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Contribution by

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Intergovernmental Group of Experts on E-commerce and the Digital Economy

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Summary

The principle that data should be borderless and that it should flow freely is a policy decision that has profound effects. Some base that principle on the idea that data is a commodity that should be freely traded.

But the idea that data should flow freely does not actually flow logically from the idea that data is a commodity: commodities are taxed and the producers of raw material are compensated for providing that material to the industries that transform it and add value to it.

Further, the idea that data is a commodity to be freely traded contradicts fundamental human rights.

And the benefits of free flow of data have been overstated: indeed free flow of data likely increases income inequality.

There is no obvious justification for policies favouring the free flow of data other than to allow dominant Internet companies to continue to accumulate huge profits (often monopoly profits) by extracting and refining data, without paying taxes and without compensating the users and the communicates who produce the data in the first place.

As a consequence, there should be a moratorium on negotiations regarding the free flow of data.

Background and Introduction

We comment here on the following substantive agenda item for the third meeting of the IGE on e-commerce:

> The value and role of data in electronic commerce (e-commerce) and the digital economy and its implications for inclusive trade and development (Item 3 of the provisional agenda, TD/B/EDE/3/1 of 23 January 2019)

As the provisional agenda correctly states:

> Data are playing an increasing role in e-commerce and the digital economy, in a context of digital and data divides within and between countries. The data-driven economy gives rise to new opportunities for wealth creation and for addressing development challenges, but it also raises various potential concerns related to, for example, data privacy and security, cross-border data flows, market concentration and taxation. Transforming these opportunities and challenges into inclusive trade and development requires adequate policy responses at the national and international levels.

The IGE should discuss the following questions at its third session:

> (a) What are the role and value of data in e-commerce and the digital economy in the context of inclusive trade and development?
>
> (b) What are the key opportunities and challenges associated with managing and regulating data and data flows?
>
> (c) What are the public policies, regulations and institutional arrangements in different countries and regions for harnessing and protecting data related to e-commerce and the digital economy,

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and bridging the digital divides including between and within countries and relating to youth, rural economy, microenterprises and small and medium-sized enterprises and gender?

(d) How could developing countries build capacities, including skills, to use new and emerging technologies such as big data analytics and artificial intelligence?

Our inputs for those discussions are presented below. We present first short answers to the questions, and then develop the answers in the following sections:

1. The implications of considering data as a commodity
2. Data is not a commodity
3. Data in the context of international trade
4. Conclusion

a) What are the role and value of data in e-commerce and the digital economy in the context of inclusive trade and development?

It is obvious that personal data has great value when it is collected on a mass scale and cross-referenced.[2] The monetization of personal data drives today's digital economy and the provision of so-called free services such as search engines.[3]

Thus issues related to the flow of data have major implications for trade and development, see for example the 2018 UNCTAD Trade Development Report, at:

https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2227

At the Introduction of the Report puts the matter:

> Technological changes are having a profound impact on the way we go about our daily lives. Digital innovations have already changed the way we earn, learn, shop and play. Collectively, as a fourth industrial revolution, they are changing the geography of production and the contours of work. But in the end, social and political actions – in the form of rules, norms and policies – will determine how the future unfolds.
>
> In this respect, the digital revolution has the misfortune of unfolding in a neo-liberal era. Over the last four decades, a mixture of financial chicanery, unrestrained corporate power and economic austerity has shredded the social contract that emerged after the Second World War and replaced it with a different set of rules, norms and policies, at the national, regional and international levels. This has enabled capital – whether tangible or intangible, long-term or short-term, industrial or financial – to escape from regulatory oversight, expand into new areas of profit-making and restrict the influence of policymakers over how business is done.

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[2] See for example pp. vii and 2 of the GCIG report, available at: http://ourinternet.org/sites/default/files/inline-files/GCIG_Final%20Report%20-%20USB.pdf . Henceforth referenced as "GCIG". See also 7.4 of http://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy_9789264218789-en ; and http://www.other-news.info/2016/12/they-have-right-now-another-you/ ; and the study of data brokers at: https://www.opensocietyfoundations.org/sites/default/files/data-brokers-in-an-open-society-20161121.pdf ; https://www.internetsociety.org/blog/public-policy/2017/03/my-data-your-business ; http://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource

[3] http://www.theatlantic.com/technology/archive/2014/08/advertising-is-the-internets-original-sin/376041/ and 7.4 of the cited OECD report; and http://www.other-news.info/2016/12/they-have-right-now-another-you/ and https://www.internetsociety.org/blog/public-policy/2017/03/my-data-your-business

This agenda has co-opted a vision of an interconnected digital world, free from artificial boundaries to the flow of information, lending a sense of technological euphoria to a belief in its own inevitability and immutability. Big business has responded by turning the mining and processing of data into a rent-seeking cornucopia.

