Emerging Collisions between Internet Governance Institutions and International Trade Law Institutions

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PRESENTED TO UNIVERSITY OF ZURICH

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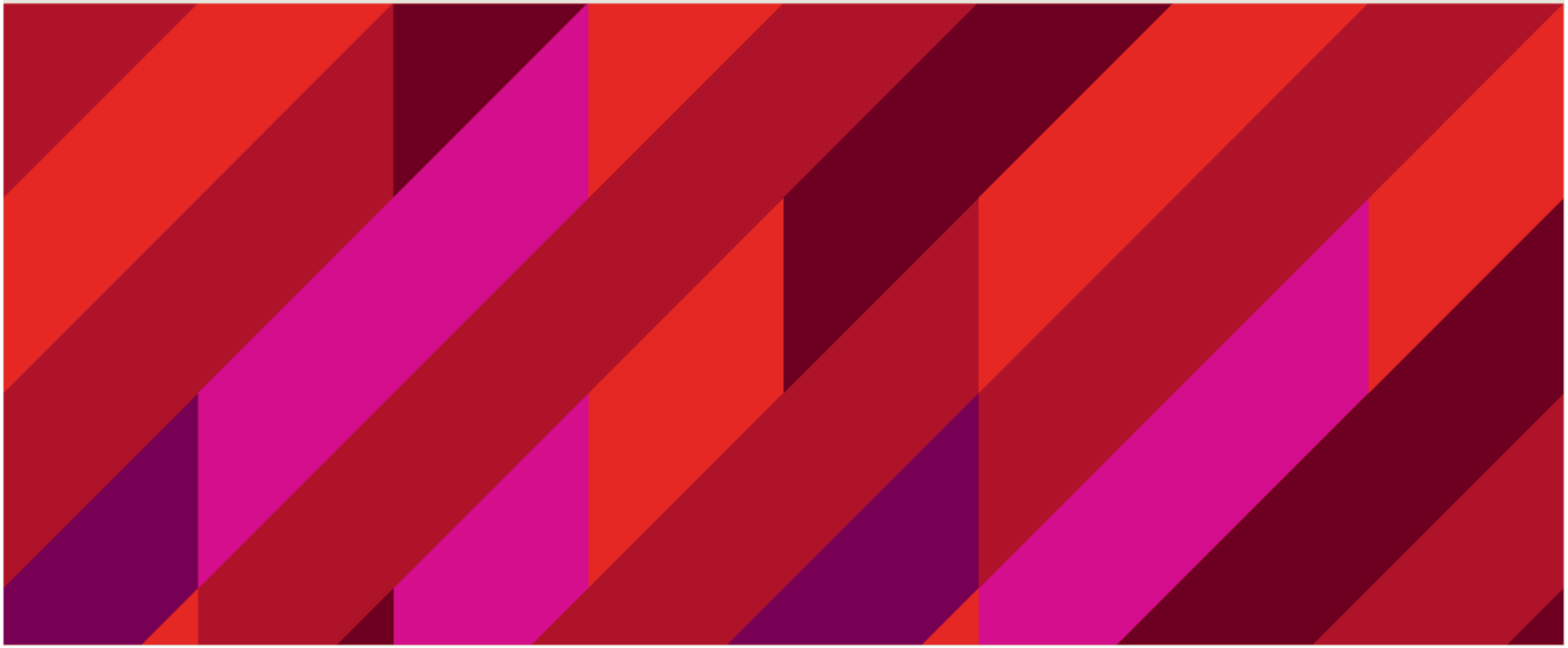

