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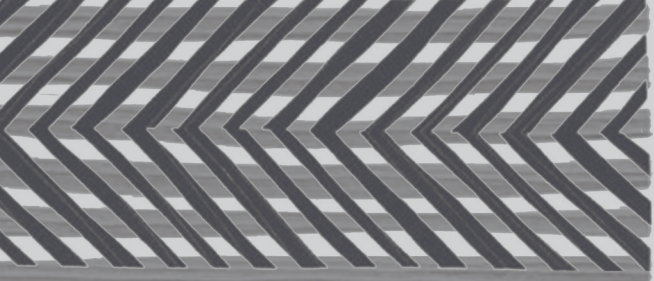
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**NEW RULES FOR
THE DIGITAL ECONOMY:**
Brazil in the international
negotiations on
e-commerce

Lucas da Silva Tasquetto

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INTRODUCTION

Digital technologies have been transforming the global economy with profound impacts on the way goods and services are developed, produced, marketed, distributed and consumed across borders. Transitioning to a knowledge-and-data-based economy requires more circulation of and access to data—mostly personal information! As such, the importance of transborder data flows cannot be overstated. And regulating them is central for securing resources and monetizing soft assets. Even if there is no common agreement on how a data-based economy is to be regulated, on the necessary flexibilities and exceptions, and particularly on whether data are ready for a binding language in international trade agreements, there have been movements to internationalize policies for e-commerce and transborder data flows².

The e-commerce agenda was embedded in trade multilateralism, initially by means of discussions on e-commerce within the World Trade Organization and the subsequent 1998 Work Program on Electronic Commerce (JOB/GC/144), which was defined as “the goods and services production, distribution, commercialization, and sale or supply by electronic means”. However, that agenda was enhanced in the context of various preferential trade agreements, thus becoming more complex and requiring greater convergence among trade and digital policy areas. In a debate built around Chinese and US technology companies and the EU implementation of the General Data Protection Regulation, more studies are still required from the perspective

¹ Faculty of the Federal University of the ABC's Graduate and Undergraduate Program on International Relations.

² UNCTAD. **Data protection regulations and international data flows: implications for trade and development.** New York and Geneva, United Nations, 2016. Available at: https://unctad.org/system/files/official-document/dtlstict2016d1_en.pdf

of developing countries, from the point of view of both regulation and digital strategies. Their economic capacity asymmetries to participate in a data-based industrial development are widening. Most developing countries will be Artificial Intelligence consumers, not producers—the same for other data-based sectors.

Historically, Brazil has had expressive participation in Internet governance forums, as well as in multilateral trade negotiations, though both agendas were conducted in isolation for quite some time. In the domestic sphere, the country has a tradition of protecting consumer rights and recently passed a law on Internet governance³, personal data privacy and protection⁴. Particularly after 2016, Brazilian trade policies have changed, with a new focus on negotiating bilateral free trade agreements and active participation in discussions around e-commerce, both bilaterally and within the WTO plurilateral negotiations.

It is therefore advisable to look into particularities of the Brazilian approach to e-commerce and of the balance between trade measures and essential digital issues that had been historically incorporated to the country's national and international agendas, such as consumer protection, personal data privacy and protection. Likewise, it is important to understand how Brazil's positions about e-commerce rank in the digital regulatory race between the US, the EU and China⁵.

1. THE E-COMMERCE AGENDA UNDER THE TRANSPACIFIC PARTNERSHIP (TPP)

The main proponent of an e-commerce agenda, the US started to gradually include more comprehensive rules on this theme in their trade agreements. Their new model for obligations thereof started in 2004, with the free trade agreements entered into with Australia, Singapore and Chile, eventually leading to the Trans-Pacific Partnership (TPP) in 2016. Though the US retired from the agreement under the Trump administration, the chapter on e-commerce

³ BRAZIL. **Lei n. 12.965/2014, Marco Civil da Internet**. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm.

