The grand myth of cross-border data flows in trade deals

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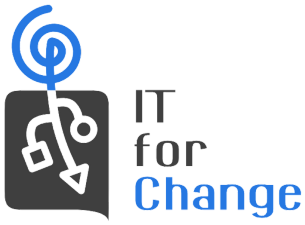

IT for Change is an NGO based in Bengaluru, India. We aim for a society in which digital technologies contribute to human rights, social justice and gender equality.

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Summary

At MC 11, the United States, Japan and European Union are actively pushing for a liberalised e-commerce regime that will reinforce the rules for trade set by the global North. Key to this dominant discourse is the persuasive rhetoric on free cross-border data flows as a means for smaller players to expand their market reach. But this discourse blindsides the fact that the e-frontier of new opportunities that dominant countries and corporations in the global trade regime evangelise is a lot more complex than can be unlocked by data flows. In fact, free data flows may be antithetical to new pathways to growth – as the current data regime favours the extraction of data for digital intelligence from the South by the corporations of the global North.

For developing countries to harness the power of data and digital intelligence, interventionist state policies in a number of areas – promotion of local over foreign platforms, financing an 'Internet plus' digital industrialization strategy on big data, cloud and Internet of Things, and enabling smaller enterprises to build their presence online – may be needed. Developing countries must not sign away their right to strategically regulate the digital market and data flows. Discussing e-commerce in the WTO will be a mission creep, constituting a set back to developing countries and their right to regulate this important area.

This paper explores the grand myth of cross-border data flows in trade deals. It is divided in four parts:

Part I - Data flows and global trade negotiations: an introduction
Part II - Cross-border data flows: contours of the debate
Part III - How e-commerce maturity links to data policies: RCEP countries as illustration
Part IV - Dangers lurking in MC11 and beyond

Part I – Data flows and global trade negotiations: an introduction

Free flows of data and Policy actions aimed at privacy, security and data protection, censorship and filtering, and cyber sovereignty - all impinge upon the cross-border flow of data.[1] Regulatory considerations for global data flows, therefore, originate in multiple considerations. Yet, rules on data flows are increasingly sought to be consolidated under global trade regimes around the thematic of 'e-commerce'. The persuasive rhetoric around economic growth and free cross-border data flows is the newest formula in the neo-liberal text book for global trade.

[1] http://twn.my/title2/resurgence/2017/324-325/cover05.htm

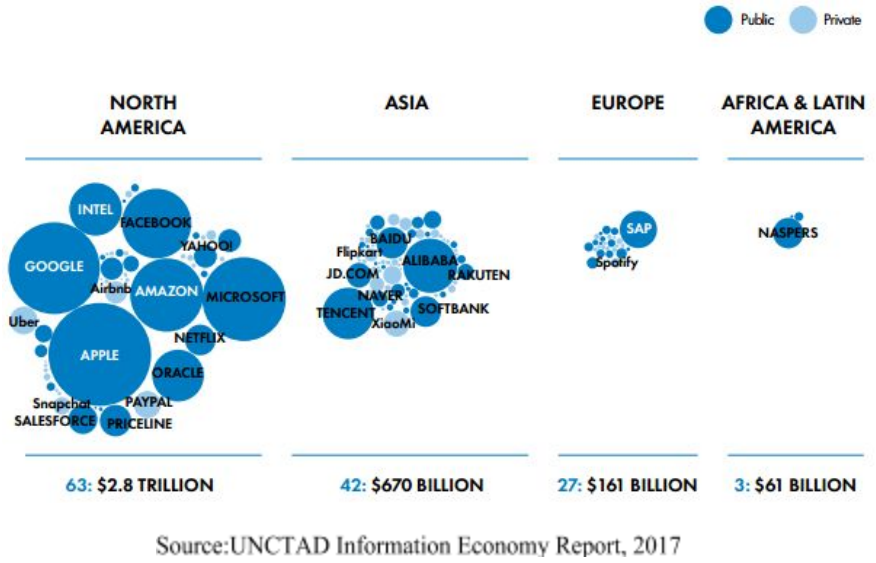

Figure 1: Geographical concentration of headquarters of digital MNEs with market capitalization of more than $1billion, by region, 2016