Overview

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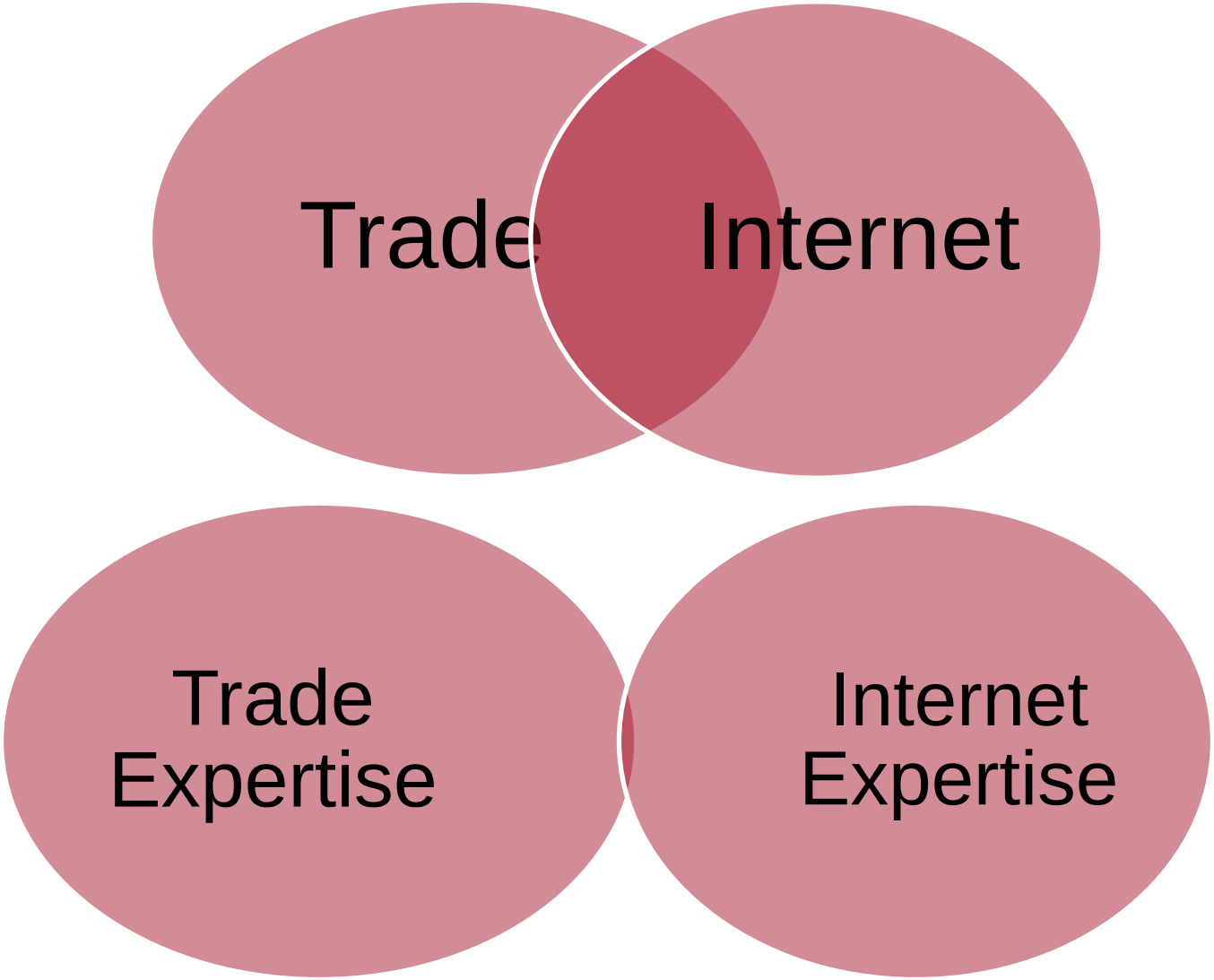
- Introduction to terminology & concepts
- International Trade Law (ITL) Institutions and Rules of Pertinence to IG
- Examples of Emerging Collisions
  1. WHOIS Policy
  2. Localisation of Data Hosting
  3. Localisation of Data Routing
  4. Tendering for Network Hardware; and
  5. New gTLDs
- Interdisciplinary Insights into these Emerging Collisions
- Testing Hypotheses on the future of IG/ITL interaction
- Questions from the Audience

Why is this occurring?



Introduction to Terminology & Concepts

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International Trade 101 for Internet experts

- Terminology:
  - Exports
  - Imports
  - Balance of Trade
  - Free Trade
  - Trade Barriers
  - Multi-lateralism
  - Bi-lateralism or Regionalism

Introduction to Terminology & Concepts

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International Trade 101 for Internet experts

- Concepts and Assumptions:
  - Nations are sovereign
  - Ricardo's *Theory of Comparative Advantage*
  - Nations with a comparative advantage like freer trade
  - Nations with a comparative disadvantage often like to resist freer trade
  - Consequently, nations have to both internally and externally resolve their tensions between trade economics and trade politics

Introduction to Terminology & Concepts

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Internet Governance 101 for International Trade experts:

- Terminology
  - What is the Internet?
  - Client-Server model
  - DNS: Domain Name System
  - ICANN: Internet Corporation for Assigned Names & Numbers
  - UDRP: Uniform Dispute Resolution Policy
  - WHOIS database

Introduction to Terminology & Concepts

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Internet Governance 101 for International Trade experts:

- A few concepts & assumptions:
  - The Internet > World Wide Web (WWW)
  - Bottom-Up Design
  - The Internet is intelligent at the edges and dumb in the middle
  - Network Effects
  - First-Mover Advantage
  - Multi-stakeholder Model

Brief Timelines for ITL and IG

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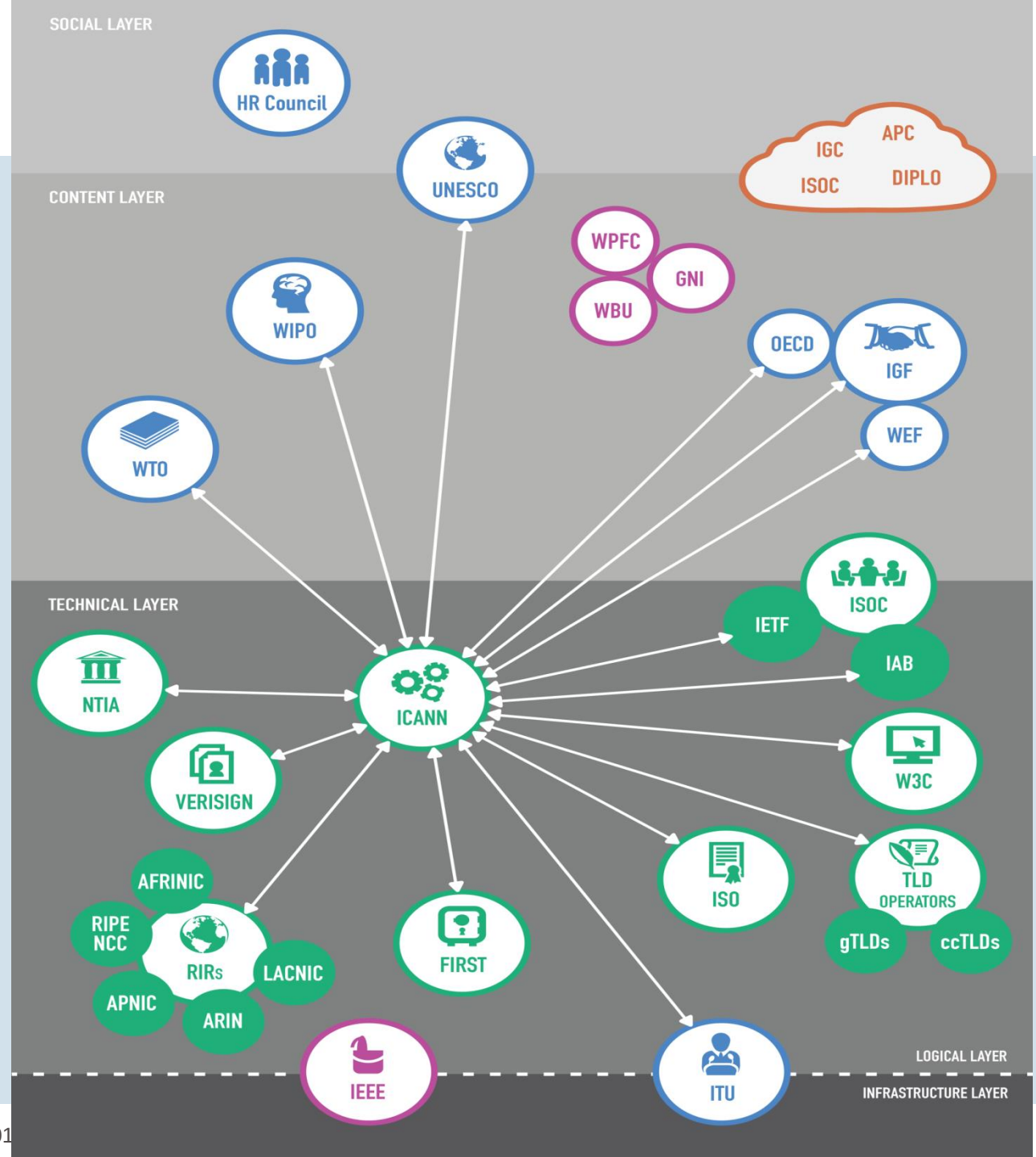
International Trade Law	Internet Governance
1947: GATT signed	1960s/70s: ARPA and DARPA research projects develop packet switching networks & TCP/IP
1950s – 1993: successive rounds of GATT negotiations to lower trade barriers	1983: Paul Mockapetris invents DNS; 1985: Jon Postel allocates rights to manage the first gTLDs and ccTLDs
1994: WTO established GATS & TRIPS signed	1986: Internet Engineering Task Force formed
2001: China joins WTO	1992: Internet Society formed
2000s: Multilateral negotiation rounds fail	1998: Jon Postel dies; ICANN formed as Californian non-profit company
2000s-: Regional and Bilateral trade agreements proliferate	2003: first World Summit of the Information Society
2011: Russia joins WTO	2006: first Internet Governance Forum held; New MoU between ICANN and U.S. Dept. of Commerce
2015: Trans-Pacific Partnership signed	2009: ICANN Affirmation of Commitments with U.S. DoC
2016-: TTIP, TISA, TAFTA, etc. negotiations continue…	2016: ICANN progresses towards greater independence from U.S. Govt?

