

Why WTO is Not an Appropriate Forum for Negotiating E-Commerce Rules

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For equitable growth, any discussion on e-commerce requires citizen participation, taking due account of safeguarding development, democracy and human rights. So far the digital economy has only lent itself to creating monopolies by big players.

Electronic commerce, one of the components of the new digital economy, is rapidly expanding. The most popular internet platforms in Latin America include Amazon, eBay, Alibaba and Mercado Libre (the latter, Latin American).

These platforms are attractive for consumers due to the wide range of options they offer, the convenience for comparing prices and often, home delivery services. They enable other companies to open new markets, sometimes without geographical boundaries, and also offer opportunities for small and medium-size businesses, one of whose main obstacles is commercialisation.

One could argue that countries in the South would greatly benefit from developing their own capacities on this sphere. So the question is: Why did most developing countries refuse to initiate negotiations on e-commerce at the latest Ministerial Conference of the World Trade Organisation (WTO)?

Digital Economy

E-commerce is really much broader and all-encompassing than online shopping. It involves selling and delivery of physical goods or services, facilitated by electronic means, including, for instance, the so-called “sharing economy” in transport or accommodation services (such as Uber and AirBnB). It also covers goods that used to be physical but are now being replaced by digital goods (books, music); as well as a whole new emerging hybrid area, such as digital designs of physical goods (with customisation options) to be reproduced in 3D printers –everything from clothes to machinery and houses, and even certain foods or prostheses for the human body. It also encompasses the products and services of the digital economy as such, where data are the tradeable goods, or else are used to provide a service, whether in web platforms or artificial intelligence applications.

We are thus speaking of a significant share of today’s economy that will still grow a lot more in the future. Consequently, any trade agreement that regulates (or deregulates) “electronic commerce” would be establishing the global foundations for the new digital economy as a whole, towards which we are rapidly moving forward, with huge implications for the economic model, jobs, development, national sovereignty or dependence, and even human rights. Therefore, profound and thoughtful analysis is required, in particular by citizens and developing countries, to avoid giving in to pressures in exchange for one-off concessions.

Precisely one of the challenges of the new digital economy is that it lends itself to favour the biggest players, thus encouraging concentration and the creation of monopolies. To such an extent is this

true that [amazon.com](https://www.amazon.com) already controls 44% of electronic trade in the US (2017) and 16% globally (2016); while Google and Facebook control 61% of global advertising income on the Internet and 25% of all [publicity income in media](#).

Towards a binding agreement in the WTO?

It is in this context that the developed countries with the greatest digital capacities have proposed to initiate negotiations in the WTO, seeking to that end a mandate for a binding agreement on electronic commerce, which they expected to get at the 2018 WTO Ministerial Conference in Buenos Aires. This is not an entirely new issue: discussions about e-commerce have been taking place for several years at the WTO, in a committee that does not have binding decision-making powers. The current proposal responds mainly to these countries' interest in cementing even further the privileges and advantages that their huge digital corporations already benefit from.

In essence, their push is to deregulate the sector, cloaked under the guise of a "Free Internet", so that these corporations are allowed free access to all markets and to tap on data flows unrestricted. For countries with incipient digital capacities (including most developing countries), this would mean not being allowed to adopt - now or in the future - regulations that would enable them to defend and promote their own sovereign development and ability to compete in this area.

This aspect of the proposal can be clearly seen in provisions the US is pushing to include in the negotiation, which mirror those it had already advanced in FTA (free trade agreement) negotiations such as the Trans-Pacific Partnership Agreement (TPP) and the Trade in Services Agreement (TiSA). These include the following measures.

Allowing cross-border data flows: Their goal is to ban the regulations that many countries have passed to protect national data. This goes hand in hand with banning localisation requirements and the requirement to establish a national presence, which are seen as obstacles.

In practice, this would mean that companies could take, without any kind of payment, all personal and collective data to turn them into a commodity to be sold or exploited. It also implies that requiring digital companies to store data in the country where the data are generated will not be allowed, with the argument that it would mean additional costs for building physical infrastructure in each country.

But this would limit the ability of national parliaments to protect the privacy of their citizens, since it would be the laws of the country where the data is stored that would be applicable (which in the case of the US, for instance, do little to protect their national population, much less extraterritorial users). Also, by giving away the possibility to adequately regulate the extraction, use and storage of data, countries would sacrifice their possibility to benefit from them to develop their own technology sector (such as artificial intelligence).

In the absence of a physical presence, jobs could be affected or become increasingly precarious through outsourcing or the hiring of autonomous workers; in addition, it would also hinder the options for and make it much more difficult to get legal remedy in cases of noncompliance with consumer protection laws and rights.

Banning forced transfers of technology, production processes or any other proprietary information: But technology transfer has always been a key developing countries' demand. Preventing it from being an obligation would mean losing opportunities to develop local knowledge and capacities aimed at developing their own technology sector.

Protecting critical source codes: Countries would be banned from requiring foreign companies to provide their source codes or patented algorithms to competitors – except for the sake of protecting health, security or other legitimate regulatory goals.

