Reality Check: The lack of consensus on new trade rules to govern the digital economy

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This article makes three arguments. First, that beyond a very narrow set of largely uncontroversial disciplines on domestic legislative reforms to facilitate or promote e-commerce and cooperate in this area, it has proven and will likely continue to prove extremely difficult to establish anything but the most superficial consensus with respect to meaningful new trade rules to govern the digital economy. Second, it argues that with respect to a second set of rules that seek to establish genuine and enforceable constraints to governments' ability to effect harmful regulatory interventions in the digital economy, the textual outcomes that have emerged so far in trade agreements such as the CPTPP are so riddled with broadly formulated exceptions and carve-outs, that there is little prospect for business to obtain the predictability and certainty that these new rules should ideally promise. Finally, this article argues that a set of exogenous factors has conspired to make the need to establish consensus on new trade rules to govern the digital economy more urgent but also infinitely more difficult, including but not limited to a backlash against technology the rise in income inequality in advanced industrialized countries, a resurgence in protectionism, and an America no longer willing to show constructive leadership that threatens to permanently cripple the rules based multilateral trading system.

Key words: Digital trade, e-commerce, consensus, WTO, CPTPP, protectionism, backlash, big-tech, US-China, trade war.

1. INTRODUCTION

The last several years have seen a flurry of activity by governments to regulate the digital economy, both in terms of international cooperation and unilateral regulatory interventions. This stands in stark contrast to the early years of the internet economy, where governments in most countries were content to take a relatively hands-off (light-tough) approach, or simply lacked sufficient understanding of the technologies driving the growth of new digital business models to be able to conceive of a coherent set of policy objectives for this sector, much less conceptualize and implement corresponding regulatory interventions to govern the digital economy. Those days are long gone. Today the voices of global business have for many years been calling for a new body of trade rules that would set limits on governments' ability to enact harmful laws and regulations, or – heaven forbid –tax firms in the digital economy in the same way conventional economic activities are taxed. This article discusses a number of the responses by governments to these calls and find them wanting. A new generation of international trade agreements such as the Comprehensive Pact for Trans-Pacific Partnership TPP, and the (at the time of writing still unratified) United States Canada Agreement (USMCA), have seen a consensus emerge on what this article posits are a series of very soft obligations that exhort governments to either make a number of changes to their domestic legislative frameworks in order to render them more compatible with the internet economy, or to cooperate in areas where they are for the most part already cooperating.

Beyond this very low-hanging fruit, there are a small number of rules that are more ambitious in their intent to constrain the regulatory autonomy of governments. These provisions address a number of issues, including

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whether and how to tax the digital economy, the free flow of information, forced data localization, and the mandatory disclosure of source code. Here a consensus is only discernible among a set of trading partners who have already negotiated bilateral or regional FTAs with the United States, i.e. the country with the biggest offensive interests in this sector. However, even this consensus reveals itself as relatively tenuous, given that the commitments that have been agreed upon are riddled with numerous and broadly-formulated exceptions and are subject to important carve-outs, both of which strongly limit the utility of these provisions in terms of providing predictability and certainty to businesses.

This is not only cause for concern on the part of economic actors, but also for international cooperation and economic integration more generally, since a toxic combination of exogenous factors has conspired to make the need to establish consensus on these rules more urgent, while at the same time rendering the prospect of this happening considerably more unlikely. These factors include a backlash against the winner-take-all dynamics that characterize the digital economy itself, the rise in income equality in advanced industrialized countries, resurgent protectionism and an America that is no longer willing to show leadership but is instead obsessively focused on confronting and containing China.

2. CURB YOUR ENTHUSIAM ABOUT THE LOW-HANGING FRUIT

2.1 Easy Concessions on Domestic Legislative Reform

Both the CPTPP, as well as USMCA, and even the (at the time of writing also unratified) Comprehensive Economic Partnership between Indonesia and Australia (IA-CEPA) contain a set of commitments to enact legislative reforms that would be supportive of digital economy interests and business models. These include provisions on establishing a domestic framework allowing for electronic transactions based upon or consistent with either UNCITRAL or UN codes.[1] To date, the UNCITRAL Model Law on E-Commerce (MLEC) has been adopted by 72 States.[2] The UN Convention on Electronic Communications in International Contracts has been ratified by 11 States.[3] The States that have ratified either one or both of these text include all the signatories of the CPTPP with the exception of Chile, Japan and Peru (and thus by default also includes the three signatories of the USMCA), as well as Indonesia. So in truth this does not represent a negotiated concession rather than a commitment to maintain the status-quo.

Another similar set of commitments is that on electronic authentication and electronic signatures.[4] In fact, this is even less of a concession than the one discussed immediately above, since in principle the obligations set out in this article are to a large extent already covered by the MLEC and the UN Convention on Electronic Communications in International Contracts.[5] Yet another example of this phenomenon are the provisions on online consumer protection.[6] These provisions mandate the adoption or retention of "consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities." It is hard to see any party to a negotiation objecting to this provision, since it arguably does nothing to curtail the regulatory sovereignty of any signatory government, nor does it embody any kind of obligation likely to be enforced by dispute settlement. In fact, most governments seeking to increase their economy's participation in the digital economy (and that is the case in most countries) would already have chosen to enact laws and regulations on online consumer protection as an essential part of creating an online environment of greater trust and to combat the many scams that have been perpetrated by this medium.[7]

Finally worth mentioning in this category are the provisions contained in these agreements on unsolicited commercial electronic messages or spam.[8] These provisions represent very sensible steps that governments should in any event be taking of their own volition to support a healthier digital economy and to minimize the incidence of malicious behaviour such as spreading computer viruses via mass emails. It is questionable to what extent a commitment like this belongs in a trade agreement rather than a set of internationally adopted guidelines or agreed best practices.