⁴ BRAZIL. **Lei n. 13.709/2018. Lei Geral sobre Proteção de Dados Pessoais (LGPD)**. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13709.htm.

⁵ See AARONSON, Susan Ariel; LEBLOND, Patrick. **Another digital divide: the rise of data realms and its implications for the WTO**. Oxford: Journal of International Economic Law, 2018. v. 21, n. 2, p. 245-272.

continued with the CPTPP, among the 11 remaining members, and moved on to influence new negotiations, for both the Pacific and the US partners in other initiatives.

Specific obligations under the TPP regulatory model for e-commerce encompass at least three categories, starting from passive obligations to stop member countries from adopting policies seen as protectionist, such as those that ban custom duties on electronic transmissions and non-discrimination against foreign digital products and others that ban restrictions to the free circulation of data as well as to the location of servers, and those that prohibit forced disclosure of the source-code. At the same time, the agreement also includes provisions requiring governments to introduce or maintain regulatory structures that will facilitate the development of e-commerce, particularly electronic transactions and signatures or electronic authentication methods. Lastly, the agreement includes non-binding provisions on consumer protection as well as personal data protection.⁶

Within that regulatory environment, there is permanent moratory on excising customs dues on electronic transmissions, including electronically transmitted content, among member countries. Governments can also impose fees and taxes or other domestic charges, provided they are compatible with the agreement. Particularly, banning custom excises on electronic transmissions will have far reaching implications for the participation of developing countries in global trade and in their industrialization efforts. These countries are, mostly, net importers of electronic transmissions. With e-commerce growing faster than physical trade, and with the development of digital technologies, such as 3-D printing and Big Data analysis, potential annual revenue losses due to customs fees will be much bigger for them than for the developed countries.⁷

Still, permission for electronic transborder transfer of data is imposed, including personal information, when this is intended for the commercial purposes of anyone in a member country. Exceptions are made when a policy or law seeks to achieve a “legitimate objective of public order”, which is not defined and can be disputed. A ban is added to that free circulation of data, which that no government may demand barriers to the localization of computer servers and storage devices for commercial data processing purposes. Therefore, one party will not require an individual from the other party to

⁶ GAO, Henry. **Digital or trade? The contrasting approaches of China and US to digital trade**. Oxford: Journal of International Economic Law, 2018. 0, p. 1–25.

⁷ BANGA, Rashmi. **Growing trade in electronic transmissions and implications for the South**. United Nations, UNCTAD Research Paper, February 2019. No. 29.

use or establish IT facilities in their own territory as a condition to carry out their own business there. Likewise, the TPP regulatory model bans forced technology transfers. A foreign investor cannot be forced to transfer any given technology, a production process or any other proprietary knowledge to somebody else in the country as a condition to establish or incur investments there; or to buy, use or give preference to local technology. Source-code and algorithms are also protected. A foreign source-code owner cannot be forced to transfer or reveal that to anyone in the other party, including the government. There is an exception for software used in critical infrastructure, which is equally not defined.

Those provisions broadly reflect the US e-commerce agenda, responding to the interests of their main technology companies. For more than a decade now, many technology industry groups have intensely lobbied for international trade rules that would protect them from global scale regulation⁸. This movement initially displaced Internet governance elements to the international trade regime and then pushed for stronger e-commerce rules within.⁹ Corporate demands were consolidated as State policy when, in 2014, the US Trade Representative published *The Digital 2 Dozen* principles to instruct future trade policies and negotiations. TPP's chapter on e-commerce was first to adopt them.

The influence of an e-commerce agenda as posed by the TPP is now reflecting upon trade multilateralism as it sets the grounds for plurilateral negotiations on the theme at hand since 2019 amongst the 86 WTO member countries, including Brazil.

