

**Strategy Meeting on  
Catalysing Reform  
of Trade Negotiation  
Processes**

**The Rapid Globalisation of Trade Agreements in the Digital Era:  
Building a Consumer-centric model**

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# On Building FTA Models



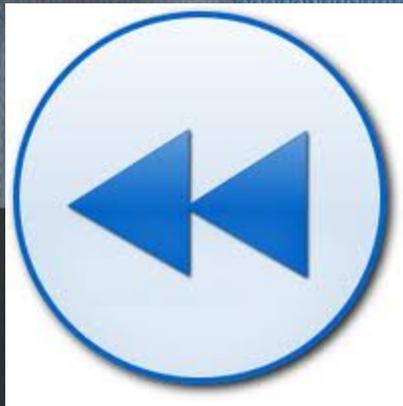
(i) Mechanism

(ii) Mechanics

(iii) Legal  
Principles/Values

(iv) Objectives

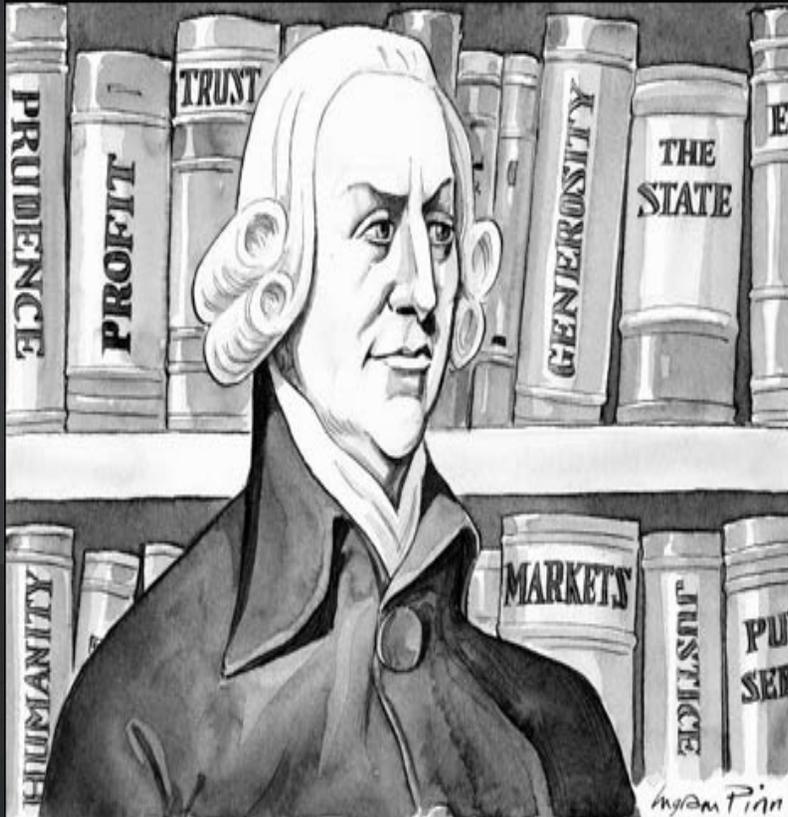
# THE PAST



[Rewind]

# Towards a Digital Economy

The agrarian economic model:  
what can we produce to support the community's economy?



‘As every individual, therefore, endeavours as much as he can both to **employ his capital** in the support of domestic industry, and so **to direct that industry that its product may be of the greatest value**; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it (...) **By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it**’. (Adam Smith)

# The Industrial economic model (19<sup>th</sup>-20<sup>th</sup>)

What can we **produce** to support the **national** economy?



# The post-industrial economic model

What can we **provide**?

cheaper cost of  
production offshore →  
economy based on  
professional services



- **Services: banking, insurance, financial, legal services**
- **International scope**

# THE PRESENT

[Pause and observe]



# The Digital Economy



What can we **control** ?  
(trans-border data flows and services)

# Information

‘... as a form of wealth, a focus of production, and a conception of value, **information is a problematic category** within our most basic ways of thinking about markets, property, politics, and self-definition’

(James Boyle ‘Shamans, Software and Spleens’ 1997)

**W H Y ?**

# Digital Trade / Data (challenges for law)

- Balance between **accessibility** and **restricted usage of information as a tradable commodity** – transnational scope.
- Balance between **public** and **private** realm
- Human rights as a barrier to trade?
- The troubling overlap of the **consumer** and the **citizen** → different accountability/enforcement spectra.

