DIGITAL TRADE AND E-COMMERCE: CHALLENGES AND OPPORTUNITIES OF THE ASIA-PACIFIC REGIONALISM

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ABSTRACT

The legal framework of the WTO does not meet the regulatory need of the digital trade business anymore. The "compensation" by regional and bilateral preferential trade agreements in the Asian-Pacific area having gained importance and covering a larger scope during the last decade is a valuable contribution to the legal stability in the region but does not fully replace the merits of a global framework.

KEYWORDS: *GATT and GATS Suitability, Information Technology Agreement, Preferential Trade Agreement, Trade in Services Agreement, Work Programme on E-Commerce*

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I. INTRODUCTION

The rapid growth of internet technology and the simple access to mobile devices like laptops, tablets, and smartphones lead to a boom of trade and purchases of goods or services online. This phenomenon is generally known as "e-commerce", a term that describes online transactions involving the transmission of products, services or payments. Nowhere in the world this trend is more apparent than in the Asian-Pacific area[1]: In 2013 already, the Asia-Pacific has become the leader in e-commerce, surpassing Europa and North America.[2]

The e-commerce growth in the Asia-Pacific promises huge potential for providers of goods and services: the evolution of a strong middle class in emerging countries comes with increasing purchasing power and consumption, a trend further reinforced by a tendency to shop online rather than in physical stores. However, the opportunities are not limited to the regional consumer market; e-commerce offers manifold ways for retailers to market their products across continental boundaries in Europe or America and to fully exploit the benefits of low production costs without having to include more intermediary retailers than necessary.

Notwithstanding these bright prospects, the success of e-commerce inevitably depends on the stability of the underlying legal framework. Only when the legal consequences of so far unclear "hot topics", such as cross-border electronic payments or data privacy, can be properly foreseen by investors as well as by consumers, the potential of cross-border e-commerce will extend the full advantages.

For the time being, the legal framework and policy environment of digital trade presents a mixed picture: on a multilateral level, the legal framework of the World Trade Organization (hereinafter WTO), established more than 20 years ago, is characterized largely by legislative standstill and has not been adapted to the digitization of the world. At the same time, the regional integration in the Asia-Pacific is rapidly deepening. With regard to e-commerce, the Preferential Trade Agreements (hereinafter PTAs) bear an important role: since cross-border delivery of services proves to be an important issue, they increasingly contain chapters on e-commerce. Typically, provisions concern the field of information and communications technology (hereinafter ICT), transparency obligations, interoperability and non-discrimination, consumer and online personal data protection, as well as the authentication, certification of electronic signatures. In addition to the

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[1] This article understands the Asia-Pacific area as encompassing the Asian countries and Oceania (Australia, New Zealand and the Pacific Island countries); the Pacific-American area is not addressed in detail.

[2] *See* Leason Chan, *The Asian E-Commerce Opportunity*, ASENDIA (Jan. 4, 2015), http://www.asendiausa.com/know-how-blog/the-asian-e-commerce-opportunity/.

topics of market access and equal treatment, many PTA partners have sought the conclusion of additional understandings on e-commerce.

This paper starts by reviewing the developments made by the international community in the WTO negotiations. It then continues illustrating the progresses reached at a regional and bilateral level by outlining the e-commerce regulations in Asian-Pacific PTAs and in regional organizations. It argues that the analysed patterns are suitable to be expanded into further PTAs and to be introduced into the discussions on a larger scale, particularly in the negotiations for the Trans-Pacific Partnership Agreement (hereinafter TPP). This article further illustrates regulatory gaps and envisages identifying a few core areas of e-commerce, which have the potential to become trade barriers and sources of disputes. It therefore is concluded that notwithstanding the promises of the Asian-Pacific developments in e-commerce and digital trade leading to new opportunities, some challenges on the multilateral level still need to be overcome.

II. E-COMMERCE IN THE WTO

A. Limited Suitability of GATT and GATS

1. History and Notion. — At the time of the negotiations of the General Agreement on Tariffs and Trade (hereinafter GATT) and the General Agreement on Trade in Services (hereinafter GATS) from 1987 to 1993, the internet was still at its infancy stage and e-commerce was only about to be born. The Uruguay Round was concluded at the end of 1993, just before both "Pizza Hut" and a platform called "NetMarket" claim to have conducted the first online transaction ever (a pizza and a Sting CD). However, it was only one year later that the launch of the online giants Amazon and eBay marked the official "birth" of e-commerce. With the rapid spread of the internet e-commerce continued to expand constantly.

The overlapping developments in respect of the establishment of the WTO and the dynamic growth of e-commerce partly explain why digital trade is not directly covered by the legal framework of the WTO and many legal uncertainties and gaps with regard to the treatment of digital trade and e-commerce remain.

Neither the GATT nor the GATS provides a legal definition of the term "e-commerce" or the term "digital trade". Only the below discussed "Work Programme on E-Commerce" describes the term e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means".[3] Literature and business suggest that the term "digital trade" can mostly be used analogously.

[3] General Council, *Work Programme on Electronic Commerce: Adopted by the General Council on 25 September 1998*, ¶ 1.3, WT/L/274 (Sept. 30, 1998).

2. Characteristics of E-commerce Transactions. — The contents provided by online trade usually lack physical attributes and often are provided on a temporary basis. In addition, online trade offers often cover items having similarities to services' rendering. Thus, at first glance, digital trade at appears to be classifiable as "trade in services".

Based on this assumption, the GATS regulating "measures (…) affecting trade in services" would then be applicable. However, the term "services" is vague and it is not *per se* clear whether it also encompasses electronically supplied services. The definition in Article I:3(b) GATS only states that the notion of "services" includes "any services except services supplied in the exercise of governmental authority". The services sectoral classification list (W/120),[4] which contains a comprehensive list of all services (sub-) sectors covered by the GATS, does not make any exact mention of digital trade and thus provides little guidance for the treatment of e-commerce under the GATS.

Following the positive-list-logic, new services are not automatically covered by the GATS; Member States have to actively agree on an obligation and notify new commitments.[5] Obviously, since the conclusion of the GATS in 1994, many new services have appeared. New services nonetheless still might not be covered or only covered by multiple categories.[6] Some digital services are for example mentioned in the category of "telecommunication services" (e-mail, online information and data base retrieval etc.).[7]

Trade in services under the GATS is classified in four categories, depending on the territorial presence of the supplier and the consumer, namely cross border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and presence of natural persons (mode 4).

