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# DIGITAL WORK AND GLOBAL TRADE LAW

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SICL WEBINAR ON OUTSOURCING DIGITAL WORK UNDER THE LAW

## AGENDA: REGULATORY FRAMEWORK GOVERNING DIGITAL WORK



- **WTO law – trade in services**
- **FTA/PTA commitments**
  - Digital inclusion
  - Labour provisions in digital trade commitments
- **What's on the horizon? AI, digital work, and the trade law perspective**

# DIGITAL WORK AND WTO LAW

## DIGITAL WORK AND WTO LAW

- **systemic virtues of WTO law**
  - regulates all trade
  - (mostly) technology neutral
  - far-reaching market access and non-discrimination principles
  - high level of legalization
  - has been interpreted in an evolutionary manner
- **yet, no real legal adaptation to the digital economy so far**

## DIGITAL WORK AND WTO LAW: RELEVANT SETS OF RULES

WTO Agreements,  
e.g., GATS, TRIPS,  
DSU

Moratorium on  
Customs Duties on  
Electronic  
Transmissions

Telecoms Annex

Fourth Protocol on  
Telecommunication  
Services

Telecoms Reference  
Paper

Financial Services  
Annexes

Joint Initiative on  
Services Domestic  
Regulation

Joint Initiative on  
Electronic  
Commerce?

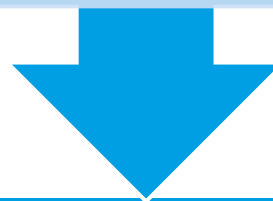
## DIGITAL WORK AND WTO LAW

**Concepts brought up by digital work in international trade law are not new**

increased servicification of trade  
and economies has been  
occurring for decades

increased share of services in  
global value chains (GVCs)

trade in tasks (offshoring)



**However, digital platforms and digitalization have created digital services GVCs – all inputs, intermediates (and intermediaries), and outputs are services (and digital)**

## **GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)**

## DIGITAL WORK AND WTO LAW

**PROS:** High degree of legal protection to services *and* services suppliers/providers, e.g.:

- MFN obligation (Article II)
- National treatment commitments (Article XVII)
- Market Access commitments (Article XVI)

**CONS:** Some limitations:

- Only certain GATS obligations (those listed in Part II on "General Obligations and Disciplines") apply to *all* measures affecting trade in services (e.g. MFN and transparency).
- Other GATS obligations (namely those in Part III on "Specific Commitments") only apply to the extent that Members have inscribed services sectors and modes of supply in their Schedule of Commitments (e.g. national treatment and market access commitments).
- Services classification issues.



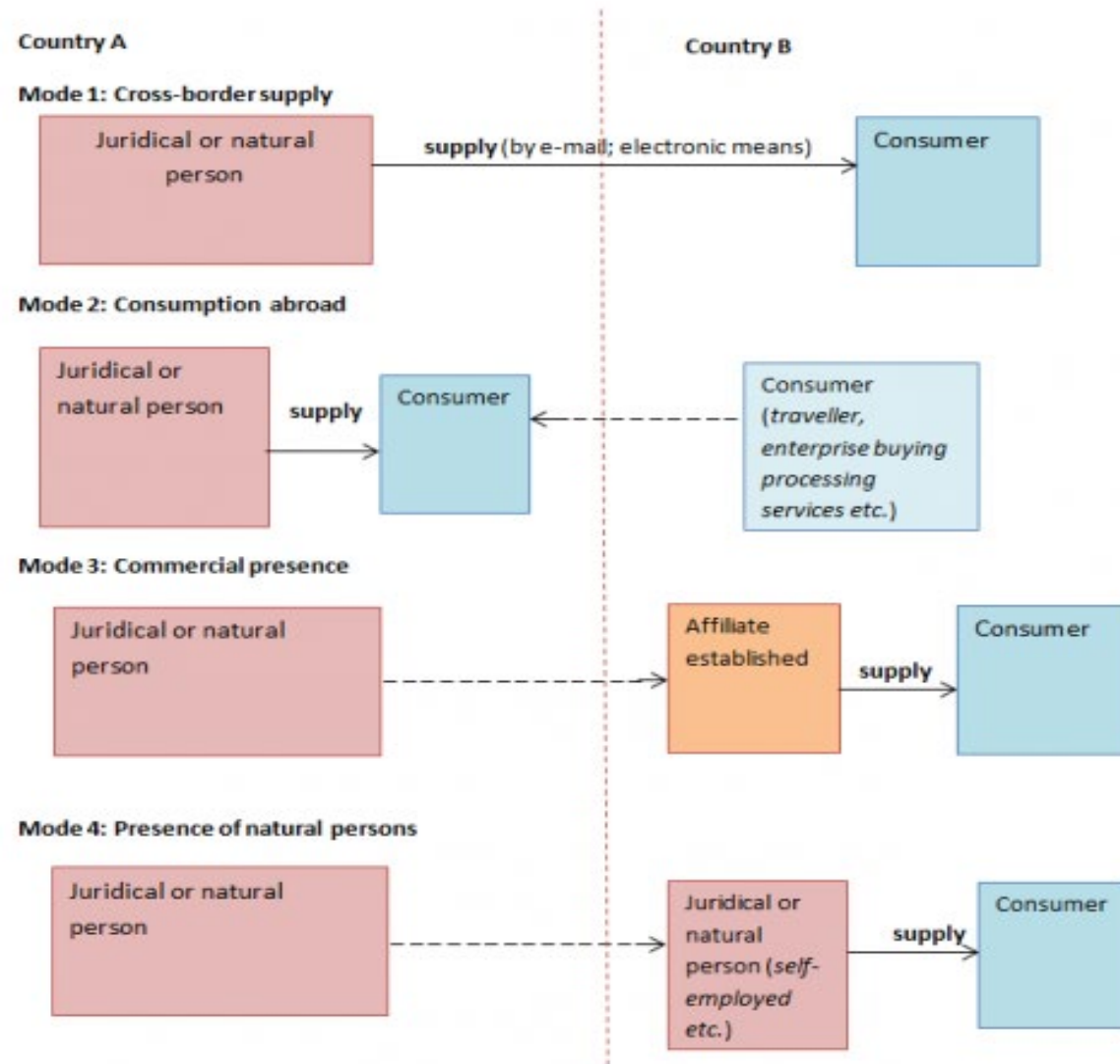
## DIGITAL WORK AND WTO LAW

“Trade in services” is defined according to 4 modes of supply listed in Article I:2:

1. **Cross-border trade:** From the territory of one Member into the territory of another Member. **(Mode 1)**
  2. **Consumption abroad:** Consumption by the service consumer of a Member in the territory of another Member. **(Mode 2)**
  3. **Commercial presence:** A service supplier of one Member provides services in another Member by way of commercial presence in the territory of that other Member. **(Mode 3)**
  4. **Movement of natural persons:** A service-supplier of one Member provides services in the territory of another Member through the movement of natural persons. **(Mode 4)**
- **Mode 1 or 2?**
  - **Article XXVIII(b):** “supply of a service” does not only include the sale of a service but its **production, distribution, marketing, and delivery – broad definition.**

**Simplified description of how services are supplied, from country A to B.**

(Based on GATS provisions)



## DIGITAL WORK AND WTO LAW

The GATS is the most relevant agreement to digital work **BUT** there are challenges:

- Outdated (W/120)
- Classification issues
- Obligations only based on scheduled commitments

## United Nations Central Product Classification (CPC) System is outdated

12 sectors, almost 160 sub-sectors defined in WTO Document [MTN.GNS/W/120](#) (Services Sectoral Classification List), used during the Uruguay Round negotiations:

1. Business (including professional and computer) services
2. Communication services
3. Construction and related engineering services
4. Distribution services
5. Educational services
6. Environmental services
7. Financial (insurance and banking) services
8. Health-related and social services
9. Tourism and travel-related services
10. Recreational, cultural and sporting services
11. Transport services
12. Other services

Because of broad definition of “supply of a service”, could involve any services sector

CHINA (continued)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
B. <u>Computer and Related Services</u>			
a) Consultancy services related to the installation of computer hardware (CPC 841)	1) Unbound 2) None 3) None 4) Unbound except as indicated in Horizontal Commitments	1) Unbound 2) None 3) None 4) Qualifications required from the certified engineer are as follows: Bachelor's degree or above and 5 years of experience in these fields	

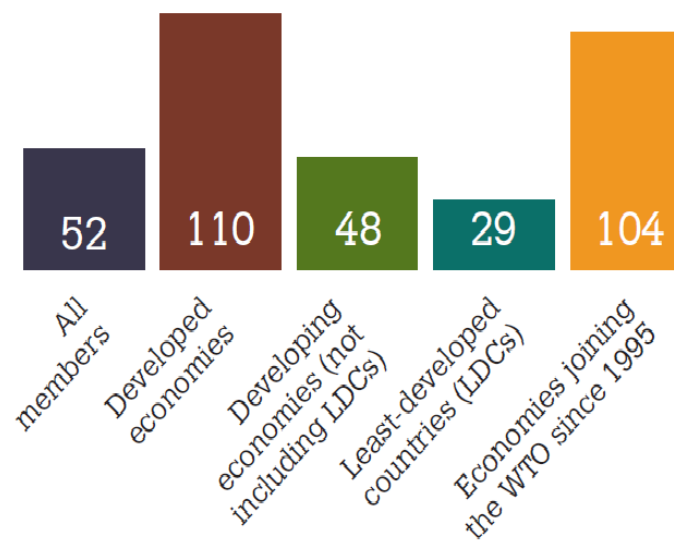
## Classification issues

- Overlap in sub-sectors – difficulty in classifying services in only one sub-sector (mutual exclusive theory of classification).
- E.g., “Data processing services” (CPC 843) appear twice in W/120: under both the heading “Computer and Related Services” and the heading “Telecommunication services”
- Further complication: Members have undertaken different commitments under both sectors
- Different methods to resolve this conundrum have emerged (including in the explanatory notes of the Prov CPC):
  - the category which provides the most specific description;
  - composite services classified by the service which gives them their essential character;
  - classification by the service consumed by the end user;
  - products making up a bundle (combination) of goods and services classified according to their main component (value added)
- New services not included in the W/120?
- Bulging “Other services” category

