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International trade law perspectives on paperless trade and inclusive digital trade

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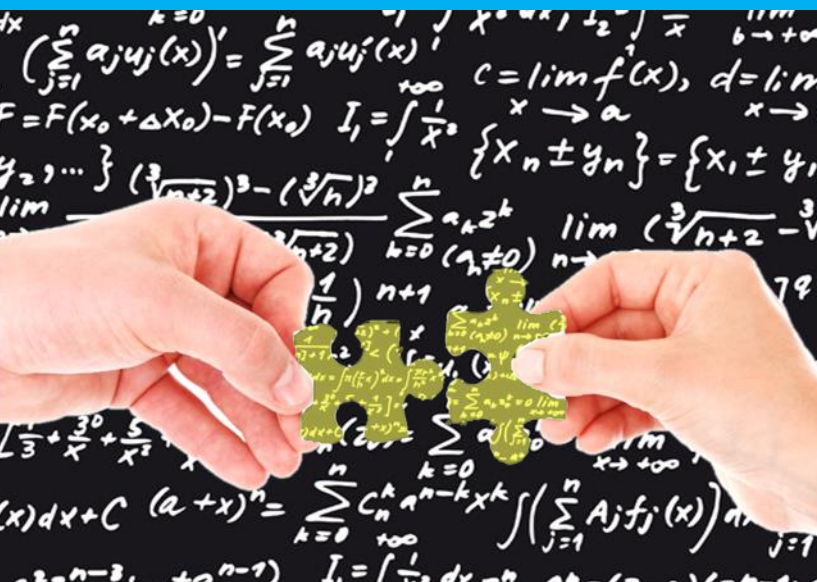
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International trade law
perspectives on paperless
trade and inclusive digital
trade



Andrew D. Mitchell
Neha Mishra

ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE

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ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE

WORKING PAPER

International trade law perspectives on paperless trade and inclusive digital trade ‡

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Abstract

Cross-border paperless trade is increasingly important to generate economic gains in a digitalised economy. Several developing and least developed countries will need to modernise their domestic laws and regulations to facilitate cross-border electronic transmissions, particularly to promote cloud computing and electronic payments. In recent trade agreements, trading partners have committed to deeper and more comprehensive provisions on electronic commerce, including adopting domestic laws on online consumer protection, spam and data protection, facilitating use of electronic signatures and authentication methods, promoting cooperation on electronic commerce issues, and facilitating cross-border data flows. The Trade Facilitation Agreement of the World Trade Organization (WTO) also supports various measures to facilitate cross-border paperless trade including facilitating online customs procedures and electronic payments. Further, many countries are also proposing reforms at the multilateral level by circulating proposals at the WTO to create trade rules relevant to the digital age. Such initiatives will support efforts in developing countries to implement an efficient and effective legal framework for electronic transactions. Simultaneously, to make digital trade more inclusive, developed countries should provide technical and financial assistance to developing countries and least developed countries in modernising their domestic legal framework applicable to digital trade.

Key words: cross-border paperless trade, electronic commerce, international trade agreements, WTO

JEL codes: K33, F19

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1. Overview

Legal and regulatory frameworks, both at the domestic and international level, are increasingly under pressure to respond to the several challenges arising in digital trade governance. Digital trade offers promising prospects for economic growth in developing countries and least developed countries – however, many of these countries either have outdated laws and regulations, or have not yet implemented any relevant laws to support the growth of the digital economy. In this paper, we look at two key aspects of digital trade which are extremely relevant for developing and least developed countries: the domestic and international regulatory frameworks pertaining to cross-border paperless trade; and the various means by which digital trade can be made more inclusive. The discussions in both these sections highlight: (a) the importance of an efficient and effective regulatory environment at the domestic level for enhancing opportunities and benefits from digital trade; (b) the important role played by international institutions (particularly those dealing with international trade and investment) in facilitating necessary reforms; and (c) the role of developed countries in making digital trade inclusive, especially by providing technical and financial assistance to developing countries in modernising their domestic legal framework applicable to digital trade.

