

## Cross-Border E-Commerce: WTO discussions and multi-stakeholder roles – stocktaking and practical ways forward

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*Disclaimer: This paper is based on and provided background for a workshop. It is intended to provide insight on the key issues and debates that were discussed during the workshop, and should not be read as a statement of the views of the organizers or the Graduate Institute regarding the treatment of the issues involved.*

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## 1. Introduction

E-commerce has long been recognized as a driver of growth of the digital economy, with the potential to promote economic development. The benefits come from lower transaction costs online, increased efficiency, and access to new markets. The smallest of vendors can join online marketplaces to increase their sales, while larger companies can use the Internet to join global value chains (GVCs), and the largest e-commerce providers are now among the most valuable companies in the world.

As a result, online retailing is growing fast, however it is still under 10% of total retail, even in the most developed markets. Furthermore, it is estimated that cross-border sales will only reach 20% of total sales by 2020. There are already a number of initiatives to facilitate e-commerce within countries, at the national and regional government level, and among international organizations and NGOs. This paper focuses on cross-border e-commerce, sometimes coming under the umbrella term ‘digital trade’ (see Annex I, discussing competing definitions).

The WTO has long recognized the importance of digital trade. At the Second Ministerial Conference in 1998, the Ministers launched a Work Programme on e-commerce, and continued a moratorium on customs duties on electronic transmissions which has been upheld through today, at the Ministerial Conference held every 2 years.<sup>3</sup> In the past several years there has been increased interest in digital trade with a number of submissions preceding the Eleventh Ministerial Conference (MC11) that took place in Buenos Aires at the end of 2017.<sup>4</sup>

The Ministerial Decision on e-commerce that emerged from MC11 had no formal decisions based on objections from a number of countries, but included an agreement under the existing Work Programme to ‘reinvigorate’ the work and periodically review it in subsequent General Council meetings leading up to the next Ministerial Conference.<sup>5</sup> At the same time, seventy-one countries plurilaterally agreed to start discussions on digital trade rules and

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<sup>3</sup> See [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm).

<sup>4</sup> See [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfecom\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm)

<sup>5</sup> See [https://www.wto.org/english/news\\_e/news17\\_e/mc11\\_13dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm),

identify topics for trade talks.<sup>6</sup> These countries now attend monthly meetings at the WTO in Geneva that are open to all WTO Member States, including a meeting that directly preceded our workshop. On 25 January, 2019, during the Annual Meeting of the World Economic Forum in Davos, 76 member states of the WTO issued a joint Ministerial Declaration setting out their intention to commence e-commerce negotiations.

In addition to the WTO discussions, e-commerce issues have been included in up to 80 preferential trade agreements (PTAs) at various levels.<sup>7</sup> Based on publicly available information from these discussions and agreements, a number of concerns have been raised about digital trade talks. These include concerns that developing countries may not be ready for digital trade agreements due to the digital divide, and similarly that small and medium-sized enterprises (SMEs) may not benefit. Other concerns relate to the nature of multilateral trade talks and to the inclusion of issues, such as data privacy, cross-border data flows, data localization, cybersecurity, spam, and disclosure of source code, among others, which some stakeholders feel may be more suitably addressed only in multi-stakeholder Internet governance processes.

Our workshop brought together a broad spectrum of stakeholders with an interest in e-commerce. While the importance of e-commerce for economic growth is widely acknowledged, the benefit of international policy in fostering cross-border e-commerce for all stakeholders involved is a contentious issue. The purpose of the workshop was not only to present viewpoints and raise differences, but also to work together to identify common views and a way forward. To make the discussions concrete, a number of issues have been identified that must be addressed in order to help to promote cross-border e-commerce. During the workshop discussions focused on how to categorise these issues and where they can be addressed. Please see the attached Annex for additional details about the background to current digital trade discussions.

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<sup>6</sup> See [https://www.wto.org/english/news\\_e/news17\\_e/minis\\_13dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm)

<sup>7</sup> See for instance <https://www.ictsd.org/themes/global-economic-governance/research/digital-trade-related-provisions-in-regional-trade>; and see the USMCA.

## 2. Issues

The following served as a starting point for the discussions on governing cross-border e-commerce. The list is based on a review of the public documents relating to the WTO discussions and of existing PTAs, along with national, regional, and international efforts to promote cross-border e-commerce by a wide range of stakeholders, including other international governmental organizations, NGOs, and multi-stakeholder Internet governance forums.

Broadly speaking, we divide the issues around cross-border digital commerce into four categories. We elaborate on each of these categories below:

- **Transactions:** Traditionally transactions range in complexity from a consumer making a one-time purchase in a retail store to complicated long-term contractual arrangements between companies in a GVC. The ability to engage in these transactions online can help develop cross-border e-commerce.
- **Trade facilitation and market access:** While e-commerce often involves digital services ranging from purchasing music online to more complicated professional services, they also involve purchase and delivery of physical goods, which requires cross-border delivery.
- **Data:** e-commerce requires and generates data, often personal, regarding the purchase and other aspects of the transaction, and possibly other data related to the activities of the buyer and/or seller, which raises questions about privacy and access across borders.
- **Complementary issues:** A number of other issues that help to promote e-commerce but are not directly involved in any particular transaction also arise in discussions of digital trade and can be addressed here, such as intellectual property rights protections, infrastructure and development of digital skills.

We explore each category in turn:

### (a) Transactions

A number of pieces must be put in place in order to both enable online transactions and create confidence among customers to engage in such transactions. Each of these pieces

requires national frameworks that must then be harmonized or recognized among trading partners. For example:

- *Electronic transactions.* Buyers must be able to authenticate themselves and the seller, where needed electronic signatures and contracts must be recognized and enforceable, and online logistics support can increase the efficiency of the delivery.
- *Payments.* Buyers must have a means to pay online, sellers must have a means to receive payments online, and taxation of the resulting corporate revenues or personal incomes is also an important issue.
- *Consumer protection.* There must be means to protect buyers in case the product does not arrive, is not satisfactory, or to arrange refund in case the product is returned.

