

# Assessing the Adequacy of Existing Multilateral Rules Regulating E-commerce Lessons from EU Law

Citation for published version (APA):

Munu, M. L. (2022). Assessing the Adequacy of Existing Multilateral Rules Regulating E-commerce Lessons from EU Law. *European Journal of Law Reform*, 24(1), 135-146.  
<https://doi.org/10.5553/EJLR/138723702022024001009>

## Document status and date:

Published: 01/01/2022

## DOI:

[10.5553/EJLR/138723702022024001009](https://doi.org/10.5553/EJLR/138723702022024001009)

## Document Version:

Publisher's PDF, also known as Version of record

## Document license:

Taverne

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

## General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

## Take down policy

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

Download date: 13 May. 2024

# Assessing the Adequacy of Existing Multilateral Rules Regulating E-commerce

## Lessons from EU Law

Martin Luther Munu\*

### Abstract

*This article assesses the multilateral rules regulating e-commerce to identify their adequacies to provide the issues the European Union (EU) needs to consider as a player in World Trade Organization (WTO) e-commerce negotiations. The analysis uses six factors: facilitating imports and export, addressing tariffs as a form of government revenue, attracting investment, preserving policy space for digital industrialization, providing development assistance, and providing for different rights and obligations according to development levels. While existing multilateral rules have relevant provisions for regulating e-commerce, there are several limitations. The existing multilateral rules were designed to regulate broader issues, which ignore the new issues brought by digitalization. The EU Single Market, proposals for the digital services tax and the New Deal for Consumers provide important lessons that can help in shaping e-commerce rules at the WTO.*

**Keywords:** e-commerce, WTO, EU, digitalization, development.

### A Introduction

This article assesses the adequacy of multilateral rules regulating e-commerce to generate evidence of pertinent issues for negotiating World Trade Organization (WTO) e-commerce rules while also drawing lessons from e-commerce-related laws in the European Union (EU). Existing e-commerce rules need to be assessed because domestic and international regulations are challenged by digital trade, impacting several legal dimensions such as data governance, intellectual property (IP) and taxation.<sup>1</sup> Although there is no specific WTO e-commerce rule, e-commerce is regulated by components of different agreements forming the WTO law<sup>2</sup> such as

\* Martin Luther Munu is a PhD Candidate, Institute for Globalisation and International Regulation (IGIR); Faculty of Law, Maastricht University. Email: m.munu@maastrichtuniversity.nl; munumartin@yahoo.com.

1 Vera Thorstensen and Valentina Delich, "Convergence on E-Commerce: The Case of Argentina, Brazil and MERCOSUR," in *Adapting to the Digital Trade Era: Challenges and Opportunities*, ed. Maarten Smeets (Geneva: World Trade Organization, 2021), 234.

2 This is known as the Marrakesh Agreement establishing the WTO and its annexes, signed on 15 April 1994, at the conclusion of the Uruguay Round of Multilateral Trade Negotiations.

Martin Luther Munu

the General Agreement on Trade in Services (GATS),<sup>3</sup> the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>4</sup> the Trade Facilitation Agreement (TFA)<sup>5</sup> and the Information Technology Agreement (ITA).<sup>6</sup> The main objective of ITA, as stipulated in Paragraph 2 of the Singapore Ministerial Declaration, is to eliminate tariffs on information technology products.

In the EU, e-commerce is regulated by the EU Single Market for services provided under Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU). The EU directive on e-commerce recognizes the need for a clear and general framework to cover certain legal aspects of e-commerce in the internal market.<sup>7</sup> The goal of this Directive is to establish a legal framework for the free movement of information society services among the Member States.<sup>8</sup> Although the Directive should not apply to services provided by service providers based in a third country, the global nature of e-commerce necessitates the development of rules that are consistent with international rules. Therefore, the Directive is without prejudice to the outcomes of legal discussions such as on taxation of the digital economy and WTO e-commerce rules.<sup>9</sup> Article 3:2 of the Directive states that Members may not restrict the freedom of another Member to provide information society services although Paragraph 3 provides for exceptions on public policy, health, security and consumer protection grounds.

