

Development Opportunity or Digital Colonialism? The planned WTO e-commerce agreement

Sven Hilbig

Digitalisation is transforming not only the world in which we live and work, but also international trade. According to figures from the United Nations Conference on Trade and Development (UNCTAD), the global value of e-commerce is estimated to have exceeded USD 26 trillion in 2018 (UNCTAD 2021); this represents around 30% of global gross domestic product (GDP). However, international trade law dates back to a time when neither Amazon nor eBay existed. In the view of the leading industrialised nations, the world trade rules therefore need to be adapted to the new realities.

Since the last Ministerial Conference of the World Trade Organization (WTO) in Buenos Aires in 2017, the Friends of E-commerce have been pushing for a comprehensive new agreement. Away from the public gaze, negotiations are under way between the EU, the US, Japan and almost all the Western industrialised nations, but also China and some developing countries and transition economies that hope to benefit from electronic trade. India and many developing countries have not joined the initiative; they fear that the planned agreement will cement and worsen the massive inequalities that already exist in the digital economy. According to numerous civil society organisations from the Global South, there is a risk of digital colonialism, underpinned by international law. What is needed, instead, is a change of direction towards strengthening local digital economies, based inter alia on countries' legal right to store and utilise their own data.

Global imbalances in digital trade

In the international debate, the term “digital trade” is increasingly replacing “e-commerce”, thus making it clear that this strand of the negotiations covers not only traditional forms of online trade but also trade in digital services and issues relating to data protection and the “free flow of data”. The demand, primarily from US digital industry corporations, for the unrestricted free flow of data across national borders to be guaranteed (by trade policy) is targeted specifically at states which require non-national companies to store locally collected data on local servers. The relevant term used in the negotiations and agreements – the “free” flow of data – belies the fact that the data held on Alibaba's, Facebook's and Google's servers are anything but free and available for everyone to use. They are owned by Zuckerberg and Co.

So how is this affecting the global economy? This is revealed in a report by UNCTAD (2019), which shows that just seven companies account for almost 70% of the market value of the digital platform economy. Five are US companies (Amazon, Apple, Facebook, Google and Microsoft) and two are Chinese (Alibaba and Tencent). A further 20% of profits are generated by medium-sized platforms, also based in the US or China. In other words, firms from just two countries generate 90% of the global turnover.

In digitally-enabled trade in goods, too, some regions of the world are doing better than others: accord-

ing to an UNCTAD report (2017), the highest share of cross-border e-commerce (CBEC) sales goes to Asia-Pacific (51%), followed by Europe (24%) and North America (23%). By contrast, Africa and Latin America each account for just 1%. In other words, the imbalance among world regions and countries is even greater here than in traditional trade (food or industrial goods), where the African continent and Central and South America account for 8%. The cause of this extreme marginalisation is the lack of production sites for immaterial goods.

The planned WTO e-commerce agreement

At the last WTO Ministerial Conference in Buenos Aires in late 2017, a group of 43 WTO members drafted a Joint Statement in order to prepare the way for a specific e-commerce agreement.

The talks, which began in spring 2019, are being conducted by the negotiating partners with great intensity and purpose (evident from the number of meetings and the scope of the negotiating text), albeit – regrettably – away from the public gaze. A 90-page negotiating text leaked in early 2020 shows that the group – which has meanwhile increased to 86 countries – has already reached agreement on some uncontroversial issues such as authentication in online trade and, since September 2021, online consumer protection; however, the countries still hold widely divergent positions on more controversial topics.

Ngozi Okonjo-Iweala, a former Nigerian Finance Minister and, since 2020, the Director-General of the WTO, is hoping that the 12th WTO Ministerial Conference, due to start in Geneva in late November 2021, will provide the fresh impetus needed to bring the talks to a successful conclusion.