Int‘l economic law rules of pertinence to global Internet governance

PD, DR.IUR. MIRA BURRI


SOCIAL LAYER
HR Council
UNESCO
IGC
APC
ISOC
DIPLO
CONTENT LAYER
WPFC
GNI
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AFRINIC
RIPE NCC
RIRs
LACNIC
APNIC
ARIN
FIRST
ISO
TLD OPERATORS
gTLDs
ccTLDs
IEEE
ITU
LOGICAL LAYER
INFRASTRUCTURE LAYER

situating WTO/IEL on the GIG landscape

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- only on the margins of the institutional map of global Internet governance (GIG)
- delineated competences / public international law *vs* informal law-making
- no contestation, no explicit clashes so far

- **yet, WTO/IEL: the unlikely but influential GIG actor?**

the layered communication model

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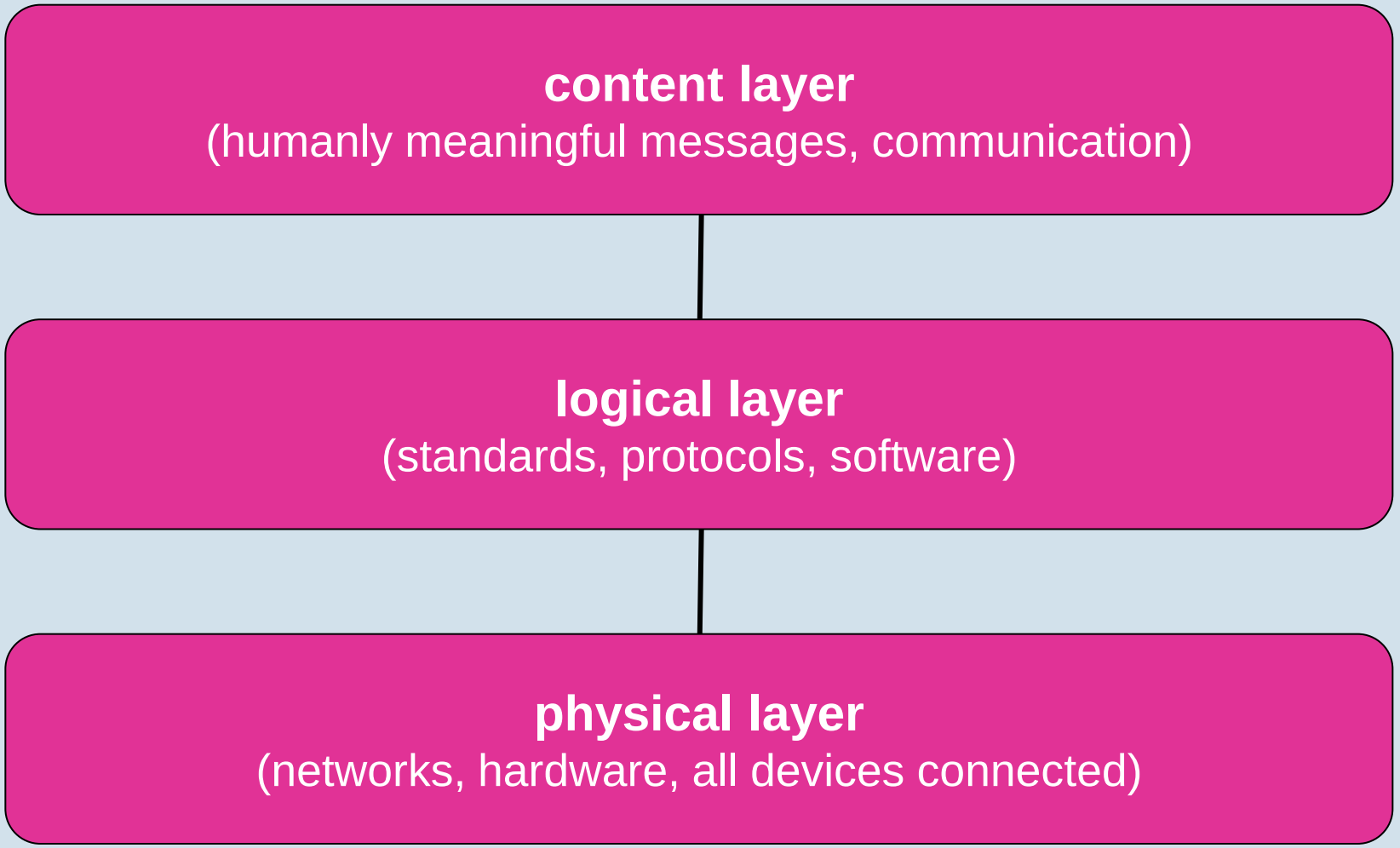