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1 For the CPTPP this is Article 14.5; For the USMCA, the corresponding provisions can be found in Article 19.5 but only prescribe consistency with the UNCITRAL framework; For the IA-CEPA this is Article 13.9.

2 This according to UNCITRAL's own figures, available at: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce/status.

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

4 For the CPTPP, this is Article 14.5; For the USMCA, this is Article 19.6; For the IA-CEPA, this is Article 13.5.

5 See for example Article 7 of MLEC "Signature", or Article 9 of the UN Electronic Communications Convention "Form Requirements", which are both expressions of the underlying principles that govern these two texts, namely non-discrimination (between electronic and non-electronic documents), technological neutrality and functional equivalence.

6 For the CPTPP, this is Article 14.7; For the USMCA this is Article 19.7; For the IA-CEPA, this is Article 13.6.

7 See for example the declaration that emanated from the ITU's 2014 Global Symposium for Regulators entitled "Best Practice Guidelines on consumer protection in a digital world", available at: https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR14_BPG_final_en.pdf.

8 For the CPTPP, this is Article 14.14; For the USMCA, this is Article 19.7; and for the IA-CEPA, this is Article 13.6.

2.2 Easier Concessions on international cooperation

The same can be said for the range of articles in e-commerce and digital trade chapters of a growing number of preferential trade agreements that call for cooperation in this area. This is essentially just the equivalent of trade negotiators throwing in the towel on an issue where no perceivable consensus is apparent, or inserting verbiage to provide some filler to a given treaty text. For example, the EU-Japan Economic Cooperation Agreement contains a provision governing cooperation on electronic commerce.[9] This provision again contains little to nothing in the way of any meaningful concession or obligation beyond both parties agreeing to talk to another on "regulatory matters relating to electronic commerce", which they presumably already do at various fora including the OECD, the ITU and in the WTO e-commerce talks.

The CPTPP and USMCA contain similar cooperation provisions on online consumer protection, unsolicited commercial electronic messages, e-commerce regulation and cybersecurity.[10] The IA-CEPA contains cooperation provisions in the areas of electronic commerce, paperless trading, online consumer protection and unsolicited commercial electronic messages.[11] Although cooperation is all well and good, governments have many opportunities to do this under the auspices of organizations and groupings such as the ITU and the G20, both of which already provide many pages of non-binding declarations every year, begging the point as to what purpose these provisions serve when included in international trade agreements.

2.3 Best-Endeavour Obligations that Obligate Nobody to do Anything

A last category of provisions worth mentioning in the context of treaty language that achieves next to nothing are those that contain loosely formulated and poorly defined best-endeavour obligations. One of the many examples of this phenomenon is Article 10 of the digital trade chapter of the EU-Mexico 2018 FTA, which still remains to be finalized. This Article, entitled "Open Internet Access" provides that:

> *Each Party shall endeavour to ensure that, subject to applicable policies, laws and regulations, end-users in its territory are able to:*
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> *(a) Access, distribute and use services and applications of their choice available on the Internet, subject to reasonable and non-discriminatory2 network management;*
> *(b) Connect devices of their choice to the Internet, provided that such devices do not harm the network; and*
> *(c) Have access to information on the network management practices of their Internet access service supplier.*

On its face this all seems well and good, but upon closer inspection it becomes clear that the parties have committed to nothing here, since they are only required to endeavour to do something (i.e. make some level of effort) and secondly any such effort is to be superseded by all existing and applicable policies, laws and regulations. This commitment is literally not worth the paper it's written on. The CPP contains a similar provision, although there signatories have done nothing more than "recognize the benefit of consumers in their territories" of having such "open access", i.e. again made a treaty commitment that obligates them to absolutely nothing.[12]

3. MORE AMBITIOUS RULES BUT WITH LIMITED ASPIRATIONS

3.1 Disciplines that Fail to Discipline

The CPTPP has been hailed by many as a ground-breaking agreement in terms of its treatment of the digital economy. With its wholly new e-commerce chapter, it sought to impose real constraints on the ability of signatory governments to enact measures deemed to be anathema by the global technology industry, such as levying customs duties on electronic transmissions, imposing restrictions on the free flow of data, enacting data localization requirements and requiring the mandatory disclosure of source code.[13]

Although generally regarded as progress by the largest export interests in the digital economy, many of the provisions discussed above are subject to either broadly formulated exceptions or come with important limitations in terms of their substantive scope. This is for example true for both the provisions on the free flow of data and those seeking to restrain the use of forced data localization, where governments may deviate from their obligations in order to achieve a legitimate public policy objective, provided this is not done for protectionist purposes or in a way

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9 Article 8.80.

10 For the CPTPP, this is Article 14.7 (3), Article 14.4 (3), Article 14.15 and 14.16 respectively; For the USMCA, this is Article 19.7 (3), Article 19.13 (5), Article 19.14 and Article 19.14 (1) (b) respectively.

