

# Digital or Trade? The Contrasting Approaches of China and US to Digital Trade

Henry Gao\*

## ABSTRACT

With the growing importance of the internet, digital trade, or electronic commerce, has become a key issue in international trade regulation. As the home to some of the largest internet companies in the world, the USA took the lead in bringing the issue into the WTO and has been the leading proponent on the issue. In contrast, the developing countries were quite sceptical and reluctant to engage on discussions on the issue. Recently, however, several developing countries have changed their positions and become more active participants. Chief among them is China, which has raised some interesting proposals both within and beyond the WTO. The issue also emerged as one of the main issues discussed at the 11th Ministerial Conference of the WTO. This article provides a critical examination of the contrasting approaches of the US and China on the issue. It argues that, the US approach tends to focus more on the ‘digital’ nature of digital trade, while the Chinese approach prefers to address the issue from the traditional ‘trade’ perspective. The article analyses the reasons for the different approaches, and provides some suggestions on how to move forward on the issue at MC11 and beyond given the differences between the two approaches.

With the conclusion of the 11th Ministerial Conference (MC11) in Buenos Aires in December 2017, the World Trade Organization (WTO) has entered a new era. Due to the lack of consensus by the WTO Membership, most items in the original agenda of the Doha Round have been quietly abandoned. Only a handful of issues in the Doha Development Agenda (DDA) remains alive. Among them, the hottest issue is digital trade, also known as electronic commerce (e-commerce).<sup>1</sup> It not only found

\* Associate Professor, Singapore Management University. Email: gaoheny@gmail.com. The author wishes to thank the organizers and participants at the Think Track MC11 conference held in December 2017 in Buenos Aires, Argentina, where this paper was first presented. All errors remain the author’s own.

1 In their article, Leblond and Aaronson differentiate the two concepts by defining e-commerce as ‘sales of physical goods online between business and consumers and between businesses’ while digital trade as ‘a broader term that encompasses goods and services delivered via the internet and associated technologies’. This article uses the two terms inter-changeably as they are not differentiated in most trade agreements. See Patrick Leblond and Susan Ariel Aaronson, ‘Another Digital Divide: The Rise of Data Realms and its Implications for the WTO’, 21 *Journal of International Economic Law* 245 (2018).

its way into both a Ministerial Decision<sup>2</sup> and a Joint Ministerial Statement,<sup>3</sup> but also became the subject of a joint initiative by the WTO, the World Economic Forum, and the Electronic World Trade Platform (eWTP),<sup>4</sup> the first of its kind in the WTO. With these promising signs, e-commerce probably will become one of the first Doha issues to bear fruit. However, before that happens, we need to first understand the contrasting approaches to e-commerce regulation in trade agreements by the two biggest players, i.e. the US and China, as they are the ones with the most potential to decide what the future rules on e-commerce will look like.<sup>5</sup> While there have been some recent studies on the US approach,<sup>6</sup> there have been no such analysis on the Chinese approach, let alone a comparison of the two. This article fills this important research gap with a systemic and thorough analysis of the different approaches taken by the two WTO Members. It starts by reviewing the regulation of e-commerce or digital trade issues under the WTO, then discusses the major initiatives by the US and China in various fora, including the plurilateral trade agreements such as the Trade in Services Agreement, Regional Trade Agreements, and the WTO. After canvassing the differences, the article argues that, the US approach tends to focus more on the ‘digital’ nature of digital trade, while the Chinese approach prefers to address the issue from the traditional ‘trade’ perspective. The article analyses the reasons for the different approaches, and provides some suggestions on how to move forward on the issue given the differences between the two approaches.

## I. THE REGULATION OF DIGITAL TRADE UNDER THE WTO

The first attempt to regulate e-commerce in the WTO was made at the 2nd Ministerial Conference in May 1998, when the Members adopted the Declaration on Global Electronic Commerce.<sup>7</sup> The Declaration recognized the ‘new opportunities for trade’, and directed the General Council to ‘establish a comprehensive work

- 2 WTO, Work Programme on Electronic Commerce: Ministerial Decision of 13 December 2017, Ministerial Conference, Eleventh Session, Buenos Aires, 10–13 December 2017, WT/MIN(17)/65, WT/L/1032, 18 December 2017.
- 3 WTO, Joint Statement on Electronic Commerce, Ministerial Conference, Eleventh Session, Buenos Aires, 10–13 December 2017, WT/MIN(17)/60, 13 December 2017.
- 4 WTO, ‘WTO, World Economic Forum and eWTP launch joint public-private dialogue to open up e-commerce for small business’, 13 December 2017, available at [https://www.wto.org/english/news\\_e/news17\\_e/ecom\\_11dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/ecom_11dec17_e.htm) (visited 20 April 2018)
- 5 As noted by Leblond and Aaronson, Europe is not a major player in this regard as there are no European firms among the top 15 digital firms in the world by market value. Moreover, until very recently, Europe could not form a coherent approach on digital trade issues in trade agreements due to internal clashes between its trade and justice directorate-generals. See Leblond and Aaronson, above n 1.
- 6 See e.g., Henry Gao, ‘Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation’, 45 *Legal Issues of Economic Integration* 1, (2018) 47–70; Mark Wu, ‘Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System’ (2017). RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB). [www.rtaexchange.org](http://www.rtaexchange.org) (visited 20 April 2018); Rachel F. Fefer, Shayerah Ilias Akhtar and Wayne M. Morrison, ‘Digital Trade and U.S. Trade Policy’, CRS Report for Congress, R44565, 6 June 2017, available at <https://fas.org/sgp/crs/misc/R44565.pdf> (visited 20 April 2018).
- 7 WTO, Declaration on Global Electronic Commerce, adopted on 20 May 1998 at the Second WTO Ministerial Conference in Geneva, WT/MIN(98)/DEC/2, 25 May 1998.

programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members.<sup>8</sup>

In the Declaration, the Members also agreed to ‘continue their current practice of not imposing customs duties on electronic transmissions’.<sup>9</sup> This moratorium on customs duties has been routinely extended since then, with the most recent one at the 11th Ministerial Conference held in Buenos Aires, until 2019.<sup>10</sup>

At the same time, the moratorium also left a few questions unanswered. First of all, it is unclear as to whether the term ‘electronic transmissions’ refers only to the medium of e-commerce, or to the content of the transmission as well, i.e. the underlying product or service being transmitted.<sup>11</sup> Second, if it refers to the medium of transmission only, does this mean that other digital products which are supplied via traditional medium, such as books, music or videos on CDs could be subject to customs duties? Third, does the prohibition apply only to customs duties, or to other fees or charges imposed on the digital products? Fourth, does the moratorium apply only to imports, or to exports as well?

While some of the issues may find answers under the covered agreements, especially the General Agreement on Trade in Services (GATS), the existing framework of the WTO has proven to be rather inadequate in dealing with the new issues raised by e-commerce.<sup>12</sup> To answer these and other questions, the General Council adopted the Work Programme on Electronic Commerce in September 1998 pursuant to the Declaration.<sup>13</sup> Under the Work Programme, ‘electronic commerce’ is broadly defined to cover ‘the production, distribution, marketing, sale or delivery of goods and services by electronic means’.<sup>14</sup> Moreover, the Work Programme also includes under its scope ‘issues relating to the development of the infrastructure for electronic commerce’.

As e-commerce cuts across many different areas, the Work Programme divides up the work among several WTO bodies such as the Council for Trade in Services, the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the Committee on Trade and Development, which

8 Ibid.

9 Ibid.

10 WTO, Work Programme on Electronic Commerce: Ministerial Decision of 13 December 2017, adopted on 13 December 2017 at the Eleventh WTO Ministerial Conference in Buenos Aires, WT/MIN(17)/65, WT/L/1032, 18 December 2017.

11 See e.g. Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives* (Oxford: Hart Publishing, 2006); Sacha Wunsch-Vincent and Arno Hold, ‘Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral versus Preferential Trade Negotiations’, in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age: World Trade Forum* (New York: Cambridge University Press, 2012), at 182.

12 For a discussion of the regulatory difficulties presented to the existing WTO framework, see Henry Gao, ‘Can WTO Law Keep Up with the Internet?’, Proceedings of the American Society of International Law Annual Meeting, 108, 350–52. doi:10.5305/procanmeetasil.108.0350, 2014. See also Jane Kelsey, ‘How a TPP-style e-commerce Outcome in the WTO Would Endanger the Development of the GATS Acquis (and Potentially the WTO)’, 21 *Journal of International Economic Law* 273 (2018); Nivedita Sen, ‘Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?’, 21 *Journal of International Economic Law* 323 (2018).

13 WTO, *Work Programme on Electronic Commerce*, adopted by the General Council on 25 September 1998, WT/L/274, 30 September 1998.

