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Are Digital Trade Disputes "Trade Disputes"?

Yuka Fukunaga

I INTRODUCTION

Since the issuance of a joint statement in January 2019, eighty-six World Trade Organization (WTO) members have confirmed their intention to commence WTO negotiations on trade-related aspects of electronic commerce. Additionally, several have submitted concept papers and text proposals, and many more have engaged in exploratory discussions on a wide range of issues surrounding electronic commerce. In December 2020, the consolidated negotiating text was circulated to the participating members. There is a growing expectation that a new Agreement on Trade-Related Aspects of Electronic Commerce (TREC Agreement) that will be either multilateral or plurilateral in nature will be adopted in the not-so-distant future.[1]

One key question that has been left out in the process of negotiating the TREC Agreement is how disputes concerning electronic commerce should be settled. The assumption may be that the rules and procedures of the WTO Dispute Settlement Understanding (DSU) apply to disputes under the TREC Agreement.[2] However, the validity of this assumption is questionable, because disputes arising under the proposed TREC Agreement would differ from conventional trade disputes, as discussed in this chapter. As a result, special or additional dispute settlement procedures must be developed to properly settle disputes under the TREC Agreement.

This chapter highlights key differences between conventional trade disputes and their digital counterparts and proposes special or additional dispute settlement rules and procedures that may be incorporated in the TREC Agreement. For the sake of convenience, this chapter uses the term "digital trade disputes" to represent disputes that would likely arise under the TREC Agreement. It does not seek to define the term "digital trade," which may include not only trade in digital products but also

[1] Compare SA Aaronson and P Leblond, "Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO" (2018) 21 *Journal of International Economic Law* 245, at 251–253, 270–271.

[2] Compare M Burri, "The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation Symposium – Future-Proofing Law: From RDNA to Robots" (2017) 51 *UC Davis Law Review* 65, at 95–97.

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digitally enabled trade in goods and services.[3] Nor does it discuss substantive rules to be included in the TREC Agreement.[4] Instead, this chapter infers the nature of digital trade disputes arising under the TREC Agreement by examining rules on digital trade provided in recently concluded regional trade agreements (RTAs); that is, the United States-Mexico-Canada Agreement (USMCA), the Trans-Pacific Partnership (TPP) Agreement, as incorporated in the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) Agreement, and the Japan-European Union Economic Partnership Agreement (JEEPA).[5] This chapter argues that differences in the nature of conventional trade rules under the WTO agreements and digital trade rules under the TREC Agreement,[6] as well as their underlying techno-social discrepancies, will result in differences in the nature of disputes arising under these rules.

More specifically, this chapter examines two key differences between conventional trade disputes and digital trade disputes. The first difference is the significant diversity of stakeholders in digital vis-à-vis conventional trade disputes. A conventional trade dispute is typically brought by an exporting WTO member against an importing WTO member when businesses of the former complain about trade practices of the latter. While a digital trade dispute may arise under similar situations, it often takes more diverse forms involving various stakeholders. For

[3] JL González and M-A Jouanjean, "Digital Trade: Developing a Framework for Analysis" (2017) OECD Trade Policy Papers No. 205, at 12–18. In addition, digital trade takes various modes. For example, Ciuriak and Ptashkina categorize activities that fall within the scope of e-commerce or digital trade into five different modes. D Ciuriak and M Ptashkina, "The Digital Transformation and the Transformation of International Trade" (2018), https://perma.cc/WMF3-L6DP, at 5–8. In the WTO work programme on electronic commerce, "electronic commerce" is defined as "exclusively for the purposes of the work programme, and without prejudice to its outcome," as the "production, distribution, marketing, sale or delivery of goods and services by electronic means." WTO, *Work Programme on Electronic Commerce: Adopted by the General Council on 25 September 1998*, WT/L/274 (30 September 1998), at para. 1.3.

[4] The WTO members discussing the TREC Agreement do not share the idea of what substantive rules should be included in the TREC Agreement. While some African countries prefer to limit the scope to what has been dealt with under the WTO e-commerce working group, others seek to go further. SA Aaronson, "Data Is Different: Why the World Needs a New Approach to Governing Cross-Border Data Flows" (2018) CIGI Paper No. 197, at 8. Furthermore, while developed countries, such as the United States and the European Union, have moved to access to cross-border flows of data, China takes a very different approach by restricting the free flow of data. H Gao, "Digital or Trade? The Contrasting Approaches of China and US to Digital Trade" (2018) 21 *Journal of International Economic Law* 297.

[5] Although digital trade rules under these RTAs are diverse, there are some common elements that indicate the common nature of digital trade disputes arising under the rules. For a quantitative analysis of digital trade provisions in preferential trade agreements, see M Burri and R Polanco, "Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset" (2020) 23 *Journal of International Economic Law* 187. For a term-frequency analysis of digital trade provisions in RTAs, see I Willemyns, "Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations" (2020) 23 *Journal of International Economic Law* 221.

