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SYMPOSIUM ON DIGITAL TRADE AND INTERNATIONAL LAW

INTRODUCTION TO THE SYMPOSIUM ON DIGITAL TRADE

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Many people around the world are now digital natives. Our daily life is becoming ever more digitalized—and this digital revolution has also fundamentally changed international trade over the past decades. With one click, one can purchase goods thousands of kilometers away. And in services, immediate, ongoing international collaboration through web platforms, telecommunication, or transborder e-payment are becoming standard now. These new digital technologies offer new opportunities, especially for developing countries that seek to integrate themselves into global value chains, but they also pose considerable risks for human rights, including inequality between people and countries as well as for national security. Adapting trade law to the new digital world is just one challenge of rapid technological development and is the theme of this *AJIL Unbound* symposium. This symposium addresses the questions of what digital trade is; how existing trade law covers it and what challenges arise from the current legal norms; and how digital trade rules account for national security and human rights concerns as well as inequality and developmental concerns of the Global South. It discusses how one should approach the delicate interlinkages between trade, technology, human rights, development, and security.

Digital trade cannot be seen in isolation from other concerns such as human rights or geopolitics. It is a crucial component of a bigger package of rapid changes, technological and otherwise, facing the world. As the United Nations (UN) Secretary-General has warned: "The world is at a critical inflection point for technology governance."[1] Digital trade law can help to find suitable solutions for the problems facing the world, or it can hinder them.

The UN High-Level Panel on Digital Cooperation has identified many challenges on how to adapt to the new digital world, pertaining to inclusivity, human and institutional capacity building, human rights and human agency protection, promoting trust in digital technology, security and stability, and fostering global digital cooperation.[2] The 2024 UN Summit of the Future aims at finding ways to achieve a just digital transition that unlocks the value of data and protects against digital harms. The UN High-Level Advisory Board on Effective Multilateralism, as a preparatory Board for the Summit, has formulated several priorities: strengthening public capacities to adequately participate and regulate in the digital age; ensuring that the benefits of digital innovation are more widely shared; improving digital literacy; preventing digital harms; securing human rights online; and creating adequate data governance. As the Board has stressed: "The wealth and safety of nations over the next century may well depend on our ability to unlock data's potential in fair, equitable, and safe ways."[3]

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[1] Report of the UN Secretary-General, Road Map for Digital Cooperation: Implementation of the Recommendations of the High-Level Panel on Digital Cooperation, UN Doc. A/74/821 (May 29, 2020).

[2] Report of the UN Secretary-General's High-Level Panel on Digital Cooperation, The Age of Digital Interdependence (2019).

[3] Fifth Statement by the Co-chairs of the High-Level Advisory Board on Effective Multilateralism (Feb. 10, 2023).

None of these goals can be seen in isolation from digital trade law since trade, and thus trade law, is crucial for realizing the opportunities that digital developments present for people and countries alike. However, the regulatory architecture of digital trade is evolving fairly slowly, and it needs to be built on a solid basis, taking into account economic realities as well as normative guidelines—including especially the UN Sustainable Development Goals (SDGs)—to realize the full potential of digital trade while mitigating its dangers.

The first obstacle to proposing a common approach to digital trade law is a lack of a commonly agreed definition of digital trade, which is discussed by Mira Burri of the University of Lucerne and Anupam Chander of Georgetown University in their contribution.[4] They approximate a definition of digital trade and digital trade law by identifying transactions that focus on the digital transmission of goods and services. Current definitions vary from broader to narrower in light of differing interests, causing legal uncertainty. Furthermore, it is difficult to find a stable and uniform approach given datafication (the fact that daily interactions can be rendered into a data format, turned into information and put to social use) and the borderless nature of data which extends the scope of trade-related issues. Datafication, in particular, has many implications for human rights and national security in the context of technological competition between countries. In my view, this lack of definitional clarity is not desirable in principle and creates a further problem. The lack of a common legal definition impedes the construction of unified measurement of digital trade and consequently obstructs a commonly agreed evidence base for the creation of digital trade law and policymaking.