2. BRAZIL IN THE MIDST OF INTERNATIONAL NEGOTIATIONS ON E-COMMERCE

Intensified after 2016, changes to Brazil's trade policy have influenced the design of the country's multilateral proposals and bilateral negotiations on e-commerce and their permeability to the Brazilian personal data privacy and protection agenda. Brazil moved relatively fast from a defensive position in the negotiation of new rules to a closer approach to the digital trade agenda in the TPP model. At the WTO, since the preparatory work towards the 11th

⁸ KELSEY, Jane. **Digital trade rules and big tech: surrendering public good to private power.** Ferney-Voltaire. France: Public Services International, 2020.

⁹ AZMEH, Shamel; FOSTER, Christopher; ECHAVARRI, Jaime. **The international trade regime and the quest for free digital trade.** *International Studies Review*, 2019. 0, p. 1–22.

Ministerial Conference in Buenos Aires in December 2017, the Brazilian delegation has presented 9 documents.¹⁰

Preparation for the Buenos Aires Conference helped bring domestic digital and trade positions closer together. In 2016, the Brazilian delegation delivered a document to the WTO General Council¹¹. This document starts by reiterating the definition of e-commerce, as in WTO's 1998 Working Program on E-Commerce and clarifies that discussions would not comprise disciplines on goods. In general, there is an outspoken attempt at balancing a free and open Internet for all legitimate commercial purposes and the development goals with enforced governmental rights to adopt legitimate purpose public policies. This document enjoyed contributions arising out of Brazilian discussions around the Civil Rights Framework for the Internet. It defends regulatory structures for consumer protection as well as personal data privacy and protection, with mandatory user protection, and suggests provisions on network neutrality with binding language to keep telecommunications operators from discriminating data packages. At the same time, the General Agreement on Trade in Services (GATS) is indicated as the main instrument to regulate on e-commerce, where the country reinforces the need to ensure technology transfer. The document reveals a concern with ensuring space for public policies—mandatory user protection and flexibilities for the State.

In the sequence, another two documents highlighted three areas of potential convergence for the WTO to implement copyright and the digital environment, in an attempt to build shared understanding between member countries on transparency, a balance between rights and obligations, and copyright territoriality¹². A third one shared with members Argentina and Paraguay the GMC Resolution 37/06, which addresses electronic signatures in the MERCOSUR and reinforces electronic signature as a crucial issue in e-commerce¹³.

¹⁰ The first one was presented still during President Dilma's ousting, another 5 originally during Michel Temer's administration—3 of which circulated again in 2019—and the remainder during Bolsonaro's administration and in the context of plurilateral e-commerce negotiations within the WTO.

¹¹ WTO. **Work Programme on Electronic Commerce** (Non-Paper From Brazil, 2016). JOB/GC/98, 20 July 2016.

¹² WTO. **Electronic commerce and copyright** (Communication from Brazil and Argentina, 2017). JOB/GC/113Rev.1, 07 March 2017; WTO. **Joint statement on electronic commerce – electronic commerce and copyright** (Communication from Brazil and Argentina, 2019). INF/ECOM/16Rev.1, 25 March 2019.

¹³ WTO. **Work programme on electronic commerce** (Communication from Argentina, Brazil and Paraguay, 2016). JOB/GC/115, 21 December 2016.

Three out of the four communications sent by the Brazilian delegation after the Davos Joint Statement on E-commerce (WinnieTeca/L/1056), issued on January 25, 2019, brought contributions to a broad range of issues on e-commerce. In an about-face on negotiating binding rules on the theme, the country forgoes defending regulation of e-commerce and strives for an outstanding role in negotiations¹⁴, in increasing alignment with US proposals¹⁵.

Originally a JOB/GC/176 document, INF/ECOM/3¹⁶, issued in April 12, 2018, suggested four negotiation pillars that would include “access to market” in the services and non-services sectors related with new business models based on the digital environment and its infrastructure¹⁷, “e-commerce facilitation”¹⁸, “e-commerce development” and a “reference document on e-commerce”¹⁹. Concerning Brazil’s historical role defending the main positions of developing countries in trade multilateralism, some points come forth in the document, particularly those related with the concepts of “flexibility” and “development”. The country advocated a more flexible approach to any potential WTO outcome on the issue, in an arrangement that could allow for adequate level of ambition to developing as well as less developed countries, without reducing the overall level of ambition in negotiations as a whole.