### **(b) Trade Facilitation and Market Access**

In addition to the long-standing issue of customs duties on sales of digital products transmitted by electronic means, we will focus on trade in other services enabling digital trade as well as goods purchased online. These issues include the following.

- *Electronic transmissions.* Should the moratorium on customs duties be made permanent? Is the definition of electronic transmissions well established? Should services delivered electronically be taxed?
- *Trade facilitation.* This can encompass paperless trading for customs and a standard *de minimis* threshold, although there are concerns that it may not be in the interest of all countries. It can also include a means for enabling returns of goods without additional customs duties.
- *Market access.* This includes goods and services market access and classifications, for telecoms and ICT services to enable Internet access; the services purchased online; and for supporting services such as logistics and delivery and e-payments that enable digital trade.

### **(c) Data**

E-commerce generates data – about the transaction and the customer - while online services themselves consist of valuable data. This data may be personally or commercially sensitive, and rules governing protection and access are needed at national and international levels. At the workshop, data related issues emerged as one of the most critical concerns. Issues include:

- *Flow of data.* The flow of data across borders by users and companies is important to enable e-commerce, for instance to enable cloud services. Many states have already enacted data privacy provisions, some with extra-territorial impact. In addition, some governments are proposing public policy exceptions to require localization of data.
- *Trust.* Data protection and privacy issues are important for the protection of data and promotion of online activities, along with action and cooperation on cybersecurity. There is evidence that the current lack of security, and the proliferation of spam used for phishing is affecting the development of e-commerce.<sup>8</sup>
- *Law enforcement.* Enabling access to data in other countries by law enforcement could be streamlined and made predictable and consistent, in order to balance privacy with legitimate law enforcement considerations.

#### **(d) Complementary issues**

A number of other issues are important to promote cross-border e-commerce, but do not relate directly to specific e-commerce transactions. Instead, they help to support online activities more generally, and can impact online trade. For example:

- *Content issues:* Addressing online intellectual property rights issues including copyright, and providing an appropriate level of immunity from liability for intermediaries.
- *Technical issues:* Address access to source code and algorithms, and restrictions on the use of encryption technologies that impact online trust.
- *Development:* This can include development of infrastructure, including ICT and roads, as well as capacity building for digital skills and entrepreneurs to develop small businesses.

### **3. The Way Forward: Principles**

The above described taxonomy was used at the workshop as a starting point to identify the key issues that need to be addressed. Subsequently the discussions narrowed down to identify where and how to best address the issues, that is, at the WTO or in bilateral trade agreements, in other intergovernmental forums, such as, multi-stakeholder Internet governance forums, or through new approaches.

Certain principles emerged as cross-cutting, irrespective of different viewpoints on the nature of rules or how they should be covered at the international level. This section highlights the principles

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<sup>8</sup> Phishing is a means of gathering sensitive information such as passwords or credit card details by sending emails or instant messages disguised to look like they are coming from official sources.

that emerged. These principles can help to simplify the set of issues that any one organisation needs to address, while also guiding how an organisation goes about doing that.

### **(a) WTO *vis-à-vis* other international institutions**

Different organizations are looking into similar or inter-connected issues mapped in this paper. At the international level, despite e-commerce related discussions in several different forums, the multilateral WTO is the key organization where e-commerce discussions (although not yet negotiations) are being conducted. Lack of transparency, given that only governments have access to many discussions, and stalemate in proceeding on negotiations due to differences between states, work against the WTO being the primary organization for e-commerce. Therefore, although the WTO may be a good place for negotiations on some issues, not all issues are trade related or suited to the state-centric and rules-based WTO structure.

Related work of other international organizations is also relevant, and may not need to be duplicated in the WTO. This includes UNCTAD (for trade facilitation, market access and e-Commerce development issues), UNCITRAL (for frameworks for national e-Commerce related legislation), the OECD (particularly for taxation), the International Telecommunications Union (for infrastructure development), the Universal Postal Union (for logistics related concerns), and others are already addressing some of the issues we identified.

### **(b) Existing rules *vis-à-vis* new rules**

In addition, some rules of international trade law which facilitate e-commerce are already in existence, yet it is rarely acknowledged that such rules extend to e-Commerce issues, thereby already providing a framework facilitating growth of e-Commerce. For example, market access and MFN principles help build consumer trust, and national treatment helps in authenticating e-contracts and e-signatures. Greater stock-taking of existing rules and their applicability to e-commerce issues is a prerequisite for any discussion on new rules that may help address the issues identified. For the remaining concerns, however, there is scope for international rule making. The scope and platform for new rules, is subject to debate, however, as discussed above.

### **(c) International *vis-à-vis* domestic rules and policy**

Although cross-border e-Commerce involves different stakeholders, national governments have a primary role in law and policy making. Discussions and negotiations in any international venue must consider the views of national governments and their laws. Certain issues like improving national coordination on transaction and development-related issues, privacy and data protection, consumer protection, law enforcement and other areas, depend first on national laws and their enforcement.



Hence, despite the need for international harmonization to improve governance in general and foster cross-border e-Commerce, the importance of domestic governments must be considered.

However, international bodies may influence how governments enact and enforce domestic laws, even if there are no binding international regulations, and hence will play a key role. One such example is the UNCITRAL Model laws described in the Annex. Given the global nature of the Internet, and to promote cross-border e-Commerce, it is important for international discussions and collaboration to help guide frameworks for domestic legislation.

#### **(d) Multi-stakeholder approaches**

Since the WTO and other government bodies are not multi-stakeholder, the absence of non-state entities is a concern for some given the range of issues involved. At the domestic level, it is also important to have a multi-stakeholder approach, including not just the private sector, which often plays a role in lobbying for legislation, but also civil society.

While trade advocates understand and may prefer trade forums due to their central regulation and dispute settlement features, Internet governance advocates prefer the transparency and inclusivity of multi-stakeholder approaches. It is crucial for the groups to interact and understand the developments on these issues, and their strengths and weaknesses.

