25 years in making, WTO still stalls on e-commerce deal

BY KEITH M. ROCKWELL
SENIOR RESEARCH FELLOW, HINRICH FOUNDATION
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For many businesses – large and small – the ongoing talks to draw up new multilateral rules on e-commerce may be the most consequential global trade negotiations underway today. These talks among 87 members of the 164-strong World Trade Organization (WTO) could result in an agreement that shaves billions off trade costs, provides the worldwide framework for digital trade, creates a common global standard for online paperwork, and locks in duty-free status for e-commerce transmissions.

But if the negotiations end in stalemate, that would mean another body blow to the credibility of the Geneva-based institution. Furthermore, this failure would entrench the fragmentation of e-commerce regulations around the world. Global governance of this critical sector would be largely split among three groupings of economies, each with its own often ideologically clashing perspectives on how best to regulate data flows.

A failure to sort out the jumble of regulatory frameworks would mean higher costs for all businesses and could lock many smaller companies out of international markets. It could result, for the first time, in tariffs being applied to trade in services. A breakdown in these negotiations also risks propelling the already conflict-strewn high-tech sector into a spiral of trade retaliation.

Failure to reach agreement could also reinforce the notion that large economies can go it alone in establishing unilateral standards, imposing them indiscriminately on the rest of the world. Such a trend is already underway (i.e., product safety and agricultural trade standards) and could well accelerate if the talks in Geneva fail to deliver an agreement by the end of 2023 as negotiators hope. A collapse in the talks would deal a major setback to the WTO and the potential plurilateral route for negotiations.

The stakes are very high indeed.

E-commerce is a big deal. According to Statista, global e-commerce retail sales hit $5.7 trillion in 2022 and will reach $6.3 trillion in 2023.1 In the United States, retail e-commerce sales rose to $265.9 billion in 2021, nearly 15% of overall retail sales, and at 3%, growth in the sector was more than four times that of total retail sales.2

All indicators point to electronic sales growing sharply for years to come. Yet, there are no global rules to govern e-commerce.
A track record of stumbles

It’s not exactly that the subject has been ignored. As far back as the 1998 Ministerial Conference in Geneva, WTO members agreed to start work on developing e-commerce rules. But the structure established then and under which WTO negotiators have labored since is shambolic and seemingly designed to guarantee an impasse. Work was divided between four WTO Councils and Committees—the Councils on Trade in Goods, Trade in Services, Trade Related Intellectual Property, and the Development Committee. This work was to be overseen by the preeminent WTO body in Geneva, the General Council.

The plodding nature of the multilateral work led many negotiators to pursue talks regionally and bilaterally. The faulty architecture was acknowledged by the General Council itself when it established an informal group to examine cross-cutting issues that straddle different WTO agreements and working groups and to navigate a more promising path forward. But just as this sub-group was gaining traction, things came to a screeching halt. In October 2016, South Africa objected to the direction the group was going and called for its work to be terminated. Pretoria, for example, isn’t participating in the current talks due to worries that the streamlined nature of the discussions was giving rise to negotiations aimed at charting new rules for e-commerce. South Africa was opposed to opening any negotiations that fell outside the scope of the Doha Development Agenda, a broad trade road that went off the rails in 2008 and was effectively killed off at the 2015 Nairobi Ministerial Conference, but to which a small group of countries continued to cling.
Frustrated negotiators responded to the South African roadblock a year later when 71 members turned away from a multilateral approach and announced at the Buenos Aires Ministerial Conference their intention to launch plurilateral negotiations. These negotiations, as well as those on investment facilitation, domestic regulation in services, and several other topics are conducted among smaller groups of economies and their outcomes are available to all other WTO signatories. They are collectively, and somewhat cumbersomely, known as Joint Statement Initiatives.

After Buenos Aires, things suddenly began to move. Under the stewardship of the ambassadors of Australia, Japan, and Singapore, the WTO members participating in the negotiations, now numbering 87, agreed on ten or so important topics including consumer protection, spam, e-authentication, e-signatures, e-invoicing, electronic transactions frameworks, and open internet access. In early December, members of the e-commerce negotiating group said the objective is to accelerate work with an eye towards striking an overall deal by the end of 2023.

“As we approach the end of the year, I think it’s timely for us to start thinking ahead and reflect on how we can accelerate the pace of negotiations next year with the aim of reaching substantial conclusions,” said Tan Hung Seng, Singapore’s ambassador to the WTO and the incoming chair for the 2023 plenary meetings, last year.