Digital transactions usually are characterized by the fact that no legal or natural person needs to be present to deliver the service. Thus, mode 3 and mode 4 would be of little relevance in this context. In contrast, the question of whether to classify a certain digital service as GATS mode 1 or mode 2 has often proven to be difficult.[8] However, established case law in *US* —

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[4] WTO, *Note by the Secretariat: Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991); for further details *see* Rolf H. Weber & Rainer Baisch, *Tensions between Developing and Traditional GATS Classifications in IT Markets*, 43(1) H. K. L. J. 77, 110 (2013).

[5] Rolf H. Weber, *Digital Trade in the WTO — Taking Stock and Looking Ahead*, 5(1) ASIAN J. WTO INT'L HEALTH L. & POL' Y 1, 3 (2010).

[6] *Id.*

[7] *Id.* at 11 and Weber & Baisch, *supra* note 4.

[8] Sacha Wunsch-Vincent & Arno Hold, *Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations*, *in* TRADE GOVERNANCE IN THE DIGITAL AGE 179, 183 (Mira Burri & Thomas Cottier eds., 2012).

Gambling and *China — Audiovisuals* suggests that digital trade in services falls within the commitments of GATS mode 1.[9]

3. GATT or GATS for Digital Trade? — In the meantime, however, the "digital revolution" also transformed trade in goods: nowadays, products can also be stored, used and distributed in digital form. These so-called "digital products" are intangible goods, the most prominent examples being digital media such as e-books, downloaded or streamed music and films, e-tickets, or software. Whereas it is uncontested that products purchased online and delivered physically fall within the scope of the GATT, the situation is less clear if the end-product itself is delivered electronically: is a film downloaded online "like" a film bought as a DVD? And what about a film streamed online? The problem of delineation between GATS and GATT is mainly due to the fact that the classification systems of both the GATT (Harmonized System, HS Code) as well as the GATS (Service Sectoral Classification List, W/120)[10] do not provide any guidance on how to classify digital trade.[11] Therefore the question arises whether digital products should be classified under the GATT, like the reference in their name suggests, or whether they should be considered as a service and thus be bound by the less strict obligations of the GATS.

Digital products need to be processed on some kind of carrier media: an application software ("app") can only be used on a mobile device like a smartphone or a tablet; an e-book, an e-reader, and a music download are of no use without a speaker or a music-player. These carrier media are tangible goods and are listed in the HS system (*see, e.g.*, HS number 8523: "Discs, tapes, solid-state non-volatile storage devices", "smart cards", and other media for the recording of sound or of other phenomena). Furthermore, some of these products are regulated by the plurilateral Information Technology Agreement (hereinafter ITA).[12]

Whereas the legal classification of such carrier media is quite clear, it is often uncertain where the carrier media ends and the digital product begins: if a video game console provides for online-games, audiovisual content, and computer services, which legal framework does apply? If considered a good, the online downloadable content would be treated equally to its physical counterpart and thus be subject to customs duties, but also be protected by non-discrimination pledges. There nevertheless is some reluctance to grant

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[9] Appellate Body Report, *United States — Measures Affecting the Cross Border Supply of Gambling and Betting Services*, ¶ 215, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US — Gambling* Appellate Body Report].

[10] *See Note by the Secretariat: Services Sectoral Classification List*, *supra* note 4.

[11] *See* Weber, *supra* note 5, at 3.

[12] The ITA obliges Member States to eliminate duties on covered IT products and aims at eliminating non-tariff barriers in trade on IT-products. The Agreement is plurilateral in nature and was concluded at the Singapore Ministerial Conference in December 1996. Today, membership encompasses 80 WTO Member States and 97 per cent of world trade in IT products.

applicability under the GATT, since digital products encompass politically sensitive contents such as audiovisual or cultural products.

So far WTO Member States have not reached consensus on the correct classification of digital products. The above-depicted questions thus still remain unanswered and belong to the biggest problems in WTO law.[13] At the moment consensus seems nowhere near: on the one hand some voices appear to favor a classification under the GATT, basing its arguments on reasons of the durability of a digital product (in contrast to services) and its inseparability from a physical carrier medium.[14] Furthermore, the fact that a product does not have distinguishable physical attributes and is invisible and intangible does not *per se* exclude the applicability of the GATT, as is shown in the case of electricity (HS Code 2716.000). On the other hand, some voices propose a classification under GATS, arguing that products delivered electronically cannot be considered like to those physically delivered ones.[15] Denying the need for a clear position, even hybrid solutions (GATS classification and GATT treatment) have been suggested under the Work Programme.[16] However, this middle course approach does not appear to be practical from a legal point of view and would further undermine the WTO legal framework.

The classification issue furthermore is difficult, since trade in digital products touches upon politically sensitive areas such as audiovisual and cultural products; an area in which some Member States are reluctant to grant the full range of the benefits under the GATT or take commitments under the GATS. This complex situation is further aggravated by the fact that issues regarding the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS) also play a role in this discussion.

B. Early Specific Efforts: Work Programme on E-Commerce

The efforts to regulate and to promote e-commerce within the WTO go back to 1998: at the Second Ministerial Conference in Geneva, Member States adopted the "Declaration on Global Electronic Commerce".[17] This political declaration recognized the growth of electronic commerce and the new opportunities for trade created thereby, and reinforced the commitment not to impose tariffs on electronic transmissions (duty-free moratorium). On this basis, the "Work Programme on Electronic Commerce" was established.

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[13] Wunsch-Vincent & Hold, *supra* note 8, at 182; ROLF H. WEBER & MIRA BURRI, CLASSIFICATION OF SERVICES IN THE DIGITAL ECONOMY 37 (2012).

[14] SACHA WUNSCH-VINCENT, THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS: EC-US PERSPECTIVES 56 (2006).

[15] *Id.*

[16] *Id.* at 61-62.

[17] WTO, *The Geneva Ministerial Declaration on Global Electronic Commerce*, WT/MIN(98)/DEC/2 (May 25, 1998).

The main achievements of the Work Programme are the following: (i) it introduced a definition of e-commerce in paragraph 1.3 (although the applicability is stated to be "exclusively" limited to the context of the Work Programme); and (ii) it highlighted the need to take action in different areas of WTO law as set forth in paragraphs 2-4.

Already in 1998 the biggest challenges concerned the area of trade in services: paragraph 2 mandated the Council for Trade in Services to "examine and report" on the e-commerce treatment within the GATS, particularly with regard to key issues such as scope (Article I GATS) and classification, most favoured nation (hereinafter MFN) and national treatment (Articles II and XVII GATS), transparency (Article III GATS), market access (Article XVI GATS), or justification reasons (Article XIV GATS).

With regard to digital trade in goods, paragraph 3 of the Work Programme entailed the mandate to clarify issues such as market access, licensing, custom duties and standards. Paragraph 4 continued to briefly touch upon issues regarding trade-related aspects of intellectual property rights and identified the need for action, particularly in the areas of copyright and trademark protection.