#### **(e) Internet governance organisations**

E-commerce involves both trade and non-trade concerns, regulated by trade and other bodies and discussed within trade and Internet communities. Due to limited interaction between the individual forums due to their specific specializations, whether trade or internet centric, it is difficult to have clarity, much less resolution, on the issues. There is increasing need for cross-fertilization between the trade and internet communities, and they should not work within their exclusive silos. Unlike trade, which has a single multilateral body – the WTO, Internet governance lacks a single forum to address all concerns involved.

At the international level, the Internet Governance Forum is a yearly venue, held under the auspices of the United Nations, where all stakeholders can attend and raise key issues, in a venue where there is no decision-making or voting. Non-profits, including the Internet Society and the Alliance for Affordable Internet are also working on Internet development issues. In addition, technical bodies, such as the IETF (Internet Engineering Task Force), which develops Internet standards, are also working on Internet security issues.

Cross fertilization between trade and internet communities, is crucial for ensuring holistic governance and development of e-commerce.

## 4. Conclusion

E-commerce governance is complex and multi-layered. Its governance should include a mix of hard and soft law, international treaties and national laws. The specific proposals put forth during the workshop were wide, diverging, and not homogenously endorsed. Some suggestions included cross-sectoral ideas, such as a World Summit for E-Commerce on lines of the World Summit on Information Society (WSIS), a new international organization for competition policy cooperation, and opening up the WTO to non-state actors to ensure a voice for non-government stakeholders. Other suggestions were targeted towards specific issues. We believe that we have created a framework, and a platform, for further discussion on the issues we have identified, as well as the principles for addressing them.

## Annex

*This annex covers key points and issues for those unfamiliar with international trade law, especially WTO law, and the e-commerce related discussions at various forums, as well as other international arrangements that are relevant for e-commerce.*

### Section I: Key Definitions<sup>9</sup>

In most contexts, the terms ‘e-commerce’ and ‘digital trade’ are used interchangeably. However, some consider ‘digital trade’ as a broader term encompassing ‘e-commerce’ and all related Internet or digital aspects, while others (including the US) consider digital trade in a narrow sense which excludes sale or purchase of physical goods through the Internet. The US prefers using the term ‘digital trade’ in its trade agreements and official submissions, and has also defined ‘digital products’ for its recent trade negotiations. The WTO does not define the terms digital trade and digital product. For our purposes, in the absence of consensus in recent times due to varying opinions between states on what e-commerce (or digital trade) comprises, we will use the term ‘e-commerce’ and its usage will be based on the WTO definition.

**E-commerce:** The WTO uses a much wider definition of e-commerce than other organisations such as OECD and UNCTAD, which use almost identical definitions.

- The WTO defines e-commerce as, *“the production, distribution, marketing, sale or delivery of goods and services by electronic means”*.<sup>10</sup> Since the definition expands beyond sale and delivery by electronic means, this is a broad definition of e-commerce.
- The OECD has previously defined e-commerce as, *“purchases and sales conducted over computer networks, using multiple formats and devices, including the web and electronic data interchange (EDI), using personal computers, laptops, tablets and mobile phones of varying levels of sophistication”*.<sup>11</sup>
- UNCTAD’s definition additionally clarifies that *“E-commerce may involve physical goods as well as intangible (digital) products and services that can be delivered digitally.”*<sup>12</sup>

**Digital trade:** The US International Trade Commission defines digital trade, as *“The delivery of products and services over the Internet by firms in any industry sector, and of associated products such as smartphones and Internet-connected sensors. While it includes provision of e-commerce platforms and related services, it excludes the value of sales of physical goods ordered online, as well as physical goods that have a digital counterpart (such as books,*

<sup>9</sup> It must be noted that definitions apply only in the context in which they have been defined. Therefore, the WTO definition of e-commerce applies only with respect to WTO, and the digital products definition provided, for example in some US PTAs apply only with respect to the parties to that PTA.

<sup>10</sup> WTO, *Work Programme on Electronic Commerce* (WTO, 30 September 1998), para. 1.3.

<sup>11</sup> UNCTAD, *Information Economy Report 2017: DIGITALIZATION, TRADE AND DEVELOPMENT* (New York & Geneva: UNCTAD, 23 October 2017) <[https://unctad.org/en/PublicationsLibrary/ier2017\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ier2017_en.pdf)>. Also see OECD, *OECD Guide to Measuring the Information Society 2011 | READ Online* (Paris: OECD), p. 71 <[https://read.oecd-ilibrary.org/science-and-technology/oecd-guide-to-measuring-the-information-society-2011\\_9789264113541-en#page74](https://read.oecd-ilibrary.org/science-and-technology/oecd-guide-to-measuring-the-information-society-2011_9789264113541-en#page74)> [accessed 23 October 2018].

<sup>12</sup> UNCTAD, *ibid.*

*movies, music, and software sold on CDs or DVDs*”.<sup>13</sup> In comparison with the WTO definition of e-commerce, this definition of ‘digital trade’ is narrower because it excludes goods that are marketed and/or sold using electronic means.

**Digital Products:** In the draft text of the US-Canada-Mexico PTA “*digital product means a computer program, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically*”.<sup>14</sup> Additionally, the definition clarifies in footnote 2 that “digital product does not include a digitized representation of a financial instrument, including money.”<sup>15</sup> This seems to exclude cyber-currencies like bitcoins.