This is of particular concern in the case of artificial intelligence systems, which have the ability to take certain decisions autonomously through algorithms. If we are prevented from knowing how they operate, how they are programmed, it will hardly be possible to demand accountability for wrong decisions or ensure that they do not have an inbuilt bias.

Ensuring companies can pick the technologies of their choice: This implies it will no longer be possible to require companies to use local technology, thus discouraging the development of national capacities.

Banning customs tariffs on digital products: The WTO has already, for several years, been applying an agreed moratorium on tariffs for goods that are transmitted electronically. It would no doubt be difficult to implement such tariffs. But as more and more goods shift to digital domains, this could mean a significant loss of income for developing countries, and promote unfair competition with domestic production. Accepting a permanent ban, without knowing how the digital market will evolve, could be risky.

Parallel negotiations

Given that an agreement on e-commerce was not moving forward nor likely in the short term, the proponent countries pitched something less ambitious in advance of the WTO Ministerial Conference in Buenos Aires, with an emphasis on “[trade for development](#)”. They argued the negotiations would favour micro, small and medium-sized enterprises (MSMEs). In a similar light, months before, a group of countries named as “Friends of e-commerce for development” was created, led by Costa Rica.

However, MSMEs will be the least able to compete with transnational corporations that enjoy the benefits of scale, subsidies, national infrastructure, technological progress, etc. Rather, what MSMEs need are national policies and regulations that offer them opportunities to develop their technological capacities and grant them preferential access to markets while enhancing their competitiveness. This includes improving national connectivity to high-speed Internet, particularly in rural areas; improving customs efficiency; improving distribution (mailing) services; and tariffs policies and credit that favour MSMEs, among other things.

Finally, most developing countries (mainly African, some Asian countries, including India, and ALBA countries in Latin America) refused to allow a negotiating mandate on e-commerce, understanding that it would mean abandoning the previously agreed position of preventing any new negotiations while the Doha Development Agenda is not concluded, and avoiding any new obstacles for national policy-making.

Anyhow, the issue has by no means been settled. The push for an agreement on e-commerce will continue, both in the WTO and under the framework of other trade negotiations. In fact, the recent coming into force of the TPP, agreed by all signatory countries except the US, left the section on electronic commerce in the agreement untouched.

At the Buenos Aires Ministerial, around 70 countries (mainly those that take part in the TiSA negotiations, and others including Argentina), adopted a joint statement on e-commerce and development, whereby they agree to engage in joint exploratory work—open to all countries, whether signatories or not—towards future negotiations in the WTO about trade and e-commerce.

This group held its first meeting in Geneva at the WTO headquarters on March 14, 2018, with the presence of WTO officials, despite the WTO not having a mandate to carry out such discussions. (The WTO can only host negotiations that have been authorised by all its members). In all, 82 countries participated (including China and Pakistan, among others that had not signed the statement). The session was led by Japan, Singapore and Australia. The US, as the original promoter of this initiative for negotiations, also participated, although in the past months they had stopped leading it, as part of Donald Trump's decision to deprioritise multilateral trade negotiations.

This *modus operandi* of negotiating in parallel tracks is becoming something usual in the framework of the WTO, as a mechanism to circumvent formal proceedings of the body, with the goal to return in a stronger position to the next Ministerial with a pre-negotiated agreement, using MSMEs in this case to attract endorsements.

Towards increased Internet regulation?

The recent scandal over the use of data provided by Facebook to Cambridge Analytica for political purposes in electoral campaigns, flagrantly abusing the privacy of users, has begun to open the eyes of legislators in several countries, including the US, about the excessive power of Internet monopolies. But we are still very far away from true public policy solutions that could safeguard the public interest in the face of these powers.

The recent scandal involving Facebook and Cambridge Analytica proves that we are still very far away from true public policy solutions that could safeguard public interest in the face of the excessive powers of Internet monopolies. Credit: Reuters/Henry Nicholls/Files

Stacy Mitchell's analysis on [amazon.com](https://www.amazon.com), recently published in [The Nation](https://www.thenation.com), gives an indication of what is at stake in the field of electronic commerce. She explains the dilemma small and medium-size businesses face when deciding whether it is best for them to try to compete from the outside or to sell their products on Amazon's platform, where success is elusive given that Amazon can manipulate prices and promote products in a way that always favours its own brands and profits. Beyond that, the author states that Jeff Bezos ([amazon.com](https://www.amazon.com)'s founder and CEO) "has designed his company for a far more radical goal than merely dominating markets; he's built Amazon to replace them. His vision is for Amazon to become the underlying infrastructure that commerce runs on". Something similar, in their respective spheres, could be said of Google and Facebook.

The eventual adoption of binding rules in the WTO would further reinforce these trends. This is not an issue to be decided by "experts" (generally identified with business interests). It is a discussion that requires a great deal of citizen participation, and due account taken on safeguarding development, democracy and human rights. The UN itself, since the World Summit on the Information Society, has recognised the importance of having multi-stakeholder spaces to discuss these issues. The WTO, traditionally closed to citizens' participation (even more since the fiasco featured by Argentina when denying visas and accreditation for civil society participants to the Ministerial) is far from being an appropriate forum for such discussions. If these negotiations advance, the future of our development could be seriously compromised.

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