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DIGITAL COLONIALISM AND THE WTO

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Despite its ongoing existential crisis, the World Trade Organization (WTO) continues to be a vital constituent of the imperial global order. It is well on its way to burying the developmental aspirations of Third World states - aspirations contained in the Doha Development Agenda (DDA) - at the urging of more dominant states in the global trading system. 'New issues' are being introduced for WTO negotiation, without reaching a conclusion on the contentious 'traditional issues' that the DDA sought to address. The most fractious amongst these new issues is the liberalization of electronic commerce (e-commerce).

The agenda to liberalize e-commerce has been introduced by digitally advanced states at the behest of Big Tech companies, such as Apple, Amazon, Google, Microsoft, and Facebook. Digitally advanced states seek to maintain their oligopoly over developing country markets by calling for the deregulation of e-commerce, particularly an unrestricted flow of data across borders. Their demand is contested by a group of African states, Least Developed Countries, and India. These countries have a repository of unprocessed data but lack the infrastructure to harness its potential. They are fearful of being reduced to suppliers of data for Big Tech, which would process such data to reap colossal profits. In a sense, their apprehension is reminiscent of India's famed handloom industry that was decimated when the British Raj exported raw cotton from India to the 'dark Satanic Mills' of Victorian England, and then shipped it back in the form of manufactured cloth, generating vast sums of money for the British East India Company.

This reflection highlights the lasting entanglement of the WTO with imperialism by examining dialogues around e-commerce liberalization. It reveals the WTO's corporate heart that pursues the interests of Big Tech while eroding the economic sovereignty of Third World peoples. We start with a flavour of WTO negotiations on e-commerce and the motivations of various member states, followed by an exposition of conflicting viewpoints on neoliberal e-commerce. We argue against liberalization of e-commerce insofar as it forecloses the ability of Third World states to incentivise their domestic e-commerce industry.

WTO E-Commerce Negotiations

The Internet has steadily displaced traditional methods of commerce, becoming a truly global marketplace. Standing on the brink of the Fourth Industrial Revolution, it seems certain that the future belongs to digital technology and innovation. As participants in the digital ecosystem, we all generate vast amounts of data, the lifeblood of the digital economy. Access to data is a prerequisite for e-commerce services, be it digital goods (such as music and software), digital services (such as cloud storage and Big Data analytics), or as a complement to manufacturing and packaging e-commerce deliveries. Thus, while a trite comparison, [data is indeed the new oil](#).

Having said that, unprocessed data is of negligible value. It is only after raw data is processed that it becomes essential to the functioning of the digital economy. The differential capacity of states to accumulate and process data leads us to the [North-South dimension](#) underlying the digital space. While developing countries are an untapped repository of data, they lack the technical know-how and infrastructure to accumulate and process it. Developed countries, on the other hand, are home to the world's leading digital firms that are at the forefront of technology and innovation. On the back of an unrestricted supply of data from developing countries, these firms have achieved enormous profits by processing such data and, thus, [capturing developing country markets](#). It is of utmost importance for developing countries to bridge the [digital divide](#) lest they remain subservient to Big Tech corporations of the North.

The WTO has been at the centre of negotiations on trade-related aspects of e-commerce since 1998, when its General Council established the [Work Programme on Electronic Commerce](#). Dismayed by the lack of convergence amongst members, the US, EU and Japan (hereafter 'proponents') sought to introduce a broader negotiating mandate in 2016. Broadly premised on the [Trans-Pacific Partnership Agreement](#) (TPP), their proposals envisage an unregulated Internet free for all. They are, inter alia, opposed to any encumbrances upon cross-border data flows, digital custom duties, and forced technology transfers.¹ According to these proponents, the neo-liberal vision holds the promise of a strong digital economy. Similar provisions on e-commerce are found in other bilateral and regional trade agreements including the *US-Korea Free Trade Agreement (2012)*, *Mexico-Panama Free Trade Agreement (2015)*, and ongoing negotiations in the *Trade in Services Agreement (TISA)*, among others. After the US withdrawal from TPP in January 2017, the same text forms part of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)* (CPTPP). Although the TPP has disintegrated, it still forms the basis for negotiations at various bilateral and multilateral forums, hence for the purposes of this Reflection we refer to TPP rules.