## Section II: WTO

This section provides a brief introduction to the law of the WTO, since e-commerce related discussions have intensified at the WTO in recent years. Established in 1995, the WTO is the successor of GATT 1947, and comprises several agreements liberalizing trade through removal of trade (tariff and non-tariff) barriers, with certain exceptions. It comprises several multilateral agreements, as well as a binding dispute settlement system. Consequently, the WTO is legally one of the most powerful international organizations. The multilateral agreements are binding on all 164 WTO members.<sup>16</sup>

WTO law widely operates in silos of ‘goods’, ‘services’ and ‘intellectual property’, all three being highly relevant for e-commerce. The GATT Agreement (General Agreement on Tariffs and Trade), is the primary agreement for trade in goods, although there are more specialized agreements such as the TBT Agreement (Technical Barriers to Trade Agreement). The GATS Agreement (General Agreement on Trade in Services) regulates trade in services, and the TRIPS Agreement (Trade Related Aspects of Intellectual Property Rights) regulates the intellectual property issues relevant for trade.

Some of the relevant WTO agreements are detailed below:

1. **GATT:** Goods traded on e-commerce platforms will be subject to the GATT Agreement which provides a framework for fixing tariffs, and ensures non-discrimination between national and foreign “like” goods (known as *national treatment*) and “like” goods from different states (known as *most-favored nation - MFN*), and market access. Such ‘likeness’ between goods is determined through end use of the products,<sup>17</sup> consumers’ tastes and preferences,<sup>18</sup> and the nature and

<sup>13</sup> U.S. International Trade Commission, *Global Digital Trade 1: Market Opportunities and Key Foreign Trade Restrictions* (Washington D.C.: U.S. ITC, August 2017), p. 33  
<[https://www.usitc.gov/publications/332/pub4716\\_0.pdf](https://www.usitc.gov/publications/332/pub4716_0.pdf)>[accessed 23 October 2018].

<sup>14</sup> U.S.T.R., *Unites States-Mexico-Canada Agreement*, Draft  
<<https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/19%20Digital%20Trade.pdf>> Art. 19.1  
[accessed 9 November 2018].

<sup>15</sup> *Ibid*

<sup>16</sup> Additionally, there are a few plurilateral agreements (such as the Government Procurement Agreement) which are binding only on those specific WTO members who have signed and gained accession to the agreements. Some of the issues discussed with respect to e-commerce, such as, cross-border data flows, and restrictions on local server will impact government procurement. See Sanya Reed Smith, ‘Some of the Implications of Ecommerce Proposals for Government Procurement - MC11 Briefing Paper’, *Third World Network Publications*, 2017, 5 <[http://ourworldisnotforsale.net/2017/TWN\\_Procurement.pdf](http://ourworldisnotforsale.net/2017/TWN_Procurement.pdf)>.

<sup>17</sup> GATT Panel Report, *Spain—Tariff Treatment of Unroasted Coffee*, Doc. L/5135 - 28S/102, 1981 [4.7].

extent of competitive relationships between products.<sup>19</sup> National treatment and MFN principles must be maintained by all the WTO members, and they cannot opt out of it unilaterally, or through agreement. However, exceptions such as public morals, health, and national security can permit a state to have a law or policy which is contrary to the GATT norms.

- 1.1. **Information Technology Agreement (ITA):** Signed in 1996, the ITA is an agreement with the aim to eliminate tariffs on information technology related goods that are essential in powering underlying infrastructure for e-commerce. This plurilateral agreement, having 81 members as parties, was expanded in scope at the 2015 Ministerial Conference, wherein tariffs were removed (zero tariff) on 201 additional goods (such as optical lenses and GPS navigation equipment, for instance). The 2015 update of the ITA provides a positive example of WTO members amending an outdated classification system and agreement to reflect current realities of the digital era.
2. **GATS Agreement:** The GATS Agreement liberalizes trade in services.. Its design and structure is different from the GATT, with a greater degree of regulatory autonomy and individualization of specific liberalization commitments. This is enabled by the following key features explained below, essential for any e-commerce related discussion.
  - 2.1. **Positive list for national treatment and market access, negative list (horizontal commitments) for MFN:** Unlike the GATT, the GATS Agreement provides MFN treatment subject to ‘opt-out’ through explicitly provided exemptions that each WTO member must list for itself. This is referred to as a negative list approach wherein States unilaterally exempt themselves from obligations during their respective Schedule drafting. Secondly, the GATS Agreement provides a positive list of commitments (along with conditions) with respect to market access and national treatment obligations. This means that States explicitly liberalize only those sectors which they want to, and retain full regulatory autonomy to discriminate in favour of national service suppliers for the services (and mode as explained below) which they have not explicitly liberalized.<sup>20</sup> The list of services are coded through a classification system, elaborated in the subsequent section, on the basis of which States have decided which services they liberalize, and which they do not liberalize. For services that have been liberalized, there should be no discrimination between ‘like’ services and service suppliers, similar to trade in goods.
  - 2.2. **Classification:** The W/120 classification system is the WTO’s comprehensive list of services sectors and sub-sectors covered by the GATS, comprising 160

<sup>18</sup> Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc WT/DS453/AB/R, 2016 [6.32].

<sup>19</sup> Appellate Body Report, *European Communities—Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc WT/DS135/AB/R, 2001 [99]; Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/AB/R & WT/DS401/AB/R, 2014, [5.82]; Farrokh Farrokhnia and Cameron Richards, ‘E-Commerce Products Under the World Trade Organization Agreements: Goods, Services, Both or Neither?’, *Journal of World Trade*, JWTL, 50.5 (2016), 793–817 (pp. 805–6).