Notwithstanding this promising start and despite the review-clause (paragraph 1.2 mandates the Council to keep the issue of e-commerce a "standing item on its agenda"), the WTO Member States did not advance the work and fill the legal gaps. The Work Programme merely served as awareness raising; it could not make the moratorium mandatory nor reach consensus on how to define the notions of "digital trade" and "e-commerce", or shed light on the question of classification of these concepts under WTO law.

C. Further Developments in the E-Commerce Field

1. Political Level. — The "Doha Ministerial Declaration of 2001" makes reference to the Work Programme on Electronic Commerce and reaffirms the political will to continue this work. It also recognizes that "electronic commerce creates new challenges and opportunities for trade" as well as that the "importance of creating and maintaining an environment which is favorable to the future development of electronic commerce" must be kept in mind.[18] Furthermore, the objective to maintain the current practice of the WTO duty-free moratorium on electronic transmissions was reaffirmed.

This statement was repeated at the "Ministerial Conference in Hong Kong in 2005", at which Member States again recognized that many tasks still need to be fulfilled and agreed to reinvigorate their work on e-commerce,

[18] WTO, *Doha Ministerial Declaration*, ¶ 34, WT/MIN(01)/DEC1 (Nov. 14, 2001).

in particular with regard to the issue of electronically delivered software.[19] Member States furthermore agreed upon maintaining the WTO duty-free moratorium on electronic transmissions.[20]

Another four years later, at the "Ministerial Conference in Geneva in 2009, Member States", in absence of a Ministerial Declaration, agreed upon a decision within the framework of the Work Programme on Electronic Commerce. The decision is characterized by the same lack of substantive progress. However, a stronger wording indicates growing concern about the stalemate situation characterizing the Work Programme and issues of digital trade within the WTO framework.

2. Case Law. — Whereas progresses on the political level stagnated, the developments on the level of case law have been more enlightening. The first case that touched upon a widely understood issue of digital trade in services was *Mexico — Telecoms*.[21] In this case, the WTO dispute settlement organs were called to assess certain public telecommunications services, including circuit switched data transmissions as well as fax and voice telephony services. The Panel found that these services were to be defined in accordance with Article 1.2(a) GATS ("mode 1"). In the two following cases, *US — Gambling* (2005) and *China — Audiovisual Products* the Panel and the Appellate Body (AB) further clarified their jurisprudence on digital trade in service.

In *US — Gambling*[22] Antigua and Barbados challenged a US measure that prohibited the cross-border supply of (internet) gambling and betting services. Both dispute settlement organs of the WTO found that the US Commitment Schedule includes full market access and national treatment in the sector of gambling and betting services. Consequently, the measure at issue was found to run counter to the obligations of the US under Article XVI GATS on market access. However, the Appellate Body (hereinafter AB) modified the Panel's reasoning, ruling that the measure at issue was provisionally justified under Article XIV:(a) GATS, since it was necessary to protect "public morals."

The Panel as well as the AB found that electronic gambling services (online or via telephone) fall within the scope of the GATS (mode 1) and thus generally confirmed the applicability of WTO law to digital trade.[23] The Panel and the AB nevertheless failed to clearly identify the exact circumstances and thus left open important questions about classifications

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[19] WTO, *Hong Kong Ministerial Declaration*, ¶ 46, WT/MIN(05)/DEC (Dec. 18, 2005).
[20] *Id.*
[21] Panel Report, *Mexico — Measures Affecting Telecommunications Services*, WT/DS204/R (Apr. 2, 2004).
[22] *US — Gambling* Appellate Body Report, *supra* note 9, ¶ 1.
[23] For more details on digital trade in the telecommunication sector, see Weber, *supra* note 5, at 1 *et seq.*; Sascha Wunsch-Vincent, *The Internet, Cross Border Trade in Services, and the GATS: Lessons from US — Gambling*, 5(3) WORLD TRADE REV. 319, 323-55 (2006).

and "technological neutrality" (likeness between electronically and non-electronically supplied services).[24]

In *China — Audiovisual Products*[25] the challenged measure concerned digital trade in goods (electronic publications, sound recordings and films for theatrical release) as well as in services (distribution of these products).

With regard to trade in services, the Panel and the AB both confirmed the general finding made in *US — Gambling* about the applicability of the GATS to e-commerce.[26] The AB upheld the Panel's finding that measures prohibiting foreign-invested entities to distribute sound recordings and reading material in electronic form were inconsistent with China's market access or national treatment commitments under the GATS and violate Arts. XVI and XVII, respectively. Both the Panel and the AB dismissed China's contention stating that commitments on "sound recording distribution services" in its Schedule do not extend to the distribution of sound recordings through electronic means.

As for the GATT, the national treatment provision in Article III:4 GATT was found to be violated and not justified by Article XX of the GATT.

D. Reform of the Information Technology Agreement

To counteract uncertainties concerning the applicability of the GATT on digital trade and to further expand trade in digital products, a group of 20 WTO Member States negotiated the ITA, which first entered into force in 1996.[27]

The ITA obliges signatory states to abolish all import tariffs and other custom duties for covered information technology (hereinafter IT) products and components. Coverage of the ITA expands to all products listed in the Annex to the Ministerial Declaration on Trade in Information Technology Products.[28] Since the list is binding, ITA Member States cannot state exceptions. However, developing Member States can request longer transition periods for domestic implementation. Through this tariff-cutting mechanism, the ITA aims at the expansion of worldwide trade in IT goods.

The ITA operates through a "critical-mass" approach: it can enter into force only if it reaches a critical mass, representing 90% of the overall trade

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[24] For a more extensive discussion, see Wunsch-Vincent, *id.* at 329 *et seq.*

[25] *See* Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

[26] Wunsch-Vincent & Hold, *supra* note 8, at 182.

[27] WTO, *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN(96)/16 (Dec. 13, 1996).

[28] *Id.*

volume in IT products.[29] Furthermore, the ITA, despite its plurilateral legal nature, is based on the MFN principle. Consequently, not only signatory states but all WTO Members benefit from the market access commitments of the ITA participants.

The review-clause in paragraph 3 of the Annex to the ITA sets forth the obligation to hold periodical meetings under the auspices of the Council on Trade in Goods and to review and expand the product coverage. Member States furthermore are invited to discuss issues of technical barriers to trade (hereinafter TBT) in the field of IT products.