11 Article 13.3, Article 13.4 (3), 13.6 (4), and Article 13.8 (3) respectively.

12 Article 14.10.

13 Articles 14.3, 14.11, 14.13 and 14.17 of the CPTPP respectively; see Lacey Simon B.C. *The TPP and the Digital Economy the Agreement's Potential as a Benchmark for Future Rule-Making*, in *Paradigm Shift in International Economic Law Rule-Making* (Julien Chaisse, Henry Gao, and Chang-fa Lo eds, Springer 2017) at pp. 400-404.

that is disproportionate to the policy objective being pursued. In terms of substantive scope limitations, the provision on mandatory disclosure of source code provides a relevant example, since the constraints that this provision is intended to impose only apply to mass-market software, to the exclusion of software for critical infrastructure (itself a problematic term that is increasingly being defined in ways that include an ever greater amount of economic activity).

The only provision of those mentioned, that is not subject to loosely formulated public policy exceptions or substantive scope limitations is the article on making permanent the moratorium on customs duties on electronic downloads, although the second paragraph of this article explicitly provides that signatories retain the right to impose "internal taxes, fees or other charges on content transmitted electronically". This essentially shifts the onus on revenue collection away from the border to the domestic taxation system, which is increasingly where the battle lines are being drawn up in a number of developed and developing countries between governments and the largest actors in the digital economy (discussed in more detail below).

3.2 A Resulting Regulatory Environment Devoid of Business Certainty

It is easy to appreciate the competing interests behind these provisions and their exceptions or substantive scope limitations. On the one hand one can perceive the desire of the global technology industry not to have to suffer onerous restrictions on the free flow of data, or be required to comply with data localization requirements, or have to hand over source code as a precondition for doing business in a market, since all of these measures add layers of operational complexity and raise compliance costs. Whereas on the other hand one can see the imperative of governments to maintain the regulatory sovereignty they believe they need in order to intervene where required to achieve important public policy goals. One could argue that the textual outcomes go some way to securing a balanced trade-off between these two competing imperatives, but in reality companies have obtained very little in the way of predictability by these provisions, and governments for their part have also given up very little in the way of their right to enact regulation both good and bad affecting the digital economy. Essentially, these textual outcomes just derogate the heavy lifting to future dispute settlement panels to adjudicate when an affected company feels that a signatory government has overstepped the boundaries of the regulatory autonomy that these exceptions afford it and can convince its own government to bring a case on its behalf.

This issue gives rise to another important implication of these exceptions and carve-outs, namely that because dispute settlement is likely to play such an important role in defining the limits of government intervention in the areas covered by these provisions (free flow of data, data localization and mandatory disclosure of source code), this lends event greater urgency to these rules both being brought within the WTO and being made subject to the WTO's dispute settlement system. In fact there are several compelling reasons for new rules on electronic commerce to be brought into the fold of the WTO and its Dispute Settlement Understanding. The first and most important being legitimacy. Negotiating these rules at the WTO allows the natural power and knowledge asymmetries that exist between large economies with well-defined offensive interests and smaller economies with few offensive interests but considerable defensive interests to be more evenly managed. One way this can be done is to link any negotiated outcomes with trade-offs in other sectors, even outside the scope of the nascent e-commerce negotiations. This gives both greater leverage and stronger incentives to engage for Members without strong offensive interests in the digital economy but with important interests in other areas. In the context of the WTO e-commerce negotiations, it is highly possible that developing countries will be able to extract commitments from developed country Members to provide either trade related technical assistance or other forms of aid to help developing countries overcome some of the constraints that hold their firms back from competing more inclusively in the digital economy. Finally, another important reason new rules on the digital economy belong in the WTO rather than bilateral or regional FTAs is because the prevalence of public policy exceptions (discussed above) that inevitably accompany binding commitments by governments in this area will need to be adjudicated in order to determine their limits. Dispute settlement at the WTO is a vastly more effective avenue of recourse than any kind of similar attempt under an FTA for a range of reasons that have to do with the WTO's ability to redress inherent power asymmetries.[14]

3.3 The Wars to Come

A number of increasingly pressing issues promise to seriously divide countries over the next months and years as the debate on how to tax and regulate the digital economy comes into sharper focus. And these will inevitably spill over to the WTO e-commerce negotiations as well as potentially raising trade tensions among some of the largest economies (particularly the EU, the US, China and India). This heading discusses two related issues, namely (1) the WTO moratorium on imposing customs duties on electronic transmissions; (2) whether and how to tax certain revenue generating activities in the digital economy.

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[14] See William J. Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, in *Regional Trade Agreements and the WTO Legal System*, (Lorand Bartels and Federico Ortino eds, Oxford University Press 2006) at pp. 345 – 357.