2. Regulatory framework on paperless trade

2.1. Facilitating domestic legal frameworks for paperless trade

One of the key tools to facilitate digital trade is ‘cross-border paperless trade’ which is defined as ‘trade in goods, including their import, export, transit and related services, taking place on the basis of electronic communications, including exchange of trade-related data and documents in electronic form’.² Studies have estimated that cross-border paperless trade will result in enormous economic gains and increased efficiency in exports (Shepherd and Duval, 2014). Further, many experts have also extensively analysed the significant economic benefits likely to arise from the Trade Facilitation Agreement (TFA) of the World Trade Organization (WTO),

² Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific, opened for signature to all ESCAP member States on 23 August 2016, art 3(a). Further information on this Agreement is available from <http://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific>.

which also supports various measures to facilitate cross-border paperless trade including facilitating online customs procedures and electronic payments (Hoffman, 2013; OECD, 2005; Beverelli, et al, 2015).

Creating an efficient and effective regulatory environment for paperless trade requires many domestic electronic transaction laws to be in place. In a highly digitised economy, trading without access to good internet platforms and reliable digital services is practically impossible. Further, these domestic laws should at least be interoperable and somewhat harmonious with laws of other countries, even if they are not identical. Achieving all this in practice is not easy. Obviously, countries have capacity or resource constraints (even basic access to internet may not be available in developing and least developed countries) and may not have any prior experience of implementing such laws. Moreover, countries may also be ideologically divided on how electronic transactions should be regulated in their domestic system, including due to economic interests tied to their domestic digital industry. For example, the Chinese government has repeatedly attempted to enforce indigenous technical standards in relation to ICT industry on the grounds of security. However, experts have argued that the motive behind these measures is to protect the domestic industry as well as increase government surveillance (Ferracane and Lee-Makiyama, 2017). We discuss some key examples below of domestic laws that promote cross-border paperless trade.

Domestic laws that promote cloud technologies and internet services such as electronic payments are essential to develop electronic platforms to encourage paperless trade. Many countries place restrictions on foreign cloud service providers which are usually more competitively priced and sophisticated. Similarly, many developing countries place restrictions on e-payment services such as PayPal by implementing strict Know Your Customer or licensing requirements, or even expressly prohibiting foreign players in the financial sector. The alternatives available within the domestic market such as government cloud or local e-payment services may not be as reliable and secure, and often may not be trusted by businesses and consumers, and can particularly affect small-scale businesses within that country trying to reach global markets. These restrictive measures are detrimental to the digital sector. For example, many data localisation laws or sector-specific restrictions on cross-border data transfers (for example, health, finance etc.) make it very inconvenient for businesses to use electronic means to conduct their transactions, but experts have pointed out that these data localisation laws or sector-specific restrictions do little to contribute to security or data protection (which is often the

given regulatory objective for such measures) (Cory, 2017; Mitchell and Hepburn, 2017). Instead, domestic laws should be designed to support cross-border flows of electronic transmissions.

Domestic laws should also promote technology neutrality (for example, the recognition of electronic signatures and secure electronic authentication methods) to facilitate cross-border paperless trade. Mechanisms should exist within the domestic framework to recognise electronic signatures and authentication methods of foreign digital service providers, provided they subscribe to recognised international standards (for example, standards prescribed by the United Nations Commission on International Trade Law (UNCITRAL)). If countries impose specific standards (for example, indigenous standards as is very common in China), it will naturally dis-incentivise foreign players, and thus, both local and foreign businesses will be unable to use these competitive and secure services. More broadly speaking, electronic transaction laws will only be effective, whether in the domestic or international context, if they promote trust of consumers and service providers in the internet and internet-driven services. While countries have strong interest in enabling such an environment, they also have vested political or economic interests which may result in policy inaction. In addition, in creating regulatory frameworks for electronic transactions, consultations between governments and the technology sector is crucial because law-makers often lack sufficient knowledge of the latest developments in technology, particularly as to how laws can unnecessarily impede on digital innovation. In our view, many countries are yet to initiate genuine constructive and open dialogues with the industry.

2.2. How international trade law can support paperless trade

International trade agreements play a very essential, supportive role in promoting a sound domestic framework for electronic transactions. Many recent preferential trade agreements (PTAs) contain provisions on several of the areas we discussed previously in Section 2.1 (see further Duval and Mengjing, 2017). Many PTAs contain provisions that require its members to not impose unreasonable restrictions on electronic commerce, and implement their domestic regulations in a transparent, objective and reasonable manner (for example, avoid regulations that unnecessarily inhibit electronic commerce, provide adequate information to businesses and consumers, particularly small and medium-sized enterprises (SMEs)). Consequently, such countries will be forced to at least set up a basic regulatory environment for online consumer protection, spam, privacy and data protection, prohibiting data localisation and protecting vital

commercial interests of digital service providers, and not impose disproportionate obligations on electronic commerce providers. Another important aspect is how investment chapters in PTAs could potentially boost foreign investment in digital infrastructure (UNCTAD, 2017). Further, many PTAs have established mechanisms to enable greater information exchange and cooperation, between countries on electronic commerce issues and provide channels for providing regulatory assistance to trading partners. While many of these provisions are not binding, they can still be effective, if international political good-will exists. As such, developed countries have strong incentives to engage in these mechanisms because of the untapped potential of electronic commerce markets in several developing countries.