Based on this review-clause, re-negotiations of the ITA were undertaken and concluded very recently. In July 2015, 18 years after the entry into force of the original ITA, 49 states agreed on an extension of the ITA coverage, eliminating tariffs of more than 200 additional products that encompass an estimated trade volume of 1.3 trillion dollars.[30]

The conclusion of the ITA II is justifiably referred to as a "landmark" for world trade. It will have far-reaching consequences, granting the WTO Member States access to the IT products markets of ITA participants (including China, the biggest producer of IT products). The zero-tariff policy (in a sector where tariffs have been as high as 25%[31]) will significantly boost trade in IT goods and cut prices for consumers worldwide. The ITA II is expected to enter into force in 2016.

The ITA reform was long overdue: the old ITA covered only products that have been on the market at the time of its conclusion in 1996, before the "digital revolution". However, in the last 18 years, technology has drastically changed, and numerous new IT products have been put on the market, rendering the ITA coverage obsolete. The reform managed to close these gaps in coverage and to adapt the agreement to the new and fast changing realities of technology development and digital trade. Instead of compact disks and tape recorders, the ITA II now covers cutting-edge technology products such as medical magnetic resonance imaging machines, high-end semiconductors, laser technology, or GPS systems.

Nowadays the trade in IT products amounts to 7% of the overall volume of trade in goods, covering a bigger share than trade in automobiles or textiles, clothing, iron, and steel combined.[32] With the increasing purchasing power and demand in emerging economies, this share will continue to grow

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[29] BRIEFING NOTE: EXPANSION OF THE INFORMATION TECHNOLOGY AGREEMENT (ITA), https://www.wto.org/english/tratop_e/inftec_e/briefingnoteita_e.htm (last visited Aug. 16, 2015).

[30] WTO, *Information Technology Agreement: WTO members Reach Landmark $1.3 Trillion IT Trade Deal*, WTO (July 24, 2015), https://www.wto.org/english/news_e/news15_e/ita_23jul15_e.htm.

[31] *Bargaining Chips: The World Trade Organisation Draws Close to its First Deal for Nearly Two Decades*, THE ECONOMICS (July 25, 2015), http://www.economist.com/news/finance-and-economics/21659715-world-trade-organisation-draws-close-its-first-deal-nearly-two.

[32] *Id.*

at fast pace, making the ITA increasingly more relevant as a regulatory instrument.

It is therefore all the more important to continue the work in the ICT Committee, namely to constantly examine and review the ITA's coverage and to undertake amendments whenever necessary. Furthermore, ITA Member States need to remove TBT and work towards enhanced membership: despite the fact that participation has increased from 29 founding members to 52 contracting parties (including the EU, China and the US) membership can still be considered limited. Important emerging economies like India, Russia or Brazil have not signed the ITA. Furthermore, only a small number of developing countries and no least developing country are represented in the ITA.

E. Trade in Services Agreement

For some years now, 25 mainly developed WTO Member States (known as the "Really Good Friends of Service" or RGFS-group) are negotiating a Trade in Services Agreement (hereinafter TiSA). The TiSA is a plurilateral agreement and as such will be binding only for signatory states. Whether the negotiated benefits (i.e., the market access commitments) will be conferred on a reciprocal basis to participants or on a MFN-basis to all WTO Member States remains to be seen.[33]

The scope of the TiSA should be comprehensive without exclusion of any services' sector and a flexible structure should lead to better and more liberalized rules. Particular attention is paid to IT services and e-business. Most TiSA negotiation parties have concluded PTAs with digital trade chapters[34] and the TiSA too will include chapters on ICT services and on e-commerce. Although the content and structure of these chapters are currently being negotiated behind closed doors, the draft chapter on e-commerce leaked by Wikileaks enables an initial assessment.[35] So far, the TiSA e-commerce chapter encompasses nine provisions, ranging from general provisions to the regulation of pressing issues like cross-border information, consumer and data protection, network neutrality, open source licensing activities, prohibition of local presence requirements, and dispute resolution. The leaked draft has been subjected to broad critics from civil society representatives and other proponents of a high level of data protection, who consider it to restrict privacy and consumer rights.

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[33] *See generally* Shin-yi Peng, *Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS?*, 43(2) H. K. L. J. 611 (2013).

[34] Pierre Sauvé, *A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement (TISA)* 15 (NCCR, Working Paper No. 2013/29, 2013).

[35] TiSA ANNEX ON ELECTRONIC COMMERCE, *available at* https://wikileaks.org/tisa/ecommerce/.

For the time being, however, it can hardly be said whether and to what extent the TiSA negotiation will be successful. And, if at all, the agreement's effectiveness would still be limited, since it will be plurilateral in nature and thus only binding for a limited number of WTO Member States.

F. Assessment

That WTO Member States established the Work Programme on Electronic Commerce as early as 1998, at a time the internet was not used outside of the remit of some specialists and digital trade was of little economical relevance, can be considered as a very foresighted and progressive pioneer step. However, WTO Member States lost momentum soon after 1998. Seen in retrospective, the Work Programme merely served for awareness-raising through constantly keeping the issue on the agenda. But on a substantive level, the WTO could not make the moratorium on electronic transmissions mandatory, it could not provide a definition for the confusing notions of "digital trade" or "e-commerce" and, most importantly, it could not clarify the pressing question of classification of these concepts under WTO law.

The classification of digital trade is a complex regulatory matter in two regards: often it remains ambiguous whether a digital delivery is to be classified as trade in services under the GATS or as trade in goods under the GATT. In addition, if a transaction is classified as a service and falls within the scope of the GATS, classification as "mode 1" or "mode 2" is also often unclear.

Although the GATT and GATS share common legal rationale and principles, in particular the MFN and the national treatment, proper delineation is still crucially important, since the two agreements have different scopes and commitments: whereas the GATT grants free market access as a general principle, the GATS operates through a positive-list approach, which implies that Member States are only obliged to grant non-discriminatory treatment in the service sectors and modes of supply listed in their individual GATS Schedules.[36]

However, in view of the political sensitivity this issue touches upon, a consensus-based solution on a multilateral level is not yet in sight. Whether the ongoing plurilateral GATS request for computer and related services can shed light on the open questions and contribute to legal certainty and predictability remains to be seen.

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[36] For more information on the universal and the sectoral approaches, see generally Henry Gao, *Evaluating Alternative Approaches to GATS Negotiations: Sectoral, Formulae and Other Alternatives*, *in* GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 83 (Marion Panizzon et al. eds., 2008).