Recent events – beginning with the financial crisis, through the sluggish recovery that has followed, to the fake news and data privacy scandals now grabbing headlines – have forced policymakers to face the inequities and imbalances produced by this agenda. Governments have begun to acknowledge the need to fill regulatory deficits that harm the public, to provide stronger safety nets for those adversely affected by technological progress and to invest in the skills needed for a twenty-first century workforce. But so far, actions have spoken more softly than words.

Despite the talk, this is neither a brave nor a new world. The globalization era before 1914 was also one of dramatic technological changes as telegraph cables, railroads and steamships speeded up and shrank the world; it was also a world of unchecked monopoly power, financial speculation, booms and busts, and rising inequality. Mark Twain castigated a “Gilded Age” of obscene private wealth, endemic political corruption and widespread social squalor; and, not unlike today’s digital overlords, the railroad entrepreneurs of yesteryear were master manipulators of financial innovations, pricing techniques and political connections that boosted their profits even as they harmed business rivals and the public alike.

And much like today, the new communication technologies of the nineteenth century helped capital to reconfigure the global economy. Many commentators wistfully describe this as a “free trade” era, evoking David Ricardo’s idea of comparative advantage to suggest that even technological laggards were better off specializing in what they did best and opening up to international trade. Here was a comforting win–win narrative for a winner-takes-most world, and an article of faith for the globalist cause, which led John Maynard Keynes, in his General Theory, to draw parallels with the Holy Inquisition.

In reality, international trade in the late nineteenth century was managed through an unholy mixture of colonial controls in the periphery and rising tariffs in the emerging core, often, as in the case of the United States, pushed to very high levels. But like today, talk of free trade provided a useful cover for the unhindered movement of capital and an accompanying set of rules – the gold standard, repressive labour laws, balanced budgets – that disciplined government spending and kept the costs of doing business in check.

As the growing imbalances and tensions of contemporary globalization play out in an increasingly financialized and digitalized world, the multilateral trading system is being stretched to its limit. Uncomfortable parallels with the 1930s have been quickly drawn. But if there is one lesson to take from the interwar years, it is that talking up free trade against a backdrop of austerity and widespread political mistrust will not hold the centre as things fall apart. And simply pledging to leave no one behind while appealing to the goodwill of corporations or the better angels of the super-rich are, at best, hopeful pleas for a more civic world and, at worst, wilful attempts to deflect from serious discussion of the real factors driving growing inequality, indebtedness and insecurity.

The response cannot be to retreat into some mythical vision of national exceptionalism, or to sit back and hope that a wave of digital exuberance will wash these problems away. There is, rather, an urgent need to rethink the multilateral system, if the digital age is to deliver on its promise.

In the absence of a progressive narrative and bold leadership, it is no surprise that the interregnum, as Antonio Gramsci would have predicted, is exhibiting disturbing signs of political morbidity. Finding the right narrative will be no easy task. For the moment, we might do best to recall the words of Mary Shelley – whose monstrous creation, Frankenstein, celebrating 200 years this year, has lost none of its power to evoke our fear of and fascination with technological progress – "the beginning is always today".

b) What are the key opportunities and challenges associated with managing and regulating data and data flows?

Some, in particular certain types of businesses and certain developed states, appear to base much discussion, and some decisions, on an implicit (or explicit) principle that data should flow freely. That principle appears to be derived from other implicit (or explicit) principles, including "the Internet is borderless, and so is data associated with the Internet" and/or "data is just another commodity, and so should not be subject to restrictions on trade".

The statement "the Internet is borderless" has no meaning. A correct statement is "some aspects of the Internet are not tied to national borders, for example many domain names and most IP addresses are not allocated on a national basis."

It is not contested that offline law applies equally online. So a meaningful statement would be "what national and international laws are appropriate for the Internet, and is there a need to change existing laws?"