14 Ibid, para 1.3.

shall deal with issues under their jurisdiction, i.e. services, goods, intellectual property rights, and development related issues, respectively.<sup>15</sup>

These bodies shall report their progress to the General Council on a regular basis.<sup>16</sup> In addition, the General Council is also responsible for the review of any cross-cutting trade-related and all aspects of the work programme concerning the imposition of customs duties on electronic transmission.<sup>17</sup> In carrying out its work, these bodies shall also take into account the work of other intergovernmental organizations as well as relevant non-governmental organizations.<sup>18</sup>

Since then, the Members have conducted many discussions on e-commerce in the various bodies.<sup>19</sup> However, due to the slow progress in the DDA in general, the Members have not been able to reach any decision on the substantive disciplines on e-commerce notwithstanding the ambitious agenda foreseen in the Work Programme.<sup>20</sup>

On 7 December 2016, the Chairman of the General Council reported on the latest progress on the Work Programme.<sup>21</sup> In the report, the Chairman noted that the potential benefits of e-commerce is widely recognized among the WTO Membership.<sup>22</sup> While there are some resistance on starting substantive discussion of e-commerce,<sup>23</sup> some Members wish to go beyond the exploratory nature of the current Work Programme and see some progress by MC11.<sup>24</sup> The Chairman suggested that Members 'should identify issues that can be discussed in the WTO and proceed incrementally in a transparent and inclusive manner'.<sup>25</sup>

With such renewed interests on e-commerce, it is worth exploring the positions taken by the two of the most important WTO Members, i.e. the US and China. The following sections will compare their respective approaches, discuss the reasons for the differences, and try to explore the best way to move the issue forward in the WTO.

## II. THE US APPROACH

Due to the slow progress in the WTO, the US has been pursuing the issue simultaneously in several fora. The first is in its bilateral and regional Free Trade Agreements, which generally follow the US template and include e-commerce as one of the key elements. Also, since 2013, e-commerce has been featured prominently in the plurilateral Trade in Services Agreement (TiSA) that the US led along with the EU and a

15 Ibid, para 5.1.

16 Ibid, para 1.2.

17 Ibid.

18 Ibid, para. 1.4.

19 For a discussion of some of the issues raised in the discussions, see Sen, above n 12.

20 WTO: Work Programme on Electronic Commerce: Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council, Report to the 21 November 2013 meeting of the General Council, WT/GC/W/676, 11 November 2013.

21 WTO General Council, Item 6 – Work Programme on Electronic Commerce – Review of Progress: Report by the Chairman, WT/GC/W/728, 8 December 2016.

22 Ibid, para 1.11.

23 Ibid, para 1.8.

24 Ibid, para. 1.13.

25 Ibid, at para 1.14.

group of 'like-minded' countries. Finally, since 2016, the US has also been active in pushing for the inclusion of e-commerce in the negotiating agenda of the WTO. This section reviews these initiatives in detail.

### A. TiSA

Under Article XIX of the GATS, WTO Members are supposed to start a new round of negotiations 'beginning not later than five years' from the date the WTO was established. In 2000, a new round of negotiation was launched pursuant to this built-in agenda. At the Doha Ministerial Conference in Nov 2001, the GATS negotiations were merged into the newly-launched Doha Round as part of the 'single undertaking'.<sup>26</sup> However, due to a series of setbacks, the GATS negotiations ran into impasse along with other parts of the DDA. In view of the difficulties, the 8th Ministerial Conference agreed to allow Members to 'more fully explore different negotiating approaches' that 'allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking'.<sup>27</sup>

The idea for a stand-alone services agreement was taken up by a group of the most enthusiastic participants in the GATS negotiations, which is known as Really Good Friends of Services (RGFs).<sup>28</sup> Led by the US and Australia, the group of 16 WTO Members reached an agreement in 2012 to start negotiations on a new services agreement known as the Trade in Services Agreement.<sup>29</sup> In March 2013, the negotiations were formally launched.<sup>30</sup> Since then, 21 rounds of negotiations have been held<sup>31</sup> and the membership has expanded to 23 WTO Members,<sup>32</sup> which are mainly developed countries and high-income developing countries with a liberal bent. Together, they account for 70% of world trade in services.<sup>33</sup>

26 WTO, Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, at paras 15, 47.

27 See WTO, Ministerial Conference, Eighth Session, Geneva, 15–17 December 2011, Elements for Political Guidance, WT/MIN(11)/W/2, 1 December 2011, at 3.

28 Pierre Sauvé, 'A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement', in Pierre Sauvé and Anirudh Shingal (eds), *The Preferential Liberalization of Trade in Services: Comparative Regionalism* (Cheltenham and Northampton, MA: Edward Elgar, 2014), at 413.

29 See Laine Škoba, 'Opening negotiations on a plurilateral Trade in Services Agreement (TiSA)', Library Briefing: Library of the European Parliament, 27 July 2013, available at <http://www.europarl.europa.eu/eplibrary/Opening-negotiations-on-a-plurilateral-Trade-in-Services-Agreement-TiSA-FINAL.pdf> (visited 20 April 2018). See also Elina Viilup, 'The Trade in Services Agreement (TiSA): An End to Negotiations in Sight?', European Parliament, Policy Department, Directorate-General for External Policies, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570448/EXPO\\_IDA\(2015\)570448\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570448/EXPO_IDA(2015)570448_EN.pdf), at 11 (visited 20 April 2018).

30 Ecorys, 'Trade SIA in Support of Negotiations on a Plurilateral Trade in Services Agreement (TiSA): Draft Final Report, at 10, available at [trade.ec.europa.eu/doclib/html/155510.htm](http://trade.ec.europa.eu/doclib/html/155510.htm). See also Viilup, *Ibid*, at 12 (visited 20 April 2018).

31 European Commission, Trade in Services Agreement (TiSA), <http://ec.europa.eu/trade/policy/in-focus/tisa/> (visited 20 April 2018).

32 The current members are Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the EU, Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, and the USA.

33 European Commission, TiSA Factsheet, [http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc\\_154971.doc.pdf](http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154971.doc.pdf) (visited 20 April 2018).

As it stands, the TiSA is expected to include four parts that largely mirror the structure of the GATS, which would make it easier to multilateralize the agreement later on.<sup>34</sup> Part I consists of definitions and general principles, similar to Parts I and II of the GATS.<sup>35</sup> Part II lays down the specific commitments on market access and national treatment as in GATS Part III.<sup>36</sup> Unlike the positive listing approach adopted by the GATS, however, the TiSA is said to adopt a 'hybrid approach', whereby market access commitments follow the positive listing approach, while the national treatment commitments follow the negative listing approach.<sup>37</sup> Part III includes thematic or regulatory annexes which address either cross-cutting systematic issues such as domestic regulation or transparency; or sector-specific chapters on e-commerce, financial services, or professional services.<sup>38</sup> Part IV deals with the institutional provisions such as organizational setup and dispute settlement. It is worth noting that the TiSA will only include a state-to-state dispute settlement system, instead of the investor–state dispute settlement mechanism that has become popular in recent investment and trade agreements.<sup>39</sup>

As the main driving force behind the TiSA, the US submitted proposals in all chapters, including e-commerce. The US e-commerce proposals can be divided into two categories: First, provisions applicable to the e-commerce sector only; second, general obligations applicable to all services but are especially relevant to e-commerce due to its special nature.

### *1. E-commerce specific provisions*

- i. Free Movement of Information, which provides service suppliers with the freedom to transfer information across countries in the conduct of its business. It is worth noting that such information includes not only commercial information, but also personal information of the users of such e-commerce business.<sup>40</sup> However, the US does not intend to apply the provision to financial services, as US financial regulators such as the Treasury and the Securities and Exchange Commission wish to retain the ability to 'seize data and resources quickly to address abuse or to contain a financial crisis'.<sup>41</sup>

34 See Imola Strehö, 'Services Trade in the European Union: Internal and External Approaches to Market Opening', in Pierre Sauvé and Anirudh Shingal (eds), *The Preferential Liberalization of Trade in Services : Comparative Regionalism*. Cheltenham (Cheltenham and Northampton, MA: Edward Elgar, 2014), at 194; Peng Shin-yi, 'Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS?', in Won-mog Choi (ed.), *International Economic Law: The Asia-Pacific Perspectives* (Newcastle upon Tyne: Cambridge Scholars Publishing: 2015), at 328–29.

35 See Vilup, above n 29, at 17.

36 Ibid.

37 Ibid.

38 Ibid, at 18.

39 Ibid.

40 WikiLeaks, Trade in Services Agreement (TiSA): Annex on Electronic Commerce, WikiLeaks release: 3 June 2015, at 2. As 'personal information' is not defined in the US proposal, it potentially could cover both 'person data' and 'social data', i.e. anonymized personal data, as defined in the data typology in Sen's article. See Sen, above n 12.

