



26 March 2018

Joint Standing Committee on Trade and Investment Growth
P.O. Box 6021
Parliament House
Canberra
ACT 2600

Dear Joint Standing Committee on Trade and Investment Growth

Inquiry into the Trade System and the Digital Economy

The Global Economic Law Network (GELN) welcomes the opportunity to make a submission to the Joint Standing Committee on Trade and Investment Growth's Inquiry into the Trade System and Digital Economy.

The Global Economic Law Network (GELN)

GELN is an interdisciplinary research centre of Melbourne Law School, established to facilitate exchange and discussion among academics, government and practitioners working in international economic law. The centre also provides training and capacity-building services to governments and other organisations, and facilitates scholarly discussions and research collaborations on various aspects of international economic law. GELN brings together academic scholars and experts from diverse disciplines. Andrew Mitchell is the Director of GELN and Neha Mishra is a GELN PhD Candidate.

Given the importance of cross-border movements of data and services in the economy today, researchers at GELN focus on important trade and investment issues pertaining to the digital economy, including questions of adaption of the international legal framework on trade and investment in goods and services to the digital economy, addressing genuine concerns of digital security and integrity without allowing them to become a disguise for protectionism, and capitalising on the potential of new technologies while maintaining employment and increasing living standards across the globe. We highlight below some of the key findings from our current research on trade and digital economy issues that might be of interest to this Committee. The underlying research is Andrew Mitchell & Neha Mishra, 'Data at the Docks: Modernising International Trade Law for the Digital Economy' (2018) *Vanderbilt Journal of Entertainment & Technology Law* (forthcoming) available here: (https://papers.ssrn.com/abstract_id=3064396).

Adopt Collaborative, Multistakeholder and Interdisciplinary Policy Processes

The future of digital trade does not only depend on technological growth, but also whether global governance framework on digital trade is reliable, open, robust and facilitates innovation and creativity. As a platform for trade, the internet generates wicked public policy including security and privacy challenges; online content regulation; enforcement of online intellectual property rights; and a digital divide between developed and

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developing economies. These problems are not yet very well understood as technology continues to evolve, thus compelling regulators to operate in an unfamiliar and uncertain territory. To operationalise an inclusive and robust regulatory framework for the digital economy, these problems should be viewed and resolved through a collaborative, multistakeholder and interdisciplinary approach. In this regard, trade and investment law and policy plays a vital role in facilitating an open global environment for digital trade, improving interoperability among differentiated domestic regulatory frameworks, enhancing trust of internet consumers, and increasing integration of developing countries into the global digital markets.

Develop Deeper Understanding of the Application of International Trade Agreements to Digital Trade Issues

In applying international trade law to digital trade issues, governments need to be mindful of the specific architecture of international trade agreements such as General Agreement on Trade in Service (GATS), and other relevant Preferential Trade Agreements (PTAs), and the concurrent obligations and commitments under these agreements. This understanding is particularly critical in case of GATS as it was implemented before the internet age.

First, the structure of GATS (whereby market access and national treatment obligations are contingent on WTO Members' commitments in their respective GATS Schedules) coupled with the outdated classification system relied upon by majority of Members creates uncertainty regarding whether GATS obligations cover new-age digital services (eg cloud services).

Second, the application of GATS to measures restricting cross-border data flows is not entirely clear, particularly in relation to two issues: (a) accommodating the cross-cutting nature of data flows with the sector-specific commitments in Members' schedules; and (b) examining the extent to which data-flow restrictive measures are necessary to achieve desired levels of internet security, consumer protection and trust.

Finally, the diverging rules on electronic commerce in various PTAs could potentially conflict with GATS rules, creating regional blocs that disrupt the international legal framework. While PTAs can be building blocks for global trade, the current upswing in digital protectionism can be tackled most effectively by the development of multilateral disciplines on digital trade.

Develop Coherent and Inclusive Digital Trade Rules

Several recent proposals from WTO Members provide a useful starting point for initiating a constructive dialogue on digital trade. The key issues are:

- (a) *Classification of digital services*: achieving common understanding on classification of digital services to facilitate higher commitments in relevant sectors;
- (b) *Regulatory frameworks for digital trade*: developing new rules to require/encourage countries to adopt globally interoperable regulatory frameworks on cross-border data flows, data protection, cybersecurity, consumer protection, etc; and
- (c) *Facilitating digital inclusion*: complementing (a) and (b) with measures targeted to help achieve digital inclusion, including initiatives on trade finance, supporting SMEs, facilitating electronic payments etc.

These suggested reforms can be supported either through making incremental changes within the existing GATS (for example, adoption of domestic regulation disciplines under GATS, or developing reference paper on electronic commerce akin to that on telecommunications services) or by adopting a new WTO agreement on digital trade. While the latter route is politically more challenging, it is perhaps more likely to be effective in overcoming gaps in the current structure. Irrespective of the route for reform, the WTO should engage with the broader network of institutions dealing with different aspects of digital trade and internet governance to contribute more meaningfully to the digital economy. In the current scenario, a plurilateral approach is likely to be more successful than a multilateral approach in undertaking new work at the WTO such a Reference paper on Electronic Commerce.

Adopt a Flexible and Pragmatic Approach in Digital Policy-Making

The developments in the technology industry take new turns almost every few weeks, and taking a highly prescriptive approach to new digital innovations, without evaluating the pros and cons can be counterproductive in the long run. We think the Australian government will benefit immensely by remaining deeply committed to open markets for digital trade, and putting forward new policy initiatives to promote the digital economy, despite mounting pressure to control certain activities in the internet. When it comes to development of international trade rules, pragmatic routes for multilayered policy response should be preferred over exclusive state-to-state negotiations — for example, to include industry, international organisations and multistakeholder bodies, whenever their expertise is meaningful. Similarly, rather than aiming for harmonized standards on electronic commerce issues, it might be more practical to achieve a sufficient level of interoperability such as through mutual recognition agreements.

Engage Stakeholders Across Different Platforms

In developing a framework for trade in the digital economy, governments need to recognise imperfections and failures, including the possibility of incoherence regarding how multiple institutions and networks will interact with each other, particularly in the short run. In our view, to become a global leader in digital governance, the Australian government should remain proactive and constantly re-evaluate the prevalent policy approaches. This might require a dedicated group of experts within the government remaining abreast of technological issues by consulting relevant experts on an ongoing basis. Finally, for this approach to be successful, different stakeholders within Australia and globally need to come together in good faith understanding that no single institution can by itself succeed in developing a holistic and inclusive framework for digital trade.

We are happy to provide further inputs and present our ongoing work on trade and digital economy issues to the Committee, its members, and any other government departments, as and when appropriate. We look forward to remaining engaged in this dialogue.

Yours sincerely

Professor Andrew D Mitchell & Ms Neha Mishra