



WORKSHOP ON

DIGITAL TRADE AND INDUSTRIALIZATION: *PERSPECTIVES FROM THE SOUTH*

8-9 March 2018
Hotel Cinnamon Lakeside
Colombo, Sri Lanka

Key Messages

The workshop was attended by senior policymakers from Bangladesh, Pakistan, Sri Lanka, Cambodia, Malaysia and Indonesia. International experts discussed pertinent issues with respect to digital trade and industrialization. Key messages that emerged from the workshop are as follows:

- There are new opportunities arising for developing countries to upgrade in the GVCs in the digital era. But, only those countries will be able to avail these opportunities which are able to develop their digital infrastructure and digital skills. At present, most developing countries lack the required digital capacity to avail the emerging opportunities. The growing digital divide is making 'catching-up' more difficult for developing countries, which are fast losing their trade competitiveness, especially in digital trade. Targeted Digital Industrial Policies are needed. But, negotiating digital rules in the WTO and other Mega Trade Agreements may not allow the developing countries to have adequate Policy Space to develop their digital industrial policies. Efficiency is not the only goal of public policies, and facilitating trade is not the only objective. Equity and national economic goals must also be considered.
- Many of the issues proposed for discussion in the WTO under the e-commerce agenda are not trade issues (e.g. spam) or they have very significant non-trade implications (e.g. data flows). Rules regarding these issues should not be negotiated in the WTO, given that developed countries have blocked discussions on these issues in other forums such as ITU and the Working Group on Enhanced Cooperation and maintained that such issues be discussed in open and inclusive so-called multi-stakeholder forums.

However, WTO is the least open and least inclusive intergovernmental organization and it is not multi-stakeholder.

- Recognising the increasingly prominent role of data flows in economic development, it is not surprising that big global players in the ecommerce business are positioning themselves to maximise their gains in the future by seeking WTO members to negotiate binding rules on e-commerce for mandating free flow of data across borders. IT/ Software and Internet/ Cloud sectors/businesses are to be distinguished from data and digital intelligence based digital businesses. WTO proposals and agreements are NOT about ICT/ software development related issues, they are principally aimed at the business of data and digital intelligence. Developing countries need policy and regulatory space to engage in digital catch-up to maximise the benefits of digital industrialisation, but the 'e-commerce' rules proposed for the WTO would close that space, prevent such strategies and lock developing countries into the low value and dependent parts of the global digital economy. That is why these rules have been strongly opposed by many developing countries in the WTO, most recently at the ministerial conference in Buenos Aires in December 2017
- Domestic digital industrialisation policies are the key current requirement for developing countries. Platform business should be largely domestic to retain control over the strategic national asset of national social and economic data. National ownership framework should be developed for such community/ national data. Better conceptualised and invested public sector role in digital economy is vital for broadband infrastructure, cloud computing systems, transactions-enabling infrastructure and data infrastructures. Putting in place WTO rules of the kind contained in the TPP and proposed by some to the WTO will not help developing countries in this regard. The proposed rules are all aimed at impeding independent and robust digital industrialisation by providing the way for foreign ownership and control over national data, digital intelligence and platform businesses in all sectors (including vital sectors like health, education, agriculture, manufacturing and indeed governance). Sectoral platform companies (Uber, Amazon, AirBnB, etc) will soon exist in all sectors. These platform companies know that control of data/ digital intelligence is the centre piece of digital economy and they aim to reorganise and control, which is across every sector.
- Within a short period, it has become a cliché to say that data is the oil of the digital economy. The burgeoning on-line retail platforms, mobile communications, social media, IoT devices etc. generate huge volumes of data that can be processed for creating innovative digital products. Access and control over data entrenches the market power of first movers and creates barriers for entry of new players. Thus, the digital economy is increasingly being viewed as "winner takes all" phenomenon. If developing countries are unable to restrict cross border flow of data (which is the raw material of the digital economy), then in future they may be unable to implement strategies for catching up with leaders in the digital economy. This would be in sharp contrast to how the existing GATT/WTO rules provide flexibilities to countries to restrict export of natural resources for stimulating domestic value-addition. Developing countries therefore need to be extremely cautious about taking any commitment on mandatory cross-border data flows.
- Because of network effects and economies of scale, there is a tendency of concentration in e-commerce for platforms. No serious discussion of e-commerce facilitation can take place until global anti-trust rules are agreed and there is global enforcement of such rules.
- The new e-commerce template proposed by some at the WTO is based on the precedent established in mega-regional agreements, starting with the TPP. That, in turn, reflects