41 See Anna Gelpert, 'Financial Services' in Peterson Institute for International Economics, Assessing the Trans-Pacific Partnership, PIIE Briefing 16-1, February 2016, 99. See also, Rachel Fefer, 'Trade in

- ii. Open networks. This provision provides consumers with two freedoms. First, the freedom to access and use services and applications of their choice online; and second, the freedom to connect their choice of devices.<sup>42</sup> The clause also provides consumers with access to information on network management practices of their Internet access service suppliers (ISPs).<sup>43</sup> The only restrictions that might be imposed are reasonable network management practices, as well as those designed to prevent harm to the network.<sup>44</sup> This provision is mainly designed to provide consumers with freedom of choice in both software and hardware, as opposed to the anti-competitive practices of mandating the use of certain services or devices. It is unclear whether the word ‘consumers’ here refer only to pure consumers or those commercial consumers which are also providers of e-commerce, but judging from the expansive approach advocated by the US, it is not unreasonable to assume that both groups should be eligible to claim the benefits under the clause.
- iii. Local infrastructure. This provision prevents countries from requiring service suppliers to store or process data in the territory of the host country as a condition of supplying a service or investing.<sup>45</sup> These include both requirements to use computing facilities located in such territory and requirements to use computer processing and storage services located in such territory.<sup>46</sup> Again there is a special carve-out for financial services, as the US wishes to limit the application of the provision to only those financial services covered by a member’s specific commitments.<sup>47</sup>
- iv. Electronic Authentication and Electronic Signatures. This provision aims to encourage the adoption of Electronic Authentication and Electronic Signatures by prohibiting the discrimination against such methods.<sup>48</sup> Instead, the parties are granted significant autonomy in adopting the methods of their choice and this could greatly facilitate e-commerce.

## 2. Horizontal provisions

The horizontal provisions apply to all services. Due to the special nature of e-commerce, some provisions are particularly relevant to the sector. These include many provisions already found in the e-commerce chapter, such as provisions on movement of information, open networks, network access and use, and electronic authentication and electronic signature. The remaining provisions mainly deal with localization requirements. As mentioned earlier, the e-commerce chapter addressed

Services Agreement (TiSA) Negotiations: Overview and Issues for Congress’, Congressional Research Service, 3 January 2017, at pp. 12–13; Jan Kelsey, ‘TiSA – Foul Play’, Uni Global Union, 2017, at 69–70, available at <http://www.uniglobalunion.org/news/tisa-foul-play> (visited 20 April 2018).

42 WikiLeaks, above n 40, at 6.

43 Ibid.

44 Ibid.

45 Ibid, at 7.

46 Ibid.

47 Ibid.

48 Ibid, at 9.

one aspect of the issue, i.e. local infrastructure. In the horizontal section, however, the obligation spans wider into three areas.

The first is the prohibition of local commercial presence or residency in the host country unless such requirement is spelt out in the schedule.<sup>49</sup> While such local presence requirements could potentially affect all service sectors, e-commerce is especially vulnerable as it is often detached from traditional brick-and-mortar establishments.<sup>50</sup>

The second is the prohibition of local content requirements.<sup>51</sup> Depending on the *modus operandi* of the local content requirements, this obligation can be further divided into two categories. One is granting preferences or advantages to goods or electronically transmitted contents produced in a territory, or, as mentioned earlier in the e-commerce chapter, to local computing facilities or computer processing or storage services supplied locally.<sup>52</sup> The other is requiring foreign service suppliers to purchase or use local goods or electronically transmitted contents.<sup>53</sup> In a way, this provision may be regarded as a further-refined national treatment obligation.

The third is the prohibition of local technology requirements.<sup>54</sup> This also can be broken down into two types of obligations. One addresses the issue of forced technology transfer and prohibits members from requiring service suppliers to transfer technologies as a condition of providing a service.<sup>55</sup> The other deals with rules which either require or prevent such service suppliers to purchase or use certain technologies.<sup>56</sup> Combined together, the two provide service suppliers total freedom in choosing the technologies they might use in providing its services.

## B. Free trade agreements

The first US Free Trade Agreement (FTA) to address e-commerce issues is the one with Jordan, which went into effect in 2010. It only includes one article, which sets out three prohibitions on various restrictions on e-commerce, i.e. customs duties on electronic transmissions; unnecessary barriers on electronic transmissions; and impeding the supply of services through electronic means.<sup>57</sup> In a way, this approach reflected the reality of the e-commerce market in the early stage of development, where there were few government regulations in the sector and all that is needed is for the regulators to leave the e-commerce businesses on their own.

With the rapid development of the sector, however, the passive *laissez-faire* approach increasingly became insufficient. Thus, later US FTAs started to include more comprehensive rules on e-commerce. This is reflected in two aspects. First, in terms of the structure, e-commerce is elevated from a few articles in other chapters into a stand-alone chapter on its own. Second, in terms of the substance, the e-

49 Ibid, at 16.

50 See e.g. the discussion on the mechanisms for data flow across border in Sen, above, n 12.

51 Ibid, at 17.

52 Ibid.

53 Ibid.

54 Ibid, at 18.

55 Ibid.

56 Ibid.

57 Agreement between the USA and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 24 October 2000, Article 7, available at <https://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-Jordan.pdf> (visited 20 April 2018).

commerce disciplines also expand from passive non-interference obligations into more positive requirements that spell out what the governments needs to do for e-commerce businesses. This new model of e-commerce obligations started out in the 2004 FTAs the US signed with Australia, Chile, and Singapore, respectively, and culminated in the Trans-Pacific Partnership (TPP) that was concluded in 2016. While the Trump Administration has withdrawn from the TPP, the e-commerce chapter was heavily influenced by the US and has been incorporated into the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)<sup>58</sup> that the remaining 11 TPP-members signed in March 2018.<sup>59</sup> In all likelihood, it is reasonable to expect that similar provisions will be reflected in future US FTAs. Therefore, we will use the CPTPP to discuss the US e-commerce provisions in its FTAs.

The CPTPP e-commerce provisions are guided by the US objectives in the TPP, as announced by the United States Trade Representative (USTR) in June 2014. It includes the following key components:<sup>60</sup>

- ‘- commitments not to impose customs duties on digital products (e.g., software, music, video, e-books);
- non-discriminatory treatment of digital products transmitted electronically and guarantees that these products will not face government-sanctioned discrimination based on the nationality or territory in which the product is produced;
- requirements that support a single, global Internet, including ensuring cross-border data flows, consistent with governments’ legitimate interest in regulating for purposes of privacy protection;
- rules against localization requirements that force businesses to place computer infrastructure in each market in which they seek to operate;
- commitments to provide reasonable network access for telecommunications suppliers through interconnection and access to physical facilities’.

These objectives have largely been fulfilled in the final CPTPP agreement. Based on the nature of the specific obligations, we can divide them into the following three categories:

The first are the passive obligations, which prohibits the members from adopting various protectionist policies. The list of prohibited measures includes customs duties on electronic transmission;<sup>61</sup> discriminations against foreign digital

58 Available at <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf> (visited 20 April 2018).

59 Joint Ministerial Statement by CPTPP signatories, 8 March 2018, Santiago, Chile, available at <https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/CPTPP/Media%20Release%20-%20CPTPP%20signed.pdf> (visited 20 April 2018).

60 United States Trade Representative, ‘Trans-Pacific Partnership: Summary of U.S. Objectives’, available at <https://ustr.gov/tpp/Summary-of-US-objectives> (visited 20 April 2018).

61 CPTPP, Article 14.3.

products;<sup>62</sup> restrictions on cross-border transfer of information; forced localization requirements; and forced transfer of source codes.<sup>63</sup> The provisions are designed to minimize the distortions created by government interventions and leave the development of the e-commerce market in the hands of the e-commerce players.

At the same time, the TPP also recognizes that, as e-commerce is a new mode of doing business, the existing regulatory framework might be ill-prepared for the development of the sector. Thus, the TPP also includes provisions which require member governments to introduce or maintain regulatory frameworks which facilitate the development of e-commerce. For example, under Article 14.5, members are required to maintain a legal framework governing electronic transactions consistent with the principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts. Similarly, Article 14.6 require the recognition of the legal validity of electronic signatures or electronic authentication methods, while Article 14.9 provides for the acceptance of electronic documents as the legal equivalent of their paper versions. These provisions all deal with one key issue facing the e-commerce sector, i.e. the recognition of e-commerce transactions as equivalents of the formalities designed for the pre-internet age.