III. OVERVIEW OVER E-COMMERCE IN PREFERENTIAL TRADE AGREEMENTS

PTAs[37] have become an increasingly popular policy instrument for countries to regulate sensitive issues in a speedy and tailor-made manner. They are often referred to as "rule-making-laboratories", since they encompass experimental provisions, which may create legal precedents and eventually spill-overs to other PTAs as well as on the multilateral level.[38]

Literature on digital trade assumes that the regulation of e-commerce in PTAs typically takes four forms with different levels of e-commerce liberalizations: (i) a separate chapter dealing specifically with e-commerce (e-commerce chapter), (ii) provisions on e-commerce included in chapters on cross-border supply of services as well as in (iii) chapters on ICT cooperation and (iv) through TRIPS-plus provisions concerning intellectual property law in digital trade.[39]

Whereas the US implements an approach that commits to a high level of liberalization and operates with e-commerce chapters throughout its PTA, the EU proves to be more reluctant to liberalize digital trade due to consumer protection concerns.[40] The EU's PTA-approach with regard to e-commerce is less consistent and ranges from loose provisions on ICT cooperation to an integration of e-commerce issues in the chapter on trade in services.[41] On a regional level however, the EU has made significant efforts to harmonize e-commerce: after having adopted the Directive on E-Commerce[42] in 2000, which amongst others introduced strong liability for intermediaries, the EU's most recent endeavour concerns the establishment of a "digital single market".[43]

E-commerce chapters are usually embedded in the respective PTA next to the chapters on trade in goods or in services. They provide clarifications on many of the mentioned unclarified questions.[44] Despite of the fact that e-commerce chapters do not directly tackle the controversial issue of

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[37] "Preferential Trade Agreement" [hereinafter PTA] is understood as encompassing any agreement (bilateral, regional or transregional) that grants preferential treatment. The term can be used as a synonym for "Free Trade Agreement" [hereinafter FTA] or "Economic Partnership Agreement" [hereinafter EPA].

[38] *See, e.g.*, Marion Panizzon et al., *Developing Trade Rules for Services: A Case of Fragmented Coherence?* 23 (NCCR, Working Paper No. 2009/38, 2009); Wunsch-Vincent & Hold, *supra* note 8, at 193.

[39] *Id.* at 192.

[40] *Id.* at 193.

[41] *Id.*

[42] *See generally* Council Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J (L 178) 1 (EC).

[43] *See generally* European Commission, *A Digital Single Market Strategy for Europe* (2015), http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf.

[44] Wunsch-Vincent & Hold, *supra* note 8, at 199 & table 8.1.

classifications, they provide for *ad hoc* solutions in the bilateral (or, depending on the PTA, multilateral) e-commerce relationship between trade partners.

Generally, e-commerce chapters address the following issues:

(i) *Definition*: Many e-commerce chapters encompass a definition of the term "digital products", usually setting forth the likeness of on- and offline provided goods and supplied services, i.e., the principle of "technological neutrality" is enshrined, a principle that prohibits differential treatment of products (or services) based on the technology used.

(ii) *Applicability of WTO law*: e-commerce chapters usually make reference to the applicability of WTO law on e-commerce; however, since e-commerce is scarcely regulated on a WTO level, the significance of this reference remains unclear.

(iii) *Applicability of trade rules*: the scope of trade rules for cross-border supply of services is often addressed.

(iv) *Duty-free moratorium*: by enacting a duty-free moratorium, parties commit themselves to not levying custom duties on electronic transmissions in general, or even on digital products.

(v) *Non-discrimination*: the principle of non-discrimination ensures that the party does not deny legal effect, validity, or enforceability to a product (e.g. a document) or a service solely on the grounds that it is in electronic form. It furthermore extends the MFN and national treatment obligations to online transaction. Usually, this non-discrimination obligations in PTAs are made contingent upon the prerequisite that the product or service at issue is "created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms" outside the country's territory; or "whose author, performer, producer, developer, or distributor is a person of another party or a non-party".

IV. E-COMMERCE IN THE ASIA-PACIFIC AREA

A. Introduction

As mentioned, the Asia-Pacific has become the leading region for e-commerce and pushed other regions from the throne in 2013. This is not surprising, considering that the rise of emerging countries in the region comes with a rapidly growing middle class, holding enormous potential purchasing power. In today's digital age, these consumers are of course targeted online, representing a development which leads to the rise of e-commerce giants such as "Alibaba" in China or "Rakuten" in Japan. Japan and China nevertheless are not the only drivers for the growth of e-commerce:

as shown by a recent study, Southeast Asian countries hold huge potential, despite remaining challenges to trade, such as low credit card penetration, inefficient supply chains, and high tariffs and tax burdens.[45]

On a political level the economic boom is accompanied by increasing regional integration and a booming number of PTAs. In the Asia-Pacific, regionalism is a rather recent phenomenon; not long ago the Asia-Pacific was known as "a region without regionalism".[46] In the 90s the region witnessed the emergence of some regional trading blocs (such the ASEAN Free Trade Agreement, or APEC, the Asian-Pacific Economic Cooperation) as well as a diminishingly small number of PTAs (e.g., the Australian–New Zealand Closer Economic Relations Trade Agreement concluded in 1983). However, this situation changed drastically around the turn of the millennium, when more and more countries started to engage in preferential trade negotiations.[47] Throughout the recent years, the Asia-Pacific has become the most dynamic region with regard to trade agreements; by mid-2013 no less than 75 PTAs were in force and 107 free trade agreements are being negotiated.[48] This evolution is observed with scepticism and often criticised to be a "noodle-bowl"[49], leading to fragmentation rather than harmonization.

B. Bilateral Level

1. 2000-2002: "Paperless Trading". — Already one of the first PTAs in the region, the Agreement between New Zealand and Singapore on a Closer Economic Partnership, concluded in 2000, addresses issues related to e-commerce remotely in Chapter 4 ("Custom Procedures"). It encompasses a provision on "paperless trading" which makes reference to the "APEC Blueprint for Action on Electronic Commerce" and calls upon parties to implement an "electronic environment that supports electronic business applications between each Customs administration and its trading community".[50] A similar approach can be found in the Agreement between Japan and Singapore for a New-Age Economic Partnership from 2002: instead of only a provision however, this PTA contains a whole chapter on "paperless trading", which *inter alia* calls upon parties to mutually recognize

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[45] *See generally* UBS, *Is ASEAN at an Inflection Point for eCommerce?* (2014), http://simontorring.com/wp-content/uploads/UBS-report-2014.pdf.

[46] David Cape, *Rival Regions? East Asian Regionalism and its Challenges to the Asia-Pacific*, *in* ASIA-PACIFIC: A REGION IN TRANSITION 149, 149 (2014).

[47] *See* Christopher M. Dent, *Paths ahead for East Asia and Asia-Pacific Regionalism,* 89(4) INT'L AFF. 963, 972-73(2013).

[48] *Id.*

[49] A reference to the term "spaghetti-bowl effect", which describes the complications arising from increasing legal complexity and fragmentation due to the many parallel existing PTA worldwide.