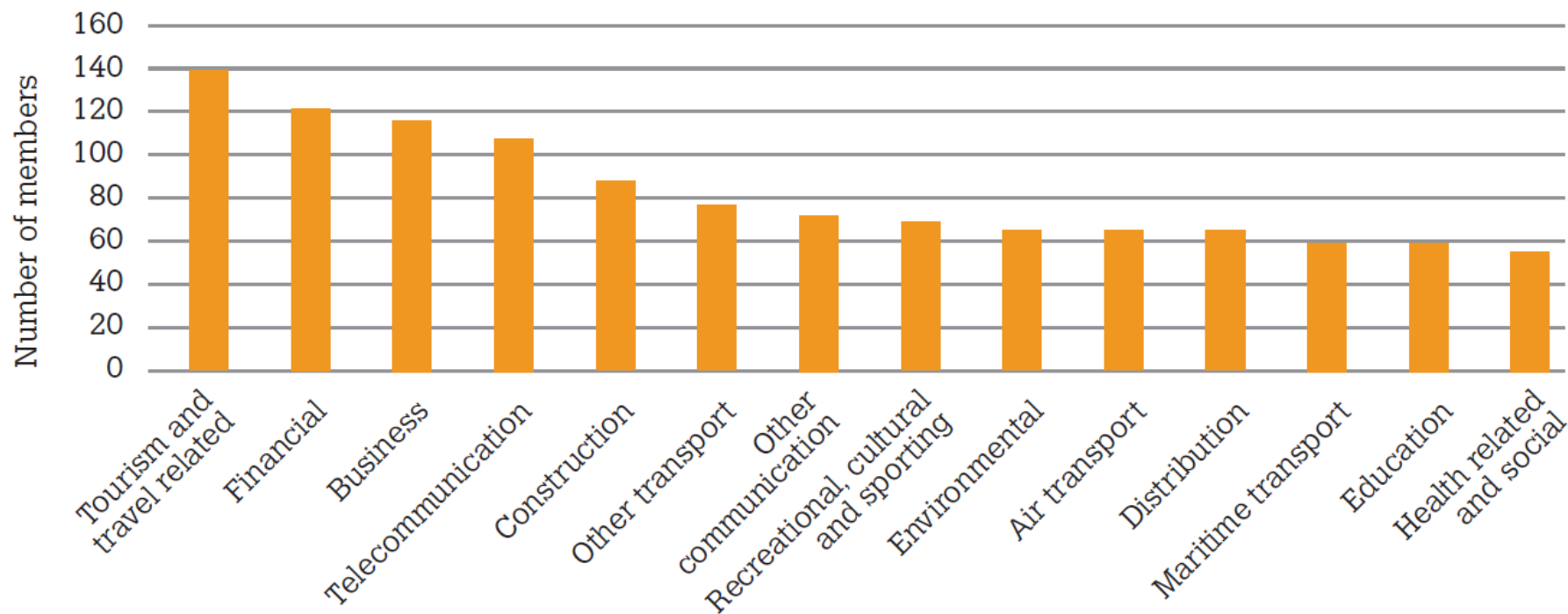
**Members have inscribed relatively few commitments in their services schedules:**

- On average, Members have undertaken commitments with respect to about 50 of the 160 sub-sectors listed in the W/120 (*i.e.* only approx. 30% of all sectors)
- These commitments rarely go beyond binding pre-existing market access
- Developed countries have commitments in nearly four times as many sectors (approx. 110) as LDCs
- Acceding Members have committed to a significantly higher number of sectors than the “original” Members at similar levels of development.
- The commitments are often subject to limitations (*e.g.* market access through the presence of natural persons is typically subject to broad horizontal limitations)
- The sector most commonly included in Schedules is tourism, followed by infrastructure services (financial services, business services, and telecommunications)
- The sectors with the least commitments are education and health services

Figure 3: Average number of committed sectors, by group of WTO members



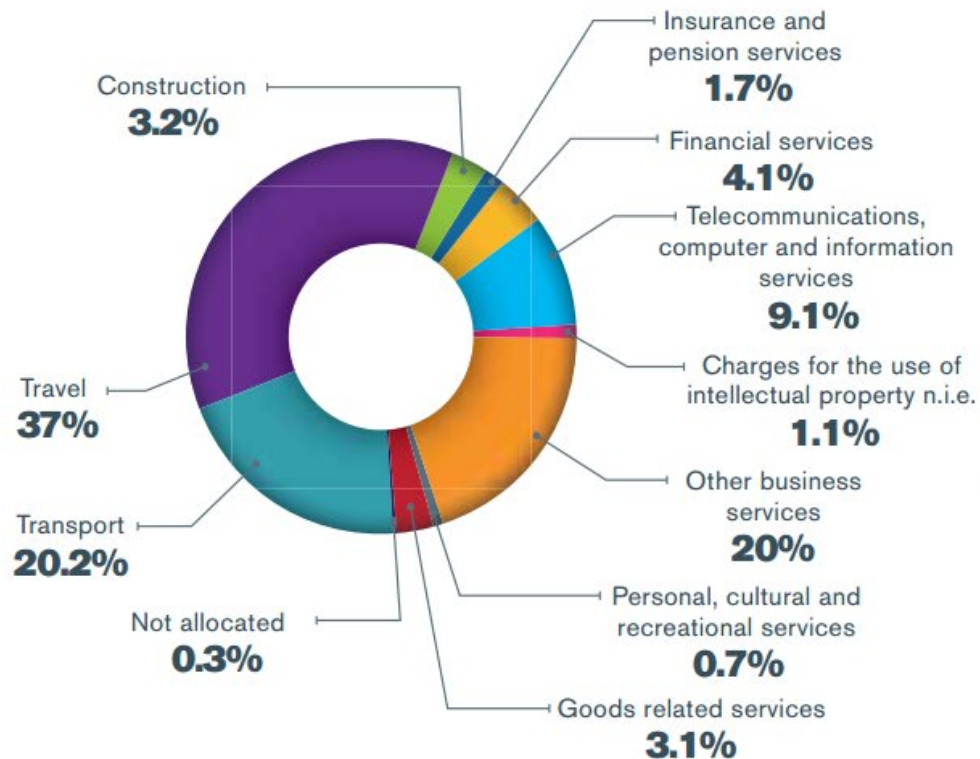
▶ Figure 4: Number of WTO members with commitments, by sector