Taken together, these provisions largely reflect the *laissez-faire* regulatory philosophy prevalent in the e-commerce regulatory framework in the US, which indeed was beneficial to the development of e-commerce in its infancy stage. With the rapid growth of the sector, however, many e-commerce giants have now acquired so much market power that, if left totally unchecked, could lead to dire consequences. In particular, there are two potential risks. The first comes from those market players which own or control key infrastructures, which could include either hardware infrastructure such as telecommunication or internet networks, or key software infrastructure such as operating systems, search portals, content sharing platforms, etc. These firms could abuse their power by unreasonably denying access to their infrastructures to their business users, making it impossible for these users to conduct e-commerce activities. This problem is mainly addressed in Article 14.10, which provides consumers with the freedom of access to and use of the internet for e-commerce, subject only to network management and network safety restrictions. It is worth noting that 'consumers' here include not only individual consumers, but also business consumers, as the provision specifies that the internet is used for electronic commerce. The second type of risks come from those e-commerce businesses which generate, store or process the personal information of individual consumers, whereby such information could be sold, misused, or leaked.<sup>64</sup> To deal with these risks, the TPP includes

62 Ibid, Article 14.4.

63 Ibid, Article 14.17.

64 See Georgia Wells and John D McKinnon, Facebook Data on 87 Million Users May Have Been Improperly Shared, The Wall Street Journal, 4 April 2018, available at <https://www.wsj.com/articles/mark-zuckerberg-to-testify-before-house-committee-on-april-11-1522844990?ns=prod/accounts-wsj> (visited 20 April 2018).

provisions on online consumer protection,<sup>65</sup> personal information protection,<sup>66</sup> and unsolicited commercial electronic messages.<sup>67</sup>

### C. WTO

In early 2016, e-commerce gained ‘renewed interests’ among WTO Members.<sup>68</sup> In July of the same year, seven proposals were tabled by major WTO Members such as the US, EU, Japan and Brazil.<sup>69</sup> The US proposal seems to be encouraged by its success in the TiSA and TPP negotiations, and is discussed in detail here.

At the outset, it is interesting to note that the US takes a rather cautious approach to the issue, probably in anticipation of the strong resistance from developing countries, especially the African Group.<sup>70</sup> Thus, they repeatedly emphasizes that they have ‘no preconceived views on best approaches, or on whether negotiations on specific aspects of e-commerce should be pursued, and if so on what bases’.<sup>71</sup> Instead, their submission is only a ‘non-paper’ that is ‘intended solely to contribute to constructive discussion among Members’ rather than to advance ‘specific negotiating proposals’.<sup>72</sup> However, as there are a lot of similarities between the US submission and its proposals in the TiSA and TPP, it is reasonable to assume that the non-paper actually does reflect the US negotiating positions.

The US submission includes a total of sixteen ‘examples of positive contributions to a flourishing digital economy’.<sup>73</sup> Like their proposals in the TiSA and TPP, many of these examples aim at the dismantling of both cross-border and domestic barriers to digital trade, such as the ban on customs duties,<sup>74</sup> non-discrimination,<sup>75</sup> removing restrictions on cross-border data flow,<sup>76</sup> and bans on government regulations requiring localization<sup>77</sup> or forced transfer of technology<sup>78</sup> or source code.<sup>79</sup> In addition to reducing government regulation, the US proposal also calls for more autonomy to e-commerce firms, which should have the freedom to use the technology,<sup>80</sup>

65 Article 14.7.

66 Article 14.8.

67 Article 14.14.

68 WTO General Council, ‘Item 4 – Work Program on Electronic Commerce – Review of Progress: Report by Ambassador Alfredo Suescum – Friend of the Chair’, WT/GC/W/721, 1 August 2016.

69 See e.g. JOB/GC/94 (US); JOB/GC/96 (Japan et al); JOB/GC/97 (EU et al); JOB/GC/98 (Brazil); JOB/GC/99 (MIKTA countries); JOB/GC/100 (Japan); JOB/GC/101/Rev.1 (Singapore et al).

70 See Kanaga Raja, ‘The African Group position on e-commerce talks at WTO’, in *South North Development Monitor*, #8559, 24 October 2017, available at <https://www.twn.my/title2/wto.info/2017/ti171021.htm> (visited 20 April 2018). As noted by Leblond and Aaronson, this could also reflect the incoherent approach on digital trade issues by the Trump Administration. See Leblond and Aaronson, above n 1.

71 WTO, Work Program on Electronic Commerce: Non-paper from the United States, JOB/GC/94, 4 July 2016, at para 1.2.

72 Ibid, at para 1.3.

73 Ibid, at paras 2.1–2.16.

74 Ibid, at para 2.1.

75 Ibid, at para 2.2.

76 Ibid, at para 2.3.

77 Ibid, at para 2.5.

78 Ibid, at para 2.6.

79 Ibid, at para 2.7.

80 Ibid, at para 2.8.

authentication methods,<sup>81</sup> encryption methods,<sup>82</sup> and facilities and services<sup>83</sup> of their own choice. Such freedom of choice applies not only to existing technologies and products, but also to ‘new and innovative digital products and services’.<sup>84</sup> The role of the government, according to the US proposal, is to facilitate the development of e-commerce by pushing for regulatory coherence at the global level, which can be achieved through adopting faster, more transparent customs procedures,<sup>85</sup> promoting the mutual recognition of standards and conformity assessment procedures,<sup>86</sup> and the development of market-driven regulations and standards which are characterized by significant stakeholder participation<sup>87</sup> and global interoperability.<sup>88</sup>

### III. THE CHINESE APPROACH

Compared to the US, China has taken a much more cautious approach to e-commerce issues in trade agreements until very recently. Its positions on e-commerce are mainly reflected in three forums, i.e. the eWTP, FTA, and WTO.

#### A. e-WTO & eWTP

At the World Economic Forum in Davos, Switzerland in January 2015, Jack Ma, the founder of Alibaba, first raised the idea for an ‘e-WTO’.<sup>89</sup> According to Ma, while the WTO has been great in the past century, its beneficiaries are mainly the big companies which trade across the globe. ‘Today, the Internet can help small businesses sell things cross the oceans’, thus, Ma suggested that Alibaba can build up ‘a platform for global small business’, what he called the ‘e-WTO’.<sup>90</sup> At the Summer Davos Forum in September<sup>91</sup> and the APEC CEO summit in November<sup>92</sup> of the same year, Ma reiterated his calls for the e-WTO again.

81 Ibid, at para 2.9.

82 Ibid, at para 2.11.

83 Ibid, at para 2.10.

84 Ibid, at para 2.12.

85 Ibid, at para 2.14.

86 Ibid, at para 2.16.

87 Ibid, at para 2.15.

88 Ibid, at para 2.13.

89 James Quinn, ‘Alibaba can become Bigger than Walmart, says founder’, in *The Telegraph*, 23 January 2015, available at <http://www.telegraph.co.uk/finance/financetopics/davos/11365479/Alibaba-can-become-bigger-than-Walmart-says-founder.html> (visited 20 April 2018).

90 PYMNTS, ‘Jack Ma’s Global “2 Billion Consumer” Plan’, 26 January 2015, available at <https://www.pymnts.com/news/2015/jack-mas-global-2-billion-consumer-plan/> (visited 20 April 2018).

91 Vivian Yang, ‘eWTO Needed to Govern the Internet, Says Jack Ma’, 9 September 2015, available at <https://www.weforum.org/press/2015/09/ewto-needed-to-govern-the-internet-says-jack-ma/> (visited 20 April 2018).

92 See Tai Beiping, ‘Interview: “E-WTO” Necessary in Era of e-Commerce: Jack Ma’, *Xinhuanet*, 18 November 2015, available at [http://news.xinhuanet.com/english/2015-11/18/c\\_134830593.htm](http://news.xinhuanet.com/english/2015-11/18/c_134830593.htm) (visited 20 April 2018); Eileen Yu, ‘Jack Ma: Free Trade a Human Right, Small Firms need More Help’, in *By The Way*, 18 November 2015, available at <http://www.zdnet.com/article/jack-ma-free-trade-a-human-right-small-firms-need-more-help/> (visited 20 April 2018).

In February 2016, Ma changed the name of his proposal from the ‘e-WTO’ to ‘e-WTP’, or ‘Electronic World Trade Platform’, to emphasize that his objective is building a platform rather than organization.<sup>93</sup> At the Boao forum in March 2016, Ma called for the establishment of the e-WTP.<sup>94</sup> He emphasized that such platform ‘is not an organization’, instead, it is a platform for the internet age that is ‘more open, fairer and freer’, a platform ‘to enable the small and medium enterprises and the consumers of the world, especially the young’. In the B20 2016 Policy Recommendations to the G20, the Business 20 group also adopted the e-WTP as one of its key recommendations by calling the G20 to ‘endorse the concept of the Electronic World Trade Platform (eWTP) - an all stakeholder initiative led by the private sector - as a vehicle for public private dialogue that can incubate the rules to foster the right policy and business environment for cross-border e-trade development’.<sup>95</sup> The proposal was also noted in the G20 Trade Ministers Meeting Statement<sup>96</sup> and the G20’s Leaders’ Communique Hangzhou Summit.<sup>97</sup>

According to Alibaba, e-WTP is a platform to collectively forge rules governing e-commerce, exchange best practices, build future facilities, and achieve inclusive trade.<sup>98</sup> There will be three components of the e-WTP ecosystem. First, at the rules level, it will provide the platform for stakeholders to discuss and incubate new rules and standards for the digital age, especially those directly related to e-commerce such as digital border, tariff policy, data flow, credit system, and consumer protection.<sup>99</sup> Second, at the commercial level, there will be commercial exchanges and cooperations among the stakeholders to build the new infrastructure for the internet age, such as e-commerce platform, finance and payment, logistics and storage, trade-related services, marketing and education and training.<sup>100</sup> Third, at the technological level, the e-WTP aims to build a technological framework based on the internet, big data and cloud computing, internet of things, and artificial intelligence.<sup>101</sup> The three components are interconnected and inter-dependent, where the discussions on rules will be based on the practices at the commercial and technological levels, while the

93 ‘Special Interview with Ma Yun: 2016, Don’t forget Yours Roots, Don’t Fear the Future [Zhuanfang Ma Yun: 2016 Buwang Chuxin, Buwei Jianglai]’, in Qianjiang Evening News (Qianjiang Wanbao), 5 February 2016, available at [http://biz.zjol.com.cn/system/2016/02/05/021015532\\_01.shtml](http://biz.zjol.com.cn/system/2016/02/05/021015532_01.shtml) (visited 20 April 2018).