<sup>20</sup> Ruosi Zhang, ‘Covered or Not Covered: That Is the Question - Services Classification and Its Implications for Specific Commitments under the GATS’ (2015) WTO Working Paper ERSD-2015-11. <[https://www.wto.org/english/res\\_e/reser\\_e/ersd201511\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201511_e.pdf)> [accessed 9 November 2018].

services (MTN/GNS/W/120). It incorporates 12 broad categories of services that further encompass several categories and sometimes even sub-categories, therefore there is either a three-tier or a two-tier level of categorization for a particular service. Among the broader categories, 'business services', 'communication services' and 'financial services' are most relevant for e-commerce, and to a lesser extent 'educational services', 'tourism and travel related services', and 'distribution services'. Within 'business services', the sub-category on 'computer and related services' under which especially 'data base' and 'data processing' services are important, whereas within 'communication services' the categories on 'telecommunication services', and 'audio-visual services' are highly relevant for e-commerce. The WTO Appellate Body has ruled that the W/120 classification of sectors and sub-sectors should be considered mutually exclusive, and there cannot be an overlap wherein a service is classified under two or more categories.<sup>21</sup> This is necessary to avoid anomalies, however this creates concern for e-commerce, in particular, since many services could now be considered hybrids or combined services. It is often argued that this classification system is outdated, does not reflect the realities of the digital era, and hence should be updated following the ITA example. However, others are of the opinion that the W/120 classification sufficiently addresses e-commerce and digital service related concerns, particularly if it were considered to be technology neutral.<sup>22</sup>

2.3. **Modes:** The GATS Agreement requires categorizing any trade in service transaction into one of 4 modes of supply.<sup>23</sup> Each Member has a 'Schedule' where it provides its commitments for the services classified under W/120, and under each one of the 4 modes of supply. This Schedule can also be subsequently amended based on negotiations, or as a result of autonomous liberalization which in some cases has been committed in GATS outside the context of a negotiating round.

- Mode 1 refers to cross border supply of service.<sup>24</sup> This is considered to be the most relevant mode for e-commerce transactions enabled via the Internet.
- Mode 2 refers to consumption of a service abroad.<sup>25</sup> Traditionally, it includes tourism, foreign education and health services. In the digital era,

<sup>21</sup> Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R 2009, [395–397].

<sup>22</sup> Ines Willemyns, 'GATS Classification of Digital Services - Does "The Cloud" Have a Silver Lining?', *Journal of World Trade*, 53.1 (2019), 59–82 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3194676](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3194676)>.

<sup>23</sup> See WTO Website [https://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c1s3p1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s3p1_e.htm) [accessed 9 November 2018].

<sup>24</sup> Defined as "service delivered within the territory of a Member from the territory of another Member", Art. I: 2(a), GATS Agreement.

<sup>25</sup> Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives* (Oxford and Portland: Hart Publishing, 2006), pp. 65–70; Rolf H. Weber, 'Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism', *Asian Journal of WTO and International Health Law and Policy*, 10.2 (2015), 321–48 (p. 324). WTO Trade in Services Council, *Work Programme on Electronic Commerce: Progress Report to the General Council* (Geneva: WTO, 27 July 1999), para. 5; WTO Trade in Services Council, *Work Programme on Electronic Commerce: Note by the Secretariat* (Geneva: WTO, 16 November 1998).

some e-commerce transactions could also arguably be considered as a Mode 2 supply of service. For example, a consumer in Switzerland purchasing an e-book from Amazon’s UK website may be considered as a consumer virtually traveling abroad for consumption of a service in the UK and hence as a Mode 2 trade in services.<sup>26</sup>

- Mode 3 refers to commercial presence, and concessions under Mode 3 are usually wider than the other modes since it comprises foreign investment. Mode 3 is relevant for e-commerce companies having subsidiaries, data centers or other infrastructures in other countries.
- Mode 4 refers to movement of natural persons, and is generally considered not directly relevant for e-commerce, although it has come up in e-commerce related discussions through issue-linkages.

Traditionally, the lines between goods and services were always clear, since services are distinguished from goods by four pervasive characteristics – intangibility, simultaneity, heterogeneity, and perishability.<sup>27</sup> However, the digital era creates ambiguities, one such example being digital products, including e-books, downloadable movies and music. E-commerce (as per the wider WTO definition) can involve trade in either tangible goods, or intangible services, or digital products. Digital products traded through e-commerce are controversial with respect to whether they should be classified as a good or service, since they also have tangible alternatives like hardcopy books or CDs. There are three options for how to address them.

- Since they are intangible, the most common view is that they should be treated as services, and hence regulated by the GATS Agreement.
- However, since they are analogous to physical goods, and usually not perishable nor heterogenous, there is also a school of thought that they should be treated as goods (often the term e-good is used for digital products) and hence governed by the GATT Agreement.
- A third opinion also exists, that is, a separate category should be created for digital products with a hybrid treatment between goods and services, or at least, as negotiated in a number of FTAs, that there should be no discrimination as between the physical and downloadable versions.

Additionally, the concept of custom duties is traditionally irrelevant for services, but applicable for goods, since the duties are imposed at the border, and services never physically cross any border such that they can be regulated.<sup>28</sup> With respect to digital products, they do not cross borders in a tangible sense, and because of the WTO moratorium on electronic transmissions (explained below), no customs duties can be imposed on them currently. However, some states are exploring options to impose customs

<sup>26</sup> For discussion on the different modes for e-commerce, see Usman Ahmed, Brian Bieron and Gary Horlick, ‘Mode 1, Mode 2, or Mode 10: How Should Internet Services Be Classified in the Global Agreement on Trade in Service?’ (2015) 2015–2016 Boston University School of Law International Law Journal.

<sup>27</sup> Jonathan P Doh and John A II Pearce, ‘Revising Our Understanding and Expectations of the International Trade in Services’ (2004) 9 Journal of Transnational Management Development 59, p. 60.

<sup>28</sup> It is interesting to note that the definition of digital trade in the draft of the newly released US-Mexico-Canada PTA states, “This definition should not be understood to reflect a Party’s view that digital products are a good or are a service”. See Footnote 2, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/19%20Digital%20Trade.pdf>

duties on digital products, since it is possible to control entry of data into a state through features like firewalls.