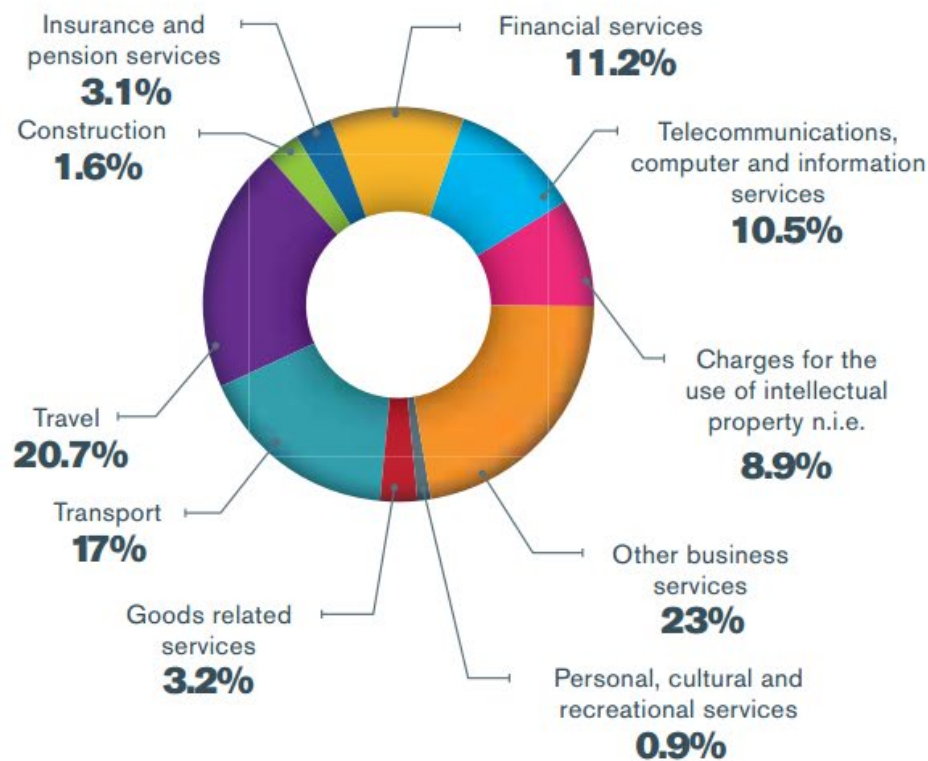
Source: I-TIP Services database, June 2015.



## Developing economies



## Developed economies



## COMPUTER AND RELATED SERVICES

- **far-reaching commitments as the sector was new and largely unregulated during the Uruguay Round**
- commitments made by 82 Members
- 5 sub-categories pursuant to services classification list (W/120):
  - consultancy services related to the installation of computer hardware,
  - software implementation services
  - data processing services
  - data base services, and
  - other

## TELECOMMUNICATIONS SERVICES

- Annex on Telecommunications (AT), attached to GATS, ensures ‘access to and use of public telecommunications transport networks and services’
- Fourth Protocol to GATS: 69 Members made specific commitments; in force since 1998
- the Reference Paper (RP): a mixture of sector-specific and competition rules; elaborates what rules are appropriate for telecommunications at the global level prescribing ends rather than means; different from the ITU sovereignty-centered approach
- **telecommunications – one of the best-covered sectors:** commitments made by 98 Members

## AUDIOVISUAL SERVICES

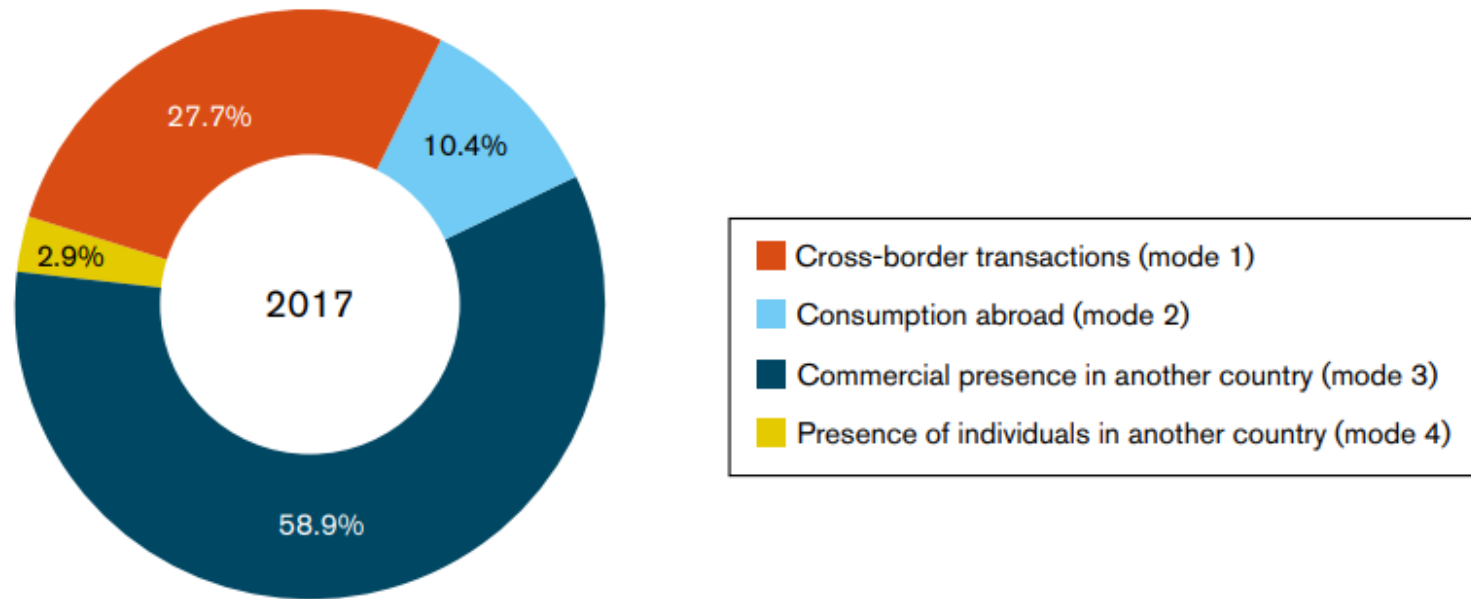
- cultural exception discussions during the Uruguay Round
- **the least covered services sector:** only 26 members made specific commitments; 35 listed MFN exemptions
- all-or-nothing approach
- the absence of any guarantee of openness stands in stark contrast to the economic and trade importance of the sector
- political (EU vs. US) path dependencies

## LIBERALIZATION BY WTO MEMBERS BY MODE

- **Mode 4** is the **least** liberalized in terms of WTO commitments
  - Immigration/labour issues – most agreed bilaterally
- **Mode 2** is the **most** liberalized in terms of WTO commitments
  - Members are less likely to restrict the movements of citizens outside domestic borders (e.g. tourists)
- **Mode 1** is often not committed
  - ***It is impossible to supply many services remotely*** (e.g. construction services).
- **Mode 3** is more open
  - Members consider that foreign direct investment (FDI) is crucial in driving the international supply of services, transferring know-how, and improving the capacity of economies to participate in global value chains (GVCs)