At the same time, the notion of “development” was presented as a central element in e-commerce discussions, across the board, on the basis of Costa Rica’s suggested Work Program on E-commerce for Development (JOB/GC/139)²⁰.

¹⁴ KANTH, Ravi. **US and allies circulated proposals on e-com pluri-accord**. Third World Network Info Service on WTO and Trade issues, 2019. Available at: <https://www.twn.my/title2/wto.info/2019/ti190315.htm>.

¹⁵ WTO. **Joint statement on electronic commerce** (Communication from the United States, 2019). INF/ECOM/23, 26 April 2019.

¹⁶ WTO. **Exploratory work on electronic commerce** (Non-Paper from Brazil, 2019). INF/ECOM/3, 25 March 2019.

¹⁷ Under the two categories here, a discussion is proposed on the technological neutrality of the GATS and the web, on transfer of or access to the source code, on transborder electronic transmissions and on a permanent customs rights moratory for electronic transmissions. According to the proposal, work on these issues would be conducted under existing GATT and GATS rules, and it would not require new rules, in principle.

¹⁸ On the pillar of facilitating e-commerce, debates would revolve around electronic authentication, reliable services and electronic signatures, unsolicited commercial messages, and consumer defense.

¹⁹ The last pillar would include the mains e-commerce topics requiring new rules since they are not explicitly contained in the previous WTO agreements.

²⁰ Costa Rica proposed an agenda based on six areas: information and communication technology (ICT) infrastructure services; commercial logistics; payment solutions; legal and regulatory frameworks; development of trade and technical assistance skills; and access to funding. The African Group has therefore presented a document indicating the “E-commerce Agenda for Development” as an “Trade Liberalization Agenda”. Among the various issues and criticism, the countries pointed at particularly six areas identified by Costa Rica as totally

Presented again on the same day, the INF/ECOM/17²¹, originally JOB/GC/203, from October 30, 2018, introduced more profound suggestions on e-contracts, payment systems, competition, consumer protection, regulatory environment and transborder information transference by digital means. Particularly on the latter topic, that was the first time in the WTO that Brazil showed willingness to ensure transborder transference of data with binding language.

Together with proposals that are broadly aligned with the topics pointed as essential by the US for an agreement, Brazil presented a final proposal²², though it contained more exceptions and caveats than the US proposal for the central provisions²³. Though there was no provision on server location and on access to transfer of source code, the document carried the same US provisions on transborder transfer of information and on lifting custom fees from electronic transmissions, explicitly excluding the electronically transmitted content. However, unlike the US proposal, the former did not contain any provision about not imposing any greater restrictions to information transfer than necessary to achieve public policy objectives²⁴.

In July 2019, Brazil proposed yet another general proposal on e-commerce, with a structure that is similar to the previous one but excludes some significant points²⁵: provisions on the right to regulate and on network neutrality; explicit mention of international transference of personal data with a verbatim list of Art. 33 provisions, except of Section 9 of the General Law on Per-

divorced from the discussions on development defended by some member countries, such as those within the African Group.

(WTO. **The work programme on electronic commerce** (Statement by the African Group, 2017). JOB/GC/144, 20 October 2017.

²¹ WTO. **Joint statement on electronic commerce** (Communication from Brazil, 2019). INF/ECOM/17, 25 March 2019.

²² WTO. **Joint statement on electronic commerce** (Communication from Brazil, 2019). INF/ECOM/27, 30 April 2019.

²³ **U.S., others call for cross-border data flow, ns localization in WTO e-commerce talks.** Inside U.S. Trade, 05 March 2019. Available at: <https://insidetrade.com/daily-news/us-others-call-cross-border-data-flow-no-localization-wto-e-commerce-talks>.

