



Supporting Digital Trade Rules for Innovation and Sustainable Economic Development

A Case for a Trade Agreement

October 2019

Context

Around the world, many people are looking for ways to press the undo button on globalization. The liberal economic order which Britain, the U.S. and other countries did so much to bring together after World War II is under attack everywhere. Nowhere is this more visible than in the current lack of support for free trade and free markets. Big companies are distrusted. Governments and global institutions are perceived to be failing to address the world's challenges. And globalization is being attacked like never before. One of the key concerns expressed by economists and businesses alike is protectionism, including the threat of all-out trade wars made by certain key government leaders.

According to the 2019 WTO Services Trade Barometer¹, rising tariffs have contributed to a decline in cross-border sales of goods and services, contributing to a weakening of global economic growth and a loss of momentum in world services trade. According to the WTO², forecasts of global trade in 2019 and 2020 have been sharply downgraded from its previous assessment only six months earlier.

While anti-globalization forces and protectionist sentiments are not new nor strictly ICT specific, WITSA in a 2018 paper³ was compelled to challenge these as -if unchecked- they can have long-term detrimental implications for our current, rules-based international order as well as for the future and prosperity of our children and future generations.

There is a compelling economic case to support ongoing efforts that enable continuing global trade liberalization. Progress to-date has resulted in significant increases in the global distribution of income

¹ https://www.wto.org/english/res_e/statistics_e/wtoi_e.htm

² https://www.wto.org/english/news_e/pres19_e/pr840_e.htm

³ https://witsa.org/wp-content/uploads/2018/12/Globalization-Perception-vs-Reality_final.pdf

with substantial benefits accruing to all nations – developed countries, emerging economies and especially to some of the poorest nations, for whom trade is demonstrably more beneficial, economically and socially, than aid. If this case isn't made and voiced in strong terms, the false narrative endorsing protectionism and nationalism remain as potent and dangerous today as it has been for past centuries.

As outlined in our 2016 Statement of Policy on International Trade in Goods and Services⁴, WITSA is concerned about the very real risk that the significant achievements in multilateral trade liberalization since 1948 might begin to erode, as nations become introspective and protective in the face of global financial and economic challenges. This is a serious and complex issue for the global business community, affecting not just the future of multilateral negotiations, but – equally important – the future of global trade rule making and dispute settlement.

The WTO, along with the World Bank and the International Monetary Fund (IMF), are the major multilateral institutions dedicated to international economic cooperation. The WTO was established by its member countries to supervise the rules developed that govern international trade, to liberalize trade on an open, competitive, non-discriminatory, predictable and transparent basis via multilateral trade agreements (MTAs), and to provide an impartial and binding mechanism for adjudicating and enforcing contractual obligations defined by the WTO and accepted by its members. It gives all members, regardless of size or level of development, a platform and a voice. WTO agreements provide the legal ground-rules for global commerce and for trade policy.

Today, the WTO, multilateralism and the international rules-based trade system is under attack. However, WITSA does not believe the system is broken; in fact, the WTO offers the best route to fix many concerns.

Nevertheless, the WTO is in need of reform. The WTO e-commerce negotiations which were launched on January 25, 2019 with a Joint Statement on Electronic Commerce⁵ at the World Economic Forum in Davos, Switzerland, presents an opportunity for the global trade body to prove its relevance in the current political environment and could lead to broader WTO reforms as well.

No multilateral agreement on digital trade exists in the WTO. The Joint Statement Initiative on E-Commerce (JSI) process launched in Davos seeks "to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible [...] in order to further enhance the benefits of electronic commerce for businesses, consumers and the global economy."⁶

A successful conclusion of the WTO e-commerce negotiations resulting in an agreement by the 2020 WTO Ministerial would invigorate global digital trade at a critical time and enhance the stature and relevance of the global trade body.

⁴ https://witsa.org/wp-content/uploads/2018/12/WITSA_Statement_of_Policy_on_International_Trade_2016.pdf

⁵ https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf

⁶ https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf

About WITSA

WITSA is a global consortium of leading ICT industry association members from over 80 countries/economies. WITSA members represents over 90% of the ICT industry.

As the leading recognized voice of the global ICT industry, WITSA aims to drive transformation and expand the use of ICT globally; given that ICT is the key driver of the global economy.

WITSA's members and stakeholders comprise national associations, multinational corporations, institutions and organizations, researchers, developers, manufacturers, software developers, telecommunication companies, suppliers, trainers and integrators of ICT goods and services. As such, they represent a large and obviously vital constituent group for whom the effective balancing of concerns and rights affecting the security, privacy and information capability provided by ICT products and services underpins business development and economic activity.

WITSA is a founding partner of the Digital Trade Network ([DTN](#)), a new initiative providing a permanent private sector resource for digital trade policy makers in Geneva. Through DTN, WITSA works with a number of other partner organizations to build an impartial, broad base of international supporters to work with the WTO, the UN Conference for Trade and Development (UNCTAD), the International Trade Centre (ITC), and related economic policy agencies in Geneva with a focus on the networked economy.