17 developing and 2 developed countries, identifying themselves as '[Friends of E-Commerce for Development](#)', joined the chorus as they also see merit in liberal e-commerce as their ticket to digital growth. These include Argentina, Chile, China, Colombia, Costa Rica, Kazakhstan, Kenya, Mexico, Moldova, Montenegro, Nigeria, Pakistan, Sri Lanka and Uruguay, and the

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¹ Jane Kelsey, 'How a TPP-Styled E-Commerce Outcome in the WTO would Endanger the Development Dimension of the GATS *Acquis* (and Potentially the WTO)' (2018) 21:2 *Journal of International Economic Law* 273, at 278.

MIKTA (Mexico, Indonesia, South Korea, Turkey and Australia) group. Notably, China's reasons for advocating the liberalization of digital trade are quite distinct from the proponents. While principally in favour of liberal e-commerce, China is against an unrestricted flow of cross-border data and limitations on data-localization, citing reasons of national security. This is in line with China's aspirations to grow in digital trade, while also securing the Chinese government's heavy regulation of the Internet.²

On the other end of the spectrum are the [African Group, Least Developed Countries, and India](#) (hereafter 'opponents'), who oppose a TPP-style framework on e-commerce for its complete lack of developmental flexibilities. These [opponents contend](#) that their large quantity of user data must be considered [a valuable resource](#) in the digital economy. Instead, a TPP-style agreement on e-commerce assigns no economic value to unprocessed data and calls for its unimpeded flow across borders. Agreeing to such a framework - opponents contend - would make their markets a goldmine for Big Tech, which would consolidate their market share and obliterate domestic e-commerce platforms. The problem is exacerbated by [lack of infrastructure and technology](#) in developing countries to support domestic e-commerce initiatives. Opponents seek to realize the [economic value](#) of their data as a means to closing the digital divide. More importantly, they envisage a greater role for the state in regulation of its laggard e-commerce sector to bring it up to speed with digitally advanced states.

Opponents successfully lodged their opposition at the Buenos Aires Ministerial Conference in 2017. But proponents have nonetheless commenced [exploratory work](#) with support from the WTO Secretariat and endorsement by the World Economic Forum. Given these developments, it is a tall order ahead for developing countries, some of which have already bought into the '[grand myth](#)' of development through e-commerce liberalization. From a TWAIL perspective, the WTO negotiations on digital trade, among other things, occasion a reflection on what it means to 'do TWAIL' at a time when historical alliances amongst countries of the South have either disintegrated or are in jeopardy.

To Regulate or not to Regulate

The debate over e-commerce repeats two longstanding competing visions of global political economy: an open Internet ostensibly free from governmental control as opposed to government regulation over e-commerce. The centre-piece of the opponents' argument is that the neoliberal vision of free e-commerce subverts the role of the state in the digital economy and thereby undermines the domestic e-commerce industry of Third World states.

To substantiate this claim, we revisit Chimni's prescient piece, '[International Institutions Today: An Imperial Global State in the Making](#)' that traces the synergies between international institutions, corporate actors, and dominant states in shaping the imperial global order. Chimni

² Henry Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade' (2018) 21:2 *Journal of International Economic Law* 297, at 319.

argues the WTO is working in the interests of an emerging transnational capitalist class and powerful states to the disadvantage of the Third World. With the purported objective of regulatory harmonization, the WTO prescribes uniform global standards that remove impediments to capital accumulation at the global level. It is through this process that economic sovereignty of Third World states has been ceded to the WTO in crucial areas such as agriculture, intellectual property, and services. [Orford](#) identifies how this ‘pose[s] an illegitimate constraint on the political choices open to peoples and governments’, undermining substantive democracy in the Third World.