### Figure B.1: Commercial presence is the most important mode in trade in services

World trade in commercial services by mode of supply, 2017

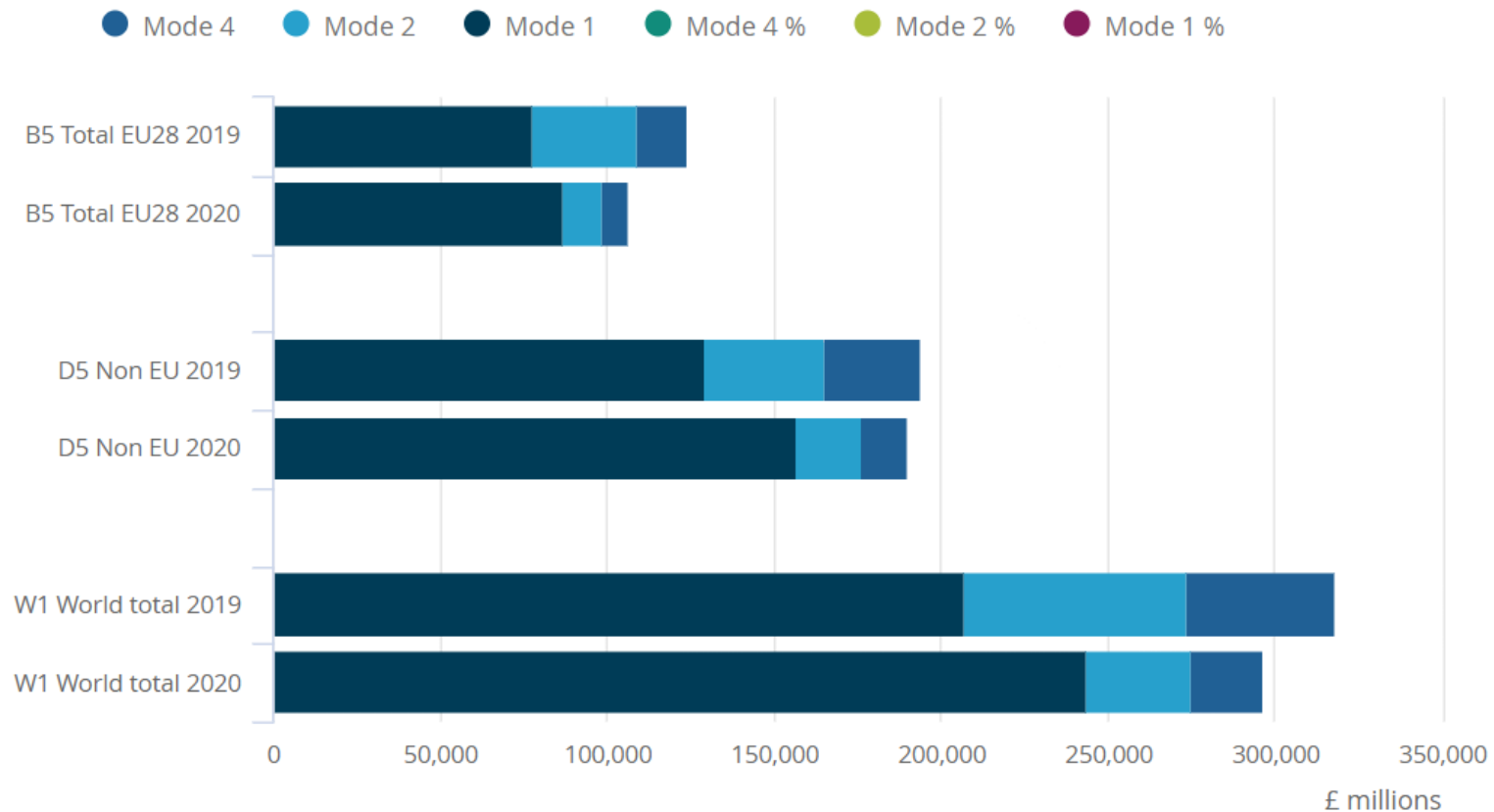


Source: WTO estimates (2019).

Note: World trade is calculated as the average of world exports and world imports.

**Figure 2: In 2020, 82.1% of UK service exports were conducted remotely via Mode 1, an increase from 65.2% in 2019**

**UK services exports by value of mode of supply, 2020**



## SOME RELEVANT GATS DISCIPLINES

- Most-favoured nation (Art. II) and national treatment (Art. XVII)
- Market Access (Art. XVI)
- General Exceptions (Art. XIV)



## SOME RELEVANT GATS PROVISIONS: GENERAL EXCEPTIONS

### Article XIV

*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:*

....

*(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:*

....

*(ii) the protection of **the privacy of individuals** in relation to the processing and dissemination of **personal data** and the protection of confidentiality of individual records and accounts;*

## SOME RELEVANT CASE LAW

- In *US – Gambling*, the Appellate Body confirmed that to the extent that a WTO Member has undertaken to provide full market access under Mode 1, that WTO Member may not prohibit the remote provision of a service, even if it permits the non-remote provision of the same service.

This essentially means that a WTO Member that has undertaken full market access commitments under Mode 1 cannot restrict the cross-border supply of the service (including data flows) in any way.

- In *US – Gambling*, the panel confirmed that Mode 1 commitments cover the supply of services through electronic means like the Internet (tech neutrality).
- In *China – Publications and Audiovisual Products*, the Appellate Body confirmed that GATS commitments – which largely pre-date the digital era – cover new technological developments (that were not contemplated at the time the commitments were undertaken).

## **EXAMPLES OF MEASURES THAT COULD HAVE IMPLICATIONS UNDER THE GATS (AND PTAs)**

- Data localization requirements.
- Cross-border data flow limitations (including data protection laws).
- Discriminatory, trade-restrictive/burdensome testing and certification requirements.
- Internet filtering, throttling, site blocking or paid prioritizations (against net neutrality).
- Restrictions on electronic payment systems.