The WTO moratorium on imposing customs duties on electronic transmissions, was originally adopted at the Second Ministerial Conference in Geneva in 1998 and has continuously been renewed until today.[15] However, a report published earlier this year by a researcher at UNCTAD sought to calculate the customs revenue foregone by developing countries adhering to the WTO moratorium on collecting customs duties on electronic transmissions.[16] It estimates that the potential tariff revenue losses to developing countries amount to some $10 billion, with the figure for LDCs estimated at $1.5 billion. In the context of the e-commerce work program currently underway at the WTO, a recent submission by India and South Africa, argued that the moratorium on customs duties for electronic transmissions should no longer be renewed and claimed that the digital economy is now so big that it is no longer rational to exempt electronic transmissions from customs duties.[17] The emerging fault lines here are clear to see, namely between a small group of large and assertive developing countries such as India on the one side, who are extremely reluctant to cede any regulatory sovereignty in terms of their right to tax and regulate the digital economy. Whereas on the other side are well-organized digital export interests, led predominantly by the US, who demand market access and freedom of action for their technology giants. At the time of writing, the moratorium appears in serious danger of not being renewed beyond its current expiry date at the end of 2020, and this is almost certain to be a major point of contention at the twelfth WTO Ministerial Conference (MC12) in Kazakhstan, scheduled to take place in May 2020.

The issue of whether and how to tax the digital economy is related to the issue of the moratorium to the extent that many governments feel that it is high time that the tax holiday hitherto enjoyed by technology giants - predominately emanating from the US – come to an end. Part of this discussion is taking place under the rubric of Base Erosion and Profit Shifting (BEPS). Research by the OECD estimates that "BEPS practices cost countries 100-240 billion USD in lost revenue annually, which is the equivalent to 4-10% of the global corporate income tax revenue".[18] Other efforts long-ongoing at the OECD on elaborating rules on taxing the digital economy, and unilateral measures already in force in France, and also being contemplated by other advanced industrialized countries such as Japan, Italy, Austria, Spain, Australia, the United Kingdom and the European Union, are evidence that this is an issue that transcends the simple and often unhelpful distinction between North/South, developing/industrialized countries that characterize many of these debates. [19]

This again demonstrates that on rules which seek to significantly restrain governments in their regulatory autonomy (in this case the ability to tax digital transactions or companies), there is some consensus among a limited number of countries who are parties to "ambitious" regional or bilateral trade agreements that contain provisions making permanent the WTO moratorium on customs duties on electronic transmissions. However this consensus breaks down as soon as one looks behind the border to see a growing number of even advanced industrialized economies seeking to re-evaluate domestic taxation frameworks that digital companies have exploited for decades in order minimize their tax liability.

4. THE FOUR RIDERS OF MULTILATERALISM'S APOCALYPSE

4.1 THE BACKLASH AGAINST BIG TECH AND THE RISE IN INCOME INEQUALITY

The Pareto Power Principle, otherwise referred to as the 20/80 Rule harks back to an observation made in 1906 by Italian economist Vilredo Pareto that 80 percent of the land in Italy was owned by 20 percent of the Italian population.[20] The power law that Pareto observed is also on display in the digital economy. For example, it is undeniable that a vastly unequal share of the value of the digital economy is captured by a small handful of firms, including Amazon, Facebook and Google.[21] Likewise, research done on various online platforms that form part of the so-called "gig economy" show that the distribution of work and thus income on these platforms is heavily skewed in a manner that confirms the underlying asymmetries inherent to the Pareto Power Principle.[22]

In addition to this, a number of the largest players in the digital economy have clearly started to amass unparalleled market power. By some estimates, Amazon, the world's largest online retailer, enjoys over 90 percent

15 See *The Geneva Ministerial Declaration on Global Electronic Commerce*, [WT/MIN(98)/DEC/2], adopted on 20 May 1998.

16 Rashmi Banga, *Growing Trade in Electronic Transmissions: Implications for the South* (United Nations Conference on Trade and Development 2019).

17 See *Work Program on Electronic Commerce, The E-Commerce Moratorium and Implications for Developing Countries, Communication from India and South Africa* dated 3 June 2019 [WT/GC/W/774].

18 See https://www.oecd.org/tax/beps/.

19 See Eglantine Lioret and Valérie Farez *INSIGHT: France's Digital Services Tax Goes Ahead*, published by (Bloomberg Tax 2019). See also Chris Sanger and Rob Thomas, *New digital tax policies: What, when, where, how and by whom?*

20 See a discussion of this in relation to venture capital in the technology sector in Peter Thiel, *From Zero to One* (Random House 2014) at pp. 83 ff.

21 See Martin Moore, Damian Tambini *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford University Press 2018).

22 See Juliet B. Schor, *Does the sharing economy increase inequality within the eighty percent? Findings from a qualitative study of platform providers*, in *Cambridge Journal of Regions, Economy and Society*, vol. 10 no. 2 (2017) at pp. 263–279.

market share in five different product markets.[23] Facebook is by far the world's most powerful social networking platform, with almost 70 percent share.[24] Google has a dominant position in the market for online search, enjoying almost 90 percent market share[25]. This trend has certainly not gone unnoticed and as a result, these platforms and the market power they have amassed have started to be the target of some highly pointed criticism.[26] Policymakers and politicians have also started to notice and construct policy platforms or political campaigns around possible responses to the growing inequality that the rise of digital hegemons has been a causal factor in exacerbating.