94 ‘Alibaba’s Jack Ma proposes new global e-commerce platform’, in Xinhua, 24 March 2016, available at [http://www.chinadaily.com.cn/bizchina/boaoforumforasia/2016-03/24/content\\_24065122.htm](http://www.chinadaily.com.cn/bizchina/boaoforumforasia/2016-03/24/content_24065122.htm) (visited 20 April 2018).

95 B20, ‘Towards an Innovative, Invigorated, Interconnected & Inclusive World Economy: B20 2016 Policy Recommendations to the G20’, 10 August 2016, at 14, available at <http://en.b20-china.org/documents/doc/1/2> (visited 20 April 2018).

96 G20 Trade Ministers Meeting Statement, 9–10 July 2016, Shanghai, available at [https://www.wto.org/english/news\\_e/news16\\_e/dgra\\_09jul16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/dgra_09jul16_e.pdf) (visited 20 April 2018).

97 G20 Leaders’ Communique Hangzhou Summit, 4–5 September 2016, available at [http://www.fmprc.gov.cn/mfa\\_eng/xxxx\\_662805/t1395000.shtml](http://www.fmprc.gov.cn/mfa_eng/xxxx_662805/t1395000.shtml) (visited 20 April 2018).

98 Ali Research, ‘EWTP 2017 Annual Report [Shijie Dianzi Maoyi Pingtai Changyi (eWTP) 2017 Niandu Baogao]’, at 3, available at [ialiresearch.com/img/20170323/20170323182812.pdf](http://ialiresearch.com/img/20170323/20170323182812.pdf) (visited 20 April 2018).

99 Ibid.

100 Ibid.

101 Ibid.

new rules resulting from such discussions can in turn promote the commercial cooperations and new technological innovations.<sup>102</sup>

The key features of the e-WTP are:<sup>103</sup>

- i. Market-driven and led by the private sector;
- ii. Open and transparent, with equal participation from all stakeholders including government agencies, businesses, international organizations, think-tanks, scholars and various communities;
- iii. More attention to the demands of Small, Medium and Micro Enterprises (SMMEs), consumers and developing countries;
- iv. Rapid incubation, dissemination and development of new models, rules, and standards for e-commerce service and regulations through the 'market-driven, pilot-implementation' approach.

In the long term, the e-WTP hopes to achieve four objectives: development of the SMMEs; growth of inclusive trade; globalization of consumption, and development of the young people.<sup>104</sup>

While the details of the e-WTP still remain a work in progress, Ma has suggested rules such as tariff exemption for SMMEs with less than one million USD of annual exports, 24-hour customs clearance, expedition of customs procedures and logistics.<sup>105</sup> In other words, the focus will be mainly on the traditional tariff reduction and trade facilitation issues.<sup>106</sup> In terms of the negotiating approach, Ma prefers to work out the rules on a country by country basis rather than going through the multilateral negotiation process in the WTO.<sup>107</sup> After visiting dozens of countries, Ma announced that the first overseas e-hub for the e-WTP will be hosted in Malaysia.<sup>108</sup> In November 2017, the hub, also known as the Digital Free Trade Zone, officially went alive.<sup>109</sup> In December 2017, the e-WTP launched the 'Enabling E-commerce' initiative along with the WTO and the World Economic Forum.<sup>110</sup>

## B. FTA

Unlike the aggressive approach of the US in its FTAs, China has taken a rather cautious approach on non-traditional trade issues such as e-commerce. The first

102 Ibid.

103 Ibid, at 4.

104 Ibid.

105 Sina Technology, 'Ma Yun: Let eWTP Free Trade Benefit 80% of the SMEs Worldwide [Ma Yun: Rang eWTP Ziyou Maoyi Huiji Quanqiu 80% Zhongxiao Qiye]', 4 September 2016, available at <http://finance.sina.com.cn/chanjing/gsnews/2016-09-04/doc-ifxvqcts9409758.shtml> (visited 20 April 2018).

106 For the impact of e-commerce on trade facilitation in developing countries, especially relating to MSMEs, see Rutendo Tavengerwei, 'Using Trade Facilitation to Assist MSMEs in E-Commerce in Developing Countries', 21 *Journal of International Economic Law* 349 (2018).

107 Ibid.

108 Tom Brennan, 'eWTP Finds First Overseas Base in Malaysia', in *Alizila*, 22 March 2017, available at <http://www.alizila.com/ewtp-finds-base-malaysia/> (visited 20 April 2018).

109 Jenny W. Hsu, 'Malaysia's New eWTP Hub A Boon to Local Firms', 3 November 2017, available at <http://www.alizila.com/malaysias-new-e-hub-boon-local-firms/> (visited 20 April 2018).

110 WTO, above n 4.

Chinese FTA to address e-commerce is the one with New Zealand (2008), but it was only mentioned incidentally in the chapter on technical barriers to trade (TBT) and the annexed agreement on conformity assessments. Since then, it has included e-commerce chapters only in two FTAs, i.e. the ones with Korea and Australia, both of which went into effect on 30 December 2015.<sup>111</sup>

Between the two, the Korea FTA is rather modest. It includes nine articles which cover the following:<sup>112</sup> moratorium on customs duties on electronic transmission; electronic authentication and electronic signature; protection of personal information in e-commerce; paperless trading; cooperation; and non-application of the dispute settlement chapter. Many of these provisions build upon the existing obligations under the other international agreements and do not add new substantive obligations. For example, the provisions on moratorium on customs duties<sup>113</sup> and paperless trading<sup>114</sup> are based on the WTO obligations. Another problem is that some of these obligations are couched in soft non-binding language. For example, the article on paperless trading simply requires parties to 'endeavour to make trade administration documents available to the public in electronic form' and 'explore the possibility of accepting trade administration documents submitted electronically as the legal equivalent of the paper version of those documents'.<sup>115</sup> Moreover, even for the clauses with stronger languages, there is no uniform approach mandated and the Parties instead are given wide discretion in adopting their own versions of domestic regulatory framework. These include, for example, the clauses on electronic authentication and electronic signature,<sup>116</sup> and protection of personal information.<sup>117</sup> Finally, the utility of the obligations in the chapter is further weakened by two provisions. One is Article 13.2, which provides that, in the event of any inconsistency between the e-commerce Chapter and other FTA Chapters, the other Chapters shall prevail. The other is the final provision, which provides that the chapter on dispute settlement does not apply to the e-commerce Chapter.<sup>118</sup> This means that, even the binding obligations in the chapter do not have real possibility of being enforced.

In contrast, the Australia FTA goes further by adding the following provisions.<sup>119</sup> First is the provision on transparency, which requires the Parties to promptly publish or make publicly available all e-commerce related measures of general application and respond promptly to all requests by the other Party for specific information on such measures.<sup>120</sup> Second, Article 12.5 requires the Parties to maintain domestic legal frameworks governing electronic transactions based on the UNCITRAL Model

111 For a detailed review of China's approach to e-commerce in these FTAs, see Henry Gao, E-Commerce in ChAFTA: New Wine in Old Wineskins?, in Colin Piker, Heng Wang and Weihuan Zhou (eds), *The China Australia Free Trade Agreement: A 21st-Century Model* (Oxford and London: Hart, 2018), at 283–303.

112 China-Korea FTA, Chapter 13.

113 *Ibid.*, Article 13.3.

114 *Ibid.*, Article 13.6.

115 *Ibid.*

116 *Ibid.*, Article 13.4.

117 *Ibid.*, Article 13.5.

118 *Ibid.*, Article 13.9.

119 China–Australia FTA, Chapter 12.

120 *Ibid.*, Article 12.4.

Law on Electronic Commerce 1996. Third, under Article 12.7, the Parties are required to ‘provide protection for consumers using electronic commerce that is at least equivalent to that provided for consumers of other forms of commerce’.

Another improvement of the Australia FTA over the Korea one is the strengthening of obligations. For example, while Article 13.6 of the Korea FTA only directs the Parties to ‘explore the possibility of accepting trade administration documents submitted electronically as the legal equivalent of the paper version of those documents’, the Australia FTA turns this into a binding obligation by mandating the acceptance of electronic versions of such documents.<sup>121</sup> However, this provision is followed by an exception clause in the same provision, which allows the Parties to refuse to recognize electronic documents as paper documents when ‘there is a domestic or international legal requirement to the contrary’.<sup>122</sup> This not only weakens the binding force of the obligation, but could potentially violate the obligation to accept electronic copies under Article 10.2 of the WTO Trade Facilitation Agreement.<sup>123</sup>

The Australia FTA also removes the Korea FTA provision on deference to the other chapters in case of inconsistency. Instead, parity of e-commerce with traditional modes of trade is achieved through Article 12.1.3, which calls the Parties to ‘endeavour to ensure that bilateral trade through electronic commerce is no more restricted than other forms of trade’. Notwithstanding all the progresses made, their practical utilities are still limited as the FTA also excludes the e-commerce chapter from the application of the dispute settlement chapter.