# MORATORIUM ON CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS



WORLD TRADE  
ORGANIZATION

WT/MIN(24)/W/26

1 March 2024

Page: 1/1

(24-1965)

Ministerial Conference  
Thirteenth Session  
Abu Dhabi, 26-29 February 2024

Original: English

## WORK PROGRAMME ON ELECTRONIC COMMERCE

DRAFT MINISTERIAL DECISION OF 1 MARCH 2024

The Ministerial Conference decides as follows:

We agree to continue to re-invigorate the work under the Work Programme on Electronic Commerce, based on the mandate as set out in [WT/L/274](#), and with particular focus on its development dimension, taking into account the economic, financial and development needs of developing and least-developed country Members.

We welcome the constructive engagement in the Dedicated Discussions which included the exchange of experiences and submissions on several e-commerce-related topics and agree to deepen such discussions on e-commerce-related topics as identified by Members building on work from previous Dedicated Discussions. We agree to hold further discussions and examine additional empirical evidence on the scope, definition, and the impact that a moratorium on customs duties on electronic transmissions might have on development, and how to level the playing field for developing and least-developed country Members to advance their digital industrialization.

We take note of the workshop held under the Work Programme with different intergovernmental organizations. In that regard, we call for continued collaboration with them and, as agreed upon by Members, with other relevant stakeholders. We agree to engage on the main trade-related challenges faced by developing and least-developed country Members in the development of their digital economy, including the need for training and technical assistance, and, as a priority, identify gaps in support of addressing the digital divide, including for micro, small and medium-sized enterprises to realize the potential of the digital economy.

We instruct the General Council to hold periodic reviews on the Work Programme, including based on reports that may be submitted by the relevant WTO bodies, with a view to presenting recommendations for action to the next Session of the Ministerial Conference.

We agree to maintain the current practice of not imposing customs duties on electronic transmissions until the 14<sup>th</sup> Session of the Ministerial Conference. The moratorium and the Work Programme will expire on that date.

## CUSTOMS DUTIES MORATORIUM

- WTO ministers adopted the **Declaration on Global Electronic Commerce** at MC2 in May 1998. The Declaration called for:
  - the establishment of a work programme
  - a provisional moratorium on customs duties on electronic transmissions (customs duty moratorium)
- It has been a mainstay of digital trade rules – benefits to digital trade, especially MSMEs.
- The customs duty moratorium has been extended unconditionally at almost every WTO MC since then (brief exceptions in 1999-2001 and 2003-2004 because of impasses on issues at the MCs).
  - At MC12, it was extended conditionally.
  - As explained, at the recent MC13, it was extended until MC14, or 31 March 2026, whichever is earlier.

## **NEGOTIATIONS ON THE JOINT INITIATIVE ON E-COMMERCE**

- **the Joint Initiative on Electronic Commerce:** started in 2019 for an agreement on e-commerce
- 90 participating WTO members – 5 LDCs
- The goal is to complete negotiations in 2024 – the next negotiating round is next week
- **does not address digital work directly but there are some relevant issues, e.g.,:**
  - **Enabling e-commerce** (e-transactions facilitation, including e-payments)
  - **Openness and e-commerce** (custom duties on e-transmission, access to internet for e-commerce)
  - **Trust and e-commerce** (personal data protection, cybersecurity)
  - **Scope and general Provisions** (including exceptions, indigenous peoples, taxation and dispute settlement)