This goes to the heart of one of the most deeply divisive and cross-cutting issues of the current age, namely inequality. The problem of income inequality had really started to gain a lot of traction among electorates in the sluggish economic recovery following the 2008 Global Financial Crisis (GFC) and the subsequent European sovereign debt crisis, spurring spontaneous but then subsequently organized political backlashes (at least in America) such as the Tea Party movement (starting in 2009 and which brought together opposition from the political Right against the financial bailouts of the Obama administration) and Occupy Wall Street (starting in 2011, which brought together proponents from the political Left against income inequality). Most observers credit a number of the momentous political upheavals of the second half of the 2010s such as Brexit and the election of Donald Trump to the US presidency, as symptoms of widespread voter dissatisfaction about the economic status quo.[27] While other commentators have pointed out that because technology is one of the underlying factors putting pressure on manufacturing and other previously middle-class jobs (the other big factor being globalization), advances in the digital economy are only serving to exacerbate problems of income inequality.[28]

As the size of the digital economy continues to grow and as the overwhelming economic power of big digital multinationals becomes increasingly hard to deny as a fact of economic life and to defend as a market outcome, it is inevitable that unilateral interventions to address the negative externalities of this trend will also increase, whereas this will also serve to polarize the differences between those countries with offensive interests in the digital economy and those whose interests are primarily defensive. By the same token it is also true that international cooperation to support new rules that give even greater freedom of action to these digital hegemons will diminish accordingly. This is likely to have a big impact on the ability to achieve consensus on new trade rules for the digital economy as governments become increasingly reluctant to circumscribe their own regulatory autonomy when it is becoming accepted orthodoxy that what is needed is more market-correcting interventions and not less.

4.2 The Rise of Preferential Liberalization

It was USTR Robert Zoellick who is credited with having coined the term "competitive liberalization" in the early 2000s to describe the determination of the US to pursue trade and investment liberalization globally, regionally, and bilaterally.[29] In reality, however, the policy shift away from relying solely or even primarily on a multilateral approach to progressive trade liberalization started in the 1980s with President Reagan, his Secretary of State James Baker III and his USTR Carla Hills all making statements to this effect on the record at different times during that decade[30]. By the time Zoellick became George W. Bush's USTR in 2001, the EU was also fully engaged in the process of negotiating and signing FTAs, having concluded some twenty such agreements just in the 1990s alone. In Asia, Japan was also embarking on an ambitious set of FTAs with other economies both in the region and further afield. This was the beginning of the rush to create what the renowned trade economist Jagdish Bhagwhati would refer to as "the spaghetti bowl of preferential trading arrangements".[31]

This trend continues to the present day, and has expanded well beyond the wave of relatively "quick and easy" bilateral agreements that were concluded in the 1990s and 2000s, to encompass ever more ambitious and geographically all-encompassing initiatives such as the CPTPP and the potentially much larger (in terms of global GDP captured) Regional Comprehensive Economic Partnership (RCEP) agreement. Similar to the existential threat posed to the GATT by the Treaty of Rome and post-war efforts at closer economic integration and preferential trade liberalization in Western Europe, mega regionals like the two mentioned in this paragraph, combined with the

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[23] This was true as of the first quarter of 2018, as cited in Banga, at p. 3

[24] This data as per Q1 2019, as cited at *ibid*.

[25] This data as per Q1 2019, as cited at *ibid*.

[26] See Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018).

[27] See Ed Milibrand T*rump, Brexit - The West in Crisis* (2017).

[28] See Eli Noam, *Inequality and the Digital Economy*, in *Digitized Labor*, (Lorenzo Pupillo; Eli Noam; Leonard Waverman eds, Palgrave MacMillan 2018) at pp. 117-140.

[29] This was done in the context of a speech given at the National Foreign Trade Council on 26 July, 2001. The exact term used by Zoelick in laying out the US' new approach was not actually "competitive liberalization" but "competition in liberalization". For the full transcript of Zoelick's speech, see: https://ustr.gov/archive/assets/Document_Library/USTR_Speeches/2001/asset_upload_file216_4275.pdf. The quote on competition in liberalization appears on p. 7.

[30] See Ernest Preeg*, The U.S. Leadership Role in World Trade: Past, Present, and Future*, in Washington Quarterly, vol. 15 No. 2 (Routledge 1992) at pp. 79-91, particularly p. 87.

[31] Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Agreements* in *The Dangerous Obsession with Free Trade Areas*, Claude Barfied ed, AEI Press 1995).

entrenched state of dysfunction that currently besets the WTO, are threatening to seriously undercut the relevance of the Organization as an institution.[32]

Some observers have bemoaned this approach as ultimately detrimental to the multilateral trading system, and accuse governments of having taken this path out of politically expedient short-termism and in doing so having actively undermined the centrality of the WTO.[33] Others take a more sanguine view and posit that the bilateral or regional route to trade and investment liberalization, although not as optimal economically as the multilateral route, still represents liberalization, and is thus to be welcomed, pointing out that bilateral and regional trade agreements can be stepping stones to more broad-based liberalization in future.[34]

4.3 Resurgent Protectionism

Following the collapse in international that ensued after the GFC, leaders from the G8 and G20 met regularly and each time committed to eschew protectionism and keep markets open to trade and investment.[35] However these promises were not kept. There was a dramatic increase in protectionist interventions, although many of these were concealed in less obvious measures, such as in stimulus packages and bailouts that provided subsidies and other support measures to domestic firms.[36] This proved to be the start of some fundamental changes in attitudes by policymakers to the global trading system, with one commentator noting that "many governments around the world – in particular those in the G20 – have stepped back from the 'level playing field' as the operative principle guiding economic policymaking."[37] To be sure, many of the extraordinary stimulus measures that were taken, including those to recapitalize the financial systems of countries were one-off interventions.[38] Their effects, however, were prolonged, lasting for several years beyond the targeted stabilization objectives had been achieved. For example as late as 2014, the WTO, in its November report on G20 Trade Measures, found that "the stock of restrictive trade measures introduced by G-20 economies since 2008 has continued to increase" and that "[of] the 1,244 restrictions recorded by this exercise since the onset of the crisis in 2008, only 282 have been removed".[39]