The areas on which the parties have agreed are important, particularly for smaller exporters, because they bring consistency and predictability to the procedures and documentation required for digital trade. But little progress has been made in bridging differences on the critically important issues of cross-border data flows, data localization, and the forced transfer of source codes. As always with the WTO, politics have thwarted progress. Major players have developed deeply held and often incompatible convictions on how the global e-commerce landscape should be shaped.

What does this mean for the future of the talks? Might members agree to pocket the gains already recorded on the bread-and-butter issues and agree to disagree on the politically contentious ones? Might some members break off and form their own rules regardless of what others want? Could a souring of the talks lead to a breakdown on the WTO moratorium on the application of duties on e-commerce transmissions which underpin global growth in services trade, hurling the world’s trading system into unchartered waters as governments take the unprecedented step of slapping tariffs on services? Or might these differences simply push the talks to gravitate outside the WTO altogether?
Shifting the talks outside the WTO is no far-fetched proposition. Trade negotiators have already invested vast amounts of time and effort in the development of bilateral and regional e-commerce initiatives. This has been both positive and negative for the global talks. On the positive side, when WTO negotiations commenced in earnest, delegates were already well-versed on the issues. Delegates had already done a great deal of technical work and important trade partners had developed alliances. But these alliances widened the divergences in rulemaking and many of the decisions taken in those various negotiations led to the discord we see in the WTO today.

In February 2016, the 11 countries that now comprise the Comprehensive and Progressive Trans-Pacific Partnership plus the United States (then collectively known as the Trans-Pacific Partnership) struck the first agreement on e-commerce. In 2019, the United States and Japan struck a deal building on this agreement. A year later, Washington reached a deal as part of the US-Mexico-Canada agreement that built on the CPTPP accord and extended it to cover financial services.

Chile, Singapore, and New Zealand entered into agreements that encompassed new elements including cross-border data flows and localization of data. The agreement between Australia and Singapore introduced clauses that enable enterprises to transfer data across borders without the requirement that data be stored locally. Source code protections were also introduced.

The European Union (EU) was not standing by idly. Brussels struck a deal with Canada that came into force in 2017. This agreement was among the first to include provisions for the protection of personal information. Unlike the deals among the Pacific countries, however, the deal did not cover cross-border data flows.

This would be a recurring theme with the EU e-commerce agreements. Deals were reached with Japan, Singapore, Vietnam, Mexico, the four-nation Mercosur group, and Britain. Only the deal with the British, reached in the context of the Brexit separation negotiations, addresses cross-border data flows.
Three global ‘blocs’ emerge on e-commerce governance

Pascal Kerneis, managing director of the European Services Forum and a longtime advisor to the EU Commission, says the WTO membership can be broken into three categories on the issue of cross-border data flows.

The first grouping, comprised of the 11 members of the CPTPP, South Korea, Taiwan, Britain, and the United States, prioritizes business interests, he explains. These countries believe data should flow smoothly across borders and businesses should not be burdened with the additional costs arising from having to store data in multiple localities.

The second group includes around 40 countries – the 27 Member states of the European Union, plus other European countries such as Switzerland, Norway, and Georgia. Colombia belongs to this group as well. The central tenet of this group, argues Mr. Kerneis, is the emphasis on the rights of citizens. It’s fine for data to flow freely and data localization should not be mandatory, but the priority needs to be the protection of personal data and individual privacy. The centrality of consumer privacy is embodied in the EU’s comprehensive domestic legislation, the General Data Protection Regulation (GDPR).

The third group is led by China and a few other countries. For these countries, national security and maintaining public order are paramount. Governments, they say, must retain the right to monitor and even block the flow of data across borders. This approach also limits the spread of news and other information.
Three Global ‘blocs’ emerge on e-commerce governance

A clash of values on data protection between the EU and the US hinders the WTO deal.

dehemed potentially disruptive. Source code protections are weaker as well. Chinese authorities encourage the transfer of technology even when the patent or copyright holders are resistant.

Mr. Kerneis and many others believe that should the first two groups agree on a common framework, the global standard would be set. Participating countries would make up roughly two-thirds of global GDP and include all major economies apart from China and India. It is unlikely that many advanced industrial countries would see merit in the autocratic Chinese approach.