[6] Compare T Streinz, "Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy", in B Kingsbury et al. (eds), *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford, Oxford University Press, 2019), at 324–329.

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example, a business entity may challenge a domestic regulation of its own government, or consumers may raise concerns with an Internet giant over data privacy issues. This chapter argues that these various stakeholders should be allowed to participate in digital trade dispute settlement mechanisms made available under the TREC Agreement.

The second difference arises from the unique nature of the balance between trade and non-trade values. Under conventional trade rules, exceptions – such as Article XX of the General Agreement on Tariffs and Trade (GATT) – are incorporated to ensure a balance between WTO members' obligations to not restrict trade and right to regulate in order to achieve legitimate non-trade policy objectives. Therefore, WTO members are entitled to adopt otherwise inconsistent measures for legitimate policy objectives, such as the protection of human life and health or the preservation of the environment, and subsequently applied in accordance with certain conditions. Meanwhile, under the TREC Agreement, the protection of certain non-trade values, such as privacy protection, may be regarded as among the principal objectives of the Agreement and would therefore be fashioned as an obligation rather than an exception. In other words, a contracting party to the Agreement would be *required* to take trade-restrictive measures to protect non-trade values. Thus, a balance between the obligation to promote digital trade and the obligation to restrict it to protect non-trade values would need to be struck under the TREC Agreement. This chapter argues that the unique nature of the balance between trade and non-trade values under the TREC Agreement would require different weighing and balancing exercises between trade and non-trade values in digital trade dispute settlements.

With these differences in mind, this chapter then considers appropriate dispute settlement mechanisms to resolve digital trade disputes. More specifically, it discusses what special or additional dispute settlement rules and procedures should be incorporated into the TREC Agreement to fill those gaps in the existing DSU with regard to the handling of digital trade disputes.

II DIGITAL TRADE DISPUTES UNDER THE EXISTING WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT PROCEDURES

Before exploring the key differences between conventional trade disputes and digital trade disputes, this section briefly reviews whether existing WTO dispute settlement procedures can properly resolve digital trade disputes in accordance with the existing rules of the WTO.

Although the Internet was almost non-existent when the WTO agreements were drafted, some of the WTO rules are applicable to digital trade, and disputes may arise regarding whether certain measures to restrict digital trade are inconsistent with these rules.[7] For example, a WTO member may claim that another WTO

[7] J Meltzer, "Governing Digital Trade" (2019) 18(S1) *World Trade Review* s23, at s37–s46.

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member's restrictions to cross-border transfers of personal data are inconsistent with its market access and national treatment commitments under the General Agreement on Trade in Services (GATS). In response, the respondent member may argue that even if they are inconsistent with its commitments, its measures are justified under paragraph (a) or (c) of Article XIV of GATS.[8]

Some issues related to the consistency and justifiability of digital trade measures under the GATS have been raised in *US – Gambling*. In this case, the panel and the Appellate Body first reviewed whether the United States' total prohibition of the cross-border supply of gambling and betting services was inconsistent with its obligations under Article XVI:1 and Article XVI:2(a) and (c) of the GATS. Having found the United States in violation of these obligations, they next examined whether the measure was justified under Article XIV(a) or (c) of the GATS. The Appellate Body found that although the challenged measures were "necessary to protect public morals or to maintain public order" relevant to paragraph (a) of Article XIV, they were not justified, because they did not meet the conditions under the chapeau of Article XIV.[9]

The findings in *US – Gambling* appear to suggest that some digital trade disputes can be handled under the existing rules and exceptions in the relevant dispute settlement procedures, although there may be difficulties in applying the conventional trade rules to digital trade disputes.[10] In some respects, the conventional trade rules simplify the settlement of a digital trade dispute involving the protection of other legitimate objectives into a matter involving the balance between members' rights to liberalize trade and members' rights to regulate non-trade issues. The mandate for panels and the Appellate Body is to determine, by the weighing and balancing of relevant factors, the counterpoise, where relevant legitimate objectives are protected without overly interfering with trade.[11]

However, digital trade disputes will likely raise far more complicated matters of balance involving multiple stakeholders with diverse policy objectives, especially if the TREC Agreement seeks to provide comprehensive rules on digital trade governance, as do recently concluded RTAs. The diversity of stakeholders and the complexity of the balance between trade and non-trade values under the TREC

[8] N Mishra, "Privacy, Cyber Security, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?" (2019) *World Trade Review* 1, at 9–20; A Mattoo and J Meltzer, "International Data Flows and Privacy: The Conflict and Its Resolution" (2018) 21 *Journal of International Economic Law* 769, at 780–782.

[9] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 7 April 2005.

[10] First, there are difficulties in determining which rules should be applied to digital trade. Restrictions to flows of data may be subject to either the GATT or the GATS depending on whether to characterize data as goods or services. N Sen, "Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?" (2018) 21 *Journal of International Economic Law* 323, at 327–331. Moreover, data flows may not be properly categorized into a single mode of transaction and a single classification under the GATS classification system. Ibid., at 331–335.