## B Adequacy of Existing Rules Regulating E-Commerce

Assessing the adequacy of e-commerce rules requires a fluid approach that incorporates both the mainstream theoretical understanding of trade and the critical approaches, in line with embedded liberalism in the WTO. Six issues are identified as normative criteria based on evidence generated that trade liberalization contributes to technological diffusion and enables markets for digital trade,<sup>10</sup>

3 GATS: General Agreement on Trade in Services, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Ann. 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

4 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Ann. 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

5 TFA: Trade Facilitation Agreement, WT/L/940 § (2014).

6 Since ITA is plurilateral agreement, the agreement is only highlighted to give context and provide some important elements for analysis.

7 EU, "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on Electronic Commerce')," L 178/1 § (2000), para. 7, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>.

8 *Ibid.*, para. 8.

9 *Ibid.*, para. 58.

10 Shamel Azmeh and Christopher Foster, "Bridging the Digital Divide and Supporting Increased Digital Trade: Scoping Study," Discussion Paper (GEG Africa, August 2018), 12.

builds digital capacity and enhances market access.<sup>11</sup> The criteria are also based on evidence of limitations to the benefits of trade liberalization, where critics see trade restrictions as crucial for shielding poor countries from the exploitative nature of international trade.<sup>12</sup> Therefore, the normative criteria interpret the adequacy of existing rules while considering elements of trade liberalization alongside trade restriction owing to their welfare and development benefits.<sup>13</sup> The normative criteria include 1) facilitating imports and exports,<sup>14</sup> 2) addressing tariffs as a form of government revenue,<sup>15</sup> 3) attracting investment, 4) preserving policy space for digital industrialization,<sup>16</sup> 5) providing for development assistance<sup>17</sup> and 6) providing for different rights and obligations according to development levels.<sup>18</sup>

### *I General Agreement on Trade in Services*

The GATS constitutes the rules in the agreement itself, the annexes on specific sectors including telecommunication services and the schedules of market access and national treatment obligations alongside their exemptions.<sup>19</sup> GATS aims to ensure that enterprises, regardless of their origin or the provenance of their services, have equal access to competitive possibilities and to support the progressive liberalization of services.<sup>20</sup> GATS applies to all measures affecting e-commerce through the four modes of services (cross-border service, consumption abroad, commercial presence and movement of natural persons) provided for in

- 11 Yasmin Ismail, "E-Commerce in the World Trade Organization: History and Latest Developments in the Negotiations under the Joint Statement" (Geneva: International Institute for Sustainable Development and CUTS International, Geneva, January 2020), 16-23.
- 12 Jill Steans, Lloyd Pettiford, and Thomas Diez, *Introduction to International Relations: Perspectives and Themes* (Harlow: Pearson Education, 2005), 85; Dashti Jaza Mahmood, "Adam Smith, David Ricardo, and Karl Marx's View on Trade," *Kurd Net - Ekurd.Net Daily News* (blog), 13 December 2016, <https://ekurd.net/karl-marx-view-trade-2016-12-14>; Ranjit Sau, "Towards a Marxian Theory of International Trade and Capital Flow," *Economic and Political Weekly* 12, no. 33/34 (1977): 1437-50, at 1447.
- 13 Francisco Rodriguez and Dani Rodrik, "Trade Policy and Economic Growth: A Skeptic's Guide to the Cross-National Evidence," *NBER Macroeconomics Annual* 15 (2000): 261-325, at 267.
- 14 Nuray Terzi, "The Impact of E-Commerce on International Trade and Employment," *Procedia-Social and Behavioral Sciences* 24 (2011): 745-53, at 747.
- 15 Amir Ebrahim Darsinouei, "Understanding E-Commerce Issues in Trade Agreements: A Development Perspective Towards MC11 and Beyond," Research Study (Geneva: CUTS International, Geneva, 2017), 21, [www.cuts-geneva.org/pdf/STUDY%20-%20E-Commerce%20Towards%20MC11.pdf](http://www.cuts-geneva.org/pdf/STUDY%20-%20E-Commerce%20Towards%20MC11.pdf).
- 16 Jörg Mayer, "Policy Space: What, for What, and Where?," *Development Policy Review* 27, no. 4 (July 2009): 373-95, at 374, <https://doi.org/10.1111/j.1467-7679.2009.00452.x>; Ha-Joon Chang, "Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies," *Economic and Political Weekly* 41, no. 7 (2006): 627-33, at 630.
- 17 Development assistance in this case means building and strengthening provisions in an agreement to better achieve the objectives of the Aid for Trade initiative, launched at the Hong Kong Ministerial Conference in December 2005. WT/MIN (15)/DEC.
- 18 This borrows the approach from the Trade Facilitation agreement, WT/L/940.
- 19 "GATS: General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B," 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) § (1994).
- 20 Mira Burri, "Trade in Services Regulation in the Data-Driven Economy," *Trade L. & Dev.* 12 (2020): 208, at 212.

