

Chapter 4

E-commerce negotiations and interests

Trade negotiation has a vital role to play in addressing external barriers to e-commerce in developing nations. Negotiations at both the bilateral and multilateral level are crucial, for example in negotiating access to developed country markets in e-commerce service exports as well as access to the hardware and software that facilitate e-commerce for countries that do not produce them.

As effective e-commerce policies take regional and international perspectives, negotiations can ensure the development of international laws and regulations for e-commerce, uniform and harmonised standards in areas such as payment systems and postal codes, as well as standards and taxation systems. Negotiators from developing nations need to call for international trade rules that support e-commerce especially in ensuring that their views are addressed; they should call for capacity-building incentives, and address taxation issues and support (UNCTAD, 2015a).

E-commerce already features on the international development agenda in outcome documents on the ‘vision beyond 2015’ for the World Summit on the Information Society, as well as in the outcome of the Bali Ministerial Conference of the World Trade Organization. Negotiators can call for more e-commerce accords and programmes, and ensure that the scope already featured in the international development agenda is prioritised. This and other initiatives will go a long way in ensuring that the global electronic trade is more inclusive and beneficial to all.

4.1 Taking stock of the status of the work programme at the WTO

Since the products and services supplied through e-commerce may be digitised or tangible goods, or they may be services (access to databases, cloud computing, consulting, etc.), which often are protected by intellectual property rights (Primo Braga, 2005), these are covered by WTO rules under the GATT, the GATS, and the TRIPS Agreement.

Since electronic commerce has emerged after the conclusion of the Uruguay Round negotiations in 1994, the relevant WTO agreements (GATT 1994, GATS and TRIPS) are silent on e-commerce. Soon after the establishment of the WTO, at the Second Ministerial Conference (May 1998), Ministers, recognising that global electronic commerce was growing and creating new opportunities for trade, adopted the Declaration on Global Electronic Commerce (WTO, 1998). The Declaration contained two notable points: (1) the instruction to the General Council meeting in special session (i.e. when it is performing its functions under the Doha Development Agenda negotiations) to ‘establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues

identified by Members' (see more detail below); and (2) the declaration that WTO 'Members will continue their current practice of not imposing customs duties on electronic transmissions'. The latter, also known as the 'moratorium on customs duties', has since then been renewed regularly at each Ministerial Conference, and has thus proved to be the single most important tangible result of WTO activities on e-commerce.

Regarding the **Moratorium on customs duties**, one can highlight two notable aspects of the decision. The decision covers only electronic transmissions; goods ordered through electronic means but imported through 'normal' trade channels are explicitly excluded. Second, the decision covers only customs duties and it is silent on other forms of restrictions. However, the bulk of the value of e-commerce, actual and potential, is likely to be services, for which the trade regime is that established by the GATS, '[which] allows countries to decide whether to commit to market access [...] and to national treatment, i.e. not to discriminate in any way against foreign services and suppliers'. According to Mattoo and Schuknecht (2000) many countries, developed and developing alike, have not made GATS commitments in a large number of services sectors where electronic delivery is feasible, so in these sectors the moratorium is 'either ineffectual, because countries can still resort to discriminatory internal-taxation, or worse, it may force countries to resort to the inferior instrument of quotas'.

The **Work Programme on Electronic Commerce**, adopted by the General Council on 25 September 1998 (WTO, 1998), defines the issues to be examined by four subordinated bodies, namely the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPs, and Committee for Trade and Development (CTD), whilst aspects concerning the imposition of customs duties on electronic transmission are examined in the General Council. The Work Programme also provides that further issues may be taken up at the request of Members and that the General Council is to play the central role in the whole process and keep the work programme under continuous review through a standing item on its agenda.

Finally, a key element of the Work Programme is the definition of the term 'electronic commerce': 'exclusively for the purposes of the work programme, and without prejudice to its outcome': it means the production, distribution, marketing, sale or delivery of goods and services by electronic means. As noted, 'such a broad definition encompasses not only electronic transactions over the networks (the Internet), but also electronic data interchange (EDI) over proprietary networks' (Primo Braga, 2005).

