trade Agreement (NAFTA).

Any framework or rules evolving out of these agreements will have a deep impact and Internet governance processes and policymaking. Regulating commercial aspects of Internet through trade agreements entails choices that will significantly influence and bear repercussions for critical aspects of the emerging digital economy. It requires coming up with global solutions that strike a balance between trade liberalization and preservation of fundamental goals of Internet governance such as openness, transparency and protection of human rights. It would also necessitate resolving differences in political and ideological stance on issues like privacy, innovation and democratic standard setting.

It is important to understand the complexities and risks involved in aligning the disciplines of trade policy and Internet governance. Despite recent initiatives, it is important to take a step back and question whether trade agreements should be concerned with setting standards for Internet technologies or on issues such as national security and privacy. Going forward policymakers and governments need to understand how the application of international trade law could be better aligned with values of Internet governance such as openness and inclusion.

With the aim of bringing in a multistakeholder approach to application of international trade civil society, private sector, technical and academic community members have come together to form the Dynamic Coalition on Trade and the Internet (DCTI). The Dynamic Coalition was formally approved by the Internet Governance Forum (IGF) Secretariat in February, 2017 and the inaugural meeting will be held in Geneva in December 2017. The Dynamic Coalition aims to serve as a liaison between representatives from trade institutions and government delegations and the broader IGF community. The Coalition been established to address the lack of transparency in international trade negotiations and domestic consultation processes and provide recommendations about how Internet public policy can be developed in a transparent and inclusive way. The Coalition will also serve as an interface for the exchange of information and best practices on Internet public policy issues.

This paper is a resource developed for the DCTI and summarizing the issues, concerns and recent developments on trade and digital rights. The paper is divided in four parts.

Part I provides a background to the evolution of trade frameworks in the context of digital trade agenda. This section will draw on history of intellectual property trade frameworks and recent attempts to introduce e-commerce related issues in the digital trade agenda.

In Part II we cover the trade negotiations that have included digital issues or are currently being negotiated. We delve into the status of negotiations including the areas where countries have reached consensus or others where negotiations face inability to pass muster and what experts have been saying on these issues.

Part III we address some of the emerging themes and issues in the context of the digital economy that are increasingly being included in trade agreements. We analyze these provisions based on the implications for Internet governance and on consumers and human rights online.

In Part IV we highlight some of the procedural inconsistencies between the multistakeholder approach that is common to Internet governance. We provide a broad-range of recommendations for introducing transparency and opening up digital trade negotiation processes by by governments for the participation by affected stakeholders and NGOs. The recommendations seek to establish a framework for participation of diverse stakeholders when developing rules through regional and mega-regional trade treaties.