The positions of the 86 countries that are pushing for a plurilateral agreement diverge considerably, however. The US is pursuing a strictly market-based approach; in its view, the primary purpose of the agreement, like the failed Transatlantic Trade and Investment Partnership (TTIP) before it, should be to eliminate trade barriers and restrict government regulation to a minimum: maximum flow of data with minimal data protection, in other words. The European Commission, by contrast, is lobbying for strong consumer protection and data privacy rules. However, like the US, it is also calling for a comprehensive ban on national data localisation. For China and numerous Global South countries, the main objective is to strengthen online trade and create more regulatory scope: governments should continue to have the right to regulate. A glance at the current negotiating text shows that 70% of the proposals were submitted by just seven countries – the US, China, Japan, Korea, Singapore, Chile and Canada – and the

EU. Not a single line was proposed by any of the 33 developing countries. Their trade delegations are also much smaller and lack purely e-commerce-related expertise.

If the chief negotiators ultimately agree that customs duties and data localisation requirements should be subject to a (permanent) ban, this would fulfil two of Silicon Valley's longstanding objectives. By the late 1990s, Amazon and Co. were already working on the assumption that digital trade and the digital economy would become one of the most important sectors in the 21st century and that they themselves would hold a monopoly position within it. At the same time, they were aware that their dominance was likely to meet with countervailing forces in the long term and that increasingly vocal demands would be heard for curbs on their market power and for regulation of the digital economy.

In order to ward off the prospect of regulation, they urged their government in Washington to pursue a deregulation agenda for e-commerce under future trade agreements. Research by netzpolitik.org in June 2021 confirms that similar lobbying activities were directed at the European Commission as well.

At regional level, restrictions on the free flow of data are already prohibited under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP), which involves a total of 11 countries, including major OECD countries such as Canada, Japan, New Zealand, Australia, Chile and Mexico. The US is no longer among them: although it was one of the initiators of this agreement, whose conclusion was successfully negotiated by Obama, Trump declined to sign.

Problematical trends: the developing countries' perspective

The digital economy and digital trade offer major opportunities for the Global South countries as well – and yet almost half the WTO members are not involved in the talks on a possible agreement. The African Group and India are particularly concerned that the proposed trade policy liberalisation and deregulation of the digital economy will benefit the leading digital industry corporations in the US and China, while they themselves derive no advantage from the agreement due to the weakness of their digital economies.

1. Prohibitions on customs duties widen the gap between world regions

Back in 1997 the WTO banned customs duties on trade in IT products, such as PCs and mobile phones, under the Information Technology Agreement (ITA) and moved to liberalise digital trade. New and more

far-reaching rules – now demanded by a number of countries – are still in abeyance, however, largely because India and a group of African countries fear that a comprehensive multilateral agreement will further marginalise their economies. As justification for their alarm, they point to the impacts of the ITA on India. Following the elimination of customs duties, the country was hit by a flood of telecommunication and consumer electronics imports by multinational corporations, mainly cheap goods from China that squeezed Indian companies out of the market. The surplus of imports over exports contributed to India's substantial current account deficit. Many other highly industrialised developing countries and transition economies, including Brazil, Mexico and South Africa, are running deficits for the same reason.

If customs duties are eliminated, the least developed countries will suffer most: their national budgets are particularly reliant on this source of revenue. In Togo, Benin, Sierra Leone and Mali, for example, revenue from trade tariffs is estimated at 40% or more of total tax revenue.

Furthermore, due to the moratorium on customs duties under the Declaration on Global Electronic Commerce (1998), duties may no longer be imposed on immaterial digital goods. For governments in the Global South, this is a worrying state of affairs, for technological progress means that a growing number of products are taking non-material form, eliminating duties that were levied in the past.

2. Data sovereignty or fragmented power?

Alongside the moratorium on customs duties, the regulation of data flows is the second major point of contention. Particular controversy surrounds the issue of a ban on data localisation requirements, which is demanded by the US, Japan and the EU; this would prohibit countries from requiring foreign companies to store locally collected data on local servers. Some developing countries and transition economies regard locally collected data as a collective asset and are demanding that they be treated as such. These countries are keen to reduce their dependence on the major digital platforms and establish their own digital economy. The Nigerian government, for example, requires non-national service providers to store customer data from Nigeria on local servers. Washington and the US digital industry corporations in particular consider provisions such as these to be a major encroachment on the postulated “free flow of data”.

