

Multilateral Institutions under Stress?

When Cooperation Fails: the Global Governance of Digital Trade¹

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Abstract

International trade is in continuous development that results in need of development of adequate answers from the international economic institutes participating in her regulation. The authors conclude that the initiatives of international organizations in the global regulation of e-commerce are far behind business practices. Despite the dynamic development of the digital economy, international institutions have not yet been able to work out control mechanisms at the multilateral level. Therefore, today the WTO and a number of other international organizations are facing the need to develop new mechanisms for regulating trade in the conditions of digitalization. This will largely depend not only on the new rules of trade policy, but also on the future of these organizations, their placement in the hierarchy of influence of international institutions.

The article shows that countries manage to regulate various aspects of e-commerce more comprehensively at the bilateral and plurilateral levels. The use of digital trade regulations developed at the regional and plurilateral levels, as well as the cooperation of countries at other sites (APEC, OECD, G20), may facilitate the creation of future WTO agreements governing digital trade.

Key words: digital trade; e-commerce; global governance; World Trade Organization; international economic organizations

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Introduction

The development of international trade in the context of globalization has undergone three important stages of qualitative and structural change.

The first stage, called “traditional trade,” developed as a result of reduced transport costs that provided new opportunities for the separation of places of production from sites of consumption. Consumers began to benefit from wide access to new and more competitive prices for goods from foreign countries. Trade was mainly in final finished goods.

The second stage in the development of international trade was associated with the active expansion of global value chains. This stage was characterized by the continuing deepening of specialization and the reduction of transportation and coordination costs which allowed business to implement the fragmentation of production across national borders and to use comparative localization advantages. This was the critical driving force that caused a wave of globalization in the 1990s characterized by a significant reduction in tariffs and the removal of strict restrictions on foreign investment [Klochko, 2015].

The third stage of the transformation of international trade is associated with digitalization. The driver of trade was the further reduction of transportation and administrative costs, along with simplified processes for exchanging ideas through the transfer of data and information. This modern stage, characterized by the highest connectivity, is due not only to the expansion of digital exchanges but also the preservation of traditional trade and the activity of global value chains. Various forms are interconnected more than ever thanks to digital communication which has made foreign markets much more accessible to foreign firms.

As digital trade has become an important component of trade flows, its importance in the trade policy of many countries has significantly increased. E-commerce, as the key segment of digital trade, has developed rapidly in recent years. Developed economies, as well as a number of developing ones, have the necessary conditions for the development of e-commerce and have received significant benefits from it. However, not all countries can take advantage of e-commerce opportunities due to poor infrastructure, low levels of education and relevant skills, and institutional and regulatory disorder [ICTSD, 2017].

This digitalization gap between the countries could grow significantly if multi-lateral rules for overcoming the barriers to the general growth of e-commerce are not established. Thus, the international community faces an urgent need to regulate this sphere.

This article assesses the ability of international institutions and regional groups to regulate digital trade. The analysis relies on the work of researchers from international institutions [Baldwin, 2016; Kirton, Warren, 2018], materials from international organizations – the World Trade Organization (WTO), the Group of 20 (G20), the Organisation for Economic Co-operation and Development(OECD) and the United Nations

Conference on Trade and Development (UNCTAD) – and the provisions of trade agreements including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP TTP), the European Union (EU) and the Association of Southeast Asian Nations (ASEAN).

Regulation of E-Commerce in the World Trade Organization

Existing multilateral WTO rules were largely established long before the active development of the digital economy and thus have little effect on the regulation of information flows. The toolkit of multilateral agreements such as the General Agreement on Trade in Services (GATS), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) can be partially used, but in general the possibilities to regulate e-commerce through them are limited.

General Agreement on Trade in Services (GATS)

GATS is the most relevant tool for regulating data flows of all WTO multilateral agreements. An important feature of GATS is its “technological neutrality.” It allows for provisions previously applied to only physical trade to be extended to digital space. Despite the fact that the agreement contains obligations in telecommunications and financial services (which are crucial for e-commerce), regulatory provisions do not cover digital trade, information flows or various barriers to trade. Since GATS is based on the “positive list” approach, the coverage of services commitments varies considerably among countries.