WTO: basic tenets

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- established in 1995; origins in the GATT 1947
- 162 members
- regulates **all trade** in goods and services, intellectual property protection
- far-reaching rules based on the **principles of non-discrimination: most-favoured-nation (MFN) and national treatment (NT)**
- deep intervention into domestic legal systems: tying regulators' hands to the mast
- unique and effective dispute settlement mechanism

- **the 'hardest' form of international law**

IG relevant rules

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Information Technology Agreement (ITA):

- covers 97% of trade in IT products; **zero tariffs**
- **ITA II**: major breakthrough in 2015; 200 new product lines

GATS rules for telecommunication services:

- far-reaching commitments
- ***Annex on Telecommunications*** and **the *Reference Paper*: liberal regime** for telecommunication networks and telecom services**; competition law-like rules**
- leaked TTIP chapter is essentially a more detailed Reference Paper

GATS rules for computer and related services:

- far-reaching commitments; low barriers to trade and market access
- covering key sectors, such as data processing and data base services

but few commitments for media services

- the ‘cultural exception’ debate; diverging US/EU positions

WTO and the Internet

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- **on the one hand**: comprehensive and far-reaching rules for the physical and the logical layers; made the emergence of global communication networks possible
- **on the other hand**: failed rules adaptation
  - the 1998 WTO E-Commerce Programme: great forward thinking➔no action
  - no agreement even on basic issues, let alone on complex matters, such as classification: goods vs. services; telecom vs. audiovisual vs. computer-related services
  - some but insufficient compensation through case-law

- **venue shopping triggered**

Preferential trade agreements (PTAs)

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- **direct or indirect solutions found in PTAs**
- **the US Digital Agenda: 12 US PTAs since 2002**
- **spillovers of templates in non-US PTAs**

- **3 PTA chapters to follow:**
  - dedicated e-commerce chapters
  - services chapters
  - IP chapters

- **addressing digital governance is a cross-sector issue**

PTAs (2)

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- **trade in services chapters**
  - negative list approach
  - dropping local presence requirements
  - dropping MFN exemptions
  - strengthened transparency
  - domestic regulation

- **e-commerce cooperation pledges + ‘deep’ digital trade rules** (data and consumer protection; interoperability)

PTAs (3)

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- **IP chapters with ever increasing IG relevance**
  - rules on ccTLD management
  - evolution of the templates to include more digital copyright issues, such as rules on the limitations on liability of ISPs or online piracy prevention (e.g. KORUSFTA)
  - increased level of IP protection and enforcement in cyberspace – export of US domestic standards
  - ratcheting-up: TRIPS➔WIPO Internet Treaties➔DMCA➔PTAs **+**