Advocates of a ban on data localisation justify their position by drawing attention to the increasing number of authoritarian states (primarily China) that would utilise government regulation solely to disadvantage non-national companies, instead of encouraging moves towards democracy. They also claim that digital policies such as these “fragment”

the global Internet map. Washington and Brussels ignore two aspects of relevance here, however. Firstly, European governments are well aware of the importance of data localisation for the territories under their jurisdiction. The majority of EU member states require sensitive data that serve the public interest (such as financial, health and registration data) to be held on local servers. Secondly, the European Commission itself stands accused of promoting “fragmentation of the Internet”. The US and the WTO Secretariat consider the EU's General Data Protection Regulation (GDPR) to constitute excessive interference in the free (data) market (Burri 2017).

In its analysis of the e-commerce negotiations, UNCTAD confirms that the demand for data localisation is legitimate from a Global South perspective and can potentially lay the foundations for data sovereignty – a concept which is steadily gaining traction in European political and economic circles as well.

Without rules that are conducive to development, the Global South countries will become even more dependent on the subsea cables, servers and algorithms of the Big Seven (Amazon, Apple, Facebook, Google and Microsoft, plus Alibaba and Tencent), whose technological know-how and financial capabilities are widening the digital divide. The pandemic has strengthened the digital industry corporations' hold on the market and worsened the global “fragmentation of power”.

Towards equitable, development-friendly digital trade

The legal cementing of the unregulated flow of data by means of a WTO agreement would deprive the developing countries and transition economies of what is perhaps their most important resource in the 21st century: their data. They would thus be denied the opportunity to profit from their own knowledge. One of the basic imperatives of development cooperation, namely technology transfer from the industrialised to the developing countries, would in practice be turned on its head. Google and the other industry titans have no interest whatsoever in sharing their technologies. On the contrary, they want to secure other parties' data on their own servers. However, this would spell the end for global inclusion and benefit-sharing in relation to digital trade, putting paid to any hope of a digital dividend for the Global South.

A progressive digital agenda that serves the interests of the developing countries is urgently needed. A shift towards an inclusive understanding of digitalisation would be desirable – one which enhances the opportunities for social and economic benefit-sharing for people across the globe, including in developing countries and transition economies.

In the long term, this can only succeed if dependence on the global players is reduced and the countries of the Global South are able to frame their own policies for a digital economy in accordance with their needs.

This will require the development of a public data infrastructure and dedicated digital platforms for mobility, health, finance and trade. Political bodies must also be established to control and regulate the monopolies and their (digital) transactions and protect citizens' data. In recent years, a number of governments have introduced data protection legislation, often modelled on the GDPR – an important step in the right direction. However, only around half of the African countries currently have data protection laws in place, and only 12 of these 28 countries have set up a public authority tasked with monitoring compliance with this legislation. For many, establishing their own digital infrastructure is still a long way off. However, such mechanisms are the only option if these countries' digital sovereignty is to be restored.

In addition, there should be no further trade agreements that include general and permanent bans on data localisation and customs duties. These rules massively curtail the scope for policy-making and deprive countries of the Global South of a major development opportunity. Instead of a general ban, the European Commission – not least in its own interests – should henceforth take a more nuanced view of the issue of data exchange. A key criterion in determining whether localisation is justified could be the type of data. South Africa is an example of a more nuanced third way. In April 2021, the government published a draft of a new National Data and Cloud Policy. The ideas presented in the draft overlap in many respects with the new initiatives by champions of strengthened digital sovereignty for Europe within the European Commission, to be achieved through measures such as promotion of digital industrial policy and the establishment of local data pools. South Africa's goal is to achieve an autonomous transition to a data-led digital economy. The infrastructural and regulatory frameworks envisaged for this purpose include localisation requirements. South Africa is also keen to strengthen data privacy, with the GDPR as its model, at the same time.

According to the new trade strategy unveiled by the European Commission in February 2021, the digital transition – alongside the European Green Deal – is a key priority for the development of the multilateral trade regime. However, Europe will only live up to

its claim to be a global agenda-setter if it heeds the legitimate interests of the developing countries in the WTO negotiations and pro-actively builds alliances with other countries for this purpose. Working with democratic countries of the Global South would do much to ensure the success of the proposed “third way”.

Author

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