It is in this context that there are calls to treat data as a commodity that should not be subject to trade restrictions.

In section 1 below we consider the idea that data is a commodity, and show that the implications of that idea are that data should be taxed and that users and collectivities should be adequately compensated for the data that they provide.

However, in section 2 below, we show that this idea is false: data is not a commodity and cannot be treated as such.

c) What are the public policies, regulations and institutional arrangements for harnessing and protecting data related to e-commerce and the digital economy, and bridging the digital divides?

See sections 1, 2, 3, and 4 below and also sections C, D.1, D.5, D.7, D.8 and D.9 of our submission to the Working Group on Enhanced Cooperation, available at:

http://www.apig.ch/Gaps%20r9%20clean.pdf

In addition, the report referenced below presents emerging insights from research studies covering 14 countries and a range of domains and sectors. It examines the current trends in certain aspects of the digital economy, platformization, mapping the emerging policy responses and challenges:

https://itforchange.net/platformpolitics/wp-content/uploads/2018/09/Mid_Project_Reflections_2018.pdf

d) How could developing countries build capacities, including skills, to use new and emerging technologies such as big data analytics and artificial intelligence?

The paper referenced below examine the nature of digital economy in a developing country context. It distinguishes digital industry from the earlier software industry and then the Internet industry. The paper defines digital economy as one where data and digital intelligence are the chief economic resources, which are employed for sector wide reorganisation of economic activity. It goes beyond the

information and communication related sectors like media to every economic sector, from transportation, energy and finance to agriculture and manufacturing to health and education. The paper offers recommendation on how developing countries must adopt a mixed economy approach to digital industrialisation, with a focus on public digital and data infrastructures. It also addresses what positions developing countries can take at global digital trade forums.

http://www.itforchange.net/sites/default/files/add/Digital-industrialisation-May-2018.pdf

1. Data as a commodity

A propensity by some to advocate in favor of the principle of the free flow of data was clearly illustrated in the workshop on "Data Localization and Barriers to Cross-Border Data Flows"[4] held at the 2017 WSIS Forum. The description of that workshop includes the following:

> There is growing debate about the spread of national data localization restrictions and barriers to Cross-Border Data Flows (CBDF). Localization policies include requirements such as: data must be processed within a national territory, and involve a specific level of "local content," or the use of locally provided services or equipment; data must be locally stored or "resident" in a jurisdiction; data processing and/or storage must conform to unique national standards; or data transfers must be routed largely or solely within a national or regional space when possible. In addition, in some cases, data transfers may require government approval based on certain conditions, or even be prohibited. Governments' motivations for establishing such policies vary and may include e.g. promoting local industry; protecting (nominally, or in reality) the privacy of their citizens, and more broadly their legal jurisdiction; or advancing national security or an expansive vision of "cyber-sovereignty."
>
> The stakes here are high. McKinsey has estimated that data flows enabled economic activity that boosted global GDP by US $2.8 trillion in 2014, and that data flows now have a larger impact on growth than flows of traded goods. The growth of localization measures and barriers to CBDF could reduce these values and impair not only business operations but also vital social processes that are predicated on the flow of data across the Internet. Hence, language limiting such policies has been included in a number of trade agreements, including the TPP and the proposed TTIP and TiSA. It also is possible that at least some of the policies in question are inconsistent with governments' commitments under the WTO's GATS. But the extent to which these issues should be addressed by trade instruments remains controversial, with many in the global Internet community and civil society remaining critical of non-transparent intergovernmental approaches to the Internet, and many privacy advocates opposing the application of trade rules to personal data.
>
> This workshop will take stock of the growth of data localization measures and barriers to data flows and assess the impacts of these trends; consider what can be achieved via international trade instruments in the current geopolitical context; and explore the possibility of a parallel track of multistakeholder dialogue and norm setting that is balanced and supported by diverse actors. It will consider whether normative approaches involving monitoring and reporting could help to ensure that data policies do not involve arbitrary discrimination or disguised digital protectionism, and do not impose restrictions greater than what is required to achieve legitimate public policy objectives.

We stress here the last sentence above "do not impose restrictions greater than what is required to achieve legitimate public policy objectives".