# Digital Trade / Data (challenges for the markets)

## - Disintermediation



Devaluation of the form (Economy of Ideas, J P Barlow)

## - Depropriatisation

→ From a limited bargaining power for the consumer to the empowerment of the user

Is the USER a barrier to trade?

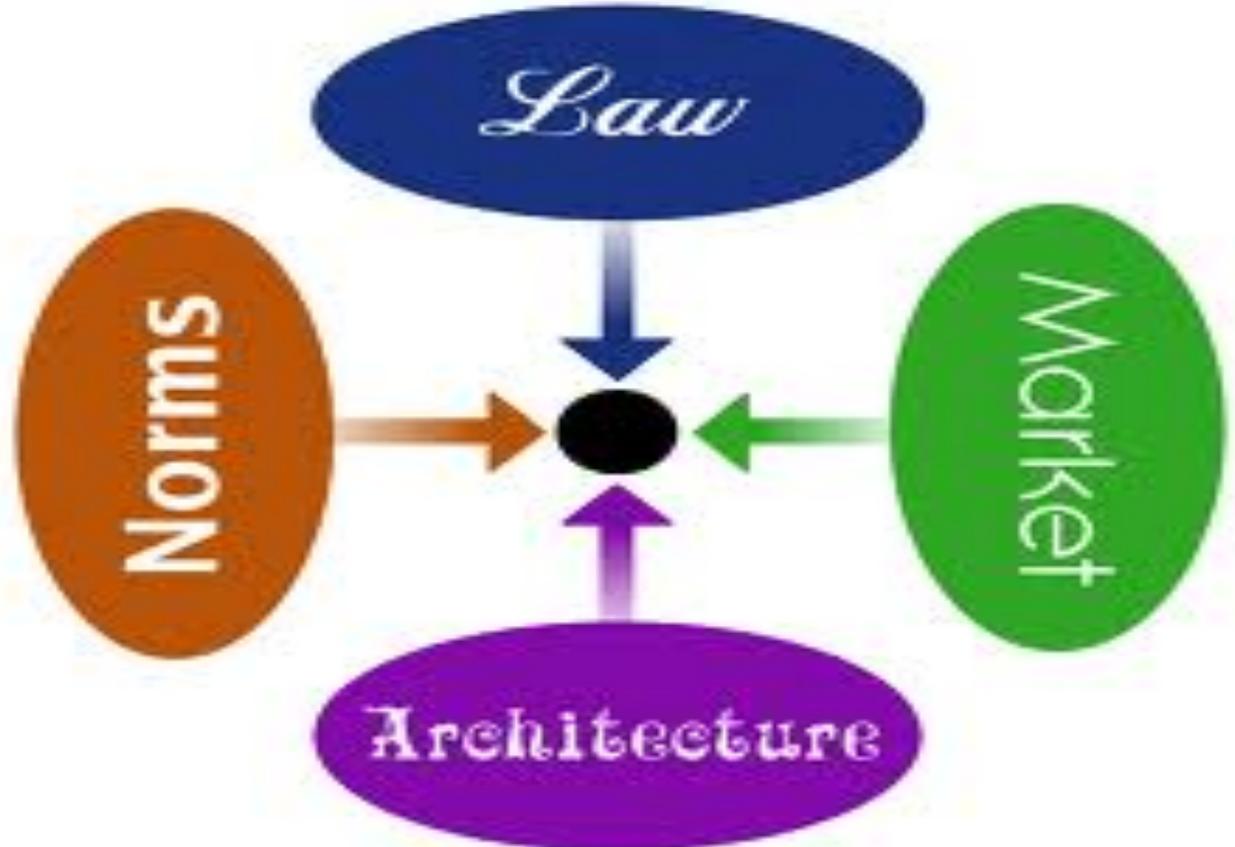
# Lessig's Dot

L. Lessig, 'The Future of Ideas' (2001)



User as a  
“pathetic dot” or  
as an active part  
of negotiation  
procedures?