[11] Ibid., at para. 310.

Agreement would render the mandates of panels and the Appellate Body extremely difficult, if not impossible.

III STAKEHOLDERS

In both conventional trade in goods and services and in digital trade, the direct economic beneficiaries are private parties, such as businesses and consumers. However, their legal status will likely differ under conventional trade rules in the WTO agreements versus digital trade rules in the proposed TREC Agreement.

Under conventional WTO rules, the primary stakeholders are the member governments, in the sense that these rules principally establish the rights and obligations of the members. Violations of the rules result in disputes between member governments, and such disputes can be properly settled through intergovernmental WTO dispute settlement procedures.

Under the TREC Agreement, rules pertaining to the rights and obligations of private entities would be equally important as those of the governments of the contracting parties, as established in this section. As a result, disputes under the TREC Agreement would arise between various stakeholders, and their settlement would require the involvement not only of governments, but also private entities. The special or additional rules and procedures under the WTO agreements designed to resolve multi-stakeholder disputes provide useful guidance as to how digital trade disputes should be settled.

The following subsections A to B contrast stakeholders in conventional trade disputes arising under the WTO agreements with stakeholders in digital trade disputes arising under the TREC Agreement.

A *Stakeholders in Conventional Trade*

1 Trade in Goods

The WTO agreements primarily establish the rights and obligations of the members. For example, the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) states that the WTO provides "the common institutional framework for the *conduct of trade relations among its Members*" (emphasis added).[12] The central role of the members is also signified by the shared recognition that the WTO agreements reflect the balance of benefits among WTO members. The primary stakeholders under the WTO agreements are the members – more specifically, the governments of the members, in the sense that they are the subject of the WTO rules.

The stakeholders in the WTO agreements become clearer when the addressee of specific rules is examined. For example, GATT Articles I and III prohibit

[12] Marrakesh Agreement, Art. II:1.

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a discriminatory measure against a certain product of a member rather than a certain product of an individual exporter or producer. A less favourable treatment of a certain product or item offered by a specific individual exporter from a member does not necessarily constitute a violation of the non-discrimination principles, unless it amounts to discrimination towards a product from that member.[13] This is because the WTO agreements protect the rights of the members rather than the rights of individual exporters or producers. It follows that WTO disputes arise between member governments and are properly settled through inter-governmental dispute settlement procedures.

Some disputes under certain WTO rules may arise between private parties and WTO member governments. More specifically, disputes under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) may arise between exporters or foreign producers and the government of an importing member conducting anti-dumping investigations and imposing anti-dumping measures, because the interests of the former are directly affected by these investigations and measures.

The rules of the Anti-Dumping Agreement provide for the obligations of the relevant authorities of WTO members that are in charge of conducting anti-dumping investigations and imposing anti-dumping measures, and they are expected to ultimately protect the interests of exporters and foreign producers from abusive anti-dumping investigations and measures. Moreover, some rules of the Anti-Dumping Agreement, such as Article 6, explicitly require the authorities of the members to ensure that the procedural rights of private parties are properly protected. Thus, the stakeholders in the Anti-Dumping Agreement include not only the governments of members, but also private parties that may be subject to anti-dumping investigations and measures.

Given that the interests and procedural rights of exporters and foreign producers are protected under the Anti-Dumping Agreement, violations of the Agreement can provoke disputes between members conducting anti-dumping investigations and imposing anti-dumping measures and exporters or foreign producers that are subject to such investigations and measures. The governments of these exporters or producers may bring such a dispute to the WTO for dispute settlement on their behalf. Conversely, governments may choose not to do so if their interests do not coincide with the interests of the WTO. In order to allow exporters and foreign producers to directly challenge anti-dumping investigations and measures of WTO members on their own, additional dispute settlement procedures are stipulated in the Anti-Dumping Agreement, which is revisited in Section V.

[13] Compare Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 16; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, at para. 100.

2 Trade in Services

Although the GATS generally shares the features of the GATT in that the primary stakeholders are the governments of members, it takes a different approach from the GATT with regard to the position of private entities. More specifically, some rules under the GATS, such as Article VIII:1 and Article IX:1, provide for discipline regarding the conduct of service suppliers, albeit indirectly, through domestic laws and regulations of WTO members.