[50] Agreement between New Zealand and Singapore on a Closer Economic Partnership, chap. 4, art. 12, Aug. 18, 2000, http://www.fta.gov.sg/anzscep/part_4_anzcep.pdf.

electronic documents as well as e-certification, and on a structural level even establishes a "Joint Committee on Paperless Trading".[51]

2. 2003: The Birth of E-Commerce Chapters. — With the Singapore–Australia Free Trade Agreement the first PTA with a whole e-commerce chapter, entered into force one year later in 2003.[52] The chapter contains a reference to WTO law and the UNCITRAL Model Law on Electronic Commerce, a catalogue with definitions, a commitment to transparency and to reduce trade barriers in e-commerce as well as a duty-free moratorium for digital products. Furthermore, it addresses issues of e-certification, paperless trading, and consumer and personal data protection. Article 10 excludes e-commerce from the scope and applicability of dispute settlement. It is worth noting that this first example of an e-commerce chapter, as compared to succeeding ones, can be considered as very comprehensive, covering many burning issues.

3. 2004-2011: A Mixed Picture. — In the years to come, the negotiated PTAs show a mixed picture with regard to digital trade regulations: the PTA concluded by Thailand with Australia and with New Zealand in 2004 and 2005 both contain basic chapters on e-commerce with a similar structure and wording as the ones depicted above.[53]

However, the Japan–Philippines Economic Partnership Agreement, concluded in 2006, returns one step in liberalization and only contains a chapter on "paperless trading" (like the PTA from 2002/2003 illustrated above); e-commerce as a regulating topic is not dealt with. [54]

In contrast, the Korea–Singapore FTA, which entered into force in the same year 2006, reached the highest level of bilateral liberalization of digital trade: based on a negative-list approach, Chapter 14 on e-commerce provides a definition of the sensitive term of "digital products"[55], grants a duty-free moratorium, a full level on non-discriminatory treatment to digital products, and ensures the applicability of trade rules to digital service supply. The Singapore–India Comprehensive Economic Cooperation Agreement, which also entered into force in 2006, contains a similar e-commerce chapter with

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[51] Agreement between Japan and Singapore for a New-Age Economic Partnership, chap. 5, arts. 40-44, Jan. 13, 2002, http://www.mofa.go.jp/region/asia-paci/singapore/jsepa-1.pdf.

[52] *See* Singapore–Australia Free Trade Agreement, chap. 14, arts. 1-10, Feb. 17, 2003, http://www.fta.gov.sg/safta/fta_safta_chp14.pdf.

[53] Thailand–Australia Free Trade Agreement, chap. 11, July 5, 2004, http://www.thaifta.com/english/fa_thau.pdf; New Zealand-Thailand Closer Economic Partnership Agreement, chap. 10, Apr. 19, 2005, http://www.mfat.govt.nz/downloads/trade-agreement/thailand/thainzcep-december2004.pdf.

[54] *See* Agreement between Japan and the Republic of the Philippines for an Economic Partnership, chap. 5, Sept. 9, 2006, http://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf.

[55] According to Article 14.1 of the *Korea–Singapore Free Trade Agreement*, "digital products means computer programmes, text, video, images, sound recordings and other product that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically". This definition excludes "digitized representations of financial systems".

a nearly equal wording regarding the general principles and definitions as well as a duty-free moratorium. However, as compared to the Korea–Singapore FTA, its scope is limited, since it does not grant MFN or national treatment for digital products and pursues a positive-list approach.

Interestingly however, some PTA concluded in the following years do not contain a chapter on e-commerce at all. Examples are the six Economic Partnership Agreements concluded by Japan with Malaysia, Brunei, Indonesia, Viet Nam, the Association of South-East Asian Nations (hereinafter ASEAN) and India (in 2007, 2009 and 2011). Furthermore, no PTA concluded by China includes any reference to e-commerce (*see, e.g.*, China–Singapore FTA, concluded in 2009). Exceptionally however, the China–New Zealand FTA, concluded in 2008, includes an Annex on the "Cooperation in the Field of Conformity Assessment in Relation to Electrical and Electronic Equipment". This chapter however touches upon issues of TBT and conformity assessments rather than on e-commerce.

An interesting case is the ASEAN–Australia–New Zealand tripartite PTA from 2009: it encompasses a relatively extensive chapter on e-commerce, which addresses questions of cooperation, paperless trading, and data and consumer protection. It does not, however, touch upon any questions related to digital products, technical neutrality, or non-discrimination obligations.[56]

4. 2014+: New Generation of E-Commerce Chapters. — Most recent PTAs show a return to e-commerce liberalization. Even Japan, a country that has shown reluctance in including issues of e-commerce in its PTAs, evidences extensive e-commerce regulations in its two latest PTA: the Agreement between Japan and Australia for an Economic Partnership (entered into force in July 2014) contains an extensive chapter on e-commerce, including *inter alia* the commitment to technological neutrality and non-discrimination of digital products, a provision on definitions (equal to the definitions on digital products in the Korea–Singapore FTA, as well as in the Singapore–India PTA), a duty-free moratorium on electronic transmissions, provisions on data and consumer protection, on paperless trade administration as well as a pledge for cooperation.[57]

The Agreement between Japan and Mongolia for an Economic Partnership, signed recently in February 2015, contains a quite all-embracing chapter on e-commerce; like the PTA with Australia, it contains a definition catalogue with a description of digital products (that does not, however, explicitly exclude financial services) as well as provisions on the above-mentioned topics. As novel issues the Japan–Mongolia PTA introduces the

[56] ASEAN–Australia–New Zealand Free Trade Area, chap. 10, arts. 1-10, Aug. 26, 2014, http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Documents/aanzfta_chapter10.PDF.
[57] Agreement between Japan and Australia for an Economic Partnership, chap. 13, arts. 13.1-13.10, July 8, 2014, http://www.mofa.go.jp/files/000044322.pdf.

prohibition to require a local server (Article 9.10 "prohibition on requirement concerning the location of computing facilities") as well as provisions on "unsolicited commercial e-mail" (Article 9.1) and "source code" (Article 9.11).[58]

C. Regional Level

1. Regional Groupings. —

(a) Asia-Pacific Economic Cooperation (APEC). — The Asia-Pacific APEC was founded in 1989 and by now is the world's largest regional economic grouping, representing around one-third of the world's population and 60 percent of the global economy. APEC's aims, as stated in the "Bogor Declaration" of 1994, are trade and investment liberalization until 2020.

APEC's encompassing membership brings together different countries with at times tense political relationships. Consequently, APEC's approach is one of "concerted unilateralism", characterized by soft-law with decisions reached only by consensus and on a voluntary and non-binding basis. While this approach might be the only viable way to bring countries like the US, Russia, Japan, and China to the table for trade negotiations, it also makes APEC a rather loose grouping with a low level of integration, whose effectiveness is often observed with scepticism.