Martin Luther Munu

the agreement, irrespective of the technology used in the delivery of such services.<sup>21</sup> The Panel in the US gambling case clarified that a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, internet, etc.<sup>22</sup> Therefore, GATS is technologically neutral, which allows it to govern digital products such as e-books and downloadable movies and music.<sup>23</sup> The technological neutrality of GATS explains why some stakeholders have called for services provided through electronic means to be negotiated under GATS provisions.<sup>24</sup>

Article II provides for non-discrimination in the provision of services through electronic means, which cuts across the four modes of services.<sup>25</sup> Therefore, the services of like products provided electronically enjoy the same treatment as services provided in other forms. Article IV of the GATS provides for increasing the participation of developing countries through strengthening the capacity of the domestic service, enhancing technology and liberalization of market access in sectors and modes of supply of export interest to developing countries.

GATS Article XIV provides for exceptions on the grounds of a Member protecting the privacy of its citizens, promoting public morals and preventing fraudulent activities.<sup>26</sup> However, under the Chapeau of Article XIV, the measures deviating from GATS must not restrict services trade more than it would be necessary to fulfil such objectives, and must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.<sup>27</sup>

In terms of facilitating imports and exports, it is important to differentiate between mode 1 and mode 2 of services, yet this difference is blurred due to digitalization.<sup>28</sup> Moreover, GATS does not have a specific definition of what a digital good or digital trade means.<sup>29</sup> The formation and growth of online markets, as more consumers and businesses turn to these sites and platforms to make purchases, is a significant source of trade cost reduction from digital technologies, which has facilitated imports and exports.<sup>30</sup>

GATS does not obligate countries to enact consumer protection laws for ensuring acceptable service quality or security, and arguably only allows for a

21 GATS Art. 1:II.

22 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel, No. WT/DS285/R (WTO Panel 20 April 2005) 6.285.

23 Ismail, "E-Commerce in the World Trade Organization: History and Latest Developments in the Negotiations under the Joint Statement."

24 ESN, "ESN Position Paper on Electronic Commerce and the GATS," ESN9 14 (European Services Network, 25 June 1999), 1, [https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122232.pdf](https://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122232.pdf).

25 GATS Art. II:1.

26 GATS Art. XIV.

27 GATS: General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Ann. 1B XIV.

28 ESN, "ESN Position Paper on Electronic Commerce and the GATS," 6.

29 Sam Fleuter, "The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification," *Chi. J. Int'l L.* 17 (2016): 153, at 162.