These provisions are incorporated into the GATS based on the recognition that the anti-competitive practices of service suppliers could restrict trade in services. This does *not* mean that the anti-competitive practices of producers of *goods* could *not* restrict trade in goods. On the contrary, the anti-competitive practices of producers of goods could also be trade restrictive and, for this reason, it would be appropriate to incorporate regulations on anti-competitive practices related to trade in goods as well.[14] Nevertheless, it is undeniable that certain service sectors are more susceptible to monopolization and other anti-competitive practices than the goods sectors. Therefore, the inclusion of competition regulations is needed more in the GATS than in WTO agreements on trade in goods. As a panel once suggested,[15] trade barriers in trade in services, especially those related to basic infrastructure, include not only governmental measures, but also anti-competitive practices of service suppliers. Although these provisions do not directly impose legal obligations on service suppliers, they demonstrate the possibility that the anti-competitive practices of service suppliers may nullify or impair the benefits of WTO members under the GATS and trigger a dispute under the GATS. As discussed in Section V, the GATS provides a special dispute settlement mechanism to address such disputes.

3 Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) has a distinctive feature in that it is closely connected with the rights of private entities. While the title of the Agreement is carefully drafted to focus on the trade-limited aspects of intellectual property rights, its rules are primarily concerned with the protection of intellectual property rights owned by private entities.[16] Although the TRIPS Agreement may not explicitly confer legal rights to private parties under WTO law, it requires their intellectual property rights to be protected through the domestic law and policy of WTO members, as implied in Article 1.1 of

[14] For example, Article 16.1.2 of the TPP Agreement, as incorporated in the CPTPP Agreement (hereinafter CPTPP Agreement), requires the contracting parties to "endeavour to apply its national competition laws to *all commercial activities* in its territory" (emphasis added).

[15] Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, 2 April 2004, at para. 7.237.

[16] TRIPS Agreement, preamble, paras. 1, 4.

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the TRIPS Agreement. In the TRIPS Agreement, private entities, as stakeholders, are as important as WTO members.

Disputes under the TRIPS Agreement may arise when a WTO member adopts or maintains a measure that is inconsistent with the TRIPS Agreement, thereby nullifying or impairing the interests of another member. Such disputes may be handled through the inter-governmental WTO dispute settlement process. However, disputes may more often arise between private parties under the domestic intellectual property law, which incorporates the rules under the TRIPS Agreement. In fact, the number of WTO disputes concerning the TRIPS Agreement is very limited compared to the number of domestic disputes involving domestic intellectual property law. In order to enable private entities to settle these domestic disputes and enforce their intellectual property rights, the TRIPS Agreement requires WTO members to maintain appropriate judicial and administrative procedures within their territories, as is revisited in Section V. Given the importance of private entities as stakeholders, these procedures are essential as a supplement to the inter-governmental dispute settlement procedures.

B *Stakeholders in Digital Trade*

The TREC Agreement that is under negotiation would provide for the rights and obligations of contracting parties similar to those digital trade rules under recent RTAs, which serve as important references. For example, Article 19.3.1 of the USMCA prohibits contracting parties from imposing customs duties on digital trade, and Article 19.4.1 of the USMCA requires contracting parties to accord no less favourable treatment to a digital product created by another party or by a person of another party.[17] In addition, some digital trade rules under the USMCA, such as Articles 19.5.1 and 19.7.2, require the contracting parties to adopt or maintain certain laws on digital trade within their territories.[18] Under Article 8.74 of the JEEPA, contracting parties are required to ensure that all the measures of general application affecting electronic commerce are administered in a reasonable, objective, and impartial manner.

However, many rules under the proposed TREC Agreement would also concern the rights and obligations of private entities, at least indirectly. First, the protection of the interests of consumers would be a central element in the TREC Agreement, as the existing regional trade rules on digital trade suggest. For example, Article 19.2.1 of the USMCA recognizes the importance of a framework to promote consumer confidence in digital trade. More specifically, Article 19.7.1 of the USMCA explicitly emphasizes the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent or deceptive commercial activities.[19]

[17] See also CPTPP Agreement, Arts. 14.3.1 and 14.4.1; JEEPA, Art. 8.72.
[18] See also CPTPP Agreement, Arts. 14.5 and 14.7.2.
[19] See also CPTPP Agreement, Art. 14.7.1; JEEPA, Art. 8.78.1.

Similarly, Article 19.8.1 of the USMCA recognizes the economic and social benefits of protecting the personal information of users of digital trade, as well as the contribution this makes to enhancing consumer confidence in digital trade.[20]

Second, the conduct of enterprises and other private entities would be indirectly subject to rules under the TREC Agreement through the domestic laws of the contracting parties, since such conduct could undermine the interests of consumers protected under the TREC Agreement. For example, Article 19.7.2 of the USMCA requires contracting parties to adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.[21] Similarly, Article 19.8.2 of the USMCA requires contracting parties to adopt or maintain a legal framework that provides for the protection of personal information of the users of digital trade.[22] Most notably, Article 19.13 of the USMCA requires contracting parties to not only adopt or maintain measures regarding certain unsolicited commercial electronic communications sent to an electronic mail address, but also to provide recourse in its law against suppliers of unsolicited commercial electronic communications that do not comply with any measure adopted or maintained pursuant to this obligation.[23] Thus, consumers would be able to seek recourse against an enterprise in domestic procedures by claiming that its conduct violates the relevant domestic law incorporating rules under the TREC Agreement.