Outside of international trade organisations, several other organisations are also committed to such initiatives – including United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), United Nations Conference on Trade and Development (UNCTAD), UNCITRAL, Association of Southeast Asian Nations (ASEAN), Organisation for Economic Co-operation and Development (OECD) and more recently, private players such as Alibaba through initiatives such as Electronic World Trade Platform. The TFA is also a step in the right direction – in our view, the scope of this agreement should be expanded beyond trade in goods, and include trade in services as well. None of the above changes can be implemented immediately, nor can international trade agreements address or resolve all infrastructural and regulatory gaps in developing and least developed countries. However, in our view, over time, sustained efforts of international institutions in collaboration with governments and the private sector are more likely to facilitate the creation of a meaningful and fruitful environment for digital trade.

3. Inclusive digital trade: Taking the first steps

3.1. Changing nature of digital trade

The idea of inclusive digital trade is very appealing and relevant in the current digital age. With the growth of digital technologies and wide internet adoption, the nature of digital trade is also evolving rapidly. Particularly, as electronic commerce platforms are becoming widespread, the number of small-size shipments have increased enormously in cross-border trade. Therefore, unlike the earlier times, when cross-border trade in goods consisted of large shipments for big businesses, modern day cross-border trade often involves individual or smaller orders for shipments from other countries. The entities engaging in this trade are often individual sellers or

small-sized enterprises, advertising their products on electronic commerce platforms such as Alibaba or eBay. The emergence of this kind of trade has increased opportunities for digital inclusion, as many entrepreneurs who have access to a computer and produce a good product can access consumers worldwide. However, the inclusion of this emerging group of ‘micro-multinationals’ (eBay, 2014) requires deeper policy engagement regarding how to make digital trade more inclusive.

3.2. Steps to achieve inclusive digital trade

In our view, boosting digital inclusion consists of two simultaneous steps, which necessitate policy action at a domestic and at an international level. First, countries should aim to implement sound and effective regulatory environments to support SMEs and not impose unnecessary regulatory burdens on them (WTO, 2016). Many countries tend to favour unproductive and inefficient policies such as data localisation or impose very tough requirements for foreign businesses such as domestic licensing requirements, technology transfer requirements, local content requirements, unreasonable security or data protection standards, restrictions on electronic payments or other internet-driven services, and even, bans on foreign internet platforms. These measures not only disadvantage foreign businesses but are also extremely harmful for local SMEs and consumers alike. Further, these measures are imposed despite most international trade agreements making requirements for countries to implement domestic regulations in a reasonable, transparent and objective manner. The TFA requires countries to publish relevant laws and regulations online.

In our view, countries need to endeavour to provide more clarity and information on their domestic regulations to both local and foreign businesses. Particularly, for individual entrepreneurs and Micro, Small and Medium-sized Enterprises (MSMEs), it is practically impossible to navigate a complex web of regulations, without technical assistance. Although developing countries have relatively less capacity to achieve such reforms, many countries also deliberately choose to implement vague regulations to be able to mask their intentions of imposing protectionist policies, or control information circulated via the internet. Several studies have shown that such measures are economically and technically unproductive, and raise larger issues of human rights violations (Aaranson, 2016; Chander 2008; Bauer, et al., 2014).