Information Technology Agreement (ITA)

The ITA aims to eliminate tariffs for information technology products. Initially, the agreement was concluded in 1996 in the form of the Ministerial Declaration on Trade in Information Technology Products. This was the first sectoral agreement after the Uruguay round of trade negotiations. At the tenth ministerial conference of the WTO in 2015, the scope of the ITA was expanded and a new version, the so-called ITA-II, came into force in 2016.

The ITA-II is an agreement between 54 developed and developing WTO members that together account for more than 90% of global trade in information technology products. Some members, such as India and Viet Nam, are parties to the first ITA but have not acceded to the expanded agreement. As in the first agreement, the benefits of an expanded agreement are extended among WTO members on the basis of the most favoured nation treatment. The ITA-II will eliminate tariffs for 201 additional products worth more than \$1.3 trillion per year. This will include many consumer electronics products, next-generation semiconductors (multicomponent semiconductors) and medical instruments such as magnetic resonance imaging (MRI).

The expansion of the Information Technology Agreement was perhaps one of the most successful attempts at trade liberalization under the auspices of the WTO since the establishment of the organization. Experts attribute the success of the negotiations as resulting from a combination of four factors: a narrower sectoral coverage without use of the “single undertaking” approach; a limited negotiating group that included interested countries but not all WTO members; discussion focused on tariff rather than non-tariff barriers; and the fact that negotiators avoided confrontations based on nationalism [Winslett, 2017].

It is expected that the implementation of the ITA-II will contribute to the growth of trade in information technology products that are critical to digital trade. At the same time, it should be noted that the agreement does not solve the problem of non-tariff barriers which can create significant restrictions in this area.

Work Programme on Electronic Commerce

E-commerce issues have been addressed in the World Trade Organization since the late 1990s. An important result of the negotiation process was the signing in 1998 of the Ministerial Declaration on Global Electronic Commerce [WTO, 1998a].

According to the declaration, the WTO’s general council addresses issues related to trade arising from global e-commerce. For the purposes of the Work Programme, the definition of e-commerce has been clarified and refers to the production, distribution, marketing, sale or delivery of a product or service through the use of electronic means [WTO, 1998b, Para. 1.3].

The Work Programme provided for a temporary moratorium on the collection of customs duties on electronic transmissions and stated the need to explore the possibilities of developing infrastructure for e-commerce. It provided that the work of other international organizations should be taken into account when developing proposals for the programme. No significant progress on the development of rules in the electronic commerce at the multilateral level was observed. At the subsequent ministerial conferences of the WTO, ministers took into consideration reports on electronic commerce and gave instructions to the general council and its subsidiary bodies for further work in this area. The ministers also repeatedly confirmed the need to extend customs duties on electronic transmissions for the next period.

At the 11th WTO ministerial conference in Buenos Aires in 2017, e-commerce was widely discussed, among other issues. The result was a joint statement on the need to develop common rules for regulating electronic commerce in the next round of negotiations in 2018. This decision was necessary because there are no uniform rules to ensure the security of global e-commerce. Seventy-one countries co-sponsored the joint statement, including Russia, the U.S. and the EU. Together, the group accounts for about 77% of world trade [WTO, 2017]. However, the largest player in the digital commerce market – China – did not sign the document.

Russia plans to focus on the development of progressive rules for the protection of online consumers, the development of national Internet sites, the involvement of micro, small and medium enterprises in online trading and ensuring non-discriminatory terms of trade for them. Special attention will be paid to the legality of ensuring the security of citizens' data and the protection of intellectual property on the Internet [RIA Novosti, 2017].

Trade in Services Agreement: A Dangerous Attempt to Realize a Dream

WTO members could not develop a unified approach to the development of the GATS provisions and the further liberalization of trade in services at the multilateral level. Developed countries did not like this situation because their transnational corporations were interested in opening the markets of developing countries and were actively lobbying for relevant negotiations. The United States initiated the formation of a coalition to develop the Trade in Services Agreement (TISA).