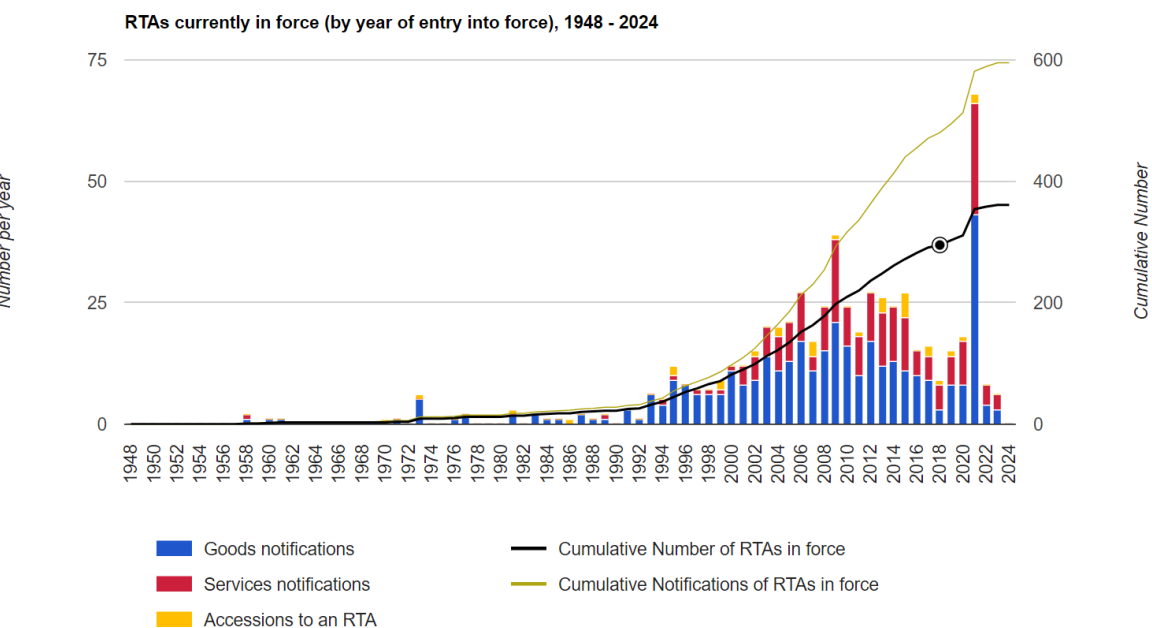


## DIGITAL WORK AND PTAs

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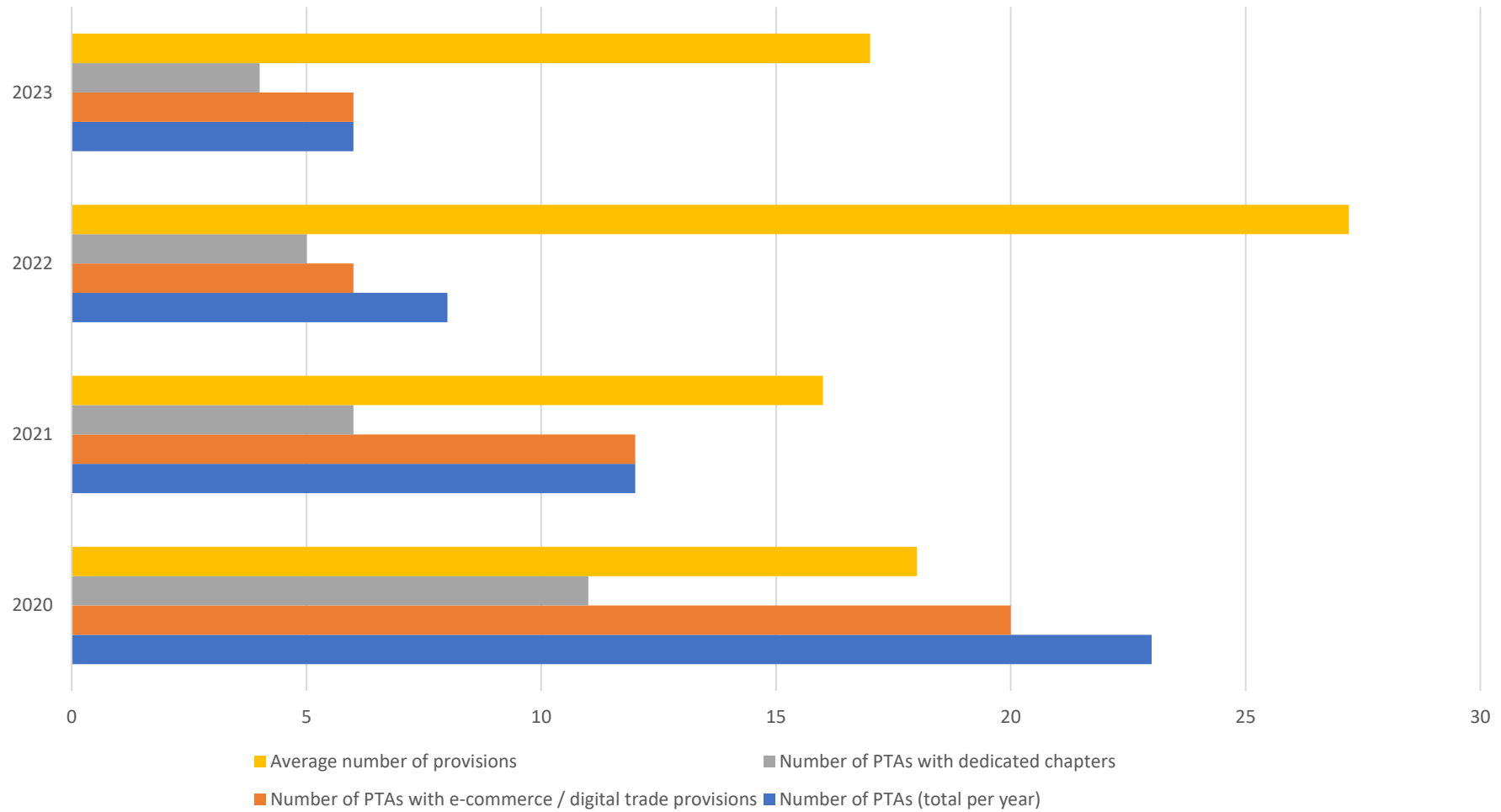
- PTAs are trade-liberalizing arrangements between and amongst countries recognized under WTO law (Article XXIV GATT 1994, Article V GATS, Enabling Clause)
- Large growth in PTAs since the 1990s (recently decreasing)
- They have various provisions/chapters, e.g., **services, labour, investment, digital trade, IP** that would apply to digital work
  - Labour chapters require the adoption of the ILO's core labour standards and generally have standstill/non-derogation provisions to ensure that FTA partners do not derogate from labour laws to attract investment
  - Have become subject to dispute settlement over time e.g. US, EU, and Canada's FTAs
  - Not helpful in cases like the Kenya/Meta case because it is unlikely that the US would initiate a dispute against Kenya to prosecute its own company (also, no PTA between US/Kenya)
- Largest and most recent growth has been in digital trade provisions in PTAs

## DIGITAL TRADE COMMITMENTS IN PTAs



- Venue shopping against slow developments at the WTO
- PTAs typically contain WTO-plus rules and increasingly address new issues (WTO extra)
- 3 PTA chapters of most relevance to digital work:
  - Dedicated e-commerce/digital trade chapters
  - Services chapters
  - Intellectual property chapters

### Recent developments in digital trade rule-making in PTAs



## KEY INFORMATION BASED ON THE TAPED DATASET (UNIVERSITY OF LUCERNE)

- 432 PTAs concluded between January 2000 and November 2023
- 214 PTAs include provisions related to digital trade
- 122 PTAs have dedicated digital trade chapters;
- 104 PTAs include a provision upholding the Customs Duties Moratorium;
- 49 agreements contain rules on data flows
- **privacy protection has become a trade topic** (145 PTAs contain provisions)

**taped.**

trade agreement provisions on e-commerce and data flows

## **DIGITAL WORK AND PTAs: SOME RELEVANT PROVISIONS**

- Facilitating e-transactions (e-contracts, e-authentication, e-payments, etc.)
- Customs duties on electronic transactions
- Net neutrality
- Non-discrimination of e-transactions
- Cross-border data flows and data localization
- Data protection
- Source code
- Interactive computer services/platform liability

