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DESIGNING DIGITAL TRADE RULES FOR DEVELOPING COUNTRIES

Commerce with all nations, alliance with none, should be our motto

- Thomas Jefferson

INTRODUCTION

The digital upheaval is transmuting partakers in trade and the trade dealings. The digital economy now reaches deeply into our lives and much in trade of goods and services as well as the transfer and use of data now flows under the title digital trade or e-commerce. Many of the largest digital companies take a valuable data output or commission for interaction. A new set of rules on digital trade is being developed by World Trade Organisation (WTO). Regardless of most evolving nations voted contrary to it, plurilateral negotiations were launched in 2019. The equivalent agenda is to be trailed in free trade agreements including Trans-Pacific Partnership (TPP), Northern American Free Trade Agreement (NAFTA), and the EU-UK deal. The main agenda comprises some of the non-debatable augmentations, like use of e-signatures in pugnacious trash, and the whole motive is the liberalisation of e-commerce and to drain the toolkit of those who would try and hold the primary tech institutions. It is a prodigious introductory break for millions of micro entrepreneurs and small industries to involve in cross border trade, grow into global sellers, and craft their own logistics network. It is helping companies, customers as well as government to access a variety of goods and services and without intermediation by retail chains.

Marketplace e-commerce entity is permitted to enter into transactions with sellers registered on its platform on B2B basis. E-commerce marketplace may provide services to sellers in respect of warehousing, logistics, order fulfilment, call centre, payment collection and other services.¹

¹ Foreign Exchange Management (Exports of Goods and Services) (Amendment) Regulations, 2017

E-commerce is diversifying the customs of trade, from goods shipped in containers to small parcels sent by post or sold online. It is speeding up the trade transactions and payments and lowering the other costs. With the revolutionization in internet, new opportunities for cross border trade have been unbolted. For safe cross border trade, Foreign Exchange Management Act, 1999 the payment making and receipts system along with deals in foreign exchange and foreign security is restricted. FEMA deals with provisions relating to procedures, formalities and dealings etc. of foreign exchange trade transactions in India. The main objective of this act was to facilitate trade and payment methods and the orderly developments and development of foreign exchange market in India. Its undertaking is to support the citizens and first responders to promote that as a nation the work should be done as to build, sustain, improve the capability to prepare and mitigate all hazards.

The movement of data across borders is also transforming international trade. Data flows can be services trade like cloud computing or professional service and the data flows that enable international trade by supporting global communications, access to information, tracking and tracing along supply chains and opportunities for collaborations and innovation in the digital market².

EXISTING DIGITAL TRADE RULES

Digital Trade is not new-fangled; it is growing and raising a set of new challenges, not related to certifying that the benefits are shared more inclusively. There are several WTO treaties that are still suitable for digital trade. These include The General Agreement on Tariffs and Trade (GATT), The General Agreement on Trade in Services (GATS), The Annex on Telecommunications, Information Technology Agreement (ITA), the Agreement on Technical Barriers to Trade (TBT)³. The most important agreement is GATS when it comes to provide a legal framework supporting cross borders data flows. Although, existing World Trade Organisation covers digital trade and there are certain questions about how well the frameworks adapted are going to work in new digital era. There is more need of methods which are complete, spanning of goods, services and digital connectivity, methods which involve more and more stakeholders, including governments, civil societies and the business community and some methods that are interest of a growth for the developing countries.