The move from 'data supported' to 'data driven' decision making marks the commencement of the era of digital industrialization. The ability to capture, store and analyze large quantities of data is an essential means to participating in the market. The Fourth Industrial Revolution defined by the embedding of technology into the human body and societal process hinges on digital intelligence and the market power that such intelligence makes possible. Given the historic dominance the Global North, especially the US, has had over the Internet, articulations of what would constitute rules for e-commerce have an innate Northern bias. Calls for unencumbered cross-border flows of data are a product of this bias. The US wants to build a data regime where no country can have ownership over its data.[2] Since the big/monopolistic digital corporations are situated in US, freely flowing data is bound to flow into the US. Market capitalization statistics of the digital corporations testify to this. **See Figure 1**

As powerful countries and their corporations vie for their share of digital intelligence – the new pie of the post-computational era – global trade negotiations become the key site for propagating the ostensible 'benefits' of free data flows. Such clamour is now the mainstay of trade treaties – including regional and global, regardless of their stages of (in)completeness or secrecy. Cross-border data flows under new rules for e-commerce is also the latest contentious issue at the 11th WTO Ministerial Conference at Buenos Aires (MC11). A deeper understanding of why this is a red herring, and worse still, a grand myth, is necessary so that smaller countries and communities struggling for global justice are well poised to articulate their rights.

This paper argues that a fair global economy where countries can compete on an equal footing cannot be achieved with a singular policy on data flows.

[2] http://www.itforchange.net/sites/default/files/1468/digital_industrialisation_in_developing_countries.pdf

Part II - Cross-border data flows: contours of the debate

Issues of cross-border data flows, once settled through assurances of privacy and data protection[3], have resurfaced, as every sector – from agriculture to education, health and finance – gets restructured by the digital. With the emergence of data as a factor of production, regional trade agreements – like Trade in Services Agreement (TISA)[4], Trans-Pacific Partnership (TPP)[5], Regional Comprehensive Economic Partnership (RCEP)[6] etc. – have become the sites where the material structures of data flows are being determined through de-facto global policies on e-commerce.

US Interests: The 'Digital2Dozen' principles for the digital economy developed by the United States Trade Representative (USTR) to guide multilateral trade agreements includes twin obligations of 'enabling cross-border data flows' and 'preventing localization barriers' to counter domestic regulations that put a 'chokehold on free flow of information' and to alleviate the burden of companies that would have to invest in building infrastructure to store data locally.[7]

Digital corporations have been crucial in pressing for a liberalized digital trade regime. Consequently, indigenous digital industrial policies with localization requirements have been viewed disdainfully by global digital companies like Google who regard localization as a threat to the Internet 'as a global marketplace and platform for innovation', urging policymakers from the US and EU to 'establish new international trade rules under bilateral, regional, and multilateral agreements that provide further assurances in favor of the free flow of information on the Internet'.[8]

Dominant global discourse promoting data flows: In May 2017, Internet Association[9] wrote to USTR expressing interest in working with it on facilitating cross-border data flows.[10] Other bodies have raised concerns about how local hosting requirements impede new and growing businesses that want to compete on a global stage, but unable to afford 'data and information costs' brought on by localization norms.[11] The frequently cited European Centre for International Political Economy's 'The costs of data localization' study estimates that an economy-wide data localization requirement (or discriminatory barriers to that effect) would substantially increase the GDP loss – estimated at Brazil (-0.8%), the EU (-1.1%), India (-0.8%), Indonesia (-0.7%), Korea (-1.1%)".[12]

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3 http://unctad.org/en/PublicationsLibrary/ier2017_en.pdf