Preliminary discussions on TISA began in 2012. A year later, the coalition published a joint declaration that the discussions on TISA had advanced and that the participating countries had reached the level of full-scale negotiations [Biryukova, 2016]. Currently Australia, Hong Kong, the European Union (28 countries), Iceland, Israel, Canada, Colombia, Costa Rica, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Panama, Pakistan, Peru, the U.S., Taiwan, Turkey, Switzerland, Chile, Korea and Japan participate in this group. Members of this group playfully call themselves "real friends of services." Other countries in reply ironically call them "true friends of multinational corporations" [Gould, 2014].

Electronic commerce takes an important place in TISA. At present there are few restrictions limiting the Internet at the global level. The powerful technological elites that create private software, the Internet and electronic equipment also govern the finance, logistic and infrastructure companies which dominate the digital sphere – and they are interested in the preservation of this situation. TISA creates for these companies the tempting prospect of almost absolute power over the global network economy. An important feature of TISA is that its provisions will automatically apply to any new services and technologies that develop in the future. The most stringent obligations contain guarantees for unlimited access to information and financial flows abroad. The agreement under development will also ensure the right to store data anywhere in the world and to keep secret its source codes for both intelligent products and search engines.

American companies are highly interested in establishing such innovative e-commerce regulations through TISA. For them it is important to give effect to these provisions in order to gain footholds as well as to enter new markets due to growing competition from Asian countries, primarily China. Ten years ago, the world's largest companies by capitalization were American (Microsoft, Exxon Mobil, General Electric, Citigroup and Shell Oil), but the composition is beginning to change. The Ameri-

can companies – leaders (Microsoft, Alphabet which is the head company Google, Intel, IBM, Cisco Systems and Oracle) are under the serious pressure by the powerful and dynamically developing Chinese companies – Tencent (social media) seriously pressed, Alibaba (electronic commerce) and Baidu (search engine). Besides, it is necessary to mention the southern Korean company Samsung.

It is worth noting that in 2017 the digital market remained oligopolistic and predominantly American. For example, Google owned 88% of the search advertising market, Facebook along with its subsidiaries Instagram, WhatsApp and Messenger owned 77% of mobile social traffic and Amazon held 74% of the e-book market share.

Thus, the implementation of the TISA provisions will strengthen the market position of several major players in e-commerce and create risks of transition to a lower level of economic freedom.

Presently, negotiations on TISA are not being held due to the position of the current U.S. administration. The option of signing of the agreement without the main developer – as happened in the case of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CP TPP) – is not being considered by the countries which remain in the coalition. At the same time, a number of states (especially Japan and Korea) are convinced that the agreement can be saved despite the pause in negotiations.

Looking for Alternative Solutions: Mega-Regional Agreements

Significant success in the development of rules of trade in the digital era was achieved when discussing the texts of mega-regional trade agreements developed with the participation of the U.S. and the EU, including the CP TPP and the Transatlantic Trade and Investment Partnership (T-TIP). Although neither has entered into force, they certainly deserve consideration in the context of the problems of regulating e-commerce.

Despite the fact that with the arrival of the Trump administration the United States refused to participate in the CP TPP, the agreement's provisions were developed under the influence of the lobbies of American Internet companies and were largely focused on consolidating their positions in the market of the countries participating in the agreement.

The CP TPP, for example, requires members to allow full cross-border data transfer, prohibits forced localization of data on servers, prohibits disclosure of source code as a business condition and prohibits customs duties on electronic transmissions or taxes on Internet traffic. The agreement also contains strict provisions on copyright protection and prohibited circumvention of technological security measures that reduce the risk of unauthorized access to copyrighted digital products.

Digital trade is one of the key areas of interest of participating countries in the T-TIP negotiations in view of its significance for transatlantic trade. Services that can be provided over the Internet constitute a large part of the mutual supply of services between the U.S. and the EU. The T-TIP negotiations were started by the EU and the

U.S. in 2013 but are currently blocked. However, if negotiations continue, T-TIP can solve the problems of digital trade regulation in a number of areas.