the Digital2Dozen principles developed by the US based on demands from the US Big Tech industry, who aim to ensure that they continue to dominate the digital domain by preventing future regulation of their activities, technologies and services, and requirements to share technology and digital capacities with developing countries. Agreeing to a negotiating mandate in the WTO for 'new issues', especially for e-commerce, would fundamentally change the WTO's focus, by abandoning the unfinished development agenda of the Doha round and eroding the *acquis* that recognises developing countries should have special and different treatment and development flexibilities.

- Even without new negotiations on e-commerce in the WTO, its proponents want to interpret existing WTO obligations to restrict developing countries' ability to regulate new technologies and services. These commitments were made in 1994 when the WorldWideWeb barely existed, let alone the activities of firms like Uber, Google, Amazon and Alibaba or technologies like drones and artificial intelligence. These interpretations need to be challenged in the WTO and other free trade agreements.
- The TPP-style e-commerce rules would have severe development impacts. As currently framed they could facilitate tax avoidance, deplete foreign exchange and the balance of payments, deny access to new technologies that are necessary for innovation, concentrate oligopolistic power over resources, endanger small businesses and local employment in agriculture, manufacturing, as well as services, and prevent the adoption of effective regulations that protect consumers, privacy, financial stability and cybersecurity. TPP-type rules would also prohibit countries from implementing local content policies in the digital arena – local storage and processing of data, local technologies, local data-related services. Local content policies are extremely important for supporting domestic industrial development. The WTO's Trade Related Investment Agreement (TRIMS) prohibits local content policies in goods, but not in services or technology. These TPP rules are thus TRIMS +.
- Two paradigms on the extent of Market Access that are now coming to a head, and are being fought out at the WTO: (i) The 1998 Electronic Commerce Work Programme which explores the issues, including their development implications; and (ii) the US's Digital Trade Agenda (reflected in TPP) and pushed by Japan, EU etc in the WTO. One allows for more policy space in market liberalisation; the other requires 'big bang' liberalisation. It has been argued in the WTO that if we want to support MSMEs, we should negotiate e-commerce rules along the lines of the second paradigm. This raises many crucial issues: (a) the WTO has never before singled out a stakeholder group for specific rule making; what are the consequences of doing so now? (b) countries will define an MSME differently; should they all be treated the same way? (c) the current Doha agenda already identifies issues which are relevant for MSMEs: the Special and Differential Treatment mandate (para 44 of DDA) deals with flexibilities in TRIMS (local content), infant industry, balance of payments, technology transfer. Why not pursue that? (d) is there an instrumentalization of MSMEs, using them to push the neoliberal / Market Access agenda by asserting that e-commerce is good for MSMEs therefore there WTO should develop rules on e-commerce.
- Amazon's functioning is an extremely good example of a company that is converting data into digital intelligence and using its digital intelligence to gain monopoly power in myriad sectors (expanding its ecosystem), to the extent that it monopolises the 'infrastructure' of the economy itself. The MSMEs that are third sellers on its platform are being squeezed, bought out, or destroyed. E-commerce is important and needs to be nurtured, but whether MSMEs benefit will depend on how governments regulate.