However, when it comes to digital trade and e-commerce, APEC has a quite comprehensive and broad agenda. In 1998 already, it established the "Electronic Commerce Steering Group" (hereinafter ECSG), which is aimed at promoting e-commerce by establishing a "predictable, transparent and consistent" legal and political environment. To this end, the ECSG takes a coordinating role and aligns the privacy laws of the APEC's Member Economies through the "APEC Privacy Framework". Furthermore, it implemented the Paperless Trading Subgroup which mainly addresses electronic certification issues, and established a cooperation mechanism with the EU on e-certifications, e-authorization, and other interoperability issues.[59]

(b) Association of South-East Asian Nations (ASEAN). — At the time of its formation (as early as 1967), the ASEAN pursued a rather political, security-oriented strategy.[60] Throughout the 90s however, ASEAN raised its ambition, extended its membership, and strived to deepen economic integration. Like APEC, the ASEAN is characterized by a consensus-based

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[58] *See* Agreement between Japan and Mongolia for an Economic Partnership, chap. 9, arts. 9.1-9.13, Feb. 10, 2015, http://www.mofa.go.jp/files/000067716.pdf.

[59] For more information, see ELECTRONIC COMMERCE STEERING GROUP, http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group.aspx (last visited Aug. 16, 2015).

[60] Dent, *supra* note 47, at 966.

soft-law approach, operating through guidelines and recommendations rather than enforceable laws. ASEAN has separate pacts with Japan, China, South Korea, Australia, and New Zealand.

Digital trade is still in its infancy stage in ASEAN countries, considering that internet penetration is relatively low as compared to other regions. However, as repeatedly emphasized in economic studies, the region holds huge potential, considering the rapidly growing population and the fast narrowing of the "digital gap". The ASEAN group has recognized the opportunities provided by e-commerce early on: efforts to tackle the issue of digital trade go back to 1999, when the "e-ASEAN Framework" was established. This framework agreement was aimed at promoting ICT and e-commerce and provided legal definitions, as well as various pledges to enhance cooperation and facilitate trade in the field of ICT products and services, e-commerce, and e-government. The ASEAN economic blueprint, published in 2007, foresees an "action plan" with regard to e-commerce, which expresses the intention to further harmonize and promote e-commerce, mainly through the passing of "best-practice" guidelines.[61] The most recent initiative in this field is the "ASEAN ICT Masterplan" published in 2015.[62]

It is worth noting that in its external relations, ASEAN mostly refrained from incorporating any e-commerce chapters in its PTAs, addressing only issues of ICT cooperation.[63] The latest trade agreement negotiated by ASEAN however, the PTA with Australia and New Zealand, established a change by introducing a comprehensive e-commerce chapter. The next few years will show whether this e-commerce chapter will form a precedent for future ASEAN PTAs.[64]

2. What about the TPP?. —

The TPP is a multilateral PTA under negotiation between 12 Asian Pacific countries, five countries from the Eastern side of the Pacific (America, Canada, Chile, Mexico, and Peru), and seven from the Western side (Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam).

The TPP is not the only "mega-regional" arrangement currently in discussion: negotiations are held in parallel for the Regional Comprehensive Economic Partnership and the Free Trade Area of the Asia-Pacific. Whereas

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[61] *See* ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 23 (2008), http://www.asean.org/archive/5187-10.pdf.

[62] Can be accessed online at: ASEAN ICR MASTERPLAN 2015, http://de.scribd.com/doc/111870071/ASEAN-ICT-Masterplan-2015 (last visited Aug. 16, 2015).

[63] Wunsch-Vincent & Hold, *supra* note 8, at 199, with reference to the Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and the Association of Southeast Asian Nations, Oct. 8, 2003, http://commerce.gov.in/trade/asean-india%20trade%20in%20goods%20agreement.pdf; Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan, Apr. 14, 2004, http://www.asean.org/images/archive/agreements/AJCEP/Agreement.pdf.

[64] Wunsch-Vincent & Hold, *supra* note 8, at 199, reference in fn. 62.

the last two are often regarded as "distant dreams", the TPP is the most ambitious one with the prospects for its conclusion remaining stable.[65] So far Already 19 negotiations rounds have been conducted so far. However, considering the political and cultural heterogeneity of the involved countries, the negotiation process is a lengthy and tedious one; at this stage it is still uncertain when negotiations will come to an end — if at all.

Although the contents of the TPP is not published yet (with the exception of the intellectual property and the environmental chapters that have been published by WikiLeaks in January 2014),[66] the proposals submitted by the negotiating parties still allow some preliminary conclusions about the structure and content of e-commerce regulations in the TPP. Not surprisingly, the US forwarded a proposal advocating a high-degree of liberalization, containing the following points: (i) a duty-free moratorium on digital products, (ii) non-discriminatory treatment for digital products, (iii) prohibition of localization requirements, (iv) commitments to provide reasonable network access for telecommunications suppliers through interconnection and access to physical facilities, and (v) provisions promoting choice of technology and competitive alternatives to address the high cost of international mobile roaming.[67]

Considering the fact that none of the negotiating parties involved have shown aversion against a high degree of liberalization in e-commerce in its past PTA practice (some countries like Australia, New Zealand, or Singapore have even shown to be in favour of substantive e-commerce Chapters),[68] the US proposal might even find consensus. According to some media sources, however, the US proposal also includes suggestions to liberalize online cross-border data flow in order to impede censorship by foreign governments.[69] This provision nevertheless is likely to face strong resistance by countries like Australia and New Zealand, which fear a violation of their domestic privacy and consumer protection laws, as well as by civil society worldwide.

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[65] *America's Big Bet*, The ECONOMIST (Nov. 15, 2014), http://www.economist.com/news/special-report/21631797-america-needs-push-free-trade-pact-pacific-more-vigorously-americas-big-bet.

[66] *See* PRESS RELEASE: SECRET TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP) — ENVIRONMENT CHAPTER, https://wikileaks.org/tpp-enviro/pressrelease.html (last visited Aug. 16, 2015).

[67] *See* TPP ISSUE-BY-ISSUE INFORMATION CENTER E-COMMERCE AND TELECOMMUNICATIONS, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-6 (last visited Aug. 16, 2015).

[68] *See supra* IV.B: Japan seemed to be agnostic towards issues of digital trade in its EPA-strategy but changed its policy in recent PTA, including substantive and comprehensive Chapters on e-commerce (*see* PTA *Japan — Australia, Japan — Mongolia*).