### C. WTO

China’s cautious approach on e-commerce in FTAs is reflected in its position in the WTO, where it has also been rather reluctant to engage in the issue until very recently.

China’s first encounter with e-commerce in the WTO setting took place in the *China-Publications* case, where the US argued that China’s commitments on ‘sound recording distribution services’ covers ‘electronic distribution of sound recordings’.<sup>124</sup> China disagreed with the US approach and argued instead that such electronic distribution ‘in fact corresponds to network music services’,<sup>125</sup> which only emerged in 2001 and are totally different in kind from the ‘sound recording distribution services’. According to China, the most fundamental difference between the two is that, unlike ‘traditional’ sound recording distribution services, network music services ‘do not supply the users with sound recordings in physical form, but supply them with the right to use a musical content’.<sup>126</sup> In response, the US cited the panel’s

121 Ibid, Article 12.9.

122 Ibid.

123 WTO, Trade Facilitation Agreement, available at [https://www.wto.org/english/docs\\_e/legal\\_e/tfa-nov14\\_e.htm](https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm).

124 Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, 261, at paras 4.49–4.71.

125 Ibid, at para 4.147.

126 Ibid, at para 4.149.

statement *in US – Gambling*<sup>127</sup> that ‘the GATS does not limit the various technologically possible means of delivery under mode 1’, as well as the principle of ‘technological neutrality’ mentioned in the Work Programme on Electronic Commerce – Progress Report to the General Council,<sup>128</sup> and argued that electronic distribution is merely a means of delivery rather than a new type of services.<sup>129</sup> Furthermore, the US argued that the term ‘distribution’ encompasses not only the distribution of goods, but also distribution of services.<sup>130</sup> After a lengthy discussion covering the ordinary meaning, the context, the provisions of the GATS, the object and purpose and various supplementary means of interpretation, the Panel concluded that the term ‘sound recording distribution services’ does extend to distribution of sound recording through electronic means.<sup>131</sup> China appealed the Panel’s findings, but they were upheld by the Appellate Body, which largely adopted the Panel’s reasoning.<sup>132</sup>

With such unpleasant experience, it is no wonder that China has not been very enthusiastic about the discussion of e-commerce in the WTO. However, with the rapid development of e-commerce, China gradually realized that it has a competitive edge on e-commerce and should promote its development. In 2013, China’s e-commerce transaction value exceeded 10 trillion Chinese Yuan (or about 1.6 trillion US Dollar), and it surpassed the US to become the largest e-commerce market in the world.<sup>133</sup> Encouraged by the development, the Chinese government decided to further unleash the enormous potential of e-commerce by designating Hangzhou, where Alibaba is based, as the first Cross-Border E-commerce Comprehensive Pilot Area.<sup>134</sup> At the World Internet Conference held in Wuzhen in December 2015, President Xi Jinping stated that China is willing to enhance cooperation with all countries to promote the development of world investment and trade through the development of cross-border e-commerce and establishing information economy

127 Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797.

128 Work Programme on Electronic Commerce, Progress Report to the General Council, adopted by the 230 Council for the Trade in Services on 19 July 1999, S/L/74, circulated 27 July 1999, para 4.

129 *Ibid*, at para 4.69.

130 *Ibid*, at para 7.1156.

131 *Ibid*, at para 7.1168-1265.

132 Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, 3, at paras 338–413.

133 ‘China’s Bulk E-commerce Transaction Value Exceeds 10 Trillion [Woguo Dazong Dianzi Shangwu Jiaoye Yi Chao 10 Wanyi Yuan]’, in *China Financial and Economic News* [Zhongguo Caijing Bao], 7 August 2014, available at [http://www.mof.gov.cn/zhengwuxinxi/caijingshidian/zgcbj/201408/t20140807\\_1123621.html](http://www.mof.gov.cn/zhengwuxinxi/caijingshidian/zgcbj/201408/t20140807_1123621.html) (visited 20 April 2018).

134 ‘Hangzhou Zhejiang Expected to Establish China Internet Free Trade Pilot Area [Zhejiang Hangzhou Youwang Jianli Zhongguo Wangshang Ziyou Maoyi Shiyangu]’, in *China News*, 30 March 2014, available at <http://finance.chinanews.com/cj/2014/03-30/6009190.shtml> (visited 20 April 2018).

pilot areas.<sup>135</sup> In January 2016, the State Council further expands the Cross-Border E-commerce Comprehensive Pilot Areas to 12 more cities.<sup>136</sup>

The rapid development of e-commerce in China also helped to boost its confidence in e-commerce rule-making. On 9 October 2016, the Politburo of the Communist Party of China (CPC) held the 36th Collective Study Session with 'Implementation of the Internet Power Strategy' as the topic.<sup>137</sup> In his speech at the Session, President Xi emphasized that China shall not only use the digital economy to promote economic development, but also further enhance its power to set the agenda and make rules for cyberspace at the international stage.<sup>138</sup> Perhaps in response to such high-level exhortation, China made its first submission on e-commerce at the WTO in November 2016.<sup>139</sup>

At the outset, China proposed that the scope of e-commerce discussions should 'focus on promotion and facilitation of cross-border trade in goods enabled by internet, together with services directly supporting such trade in goods, such as payment and logistics services'.<sup>140</sup> This reflects China's reservation on the discussion of pure digital services, as revealed in the *China-Publications* case.

Furthermore, even for trade in goods, China took a cautious approach with two limitations. First, China proposes that the e-commerce discussions are 'to clarify and to improve the application of existing multilateral trading rules'.<sup>141</sup> This suggests that China is not eager to discuss new rules such as those on freedom of information flow, data localization, etc. Second, the proposal also states that discussions at this stage 'should not lead to new market access commitments including tariff reductions'.<sup>142</sup> This means that tariff negotiations will not be part of the discussions on e-commerce.

As there is no room for either new rules or new tariff concessions, all that remain to negotiate are just trade facilitation and transparency rules, which are

135 'Speech of Xi Jinping at the Opening Ceremony of the Second World Internet Conference [Xi Jinping zai Dierjie Shijie Hulanwang Dahui Kaimushi shang de Jianghua]', 16 December 2015, in *Xinhua News*, available at [http://news.xinhuanet.com/politics/2015-12/16/c\\_1117481089.htm](http://news.xinhuanet.com/politics/2015-12/16/c_1117481089.htm) (visited 20 April 2018).

136 State Council, 'Reply by the State Council on the Approval of the Establishment of Cross-Border E-commerce Comprehensive Pilot Areas in 12 Cities such as Tianjin [Guowuyuan Guanyu Tongyi zai Tianjin deng 12 ge Chengshi Sheli Kuajing Dianzi Shangwu Zonghe Shiyangu de Pifu]', Guohan [2016] #17, 12 January 2016, available at [http://www.gov.cn/zhengce/content/2016-01/15/content\\_10605.htm](http://www.gov.cn/zhengce/content/2016-01/15/content_10605.htm) (visited 20 April 2018). The 12 cities are Tianjin, Shanghai, Chongqing, Hefei, Zhengzhou, Guangzhou, Chengdu, Dalian, Ningbo, Qingdao, Shenzhen, and Suzhou.

137 Xi Jinping: Accelerate the Promotion of Indigenous Innovation on Internet Information Technology, Strive Unrelentingly Towards the Objective of Building the Internet Power [Xi Jinping: Jiakuai Tuijin Wangluo Xinxi Jishu Zizhu Chuangxin, Chaozhe Jianshe Wangluo Qiangguo Mubiao Buxie Nuli], 9 October 2016, in *Xinhua News*, available at [http://news.xinhuanet.com/politics/2016-10/09/c\\_1119682204.htm](http://news.xinhuanet.com/politics/2016-10/09/c_1119682204.htm) (visited 20 April 2018).

138 Ibid.

139 WTO General Council, Council for Trade in Goods, Council for Trade in Services, Committee on Trade and Development, Work Programme on Electronic Commerce: Aiming at the 11th Ministerial Conference, Communication from the People's Republic of China and Pakistan, Revision, JOB/GC/110/Rev.1, JOB/CTG/2/Rev.1, JOB/SERV/243/Rev.1, JOB/DEV/39/Rev.1, 16 November 2016.