Third, enterprises and other private entities would also be beneficiaries whose interests must be protected under the TREC Agreement. For example, provisions such as Article 19.5 of the USMCA, concerning the domestic electronic transactions framework, and Article 19.6 of the USMCA, concerning electronic authentication and electronic signatures, are intended to facilitate business activities in digital trade.[24] In addition, provisions prohibiting the contracting parties from requiring localization of computing facilities,[25] or the transfer of, or access to, source codes,[26] are inserted to address one of the most urgent concerns of enterprises.

These features of the rules under the proposed TREC Agreement would characterize the nature of disputes arising under the Agreement in two ways. First, while disputes may arise between contracting parties under certain circumstances, a greater number of disputes would likely arise between a consumer and an enterprise, or between an enterprise and the government. For example, a consumer may claim that certain practices of an enterprise inappropriately use his or her personal information. Alternatively, an enterprise may claim that a regulation of the government unduly restricts its business activities in digital trade. Second, disputes would

[20] See also CPTPP Agreement, Art. 14.8.1; JEEPA, Art. 8.78.3.
[21] See also CPTPP Agreement, Art. 14.7.2.
[22] See also CPTPP Agreement, Art. 14.8.2.
[23] See also CPTPP Agreement, Art. 14.14; JEEPA, Art. 8.79.
[24] See also CPTPP Agreement, Arts. 14.5 and 14.6; JEEPA, Arts. 8.76 and 8.77.
[25] USMCA, Art. 19.12; CPTPP Agreement, Art. 14.13.
[26] USMCA, Art. 19.16; CPTPP Agreement, Art. 14.17; JEEPA, Art. 8.73.

more often arise under domestic law rather than directly under the TREC Agreement. The TREC Agreement would presume that many of its rules are to be incorporated into the domestic laws of the contracting parties. It would be reasonable for consumers and enterprises to refer first to a relevant domestic law to determine if their benefits are legally protected under said domestic law. These characteristics must be considered when constructing dispute settlement mechanisms for digital trade disputes.

IV PROTECTION OF NON-TRADE VALUES

In accordance with the objectives and purpose under the preamble of the GATT and the Marrakesh Agreement, trade benefits need to be balanced against other non-trade values, such as the environment and human rights. To strike a proper balance, the WTO agreements provide for several exceptions to trade rules. A similar balance would be required under digital trade rules in the TREC Agreement in order to allow contracting parties to protect their legitimate objectives; however, different weighing and balancing exercises would be required because of the unique nature of conventional trade rules and digital trade rules. The following subsections A to B examine the nature of balance between trade and non-trade values under the WTO agreements, and also under the proposed TREC Agreement.

A *Non-Trade Values in Conventional Trade*

1 Trade in Goods and Services

The WTO agreements provide for several exceptions to rules on trade in goods. Most importantly, GATT Article XX provides for general exceptions for obligations, which balance trade benefits against the protection of public morals,[27] the protection of human, animal, or plant life or health,[28] and the conservation of exhaustible natural resources,[29] among others. In this regard, the Appellate Body has stated that GATT Article XX "affirm[s] the right of Members to pursue various regulatory objectives identified in the paragraphs of these provisions"[30] and "embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations."[31]

A similar balance is struck between the rights of members to take advantage of trade liberalization in services and the rights of members to regulate in order to pursue

[27] GATT, Art. XX(a).
[28] GATT, Art. XX(b).
[29] GATT, Art. XX(g).
[30] Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R, 14 April 2016, at para. 6.113.
[31] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, at para. 156.

legitimate policy objectives. The preamble of the GATS explicitly recognizes that liberalization of trade in services shall be "aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives."[32] The Appellate Body finds that the GATS shall be interpreted "in consonance with the balance of rights and obligations that is expressly recognized in the preamble of the GATS"[33] and Article XIV "affirm[s] the right of Members to pursue various regulatory objectives identified in the paragraphs of these provisions."[34]

2 Intellectual Property Rights

It is worth noting that exceptions in the TRIPS Agreement take a different approach from trade in goods and services. Instead of providing general exceptions, the TRIPS Agreement provides for conditions, limitations, and exceptions for each category of intellectual property. For example, with respect to copyrights, Article 13 of the TRIPS Agreement provides that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Article 30 allows members to "provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." Additionally, Article 31 provides that "other use" without authorization of the right holder may be allowed under certain conditions.

Disputes may arise between WTO members concerning these limitations and exceptions under the TRIPS Agreement. For example, a WTO member may claim that a limitation to a certain intellectual property right imposed by another WTO member to protect legitimate non-economic interests excessively limits the right of intellectual property right holders of their nationality and thereby nullifies or impairs its own benefits under the TRIPS Agreement. Panels and the Appellate Body can settle such disputes by weighing and balancing the rights and obligations, as they do in disputes involving Article XX of the GATT.