3D printing, also known as additive manufacturing, is the process of manufacturing tangible, 3 dimensional objects from digital files. Although currently in nascent stages, this technology is predicted to expand in the near future. In 3D printing, the end-product is a good, however it is intangible data (typically software) that can move across borders for a trade transaction using the Internet. Consequently, classification of products traded through the medium of 3D printing is complicated in light of the goods and services distinction.<sup>29</sup>

However, the WTO does have some experience in cases that combine goods and services issues. The issue of delineating between goods (hence GATT) and services (hence GATS) has previously been the subject of WTO jurisprudence. In *EC-Bananas*, the WTO Appellate Body held that the same measure may be subject to both GATT and GATS since it was considered that part of the company's activity involved provision of a service.<sup>30</sup> *China-Audiovisuals* upheld that, with respect to any content heavy product (which is the case for digital products), if it is embedded and delivered through physical materials, it is a good, subject to the GATT Agreement. However if it is delivered through electronic means, it would be subject to the GATS Agreement since such distribution function is considered a service, although the Panel avoided ruling on whether the downloaded music itself is a good or service. WTO jurisprudence, in this case, suggests that if a state's service schedule is sufficiently generically worded, then it applies as technology changes over time.<sup>31</sup>

Therefore, although the debate is not definitely settled, it appears that a film traded through a physical film reel, is a good, however, if traded as a digital file through the Internet, it is a service. *Prima facie*, this may create some discrepancies, for instance, the reel will be subject to customs duties, however the same movie traded electronically, will not be subject to customs duties.

The WTO Appellate Body has in the *US-Gambling* dispute held that any means of delivery, including the internet, is a covered mode of supply of a service. The panel in this ruling relied on a notion of the 'technological neutrality' of the GATS Agreement, and factors in new technology and means of delivery,<sup>32</sup> however, this interpretation has been criticized by some as an instance of judicial overreach.<sup>33</sup>

#### 2.4. **Telecommunications Services:** Within the ambit of the GATS Agreement, the most relevant aspects are the GATS Annex on Telecommunications, the extended negotiations and other subsequent commitments to open markets for

<sup>29</sup> Nivedita Sen, 'Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or Regulatory Autonomy Path?', *Journal of International Economic Law*, 21.2 (2018), 323–48 (p. 330).

<sup>30</sup> Appellate Body Report, *EC — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (9 September 1997), 221. Joost Pauwelyn, 'Case Note: Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China-Audiovisuals', *Melbourne Journal of International Law*, 11.2 (2008), p. 7  
<[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0005/1686281/Pauwelyn.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1686281/Pauwelyn.pdf)>.

<sup>31</sup> Appellate Body Report, *China — Publications and Audiovisual Products*, WTO Doc WT/DS363/AB/R, 2009 [412], Appellate Body Report, *United States— Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [2005] WTO Doc. WT/ DS285/AB/R.

<sup>32</sup> *United States— Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Panel Report, [2004] WTO Doc. WT/ DS285/R [6.285].

<sup>33</sup> Sen, above note 29, p. 331.



telecommunications, and the accompanying Reference Paper on regulatory disciplines for the sector. These may have important implications for the Internet, depending on the coverage of commitments and interpretation of the regulatory provisions.

- The GATS Annex on Telecommunications, contains provisions to guarantee service suppliers access to and use of basic telecommunications needed to supply their services and is an integral part of the GATS Agreement.
- The Fourth Protocol on Basic Telecommunications annexed to the GATS Agreement in 1997,<sup>34</sup> contains schedules of market access and national treatment commitments as well as "additional commitments" on regulatory practices (see below), wherein participating WTO Members opened their markets for foreign participation in basic telecommunications services.<sup>35</sup> Combined with later commitments by other Members and acceding countries, 116 WTO Members have market access commitments on telecommunications today.
- The regulatory framework on the basis of which the scheduled GATS commitments on the provision of telecommunication service can be realized is enumerated under the WTO Telecommunications Reference Paper (commonly referred to as the 'Reference Paper'). It calls of governments who have appended it to their schedules to restrict anti-competitive practices by dominant suppliers of basic telecommunications (public telecommunications transport networks and services).<sup>36</sup> At present, 101 Members have undertaken the Reference Paper.<sup>37</sup> A few Members committed explicitly on Internet Access Services, often when little else was liberalized at the time, while some other Members appear to consider Internet supply of the services listed in their telecommunications commitments to be covered implicitly.

Telecommunication services negotiated upon during the 1997 negotiations covered only basic services, but some Members, although fewer, have also committed on value-added service. The GAT W/120 classification does not designate services as "basic" or "value added", the definition of basic telecommunications (PTTNS) is provided in the Annex on Telecommunications, and value-added services can be derived as services not falling within the Annex definition. For example, telephone services and data transmission services are a 'basic' telecommunication service, and services offering storage or transforming the customer information, such as email, voice mail and online data processing are considered to be value-added telecommunication services. However, there are differences of view among WTO Members regarding whether Internet access service, and other Internet based services relevant for e-commerce, are basic or

<sup>34</sup> WTO, *Fourth Protocol to the General Agreement on Trade in Services*, ILM, 1997, 36:366. .

<sup>35</sup> Art. 4, Telecom Annex.

<sup>36</sup> WTO, *Reference Paper, Fourth Protocol to the General Agreement on Trade in Services*, ILM, 1997, 36:354, 367.

<sup>37</sup> 'WTO | Services: Telecommunications Services'  
<[https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm)> [accessed 9 November 2018].

value-added telecommunication services.<sup>38</sup> The Annex on Telecommunications extends benefits to all service suppliers, including those of value-added telecommunications, whereas the Reference Paper provides regulatory obligations, as well as benefits only for basic telecommunication services.

### 3. TRIPS Agreement

Intellectual property issues relating to e-commerce transactions are in the domain of the TRIPS Agreement, including license fees and royalty for use of the copyright protected content of a digital product. Intellectual property also exacerbates the uncertainty regarding the goods versus services debate since content-oriented digital products have been referred to as transferring 'intellectual goods' into the digital environment.<sup>39</sup> Previously, certain states have also contemplated whether digital products should be devoid of both good and service status, and be considered only as intellectual property.<sup>40</sup> This issue has not yet been resolved.