## SOME RELEVANT PROVISIONS: DIGITAL INCLUSION

- New standalone provisions in digital trade chapters  
**Digital Economy Partnership Agreement (DEPA) (Chile, New Zealand, Singapore); Chile-Paraguay FTA; India-United Arab Emirates Comprehensive Economic Partnership Agreement; Singapore-United Kingdom Digital Economy Agreement (SUKDEA); and UK-New Zealand FTA**
- Speaks to bridging the digital gap by including economically marginalized stakeholders in the digital economy (sustainable development and inclusive growth)
- So far, there are provisions on MSMEs, women, workers, digital skills, indigenous populations, rural populations, and persons with disabilities
- In general, these provisions are non-binding – recognition and cooperation

## RELEVANT PROVISIONS: DIGITAL INCLUSION

### SUKDEA (Article 8.61-P)

1. The Parties recognise the importance of digital inclusion, that all people and businesses can participate in, contribute to, and benefit from the digital economy [...]The Parties also recognise the importance of adopting or maintaining labour policies that promote ***decent conditions of work for workers who are engaged in or support the digital economy***, in accordance with each Party's laws and regulations.
2. The Parties shall cooperate on matters relating to digital inclusion, including the participation of women and other groups and individuals that may disproportionately face barriers to digital trade. Such cooperation may include:
  - ...
  - (d) improving digital skills and access to online business tools;
  - (e) promoting ***labour protection for workers who are engaged in or support digital trade***.

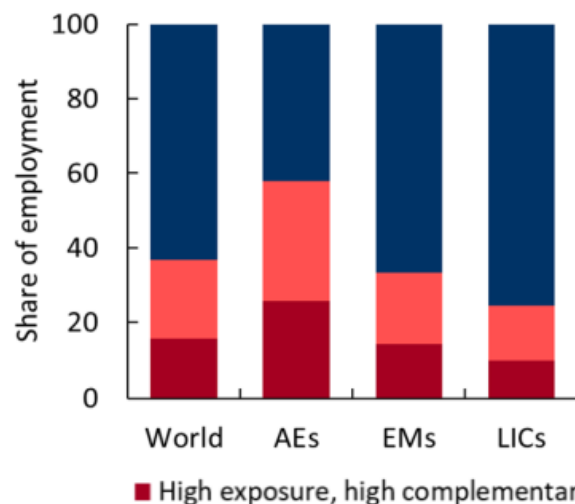


## **ON THE HORIZON: AI, DIGITAL WORK AND TRADE**

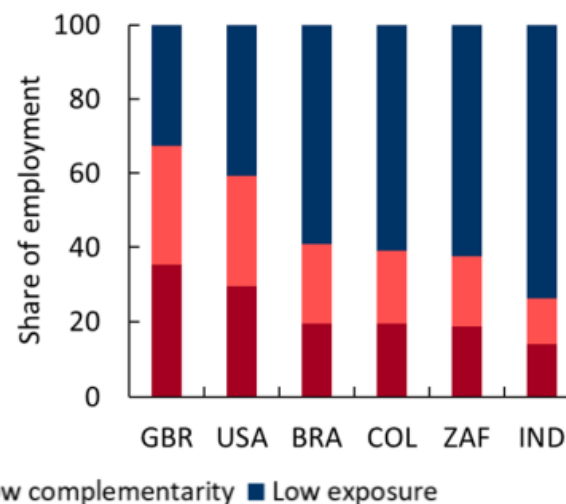
## AI, DIGITAL WORK AND TRADE

**Figure 1. Employment Shares by AI Exposure and Complementarity: Country Groups and Selected Individual Countries**

1. Country Groups  
(Percent)



2. Selected Countries  
(Percent)



Sources: American Community Survey; Gran Encuesta Integrada de Hogares; India Periodic Labour Force Survey; International Labour Organization; Labour Market Dynamics in South Africa; Pesquisa Nacional por Amostra de Domicílios Contínua; UK Labour Force Survey; and IMF staff calculations.

Note: Country labels use International Organization for Standardization (ISO) country codes. AEs = advanced economies; EMs = emerging market economies; LICs = low-income countries; World = all countries in the sample. Share of employment within each country group is calculated as the working-age-population-weighted average.

## AI, DIGITAL WORK AND TRADE: POTENTIAL ISSUES UNDER WTO LAW

- Are services provided by AI covered under the GATS (e.g., legal/customer service bots)?
  - Article I:3(b): “**services**” includes any service in any sector except services supplied in the exercise of governmental authority
  - Article XXIV(g) GATS: “**service supplier**” means any person that supplies a service
  - Article XXIV(j) GATS: “**person**” means either a natural person or a juridical person
  - Article XXIV(l) GATS: “**juridical person**” means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association

AI would be deemed an “employee” of a juridical person?

- **Did WTO Members commit to services provided by AI?** See *China – Audiovisual Products* (vs clear provisions in PTAs)
  - However, commitment under Mode 1 (Mode 2?) must be made

## **AI, DIGITAL WORK AND TRADE: POTENTIAL ISSUES UNDER WTO LAW**

- What about professional licensing requirements? E.g., medical, legal, accountancy
- Classification issues:
  - If no commitment is made under “health services”, could you argue that a medical diagnostic AI falls under data processing?

## AI, DIGITAL WORK AND TRADE: POTENTIAL ISSUES UNDER PTAs

- AI is a new but growing area of regulation in PTAs – five agreements so far

**Australia-Singapore Digital Economy Agreement (DEA), DEPA, SUKDEA, New Zealand-UK FTA, Korea-Singapore DEA.**

- Soft/ cooperation types of commitments
- Remains to be seen how AI will be regulated in trade law – topical issue
- Growing interest/discussions around technical standards (EU AI Act, China, US)

**THANK YOU, DANKE, MERCI**

**<http://digitaltradelaw.ch>**