Today, the situation has worsened considerably. The evidence is that markets never returned to pre-crisis levels of openness, and that the rise in trade tensions the world has witnessed since 2017 has only exacerbated matters, particularly between the two protagonists (the United States and China), but also in other markets that have been targeted by unilateral interventions by the Trump administration. This has several implications for efforts to negotiate new rules on the digital economy. To start with, any negotiations where both China and the United States are present, are likely to suffer gridlock caused by the confrontational policies of the Trump administration and the need for Chinese policymakers not to appear to concede to these tactics. This bodes ill for the ongoing WTO negotiations on electronic commerce, whereby there have already been calls from certain quarters in the US to exclude the Chinese from these negotiations.[40]

4.4 America on the Offensive

Today, US interest and engagement in the rules-based multilateral trading system and in international economic cooperation more generally seems tenuous at best. President Trump's campaign platform included a strong anti-globalization bias. In a much-publicized June 2016 speech on the campaign trail, in a metals recycling facility, in Monessen Pennsylvania, Trump stated "globalization has made the financial elite who donate to politicians very wealthy. But it has left millions of our workers with nothing but poverty and heartache."[41] He then went on to articulate his view that what was needed for America to recover was to reverse what he referred to as two of the worst legacies of the Clinton years, namely NAFTA and China's accession to the WTO, stating "NAFTA was the worst trade deal in history, and China's entrance into the World Trade Organization has enabled the greatest jobs theft in history."[42] Trump also made his hostility to the TPP known, calling it "the death blow for American

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32 On the threat to the principle of non-discrimination that early efforts at European integration posed to the GATT, see: Lucia Coppolaro, *The Making of a World Trading Power: The European Economic Community (EEC) in the GATT Kennedy Round Negotiations (1963-67)* (Ashgate. 2013).

33 See Maria Panezi, *The WTO and the Spaghetti Bowl of Free Trade Agreements: Four Proposals for Moving Forward* (Centre for International Governance Innovation 2016).

34 See Richard Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, (NBER Working Paper 2006).

35 See para. 45 and 46 of the Leaders Communiqué from the July 2009 G8 Summit in L'Aquila (Italy). See also para. 48 of the Leaders' Communiqué from the G20 meeting in Pittsburg.

36 See Simon Evenett and Frédéric Jenny, *Bailouts: how to discourage a subsidies war* in *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20*, (Richard Baldwin and Simon Evenett eds, Graduate Institute and CEPR 2009).

37 See Simon Evenett, *The 11th Global Trade Alert Report: Débâcle*, (CEPR 2012) at p. 21.

38 This was true for example of the 2008 Troubles Asset Relief Program in the United States, although even this intervention was followed by the 2009 American Recovery and Reinvestment Act.

39 WTO, *Report on G20 Trade Measures (Mid May 2014 to Mid-October 2014)*.

40 An unrealistic demand that is not shared by a majority of other participants; see: Nigel Cory, *Why China Should Be Disqualified From Participating in WTO Negotiations on Digital Trade Rules*, 2019.

41 See the full transcript of the speech, at: https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891.

42 *Ibid*.

manufacturing".[43] After assuming office, Trump made it one of his very first acts as president to withdraw the United States from the TPP.[44] In office, Trump has also explicitly exuded contempt for the system of international alliances the US has spent decades building and maintaining, and has continuously derided those who sought to defend these, calling them "globalists", which is viewed as a real insult in the Trump White House.[45]

Trump and his Trade Representative Robert Lighthizer have taken a number of positions that represent a direct assault on the future viability of the WTO. The first of these is by systematically and categorically blocking the reappointment of new WTO Appellate Body members as the terms of existing members expire, a strategy that at the time of writing seems likely to bring an era of appellate review at the WTO to a conclusive end. The second prong of the Trump administration's attack on the WTO is in the form of resorting to unilateralism to address a series of alleged intellectual property violations by China, when the US was left in no doubt more than ten years ago that this particular remedy (Section 301) was not a legal means to seek redress against other WTO Members for alleged breaches of WTO rules.[46] Yet another way in which the US has up-ended longstanding practice in the rules-based multilateral trading system is its invocation of national security to justify a range of trade restrictions that are clearly protectionist, in a way that strains the credibility of the entire system. Finally, the Trump administration has taken up a controversial crusade against WTO Members' ability to self-designate themselves as developing countries, seeking to re-write the rules on this issue in a way that has left many other WTO Members incredulous and most experts bewildered, while others such as Brazil and Korea have calculated that it is simply easiest to comply and renounce their developing country status at the WTO.

The rationale for most of these actions can in many ways be found in America's new and confrontational posture vis-à-vis China.[47] Certainly its objection to the existence of the WTO Appellate Body seems to derive from the latter's perceived failure to discipline Chinese subsidy practices so that the US came to the conclusion that if the Appellate Body wasn't going to be supportive in American attempts to enforce WTO subsidies disciplines, then it should be neutralized.[48] The Section 301 cases against China are clearly directed as confronting a set of practices that the US is convinced has been a causal factor in China being able to shift the economic and technological balance to its favor so quickly. And the flouting of the national security exception is likewise being used mostly to target imports from China, and is an area where the US feels (perhaps mistakenly) that it is not prone to being found to have violated its WTO obligations by a dispute settlement panel.