140 Ibid, at 1.

141 Ibid.

142 Ibid.

exactly what the Chinese submission covers. There are five sections in the proposal, but the main proposals are found in the first section, which addresses the following issues:<sup>143</sup>

- i. Simplified border measures for certain products under B2B (business to business) and B2C (business to consumer) mode, such as VAT (Value Added Tax) rebates, simplified fast-track procedures for customs clearance, better policies for returned goods, allowing establishment of bonded warehouse in the export destinations with simplified customs procedures and duty concessions.
- ii. Exchange information on regulatory requirements to facilitate the establishment of platforms for cross-border E-Commerce transactions such as e-WTP, which is also prominently featured in the proposal.
- iii. Promote paperless trade, and facilitate the data exchange between the single window of a WTO Member and cross-border E-Commerce transaction platforms, traders, and supporting service providers of trade facilitation, payment, logistics, and courier services, as well as the data exchange among different Member's single windows.
- iv. Exchange information on regulatory framework governing e-commerce supporting services, such as trade financing, electronic and online payment, logistics and courier, online customs clearance and other trade facilitation services, and bolster cooperation among the service suppliers.

Section 2 calls for enhanced transparency on the policy framework on cross-border e-commerce through the publication of relevant regulatory measures and making such information available to firms and other Members.<sup>144</sup> Section 3 suggests Members to exchange information on policies on digital certificates, electronic signature and electronic authentication, and promote their mutual recognitions.<sup>145</sup> Section 4 addresses the policies on other relevant issues such as consumer protection, privacy protection, and intellectual property rights.<sup>146</sup> The final Section calls for intensified discussion among the various WTO Councils and incorporation of e-commerce issues in the works by the WTO Secretariat, such as more research and training on e-commerce issues.<sup>147</sup>

#### IV. COMPARISON OF THE TWO APPROACHES

As the discussions above have illustrated, the US and China have taken quite different approaches to digital trade issues in trade agreements. This section discusses the major differences and explores the underlying reasons.

143 Ibid, at 2.

144 Ibid.

145 Ibid, at 3.

146 Ibid.

147 Ibid.

### A. Digital or trade?

Overall, the differences between the US and China are reflected in their chosen terminology, where one refers to them as ‘digital trade’ while the other prefers to call them ‘electronic commerce’. More specifically, the differences between the two include the following:

#### 1. *Scope of coverage*

The US proposals focus on the digital contents or services, and largely ignores the trade in goods issue. This is reflected in the US FTAs, which defines ‘digital products’ to include ‘computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically’.<sup>148</sup> Moreover, the US chose to deliberately leave open the issue of whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.<sup>149</sup> Such ‘constructive ambiguity’ avoids the hard battle that is often fought on services liberalization and make it easier to address all digital trade issues under a single framework rather than being divided into different rules for goods versus services. In contrast, the Chinese proposals mainly deal with trade in goods. Even where services are mentioned, they are mainly ancillary services helping to facilitate goods trade.<sup>150</sup> Such an approach is not surprising, as China has long taken a cautious approach on services liberalization, and most of its commitments are in mode 3 rather than mode 1.

#### 2. *Type of trade barrier*

The US proposals tend to go deep into the behind-the-border trade barriers, which include not only discriminations against or among digital products in general, but also specific types of trade barriers such as restrictions on cross-border data flow, data localization requirements, forced transfer of technology or source code, etc. On the other hand, China is concerned mostly with traditional border barriers such as high tariffs, cumbersome customs procedure, etc.

#### 3. *Regulatory approach*

Many of the US proposals call for deregulation or removal of regulations on the location of computer facilities, transfer of technology, disclosure of source code or propriety data. Instead of relying on government regulation, the US favours self-regulation by the industry and argues that the firms should be able to choose their own technology, network, authentication methods and encryption products. Even for technical standards which normally are set by the government, the US prefers a market-driven approach with significant involvement by firms in their development. China, however, prefers to deal with e-commerce related issues on a government-to-government basis. Even for initiatives which were originally started by private firms, such as the e-WTP, China still prefers it to be handled through the governments rather than going directly to firms.

148 TPP, Article 14.1.

149 TPP, footnote 3 in Chapter 14.

150 Communication from the People’s Republic of China and Pakistan, above n 139, at 2.

#### 4. Relationship with WTO rules

Many of the issues on the US shopping list have not been mentioned in the existing WTO rules, which were really designed to deal with traditional trade in goods issues and thus ill-equipped to handle the digital trade barriers such as data flow restrictions, localization requirements, and forced transfer of source codes. Thus, many of the digital trade rules proposed by the US really go beyond the narrow confines of the WTO regulatory framework. To address these issues, the WTO needs to realign its regulatory philosophy and redesign its outdated toolbox, which so far has largely been focusing on trade in tangible goods and border measures. The Chinese proposals, however, do not really go that far from the existing WTO rules. Instead, as China itself has stated, they simply ‘clarify and to improve the application of existing multilateral trading rules’ without adding much new.<sup>151</sup> Indeed, even if no new negotiations are conducted, the measures covered by the Chinese proposals could still be addressed within the existing WTO rules.

#### B. Reasons for the differences

Trade rules never exist in a vacuum. Instead, they often reflect the unique trade profiles of the countries proposing such rules and their own domestic regulatory frameworks.<sup>152</sup> These are also the reasons for the different approaches to e-commerce taken by the US and China.

##### 1. Nature of the trade

Among the top 10 internet companies in the world, six are US companies such as Amazon, Alphabet (Google), Facebook, Priceline, Ebay, Netflix, while the remaining four are Chinese companies including JD.com, Tencent, Alibaba, Baidu.<sup>153</sup> The US companies are mostly service providers which provide online search, social network or content services. In contrast, two of the top three Chinese companies sell mainly physical goods. This explains why the US focuses on digital services while China focuses on traditional trade in goods enabled by the internet.

The other two Chinese companies on the list, i.e. Tencent and Baidu provide, respectively social networking and search services. While they are often referred to respectively as the Facebook and the Google in China, they do not share the demands by the latter group for rules on cross-border digital trade because they are not global companies like their US counterparts. Instead, they serve the Chinese market almost exclusively and most of their facilities and operations are based in China. In contrast, while the main facilities of the US companies like Google and Facebook are often based in the US, they also have data centres at strategic locations around the world.<sup>154</sup> Thus, for them, it is crucial to have free flow of information across the

151 Ibid, at 1.

152 See e.g. Henry R. Nau, ‘Domestic Trade Politics and the Uruguay Round: An Overview’, in Henry R. Nau (ed.), *Domestic Trade Politics and the Uruguay Round* (Columbia University Press, 1989), at 1–25.

153 Wikipedia, List of largest Internet Companies, available at [https://en.wikipedia.org/wiki/List\\_of\\_largest\\_Internet\\_companies](https://en.wikipedia.org/wiki/List_of_largest_Internet_companies) (visited 20 April 2018).

154 See e.g. Google, Data center locations, available at <https://www.google.com/about/datacenters/inside/locations/index.html> (visited 20 April 2018); Rich Miller, Facebook Building Even Bigger Data Center Campuses, 20 February 2017, available at <https://datacenterfrontier.com/facebook-building-even-big-ger-data-center-campuses/> (visited 20 April 2018).

globe and autonomy in deciding where to locate their computing facilities and servers.

## 2. *Domestic regulatory framework*

In the history of the multilateral trading system, it is not unusual for countries to transplant rules from their domestic regulatory framework into the international trade agreements. For example, the transparency obligation under the General Agreement on Tariffs and Trade (GATT) was copied from the US Administrative Procedure Act (APA).<sup>155</sup> Similarly, it is well known that the GATT and WTO anti-dumping regime is modelled after Canadian and American statutes.<sup>156</sup> This is also the case with regard to e-commerce proposals from US and China.

In the US, the development of the internet companies benefited greatly from the lax regulatory environment. Such 'permissive legal framework', as argued by Anupam Chander, 'offers the United States as a sort of export-processing zone in which Internet entrepreneurs can experiment and establish services'.<sup>157</sup> According to Chander, the groundwork for dominance of US internet companies is laid by the following laws: free speech rights guaranteed by the First Amendment to the US Constitution; section 230 of the Communications Decency Act, which immunizes interactive computer service providers from legal claims arising from third-party speech published on their networks; copyright infringement liability protections under the safe harbour provisions of the Digital Millennium Copyright Act; and 'weak consumer privacy regulations'.<sup>158</sup> The aim of reducing regulation in the sector is even codified in the Telecommunication Act of 1996, which explicitly states that it is 'the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation'.<sup>159</sup> These laws minimized the risks for internet companies and allowed them to grow at exponential speed. Thus, it is no surprise that the US wishes to call for deregulation at the international level.

On the other hand, the development of the internet in China has always been subject to heavy government regulation. There are mainly two types of regulations. The first regulates the hardware or the facilities. Barely two years after the internet was introduced into China, the Chinese government issued the Provisional Regulations on the Management of International Networking of Computer

155 See Padideh Ala'i and Mathew D'Orsi, 'Transparency in International Economic Relations and the Role of the WTO', in Robert G. Vaughn (ed.), *Research Handbook on Transparency* (Cheltenham and Northampton, MA: Edward Elgar, 2014) at 370.