²⁴ The proposal considers that banning customs excise on electronic transmissions “will not stop one Part from imposing customs taxes, domestic tariffs, fees or other charges on electronically transmitted content, provided those taxes, fees and other charges are imposed in compliance with this Reference Agreement/Document and in a “non-discriminatory” fashion, and that, “subject to the conditions in their respective domestic laws, member countries have the right to tax digital commerce according to revenues and profits generated in their territories, even if platforms of electronic suppliers do not have a commercial footprint in their territories” (WTO. **Joint statement on electronic commerce** (Communication from Brazil, 2019). INF/ECOM/27, 30 April 2019).

²⁵ WTO. **Joint statement on electronic commerce** (Communication from Brazil, 2019). INF/ECOM/27/Rev.1, 09 July 2019.

sonal Data Protection; and provisions on data protection from the origin and per standard, equally inspired on the LGPD, particularly on its Art. 48. Lastly, the issue of customs fees on e-commerce is more exacting and contains less exceptions. Later, in October 2019, the country offered an amendment to document INF/ECOM/27/Rev.1, containing other proposals on aspects related to facilitating digital trade²⁶. Issues related with e-commerce administrative documents were addressed, including single window data exchange and system interoperability, electronic availability of trade related information, and use of technology to clear goods.

Table 1. Brazil's Documents on Electronic Trade at the WTO

Date	Communications	Theme	Content
20.07.16	JOB/GC/98	General	<i>Regulatory contributions (Consumer confidence enhancing measures, Trade facilitating measures), Open Markets (Liberalization commitments, Measures ensuring openness).</i>
12.12.16 25.03.19	JOB/IP/19 (AR, PR) INF/ECOM/16/Rev.1	<i>Copyright</i>	<i>Transparency, Jurisdiction and Balance of rights and obligations</i>
21.12.16	JOB/GC/115 (AR, PR)	Electronic signature	<i>MERCOSUR (Resolution GMC 37/06): Scope of Application, Principles, Definitions, Legal effects of electronic documents and electronic signatures, Advanced electronic signature - Mutual recognition, Qualified digital certificates, Provision of certification services, Liability, Protection of personal data</i>
07.03.17	JOB/GC/113Rev.1 (AR)	<i>Copyright</i>	<i>Transparency, Balance of rights and obligations, Territoriality of copyright</i>
12.04.18 25.03.19	JOB/GC/176 INF/ECOM/3	Geral	<i>Scope, Principles, Development, Four negotiating pillars (Market access, Electronic commerce facilitation, Development of electronic commerce, Reference paper on electronic commerce)</i>

²⁶ WTO. **Joint statement on electronic commerce** (Communication from Brazil, 2019). INF/ECOM/27/Rev.1/Add.1, 07 October 2019.

30.10.18 25.03.19	JOB/GC/203 INF/ECOM/17	General	<i>Principles, Electronic Contracts (Electronic signature and digital certification, Unsolicited commercial communications), Online payment systems, Return period and taxation, Copyright, Competition, Consumer protection, Regulatory Environment (Prior Comment, Publication, Notification, Paperless Trading, Principle of No Prior Authorization, Cooperation on regulatory issues), Cross-Border Transfer of Information by Electronic Means, Cybersecurity, Personal Data Protection, Data protection by design and default, Jurisdiction, Business trust and obligations</i>
30.04.19	INF/ECOM/27	General	<i>Definitions, Principles, Electronic Contracts (Electronic signature and digital certification, Unsolicited commercial communications), Taxation, Competition, Consumer Protection, Regulatory Environment (Paperless Trading, Principle of no prior authorization, Cooperation on regulatory issues), Cross-Border Transfer of Information by Electronic Means, Cybersecurity, Personal Data Protection, General Exceptions</i>
09.07.19	INF/ECOM/27/Rev.1	General	<i>Definitions, Principles, Electronic Contracts (Electronic signature and digital certification, Unsolicited commercial communications), Taxation, Competition, Consumer Protection, Regulatory Environment (Paperless Trading, Cooperation on regulatory issues), Cross-Border Transfer of Information by Electronic Means, Cybersecurity, Personal Data Protection, General Exceptions</i>
07.10.19	INF/ECOM/27/Rev.1/ Add.1	Facilitating digital commerce	<i>Electronic trade administration documents, Single window's data exchange and system interoperability, Electronic availability of trade related information, Use of technology for the release and clearance of goods</i>