[4] https://www.itu.int/net4/wsis/forum/2017/Agenda/Session/272#intro

This raises the question: who will decide what public policy objectives would not be legitimate? During the workshop, it was made clear that the legitimacy of restrictions, and of public policies themselves, would be made by arbitration panels under the WTO or related agreements. That is, the intent is to subordinate decisions made by national parliaments and national governments to the opinion of a panel of international jurists regarding whether or not those decisions are "legitimate" in light of treaty provisions.

But why should trade agreements be given primacy over other international instruments, in particular those regarding human rights? Some recognize that trade is not the only, or even the pre-eminent, matter to be considered.

For example, at the 2017 WSIS Forum High-Level Policy Session on "Digital Economy and Trade"[5], H.E. Mr. Julian Braithwaite, UK Ambassador and Permanent Representative to the United Nations and Other International Organisations in Geneva, stated:

> There are two big public policy challenges on digital the first is over data and as the Internet is so important for wider public policy the regulatory response to that, child protection online, cybersecurity, privacy is to regulate in a way to apply online the laws you that are applied offline. Putting your arms in a data in a national jurisdiction. This may be the right response for that particular public policy issue but the unintended consequence of that is you close down data flows internationally and you potentially break up this extraordinary advantage of the Internet providing as a global platform. How one achieves the wider public policy goals which involve the safe, responsible use and sharing of data while maintaining the cross-border flows that are the things that lead to the advantages, that's the first question.

According to this view, cross-border flows are always beneficial, so it is important to consider the disadvantages that might result if cross-border data flows are restricted, for example to protect privacy.

However, it is not obvious that cross-border flows are always beneficial. Reacting to the above statement, and to and other statements, a staff member of the European Commission stated, speaking in a private capacity:

> I wanted to raise a word of caution from the European Commission, I will talk in my personal behalf as an economist. You introduced this session saying there is a wide consensus that broadband will grow, jobs, et cetera.
>
> I would say that's not 100% true. There is increasing evidence and papers, other international organizations saying that technologies are increasing inequality and in the long run thus is a cause of slowing growth. This is an important point. The enthusiasm that's tried to be here for the new technology should probably be kind of moderated if we think about the Sustainable Development Goals. So the thing is, probably on the Agenda of the international organization it should not only be data trade, common rules for access to data, et cetera, but also some other very hot issues like taxation of multinationals, migration problems, et cetera which are closely related to evolution of digital technologies.

Indeed, if data is considered to be a commodity, subject to trade facilitation rules, then why isn't it considered a commodity also from the point of view of taxation? And why aren't the producers of the raw material (the end-users who provide the data) fairly compensated for their production?

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[5] https://www.itu.int/net4/wsis/forum/2017/Agenda/Session/287#intro
The transcript is at:
https://www.itu.int/net4/wsis/forum/2017/Content/Uploads/DOC/3490e121a88547aea5502d3f5cba96a9/Captioning_287.pdf

Data in the context of the digital economy has often been compared to oil. Nobody expects the owners of the ground in which there is crude oil to provide the crude oil for free to the companies that refine it, add value to it, and sell the products derived from crude oil. And nobody expects the flow of oil to escape taxation.

So there is a fundamental inconsistency here: if one argues that data should be treated as a commodity, because it is valuable when it is combined with other data, then one cannot simultaneously argue that it cannot be taxed and that end-users should provide their personal data without adequate compensation.

Of course users are, at present, compensated for their data because they receive so-called "free" services, such as social networks, search engines, etc. But the value of those services is far less than the value of the data, as can be seen from the fact that the providers of such services are extremely profitable: in fact, far more profitable than other extractive industries. Thus users do not receive adequate compensation for the raw material that they provide: their personal data.

Furthermore, it is important to consider the collective value of data. A ride sharing company has valuable data on traffic flows within a city. That data is generated by the residents of the city, so the residents of the city should benefit from the value-added of the collective data.

2. Data is not a commodity

But personal data is not a commodity like any other commodity: it is related to a person's private life and thus to his or her human rights.

The Universal Declaration of Human Rights provides in its Article 12:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Thus it is up to the law (meaning national law) to define what is an "arbitrary" interference with a person's privacy. Many states, in particular in Europe, have enacted, and enforce, laws regarding the protection of personal data.

Since those laws implement the human right to privacy, they take priority over other laws. Consequently, data is not a commodity like oil, because data can only be processed in accordance with laws that protect personal data, and the privacy of the people to whom the data relates.