The World Trade Organization (WTO) is, in my view, the best forum for brokering an agreement on digital trade,[5] including for finding a commonly agreed definition that would create an anchor for bilateral and regional trade agreements. Yet, as Burri and Chander point out, WTO members have hitherto not agreed on a new binding text specific to digital trade. The WTO Work Programme on E-commerce[6] was launched in 1998, with the agreement to refrain from imposing customs duties on electronic transmissions (Customs Duty Moratorium), which has been prolonged despite concerns that it deprives developing countries of highly needed tariff income.[7] In January 2019, seventy-six WTO member states announced the initiation of plurilateral negotiations on trade-related aspects of e-commerce, the Joint Statement Initiative (JSI),[8] broadening the definition of electronic commerce to cover the concept of "digital trade."[9] The JSI now includes eighty-eight states, responsible for 90 percent of world trade, aiming to wrap up talks by the end of 2023,[10] but its conclusion is by no means secured. Clearly, any agreement will need to address concerns of a diverse range of countries and stakeholders, including lower-income countries in which the digital sector is less developed. It should, in my view, also take into account the goals as formulated above by the UN in order to avoid additional fragmentation of international law.[11]

[4] Mira Burri & Anupam Chander, *What Are Digital Trade and Digital Trade Law?*, 117 AJIL UNBOUND 99 (2023).

[5] Mira Burri, *Trade Law 4.0: Are We There Yet?*, 26 J. INT'L ECON. L. 5 (2022) (discussing whether digital trade can be multilateralized).

[6] WTO, Work Programme on Electronic Commerce, WTO Doc. WT/L/274 (Sept. 30, 1998). Electronic commerce is understood to mean the production, distribution, marketing, sale, or delivery of goods and services by electronic means and is thus a rather restricted definition.

[7] Rashmi Banga, *WTO Moratorium on Customs Duties on Electronic Transmissions: How Much Tariff Revenue Have Developing Countries Lost?* (South Centre Research Paper 157, June 3, 2022).

[8] WTO, Joint Statement on Electronic Commerce, WTO Doc. WT/L/1056 (Jan. 25, 2019).

[9] See, e.g., United States-Mexico-Canada Agreement (USMCA) and the European Union-New Zealand Free Trade Agreement, which have dedicated chapters titled "Digital Trade." The latest negotiating text circulated under the JSI in December 2022 uses the terms "e-commerce/digital trade" as alternatives.

[10] WTO Press Release, E-commerce Negotiations Enter Final Lap, Kyrgyz Republic Joins Initiative (Feb. 16, 2023).

[11] *See* Report of the Study Group of the International Law Commission Finalized by Mr. Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

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Existing obligations under WTO law have hitherto been applied to digital trade in goods and services. But are they fit for purpose? In their contribution, Simon J. Evenett, Johannes Fritz, and Tommaso Giardini, all of the University of St. Gallen, first consider the application of WTO law to digital trade, and second, argue that regulatory heterogeneity of member states can deter digital trade even without discrimination, as understood by WTO law.[12] Although principles such as the Most Favoured Nation Clause (non-discrimination between similar goods and services of different foreign countries) and National Treatment (non-discrimination between similar goods and services of national and foreign countries) can be applied, they are not able to cope with the heterogeneity of regulatory approaches within different states,[13] and those are burgeoning.[14] If regulatory frameworks differ widely, disparities in policies will segment markets and may exclude foreign firms based in countries with regulatory frameworks that are deemed inadequate by importing states. Indeed, "unilateral state action in the digital domain [that] remains uncoordinated, stokes trade tensions on topics from corporate taxation through to competition law enforcement, and chills cross-border corporate deployment of digital technologies."[15] Evenett et al. thus argue that we are faced with a fragmentation of the digital trade law landscape and risk another spaghetti bowl of either bilateral/multilateral digital trade agreements (DTAs) or an inclusion of digital trade norms in Preferential Trade Agreements (PTAs).[16] Although regulatory heterogeneity has always been an impediment to trade, it is enhanced in digital trade since from an economic perspective many digital business models require economies of scale to be profitable. They find that both WTO and DTA rules insufficiently mitigate intended and unintended heterogeneity. They make the economic case that regulatory heterogeneity can be a de facto trade deterrent and thus stress the importance of regulatory coherence, e.g., through mutual recognition of regulatory frameworks and preempting the formation of digital blocks. Further solutions, such as adoption of good regulatory practices that are recognized in foreign markets and efforts to establish recognition or equivalence systems, are proposed.[17]