Even before, but particularly after the Buenos Aires Ministerial Conference, Brazil has also received proposals to negotiate e-commerce rules in bilateral agreements. Brazil and Chile signed a bilateral free trade agreement on November 21, 2018, that will be incorporated to the Economic Complementarity Agreement N. 35, previously signed between Chile and the Mercosur member countries. Under the new agreement, both countries undertake commitments in 24 non-tariff areas. This is the first time Brazil enters bilateral agreements on issues such as e-commerce, good regulatory practices, regional and global value chains, in addition to trade and gender, environment and labor.

With a specific chapter in the field of e-commerce, the agreement adopted the TPP²⁷ language and structure as reference, including the promotion of transborder free flow of information (Article 10.12), non-mandatory localization of the other part's servers in the national territory (Article 10.13) and commitment to not impose custom duties on electronic transmissions by persons from either country (Article 10.3), though it does not provide any discipline to prohibit source-code disclosure. The TPP model was also upheld in the telecommunications chapter with provisions on network neutrality²⁸. Article 11.11 does not create any legal obligation. Unlike what Brazil proposed in its documents at the WTO, the provisions on network neutrality adopts the language of best-endeavor.

Lastly, in the context of concluding negotiations on the EU-Mercosur Association Agreement, in specific subsections, disciplines relative to regulating telecommunications e-commerce are adopted. The European Union plays a crucial role in the global governance of personal data privacy and protection, and, since 2015, the European Commission's trade and investment strategy recognizes transborder data flows as an offensive interest for the block²⁹. In its turn, Brazil also faces the challenge of reconciling its General Law on Personal Data Protection, which will come in force in May 2021, with the recent provision on negotiating commitments on economy, in ever-growing alignment with US interests (*Silicon Valley Consensus*³⁰).

Subsection 6 e-commerce in the Chapter on "Trade in Services and Establishment" presents a yet limited set of rules that apply to all sectors. Binding provisions were adopted to ban customs duties on electronic transmissions and promote recognition of electronic documents and signatures, in addition to a commitment that the parties will work together on the fight against spam and on consumer protection.

In its Article 51, the subsection on e-commerce adopts the "understanding on Information Technology service". Promoted since the early 2000's by the

²⁷ For a discussion on the impacts of mega-regional agreements, even for third-party countries, see: BENVENISTI, Eyal. **Democracy captured: the mega-regional agreements and the future of global public law**. Constellations, 2016. v. 23, n. 1.

²⁸ NEERA, RS. **Trade rules for the digital economy: charting new waters at the WTO**. World Trade Review, 2019. S1.

²⁹ YAKOVLEVA, Svetlana; IRION, Kristina. **Pitching trade against privacy: reconciling EU governance of personal data flows with external trade**. International Data Privacy Law, 2020. p. 1-21.

³⁰ STREINZ, Thomas. "Digital megaregulation uncontested? TPP's model for the global digital economy". In: **Megaregulation Contested: Global Economic Ordering After TPP**, ed. SUNAMI, Atsushi. New York: Oxford University Press, 2019, p. 312-342.