However, disputes concerning limitations and exceptions are also likely to arise between private parties. For example, an intellectual property right holder may claim that the use of its intellectual property by a user without permission infringes upon its right, while the user may in turn contend that its use is justified as a legitimate exception. The settlement of such disputes requires consideration of the balance of interests between private parties rather than members, and the WTO dispute settlement procedures may not be an appropriate forum for such disputes for

[32] GATS, preamble, para. 3.
[33] Appellate Body Report, note 30 above, at para. 6.260.
[34] Ibid., at para. 6.113.

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the following reasons. First, while the TRIPS Agreement requires WTO members to confine limitations and exceptions to certain prescribed circumstances, it does not specify what limitations and exceptions should be justified. It is left to each WTO member to decide the appropriate balance between the interests of right holders and the interests of right users within the limits of the TRIPS Agreement, and to reflect such a balance in its domestic law. Second, panels and the Appellate Body are not well suited to engage in the weighing and balancing of various private interests and judge what should be the appropriate balance within the territories of WTO members. Such judgement should be left to the domestic authorities of members that are closer to the local community. Thus, as stated in Section V, it is reasonable that disputes concerning intellectual property rights protected by the TRIPS Agreement are primarily settled through domestic tribunals.

B *Non-Trade Values in Digital Trade*

The TREC Agreement under negotiation would provide exceptions similar to Article XX of the GATT and Article XIV of the GATS, with a view towards protecting non-economic interests. In fact, digital trade rules under recently concluded RTAs provide GATT Article XX-type exceptions. For example, Article 19.11 of the USMCA provides that while no party shall prohibit or restrict the cross-border transfer of information, a party is not prevented from adopting or maintaining a measure that is inconsistent with the obligation but "necessary to achieve a legitimate public policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and does not impose restrictions on transfers of information greater than are necessary to achieve the objective."[35] Disputes arising out of these exceptions may be settled in a manner similar to the settlement of disputes involving Article XX of the GATT, through the weighing and balancing of the right of a contracting party to invoke an exception and the substantive rights of the other contracting parties protected by the proposed TREC Agreement.

However, digital trade rules under RTAs suggest that balance between trade benefits and non-trade values would also need to be sought in different circumstances under the proposed TREC Agreement. First, a measure justified as an exception under the TREC Agreement would impact the interests of a specific private entity rather than the interests of another party. For example, Article 19.16.2 of the USMCA provides that a regulatory body or judicial authority of a party is not precluded from requiring a person of another party to preserve and make available a source code of software or an algorithm expressed in that source code to the regulatory body under certain circumstances, while Article 19.16.1 generally prohibits the parties from requiring the transfer of, or access to, such source code or algorithm as a condition of the

[35] See also CPTPP Agreement, Art. 14.11.

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import, distribution, sale, or use of that software.[36] Specific circumstances under which disclosure of a source code is required would be provided in the domestic law of each contracting party. Disputes involving this exception would require the weighing and balancing of the public policy objectives of a contracting party invoking the exception against the economic interests of a private person who is required to make available its source code, which may not be properly undertaken through the WTO's inter-governmental dispute settlement procedures.

Second, in some cases, the proposed TREC Agreement would provide obligations, rather than exceptions, to take certain measures to achieve legitimate non-economic objectives. For example, Article 19.7.2 of the USMCA requires contracting parties to adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.[37] Similarly, Article 19.8.2 of the USMCA requires contracting parties to adopt or maintain a legal framework that provides for the protection of personal information of the users of digital trade.[38] Additionally, Article 19.13 of the USMCA requires each party to adopt or maintain measures to limit unsolicited commercial electronic communications.[39] These provisions require, rather than allow, contracting parties to restrict digital trade to achieve legitimate non-trade objectives.[40] It is questionable at best to assume that disputes involving such obligations can be properly regarded as "trade" disputes, and that non-trade policies can be properly examined by panels and the Appellate Body.

V DISPUTE SETTLEMENT

A *Conventional Trade Disputes*

1 Trade in Goods and Services

The WTO dispute settlement mechanism primarily seeks to redress the loss of benefits suffered by WTO members, the primary stakeholders under the covered agreements. WTO dispute settlement procedures are structured in a manner consistent with this objective. For example, participation in the WTO dispute settlement proceedings is almost[41] exclusively reserved to member governments.

[36] See also CPTPP Agreement, Art. 14.17; JEEPA, Art. 8.73.
[37] See also CPTPP Agreement, Art. 14.7.2.
[38] See also CPTPP Agreement, Art. 14.8.2.
[39] See also CPTPP Agreement, Art. 14.14; JEEPA, Art. 8.79.
[40] For example, the TREC Agreement is expected to play a proactive role in protecting privacy. Compare AD Mitchell and N Mishra, "Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute" (2019) 22 *Journal of International Economic Law* 389, at 398–403.
[41] Private parties may be allowed to participate in WTO dispute settlement proceedings as amicus curiae under limited circumstances.