How can the  
law/norms help?

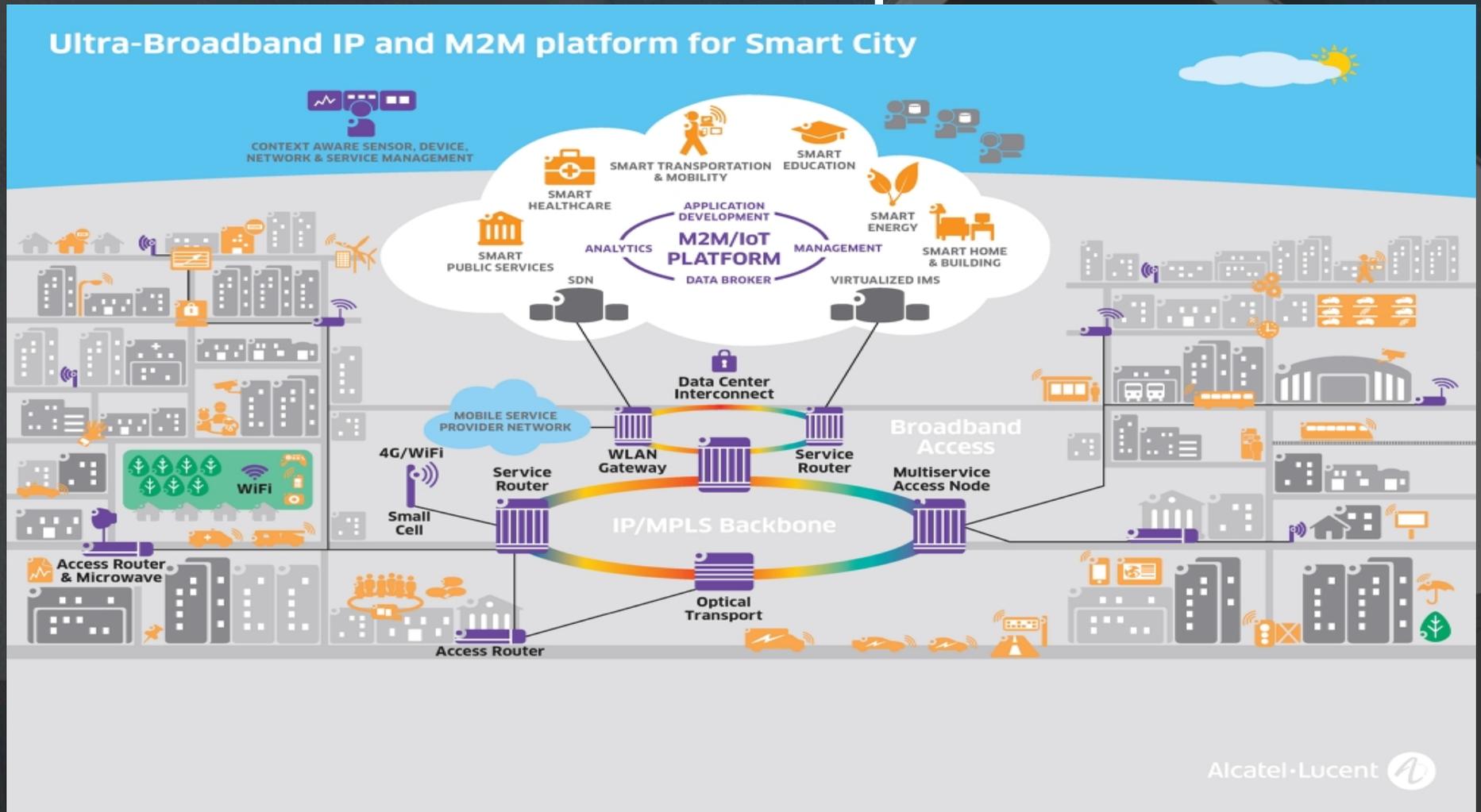


# THE FUTURE



[Fast Forward]