A telling example of corporate influence over the WTO is the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS), where a handful of Big Pharma companies successfully amplified their private interests into public international law, resulting in a neoliberal regime on intellectual property. In the same vein, Big Tech companies seek to maintain oligopolist control over the digital ecosystem through binding trade commitments. By wielding influence over their respective governments, these corporations have already translated their interests into the TPP blueprint. Now, by pursuing their agenda at the WTO, Big Tech and digitally advanced states seek to [codify their interests into WTO law](#). Thus, the North seems to be using mega-market trade agreements such as the TPP not only in their own right but also as a bargaining chip at the WTO. In this regard, [O’Donoghue and Tzouvala](#) rightly observe that regional trade and investment agreements have become instruments of ‘strategic bilateralism’ of the Global North, aimed at by-passing or threatening to by-pass multilateralism at the WTO when needed.

The thrust of the proponents’ demand is to harmonize divergent regulatory orders to remove impediments to e-commerce transactions. They seek to [prohibit](#), among other things, restrictions on cross-border transfer of data, imposition of digital custom duties, forced technology transfers, and discrimination. Their demands would have far reaching implications for developing countries that presently lack the necessary wherewithal - infrastructure, technology, and skilled manpower - for domestic e-commerce platforms to compete with Big Tech. In such a situation, it is imperative for the Third World state to step in and regulate in favour its infant e-commerce sector. However, the neoliberal framework on e-commerce prevents this. Case in point is the [CPTPP](#) chapter on e-commerce that reinforces market freedoms while divesting the state of regulatory autonomy over e-commerce. States are prohibited from adopting localization measures³ or imposing custom duties on the transfer of data, which prevents developing

³ Data localization is defined as:

[M]easures as those that specifically encumber the transfer of data across national borders. These measures take a wide variety of forms—including rules preventing information from being sent outside the country, rules requiring prior consent of the data subject before information is transmitted across national borders, rules requiring copies of information to be stored domestically, and even a tax on the export of data.

See Anupam Chander and Uyen P Le, ‘Data Nationalism’ (2015) 64:3 *Emory Law Journal* 677, at 680.

countries from realizing the economic value of their data⁴. There are no provisions for technology transfer or capacity building, making it almost impossible for developing countries to [bridge the digital divide](#).

Oftentimes, the secession of sovereignty is voluntary, as in the case of the ‘Friends of E-Commerce’. While some of these states may not fully appreciate the consequences of a standardized e-commerce agreement, others are guided by rent-seeking local political and economic elites, or as a means of political suppression, as in the case of China. As for opponents, it seems likely their concerns will be side-lined to accommodate the interests of Big Tech. As [Orford](#) notes:

States become members of the WTO, and thus equal participants in a formally democratic polity, only *after* they have responded to the demands of the market ... For developing countries these demands to sacrifice are much greater – these states in general have responded to detailed prescriptions requiring an openness to global economic integration and removal of barriers to market access. These demands are imposed as part of conditions ... in order to be entitled to ‘preferential’ treatment from developed countries as permitted under the GATT ... In other words, where once the conditions of possibility of the empty universalism of international law were the colonial doctrines governing sovereignty and later the mandate and trusteeship systems, today these conditions include the creation of liberal democratic capitalist states through the strictures of international economic law.

The aforementioned CPTPP chapter on e-commerce is a prime example, requiring developing countries to liberalize e-commerce without any consideration for [developmental needs and flexibility](#).

In sum, by ceding their sovereign economic space to the WTO, developing states cannot incentivise their domestic e-commerce industry. The WTO is a technocratic institution, unaccountable for the repercussions of its actions. This leads to a Kafkaesque situation where Third World peoples can hold neither their own governments nor the WTO accountable for the decimation of their domestic e-commerce industry.

Fallacies in the Neoliberal E-Commerce Vision

The neoliberal friends of e-commerce premise their argument on the twin logic of economic growth and human rights protection. This vision is aptly summarized in the [US submission](#) to the WTO General Council:

⁴ CPTPP Chapter 14: Electronic Commerce, Arts 14. 3, 14.11 and 14.13.