[69] IAN F. FERGUSSON ET AL., THE TRANS-PACIFIC PARTNERSHIP (TPP) — NEGOTIATIONS AND ISSUES FOR CONGRESS 41 (2015), http://photos.state.gov/libraries/vietnam/8621/pdf-forms/tpp-crsreport032015.pdf.

D. E-Commerce in Asia-Pacific: A Thread in the Noodle-Bowl?

The assessment of the Asian-Pacific PTA generally shows a high degree of e-commerce liberalization, as many of the countries in the region have incorporated e-commerce chapters in their PTAs. This fact is remarkable, considering that the inclusion of e-commerce chapters was a policy strategy previously mainly pursued by the US. Nowadays however, this approach seems to have gained footing in the Asia-Pacific area (and is realized even in trans-continental PTAs, as the Switzerland–Japan PTA shows).[70]

On the one hand, this development can be attributed to the fact that regional organizations like the APEC or the ASEAN have put the issues of e-commerce on their agenda quite early. Although they operate through a voluntary guideline approach and thus have only limited enforcement and coordination capacity, they still have considerable soft-law power to raise awareness with regards to e-commerce and the necessity to regulate this policy field. Furthermore, the efforts to harmonize national e-commerce laws contributed to a common starting point in PTA negotiations and certainly facilitated the negotiations process. On the other hand, some Asian countries that have committed to e-commerce liberalization in their PTA policies have strong political ties to the US, a geopolitical factor that might have contributed to the proliferation of e-commerce chapters, often reflecting the same wording.[71]

However, in spite of a wide dissemination of e-commerce chapters, the design of these PTAs, namely the degree of commitment, varies strongly: whereas some PTAs, like the Korea–Singapore PTA show a high density of regulation and commitment, others like the ASEAN–Australia–New Zealand PTA remain rather vague. Major differences can also be detected between countries: the Oceanic countries Australia and New Zealand, as well as Singapore serve as driving forces in e-commerce liberalization, whereas China is very reluctant to make commitments in this area. Japan's stance is not quite clear yet; whereas the country mainly ignored the issue of e-commerce in most of its first intra-regional PTAs, it suddenly switched to a strategy of including comprehensive e-commerce chapters in 2014/15. The mentioned two origins of the Asia-Pacific PTA developments make it quite difficult to identify a clear thread of the legal framework in the "noodle-bowl"; moreover, the patchwork of regulations leads to legal fragmentation that does not lie in the interest of the business community.[72]

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[70] For an overview on e-commerce Chapters in PTA worldwide, see Wunsch-Vincent & Hold, *supra* note 8, tables 8.3 & 8.4.

[71] *Id.* at 193.

[72] For further details, see Rolf H. Weber, *Legal Interoperability as a Tool for Combatting Fragmentation*, GLOBAL COMMISSION ON INTERNET GOVERNANCE PAPER SERIES NO. 4 (2014), https://www.cigionline.org/sites/default/files/gcig_paper_no4.pdf.

V. OUTLOOK

The economic growth, the rapid spread of internet technology, and the deepening of international supply chain developments have brought qualitative changes to Asian-Pacific regional economic integration. As recent experience in the Asian-Pacific region has shown, the proliferation of bilateral and regional trade agreements can be seen as an innovation in respect of the cross-border promotion of e-commerce. A large number of the newer PTAs in the Asian-Pacific region include specific e-commerce chapters. Even if the respective provisions are not perfect, they can be considered viable instruments to regulate growing cross-border digital trade, introducing a specific regulatory framework for e-commerce, designed in a way that suits the cross-border trade on a bilateral basis with obligations and benefits tailored to the needs of the respective trading partners.

This regional approach is generally viewed as a reaction to compensate for the standstill situation in the WTO. Without any doubt, WTO law in its current form does not seem fit to meet the realities of today's online society. Although efforts to adapt WTO law to digital trade have started in a very promising and progressive way in 1998, no substantive progress has been made since then, i.e., the situation on the multilateral level is characterized by legal gaps; governments, investors, traders as well as consumers need solutions to the uncertainties more urgently than ever, since digitalization is steadily progressing and e-commerce expanding.

The discussed stalemate situation on the multilateral level could lead to the assumption at first glance that regional or even bilateral trade agreements are more capable of facing the reality of digital trade. But although the bi- or multilateral approach in the Asia-Pacific can remedy existing uncertainties to a certain degree, bi- or multilateral solutions naturally have their limits, since their applicability is restricted to the involved parties. Furthermore, PTA rules are mostly characterized by a low degree of clarity with regard to implementation, and often lack enforceability.

An additional aggravating factor, which appears to be especially drastic in the Asia-Pacific, is the policy fragmentation due to the sheer number of PTAs and regional rules. This "noodle-bowl" situation leads to legal fragmentation[73] rather than regulatory coherence and thus poses the biggest threat to the effectiveness of the previous Asian-Pacific approach for e-commerce rules, and strongly calls for a solution on a multilateral rather than a regional level.

Considering the fact that the WTO's core aim is the reduction of barriers to trade, the WTO should not close its eyes for the emergence of potential barriers to trade that the chaotic legal situation in the field of e-commerce

[73] For further details to the problem of legal fragmentation, *see id.*

poses, and should become more active than during the last years. As a consequence, apart from promoting the TiSA project, the WTO should invest more efforts into the negotiation of amendments to the services sectoral classification list (W/120), particularly by including modern IT-Services (or digital services) that correspond to the reality of today's world. A similar exercise has been done with the ITA; even if the revision took quite some time, it was finally successful in July 2015. Furthermore, the WTO should attempt to continue the development of an enlarged Electronic Commerce Work Programme that reflects the needs of the digital economy, which has undergone substantial changes since 1998; in view of the digital trade chapters in many PTAs, the chances of finding compromises appear to be better than ten years ago.

A basic underlying problem of the existing legal environment consists of the fact that technologies and thereafter economic factors have dramatically changed, which is not reflected in the existing normative frameworks. GATT/GATS and PTAs are treaties between sovereign states that should indirectly help businesses to execute cross-border trade in order to improve public welfare. The consumers and individuals are not the focus of these treaties. However, new technologies first enabled consumers to participate in the production of goods and services (peer-to-peer-production in a shared economy),[74] and now consumers can even share production with each other (for example through platforms like "Airbnb"). The present laws are not designed to deal with these commercial activities at all. Consequently, the change in media must also be reflected in a change of the legal regimes.

Finally, it should not be overlooked that the existing PTAs only limitedly encompass the economic consequences of the technological changes in the inclusion of consumers in the production process.

[74] *See* ROLF H. WEBER, REALIZING A NEW GLOBAL CYBERSPACE FRAMEWORK, NORMATIVE FOUNDATIONS AND GUIDING PRINCIPLES 60 (2014).

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