WITSA Recommendations

WITSA welcomes the Joint Statement Initiative on E-Commerce (JSI) process launched by 76 WTO members in Davos and encourages the successful conclusion of an inclusive, high-standard plurilateral WTO agreement that builds on existing WTO agreements and frameworks, agreed to by as many countries as possible.

Non-Discrimination

Two fundamental principles run throughout all the WTO agreements: the “most-favored-nation” (MFN) principle, which means countries cannot discriminate between their trading partners; and the “national treatment” (NT) principle, which means both imported and locally produced goods and services must be treated equally. These provide an equal and neutral foundation for negotiations and ultimately, trade rules, which ensure trade can occur between nations without any bias or preference. Such principles of non-discrimination in the treatment of digital products and business models, including between incumbents and new entrants in their innovation activities, should be included in any WTO agreement.

Cross-Border Data Flows

Underpinning all digital trade – and in a digitized world all trade - is international transfers of data . In 2016, WITSA issued a statement⁷ warning that barriers to free data flows form considerable obstacles to global trade. Far from being exclusive to high-tech firms, data flows are used by almost all businesses and customers; studies have consistently demonstrated that more than ¾ of the benefits of digitalization accrue to traditional businesses. Countries are concerned about these free data flows, however, for a variety of reasons: revelations about the ability of governments to collect digital traffic;

⁷ https://witsa.org/wp-content/uploads/2018/12/Cross-border-Data-Flows_final.pdf

protectionist goals to favor local companies; and concerns about the security of personal data, to name just a few. In response, barriers are being imposed on the transfer of data across borders by various nations, both developed and developing, despite the evidence that, like tariffs, it is an act of national self-harm.

Customers would find themselves unable to access valuable digital services. Small and medium-sized enterprises (SMEs), which benefit from digital trade even more than large firms do, would be disproportionately affected by these barriers. They do not have the resources to bear these unnecessary costs.

WITSA believes 'data' is an essential resource for healthy economic growth and that excessive restrictions on data will be a barrier to secure management and protection of data. New WTO ecommerce trade rules should enable the secure movement of data across borders.

Forced Data Localization

In the last few years, a growing number of countries have imposed what are called "localization barriers to trade" – obligations for firms to store their data, or host their activities, within the geography of specific countries. These localization measures are designed to protect, favor, or stimulate domestic industries, service providers, and/or intellectual property (IP) at the expense of goods, services, or IP from other countries; in some cases the justification is to protect personal information of citizens. Localization barriers are measures that can serve as disguised trade barriers when they unreasonably differentiate between domestic and foreign products, services, IP, or suppliers, and may or may not be consistent with WTO rules. Examples of localization barriers include:

- Local content requirements, i.e., requirements to purchase domestically-manufactured goods or domestically-supplied services
- Subsidies or other preferences that are only received if producers use local goods, locally-owned service providers, or domestically-owned or developed IP, or IP that is first registered in that country;
- Requirements to provide services using local facilities or infrastructure;
- Measures to force the transfer of technology or IP
- Requirements to comply with country- or region-specific or design-based standards that create unnecessary obstacles to trade
- Unjustified requirements to conduct or carry out duplicative conformity assessment procedures in-country.

When foreign goods, services, or IP are either disadvantaged in a market compared to domestic goods, services, or IP, or when they're kept out of the market altogether, that can distort trade, discourage foreign direct investment, and push other trading partners to impose similarly detrimental measures. And, consequently, often over the long term, these measures can actually stand in the way of the economic growth and competitiveness objectives that they were intended to achieve. For these reasons, WITSA strongly advocates against localization barriers and instead encourage governments to pursue policy approaches that help their economic growth and competitiveness without discriminating against imported goods or services.

While existing rules already prevent localization in areas where WTO Members have commitments, a new WTO trade framework should prohibit the forced localization of data or computing facilities for all sectors. The agreement should not permit any country to require foreign investors to use or locate computing facilities in their territory as a condition for conducting business in that territory.

Customs Duties on Electronic Transmissions

In 1998, The WTO adopted the [Declaration on Global Electronic Commerce](#), preventing member countries from adopting burdensome customs duties on electronic transmissions (“Moratorium on Customs Duties on Electronic Transmissions”). However, the moratorium was not made permanent, being subjected to periodic renewals. The current moratorium is set to expire on December 31, 2019 and its extension will be decided upon by the WTO General Council in December⁸.

Some countries have expressed concern over the loss of tariff revenue stemming from the moratorium. This is especially true in certain developing countries. However, as demonstrated in an August 2019 comprehensive scenario modelling study undertaken by the European Centre for International Political Economy (ECIPE), potential tariff revenue losses are far outweighed by the GDP losses that would accrue from the unilateral imposition of tariffs⁹. According to the ECIPE analysis, India would lose 49 times more in GDP than it would generate in duty revenues. The figures are even more skewed for Indonesia, which would give up 160 times as much GDP as it would collect in tariffs, while South Africa would lose over 25 times more and China, seven times more.