Some point out that this newfound assertiveness is not symptomatic of a decision by the US to disengage, but rather to engage with more conviction, and that if anything, the Trump administration's confrontationist approach is merely a continuation of President Obama's explicit assertion that the US will not allow China to write the rules of global trade for the 21st Century.[49] This may be true. However, the long-term damage that these actions risk doing to the viability of the WTO and the rules-based multilateral system that it oversees, as well as the leadership role that the US has for so long enjoyed and exploited to its advantage, could be an example of the Trump administration cutting off its nose to spite its face. Most commentators agree that the WTO rulebook in its current form is no longer fit for purpose in the 21st Century and is also simply not capable of disciplining China in any meaningful way.[50] However bringing about change to the system by taking it to the brink of destruction is undoubtedly a very risky gamble.

To conclude this section the author reiterates that there are clearly a number of significant exogenous factors and external dynamics that are influencing governments' willingness and ability to forge a consensus on a new set of trade rules to govern the digital economy. This is certainly true at the WTO, where these rules would have the largest impact and also be able to claim the greatest legitimacy. This is due, in part to the dominance that a small number of digital players have achieved, the income equality this has exacerbated, and the political backlash this has unleashed. This is likewise true of the tensions that have arisen as the United States seeks to confront and contain China economically and technologically. These factors and dynamics (among others) have both made finding agreement on these rules more imperative, since the WTO is struggling to maintain and assert its relevance, as well as rendering the possibility of such a consensus being achieved more remote.

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43 *Ibid*.
44 See the official letter by which this was done, at: https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf.
45 Bob Woodward, *Fear: Trump in the White House* (Simon & Schuster 2018).
46 See the Panel and Appellate Body Reports in *United States - Sections 301–310 of the Trade Act 1974* [DS152].
47 See USTR, *2018 Report to Congress on China's WTO Compliance*, at p. 10.
48 See Appellate Body Report, *United States — Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, [WT/DS379/AB/R] dated 11 March 2011). This is discussed in more detail in Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, in Harv. Int'l L.J. vol. 57 no. 2, (2016) pp. 261 – 324, see pp. 301 ss.
49 See: Mark Wu, *Trump vs. International Law: Trade Unilateralism in Pursuit of What?*
50 See Mark Wu, 2016, *op. cit*.

5. MAKING BETTER RULES TO INCREASE CERTAINTY FOR BUSINESS

5.1 BORROWING A PAGE FROM THE TBT AGREEMENT

Article 2.2 of the WTO Agreement on Technical Barriers to Trade represents a remarkable feat of international treaty drafting and has been the decisive factor between victory and defeat in a number of high-profile trade disputes. It essentially requires that "technical regulations not be prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade". Moreover, it demands that "technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective".[51] The article then goes on to provide a non-exhaustive list of such legitimate objectives, including (of relevance for our purposes here) national security and the prevention of deceptive practices. Applying the core elements of this provision to regulatory interventions in the digital economy could allow governments to enact more sensible regulation to govern the digital economy in that it would inform them as to (1) whether an intervention pursues a legitimate objective and (2) whether the intervention is more trade restrictive than necessary. This would be a very significant step in minimizing negative and unintended consequences from regulatory interventions.

For trade associations representing digital businesses and trade negotiators seeking ambitious textual outcomes at the behest of their digital export interests, language that exhorts governments to only enact measures that pursue legitimate objectives and that are minimally trade restrictive would offer a considerably greater amount of predictability and certainty than we have seen with the most recent generation of trade rules to govern the digital economy, as embodied in treaty texts such as the CPTPP and the USMCA. This solution would still afford governments a high degree of regulatory sovereignty, since it would allow them the space to enact restrictive measures in pursuit of legitimate policy objectives, while at the same time forcing them to be honest when doing so, by requiring them to only enact any such measures to the extent that they do not impose unnecessary obstacles to international trade and in such a way that is minimally trade restrictive. Governments would still retain the ability to argue that even though measures they have enacted impose harsh restrictions on actors in the digital economy, these measures were necessary to fulfil legitimate objectives, and that no less trade-restrictive measure was available given the risk that non-fulfilment would pose. Although this may be further than most governments are willing to go, it is equally true that such a provision would go a long way to increasing certainty for businesses in the digital economy, which is likewise a professed goal of many governments. Of course, this solution also would need to be backed up by the credible threat of effective dispute settlement, since there is clearly a lot of room for interpretative differences of opinion between governments and businesses on whether a measures is (1) necessary to achieve a legitimate objective, (2) minimally trade restrictive, and (3) that no less trade-restrictive alternatives were available. But at least this would provide textual discipline beyond the blanket exceptions that characterise and undermine the current set of provisions.