- Many countries including China, Russia, Indonesia, Brazil, Panama, Nigeria, South Korea have data localisation requirements such as local data storage, processing, use of local technologies. Digital companies / USTR have complained about these measures. USTR has pushed for the following provisions, amongst others, in the TPP: (i) unrestricted data flows (parties must allow cross-border flow of information, including personal information, for the conduct of business); (ii) no possibility to have localisation requirements, including use of local technology and servers.
- Binding rules on access to source code could prohibit governments from making import, distribution and sale of software, or products containing such software, contingent on disclosure of source code. Further, government agencies may be mandated to use only non-infringing computer software protected by copyright and related rights.
- Binding rules on access to source code would discourage the diffusion of software technology. That would perpetuate the technology dependency of developing countries, thereby deepening the digital inequities. In addition, there could be adverse implications for security and for assessing regulatory compliance. It is also apprehended that these rules could prevent governments from giving preference to open-source software, thereby conferring a huge advantage to proprietary software.
- Considerable evidence has emerged of the anti-competitive practices being resorted to by some of the prominent digital giants. To illustrate, the Federal Cartel Office of Germany found that Amazon implemented a ‘best-price clause’ which actually had a price-increasing effect and exposed the anti-competitive effects of cartel-like price collusion. In its Preliminary Findings, the Bundeskartellamt has held that Facebook imposes unfair conditions on its users by making them choose between accepting ‘the whole Facebook package’, including an extensive disclosure of personal data, or not using Facebook at all. In another proceeding, the EC Competition Authority has established that Google abused its dominant position by the more favourable positioning and display, in its general search results pages, of its own comparison shopping service compared to competing comparison shopping services.
- Overall, the unfair trade practices have arisen, in part, from market dominance which in turn arises from access to data. This underscores the importance of data for creating competitive businesses. Many retailers have closed on account of unfair trade practices of the global digital giants. Strategies for enhancing their stranglehold and deepening their market share include buying out competitors (crippling them financially); removing off the search list those sellers who complain, or putting them at the bottom; exploitation of workers and deeming them ‘self-employed’; avoiding taxes; and financial capitalization.
- In today’s economy, the old focus of trade rules on NAMA and agriculture is being overtaken by services. Digitized services increasingly run key sectors of the economy, including agriculture, mining, fisheries and manufacturing, 3-D printing, logistics supply chains, call centres, digital marketplaces and payment systems. Negotiations on e-commerce have the potential to subsume traditional subjects of WTO negotiations under this single agenda.
- The scope of governments’ regulatory authority that is governed by GATS, and more so by TPP, is far-reaching. They apply to all government measures that would ‘affect’ supply of services, at all levels of government, in four different modes of supplying services, including across the border, and include measures on buying, paying & using a service. Measures affecting supply of a service could include those that address control or use of data, privacy, payments, cybersecurity, even if not directly targeting them.

- The objective of provisions in TPP and TISA, which are being proposed in the WTO, is not only to expand coverage, but also to get rid of the 'development acquis' in the GATS. Even without a mandate to negotiate on e-commerce in the WTO, four unresolved GATS matters are critically important, because they can greatly expand Members' existing obligations and restrict their policy space: (i) the meaning of services that Members have committed in their schedules (do the digital giants supply computer services, or is Google an advertising service, Amazon a distribution service, Uber a transportation service, e-Bay an auction service, Netflix an entertainment service, Visa, Mastercard, Poli, Pay-Pal, AliPay a financial service, or are they both, and more?); (ii) uncertainties over what a commitment to allow unrestricted cross-border supply of a service, or its consumption offshore, means; (iii) claims that 'technological neutrality' means commitments made back in 1994 apply to any new technologies that were invented later; and (iv) new restrictions on domestic regulation (eg. technical standards, licensing, administration of regulations). If the expansive interpretations of the e-commerce proponents are not challenged, developing countries will have massively expanded obligations.
- South-South cooperation is foremost and urgently required with regard to digital industrialisation - first to develop knowledge and policy frameworks, and next for practical steps regarding developing digital/ data infrastructures, better integration of digital/ data markets on equitable, reciprocal, mutually beneficial and complementary terms, and development of fair global digital governance, standards and rules.
- As a way forward for the developing countries, UNCTAD proposed a 10-point South-South Digital Cooperation Agenda for boosting Industrialization, which includes South-South cooperation for (i) Building a Data Economy (ii) Building Cloud Computing Infrastructure (iii) Strengthening Broadband Infrastructure (iv) Promoting E-Commerce in the Region (v) Promoting Regional Digital Payments (vi) Progressing on Single Digital Market in the Region (vii) Sharing Experiences on E-Government (viii) Forging partnerships for building Smart Cities (ix) Promoting Digital Innovations and Technologies (x) Building Statistics for measuring Digitization. These areas of cooperation can be added to the on-going existing regional integration agendas of the developing countries.
- Participating countries shared their experiences and efforts on digitalization and agreed that all countries are making the efforts to digitalize their economies but there are significant challenges faced by them and many of these challenges may not be amenable to solutions through binding rules at the WTO.