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According to Article XXIII:1 of the GATT, a WTO member government may bring a dispute to the WTO dispute settlement mechanism if it considers that its benefit under the WTO agreements is being nullified or impaired as a result of violations of the agreements. Moreover, remedies are granted to the complaining member government to the extent necessary to redress the nullification or impairment of its benefits. In accordance with Article 22.4 of the DSU, the level of the suspension of concessions in the case of non-implementation of a DSB recommendation is assessed by considering the level of the nullification or impairment of benefits suffered by the complaining member.

At the same time, special or additional dispute settlement procedures are also provided in the WTO agreements to complement the WTO inter-governmental dispute settlement procedures in order to settle certain disputes directly involving private parties. For example, Article 13 of the Anti-Dumping Agreement requires each member to maintain judicial, arbitral, or administrative tribunals or procedures for the purpose of the prompt review of administrative actions relating to final determinations and reviews of determinations. While anti-dumping disputes may be brought by member governments, on behalf of their exporters and producers, before the inter-governmental WTO dispute settlement procedures in accordance with Article 17 of the Anti-Dumping Agreement, anti-dumping disputes may also be brought before the domestic procedures maintained pursuant to Article 13 by exporters and producers on their own. In fact, many anti-dumping disputes are addressed in domestic proceedings between a private entity targeted by an anti-dumping measure and a member government seeking to impose said measure. The domestic procedures are made available to private entities in light of the fact that they are most directly impacted by anti-dumping investigations and measures, which means that they are de facto principal stakeholders.

The GATS provides for a special mechanism to settle disputes that are triggered by the conduct of service suppliers. More specifically, Article VIII:3 of the GATS authorizes the Council for Trade in Services to request a member establishing, maintaining, or authorizing a monopoly supplier of a service which is allegedly acting in a manner inconsistent with that member's obligations under the GATS to provide specific information concerning relevant operations at the request of another member. Moreover, Article IX:2 of the GATS provides that a "Member shall, at the request of any other Member, enter into consultations with a view to eliminating" business practices of service suppliers that may restrain competition and thereby restrict trade in services, and that it "accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question." It "shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the

requesting Member." These provisions provide WTO members with a special mechanism by which to settle disputes provoked by the conduct of service suppliers rather than that of governments, in view of the fact that the conduct of service suppliers can restrict trade in services.

The special or additional procedures under the Anti-Dumping Agreement and the GATS provide useful guidance as to how digital trade disputes should be settled, as identified in the next subsection.

2 Intellectual Property Rights

Disputes involving the TRIPS Agreement may also be brought before the procedures laid out in the DSU, although the number of TRIPS disputes settled under the DSU is extremely limited. Rather, the domestic procedures within the territories of members play a central role in the implementation of the TRIPS Agreement, because disputes concerning the TRIPS Agreement often involve conflicts of interest between owners and users of intellectual property rights.

Part III of the TRIPS Agreement provides for the extensive obligations of WTO members to ensure that enforcement procedures are available under their domestic law to permit effective action against any act of infringement of intellectual property rights covered by the TRIPS Agreement. These provisions demonstrate a similarity to the Anti-Dumping Agreement, in that private entities are entitled to seek recourse to domestic procedures if their benefits, which are indirectly protected under the WTO agreements, are harmed. The enforcement procedures under the TRIPS Agreement are different from those under the Anti-Dumping Agreement, in that the former covers not only disputes between a private entity and the government, but also disputes between private entities, while the latter deals with disputes brought by a private entity against the government. It should also be noted that domestic tribunals are often better suited to make decisions regarding what limitations and conditions on intellectual property rights are justified, based on an analysis of weighing and balancing, than international tribunals. This is because domestic tribunals possess greater knowledge of the different interests of owners and users within the jurisdiction in question.

B *Digital Trade Disputes*

The previous subsections have pointed out that digital trade rules in the proposed TREC Agreement will likely differ from conventional trade rules in the WTO agreements in terms of the diversity of stakeholders and the nature of the balance between trade and non-trade values. These differences suggest that disputes arising from the TREC Agreement may take unique forms when compared with conventional trade disputes. More specifically, digital trade disputes can take six different forms, depending on the nature of the involved parties.

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First, disputes may arise between contracting parties to the proposed TREC Agreement. Some provisions of the TREC Agreement may provide for the rights and obligations of the contracting parties, and violations of these provisions may trigger disputes between parties. For example, if a contracting party imposes a customs duty on digital trade in violation of the TREC Agreement, another contracting party whose digital product is subject to the duty may bring a dispute against the party imposing the duty. Alternatively, a contracting party may claim that a restriction to cross-border flows of personal data imposed by another contracting party is a violation of the Agreement, while the latter party may claim that the restriction is justified as an exception to achieve its legitimate public policy objective.[42]

Second, digital trade disputes may also be brought by a business enterprise of a contracting party against another contracting party. Some of the provisions under the proposed TREC Agreement may require contracting parties to protect the interests of enterprises engaged in digital trade. If a contracting party fails to take appropriate measures to do so, it may face a claim by an enterprise, arguing that the contracting party has violated requirements under the TREC Agreement. For example, an enterprise of a contracting party may claim that it is forced to transfer its source code to the government of another contracting party, contrary to obligations under the TREC Agreement. This type of dispute may also arise between an enterprise of a contracting party and its own government.