### 4. E-Commerce Work Programme

The WTO E-Commerce Work Programme was established in 1998 during the second WTO Ministerial Conference.<sup>41</sup> It aims to be a comprehensive forum for examining all trade related issues for e-commerce, including its economic, financial and development aspects.<sup>42</sup> One of the first outcomes of the Work Programme was imposition of a temporary moratorium on customs duties for electronic transmissions, which was in accordance with the practice existing at that time. This covers only the electronic transmission aspect of e-commerce, for instance, the sale and delivery of digital products. However, if there is a trade in goods, using electronic means, when the physical good is crossing borders, it will still be subject to customs duties. The moratorium has been extended at every subsequent WTO Ministerial Conference, including the 11<sup>th</sup> in 2017.<sup>43</sup>

Under the ambit of the Work Programme, four different WTO bodies as well as the General Council are tasked with examining and reviewing various aspects of e-commerce impacting the work area governed by the four bodies.

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<sup>38</sup> Note that while some scholars such as David Luff consider that the two telecommunications agreements liberalize internet service supply market, others such as Rohan Kariyawasam are of the opinion that they do not apply to Internet networks. ICC, *Trade Related Aspects of Electronic Commerce and Telecommunications* (Paris: ICC, 6 June 2001) <<https://iccwbo.org/publication/trade-related-aspects-of-electronic-commerce-and-telecommunications/>> [accessed 2 November 2018]; Rohan Kariyawasam, 'Better Regulation for Digital Markets: A New Look at the Reference Paper', in *Trade Governance in the Digital Age: World Trade Forum*, 1st edn (USA: Cambridge University Press, 2012), pp. 222–46; WTO Trade in Services Council, *Work Programme on Electronic Commerce: Progress Report to the General Council*, paras 19–21; WTO Trade in Services Council, *Work Programme on Electronic Commerce: Note by the Secretariat*, para. 28.

<sup>39</sup> Wunsch-Vincent, above note 24, p. 60; Antony Taubman in *Trade Governance in the Digital Age*, ed. by Mira Burri and Thomas Cottier (Cambridge University Press, 2012).

<sup>40</sup> Antony Taubman in Burri and Cottier, pp. 314–19; 'Preparations for the 1999 Ministerial Conference - Work Programme on Electronic Commerce - Communication from Indonesia and Singapore' (WTO, 1999), WT/GC/W/247.

<sup>41</sup> *WTO Work Programme on E-Commerce* (WTO, 25 September 1998) adopted on September 25, 1998.

<sup>42</sup> *Ibid* paragraph 1.1.

<sup>43</sup> *WTO Work Programme on E-Commerce: Ministerial Decision of December 13, 2017* (Buenos Aires: WTO, 18 December 2017).

- the GATS Council is in charge of modes of supply, domestic regulation and standards, increasing participation of developing countries, MFN and National Treatment principles, privacy, telecommunications, competition, and distribution services and customs duties classification;
- the Council for Trade in Goods deals with market access for goods, import licensing, regulations and standards for goods traded, custom duties, classification and rules of origins;
- the TRIPS Council examines issues related to IP rights, access to technology and innovation, protection and enforcement of copyrights and trademarks;
- the Trade and Development Committee assesses the impacts of e-commerce on the economy of developing countries, and the challenges of enhancing participation of developing countries in international trade (especially transfer of technology and access to infrastructure, the use of information technology and the impact of e-commerce on traditional distribution methods);

In addition to the four specific bodies, the General Council has the responsibility to continuously review the Work Programme and to consider all trade-related issues of a cross-cutting nature, including customs duties (including moratorium), and classification of digital products.<sup>44</sup>

The WTO E-commerce Work Programme currently has no negotiating mandate, however it is exploratory in nature and does provide the appropriate platform for states to issue clarifications and official communications. Since 2016, several members (or groups of members), such as Japan, Singapore, the EU, have issued statements highlighting issues for discussion ranging from data flows, data protection, market access, relevant services, cybersecurity and e-authentication, to infrastructure development and trade facilitation. Some submissions, for instance those made by members of the African Group, individually and collectively, oppose negotiating new rules at the WTO or oppose discussion of particular issues at a trade-centric organization like the WTO.

## 5. 2017 Ministerial Conference Declaration

At the 2017 Ministerial Conference in Buenos Aires, 71 Members issued a Joint Statement to explore trade-related aspects of e-commerce so as to work towards future rules, setting the stage for possible plurilateral negotiations on e-commerce.

Since the 2017 Ministerial Conference, e-commerce is discussed regularly during General Council and the related Council/Committee sessions at the WTO. Several new papers have also been submitted highlighting elements of potential framework for negotiations in the future, although at an exploratory level since the Work Programme continues to lack a negotiating mandate.

On 25 January, 2019, during the Annual Meeting of the World Economic Forum in Davos, 76 member states of the WTO, that is almost half of the total membership of the WTO, issued a joint Ministerial Declaration setting out their intention to commence e-commerce negotiations. The first round of discussions is supposed to have begun in March 2019.

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<sup>44</sup> Work Programme on Electronic Commerce, WT/L/274, adopted on 25 September 1998, Paragraph 1.4.

### Section III: UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) is the Vienna based UN legal body focused on harmonization of domestic frameworks for international trade and investment. Unlike the WTO, which focuses on international agreements (negotiations, technical assistance, and dispute resolution), UNCITRAL primarily issues model laws and guidelines to assist in national law and policy-making. Working Group IV of UNCITRAL focuses on e-commerce, among other digital issues, and its current work is centered around contractual aspects of cloud computing, identity management and trust. UNCITRAL has two relevant model laws and one guideline, elaborated below, on the basis of which some states have already enacted domestic laws.