4 https://wikileaks.org/tisa/ecommerce/

5 https://mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf

6 Will be discussed in detail later in the paper

7 https://ustr.gov/sites/default/files/Digital-2-Dozen-Final.pdf

8 https://static.googleusercontent.com/media/www.google.com/en//googleblogs/pdfs/trade_free_flow_of_information.pdf

9 Internet Association comprises leading global digital corporations- Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Match Group, Microsoft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga

10 https://cdn1.internetassociation.org/wp-content/uploads/2017/05/Lighthizer-Letter-5.16.pdf

11 https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/575a654c86db438e86009fa1/1465541967821/RCEP+E-commerce+June+2016.pdf

12 http://ecipe.org/blog/the-costs-of-data-localization/

Alternative discourse on protecting domestic players: Azmeh and Foster observe that a focus on GDP can be a red herring. What may seem as a security/censorship measure of restricting the flow of data, could actually be an economic measure to vitalize local digital corporations that need troves of data to be successful and to be shielded from global competitors. Thus, "it is important to also consider the impact on catching-up rather than a narrow assessment of the direct impact on GDP".[13]

Acknowledging the economic implications of localization, the French Digital Council opined in its report, 'Strengthening EU's negotiation strategy to make Transatlantic Trade and Investment Partnership (TTIP), a free trade agreement between the US and EU, a sustainable blueprint for the digital economy and society',[14] that allowing free movement of data between the EU and US can affect the ability to take decisions for the protection of domestic industry.[15] The Sustainability Impact Assessment by the European Commission of TTIP, however, speaks only to privacy concerns regarding personal data and raises no other issue regarding free flow of data.[16]

Part III – How e-commerce maturity links to data policies: RCEP countries as illustration

The RCEP is a free trade negotiation between the ten ASEAN countries[17] and India, China, South Korea, Australia, New Zealand and Japan. Countries in the regional partnership pushing for a liberal e-commerce regime have already built a robust digital economy and are looking to expand their operations to digital non-starter nations by forcing unencumbered cross-border flow of data.

The draft terms of reference of the Working Group on E-commerce of the RCEP lists in their 'scope of work' - 'prohibition on the requirements concerning the location of computing facilities', and 'cross-border transfer of information by electronic means'.[18] Japan, South Korea, New Zealand and Australia (all the high-income countries in the partnership) have been pushing for binding commitments on e-commerce.[19]

Internet access and web presence of SMEs – critical to performance in the digital economy

The UNCTAD B2C E-commerce Index, 2017 which accounts for sellers' web-presence and Internet access by consumers (secure Internet Servers), delivery and payment systems - shows a direct correlation between the income level of a country and its rank in the Index.[20] All countries in the partnership favoring free data flows have mature e-commerce markets.

13 http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP175.pdf
14 https://cnnumerique.fr/wp-content/uploads/2014/05/Version-web-ANGLAIS-19.05.pdf
15 https://cnnumerique.fr/wp-content/uploads/2014/05/Version-web-ANGLAIS-19.05.pdf
16 http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155464.pdf
17 Thailand, Vietnam, Indonesia, Malaysia, Philippines, Singapore, Myanmar, Cambodia, Laos and Brunei
18 http://www.bilaterals.org/IMG/pdf/ecommerce_draft_terms_of_reference.pdf
19 https://www.eff.org/deeplinks/2017/07/rcep-discussions-ecommerce-gathering-steam-hyderabad
20 http://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d09_en.pdf