But the alignment of the first two groups first requires the EU and the US to agree, something which has proven elusive. Brussels and Washington may have reached agreements with common trade partners including Japan, Singapore, Canada, and Australia. But a clash of values on the issue of the protection of data has made an EU-US agreement thus far impossible on this front.

“In the European Union,” Mr. Kernels points out, “protection of personal data is a fundamental human right.”

Disagreement between Brussels and Washington has been driven largely by cultural and legal differences, but also through a fundamental breach of trust. EU officials already harbored grave reservations about the vast troves of personal data held by US tech companies. But the breaking point came with the revelation by WikiLeaks in 2015 that the US National Security Agency had tapped the phones of then-Chancellor Angela Merkel and other top German officials.

The EU channeled its fury into what it does best – drafting regulations. In 2018, Brussels implemented the GDPR, the most rigorous data privacy and data security law in the world. GDPR obliges companies holding data on EU citizens to protect that data, obtain the consent of those whose data is held, and ensure that whatever data is processed is accurate. Data can only be stored for a limited amount of time and data processors are allowed to store only that essential data.

Stiff penalties are applied to those companies that don’t follow the rules with fines reaching 20 million euros or 4% of global revenue, whichever is higher. Data processing companies can also be sued by those whose data they hold. EU regulators have not been shy about coming down hard on offenders. In November, the Irish Data Protection Commission slapped a total of 390 million euros in fines on Meta for a series of transgressions including allegedly failing to adequately protect the personal data of some 533 million people in 106 countries who imported contact information from their phones to the apps of Facebook and Instagram, two of Meta’s subsidiaries. Since the implementation of GDPR, Meta has been fined nearly 1 billion euros.5

Washington and Brussels thought they had resolved their differences on the protection of data in July 2016 when the EU Commission accepted the Privacy Shield Framework as a means of ensuring adequate privacy. But four years later, the European Court of Justice struck down the agreement, arguing that the privacy requirements had not been met largely because US intelligence agencies still had, the court argued, too much freedom to delve into the data of EU citizens.

Failure of the two sides to agree on data privacy and protection standards has left businesses in legal limbo and hindered efforts to negotiate a deal in the WTO.
The election of Joe Biden in 2020 led to a thaw in EU-US relations. The Biden administration sought to rebuild trust with its EU partners across the full spectrum of the bilateral relationship, including searching for solutions to the data privacy conundrum. In March, the Biden administration and the EU Commission agreed on a second Trans-Atlantic Data Privacy Framework. In October, President Biden signed an executive order which essentially limits US intelligence agencies to “necessary and proportionate” data access for the protection of national security. Additionally, EU citizens who believe that their data has been unfairly accessed can bring a complaint to the United States Data Protection Review Court. The EU Commission will now go through the procedural steps required to render its “draft adequacy decision” final.

Commission officials and most European business leaders are largely supportive of the new measures though some business leaders complain that an executive order is no guarantee that future presidents won’t backtrack on the deal. US businesses that have long sought the more predictable and stable environment of a common set of rules broadly support the new arrangement.

Might this breakthrough be sufficient to spur a broader US-EU agreement on e-commerce and be the much-needed catalyst for a deal among the 87 WTO members?

Disagreement between Brussels and Washington has been driven largely by cultural and legal differences, but also through a fundamental breach of trust.
Questions hang over Geneva

It is certainly conceivable. One key could be Japan potentially brokering a compromise. Tokyo has negotiated bilateral e-commerce agreements with both the EU and the US and might have insights to where the landing zone for agreement may lie. Should Europe, CPTPP, and North America coalesce around an agreed set of rules, it is likely Latin America and parts of Africa would join in setting the de facto global standard.

But where would that leave China?

Most observers see little possibility the Chinese would ever agree to the free flow of data across borders or accept the premise that data on Chinese citizens or businesses could be stored outside China. But at least one prominent negotiator says people should not rush to judgment. China has, this negotiator points out, applied to join the CPTPP, and is fully aware that membership would mean accepting CPTPP rules on the free flow of data and prohibitions on data localization. The negotiator rejects the idea that this could merely be Beijing’s bluff to get its foot in CPTPP’s door. “That is not China’s style. They have submitted their application to join, and they are serious about it.”

Then there is the matter of Washington. Would the United States agree to a WTO deal to which China did not subscribe? Given the broad and bipartisan hostility to Beijing across Washington, any arrangement in which China would be a free rider, benefitting from new rules without accepting the terms and disciplines, would be greeted with suspicion. Some Washington trade policymakers may well seek an agreement that is not under “Most Favored Nation,” (MFN) or non-discriminatory terms effectively locking China out of the deal.