Commonly, three main approaches to regulation of digital business can be distinguished. First, a relatively laissez-faire approach that favors self-regulation or minimal regulation. Second, more active state intervention to set rules for digital companies on a range of issues including data privacy; data localization obligations; local content requirements; and requirements of local sourcing or participation in government procurement. Third, treating and regulating digital businesses as public utilities.[18] This divergence is mirrored in the different approaches to digital trade and different restrictions imposed on trade: whereas small and open economies (New Zealand, Iceland, Norway, Ireland, and Hong Kong) tend to regulate less, others (China, Russia, India, Indonesia, and Vietnam) regulate extensively.[19] Furthermore, regulation of digital trade mirrors human rights concerns regarding, e.g., privacy as well as the current geopolitical circumstances with heightened national security concerns.

[12] *See* Simon J. Evenett, Johannes Fritz & Tommaso Giardini, *Deterring Digital Trade Without Discrimination*, 117 AJIL UNBOUND 104 (2023).

[13] *Id.*

[14] Several databases now cover the regulations concerning digital trade. *See, e.g.*, European University Institute (EUI): The Digital Trade Integration Project; University of St. Gallen: Global Trade Alert and Digital Policy Alert; Organisation for Economic Co-operation and Development: Digital Services Trade Restrictiveness Index Regulatory Database. All of them find growing obstacles to digital trade.

[15] Simon J. Evenett & Johannes Fritz, *Emergent Digital Fragmentation: The Perils of Unilateralism*, Joint Report of the Digital Policy Alert and Global Trade Alert 5 (2022).

[16] *Id.*

[17] United Nations Office of the High Representative for the Least-Developed Countries and Small Islands Developing States (UNOHRLLS) & WTO, Digital Trade: Challenges and Opportunities (2022).

[18] Erik Marel & Martina Francesca Ferracane, *Do Data Policy Restrictions Inhibit Trade in Services?*, 157 REV. WORLD ECON. 727 (2021).

[19] Martina Francesca Ferracane, *Digital Trade Integration: Global Trends*, TRANS EUR. POL'Y STUD. ASS'N (2022).

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Those additional concerns are highlighted in the other contributions to this symposium: How to minimize trade barriers while simultaneously accounting for legitimate (regulatory) concerns, such as human rights protection, national security, inequality, and development? Although these are not new concerns for international trade law, they are aggravated in digital trade due to geopolitical tensions raised by the technological advancement of certain countries. Furthermore, the impact of digital technologies on human rights and unequal access to digital technology is at stake. A 2021 UN report[20] noted that nearly half of the world's population, 3.7 billion people, lack internet access and this lack of digital connectivity is especially prevalent within Least Developed Countries (LDCs), where more than 80 percent of the population is still offline. This aggravates the uneven realization of economic and social rights in an ever more digitalized world.

Mira Burri's essay discusses the human rights implications of digital trade law, concentrating on civil rights, such as personal data protection, the right to privacy and free speech, given that those rights are at the center of digital trade regulation efforts of trading partners.[21] Data governance provisions, which cover cross-border data flows, data localization measures, and personal data protection have been the most contentious in trade negotiations, given the stark differences between different trading partners such as the United States, the European Union, and China. In these countries, attitudes concerning the desired scope of protection of civil rights are fundamentally different. Burri argues that data localization is Janus-faced. While it is an obstruction to digital trade and data-driven innovation, and can serve to limit liberties, it can also serve to protect the fundamental freedoms of citizens. She draws attention to the need for more discussion of free speech implications of regulation of digital business, in order to account for the profound changes of the digital media space, which is characterized by platformization and private power, alongside widespread hate speech and disinformation. She also notes that at least newer agreements on digital trade, such as the 2020 Digital Economy Partnership Agreement (DEPA) between New Zealand, Chile, and Singapore, include provisions on open government data, digital inclusion with a focus on women, rural, and low-income socioeconomic groups, and the importance of a rich and accessible public domain.