- **TPP and TTIP: less than expected ?**

summing up: discernible trends

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- emergence of a specific trade regime tailored to digital products and services
- digital trade not so much about market access **but about interfacing domestic regimes, so as to provide interoperability and some certainty**
- value of international economic law (if not through the WTO) increased for GIG (hard *vs* soft law)
- **limitations (or advantages?) of trade venues as GIG actors:**
    - bargaining across sectors
    - asymmetrical power deals
    - conventional state-to-state relations

Examples of Emerging Collisions Between IG and ITL Institutions

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1. **WHOIS Policy**
   - Significant policy development work at global- and country-levels over the last decade by Internet Governance stakeholders on confidentiality/privacy-justified exclusions to the general rule that WHOIS information is readily publicly available
   - Business stakeholders are divided
   - Civil Society stakeholders want exceptions

Examples of Emerging Collisions Between IG and ITL Institutions

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Trade Response:

- Article 18.28(1)(b) of the TPP requires that all signatory countries' ccTLD WHOIS databases provide:

"online public access to a reliable and accurate database of contact information concerning domain name registrants in accordance with each Party's law and relevant administrator policies regarding protection of privacy and personal data"

– WHOIS proxy & privacy rules in Australia, New Zealand and Canada could potentially be the basis of TPP disputes

Examples of Emerging Collisions Between IG and ITL Institutions

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2. Localisation of Data Hosting

- First-Mover Advantage, Economies of Scale and Network Effects give US Internet data hosting businesses a competitive advantage, as do generous US government domestic energy subsidies
- Many non-American businesses, Governments, NGOs and individuals outsourcing their data hosting needs to US-based providers
- The Snowden Leaks removed NSA's plausible deniability and confirmed its competitive advantage in the economies of surveillance
- France, Russia, Germany and other governments proposed to introduce laws requiring the localised hosting of their citizens' and businesses' data

Examples of Emerging Collisions Between IG and ITL Institutions

- Trade Response:
  - The Office of the U.S. Trade Representative threatened potential trade sanctions
  - Article 14.13 of the TPP prohibits localised hosting, with limited exceptions
  - Lack of precedents: GATS Privacy exception has never been the subject of Dispute Settlement Panel decision

Examples of Emerging Collisions Between IG and ITL Institutions

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3. Localisation of Data Routing

- U.S.-based Internet Service Providers enjoy a competitive advantage in the provision of global Internet backbone data routing services
- Tier 1 ISPs peer with each other, charge others
- USA enjoys a significant competitive advantage and trade surplus in data routing
- This routing ecosystem also reinforces the economics of surveillance advantage enjoyed by the U.S. National Security Agency
- Snowden Leaks led to proposals for localised data routing in Germany, Russia, etc. for domestic Internet traffic (e.g. Schengen routing)
- ECJ *Schrems* decision

Examples of Emerging Collisions Between IG and ITL Institutions

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- Trade Response:
  - Office of the U.S. Trade Representative warnings
  - TPP Article 14.11(2): cross-border data flows allowed by default
  - Article 14.11(3) places limits on public-policy exceptions to those data flows

Examples of Emerging Collisions Between IG and ITL Institutions

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4. Tendering for Network Hardware

- Snowden leaks prompted concerns about both the security of Chinese and US networking hardware

- Inconsistencies when building national infrastructure: NZ bought Huawei products; US and Australia banned them

- Chinese Government response: turn over source code, submit to audits and build back-doors into hardware and software. Apple and Cisco removed from its list of approved technology vendors.

Examples of Emerging Collisions Between IG and ITL Institutions

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- Trade Response:
  - TPP Article 14.17(1): prohibits laws requiring disclosure of source code
  - Art 14.17(2) excludes software “used for critical infrastructure” (which is undefined)
  - Problem: most mass-market software is also used on critical infrastructure
  - TPP Article 29.2: National Security exception
  - Alas, not many WTO dispute decisions on National Security

Examples of Emerging Collisions Between IG and ITL Institutions

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5. Geographical Indications and Introducing new generic Top-Level Domains (gTLDs)

- For over a century, various forms of geographical indications have received protection under laws within European countries, such as France
- Article 22(1) of the TRIPS Agreement recognises geographical indications
- EC Regulation 1151/2012
- TPP Articles 18.30-18.36

Examples of Emerging Collisions Between IG and ITL Institutions

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- Internet Governance Response:
  - Since 2012, ICANN has introduced many new generic Top-Level Domains
  - What about .wine and .vin?
  - Geographical indications as domain names?
  - Effectiveness of ICANN's internal dispute resolution processes?
  - Alas, no signalling effect from a formal published decision resolving this dispute