Progress reports of the four WTO bodies involved in the work programme and the Secretariat's background papers indicate that many WTO Members believe that various aspects of e-commerce are already addressed by existing provisions of GATT, the GATS and the TRIPS Agreement, and that e-commerce, rather than operating in a legal vacuum, is already governed by the legally binding multilateral principles and rules of WTO agreements. The reports produced under the Work Programme also point to the benefits for e-commerce from several other WTO agreements, e.g. on import licensing, technical barriers to trade (TBT), and government procurement. In

addition, the Work Programme ‘highlighted the importance of WTO agreements not only to e-Commerce itself, but also for the facilitation of e-Commerce [...] and an added emphasis has been placed on the results of both the Information Technology Agreement [ITA] on tariff reductions on IT equipment under the GATT and the agreement on basic telecommunication services under the GATS on introducing market forces in the sector’ (Tuthill, 2000). The ITA, signed on 1996 (ITA I) and recently expanded (ITA II), will be a critical complement to a future e-commerce agreement and especially relevant for developing countries, as they are likely to benefit in three main ways:

1. *reducing tariffs on a broader range of ICT products encourages greater adoption of ICT products that play a key role in spurring economic growth;*
2. *lower prices realised by reducing tariffs on ICTs increases the productivity of all other industries in a developing economy; and*
3. *by lowering the price of a key input, the ITA has undergirded development of the burgeoning ICT software and services industries in many developing countries.* (Ezell, 2012)

The recent Trade Facilitation Agreement also contains some provisions which are relevant to e-commerce (see Box 4.1).

The WTO paper ‘Work Programme on Electronic Commerce – Background information by the Secretariat’ (WTO, 1998) provides a comprehensive overview of the developments in the Work Programme since its launch in 1998.¹ The programme has produced 156 documents, including 40 collective or individual country proposals², but still Members have been unable to translate progress into actions. Indeed, in spite of the analytical works and the positive awareness-raising conclusions highlighted above, the Work Programme, during its 18 years of existence, did not result in any recommendations for action to the Ministerial Conference as requested by the Ministerial Declaration except the periodic (but temporary) renewal of the moratorium on customs duties. Disagreement between WTO Members remains deep on the most important mandated questions: as noted by Wunsch-Vincent and Hold (2012): ‘Even on simple issues such as establishing a permanent and clear duty-free moratorium on e-commerce, or confirming the applicability of WTO rules and commitments to electronically traded services, no results have been achieved.’

Box 4.1 E-Commerce and the WTO’s Trade Facilitation Agreement

Despite the increases in digital trade, most goods still need to be physically delivered, for which an effective and competitive trade logistics environment is vital for implementing a successful e-commerce strategy. Therefore, national and international trade logistics, as well as cross-border facilitation measures, remain key for the success of any international e-commerce transaction related to trade in goods (UNCTAD, 2016).

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Notwithstanding the improved trade facilitation indicators and the overall reduction of transport costs, significant connectivity gaps remain in place, with trade costs still being prohibitive in some developing countries. The WTO's Trade Facilitation Agreement (TFA) will play a crucial role to reduce trade costs, as it is expected that its implementation will reduce worldwide trade costs by anywhere between 12.5 and 17.5 per cent, with the greatest benefits accruing in developing countries (OECD, 2015).

Additionally, whilst e-commerce is not directly addressed by the TFA, the relevance and complementarity between both elements has been highlighted, as the TFA is expected to specially benefit comparatively more those frequent and small deliveries, usually ordered online.

In this sense, and despite not being explicitly addressed, TFA's Article 7.8, on expedited shipments, might be of special interest to online trade. This article obliges Member States to adopt or maintain procedures for allowing for expedited release of '*at least*' those goods entered through air cargo facilities. This is a concern for express delivery operators, many of which operate air cargo services and whose services rely on the ability to offer just-in-time delivery. As highlighted by ITC (2013), '[in] modern global supply and value chains, just-in-time delivery helps to keep down business costs such as holding costs for inventory and increases competitiveness.'

In September 2016, the WTO Working Party on Domestic Regulation received a proposal from India for an agreement to ease global services trade, following the example of the TFA. This Agreement on Trade Facilitation in Services (TFS) would result in a reduction of transaction costs associated with unnecessary regulatory and administrative burden on trade in services, by addressing the key issues that are pertinent to facilitating services trade, such as transparency, streamlining procedures, and eliminating bottlenecks. The proposed agreement would, under Mode 1, also facilitate the free flow of data across borders, which would enhance and facilitate e-commerce across countries (WTO, 2016).

4.2 Proposals made in the WTO

Discussions surrounding e-commerce regulation are continuing at the WTO. Specifically, a series of proposals were made by the US, the EU, Brazil, the MIKTA³ countries, Singapore and Japan. In this sense, the US, Japanese and EU proposals adopt a more liberal approach, whilst the proposal from Brazil (WTO, 1998, Job/GC/98) for example, has a somehow more conservative approach, aiming to include e-commerce into the GATS framework. Some of the issues raised are:⁴

Tariffs and non-discrimination rules: the US (WTO, 1998, Job/GC/94) and Japanese (WTO, 1998, Job/GC/100) proposals call for a prohibition of customs duties on digital products, whilst requesting the applicability of non-discrimination principles to those

products. Nevertheless, this approach might, in the future, render non-agricultural market tariffs duty-free, creating a parallel and non-regulated trade route.