BENEFITS FROM DIGITAL TECHNOLOGY

²The Impact of Digitalisation on Trade, OECD.org, www.oecd.org/trade/topics/digital-trade (Last visited on April 16, 2020)

³Joshua P. Meltzer, *Governing Digital Trade*, 18 WORLD TRADE REV. S23 (2019)

Global data flows and the emerging technologies are key drivers of international trade. The rules of Indian legal systems provide for a better working environment to digital trade. For instance, by using artificial intelligence, businesses are improving the management of supply chain, evolving smart business and using artificial intelligence services to increase exports to countries where language was always a barrier between the business houses. Following are some of the benefits of digital technology: -

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- A. Across Borders E-commerce Prospects:** Businesses can have their websites or can use digital platforms to become global. E-commerce gives a great chance to small magnates to contribute in international trade activities. To establish its business there is no need of physical presence overseas, a website can do that work without instant presence.
- B. Digital Services:** International data flows are predominantly significant for growth in digital services⁴. Services can conveniently be purchased and disbursed online. Cloud computing can be a crucial business input in digital trade. Electronic money transfers can simplify the work in lesser time or just in one click.
- C. Participation in Global Value Chains (GVCs):** Advancement of GVCs has been empowered by global connectivity and international data flows that facilitate communications and can be used to coordinate logistics.
- D. Growth in Digital Protectionism:** There are certain limitations on data flows which disallow the transfer of data outside national borders and also data localisation limitations that often include restrictions on data flows.
- E. Data Localisation:** Another important benefit from digital trade is the data localisation where for small businesses and for developing countries it becomes difficult to stand up on the cross-border platforms. Digital trade makes it very easy to generate data and the domestic location of computing facilities as a condition for doing business.
- F. Open Government Data:** The United States Mexico Canada agreement (UMSCA) is the first trade agreement to include a commitment on improving access to and sharing of government data. This commitment does not compel any of the parties to provide government data. However, the recognition of public and government data fosters economic and social development.

⁴ Aaditya Mattoo & Sacha Wunsch-Vincent, *Preempting Protectionism in Services: The GATS and Outsourcing*, 7(4) J.INT'L ECON. L. 765(2004)

G. Privacy and Consumer Protection: Digitisation of governmental data should be ensured by the guarantee of privacy provided to the consumers. This affirms the commitment to apply consumer protection act on cross border digital trade. The core commitment of each party is to adopt and maintain a legal framework for the protection of personal information of users of economic commerce.

BARRIERS IN DIGITAL TRADE:

Digital trade is a broad concept with benefits there comes some barriers in the path of digitisation. E-commerce not only focuses on sale of consumer products or supply of online services but also data flows that enable the global value chains. Following are some of the key barriers in digital trade: -

- A. Data Localisation Barriers:** There are certain unnecessary requirements to store data within a particular jurisdiction of government or the localisation of computing facilities which puts a ban on the circulation of cross border data flows.
- B. Technology Barriers:** Different types of technologies are being used in different countries. There are requirements to meet onerous and unnecessary security standards. There are requirements to disclose encryption algorithm or other property source codes to avail the data.
- C. Barriers on Internet Services:** Inappropriate applications which have malwares and spams are the main barriers on which the businesses do not trust. There is always a fear of stealing of data. The wrong IP addresses used can contain the not so user-friendly content and activity. Likewise, in the landmark judgment of Nasscom v. Ajay Sood and Others⁵, the concept of 'phishing' was very well explained, the court stated that it is a form of internet fraud where a person intends to be a legitimate association such as a bank or an insurance company in order to extract personal data from customers like their passwords, OTP's or any other details. Thus, the court held that 'phishing' on internet to be an illegal act, entailing an injunction and recovery of damages.

In another case, Sanjay Kumar v. State of Haryana⁶, in this it was observed that the petitioner had convicted offence under Sections 420, 467, 468, 471 of IPC, 1860 and

⁵Nasscom v. Ajay Sood and Others, 119 (2005) DLT 596, 2005 (30) PTC 437 Del

⁶Sanjay Kumar v. State of Haryana, CRR No. 65 of 2013 (O&M)

section 65 and 66 of IT Act, 2000 as he was working on software system of bank and was also in the position to enter into the ledgers. Thus, he manipulated the entries by forging and fabricated certain entries of the accounts.