In Australia and New Zealand, retailers are increasingly taking their wares online and want to invest in e-commerce technology. The commitment to further e-commerce owes to the fact that a large percentage of the population in Australia shops online. Further, dominant e-commerce players are not established retailers but relatively younger companies.[21] This allows Australia to drum up support for the rhetoric that survival rate of online small and medium-sized enterprises (SMEs) is higher than that of their offline counterparts.[22] Obscuring factors like Internet reach, this half-truth is often used by developed countries as a bait to bring developing counties to the table at trade negotiations. For example, Japan in its support for a 'Working Group on E-commerce' at the WTO has proposed that the group look into the 'opportunities, challenges, and barriers' micro, small and medium enterprises are faced with while wanting to participate in e-commerce.[23] Malaysia, where 70% of SMEs do not have a website[24], or India where 90% of SMEs have no access to the Internet,[25] and Indonesia, are already on the back foot, which a liberal e-commerce regime will only entrench. The World Bank admits that few developing countries have the necessary wherewithal to conduct e-commerce globally.[26] As Deborah James points out, SMEs, especially ones located in developing countries, are unlikely to make it against the might of established digital corporations.[27]

Data regulation and localization for domestic industry's competitiveness

Notably, developed countries – ready and willing to participate in the liberalized digital trade have domestic policies to support domestic market players. Japan's competition regulator, for example, wants to designate the monopolization of data, which may prevent others from accessing it, as an abuse of market position.[28] The head of the regulatory authority raised concerns of the dominance of foreign digital corporations in the country.[29]

China who has become a force to reckon with in e-commerce, has strong data localization requirements. China's new cybersecurity law contains broad requirements for the localization of personal data and 'important data' relating to critical Internet infrastructure. It also maintains sector specific rules – health, finance – where it restricts the movement of data.[30] Meltzer notes how restrictions on free flow of data are guided by economic considerations, and the desire to strengthen nascent digital players.[31] The rise of Chinese digital giants - Alibaba, Tencent etc. are the proof of this function.

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21 https://www.hybris.com/medias/sys_master/formsCollaterals/formsCollaterals/hda/h43/8808385347614/WP-State-of-Ecommerce-Australia-New-Zealand-EN.pdf

22 http://reports.weforum.org/global-information-technology-report-2016/1-2-cross-border-data-flows-digital-innovation-and-economic-growth/#view/fn-176

23 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240318,240322,240296,240311,240285,240274,240284,240312,240270,240264&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

24 http://www.ecinsider.my/2013/12/malaysia-sme-statistics-ecommerce-readiness.html

25 http://smartinvestor.business-standard.com/market/Compnews-203520-Compnewsdet-90_of_Indian_SMEs_have_no_access_to_Internet_Report.htm#.WiuxlHWGPrc

26 https://www.fes.de/gewerkschaften/common/pdf/2017_TiSA_FoulPlay_UNI.pdf

27 http://cepr.net/publications/op-eds-columns/twelve-reasons-to-oppose-rules-on-digital-commerce-in-the-wto

28 https://asia.nikkei.com/Politics-Economy/Policy-Politics/South-Korean-antitrust-agency-moving-to-control-Google-Facebook

29 https://www.ft.com/content/a2e4f05c-66ae-11e7-8526-7b38dcaef614, http://www.jftc.go.jp/en/pressreleases/yearly- 2017/June/170606.files/170606-4.pdf

30 https://www.cnbc.com/2017/05/31/chinas-new-cybersecurity-law-takes-effect-today.html

31 https://www.brookings.edu/wp-content/uploads/2016/06/internet-data-and-trade-meltzer.pdf

Policy support for digital industrialisation

China's success also comes from concerted state action that favored local industry – capitalization for Chinese digital platforms at the early stages, blocking of foreign platforms, formulating policies in Internet finance, cloud provisioning etc. Because China believes that leveraging the Internet is key to dominance in the global economy, it has instituted forward looking, cutting edge action plans like 'Internet plus', which looks to use big data, cloud and Internet of Things for the 'modernisation of industry',[32] and its Industry 4.0 strategy calls for 'integration of industrialisation and informatisation.[33]

Despite data localization, lack of policies for market leverage

Vietnam, despite its extensive data localization policies, has not had much success with respect to e-commerce. There are a variety of reasons for this such as domination of the local market by Chinese e-commerce firms, a deficit in cross-border e-commerce traders (because many more Vietnamese buy from foreign sites than do foreigners from Vietnamese sites), inability of local digital startups to secure funding etc. Even if Vietnam were to adopt Chinese style protectionist policies, it does not have market power and size to back it up.[34]

