

Comment: Digital trade: Technology versus legislators

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The previous chapter by Sacha Wunsch-Vincent carefully depicts the reasons for the growth of digital trade internationally and the evolving environment surrounding such trade. In particular, it presents the various attempts and motives for regulating digital trade – or for avoiding excessive specific regulation – at national and international level. In this field as in others, history is always a good starting point before contemplating the future.

In a sense, most past developments were conditioned by the rise and fall of different types of barriers. To start at the early days, international trade was always facing a natural barrier: the distance barrier. What new electronic technologies brought about was an erosion of this barrier. Distance mattered less and less for traders. This freed an immense potential for trade. Even more so because others were confronted with another type of barrier: lack of appropriate technological tools hindered regulators in their attempts to enforce specific (trade restrictive) rules on e-commerce. This is what Sacha Wunsch-Vincent calls the pristine state of e-commerce. With the advent of more sophisticated new technologies, regulators are now able to intervene. Interestingly, one main motive for enacting specific e-commerce rules is in order to reduce yet another barrier: namely the lack of confidence among market players, which is seen as hindering trade. With more stringent regulation, confidence in e-commerce would improve, which would allow trade to expand further. Nowadays though, technological development may prove more effective than legislators in this respect, and its potential should not in any way be underestimated. New generation firewalls, electronic certificates and fingerprints, secured sites and widespread use of cryptography

are devices that help the consumer to deem for himself whether a transaction will or will not be safe enough. Other devices are available on the supplier end (intrusion detection, central access lists, perimeter routers and inspection filters).

Against such a multi-faceted background it is no wonder that so many diverse multilateral and bilateral initiatives on e-commerce have emerged. The inventory made in Sacha Wunsch-Vincent's chapter is impressive indeed. Some e-commerce initiatives contain both pro-liberalisation elements and pro-regulation elements. E-commerce Chapters of PTAs are a case in point in this respect. Whatever the respective merits of trade liberalisation and regulation, the present state of affairs is regrettable at least in one respect, as Sacha Wunsch-Vincent points out. A number of sets of rules are being developed that are often overlapping, uncoordinated and sometimes difficult to reconcile. Looking back, it was perhaps an inevitable course of events. If it is just a transition towards a more coherent trade regime, it may be even a sound development. Testing several approaches is the main way to find optimal solutions. In the meantime, the institutional environment surrounding international e-commerce seems, ironically, in a similar degree of disorganisation as e-commerce markets were in the early days.

But, sooner or later, we will have to go back to basics. And in this case, the basics are to be found in the GATS, namely in the key principle of technological neutrality: in other words, the fact that trade disciplines apply equally whatever the means of a transaction. The fact is that many suppliers do offer their products and services both through traditional means and via electronic means, and which means is used in a particular transaction is more a matter of convenience than anything else. The same can be said regarding consumers. One can go to a bank counter and hand over a paper form to make a transfer. Or one can fill in and send an electronic form from a computer. Ultimately, one has transferred the same amount of the same currency to the same person in the same place at the same time. The difference between the two operations is slight.

Given that for both the suppliers and the consumers electronic and traditional commerce are just two alternative means for selling and buying essentially the same products or services, why should regulators and trade negotiators make a difference and be tempted to devise two sets of rules? To take one example from Sacha Wunsch-Vincent's chapter, why do some PTAs contain e-commerce provisions on prevention of deceptive and fraudulent trade practices or on confidentiality, which are overlapping with the corresponding exceptions applicable to trade in

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services and in goods (such as Article XIV of the GATS)? Maybe because national regulators showed the way by laying down specific e-commerce rules on essentially the same subject matter as that covered by generally applicable commercial rules?

The question is not only academic. The fact is that, in GATS, commitments undertaken by Members under cross-border modes (of which e-commerce of services is undoubtedly a part) are substantially below the level of the regimes that actually prevail nationally. There are numerous cases of entries in schedules that are unbound, while trade is not only allowed but is also taking place. In comparison, commitments on mode 3 reflect more closely the actual legal regime. One argument for refraining from undertaking new commitments is that it still remains to be seen whether trade through electronic means should or should not be treated like other forms of trade. This may lead the ongoing negotiations into a stalemate. Meanwhile, trade continues to grow and internet-based globalisation is deepening. What might occur is that this growing part of international trade will not be subject to appropriate market access and non-discrimination commitments. Allowing this situation to persist would cause a dis-service to the market players and make the WTO less relevant. Turning to the issue of barriers, probably the ongoing confusing debate about concepts is standing as a barrier hampering the development of a stable, predictable and open trade regime. That is one reason why this debate needs to be clarified. Sacha Wunsch points out, among other questions, that of the definition of e-commerce and its relation to trade rules. Probably it should even first be checked whether some questions really still need to be answered. Some may actually have already been answered long ago. Some may not really matter that much for the purpose of undertaking commitments. For example, the question as to whether e-commerce is covered by the concept of trade in services, and is the subject of commitments undertaken, is undoubtedly settled – positively – by the principle of technological neutrality. Nothing within the GATS could suggest another interpretation. Another common debate is whether e-commerce is mode 1 or mode 2, or both. Whatever the technical answer, one should not forget that in the vast majority of sectors States have no restrictive measures on e-commerce in their legislation anyway (in terms of market access or national treatment). Thus whether e-commerce is mode 1 or 2 should not matter since, whatever the answer, a full commitment can be undertaken.

That said, for the sake of ending on a more pragmatic note, it will be recalled that trade in services was able to thrive and expand long before GATS arrived. It is perfectly possible that cross-border e-commerce in services, which is the most invisible of all invisibles, can continue to thrive even in the absence of the stable and predictable environment that GATS commitments are able to provide.

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OF INTERNATIONAL TRADE
IN SERVICES

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