

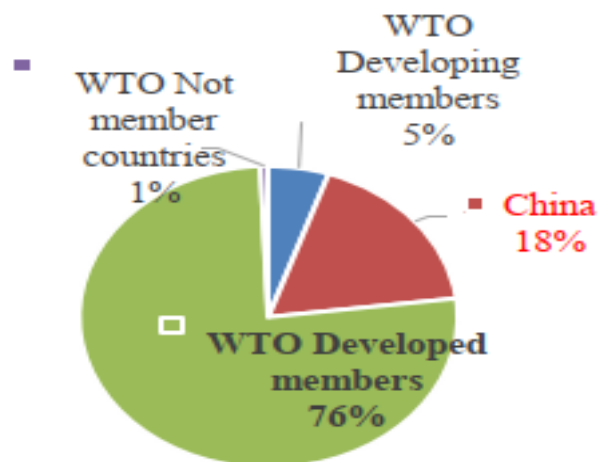
DIGITAL RULES IN THE PACIFIC — SOME IMPLICATIONS

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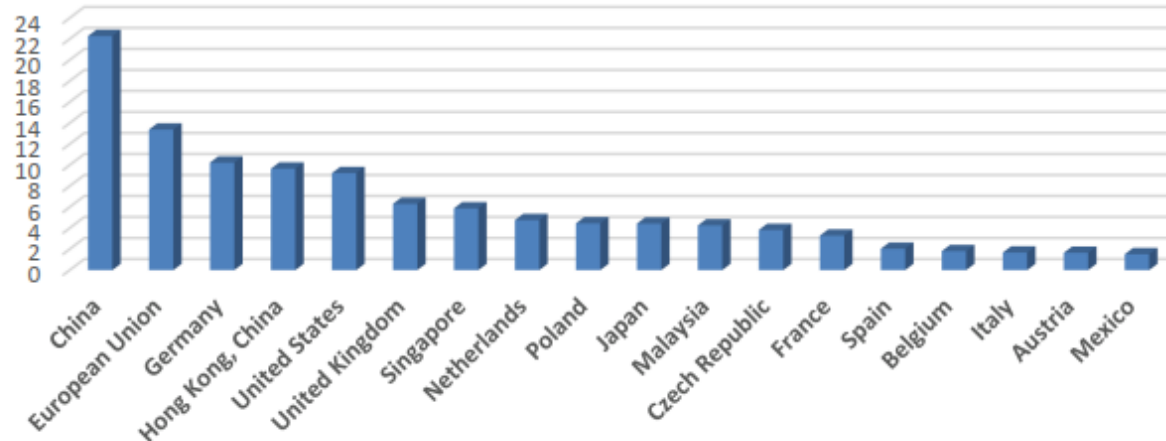
CUSTOMS DUTIES ON ETRANSMISSIONS

- A ban on customs duties on electronic transmissions benefits developed countries (as exporters of these products) but can have adverse implications for revenue, digital industrialisation etc in developing countries. E.g. as a net importer of these digital products, Fiji lost US\$9 million in potential revenue in 2020 from the current WTO temporary moratorium on these customs duties, see
 - https://www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf
 - https://unctad.org/system/files/official-document/gdsecidc2017d3_en.pdf

EXPORTS OF DIGITIZABLE PRODUCTS IN 2017 (%)



Largest Exporters of Digitizable Products in 2017 (USD bn)



https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf

CUSTOMS DUTIES ON ETRANSMISSIONS

	Simple Average of Bound Duties in 2017 (%)	Estimated Total Imports of Digitizable Products (\$Mn)	Imports via Mode 1 of All Services (\$Mn)	Potential Tariff Revenue Loss if ET are Digitizable Goods. using Average Bound Duties (\$Mn) *
WTO Developing members (excluding LDCs)	12.6	79 957	705,630	10 075
WTO High-Income Members (21)	0.2	144 566	1,822,184	289
Sub-Saharan Africa	46.4	5 669	62,919	2 630
Middle East - North Africa	18.9	5 371	66,012	1 015
WTO LDC members (31)	50.3	2 995	46,230	1 506

https://unctad.org/en/PublicationsLibrary/ser-rp-2020d6_en.pdf

Some implications of:

- Deregulating electronic authentication:

https://www.twn.my/announcement/TWN_esignatures2018-9.pdf

- Non-discriminatory treatment of digital products USMCA provision:

<https://rethinktrade.org/reports/digital-trade-doublespeak-big-techs-hijack-of-trade-lingo-to-attack-anti-monopoly-and-competition-policies/> and

<https://medium.com/rethinktrade/trade-law-hijacked-big-techs-digital-trade-doublespeak-strikes-again-8af0a37cead9>

- Cross-border data flow provisions:

- <https://www.twn.my/MC11/briefings/BP3.pdf>

- For digital industrialisation e.g.

https://www.twn.my/announcement/UNCTAD%20Re%20Paper%2058_022021.pdf

- On MSMEs: https://www.ourworldisnotforsale.net/2017/Hill_MSMEs_E-commerce.pdf and the concerns of MSMEs about these provisions: https://www.ourworldisnotforsale.net/2017/R_MSMEs_reject.pdf

SOME IMPLICATIONS OF SOURCE CODE AND ALGORITHMS PROPOSALS

- TRIPS+ trade secret protection. (LDCs in WTO like Solomon Islands are not supposed to have to comply with TRIPS until they graduate from being LDCs)
- TRIMS+ restriction on performance requirements
- Some measures affected:
 - Tax law
 - Financial regulation
 - Medicine manufacturing regulations
 - Car safety
 - Gambling regulation
 - Court ordered disclosures
 - Competition law
 - Government procurement
 - Checking car emissions software
 - Checking medical device safety
 - Checking critical infrastructure cybersecurity
 - Checking internet of things cybersecurity
 - Algorithmic bias/discrimination (eg algorithmic auditing/transparency)
 - Other?

<https://www.twn.my/MC11/briefings/BP4.pdf>

CHANGES IN SOURCE CODE EXCEPTION OVER TIME

FTA	Japan-Mongolia	TPP/CPTPP	TISA	EUFTA	USMCA (new NAFTA)	Japan-US
Date of proposed text/ FTA was concluded	February 2015	6/10/2015	November 2016	Indonesia: 27/7/2017 Chile: 6/2/2018 Mexico: 21/4/2018	Text released on 1/10/2018	Signed 7/10/2019
Exception to source code provision	For critical infrastructure	-For critical infrastructure -For patents	For legitimate public policy objectives, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or disguised a restriction on trade.	- legitimate public policy objective, including to ensure security and safety’ -‘requirements by a court, administrative tribunal or competition authority to remedy a violation of competition laws;’ -intellectual property rights and their enforcement’ -military procurement	‘Nothing in this Article shall preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination enforcement action or judicial proceeding’	‘This Article does not preclude a regulatory body or judicial authority of a Party from requiring a person of the other Party to preserve and make available the source code of software, or an algorithm expressed in that source code, for a specific investigation, inspection, examination, enforcement action, or judicial proceeding’

OTHER OBLIGATIONS?

WTO JSI ecommerce includes many other proposed obligations including:

- Join ITA1 and 2 (See implications at <https://wtocentre.iift.ac.in/workingpaper/WP%20Implications%20of%20signing%20IIITAI%20and%20ITA%20Expansion.pdf>)
- Services liberalisation including:
 - Computer and related services
 - E.g. see https://www.twn.my/title2/FTAs/Services/Full%20report%20for%20TD%20series_FORMAT_Ver6-FIN-09012020.pdf for some implications
 - Retail services
 - Advertising services
 - FCTC text: <https://fctc.who.int/publications/i/item/9241591013>
 - FCTC Parties: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&clang=en
 - Trade facilitation
 - Existing levels of implementation of WTO's Trade Facilitation Agreement: <https://www.tfadatabase.org/en/implementation/progress-by-member>

Likely exceptions:

- WTO's general exceptions in GATT/GATS which are so difficult to use governments have only succeeded in 2/48 attempts: [https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper .pdf](https://www.citizen.org/wp-content/uploads/WTO-General-Exceptions-Paper.pdf)
 - Necessity test difficulties
 - Privacy exception is self-cancelling. Compare it to EU's proposed privacy exception to Indonesia: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/transparency-eu-trade-negotiations_en
- Prudential defence
- Legitimate public policy objective problems
- Security exception
- Tax exception?

SOME FURTHER INFORMATION

- Leaked JSI ecommerce text: <https://www.bilaterals.org/?wto-2023-plurilateral-ecommerce-48862> from <https://www.bilaterals.org/?-other-292->
- Publicly available information about IPEF digital economy provisions: <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef/trade-pillar>
- USMCA digital trade chapter: <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

Thank you

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