Role of venture capital in growing e-commerce markets

Other developing countries in the partnership, keen to ride the wave of e-commerce are loosening their protectionist policies, and opening up their domestic markets. In 2015, due to pressure from the RCEP discussions, specifically Japan, India relaxed its foreign direct investment (FDI) norms in e-commerce.[35] India also allows foreign venture capital investors in domestic start-ups,[36] as a result of which the Indian e-commerce market is witness to large amounts of capital dumping by Japan and China.[37] *Bhartiya Udyog Vyapar Mandal*, an association of small traders and manufacturers in India, anticipates that a liberal e-commerce regime, including a permanent moratorium on customs duties of all digitized and digitisable products can adversely impact physical retailers.[38] In a letter to the Prime Minister of India, the association has expressed fear over RCEP and WTO negotiations pushing for e-commerce liberalization, requesting for socio-economic impact assessment, wider public consultation, debate in Parliament and make transparent negotiations for such a regime.[39]

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[32] http://ipp.oii.ox.ac.uk/sites/ipp/files/documents/IPP%2520paper%2520finalv3.pdf

[33] http://www.merics.org/fileadmin/templates/download/china-monitor/China_Monitor_No_23_en.pdf

[34] https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Nguyen_Vietnam%2BGovernance%2BReport_ENG.pdf

[35] http://indianonlineseller.com/2015/09/ecommerce-companies-get-ready-for-strict-consumer-protection-and-data-security-norms-in-the-wake-of-rcep-talks/

[36] https://inc42.com/buzz/fdi-policy-indian-startups-dipp/

[37] https://www.japantimes.co.jp/news/2017/08/15/business/corporate-business/softbank-invests-major-indian-e-commerce-operator-flipkart-group/#.Wc9Q6nWGPrc,https://www.medianama.com/2017/10/223-176171/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+medianama+%28Medianama%3A+Digital+Media+In+India%29, http://www.moneycontrol.com/news/business/startup/softbank-contributes-nearly-25-to-indias-pe-investments-till-september-2401673.html

[38] http://www.thehindubusinessline.com/economy/policy/wto-meet-civil-society-urges-govt-to-protect-farmers-fishers-traders/article9972405.ece

[39] Letter from Bhartiya Udyog Vyapar Mandal to the Prime Minister of India, Concerns regarding opening e-commerce through WTO and RCEP

In light of the contentions surrounding e-commerce, Electronic Freedom Frontier has reported that the e-commerce chapter in the RCEP may just be bare bones, dealing with less controversial issues of electronic payments and signatures as it heads towards a closure.[40]

Unpacking the political economy of e-commerce in the RCEP context enables us to arrive at the following observations. The e-frontier of new opportunities that dominant countries and corporations in the global trade regime evangelise is a lot more complex than can be unlocked by data-flow. In fact, free data flow may be antithetical to new pathways to growth. The role of the state in provisioning the Internet to broad base use by citizens and enabling smaller enterprises to build felicity and sophistication online cannot be over emphasised. Then there is the role for state policies, both – in favouring local over foreign platforms, and in financing an 'Internet plus' digital industrialization strategy on big data, cloud and Internet of Things. Data localization, as part of this mix of strategies, is a non-negotiable for making good the value of data for digital intelligence that local economic players can use and extract. However, in the absence of public support for domestic e-commerce players, and poor Internet infrastructure, data localization may not amount to anything. Especially when a liberal e-commerce regime grows through foreign capital, and small players lack basic Internet infrastructure, large -scale distortion to current patterns of domestic trade is plausible. Under the circumstances, the absence of data ownership through free flow of data can end up as a double whammy, squeezing out smaller local players and entrenching control of big domestic/ foreign players. Evidently therefore, the free data flows logic is a grand myth that draws attention away from the here-and-now force field of the digital economy in all its multivariate complexity, permitting countries with the economic muscle to fence off data resources for unfair exploitation.