30 Eddy Bekkers, Robert Koopman, Giulia Sabbadini, and Robert Teh, "The Digital Trade Era – Challenges and Opportunities for Developing Countries," in *Adapting to the Digital Trade Era: Challenges and Opportunities*, ed. Maarten Smeets (Geneva: World Trade Organization, 2021), 44.

restriction of data transfers in consumer interests under Article XIV(c) (ii).<sup>31</sup> GATS does not address the challenge of trade barriers caused by differences in privacy frameworks among nations since it does not obligate members to develop mutually compatible privacy frameworks.<sup>32</sup> Such uniformity in consumer protection laws would enhance trust in e-commerce by providing laws to address the challenges faced by consumers in the digital economy, which include unstable and fluctuating prices, information asymmetry, data privacy as well as safety, and liability for damages caused by any online transaction.<sup>33</sup> The EU New Deal for Consumers can inform the WTO e-commerce process since it provides good avenues for consumer protection such as providing individual remedies in case a consumer is harmed, more transparency for consumers in online marketplaces, extending the protection of consumers to 'free services' and removing burdens for businesses.<sup>34</sup>

Regarding tariffs as a form of government revenue, while the GATS provides for non-discrimination, it has no reference to customs duty or tariffs. As such, Members have recently imposed several taxes on digital services, known as Digital Services Tax (DST).<sup>35</sup> DST is seen as applicable under GATS because of Article I.1. France was one of the first countries to bring the DST debate into a policy forum. Evidence from a French investigation found that DST is important because digital corporations based in lower tax jurisdictions were making billions in revenue, yet the revenues they generated by offering their services to French consumers were not taxed.<sup>36</sup> The EU approach to DST could provide some lessons for the WTO e-commerce negotiations.

The uncertainty in classifying a service and the physical borders they are crossing also presents complexities in applying GATS on digital trade for customs duty and domestic tax purposes.<sup>37</sup> Among big players in the digital economy, the United States considers digital products to be goods, which are more comprehensively covered by GATT other than the GATS, whereas the EU considers digital products to be an extension of service which in effect makes them more covered by the GATS.<sup>38</sup> One prominent example is whether online banking is to be

31 Andrew D. Mitchell and Neha Mishra, "WTO Law and Cross-Border Data Flows: An Unfinished Agenda," in *Big Data and Global Trade Law*, ed. Mira Burri (Cambridge: Cambridge University Press, 2021), 83-112, at 96, <https://doi.org/10.1017/9781108919234.006>.

32 *Ibid.*, 94.

33 Phan Thi Thanh Thuy, "Consumer Protection in the Digital Economy and Its Legal Challenges," *Revista Geintec-Gestao Inovacao E Tecnologias* 11, no. 2 (2021): 686-700, at 692.

34 EU, "Communication from The Commission to The European Parliament, The Council and The European Economic and Social Committee: A New Deal for Consumers," COM/2018/0183 Final (European Commission, 4 November 2018), 4-5, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1573718927782&uri=CELEX%3A52018DC0183>.

35 Petros C. Mavroidis, "And You Put the Load Right on Me: Digital Taxes, Tax Discrimination and Trade in Services," *Trade Law and Development* 12 (2020): 75, at 78.

36 *Ibid.*, 80.

37 Ismail, "E-Commerce in the World Trade Organization: History and Latest Developments in the Negotiations under the Joint Statement."

38 Marc D. Froese, "Digital Trade and Dispute Settlement in RTAs: An Evolving Standard?," *Journal of World Trade* 53, no. 5 (1 October 2019), <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\TRAD\TRAD2019031.pdf>.

classified as mode 1 or mode 2 under the GATS or whether electronic books are to be classified as a good under GATT or service under GATS.

On attracting investment, GATS implementation promotes investment through the application of non-discrimination principles enshrined in Articles II and XVII. If a firm knows that its investments will receive the same treatment as that of a foreign country it intends to invest in, then that firm is motivated to invest in such a country, which would be under mode 3. GATS may not be able to adequately support Members in attracting investment since even digital services such as 3-D printing can be supplied under mode 1 which would then deny governments the chance to attract investments in their domestic markets.