European Union at the WTO and in their free trade agreements, the “understanding” subtly expands the classification of information technology services in their trade-in-service agreements. Adhering to this EU open definition ensures virtually unrestricted access to digital infrastructure companies and operation with fairly limited regulation. Full commitment with market access rules and national treatment obligations would enhance this framework and hinder the development of local competitors. In the words of J. Kelsey, the “understanding” may work as a Trojan Horse for e-commerce rules to which some of the developing countries still resist in trade agreements.³¹

Table 2. Regional trade agreements with rules on e-commerce

Date	Doc	Theme	Content
21.11.18	Acuerdo de Libre Comercio entre la República de Chile y la República Federativa de Brasil	Chapter 10: e-commerce	<i>Definiciones, Ámbito de Aplicación y Disposiciones Generales, Derechos Aduaneros, Principio de No Discriminación (Las Partes reconocen que hay un importante debate en foros internacionales), Marco Legal para las Transacciones Electrónicas, Firmas Electrónicas Avanzadas o Calificadas, Protección al Consumidor en Línea, Protección de los Datos Personales, Administración del Comercio Sin Papel, Principios sobre el Acceso y el Uso del Internet para el Comercio Electrónico, Cooperación en Asuntos de Ciberseguridad, Transferencia Transfronteriza de Información por Medios Electrónicos, Ubicación de las Instalaciones Informáticas, Comunicaciones Comerciales Electrónicas No Solicitadas, Cooperación, Relación con Otros Capítulos.</i>
28.06.19	EU-Mercosur Association Agreement	Trade in Services and Establishment: Sub-Section 6 E-commerce	<i>Objective and scope, Technological neutrality, Definitions, Customs duties on electronic transmissions, Principle of no prior authorization, Conclusion of contracts by electronic means, Electronic signature and authentication services, Unsolicited direct marketing communications, Consumer Protection, Regulatory cooperation on e-commerce, Understanding on computer services.</i>

³¹ KELSEY, Jane. **Understanding the European Union’s understanding on computer and related services.** Penang, Malaysia: Third World Network, 2019.

3. FINAL CONSIDERATIONS

In a context of exponential digitalization of the economy, if digital transformation gains are to be more inclusive, the way countries in different stages of development engage in digital commercial transactions must be observed³². Though the pressure for uniform international rules increases, the challenges of the digital economy and the capacity different countries have to enjoy their expansion are still wide apart. Unless adequately faced, the digital divide inside and between countries will widen, thus exacerbating existing inequalities³³. In the digital economy, Brazilians “are purely consumers, not protagonists”³⁴, which places the country in a position of economic and political vulnerability. In parallel, investments in science, technology and innovation wane. As it is, the e-commerce agenda does not address basic infrastructure disparity issues, access to web and room for innovation.

Notwithstanding, in a comparison among different positions presented by the other WTO member countries, moments before and during the 11th Ministerial Conference in 2017, developing countries could not be considered as a whole on the basis of their particular positions in e-commerce negotiations³⁵. The Brazilian resistance to undertake binding commitments on cross-border data flows and other aspects of the digital realm, under the aegis of e-commerce, seems to be broken. Under a commercial approach, issues related with Internet governance and e-commerce became “peripheral areas”, ready to be included in trade-offs within new trade agreements.

³² GONZÁLEZ; J López; JOUANJEAN, M. **Digital trade: developing a framework for analysis**: Paris. OECD Trade Policy Papers, 2017. No. 205. OECD Publishing.

³³ UNCTAD. **The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development**. New York and Geneva: United Nations, 2019.

³⁴ ABRAMOVAY Ricardo. **Na economia digital, somos puramente consumidores, em vez de protagonistas**. *CBN*, 05 Maio de 2019. Available at: <https://m.cbn.globoradio.globo.com/media/audio/258785/na-economia-digital-somos-puramente-consumidores-e.htm>

³⁵ On the one hand, Chile and Paraguay, together with Australia, Canada, European Union, Korea and Norway (JOB/GC/140) defended creating a working group right after the Ministerial Conference in order to start preparing for negotiations on e-commerce. On the one hand, the African Group did not agree to go beyond the framework of the Work Program on e-commerce. Between the two contrary positions, China focused on trade facilitation rules (JOB/GC/142) while Costa Rica brought a proposal to establish an “E-commerce Agenda for Development”, allegedly to factor developing country needs in for e-commerce, in a joint effort by the WTO, UNCTAD, ITC and the World Bank (JOB/GC/139). At the end of the Ministerial encounter, together with another 44 WTO member countries, Brazil signed the Joint Declaration on E-commerce, including China, Nigeria, Russia and another ten Latin American countries. Consequently, signatories commit to start joint exploratory efforts for future WTO negotiations on e-commerce related aspects.