The participants in the e-commerce Joint Statement Initiative (JSI) have always insisted the talks were open to all who wished to participate, that the process would be conducted in a transparent manner and that whatever rules were agreed upon by the participants would apply to all 164 WTO members. These principles have been central to the work of the group. While some WTO members, notably India and South Africa, have raised questions over the legality of the JSIs, most members are participants in one JSI or other and few believe any legal challenge against an open and non-discriminatory plurilateral would succeed. But a plurilateral deal that discriminates between members would run contrary to Article I of the General Agreement on Tariffs and Trade and would be another matter. A plurilateral which does not offer MFN to all WTO members would require a consensus, one which China, India, and South Africa would be reluctant to join.

Given the political and legal obstacles to a non-MFN plurilateral agreement in the WTO, Washington might seek an e-commerce deal outside the WTO. Not all US allies would favor such an approach, not least because of the damage this would inflict on the WTO itself. However, the possibility of such an approach cannot be ruled out at this stage.
At the 1998 Geneva Ministerial, the WTO agreed on something with far more lasting impact on e-commerce than the creaky and inert multilateral work program: a moratorium on applying duties on e-commission transmissions. The agreement was not hard and fast, and members have since been locked into a tedious process of deciding before or at each Ministerial Conference whether the moratorium would be renewed. For more than 20 years, that moratorium has held, but its future is now uncertain. There is the very real possibility that it will expire at the end of March 2024 because of strong opposition from India, Indonesia, and South Africa.

This issue is not technically part of the JSI e-commerce discussions, but such is its importance that it may factor into the discussions as the moratorium expiry deadline approaches. For the next year and a half, the negotiations on extending, or even making permanent, the moratorium will be among the WTO’s most heated.

Indonesia, India, and South Africa say they want greater clarity on the scope and definition of e-commerce. They also believe they may have foregone potential tax revenues by not applying duties and they want the “policy space” to develop their e-commerce sector in the future. There have not been, they maintain, sufficient discussions on whether the moratorium should also apply to the content of transmissions as proponents suggest. Moreover, they argue, correctly, that there is no official WTO definition of what constitutes an e-commerce transmission. This will be important, they argue, as 3D printing and artificial intelligence become central to manufacturing.
According to a controversial report by United Nations Conference on Trade and Development analyst Rashmi Banga, developing countries forfeit up to $10 billion annually by not applying their maximum allowable WTO tariffs on e-commerce transmissions. Others including the Organisation for Economic Co-operation and Development (OECD) and the University of St. Gallen suggest this figure is misleading because Ms. Banga’s method uses the higher legally bound tariffs rather than the tariff rates that economies apply in practice. The revenue harvested by developing countries from tariffs would be minimal in any case, says OECD, or between 0.08% and 0.23% of overall government revenues depending on whether the duties were set at the applied or the higher bound rate. Moreover, the duties would depress demand and drive down overall revenue intake. Consumer welfare gains of $900 million would also be lost. Exports of smaller companies in these countries would also be threatened particularly if other countries retaliated with duties of their own.

In a 2019 report, the European Centre for International Political Economy (ECIPE) says slapping duties on e-commerce transmissions would spark retaliation from affected trade partners and that such retaliation would dampen consumer demand and sink economic output. The result would slash tax revenues by a far greater margin than the value of any tariff revenue collected, the think tank said. For instance, ECIPE forecasts that Indian GDP losses would be 49 times greater than the tariff revenue and the tax loss 51 times greater than the value of the tariffs. Indonesia would incur a loss of output 160 times the tariff value while the decline in tax collection would be 23 times greater than the tariffs collected.
The administrative burden in applying these duties would also be immense. “Finance ministries have no clue how to apply such duties,” says Mr. Kerneis. “You are not talking about only one set of data but many different sources of data from different clouds for the same transactions.”

The number of internet users in India is estimated at roughly 800 million.10 India boasts major e-commerce actors, including Rediff, Nykaa, Snapdeal, and Indiamart. Companies like Wipro Ltd., Tata Consulting Services, and Infosys provide information technology and consulting services that support e-commerce operations around the world.

India also has a burgeoning e-commerce giant of its own, the Unified Payment Interface (UPI), a government-run open network that provides the payment platform for individuals and businesses. Every month, billions of transactions take place across this platform with a value of roughly $140 billion. In the fiscal year 2021-22, the value of all transactions on the platform exceeded $1 trillion.11 Thanks to UPI, the Indian e-commerce market has more annual transactions than any other. Moreover, the Indian government is moving to expand UPI’s reach to other countries particularly the United States and China.