María Vásquez Callo-Müller and Kholofelo Kugler, both of the University of Lucerne, discuss the challenging topic of the link between digital trade, development, and inequality.[22] For their purposes, they define development and inequality as pertaining to the ability of developing countries and LDCs to shape and participate in the digital economy, and in particular, in the regulatory framework for digital trade. Although development and inequality feature prominently within the JSI discussions (where LDCs and developing countries are underrepresented), those relate mainly to how to bridge the "digital divide" (*inter alia*, gaps in connectivity, infrastructure, digitalization, and regulatory frameworks, as well as low digital literacy, gender inequalities, and the participation of micro, small, and medium enterprises (SMEs) in digital trade). Less emphasis is placed on human rights, except privacy concerns, and environment-related issues. The reader may note that the heterogeneity of digital trade rules, as discussed by Evenett et al., is especially hazardous for SMEs—thus heavily impacting development in developing countries and LDCs, where SMEs comprise a significant portion of the economy. While developing countries' increasing participation in digital trade norm-setting in PTAs might result in more "development issues" permeating the rules, hitherto, solely cursory references to development and inequality appear in only a few agreements. Yet, some PTAs set frameworks for the trusted, safe, and responsible use of artificial intelligence technologies, which are important for the Global South and Global North alike. The authors emphasize that data localization could support the creation of local domestic data industries, thus spurring economic development. Nevertheless, data localization is a form of import substitution, locating personal data within national borders and should,

[20] UN Deputy Secretary-General Press Release, With Almost Half of World's Population Still Offline, Digital Divide Risks Becoming "New Face of Inequality," Deputy Secretary-General Warns General Assembly, UN Doc. DSG/SM/1579 (Apr. 27, 2021).

[21] Mira Burri, *Digital Trade Law and Human Rights*, 117 AJIL Unbound 110 (2023).

[22] María Vásquez Callo-Müller & Kholofelo Kugler, *Digital Trade, Development and Inequality*, 117 AJIL Unbound 116 (2023).

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therefore, be appraised with caution—as is the practice in traditional trade law, in addition to the concerns as formulated by Burri.

In her contribution, Shin-yi Peng of National Tsing Hua University addresses the challenges that the digital economy poses for national security in the form of cybersecurity threats.[23] She focuses on two aspects of cybersecurity. First, digital technology suppliers have the ability to build "back doors" into hardware or software and gain access to computer systems that bypass standard security mechanisms. Second, the use of digital technology in critical infrastructure is rising, creating heightened vulnerability to cyberattacks. Challenges also rise due to cyber espionage, surveillance, and other cybersecurity risks, creating an intertwined relationship between digital trade, cybersecurity, and national security. China, the United States, and the European Union, *inter alia*, have passed laws on cybersecurity, including banning foreign companies (e.g., Huawei for 5G technology). Such legislation may contravene WTO law as well as PTAs. Peng argues that the current "conventional" trade law general exceptions and security exceptions are not fit for purpose for the digital age since they are too narrowly framed, covering only enumerated circumstances under which they can be invoked, notwithstanding their self-judging nature. And indeed, broad self-judging cybersecurity exemptions without purpose restriction are included in recent treaties. But it remains unresolved how to balance legitimate concerns on national security and simultaneously guard against protectionism. Peng proposes that non-critical infrastructure and critical infrastructure be subject to different levels of scrutiny. It remains an open question what other ways exist to curb unjustified invocations of the security exceptions and the consequent erosion of trade disciplines. In my view, one could explore procedural solutions, including the establishment of a special council on cybersecurity.[24]

Digital technology carries high potential as well as high risks. Digital trade policymaking mirrors the problems facing the world. So far, different states regulate digital technology and trade differently, consequently creating trade barriers and potentially hindering development and exacerbating inequalities. Data protectionism, data localization, and import substitution attempts, for example, can backfire from a development perspective. Regulatory policy divergence may create tensions with the goals formulated by the UN, including inclusivity, fostering global digital cooperation, and promoting digital trust, security, and stability. Yet, regulation is also needed to safeguard, *inter alia*, human rights and national security. Effective multilateralism is urgently needed to find a sustainable balance between legitimate concerns and protectionist tendencies in digital trade law. The WTO is, to my mind, best placed to find adequate solutions that take into account the broader picture on how to achieve the SDGs with an inclusive plurilateral digital trade agreement.

[23] Shin-yi Peng, *Digital Economy and National Security: Contextualizing Cybersecurity-Related Exceptions*, 117 AJIL Unbound 122 (2023).

[24] Similar to what has been proposed for Global Values Chains by Christopher Findlay & Bernard Hoekman, *Value Chain Approaches to Reducing Policy Spillovers on International Business*, 4 J. Int'l Bus. Pol'y 4, 390 (2021).

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