Third, the government of a contracting party may claim that an enterprise of another contracting party has engaged in unfair digital trade practices. For example, a contracting party may consider that an enterprise from another contracting party is abusing the personal data of its consumers and is therefore violating the obligations of its domestic law, incorporating rules of the proposed TREC Agreement. It could handle the matter pursuant to its own domestic law, but it may also seek to consult with the government of the other contracting party on the matter.

Fourth, digital trade disputes may be disputed between enterprises of different contracting parties if the conduct of an enterprise of a contracting party undermines the digital trade activities of the enterprises of another contracting party. Although many of these disputes between enterprises are commercial in nature, they may involve issues related to the interpretation and application of the proposed TREC Agreement.

Fifth, digital trade disputes may also be brought by a consumer of a contracting party against its own government. As discussed earlier, the proposed TREC Agreement requires contracting parties to protect consumer interests, such as privacy, through domestic laws and regulations. A consumer may claim that his or her government's failure to do so constitutes a violation of the TREC Agreement.

[42] Compare Mattoo and Meltzer, note 8 above, at 780–782.

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Sixth, and finally, digital trade disputes may be brought by a consumer of a contracting party against an enterprise of another contracting party when the former considers that the conduct of the latter violates its interests, as indirectly protected under the TREC Agreement. In such cases, the consumer may seek to obtain remedy from the enterprise.

What would be the appropriate form of dispute settlement for such digital trade disputes arising under the TREC Agreement? The first category of disputes is similar to conventional trade disputes and could therefore be dealt with under general trade dispute settlement procedures. The TREC Agreement should provide that the rules and procedures under the DSU shall apply to disputes arising under the Agreement. Nonetheless, some special or additional rules would be needed in order to allow the contracting parties some flexibility in the implementation of the Agreement in light of the novel and evolving nature of digital trade. For example, both developing and developed parties should be given grace periods, during which a contracting party would refrain from using the dispute settlement mechanism. The use of enforcement measures, such as suspension of concessions, should be restricted.

The second category of disputes is similar to certain disputes under the Anti-Dumping Agreement. As in the case of disputes under the Anti-Dumping Agreement, this type of dispute would be best dealt with through the domestic procedures of a contracting party taking measures at issue. To effectively address this category of disputes, the TREC Agreement should require the contracting parties to establish and maintain domestic procedures that are accessible to enterprises. This type of dispute would be principally reviewed under domestic laws and regulations that have incorporated the rules under the TREC Agreement. The TREC Agreement could explicitly require domestic tribunals to apply domestic laws and regulations, in accordance with the TREC Agreement.

The third category of disputes shares some features with certain disputes under the GATS, in that the disputes are triggered by the conduct of private entities. It would be useful for the TREC Agreement to provide consultation procedures, by which the government of a contracting party can request consultations with the government of another contracting party regarding the enterprises of the latter party. The complaining party may also seek to apply its domestic law to a foreign enterprise allegedly engaged in trade-restrictive practices. A cooperative mechanism would be desirable to avoid the excessive extraterritorial application of domestic law.

The fourth category of disputes may be better dealt with outside the framework of the TREC Agreement in light of its commercial nature. Existing judicial and non-judicial procedures employed to handle commercial disputes could also be used to address this category of disputes.

It is essential that the proposed TREC Agreement would be capable of properly settling the fifth and sixth categories of disputes, given the importance of the protection of consumer interests. Principally, these types of disputes should be dealt with through domestic procedures because they are easily accessible to

consumers. Domestic procedures are also desirable because domestic courts and tribunals are better suited, when compared with international mechanisms, to make decisions regarding how to weigh and balance the different interests of consumers and enterprises within the jurisdiction of a contracting party. To ensure that domestic procedures function as an effective dispute settlement mechanism for consumers, the TREC Agreement should require contracting parties to not only establish and maintain domestic procedures that are accessible to consumers, but also ensure that domestic laws and regulations are applied in accordance with the TREC Agreement.

VI CONCLUSION

Are digital trade disputes "trade disputes"? This chapter argued that digital trade disputes will differ from conventional trade disputes, particularly in terms of stakeholders and the balance between trade and non-trade values, reflecting the unique nature of digital trade rules. Effective dispute settlement mechanisms are essential to the successful enforcement of digital trade rules. WTO negotiations on trade-related aspects of electronic commerce should address not only the issue of substantive digital trade rules, but also that of special or additional dispute settlement rules and procedures required to resolve digital trade disputes.