Part IV - Dangers lurking in MC11 and beyond

In 1998, during the second WTO Ministerial Conference, a Declaration on Global Electronic Commerce was adopted, which established a renewable moratorium of custom duties on electronic transmissions of goods and services and established a work programme to examine the issue related global e-commerce by various WTO bodies.[41] Leapfrogging from the Work Programme on Electronic Commerce, MC11 will see the US, Japan and the EU pushing for new e-commerce rules based on Global North dictated free-trade agreements. EU, supported by Japan[42] among others has proposed a 'Working Group on Electronic Commerce' where negotiation on 'trade-related aspects of electronic commerce on the basis of proposals by members' will be carried out.[43] Jane Kelsey notes that these rules derogate from the hard fought and won GATS acquis that give developing countries the autonomy to decide the pace of liberalization of services.[44] The GATS also does not have the language or history to support new kinds of services that the digital has introduced. Thus, reading into the agreed

40 https://www.eff.org/deeplinks/2017/08/e-commerce-rcep-chapter-have-big-techs-demands-fizzled

41 https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm

42 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240318,240322,240296,240311,240285,240274,240284,240312,240270,240264&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

43 http://www.twn.my/title2/wto.info/2017/ti171121.htm

44 Jane Kelsey, E-commerce -The development implications of future proofing global trade rules for GAFA

commitments new sorts of services should not be allowed. Further, the services that a digital corporation provides is not easily pegged; is Uber just a software service as it claims, or a transport service – the sector it competes in? [45]

European Union, South Korea, Canada, Singapore among others have proposed amending WTO rules to account contemporary digital commerce. The amendments include provisioning cross-border flow of data. It is not just developed countries, some developing countries also have supported negotiating a new e-commerce regime which they believe is the avenue to an inclusive global trade order. The 'Friends of E-commerce for Development' comprising only developing countries are in favour of new negotiations for e-commerce, believing that it will provide opportunities for the participation of SMEs who can access new markets through digital platforms.[46] However, some developing countries- especially the African Group and India, have been vocal in resisting these paradigmatic shifts in e-commerce rules, unwilling to budge from the 1998 Work Programme[47] and pointing out the need to first build national capabilities[48]. This, as we saw in the previous section, includes thinking through data ownership frameworks, but not only. Without sound domestic policies, there is no way an SME from a developing country will survive against a transnational digital corporation.[49] Conversely, while policy support for Internet access, incentives for SMEs online participation, and building digital infrastructure are vital, unless the economic value of data, as intelligence, can be localised, the fourth industrial revolution is bound to fail developing countries and the vast majority of their workers.

The South-South divide in the e-commerce debate is unfortunate, and even dangerous. There are no automatic gains from a liberalized e-commerce. As Parminder Jeet Singh points out, the WTO is not the location where developing countries can or should bargain for an equitable stake in a global e-commerce regime.[50]

With the opening up of the domestic regulation discipline on services at MC11, developing countries will be cornered into inaction even on the domestic front. This mission creep in the WTO will be a set back to developing countries and their right to regulate this important area.[51] It will augur developing country negotiators well to look hard at the evidence on the ground and reject glib reductionist readings and sweeping forecasts about their economic futures by those with an axe to grind.

45 Jane Kelsey, E-commerce -The development implications of future proofing global trade rules for GAFA
46 http://www.madhyam.org.in/wp-content/uploads/2017/11/BP-21-on-ecommerce-WTO.pdf
47 https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/240274/q/Jobs/GC/153.pdf.
48 https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/240318/q/Jobs/GC/155.pdf.
49 http://twn.my/title2/resurgence/2017/324-325/cover03.htm
50 http://twn.my/title2/resurgence/2017/324-325/cover03.htm
51 http://ourworldisnotforsale.net/2017/TWN_DRD_analysis.pdf