WTO Members may instead levy taxes on consumption or sale within the domestic market to ensure equivalent treatment. Doing so is far less complex given that assessing duty on an intangible electronic transmission would also be very difficult to do¹⁰.

A WTO agreement should permanently prohibit customs duties and other discriminatory measures from being applied to electronic transmissions. As the Internet and electronic commerce become increasingly important elements of global trade and economic growth, it is essential to provide the certainty and maintain trade flows that are driving economic activity and innovation. Last but not least, the moratorium made an entire area of trade effectively tariff-free from its inception. That is a fundamental objective of the entire trading system. Rolling back on that commitment would send a terrible signal and lead to further questions about the viability of the system as a whole.

Trade Facilitation

There is an opportunity to build on the WTO Trade Facilitation Agreement, which entered into force in 2017, containing provisions for expediting the movement, release and clearance of goods, including goods in transit, setting out measures for effective cooperation between customs and other authorities on trade facilitation and customs compliance issues as well as addressing technical assistance and capacity building issues¹¹.

A new WTO digital trade agreement should include further commitments on trade facilitation that help enable cross-border e-commerce for businesses of all sizes, especially micro-, small- and medium sized

⁸ https://www.wto.org/english/thewto_e/gcouncil_e/gcouncil_e.htm

⁹ <https://ecipe.org/wp-content/uploads/2019/08/PR-PB-32019.pdf>

¹⁰ <https://cdn.iccwbo.org/content/uploads/sites/3/2019/09/icc-issues-brief-2-moratorium.pdf>

¹¹ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

enterprises (MSMEs). These commitments should simplify processing for low-value shipments and streamline requirements at the border including, for example, the electronic submission of documents and pre-arrival processing for shipments. It should establish that every document required for the movement of goods is as legally valid in digital as in paper terms.

Protection for Algorithms and Source Code

Requiring companies to provide source code or proprietary algorithms as a condition of market access is limiting to open trade and investment and inherently a violation of the principle of non-discrimination so fundamental to the entire trade system. Modeled after the United States-Mexico-Canada Agreement (USMCA), a WTO agreement on digital trade should include protections for such proprietary company information. Source code disclosure protection should not be limited to mass-market software, and software used for critical infrastructure should not normally be excluded from protection. In addition to providing protections against source code disclosures, there should be a limit to the ability of governments to force disclosure of proprietary algorithms¹².

Prohibition of Purchase and Use of Specific Technologies

A WTO e-commerce agreement should ensure that companies may purchase and use technologies that are consistent with their business model and practices. An agreement should prohibit governments from imposing measures requiring companies to purchase or use a particular technology. In addition, an agreement should prohibit governments from according a preference to a particular technology in its market and should retain the obligation to support international standards which are integral to interoperable software, hardware and services which underpin the open Internet.

Cybersecurity

Threats to cybersecurity undermine confidence in digital trade. To combat this, countries need to engage in capacity building, and work together, strengthening existing collaboration mechanisms. In order to effectively monitor malicious activity and act on trends, access and sharing of threat data globally is critical. A WTO agreement should include a provision promoting the use of risk-based approaches that rely on consensus-based standards and risk management best practices.

Privacy Protections

Personal information should be protected regardless of where it is located. A WTO agreement should provide that parties in adopting or maintaining a legal framework for data protection should take into account relevant international best practices and standards, such as the *APEC Privacy Framework* and *OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)* (OECD Guidelines). An agreement should also specifically recognize that different approaches can achieve comparable levels of privacy protection and the agreement should not mandate one particular approach. However, it should recognize that all countries should provide a mechanism to allow international transfers of protected data – accepting that countries need the policy space to determine the terms under which those transfers may take place.

Open Government Data

Facilitating public access to and use of government information fosters economic and social development, competitiveness, and innovation. A WTO agreement should recognize this by promoting access to government data in a machine-readable and open format leveraging international standards.

¹² USMCA Art. 19.16: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19_Digital_Trade.pdf

Conclusion

Negotiators in Geneva are meeting monthly to discuss and seek consensus on the scope and particulars of a future WTO plurilateral ecommerce agreement, having now expanded to include some 80 WTO members by the July 2019 round, accounting for more than 90 percent of global digital trade.

WITSA will continue to work with its partners in the Digital Trade Network in order to ensure that negotiations for a digital trade plurilateral arising out of the Joint Statement Initiative (“JSI”) will have the highest possible level of ambition - including the main priority areas for global industry; have broad-based buy-in and participation in both developed and developing countries and in all regions; and result in sufficient progress before the 12th WTO Ministerial in June 2020 so that there is a substantive announcement at that Ministerial or end-state negotiations are in prospect.

Any concept of WTO reform must treat the successful completion of WTO digital trade negotiations as a key element. Unless WTO members can find a way to agree to rules relevant to the challenges and opportunities governing international trade today, no amount of improvements in WTO process will matter.