In terms of preserving policy space for digital industrialization, the nature of GATS, which in design only gives MFN obligations to a Member based on the specific commitments as per the schedule means a Member has a reasonable policy space to restrict market access.<sup>39</sup> GATS Articles XVI and XVII prohibit Members from introducing data-restrictive measures in sectors where they have scheduled their commitments to national treatment and market access, as well as arbitrary and discriminatory measures unrelated to domestic regulatory objectives.

The issue of technological neutrality is challenged by advances in the digital economy, especially in terms of the classification of services. The GATS was agreed during the period when digitalization was in its infancy, data were not that valuable, only seen as a by-product of business that could not be profited from, something which has dramatically changed over the last few years.<sup>40</sup> Therefore, GATS may be inadequate in effectively regulating e-commerce as several policy issues regarding the classification of services cannot be explicitly agreed to by Members.<sup>41</sup>

Regarding development assistance, Article XXV.2 stipulates that the Secretariat shall provide technical assistance as decided by the Council for Trade in Services. Section 6 (c) of the Annex on Telecommunications states that where applicable and in cooperation with relevant international organizations, Members shall make information about telecommunications services and information technology available to developing countries for building the domestic capacity of these developing country Members. However, the technical assistance largely has best endeavour languages.

As concerns providing for different rights and obligations according to development levels, GATS does not follow the traditional Special and Differential Treatment (SDT) approach that grants more rights and offers longer transition periods for the implementation to developing countries but gives flexibility on a case-by-case basis.<sup>42</sup> Article IV.2 observes that developed country Members shall

39 Mavroidis, "And You Put the Load Right on Me: Digital Taxes, Tax Discrimination and Trade in Services," 86.

40 Dan Ciuriak, "The Challenge of Updating Institutions for Digital Trade," Centre for International Governance Innovation, 16 July 2021, [www.cigionline.org/articles/the-challenge-of-updating-institutions-for-digital-trade/](http://www.cigionline.org/articles/the-challenge-of-updating-institutions-for-digital-trade/).

41 Froese, "Digital Trade and Dispute Settlement in RTAs: An Evolving Standard?"

42 WTO, "Special and Differential Treatment Provisions in WTO Agreements and Decisions," Note by the Secretariat, WT/COMTD/W/258 (World Trade Organization, 2 March 2021), 95.

establish contact points for facilitating services suppliers from developing countries to access information related to their respective markets, particularly on issues related to commercial and technical aspects of the supply of services, registration, recognition, and obtaining of professional qualifications; and availability of technologies offering particular services.

## *II Agreement on Trade-Related Aspects of Intellectual Property Rights*

TRIPS establishes minimum standards for governments to regulate various forms of IP as they apply to nationals of other WTO Members.<sup>43</sup> Article 2 of TRIPS clarifies the agreement as building on the obligations of Members of the Paris Convention (1967), the Berne Convention (1971) and the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits. TRIPS is important because e-commerce involves the cross-border transfer of products that are based on IP, and its licensing, as well as the assignment of domain names to producers, suppliers or platforms.<sup>44</sup>

TRIPS provides for national treatment and MFN Treatment, covered in Articles 3 and 4 respectively. Under national treatment, Members are to treat nationals of other Members in the same way as nationals as concerns protection of IP. However, TRIPS recognizes exceptions to national treatment as provided for in the different treaties, specifically the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.<sup>45</sup> Concerning MFN, TRIPS obliges a Member to immediately and unconditionally extend to Members any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country.<sup>46</sup>

The IP protection offered to performers and producers of phonograms lasts at least until the end of a period of fifty years computed from the end of the calendar year in which the fixation was made or the performance took place while that offered to broadcasters lasts for at least twenty years from the end of the calendar year in which the broadcast was made.<sup>47</sup> The principles and objectives of IP have lasted over the many years of technological advancement, meaning even the development of e-commerce and the infrastructures to facilitate digitalization may be covered by the agreement.<sup>48</sup>

Considering the facilitation of imports and exports, TRIPS agreement is limited since it is about the protection of IP rights as provided for under Article 2. Designed to protect innovations and copyrights, the enforcement of IP protects rights holders from abuse or exploitation by consumers through unauthorized use of the innovations. Article 51 provides for the suspension of release by customs authorities, upon request by the rights holder if they suspect that an import is a

43 TRIPS Arts. 1, 4.

44 Sacha Wunsch-Vincent and Joanna McIntosh, "WTO, E-Commerce, and Information Technologies," *A Report for the UN ICT Task Force, Markle Foundation*, 2004, 21.