D. Cyber Defamation: The hackers these days have become more advanced and are using different ways to defame a person. Misuse of emails and passwords have become a trend. Likewise, in the case of *SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra*⁷, in this case plaintiffs contended that the emails sent by defendant were obscene, vulgar, abusive, intimidating, humiliating and defamatory in nature. Counsel further argues that the aim of sending such emails was to malign the reputation of plaintiffs all over the India and the world. However, Court of Delhi assumed jurisdiction over a matter where a corporate's reputation defamed through emails and passed an important ex-parte injunction.

E. Others Barriers: There are certain issues related to the electronic authentication and signatures, internet domain names, digital products and other discriminatory platforms which may hinder the digital trade activities.

The regulations of FEMA, 1999 the payment making and receiving system has strengthen. As well the Indian legal provisions support the digital traders to grow their business in India as well as outside country.

DIGITISATION

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Digitisation is giving new breaks to firms for selling more and more products to a wide market at once, which results in diversification of their export baskets. Data flows across borders enables digitisation of the entire manufacturing enterprise, faster lifestyles and collaborative and connected supply chains. For instance, data collected from sensors attached to mining and farming equipment allows businesses to improve their operations and thereby the value from the use of such equipment. It helps in growing trade activities and allowing countries and the entrepreneurs to get benefit from these trade agreements. However, digitisation acts as a backbone for the digital services and its trading transactions. International standards could help the better data flows across international borders⁸. There are many standards which are to be maintained for privacy and in order to build a secured digital market. Some of these standards can reduce the costs for customers and safety of

⁷*SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra*, Suit No. 1279/2001 Delhi HC

⁸Lopez Gonzalez, J. and M. Jouanjean (2017-07-27), "Digital Trade: Developing a Framework for Analysis", OECD Trade Policy Papers, No. 205, OECD Publishing, Paris. <https://dx.doi.org/10.1787/524c8c83-en> (Last visited April 16, 2020)

customers can be ensured through these standards. As according to the standards ensured the members will use the standards on the basis of technical regulations. Data collection and analysis are allowing new digital services to add value goods in exports.

CYBERSECURITY

Cybersecurity is the practice of protecting systems, networks and programs from digital attacks. The cyber-attacks are generally aimed at accessing, changing or destroying the sensitive data, extorting of money from users or interrupting the domestic as well as international businesses⁹.

Cyber Crime may be defined as the “act of creating, distributing, altering, stealing, misusing and destroying information through the computer manipulation of cyber space; without the use of physical force and against the will or the interests of the victim”¹⁰.

Indian legal system has enacted Information Technology Act, 2000 which later came to be known as Cyber Law. Along with the IT Act, 2000 to recognise the electronic communication certain important amendments has been made in the Indian Laws, the amendments are required to make the execution of the regular laws in the information technology age. The main object of this act was to facilitate legal regularisation of commercial activities through electronic medium. Therefore, this act regulates all the technology related activities and punishments are imposed on the law breakers.

These days it has become a necessity to protect one’s personal data as hackers have more innovative idea to fool the user and extract its personal information. It has become more challenging to protect users data because there are more devices than people. A unified threat management system can automate integrations can accelerate key security operations such as detecting, investigation and remediation. Users shall also comply with basic security principles like choosing strong passwords, backing up data, synchronising the devices. The developing countries shall focus on cybersecurity more by learning and installing the security principles to protect its data. As a cybersecurity attack could lead to theft of identity, extortion attempts and loss of very crucial data which could destroy the business in one go. Commitments to protection of consumers engaging in e-commerce should have to be the main feature of protecting cross border trade. The core commitment is for each party is to

⁹Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Dec. 30,2018, <https://www.iilj.org/wp-content/uploads/2018/03CPTPP-consolidated.pdf> (last visited April 15, 2020)

¹⁰Cyber Crime: a challenge to Leviathan, available at <http://www.lse.ac.UK/clubs/hayek/essays/cybercrime.htm>. (Last visited on April 16,2020)

adopt and maintain a legal framework for the protection of information of its users. The trade agreement is to recognise the importance of building cooperation on cybersecurity. It includes the hortatory commitments on developing risk-based approaches to cybersecurity threats that rely on consensus based-standards and risk management practices. This is consistent with the aim of focusing risk-based cybersecurity measures by the Organisation for Economic Co-operation and Development (OECD) as well as the U.S. National Institute of Standards and Technology (NIST).