Many developing and least developed countries have a weak regulatory environment for the internet (e.g., poor standards of cybersecurity or ineffective data privacy laws) – this can deter

Internet-based businesses from operating in that country. Equally, it can deter customers (both local and foreign) who may not consider the available domestic platforms to be reliable, particularly while revealing financial details or other personal information necessary to conduct electronic transactions. Within the WTO and several other international trade platforms, stakeholders are increasingly engaging in dialogues regarding how these issues can be addressed in international trade agreements. A few developing countries have joined hands (Friends of the E-commerce group) to discuss ideas regarding inclusive digital trade, some of which, will be discussed later in the paper.³ Further, several other organisations (such as UNCTAD, APEC, OECD, and ASEAN) are working on these issues to enable a better balance between protecting business interests and protecting users of online commerce. As far as possible, countries should engage in these dialogues and make best efforts to incorporate domestic regulations which are in line with international standards and industry best practices. In particular, continued dialogue between interested stakeholders in different platforms can be a critical step in exploring new opportunities for participation of developing countries in the digital economy, finding solutions that drive industry best standards without harming regulatory interests, and protecting the interests of digital trade consumers in the long run. Many countries continue to not engage in such dialogues constructively and only provide symbolic opportunities for private sector and civil society to participate in the formulation and implementation of regulations on digital trade.

The second important step in the process is to complement regulatory reforms with mechanisms specially designed to assist developing countries and more specifically, least developed countries in improving both their technological and regulatory capacity in the digital space. Perhaps, not surprisingly, the existing mechanisms within the TFA and several other PTAs only make it voluntary for countries to assist their trading partners to develop their domestic electronic commerce framework. However, as discussed earlier, several initiatives are being undertaken under different international and multi-stakeholder platforms to increase opportunities to support developing countries to build their domestic digital environment. These initiatives should be taken seriously by developed countries, not only because they appear appealing and morally sound, but also because entrepreneurs and consumers in developed

³ WTO, *Work Programme on Electronic Commerce, Non-paper from Colombia; Costa Rica; Hong Kong, China; Israel; Malaysia; Mexico; Nigeria; Pakistan; Panama; Qatar; Seychelles; Singapore and Turkey - Electronic Commerce and Development*, JOB/GC/101/Rev.1 (28 July 2016).

countries can gain substantially if the digital trade market can be expanded in developing countries.

We would also like to highlight some of the ideas circulated in recent WTO proposals in the Work Programme on Electronic Commerce, by countries such as China, Pakistan and a host of other developing countries.⁴ First, some proposals have suggested that initiatives must be taken to integrate MSMEs in developing and least developed countries by offering them technical assistance, trade finance and simplifying customs procedures to enable easy logistics for small-size shipments. The Trans-Pacific Partnership Agreement provides important provisions in a chapter on SMEs (Chapter 24) which support such measures, although none of the provisions are binding. Second, measures must be taken to promote electronic payments particularly in least developed countries. Finally, even under the WTO, the Committee on Trade and Development can be an excellent avenue to share information and find creative ways of providing technical assistance to countries trying to build their domestic digital economy.

4. Conclusion

The ideas presented in this paper outline some of the significant first steps that countries must take to integrate into the digital economy, and improve their prospects for economic gains from digital trade. In practice, implementing these ideas will require strong political commitment and engagement of different domestic, regional and international institutions. We have outlined how international trade agreements contain several useful provisions (both binding and non-binding) that can help governments implement reforms within their domestic frameworks to facilitate cross-border paperless digital trade. However, developing and least developed countries also need stronger financial support and technical assistance from international institutions and developed countries to initiate such reforms. Despite conflicts in economic and political interests

⁴ See, for example, WTO, *Work Programme on Electronic Commerce, Non-paper from Colombia; Costa Rica; Hong Kong, China; Israel; Malaysia; Mexico; Nigeria; Pakistan; Panama; Qatar; Seychelles; Singapore and Turkey - Electronic Commerce and Development*, JOB/GC/101/Rev.1 (28 July 2016); WTO, *Work Programme on Electronic Commerce, Communication from Canada, Chile, Colombia, Côte d'Ivoire, the European Union, the Republic of Korea, Mexico, Montenegro, Paraguay, Singapore and Turkey: Trade Policy, the WTO and the Digital Economy*, WTO Doc JOB/GC/116, JOB/CTG/4 JOB/SERV/248, JOB/IP/21 JOB/DEV/42 (13 January 2017); General Council, *Communication from the People's Republic of China, Work Programme on Electronic Commerce – Aiming at the 11th Ministerial Conference*, WTO Doc JOB/GC/110, JOB/CTG/2 JOB/SERV/243, JOB/DEV/39 (4 November 2016).

of various stakeholders involved in digital trade, international trade institutions and governments should continue to engage proactively and meaningfully in various initiatives that promote facilitation of digital trade, and improve prospects for integrating developing countries and least developed countries into the digital economy. Increasingly, the private sector and civil society can also provide a strong, complementary role in such initiatives.

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