45 TRIPS Art. 3:1.

46 TRIPS Art. 4.

47 TRIPS Art. 14: 5.

48 "The Work Programme on Electronic Commerce – Background Notes by the Secretariat," IP/C/W/128, 10 February 1999, 3, [www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/8\\_1\\_ipcw128\\_e.pdf](http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/8_1_ipcw128_e.pdf).



Martin Luther Munu

counterfeit trademark or pirated copyright goods. However, the administrative procedures associated with those checks by customs authorities may lead to unnecessary delays that may have a negative impact on imports of goods ordered online.<sup>49</sup>

On the issue of addressing tariffs as a form of government revenue, the TRIPS agreement does not contain any clear provision. The de minimis rule on imports under Article 60 of the agreement does not apply to customs duty but rather to the protection of IP rights on imports. Under the de minimis imports rule, small quantities of non-commercial products in travellers' luggage or delivered in small consignments may be exempted from enforcement of IP rules or any infringement.<sup>50</sup> This means that TRIPS is inadequate to use its de minimis rule<sup>51</sup> to regulate imports of small consignments or products using electronic means, a trend which is only expected to grow as more businesses and consumers adopt digital trade due to its ability to reduce the costs of transaction and logistics incurred when using traditional mechanisms of delivering goods and services.<sup>52</sup>

The ability of TRIPS to promote technological transfer as provided under Article 66:2 of the agreement presents an opportunity for Members to attract investment. The TRIPS agreement states that developed country Members are to promote and encourage the transfer of technology to least developed country (LDC) Members through offering incentives to enterprises and institutions in their territories. Such incentives have been recognized as instrumental in creating a sound and viable technological base in LDC.<sup>53</sup> The TRIPS agreement protects the outcomes of investment in the development of new ICT, providing an incentive and the means to fund research and development aimed at enhancing investment in the ICT sector.<sup>54</sup> Even though the relevance of IPRs varies across different activities and industries, right holders are generally more inclined to share technology willingly when a country's IPR system provides effective protection.<sup>55</sup>

As regards preserving policy space for digital industrialization, TRIPS Article 65.2-3 gives developing countries longer transition periods to implement the agreement from the date of entry into force. Building the momentum of TRIPS flexibility means the WTO can carve out similar provisions in future agreements to consider the peculiarities of the digital economy, which would give more policy space for countries to implement digital industrialization.

In terms of providing development assistance, TRIPS is limited to technical cooperation. However, technical cooperation is only limited to support for enacting

49 Peggy E. Chaudhry and Alan Zimmerman, *The Economics of Counterfeit Trade: Governments, Consumers, Pirates and Intellectual Property Rights* (Springer, 2009), 44.

50 TRIPS Art. 60.

51 De minimis rule sets a minimum value of imports below which customs officials do not apply certain rules such as tariffs or intellectual property rights.

52 Adedeji Adeniran and Sone Osakwe, "Why Digitalization and Digital Governance are Key to Regional Integration in Africa," Center For Global Development, 11 May 2021, [www.cgdev.org/blog/why-digitalization-and-digital-governance-are-key-regional-integration-africa](http://www.cgdev.org/blog/why-digitalization-and-digital-governance-are-key-regional-integration-africa).

53 TRIPS Art. 66:2.

54 "The Work Programme on Electronic Commerce – Background Notes by the Secretariat," para. 22.