Duties on e-commerce transmissions could have an adverse impact on another vital component of the Indian economy, the receipt of remittances from abroad. In 2021, India received more in remittances, $89.4 billion, than any other country, up 4.6% from 2020 and up nearly 50% since 2011.12 For 2022 Indian Finance Minister officials estimate the total will be more than $100 billion. The Indian government is seeking to facilitate these transmissions by helping to integrate UPI with Western Union.

Given the thriving e-commerce industry in India and the potential hazards linked to the application of duties, why would Indian negotiators seek to bring an end to the moratorium? Many believe India’s position is tactical. In holding the e-commerce moratorium hostage, New Delhi might increase its leverage in other negotiating areas such as the protection of intellectual property or rich country agricultural subsidies.

How else to explain a position that, on the surface, seems illogical?

Another theory is that India would like to apply duties to imports of streaming services, like Netflix movies, or software, like Microsoft 365 software. Others say that India is so fearful of Chinese e-commerce giants like Tencent and Alibaba that it is prepared to take drastic actions to keep them out of the market.
Conclusion

2023 is a critical year for those who believe the world needs global rules on e-commerce.

With the most vociferous opponents of e-commerce rules absent from the process, negotiators in the Joint Statement of Initiative have done well. They have made far greater progress in five years than was achieved in the two prior decades of often fruitless multilateral talks. But the time is rapidly approaching when they must deliver. They have set themselves the challenging, but attainable, goal of concrete results by the end of 2023. Virtually all 87 proponents are also dedicated to preserving, and even making permanent, the moratorium on duties on e-commerce transmissions.

If achieving an ambitious deal that includes cross-border data flows, data localization, and protection of source code, proves beyond its reach, would the group agree to pocket the nuts-and-bolts agreements on e-contracts, consumer protection, and spam? At present, negotiators are not showing their hand. Any indication now that an early and less ambitious harvest might be acceptable could drain the talks of the energy needed to conclude a bigger package. Nevertheless, many companies, aware of the challenges involved in a big package, are beginning to see merit even in a smaller deal.

This smaller deal could be made sweeter if the parties to the plurilateral agreed to make the moratorium on duties permanent. This would fall short of a multilaterally agreed permanent moratorium, but it would, if all parties agreed, cover 90% of the world’s e-commerce trade. This would be easier than agreeing multilaterally to a permanent moratorium but is still no sure thing given that some of the e-commerce JSI participants – notably Indonesia – now do not accept a permanent moratorium.

Politics will, as always, determine the fate of these negotiations. Next year, the United States will hold another presidential election. Given the fiercely adverse reaction that trade provokes across the US political spectrum, especially issues involving China, it is unlikely the Biden administration would spend political capital negotiating a major trade deal that would be a target for political opponents. In short, 2023 will be critical for those who believe the world needs global rules on e-commerce. Pushing the talks into 2024 or waiting for the next US administration would be a recipe for drift and would greatly increase the odds of failure.

Should negotiators stumble and fall, the future of e-commerce, once considered unassailably bright, would for the long term begin to dim.
Keith M. Rockwell is a Senior Research Fellow at the Hinrich Foundation. Prior to his retirement in June 2022, Keith served as a Director at the World Trade Organization (WTO) and spokesperson for the organization for more than 25 years. He also is Global Fellow at the Wilson Center.

In his former role as Director of the WTO’s Media and External Relations Division, Keith worked closely with the Director General and his office to reflect the objectives and activities of the WTO. He was responsible for the overall coordination of the WTO’s interaction with media, civil society, parliamentarians, and the United Nations. He appeared regularly before media at press conferences, briefings, and television and radio appearances.

Keith received his Masters in Business Administration in International Business from George Washington University in 1991 and his Bachelor’s Degree in History and Political Science from Tufts University in 1980. In 1990, he authored 1992 AND BEYOND: How to Prosper in the World’s Biggest Market, which was published by Knight-Ridder Inc.
Endnotes

9. Ibid.
10. India has more than 800 million internet users, says Rajeev Chandrasekhar, Indian Express: https://indianexpress.com/article/technology/tech-news-technology/india-has-more-than-800-million-broadband-users-says-rajeev-chandrasekhar/

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