# An example



But also .... Decentralised Community networks (e.g. guifi.net in Spain)  
Cf TISA (privatisation on public services)

# Engineering and Architecture of Trade Agreements

- **Mechanism (synthesis – components)**  
(TISA → 2/3 of the global GDP)
- **Mechanics (how is this set to motion)**  
(secrecy + “invisible dictation” through ISDS)
- **Objectives** ( privatisation of services)
- **Principles (embedded values)**  
Data protection BUT, “the gvmt may not prevent a foreign services company from transferring info/data)
- How should a fair balance be decided?

# THE LAW



# FTA (intro)

- Free Trade Agreements are concluded to reduce tariffs and barriers to trade
- Connection to WTO?
- What about mega-regional FTAs such as TTIP, TISA and TPP?
- In the absence of a legal framework for negotiations, what are the guarantees for the protection of the consumer?
- Fundamental contractual principles re consumer contracts should not be set aside

# A taxonomy of TA models

## I. INTERGOVERNMENTAL

( e.g. WTO, UNCITRAL)

## II. PLURILATERAL

(regional mini-lateral FTAs, e.g. TTIP, TISA)

## III. MULTISTAKEHOLDER

(e.g. NetMundial)

## IV. DECENTRALISED (P2P)

(e.g. Block-chain)

# Assessment of TA models

- **Legal criteria provided (Rule of Law)**
  - (i) Accessibility (-mechanics)
  - (ii) Transparency (-mechanism)
  - (iii) Clarity (-objective)
  - (iv) Fairness/ Proportionality (-values)

**Equitable Balance of Clashing Interests**

# Rating FTA models: A legal assessment matrix

Model	Mechanism	Mechanics	Values & Objectives	Balance (Trust & legitimacy)
Inter-Governmental	Default: Closed	Agreement		
Pluri-lateral Mini-lateral	Default: Closed	Agreement		
Multistakeholder	Default: Participatory	Consensus		
Decentralised P2P	Default: Open/ Communal	Collaboration		

# Consumer's limits

- TTIP, TISA, TPP as a closed model
- Not new-always had a limited bargaining position
- What is new is that they are far reaching as to their scope (not merely trade but also affecting the State's sovereignty in policy making and regulating seminal human rights eg privacy).
- ISDS mechanism in TTIP

# And what about harmonisation?

- Is harmonisation a possible solution to protecting consumers' rights in FTAs such as TTIP? How?
- A set of unified rules and principles governing consumer contracts
- Common standards of protection
- If we want a participatory model, all sides should be treated equally on the table.

# Harmonisation Levels of Consumer Law

- European
- International UN Guidelines on Consumer Protection
- Transnational harmonisation
  
- But values and principles need to be embedded (engineering and architecture)

# European Harmonisation of Consumer Rights

- European level of consumer rights harmonisation most successful
- Successful harmonisation of EU consumer contract law
- Fundamental standards of fairness in consumer contracts in B2C contracts
- Embedded in Article 38 EUCFR:  
'Consumer protection Union policies shall ensure a high level of consumer protection.'

# Harmonised EU Texts on Consumer Rights

- EU DIRECTIVE 93/ 13/EEC on unfair terms in consumer contracts
- EU Directive 2011/83/EC on Consumer Rights
- European Commission Proposal on the supply of digital content
- European Commission Proposal on the Online Sale of Goods

# Fairness Standards in Harmonised EU Texts

- **Article 6 (1) Directive on Unfair Terms in Consumer Contracts:** 'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

# Fairness Standards in Harmonised EU Texts

- Transposition of EU Directives on Consumer Rights in the UK
- Consumer Rights Act 2015
- Includes a clause on contractual fairness-protection of consumer
- Section 62 of the Act on the Requirement for Contract Terms and Notices to be Fair
- Important to uphold these standards during negotiations of TTIP and TISA

# Thank you !

## Your feedback is valuable to us!

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