55 *Ibid.*, para. 23.

laws and regulations relating to the protection and enforcement of IP rights, as well as the prevention of their abuse. The only other area where technical assistance can be applied is the establishment or reinforcement of domestic offices and agencies dealing with these issues, as well as personnel training.<sup>56</sup>

In terms of providing for different rights and obligations according to development levels, TRIPS Agreement Articles 65:2 and 65:4 offers longer transitional periods for developing countries to implement most aspects of the agreement. Article 67 provides for technical assistance while Article 66:2 provides for technological transfer to developing countries. However, the most successful SDT provision of TRIPS is associated with the pharmaceutical industry extensions which have promoted the development of those industries in developing countries and LDCs, which is currently lacking in the digital economy and can be adopted in the e-commerce negotiating proposals by the EU and other members.<sup>57</sup>

### *III Trade Facilitation Agreement*

The TFA, the first WTO agreement since the Marrakesh agreement, requires Members to put in place policies and administrative provisions dealing with the entry of goods into a Member territory and with the transparency as well as provision of information relating to the entry of goods.<sup>58</sup> The TFA covers several issues of relevance to e-commerce since it tackles procedures and mechanisms for facilitating the movement of goods across borders. The TFA provides for transparency and paperless trading, which is an important component in promoting e-commerce, especially regarding the publication of information related to imports and exports.<sup>59</sup>

As regards facilitating imports and exports, promoting transparency in the TFA is an important element in building confidence in digital trade for traders and consumers alike. However, the publication of trade information through the internet as stipulated in Article 2 of TFA is the best endeavour language that requires Members to undertake this publication to the extent possible and as appropriate, while Article 2.3 encourages Members to make available further trade-related information including relevant trade-related legislation through the internet. Such best endeavour language does not provide the legal certainty needed by businesses in the digital economy.

In terms of paperless trading, an important area for enhancing digital trade, the TFA is limited in scope. Although the TFA provides some information to be provided by Members through the internet in addition to allowing importers to

56 GATS Art. 67.

57 Daniel Gervais, "TRIPS and Development," in *The Sage Handbook of Intellectual Property* (Los Angeles/London: Sage, 2014), 95-112, at 90.

58 Antonia Eliason, "The Trade Facilitation Agreement: A New Hope for the World Trade Organization," *World Trade Review* 14, no. 4 (October 2015): 643-70, at 645, <https://doi.org/10.1017/S1474745615000191>.

59 TFA Art. 1.

Martin Luther Munu

submit their documents before shipments arrive, these provisions do not go far enough to accommodate all the complexities of digital trade.<sup>60</sup>

Regarding addressing tariffs as a form of government revenue, the TFA only covers what affects customs duties through the application of the de minimis rule, moreover only to the extent possible as stipulated under Article 8:2(d). With the advance of the digital economy, the issue of customs duty has emerged as an important factor for developing countries, particularly with the extension of the moratorium on customs duty for electronic transmissions while tariffs continue to be applied on the physical imports of these digitalized products.<sup>61</sup> Since the TFA does not sufficiently address the issue of tariffs as a form of government revenue, WTO Members could explore mechanisms through which tariffs can be enhanced as the digital economy grows because this growth in the digital economy has seen developing countries lose out on tariff prospects, a critical trade policy instrument as reported by India and South Africa.<sup>62</sup>

In terms of promoting investment, as the TFA seeks to promote trade, it indirectly promotes investment opportunities for Members since companies are attracted to invest in countries due to the improved supply chain trade and diversified exports.<sup>63</sup> The National Committee on Trade Facilitation (NCTF), established under Article 23 to facilitate both domestic coordination and implementation of the agreement, provides an important element in coordination measures that would promote investment, given the strong relationship between trade and investment. However, the NCTF lacks the mandate to tackle investment issues, more so on the digital economy. Widening the mandate of NCTF to include investment facilitation could therefore be one way to cover investment facilitation in the domestic market.<sup>64</sup>

In terms of preserving policy space for digital industrialization, the TFA grants policy space to developing countries under its SDT provisions, mainly allowing Members to choose which provisions of the agreement and when to implement them. The TFA also recognizes that some provisions will necessitate resources and that some Members may require assistance in implementing these provisions.