Further, the Universal Declaration of Human Rights provides in its Article 22:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

As noted above, data is a valuable resource: dominant Internet companies derive their profits from extracting and refining data.

People have the right to realize the economic rights needed for their dignity and the free development of their personality. That right includes the right to be adequately compensated for the value of the data that is provided to dominant Internet companies, both individually, and as residents of a state, through taxation of data flows.

3. Trade negotiations

Past and current trade negotiations have resulted (or are likely to result) in agreement on provisions that place restrictions on the ability of states to restrict data flows.

For example, Article 19.11 of the US-Mexico Canada Agreement (USMCA)[6] includes the following provisions:

> 1. No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.
>
> 2. This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:
>
> (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
>
> (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective. [Footnote 5: A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party.]

What will prevent a state from arguing that taxation of data is a disguised restriction on trade, which is not necessary to achieve a legitimate public policy objective?

Or from arguing that data localization requirements, thought to be necessary to protect privacy, are a disguised restriction on trade, which is not necessary to achieve a legitimate public policy objective?

This in particular when there are proposals to prohibit data localization requirements and/or requirements regarding the location of computing facilities, see for example WTO documents JOB/GC/177 from Japan and JOB/GC/178 from the USA.

Recall that disputes regarding the interpretation and implementation of trade agreements are not decided by national courts. They are decided by arbitration panels composed of international jurists.

Thus national measures regarding data flows can be overturned even if they have been democratically decided by a national parliament.

This appears to us to be a violation of the human right to take part in the conduct of public affairs, as provided in Article 25 of the International Covenant on Civil and Political Rights (and also in Article 22 of the Universal Declaration of Human Rights).

Trade-related negotiations regarding the free flow of data must stop. As two experts put the matter[7]:

> One must wonder whether this [trade negotiations regarding e-commerce] will be an opportunity to foster digital rights or leave us with even lower standards and a concentrated, quasi-monopolistic market benefiting from public infrastructure? The rhetoric of opportunities for the excluded – connecting the next billion – sounds great, but only if we disconnect it from the current realities of the global economy, where trade deals push for deregulation, for lower standards of protection for the data and privacy of citizens, where aggressive copyright enforcement risks the security of devices, and when distributing the benefits, where big monopolies, tech giants (so called GAFA) based mostly in the US, to put it bluntly, take them all.

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[6] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

[7] https://www.opendemocracy.net/digitaliberties/renata-avila-burcu-kilic/new-digital-trade-agenda-are-we-giving-away-internet

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Never before has a trade negotiation had such a limited number of beneficiaries. Make no mistake, what will be discussed there, with the South arriving unprepared, will affect each and every space, from government to health, from development to innovation going well beyond just trade. Data is the new oil – and we need to start organising ourselves for the fourth industrial revolution. The data lords, those who have the computational power to develop superior products and services from machine learning and artificial intelligence, want to make sure that no domestic regulation, no competition laws, privacy or consumer protection would interfere with their plans.

Disguised as support for access and affordability, they want everyone to connect as fast as they can. Pretending to offer opportunities to grow, they want to deploy and concentrate their platforms, systems and content everywhere in the world. Enforcement measures will be coded in technology, borders for data extraction will be blurred, the ability to regulate and protect the data of citizens will be disputed by supranational courts, as local industries cannot compete and local jobs soar. If we are not vigilant, we will rapidly consolidate this digital colonisation, a neo-feudal regime where all the rules are dictated by the technology giants, to be obeyed by the rest of us.

See also:

http://www.ourworldisnotforsale.net/2019/Digital_trade_WEF.pdf

https://data.justnetcoalition.org/WEF_and_e-com_plurilateral.pdf

https://justnetcoalition.org/2019/WEF_and_e-com_hypocrisy.pdf

http://www.ourworldisnotforsale.net/

4. Conclusion

The principle that data should be borderless and that it should flow freely is a policy decision that has profound effects. As shown above, it does not flow logically from the idea that data is a commodity, it contradicts the human right to privacy, and its economic benefits have been overstated (indeed, free flow of data is likely increasing income inequality).

There is no obvious justification for policies favouring the free flow of data other than to allow dominant Internet companies to continue to accumulate huge profits (often monopoly profits) by extracting and refining data, without paying taxes and without compensating the users who produce the data in the first place.

As a consequence, there should be a moratorium on negotiations regarding the free flow of data.