5.2 ADHERING TO THE PATH LAID OUT BY UNCITRAL

As early as 1996, and before the internet economy we are all so familiar with today had really emerged, the United Nations Committee on International Trade Law – UNCITRAL – had already elaborated a model law on electronic commerce that was founded on three core concepts, namely (1) non-discrimination (between conventional paper-based and newly emerging electronic transaction processes); (2) technological neutrality; and (3) functional equivalence. The principle of non-discrimination sought to ensure "that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form".[52] The principle of technological neutrality recognizes the fact that technologies in the area of information and communication technologies are changing rapidly, and that an approach to rule-making that was technologically neutral would be better suited to keeping pace with future developments. Finally the principle of functional equivalence sought to establish criteria under which "electronic communications would be considered equivalent to paper-based communications".[53]

In the context of new trade rules to govern the digital economy, trade negotiators would do well to recall and apply the approach mandated by adherence to these core principles. In the area of non-discrimination this would mean that the provision of goods or services by digital means would not be treated any less favourably than the provision of same goods and services by conventional means in all areas of the law and regulation (including in particular licensing and the handling of customer data). In the area of technological neutrality this would mean that trade rules would be drafted in a manner that is not overly prescriptive and leaves economic actors the freedom to adopt whatever technology they feel is most appropriate under a given set of circumstances.[54] And in the area of functional equivalence this would foster an approach focused on defining the core characteristics of any desired

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[51] See for example the analysis of Article 2.2 of the TBT Agreement by the Appellate Body in *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)*, Report of the Appellate Body, [WT/DS381/AB/R], at paras. 311 – 322.

[52] See https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce.

[53] *Ibid*.

[54] See Winston Maxwell and Marc Bourreau, *Technology Neutrality in Internet, Telecoms and Data Protection Regulation*, Computer and Telecommunications L. Rev. (2014).

regulatory outcomes (rather than mandating ways in which to achieve them). As guiding principles, these would likewise go a long way in making different approaches to regulation more interoperable.

To some extent, we can already see tentative steps towards such an approach, for example in the CPTPP e-commerce chapter provisions on the protection of personal information.[55] These provisions mandate a number of common principles, such as non-discrimination and transparency, while also requiring that signatories enact laws on personal information protection that (1) allow individuals to assert their rights by pursuing remedies, and (2) allow businesses to comply with their legal obligations. This is a statement on the desired regulatory outcomes to be achieved that essentially leaves it up to signatories to determine how they wish to go about doing this. Finally paragraph 4 of this provision mandates signatories to encourage the development of mechanisms that promote compatibility between different regimes including by recognition of regulatory outcomes. Again, success in doing this in other areas such as online consumer protection and cybersecurity would provide considerably more certainty and predictability to business than that offered by the current generation of "gold standard" agreements.

6. CONCLUDING REMARKS

From the various commitments countries have made in a number of free trade agreements (as discussed above), it is clear that there is general consensus on a cohort of enabling provisions that do little to constrain governments or impinge on their regulatory sovereignty, but rather seek to codify and unite a series of best-endeavour commitments on legislative and regulatory reforms aimed at facilitating electronic commerce. These are areas where there is some degree of consensus since governments are being asked to renounce little to no sovereignty but to instead enact domestic reforms that are very much in their own interest. In fact the lack of any give-and-take underlying the offering of these commitments demonstrates that this is, if anything, a false consensus. These commitments represent the easy part of trade liberalization, the so-called low-hanging fruit which can be harvested before negotiations get bogged down in hard political-economy trade-offs or technical minutiae. This easy consensus is discernible among both advanced industrialized countries as well as developed countries, although the latter are likely to require some kind of *quid pro quo* even for these concessions, since advanced industrialized countries are mostly *demandeurs* in these negotiations, and because nobody concedes anything in a trade negotiation without getting something in return.

With regard to the more substantive rules that were at the core of demands by export interests in the digital economy and which first took the form of a binding e-commerce chapter in the TPP negotiations which later culminated in the CPTPP,[56] it is likewise clear that the outcomes achieved fall short of providing a certain and predictable environment for businesses in the digital economy, who are still largely on their own when dealing with harmful regulatory interventions by governments into their digital business models. Sadly it does not seem likely that this will change anytime soon, since governments are not even able to agree on the scope of a future e-commerce agreement at the WTO and have in any event shown little propensity in the FTAs many of them have already signed, to forego what they perceive as vital areas of regulatory sovereignty. This is understandable given the underlying strategic and economic importance of the digital economy, particularly with respect to information and communications technologies, networks and data flows, but it bodes poorly for digital companies seeking greater regulatory certainty. In fact the tide definitely seems to be turning from a hitherto discernible policy bias in advanced industrialized countries in favour of the positive economic growth effects of opening markets to digital platforms and services, to a more conservative and even sceptical position that views the digital economy as a source of both potential new market growth but also disruptive pressures on existing players in the offline economy. The digital economy is also starting to be perceived by policymakers in advanced industrialized countries as a potentially dark and disruptive force that is likely to compound existing inequalities in income distribution, thereby leading to increased social and economic instability. This new scepticism will surely play out in future efforts to adopt new international rules to govern trade and investment in the digital economy, with the moratorium on customs duties for electronically transmitted goods likely to be the next big battle ground at the time of writing.

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[55] Article 14.8.

[56] The TPP negotiations and the resulting CPTPP were not the first time US trade negotiators had sought to and succeeded in introducing e-commerce provisions into an FTA, since this had been going on since the US FTA with Jordan in 2000. However the CPTPP represented the culmination of many years of effort by US industry in this sector to get binding rules into an FTA to try and constrain some of the regulatory interventions they resented the most. See: Chander, Anupam. *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press 2013).