60 WTO, "Joint Statement on Electronic Commerce Communication from Australia," JOB/GC/199 (World Trade Organization, 21 September 2018), 3, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/199.pdf&Open=True>.

61 Rashmi Banga, "Should Digitally Delivered Products Be Exempted from Customs Duties?," United Nations Conference on Trade and Development, 16 July 2020, <https://unctad.org/news/should-digitally-delivered-products-be-exempted-customs-duties>.

62 WTO, "The E-Commerce Moratorium: Scope and Impact Communication from India and South Africa," WT/GC/W/798, para. 2.7, accessed 17 March 2020, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=264789%2C264692%2C263985%2C262610%2C262031%2C261632%2C261432%2C261434%2C259951%2C259601&CurrentCatalogueIdIndex=4&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=264789%2C264692%2C263985%2C262610%2C262031%2C261632%2C261432%2C261434%2C259951%2C259601&CurrentCatalogueIdIndex=4&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True).

63 Bernard Hoekman and Ben Shepherd, "Who Profits from Trade Facilitation Initiatives? Implications for African Countries," *Journal of African Trade* 2, no. 1-2 (2015): 51-70, at 52.

64 Bernard Hoekman, *From Trade to Investment Facilitation: Parallels and Differences* (Geneva: International Trade Centre, 2021), 16.

However, many of these provisions are not legally binding since they are formulated in the best endeavour language.<sup>65</sup>

Regarding the provision of development assistance, the TFA ties the implementation of agreement's key provisions by developing countries to the accessibility of development assistance.<sup>66</sup> However, the development assistance envisaged in the TFA is related to administrative and infrastructures associated with trade in general, not e-commerce. Therefore, while some provisions for development assistance, such as the provision of information through the internet in Article 2, the formalities connected with importation, exportation and transit in Article 10, and customs cooperation in Article 12, support e-commerce, they may not go far enough in providing the specific development assistance needed to build capacity in the digital economy.

In terms of providing for different rights and obligations according to development levels, the TFA has three categories of obligations, namely Category A, Category B and Category C where each developing country and LDC Member can individually designate their obligations.<sup>67</sup> While Category A provisions are those that a Member designates for implementation upon entry into force of the Agreement, or in the case of a LDC Member within one year after entry into force, Category B provisions are those a Member designates for implementation on a date after a transitional period following the entry into force of the Agreement. The implementation of Category C provisions is conditioned to a Member receiving assistance and support for capacity building.

## C Conclusion

This article assessed the existing multilateral rules regulating e-commerce to identify their adequacies, drawing from some of the EU rules governing e-commerce. While several WTO rules govern trade among Members, three major rules are the most relevant for e-commerce discussions: rules on non-discrimination, rules on market access and general exceptions to these rules, which tackle the need to regulate trade liberalization to achieve other societal goals. The GATS and the TFA are the most relevant WTO rules for e-commerce as they have provisions directly related to the use of electronic means or the internet. However, there are several limitations to the existing rules governing e-commerce. WTO Members signed these agreements before advances in digital technologies, which renders them inadequate in addressing the complexities brought about by the digital economy. Secondly, Members designed these rules for regulating different and in some instances wider issues, meaning they only have sections or provisions, which are relevant to e-commerce, ignoring the new issues brought by digitalization. The EU

65 Bernard Hoekman and Alessandro Nicita, "Non-Tariff Measures and Trade Facilitation: WTO Disciplines and Policy Space for Development," in *Non-Tariff Measures: Economic Assessment and Policy Options for Development*, ed. Jaime De Melo and Alessandro Nicita, UNCTAD/DITC/TAB/2017/2 (Geneva: United Nations Conference on Trade and Development, 2018), 59.

66 *Ibid*

67 TFA Art. 14:2.

Martin Luther Munu

Single Market, proposals for the DST and the New Deal for Consumers provide important lessons which can help in shaping e-commerce rules at the WTO.