#### 1. UNCITRAL Model Law on Electronic Commerce, 1996<sup>45</sup>

This model law provides guidelines to national legislatures to enable and facilitate electronic commerce with the aim of predictability and removal of legal obstacles. Among others, it underlines principles of non-discrimination and functional equivalence between offline and online contracts. It provides model legal requirements for recognition of data messages as binding contracts, and formation and validity of online contracts. 71 States have adopted legislation based on, or influenced by, this model law.<sup>46</sup>

#### 2. UNCITRAL Model Law on Electronic Signatures, 2001<sup>47</sup>

Domestic and private regulations are often created to provide certification standards for electronic signatures. However, there is often a problem of incompatibility and non-recognition of the validity of such signatures to form a binding contract. Unless recognized internationally or harmonized across jurisdictions, this creates a barrier for e-commerce. The UNCITRAL Model Law on Electronic Signatures aims to harmonize technical and legal facets to enable technical inter-operability and mutual recognition of certification agencies, and emphasizes the principles of equivalence and technology neutrality. Additionally, it provides basic standards of conduct for third-party certification service providers. 32 States have adopted legislation based or influenced by this model law.<sup>48</sup>

#### 3. UNCITRAL Technical Notes on Online Dispute Resolution, 2016<sup>49</sup> (ODR)

Consumer trust is key for a thriving e-commerce environment. One important mechanism to build trust is provision of accessible and speedy dispute resolution to consumers for e-commerce transactions. The Technical Notes on ODR (online dispute resolution) provide some guidelines for establishing such dispute resolution

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<sup>45</sup> UNCITRAL, *UNCITRAL – United Nations Commission On International Trade Law* (Vienna: United Nations, 2009) <<https://doi.org/10.1163/ej.9789004180048.i-962.595>>.

<sup>46</sup> See UNCITRAL, 'Status-UNCITRAL Model Law on Electronic Commerce' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html)> [accessed 23 October 2018].

<sup>47</sup> *UNCITRAL Model Law on Electronic Signatures: With Guide to Enactment 2001* (New York: United Nations, 2002).

<sup>48</sup> UNCITRAL, 'Status UNCITRAL Model Law on Electronic Signatures' <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html)> [accessed 23 October 2018].

<sup>49</sup> UNCITRAL, 'UNCITRAL Technical Notes on Online Dispute Resolution' (UNCITRAL, 2017) <[http://www.uncitral.org/pdf/english/texts/odr/V1700382\\_English\\_Technical\\_Notes\\_on\\_ODR.pdf](http://www.uncitral.org/pdf/english/texts/odr/V1700382_English_Technical_Notes_on_ODR.pdf)>.

mechanisms. It is a descriptive, non-binding document outlining key elements of a dispute resolution process for online transactions, comprising cross-border low value sales or services contract, including both B2B and B2C transactions. Its purpose is that the online dispute resolution process be based on explicit and informed consent of parties. It emphasizes the principles of transparency and independence. It also provides guidelines for administrators and platforms for online dispute resolution. National legislation as well as private dispute resolution processes established by e-commerce platforms have used this as a reference point.

#### **Section IV: WIPO**

WIPO is the Geneva-based UN body for intellectual property rights, including related services. Since e-commerce involves cross-border transfer of products that are based on intellectual property, and its licensing, as well as assignment of domain names to producers/suppliers/platforms, the work of WIPO is relevant for international governance of e-commerce.

##### **1. WIPO Internet Treaties:**

Two treaties, namely, the WIPO Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonograph Treaty, 1996 (WPPT), are referred together as the WIPO Internet Treaties. These are two of the earliest treaties to specifically address relevant digital issues related to copyright and intellectual property rights. These treaties incorporate rights for copyright protection in addition to the Berne Convention, 1886, for example copyright protection for computer programs and databases; and performance and broadcasting rights in addition to the Rome Convention, 1961. The majority of the provisions of both the Berne Convention and the Rome Convention are incorporated into the WTO's TRIPS Agreement, and hence binding on all WTO Member States. However, the WIPO Internet Treaties are independent of the TRIPS Agreement, which does not specifically address the needs for copyright and other protection in the digital era. WIPO Internet Treaties have been adopted by 97 states, including developed, developing and least-developed states.

##### **2. Domain Name Dispute Resolution**

Third parties often register domain names that include trademarked names, either to divert Web traffic from the trademark owner, or to try to sell the name back to the owner — a practice referred as cyber-squatting. Domain name dispute resolution services are provided by WIPO's Arbitration and Mediation Center on the basis of rules under the Uniform Domain Name Dispute Resolution Policy. It is a leading dispute resolution service provider for disputes on the use of Internet domain names, and is accredited by ICANN.<sup>50</sup>

#### **Section V: Preferential trade agreements**

Besides the WTO, trade issues are also negotiated through bilateral or regional treaties often referred to as preferential trade agreements (PTAs), as they exchange preference going beyond WTO commitments. Several such PTAs have a chapter on e-commerce. Therefore, some PTAs have varying degrees of commitments for e-commerce that are

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<sup>50</sup> 'WIPO Arbitration and Mediation Center' <<http://www.wipo.int/amc/en/center/background.html>> [accessed 24 October 2018].

binding between the parties to the PTAs. Hence, as things exist today, even though there are no binding e-commerce provisions or agreements at the multilateral WTO level, at the bilateral level discussions and obligations exist.

While some states have no e-commerce chapter in any of their PTAs, others have a chapter in all their recent PTAs. As of October 2018, at least 80 PTAs have e-commerce provisions<sup>51</sup> Some of the most developed e-commerce chapters are set out in the following PTAs: ASEAN-Australia-New Zealand, EU-Japan, US-Chile, Korea-Singapore. In October 2018, the draft for the US-Mexico-Canada Agreement (set to replace NAFTA) was realized, which consists, arguably, of the most elaborate digital trade (or e-commerce) chapter in a PTA to date. Although not yet in force, the draft chapter may provide a reference point for the commitments being made and the issues brought up in recent e-commerce negotiations bilaterally. The chapter is available [here](#). Other states have undertaken a different approach in their e-commerce chapters in PTAs. For example, select few Chinese PTAs have an e-commerce chapter, one of the latest being the China-Georgia PTA, in force since January 2018. The text of this chapter is available [here](#).<sup>52</sup>

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<sup>51</sup> See <https://rtais.wto.org/UI/PublicSearchByCr.aspx> [accessed 6 November 2018]

<sup>52</sup> Article 12.2