In addition to provisions to expand market access for digital products, the T-TIP planned to include commitments to remove burdensome barriers to digital trade [EC, 2016]. Provisions on cooperation in the field of normative regulation were supposed to include sectoral commitments (for example, for the information and communications technology (ICT) sector) and horizontal commitments (for example, regarding the contribution of stakeholders and transparency).

As became clear during negotiations, the U.S. and the EU have “various legal traditions, ways of regulation, market results” and approaches to development of policy which significantly limit integration of a transatlantic digital economy. Negotiation progress on digital trade between these countries is significantly complicated by the influence of other factors, including the formation of the single digital market in the EU, the new policy of Brussels for confidentiality of data and the Brexit.

Initiatives for the Regulation of Digital Trade in Economic Integration

Regional integration contributes to the development of digital trade and integration of digital markets. Conceptually, regionalism can solve two problems in this area: it feeds and facilitates intra-regional digital trade and allows for economies of scale to be achieved. Without compatible laws on the Internet, regions with isolated regulatory policy for the movement of digital goods and services have no opportunities to provide cross-border flows, and their companies will not be able to reach a scale similar to that of a multinational corporation. For example, Facebook, Google and Alibaba won because they arose in the largest integrated digital markets [Fefer, Shayerah, Morrison, 2017].

At the same time, common regional regulatory and policy frameworks in areas such as privacy, consumer protection and cybersecurity help to reduce the operating costs of companies in regional markets, encourage investment and the creation of start-ups, and contribute to the expansion of digital networks and services. Such conditions are also important for small businesses, which usually do not have the resources to find foreign markets or to adapt their operations to the complex systems of other countries. In the digital age, a number of efforts are being made to integrate trade and regional markets. The most successful are presented below.

Digital Single Market of European Market

In May 2015, the European Commission announced plans to create a digital single market to improve access for consumers and businesses to digital goods and services throughout Europe, to level out the conditions for digital networks and innovative services and to maximize economic growth from digitalization. According to estimates,

the digital single market can provide up to EUR 415 billion a year for the EU's economy, as well as create hundreds of thousands of new jobs [EC, 2017].

In 2017, the commission announced the latest elements of this strategy, including new regulation in the field of electronic privacy. Brussels also allowed the transfer of online content, permitting EU citizens to access online subscription services while traveling around the EU, thereby stopping so-called "geolocation" tactics.

ASEAN E-Commerce Initiative

The ASEAN initiative to form a coordinated regional legal framework for electronic commerce was launched in 1999 when the participating countries approved the e-ASEAN initiative. The 2000 E-ASEAN Framework Agreement promoted regional development by creating an ASEAN information infrastructure.

The ASEAN ICT Masterplan 2020 [ASEAN, 2015a] stated that information and communication technologies are important factors for further social and economic integration. The ASEAN Community Blueprint 2025 [ASEAN, 2015b] also calls for cooperation in the field of electronic commerce, recognizing the importance of facilitating cross-border electronic transactions.

ASEAN legislation focuses on electronic transactions, countering cybersecurity, consumer protection, content regulation, data protection, privacy and dispute resolution in this area.

Digital Trade in the Context of Eurasian Integration

In the Eurasian Economic Union, some steps were also taken to develop trade in the new digital paradigm. The objectives for the development of digital space were developed by 2025. Among the main tasks for the progress of the "new" economy, the EAEU sees the development of a regulatory framework that can regulate emerging processes, as well as the creation of wide public access to the Internet, both from a technical point of view and to improve the computer literacy of the population [WB, EEC, 2017].

The development of the digital economy is crucial for Russian trade because this measure will have positive effects for Russian business, for consumers and for the economy as a whole [Plaksin, Abdrakhmanova, Kovaleva, 2017]. Because the digital space offers easier access to the world market and simplified business activities, the digital economy is a chance for Russia to change the orientation of its exports from raw materials to secondary goods and services [Biryukova, Matiukhina, 2018]. In the future, this will allow Russia to increase its share in world exports, which is now quite small.