156 See Aradhna Aggarwal, *The Anti-dumping Agreement and Developing Countries: An Introduction* (Oxford University Press, 2007), Chapter 3: Genesis and Evolution of the Agreement, at 49–111; John J. Barceló III, 'A History of GATT Unfair Trade Remedy Law—Confusion of Purposes', 14 *World Economy*, 1991, 311–33, at 314–16.

157 Anupam Chander, *The Electronic Silk Road: How the Web Binds the World Together in Commerce* (Yale University Press, 2013), at 57.

158 *Ibid.*, at 57–58.

159 Telecommunication Act of 1996, 47 U.S.C. §230(b)(2), available at <https://www.law.cornell.edu/uscode/text/47/230> (visited 20 April 2018).

Information Networks<sup>160</sup> to regulate the development of the sector. According to the regulation, connection to international networks must go through international gateway provided by the Ministry of Posts and Telecommunications and firms and individuals are prohibited from establishing or using any other gateways.<sup>161</sup> A high level Economic Information Group is established under the State Council to regulate the sector<sup>162</sup> and all new Internet networks must be approved by the State Council.<sup>163</sup> Anyone caught accessing the internet through illegal channels could be fined up to 15,000 Chinese Yuan,<sup>164</sup> which was a hefty amount at the time.

The second type of regulations focus on the content. In 2000, the State Council issued the Regulation on Internet Information Service.<sup>165</sup> The Regulation prohibits a wide range of contents, such as information endangering national security, leaking state secrets, harming state honour and interests, spreading rumours, disrupting social order and stability.<sup>166</sup> As the items on the list are vaguely worded and often broadly interpreted, the Regulation operates like a sword of Damocles hanging over the heads of the internet users. Moreover, unlike the US, internet information service providers are not exonerated from liabilities arising from user-generated contents in China. Instead, they are not only required by the Regulation to ensure that the contents they themselves provide are legal,<sup>167</sup> but also shall not copy, publish or distribute any illegal information produced by their users or anyone else.<sup>168</sup> Once they discover such information being transmitted on their website, they shall 'terminate the transmission immediately and keep record and report to relevant authorities'.<sup>169</sup> If they fail to comply with these requirements, they could have their business licenses revoked, websites shutdown or even be subject to criminal liabilities.<sup>170</sup> This is not surprising, as the Chinese regulatory regime has always emphasized the need for censorship at the cost of freedom of expression by citing concerns over national security, public order, and public moral.<sup>171</sup>

With such tight restrictions, it is no surprise that few content providers from China could become real global players. As mentioned earlier, even though companies such as Tencent and Baidu are among the largest internet companies in the world, they primary serve the Chinese market and lack global presence. On the other hand, such constraints can be a blessing for the Chinese companies as well. As the

160 State Council, Provisional Regulations on the Management of International Networking of Computer Information Networks [Jisuanji Xinxu Wangluo Guoji Lianwang Guanli Zanxing Guiding], Guowuyuan Ling #195, 1 February 1996.

161 Ibid, Article 6.

162 Ibid, Article 5.

163 Ibid, Article 7.

164 Ibid, Article 14.

165 State Council, Regulation on Internet Information Service [Hulianwang Xinxu Fuwu Guanli Banfa], Guowuyuan Ling #292, 25 September 2000.

166 Ibid, Article 15.

167 Ibid, Article 13.

168 Ibid, Article 15.

169 Ibid, Article 16.

170 Ibid, Articles 20 and 23.

171 For a detailed analysis of the censorship regime in China, see Henry S. Gao, 'Google's China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS', 6 *Asian Journal of WTO & International Health Law and Policy* (AJWH), (2011) 347–85.

foreign companies wishing to enter the Chinese market are subject to the same restrictions, they find it particularly hard to adjust their business models developed in an open and free internet to fit the constricting regulatory environment in China. Thus, paradoxically, the internet restrictions in China also helped to shield firms like Baidu and Tencent from the competitions by Google and Facebook and effectively reserved the Chinese market to these home-grown firms, which quickly became the largest internet companies in the world by drawing from the enormous demands in the domestic Chinese market alone.

Moreover, with the heavy regulation in China, the internet companies realized that, if they were to achieve commercial success in China, they should align their commercial strategy with the government agenda, or, better yet, make it part of the government policy. For example, in 2015, the ‘internet+’ model proposed by Tencent CEO Pony Ma was Incorporated into the official government Work Report of the State Council as the ‘Internet+ Action Plan’.<sup>172</sup> The other example is Alibaba’s e-WTP initiative, which was not only taken up by the Chinese government, but also elevated to the international level by making its way into the G20 Communique and China’s official e-commerce proposal in the WTO. Thus, it is no surprise that China prefer to deal with e-commerce issues through the government, as that has been how the sector was developed in China.

## V. CONCLUSION

The rapid growth of e-commerce in the past two decades has created many challenges for the international trading system. In particular, the regulatory framework of the WTO, which was originally designed for the traditional offline trade model, has to grapple with issues such as the classification of e-commerce, application of existing trade rules to the sector, and how to design new rules that better reflect the realities of online trade. Due to the divergence of views among the WTO membership, efforts to revamp the rules in the WTO have largely failed. Disappointed over the lack of progress in the WTO, the US, as the champion of digital trade, had turned to various bilateral, plurilateral, and regional initiatives to push for the internationalization of digital trade rules which are based on the regulatory philosophy and approach in the US to tackle trade barriers facing US companies. Meanwhile, while initially reluctant to engage on the issue at the international level, China has also gradually warmed up to the issue and became more willing in negotiating e-commerce rules in its recent FTAs. Ahead of the Ministerial Conference in Buenos Aires, both the US and China have also submitted negotiating proposals on the issue in the WTO.

While both submissions are couched in exploratory language and neither claims to be a formal negotiating proposal, they are still useful as they tell us the major differences between the two. Overall, the US approach tends to focus more on the ‘digital’ nature of digital trade, while the Chinese approach prefers to address the issue from the traditional ‘trade’ perspective. Thus, the US submission focuses on the behind-the-border barriers, especially those relating to various services provided online by internet companies. In contrast, China is more concerned with the customs

172 Xinhua, ‘When China’s tech “big four” meet “Internet Plus”’, 9 March 2015, available at [http://china.org.cn/business/2015-03/09/content\\_35031639.htm](http://china.org.cn/business/2015-03/09/content_35031639.htm) (visited 20 April 2018).

and border issues, especially those relating to the facilitation of trade in goods bought via online platforms yet delivered in physical forms offline. Such differences are not really surprising, as they reveal the deep gap between the two: while the US internet companies have successfully moved their businesses entirely online by turning their commodity from tangible products to information or bits, Chinese companies still continue to trade physical goods or atoms, as mankind has done for centuries.

Which of the two approaches will win the support from other WTO Members? It might be natural to assume that the US approach is more appealing to developed country Members, which also share the comparative advantages in services trade, while the Chinese approach is more receptive to developing country Members, which mostly rely heavily on goods trade. However, such simplified views tells only part of the story. There are divergent views even within each camp. For developed countries, while they share the vision of the US in further promoting trade in services and knowledge, they might still fear the encroachment of American websites on their national culture at the same time. Moreover, as the negotiations in the TPP, TiSA, and TTIP have illustrated, the other developed countries demand higher levels of privacy and personal information protection than the US and try to reign in the abuse of market power by the American internet giants.<sup>173</sup> On the other hand, the Chinese call to build an online trade platform will probably find warm reception among developing countries, as such platform will benefit MSMEs, which account for most of the growth and jobs in many developing countries. Nonetheless, some developing countries might still be reluctant as they lack the financial resources to build such platform, or to invest in the hardwares and softwares necessary to facilitate cross-border e-commerce.<sup>174</sup> Even if China offers to provide the necessary financing for such projects, some developing countries might still be hesitant to commit as they might view this as a Trojan horse to sell more products to them by China, the largest producer and exporter of manufactured goods in the world.

Notwithstanding so many difficulties, I think it is still imperative for the WTO to start substantive work on e-commerce and digital trade, lest the WTO became irrelevant in this important sector with growing significance and immense potential. To move forward on the issue, the Members can start with uncontroversial issues with sufficient consensus among the membership, such as making permanent the moratorium on customs duties on e-commerce. As to the more controversial issues, the Members might wish to consider a positive-listing approach as under the GATS, or a system of tiered obligations for different categories of Members as under the Trade Facilitation Agreement. Hopefully, the Members can realize the significance of bringing e-commerce and digital trade within the framework of the multilateral trading system and seize the opportunity by building on the momentum of the Ministerial Decision and Joint Ministerial Declaration made at the 11th Ministerial Conference in Buenos Aires.

173 See European Parliament, TTIP: Trade agreements must not undermine EU data protection laws, say Civil Liberties MEPs, 31 March 2015, available at <http://www.europarl.europa.eu/news/en/news-room/content/20150330IPR39308/html/TTIP-Trade-agreements-must-not-undermine-EU-data-protection-laws-say-MEPs>. See also Leblond and Aaronson, above n 1.

174 See Tavengerwei, above n 106.