Meaningful trade rules can support the role of the digital economy in promoting global economic growth and development while also allowing governments to address the growing concerns of internet users about the security and privacy of their personal data.

Wedding the benefits of economic liberalization to the protection of human rights has been a longstanding argument of scholars that view the WTO as ‘[a linkage machine](#)’, where the protection of civil liberties is inextricably linked with trade liberalization.

[Proponents argue](#) that a liberal e-commerce regime would economically benefit developed and developing states alike. They contend that an unregulated digital space would, inter alia: (i) enable e-commerce platforms to innovate and render better services; (ii) allow micro, small and medium enterprises (MSMEs) from developing countries to participate in the global market; and (iii) encourage digitally challenged states to embrace the path to digitalization.

The neoliberal e-commerce regime also situates itself as the custodian of democratic values, holding back the Orwellian tendencies of states. Proponents contend that, by [minimizing governmental control](#) over data, instances of state surveillance can be mitigated. Furthermore, the CPTPP chapter on e-commerce permits restrictions on cross-border data flows on the grounds of privacy, data protection, and cybersecurity.⁵ Therefore, states can in theory deny data access to other states that are violating international norms on privacy for the sake of state surveillance. Overall, proponents assert that economic freedoms guaranteed by the liberalization of e-commerce would go arm in arm with political freedoms. However, their argument is fundamentally flawed for two reasons. First, the neoliberal promise of economic development is never quite realized in the case of developing countries. And second, in the name of securing the right to privacy, e-commerce liberalization deprives the Third World peoples of their socio-economic right to a prosperous digital economy.

The foremost argument of the proponents is that e-commerce liberalization would by itself encourage digitalization in developing countries. It is hard for such an argument to stand given vast asymmetries within the digital ecosystem. As discussed earlier, the lack of infrastructure in developing countries has curtailed their pace of digital industrialization. If data moves freely across borders, Big Tech will oligopolize developing country markets and further dismantle fledgling domestic e-commerce platforms. The problem is exacerbated by prohibitions on states incentivising local e-commerce through measures such as data localization. This - coupled with feigned aspirations for technology transfer and technical assistance (as in the case of TRIPS) - ensures that developing countries remain lucrative markets for Big Tech with no hopes for digital industrialization on their own terms. The promise of [expanding the market reach of MSMEs is unfounded](#) as most MSMEs in developing countries do not have adequate access to digital infrastructure and would likely be eliminated by the highly competitive digital market.

⁵ CPTPP Chapter 14: Electronic Commerce, Arts. 14.11.3 and 14.13.3.

The privacy argument of the proponents is also flawed insofar as it does not concede that a free flow of data and the resultant advancement of Big Tech have also been accompanied by surveillance on a mass scale for policing, military, and commercial purposes. Thus, what is required is not a complete prohibition of governmental control over data, but to make governments and corporations accountable for privacy violations under international human rights law. To this end, the provision of data localization and other developmental flexibilities could be conditioned on adherence to domestic and international norms on privacy and data protection. This would enable the state in developing countries to incentivise its domestic e-commerce industry while also being legally responsible for privacy violations; thereby, ensuring a parallel pursuit of both privacy protection and economic development of the Third World peoples.

With the demise of the Doha Development Agenda, we are at a moment when powerful states are again rewriting global trade rules to push for neoliberal globalization. Developing countries must resist and arrest the concerted efforts of the transnational capitalist class, the WTO, and powerful states to form an imperial global state. In the context of e-commerce, resistance must be registered at the ongoing Exploratory Work on Electronic Commerce, which seeks to galvanize support for an e-commerce agreement modelled on the TPP. Under a pretext of democratic participation, the Exploratory Work is attempting to codify the interests of Big Tech and digitally advanced states into WTO law. Developing countries must resist rules that erode their regulatory autonomy over e-commerce. They must oppose proposals that prevent them from realizing the economic value of their data and incentivizing their domestic e-commerce industries. Only then can developing countries partake in the Fourth Industrial Revolution as equal beneficiaries and not neo-colonies of digitally dominant corporations and states.