Dialogue on Digital Policy and Trade Expansion

A growing number of countries at the national level are setting up barriers to the processing, storing and transmitting of data [UNCTAD, 2017]. As a result, many trade agreements contain provisions to eliminate these obstacles between partners. The tools of trade agreements allowing interoperability and the combination of national systems of data protection could help to find balance between the supporting processes of data transmission on the one hand, and the resolution of confidentiality and safety problems on the other.

It is obvious that the potential of such agreements is not yet realized and remains high. At the same time, while at the regional or plurilateral levels the countries manage to take common decisions, at the multilateral level a formal framework for regulation of digital trade remains an unattainable task [Suominen, 2017]. In these circumstances, cooperation between the WTO and other international organizations, as well as discussion of questions of regulation of digital trade on alternative platforms, is important and necessary to find an exit from this impasse.

The Asia-Pacific Economic Cooperation (APEC) is a forum that provides a broad opportunity to share best practices and establish principles for regulating the digital economy for countries with different levels of development. The APEC e-commerce working group coordinates the activities of members and promotes a transparent and consistent e-commerce environment.

At the initiative of the ad hoc coordination group, the APEC Road Map on the Digital and Internet Economy was prepared in 2017 [APEC, 2017a]. The importance of the road map was highlighted in a ministerial declaration and a declaration of APEC leaders in 2017 [APEC, 2017b, 2017c]. Finding balance between openness and data security became one of the most sensitive issues in the course of coordination of the document.

Although APEC's initiatives are focused at the regional level, they can serve as the basis for the expansion of global efforts. Due to its voluntary nature, APEC can serve as a convenient incubator for potential multilateral agreements.

The OECD is another platform for discussing principles and norms for the digital economy. In June 2016, a ministerial meeting was held in Mexico, and the key item on the agenda was discussion of innovation, growth and social prosperity in relation to the digital economy. At this meeting countries discussed an open Internet and data flows, infrastructure and connectivity to the network, and digital confidence and skills.

The ministerial declaration recognized the growth and transformation of the digital economy, along with emerging challenges [OECD, 2016]. The declaration also referred to the need to support the free flow of information, innovation and new technologies, as well as the need to build confidence and reduce obstacles to e-commerce.

The G20 has relatively recently become an important site for defining general principles and individual issues in the field of digitalization. In the November 2015 G20 meeting, the leaders published a statement on the new positions of the Internet econo-

my, recognizing the opportunities and challenges associated with global economic growth and development. Leaders expressed the need to eliminate the risk of theft of IP technologies using ICT for commercial competitive advantage, and also to respect and protect confidentiality. In 2016, China was the host country for the G20 summit and digitalization was an important item of discussion among the parties. Beijing identified the theme of the meeting as “towards an innovative, brisk, interconnected and inclusive global economy,” thus opening up the possibility for further discussion of the digital economy and the development of global regulatory rules. The digital economy continued to be a major topic during the German presidency. In April 2017, the G20 held the first meeting of the digital ministers, which resulted in the adoption of the G20 Ministerial Declaration on the Digital Economy. At the summit in Hamburg in 2017, leaders expressed a desire to ensure the connection of all their citizens to digital communications by 2025 [G20, 2017].

The G20 has considerable potential to address problems of digital transformation. However to avoid risks of unbalanced development and an increased gap between developed and developing countries, the organization has to actively coordinate a strategy for digital economy that can help technologically poor countries [Guo, Ding, Lanshina, 2017]. The comparatively weak enforceability of summit decisions in practice in the field of digitalization causes serious concern. This creates uncertainty for the future role of this international institution in regulating electronic commerce [Kirton, Warren, 2018].

The main areas of work regarding the development of rules to regulate e-commerce and the digital economy were formulated at the World Economic Forum. They consist of several recommendations. First, instead of trying to negotiate binding trade rules, countries should coordinate their efforts to develop joint declarative statements of mutual interest. These statements should take into account the interests of stakeholders at the national and global levels. At present, efforts to develop principles and best practices for cooperation are being undertaken by several multilateral mechanisms (including the OECD and the G20). A special role should be assigned to UNCTAD as a possible mediator to improve the interaction between different efforts and as a platform for the formulation of “soft law” outside the framework of trade negotiations.