Interdisciplinary Perspectives

- New Institutional Economics theory:
  - Integrates insights from law, politics, economics, sociology and history
  - Can be situated within the School of New Legal Realism
  - Five modalities of regulation:
    - Law
    - Markets
    - Cultural Norms
    - Architecture (such as software code)
    - Transaction costs (search, enforcement)

Interdisciplinary Perspectives: Politics

- Agreements for “managed trade” rather than “free trade”:
  Joseph Stiglitz
- Not all stakeholders have equal voices in trade (or Internet) negotiations
- Trade Agreements can “ratchet-down” regulation effect
- The Internet as it currently works is not politically neutral
- Trade as a forum-shifting strategy for Internet issues
- Internet Neo-colonialism risk? Exclusion of China from TPP?

Interdisciplinary Perspectives: Law

International Trade Law	Internet Governance
Longer history of formal dispute resolution through arbitration	Shorter history of formal dispute resolution: UDRP = quasi-arbitral, high volume; Independent Review Tribunal = arbitration
Mechanisms: • Negotiation • Dispute Settlement Panels • Appellate Body • Investor-State Disputes	Mechanisms: • UDRP • Board Reconsideration Committee • Independent Review Tribunal • Internal Ombudsman
Parties: States vs States, amicus curiae briefs by academics & NGOs, Investors vs States	Parties: Individuals (and ICANN)
WTO cannot be sued in a court	ICANN has been sued in Californian courts

Interdisciplinary Perspectives: Culture / Sociology

- The cultural norms amongst International Trade Law stakeholders and Internet Governance stakeholders tend to be quite different:
  - Relative power of the state vs individuals (multi-stakeholder vs multi-lateral)
  - U.S. West-Coast tech culture is more libertarian and utopian
  - ICANN has only become multi-lingual and more multi-cultural in the last few years, whereas the WTO has a longer history of linguistic & cultural inclusion (but only for certain categories of stakeholders)
  - North-South issues exist within both spaces

Interdisciplinary Perspectives: History

- "The Natural Effect of Commerce [between nations] is to bring peace" – *Montesquieu*

- Unresolved trade tensions have contributed to many conflicts throughout history, for example:
  - First & Second China Opium Wars 1839-1860
  - WW1
  - WW2

- 21st century conflicts over trade over the Internet are unlikely to be resolved through sending gunboats to open shipping ports

- Instead, malicious programs will likely be used to open computer network ports, i.e. hacking or cyber-warfare

- So better coordination between our International Trade Law Institutions and Internet Governance Institutions might just contribute to improved cyber-security

future scenarios of IEL/IG interaction

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- **scenario 1: the consolidated governance model striving for coherence across regulatory areas**
  - EU: Digital Single Market Strategy
  - CH: Digitale Schweiz

- **scenario 2: fragmentation (and contestation) of governance venues, actors and approaches continues**
  - clashes more frequent
  - power matters
  - sustainable provision of global public goods at risk?

scenario 1 example: 2015 EU Digital Single Market Strategy

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- **a truly comprehensive initiative that seeks to address in a coherent manner all legal challenges brought about by digitization, so as to enable the growth of the digital economy and give the EU a competitive edge**
- **core e-commerce issues:**
  - less burdensome but trusted rules for online purchases of digital content and improved consumer protection
  - affordable parcel delivery
  - reducing VAT burdens
  - preventing unjustified geo-blocking
- **but also: an update of the copyright framework; the telecom and media frameworks; a framework for platforms and intermediaries; interoperability and standardization; trust and security in handling personal data; inclusive e-society; EU 'Free flow of data' initiative**

scenario 2: intensified fragmentation and contestation

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- proliferation of fora and rules that are not coordinated and may overlap/clash
- rules of different legal value (hard *vs* soft); different membership, leadership and institutional design
- IL/IR assumptions:
  - **power matters at the international level:**
    realpolitik; the importance of regulatory capacity: e.g. advantage for Switzerland but not for developing countries
  - **power matters domestically:**
    public choice theory: small but powerful constituencies push for key decisions (e.g. US IP industry)
  - **IG multi-stakeholderism only on paper ?**

- **thank you for the attention !**
  questions and comments are welcome.

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