Still, can we possibly point at a particular position Brazil has taken on e-commerce regulation?

Brazil's early manifestations on the theme within the WTO explicitly reflected how developing countries need flexibilities in negotiations, measures to ensure technology transfer, binding rules on regulatory frameworks for consumer protection, personal data privacy and protection, with mandatory user protections. In addition to that, network neutrality provisions were suggested with binding language to stop telecommunication operators discriminating data packages. Back then, significant contributions were incorporated to the proposals, both on domestic regulations for consumer, personal data privacy and protection, and on Brazilian participation in international Internet governance forums. The General Law on Data Protection was expected to pass in 2018, thus reinforcing the permeability between the digital and the commercial agendas.

However, the free trade agreement with Chile, also in 2018, and the more recent documents presented at the WTO during plurilateral negotiations on e-commerce, closer to the main points brought by the US e-commerce agenda, pointed at another direction. Particularly on the agreement with Chile, Chapter 14 of the CPTPP was adopted as reference for negotiation, with binding regulation on the promotion of cross-border data flows, the ban on server localization requirements and the imposition of customs duties on electronic transmissions, while maintaining exceptions to regulate the objectives of public policies and privacy protection. It does not address the need for political space to accommodate digital industrial policies, nor does it adequately ensure domestic policies on personal data privacy and protection.

Considering what has already been pointed as the main regulatory frameworks on digital regulation, it would be as if Brazil had adopted a European approach to personal data privacy and protection, based on the EU's General Data Protection Regulation (GDPR), at the same time as, in international trade negotiations, it seems to consolidate commitments in the wake of the US model for e-commerce and their approach to personal data privacy and protection in trade agreements. The reasons for that point at changes to the bearings of the national trade policies as of 2016, with greater commercial emphasis in the definition of positions related, as well, to non-commercial issues; the trade negotiations focus on North-South relations and on Pacific Alliance countries in Latin America; and, lastly, greater political and commercial alignment with the United States that reflects upon Brazil's position within the WTO.

Consequently, e-commerce and other sectors are potentially subject to trade-offs among several regulatory and economic sectors for access to the

Brazilian goods and services sector. The consequences can be vast: from the legal point of view, as it exposes the country to potential shocks between national and international rules; from the commercial point of view, with impacts on the space for data-based digital industrial policies; from the civil rights point of view, with potential individual and fundamental rights mitigation, such as personal data privacy and protection, to the detriment of commercial interests.

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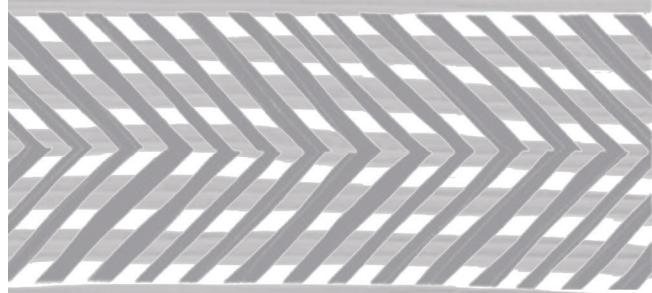
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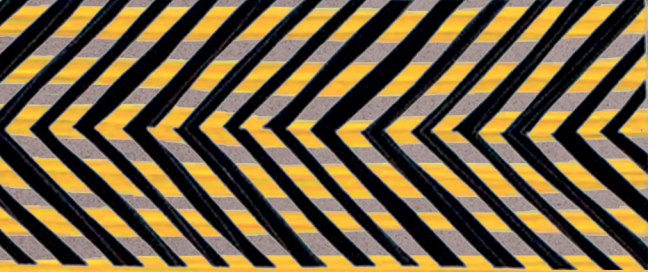
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