Second, groups of experts including representatives of trade negotiations and the Internet community should come to a consensus on key issues. Achieving consensus is seen as the most important condition for agreement on trade issues in order to develop an open, transparent and inclusive approach to setting the agenda for negotiations while maintaining the authority of governments to make final decisions.

Third, it is necessary to make long-term efforts to regulate trade policy at the inter-governmental level so that measures taken from a wider matrix of analysis and dialogue can be of greater benefit. Reforms that allow relevant stakeholders to track changes and contribute to the development of perspectives and experiences can help to increase their participation and support trade policy developed through trade processes.

In general, the formation of a regulatory system of relevant elements at the multi-lateral, plurilateral and regional levels, despite the growing role of the digital economy, is hampered by the lack of dialogue between the trade negotiators and Internet communities. As part of this dialogue, the parties need to address issues related to the risks associated with data privacy and security. It is important that trade processes are consistent with the values of transparency, openness and overall equal participation of any interested party [UNCTAD, 2017].

Conclusion

Benefits for economic development from trade are not obtained automatically after the conclusion of trade agreements, both at the multilateral and regional levels. More important is the coherence of the measures which impact certain categories of economic agents.

In practice, it is important to use a comprehensive approach because when opening new markets for trade the benefits should be distributed as widely and fairly as possible for all stakeholders. That is why the development of electronic commerce will largely be determined by the success of trade negotiations. For most developing countries, this will require additional support from the international community.

The most progressive provisions in the regulation of e-commerce are developed in the agreements with a limited number of participants (TISA, CP TTP, T-TIP), which have not been tested in practice, as well as in the framework of integration initiatives in regional economic blocs around the world (EU, ASEAN, EAEU).

Despite the strong development of the digital economy, countries have not been able to develop a coherent set of rules and guidelines on e-commerce and digital trade policy. The WTO remains one of the main regulators of world trade and therefore carries the greatest weight and responsibility in resolving the existing problems. Multilateral trade agreements are far behind the regulation of digital trade. Various aspects of electronic commerce are discussed unevenly and a number of provisions are not even discussed in the WTO.

This is due not only to the complexity of developing new tools in the digital environment but also to disagreements among members. One group of countries continues to support state control, while the other prefers to rely on liberal and international regimes dominated by the private sector.

Only under conditions of close cooperation with other international organizations and the use of best practices derived from regional trade agreements the World Trade Organization has a chance to find compromise solutions and to take a key role in the global e-commerce governance system.

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Когда сотрудничество не складывается: глобальное управление цифровой торговлей¹

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Международная торговля постоянно развивается, что приводит к необходимости выработки адекватных ответов со стороны международных экономических институтов, участвующих в ее регулировании. Авторы приходят к выводу, что инициативы международных организаций в области глобального регулирования электронной торговли значительно отстают от практики. Несмотря на динамичное развитие цифровой экономики, международным институтам пока не удается выработать механизмы контроля на многостороннем уровне за отдельными ее элементами. Поэтому сегодня ВТО и ряду других организаций необходимо выработать новые механизмы для регулирования торговли в условиях цифровизации. От этого во многом зависят не только новые правила торговой политики, но и судьба самих организаций, их позиция в иерархии влияния международных институтов.

Показано, что странам удастся более комплексно регулировать различные аспекты электронной коммерции на двустороннем и плюрилатеральном уровне. Использование положений о цифровой торговле, разрабатываемых в рамках региональных торговых соглашений и в плюрилатеральном формате, а также сотрудничество стран на других площадках (АТЭС, ОЭСР, «Группе двадцати») может оказать содействие в создании будущих соглашений ВТО, регулирующих цифровую торговлю.

Ключевые слова: цифровая торговля; электронная коммерция; глобальное управление; Всемирная торговая организация; международные экономические организации

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