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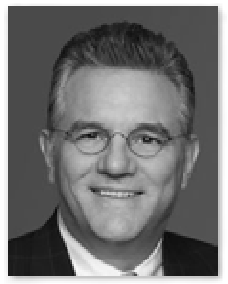
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# Digital Trade In An Analogue Trade Regime: Global E-Commerce In International Trade Negotiations

By Duane W. Layton & Paulette Vander Schueren

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In 1994 trade ministers from around the world came together to completely overhaul the international trade regime. The result was the World Trade Organization (WTO), a modern successor to replace the antiquated post-WWII GATT system. The WTO responded to issues that the GATT had not anticipated, including intellectual property rights and international trade in services. World leaders lauded the WTO as a trade regime for the future. Little did they know a technological advance was coming that would transform the entire global economy in just a few short years: the Internet.

## What Is Digital Trade?

Before looking at the challenges digital trade poses to the international trade system, it is useful to know what we are talking about. Digital trade refers to the movement of goods and services via electronic means. The following table illustrates the different categories of digital trade:

| Category | Description |
|---|---|
| Digital Content | News and entertainment media, books, music, games, images, etc. |
| Digital Services | Includes "new economy" services (e.g., web development, programming, IT assistance, software) as well as traditional services that can be delivered electronically (e.g., legal and tax advice, education services, retail, payment systems). |
| Data Services | Data storage and processing |
| Social Media | Websites that feature user-created content and facilitate user interaction (e.g., YouTube, Facebook, LinkedIn, Tumblr, Twitter) |
| Search Engines | Websites that search the Internet using proprietary algorithms based on users' search criteria and return ordered results (e.g., Google, Bing, Yahoo!, Ask) |
| Cloud Computing | Data storage and programs that allow users to access local files from a remote location. |
| Communications | Email, texting, voice and video chat.[1] |

Of course, the rapidly changing nature of technology makes it difficult to define every aspect of digital trade. However, the above categories account for the vast majority of the "digital economy" as it exists today.

## Integrating Digital Trade Into The Global Trade System

There is little doubt among economists that digital trade is a vehicle of tremendous growth. A study by the Boston Consulting Group presented at the World Economic Forum in Davos this week demonstrates that there is a direct correlation between a country's quality and cost of Internet access and the size of its digital economy.[2] A recent report by the OECD called the Internet and broadband connectivity "general purpose technology" that has reshaped the global economy. The OECD went on to say that it "expects the economic impact of the Internet to be more profound than that of previous general purpose technologies, such as the steam engine, railways, and electricity."[3] Even so, the rapid proliferation of the Internet and e-commerce has exposed gaps in international trade law:

### 1. Cross-Border Data Flows: Export Controls and Privacy Concerns

Perhaps the biggest concern is how to provide unfettered access to the Internet for the purpose of promoting legitimate global trade while controlling the flow of data to be used for more nefarious purposes. This includes both traditional export controls of military technology and information, but also personal data. The EU in particular has voiced concern in recent months about the illegal use of personal data by companies. It is no secret that companies in the US that conduct business online save customers' personal information for marketing purposes, at times even selling that information to third parties. The idea of companies retaining personal data after Internet transactions are completed is unsavory to most

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Europeans, even in the UK where e-commerce accounts for nearly 8 percent of GDP. Recent revelations about the US National Security Administration's vast data-mining operations have heightened these concerns.

This issue is likely to be a point of friction in negotiations over the Trans-Atlantic Trade and Investment Partnership (TTIP) between the US and EU, which has the potential to be the largest bilateral trade agreement by volume ever concluded. Members of the US Senate are now working on legislation that will require the US Trade Representative to seek "strong, binding commitments to keep the Internet open for business and for the free exchange of ideas" in upcoming negotiations.[4] While the outcome of these negotiations remains to be seen, it is fair to say that TTIP will set the standard for digital trade in future agreements.

### 2. Forced Localisation as a Technical Barrier to Trade

One of the biggest obstacles faced by companies offering transnational digital services is the forced localisation policies of certain countries. Forced localisation refers to a policy by which countries require the physical infrastructure supporting digital services offered within their borders to be located within their territory. For example, a company that offers remote data storage services must establish a physical presence within the country and maintain its servers there, even though there is no technological benefit to doing so. A customer can just as easily upload its data to a server located in California as it can to a server located in, for example, Hanoi. Requiring a physical presence in order to offer digital services makes it easier for a country to tax businesses offering digital services, but it also discourages global competition from small- and medium-size enterprises without the resources to establish a physical presence in each market it hopes to reach.

There is great disparity among WTO Members about the nature of localisation requirements. The US views it as a discriminatory technical barrier to trade with no legitimate function other than protectionism. Other Members, such as China, Russia, and Vietnam, view localisation as a state's prerogative and necessary for maintaining state control of the flow of information. Even countries belonging to the EU are increasingly keen on establishing localization requirement, largely due to the data security concerns mentioned above. No doubt localisation will be a key issue in future trade negotiations.

### 3. Intellectual Property Rights and a New Kind of Piracy

While the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) addressed many IP issues, it did not anticipate the unique intellectual property concerns of digital trade. Digital content presents its own unique intellectual property problems, including "piracy" and "bootlegging." Countries with developed economies generally believe that the TRIPs Agreement does not go far enough to protect digital intellectual property. On the other hand, developing countries are likely to protest increased IP protection in the international trade regime as they are unlikely to see any immediate benefit to heightened protection. In fact, many developing countries have seen lucrative bootlegging industries emerge within their borders as a result of the proliferation of the Internet. Although there was some progress made at the most recent WTO Ministerial Meeting in Bali, Indonesia, getting all WTO Members to agree on increasing IP protection for digital trade will be an uphill battle for years to come.

## The Future Is Digital

Although the debate on bringing international trade law up to speed with the digital economy is just beginning, one thing is certain: there's no going back. The Internet has changed the global economy forever. Producers and consumers from around the world are connected as never before, and popular demand for open access to information has resulted in very creative ways to get around all state barriers to contain

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the Internet within their borders. Countries that adopt isolationist policies towards the Internet likely miss out on opportunities for rapid economic growth. It is up to trade negotiators in the ongoing TTIP, TPP and WTO multilateral negotiations to set the standard for international digital trade moving forward.

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1 - For more information on the types of digital trade, see presentation by USITC Commissioner Broadbent, "CSIS Roundtable Series: Digital Trade," video available at http://csis.org/multimedia/video-csis-roundtable-series-digital-trade.

2 - Paul Zwillenberg, Dominic Field and David Dean, "Greasing the Wheels of the Internet Economy," Boston Consulting Group, 20 January 2014, available at http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcm:12-153140.

3 - Daniel O'Connor, "Whither Global Internet Commerce? It's Time to Give Internet-enabled Trade the Attention it Deserves," Disruptive Competitive Project, 18 December 2013, available at http://www.project-disco.org/21st-century-trade/121813-whither-global-internet-commerce-its-time-to-give-internet-enabled-trade-the-attention-it-deserves/.

4 - US Senators Ron Wyden and John Thune, "Time to Give Trade Policy a Digital Upgrade," The Wall Street Journal, 13 November 2013, available at http://online.wsj.com/news/articles/SB10001424052702303309504579181680501049284. See also, Digital Trade Act of 2013, US Bill S. 1788, introduced 10 December 2013 by Senators Wyden and Thune.