INDIAN LAWS ON DIGITAL TRADE

Like other developed countries having well developed legal infrastructure, Indian legal infrastructure in digital world is evolving with a great speed. With outcome of this India too is sharing legal liability with others and which is the outcome of technological boom. though India is having a rich legal heritage then also it is facing problem of traditional notion of jurisdiction which is great difficulty for laws related to cyber space. Different laws are made to protect the businesses from cybercrimes. India has emerged as a world leader in Information Technology and is nicely contributing to Indian technology. Indian Parliament therefore enacted Information Technology Act,2000 for combating crime problems. Before this act Indian Penal Code dealt with the crime committed through computer.

In the case of *S. Sekar v. the Principal General Manager (Telecom) (B.S.N.L)*¹¹, the petitioner was the employee off respondent working as a Telecom Technical Assistant, he was suspected by the officials for having committing the offence of manipulating the computer system and thereby causing loss to B.S.N.L. Thus, the FIR was logged and he was liable for offences under Section 406, 420 and 468 of IPC,1860 and 43(g) of the Information Technology Act, 2000.

DIGITAL TRADE GOVERNANCE

With the transformation in digital era an increasing share of economic activity is accounted for digitally enabled modes. The digital trade commitments are significant and help in underpin growth of digital trade. However, there are certain areas where trade policy can support digital trade. Regulatory needs and regulatory differences between the countries is the area of privacy and cybersecurity are key drivers of restrictions on international trade border data flows. Until the regulators have confidence that allowing data to leave their

¹¹*S. Sekar v. the Principal General Manager (Telecom) (B.S.N.L)*, W.P.(MD) No. 10208 of 2005 and M.P. No. 10905 of 2005

jurisdiction will not undermine domestic regulatory goals, there will remain a strong incentive to restrict data flows and the opportunities for digital trade. Digital disruption is being felt pervasively as new models of trade has been enabled including trade between households mediated by digital platforms and non-monetised barter exchange of digital services return for the value of data as an asset. In this data driven economy, data plays a fundamental role, it is a digital space including inter and intra international firm production network, the essential capital stock for data driven business and the soft infrastructure of digitised world.

There are some challenges faced by the digital governance of developing countries such as personal privacy, integrity of democratic processes, maintaining the tax base to fund public goods and economic regulation to address market failure. Even the definition of national production is at issue, more importantly the data driven economy promises to serve up the market failure in abundance.

In the case of Syed Asifuddin and Ors. V. The State of AP.& anr.¹², Tata Indiacom employees were arrested for manipulation of the electronic 32-bit number (ESN) programmed into cell phones that were exclusively franchised to Reliance Infocomm. The court held that such manipulation amounted to tampering with computer source code as envisaged by section 65 of the Information Technology Act, 2000.

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The deployment of machine knowledge capital on a massive scale promises to generate similar effects to returns to human capital in the advanced economies as the entry of China and India into the global division of labour and the robotization of routine production had on blue collar jobs and wages.

CONCLUSION

To conclude it could be said that the revolution driven by rapid technological change and digitisation has already had a profound impact on the different ways of trade. International digital trade is booming day by day. New and efficient technologies are making supply chains and border clearance more effective for the developing countries. E-commerce entrepreneurs must navigate the challenges from delivery logs to secure payments. New technologies can fragment the digital economy. More laws should be implemented to deal with cyber-crimes

¹²2005 CriLJ 4314

as well as safe, secure and strong networking is required to make digital trade a success in developing countries.