Cross-border data flows: following the example of TiSA and the TPP, the US proposes a framework allowing companies and consumers to move data freely, with certain security exceptions. However, this proposal contradicts the regulations adopted by a series of countries, on the grounds of political, security and economic reasons, requesting data from their citizens to be stored in local servers. Similar to this proposal is the call prohibiting members from requiring the localisation of computing centres as a prerequisite to doing business in their markets.

Technological transfer: the US proposal aims for a prohibition, with exceptions, on the requirement on companies to transfer technology, production processes and other commercial information, in addition to local content requirements, as a market access condition. Nevertheless, this approach might harm the efforts of those countries aiming to foster domestic innovation.

Safeguards on network competition: whilst this is meant to allow digital suppliers to access built networks or similar facilities in third countries to obtain better access to consumer and businesses, there might be a need to include an exception based on a public policy objective, as some countries currently impose certain restrictions to ensure that both urban and rural areas are serviced.

Some of the remaining key outstanding questions are⁵:

1. **Applicability of general GATS rules and specific commitments to the electronic delivery of services:** To date, no clear affirmation concerning the applicability of WTO rules to cross-border electronic services has been forthcoming from WTO Members, although WTO jurisprudence (US – Gambling and China – Audiovisuals) confirmed that WTO rules are indeed applicable to e-commerce and to electronically supplied services.
2. **Classification of electronically traded services as either Mode 1 or Mode 2:** So far, WTO Members have found it difficult to determine whether the electronic cross-border delivery of a service is a service supplied through GATS mode 1 (cross-border supply) or Mode 2 (consumption abroad). WTO case law (US – Gambling) implies that GATS Mode 1 commitments are the ones applicable to the delivery of electronic services.
3. **Classification and scheduling of new services arising in the context of e-commerce:** Since the conclusion of the GATS negotiations in 1994, many new services that can be delivered across borders have appeared, which cannot be clearly captured by the provisional UN Central Product Classification (CPC) that was used for negotiating existing specific GATS commitments. The difficulty stems from that fact that, whilst the CPC has been updated three times to reflect the new services realities, the present specific commitments and the ongoing WTO services negotiations are still based on the provisional CPC of 1991.
4. **Classification of digital products:** One of the most contentious issues in the Work Programme discussions is the question of whether electronically delivered

products, such as software, music and books, represent goods or services according to international trade rules. WTO Members have been unable so far to agree on a decision on the correct classification of digital products, which appears to be the biggest stumbling block in advancing the Work Programme. The issue is whether digital products traded electronically are goods governed by the GATT, services governed by the GATS or some unique category deserving its own set of trade rules. This is not only a technical question, but a highly political matter, which may have serious implications for all internet-related sectors of the economy. The stakes are high since the GATT provides for a much more liberalised regime, while GATS, with its positive list type of commitments, permits more flexibility for the state, including forms of protectionism. In case GATS commitments are found pertinent to digitally downloaded multimedia products, it also needs to be decided which specific commitments apply: those on audiovisual, value-added or basic telecommunications, or computer-related services (Burri, 2014.)

5. **Determining ‘likeness’ for application of the most-favoured-nation (MFN) and the national treatment obligations:** Here, WTO Members could not conclude their work on two concepts: (1) technological neutrality and (2) ‘likeness’ of electronic versus non-electronically supplied services.
 - With respect to intra-modal technological neutrality the issue is whether specific commitments (market access and national treatment obligations) for GATS Mode 1 encompass the delivery of services through electronic means. Apparently WTO Members could not agree on this question, although in US – Gambling the dispute settlement Panel confirmed this view when it determined that ‘a market access commitment ... implies the right ... to supply a service through all means of delivery ... unless otherwise specified in a Member’s Schedule’.
 - Regarding likeness of electronic and non-electronic services, the question is whether electronically delivered services and those delivered by more traditional methods, otherwise found to be ‘like services’, should be considered ‘like services’, thus triggering the obligation of applying GATS MFN and national treatment obligations. Some WTO Members hold the view that, on the basis of technological neutrality, services provided electronically and services provided non-electronically were like services. In an explanatory note, the WTO Secretariat also emphasised that ‘likeness in the national treatment context ... depends in principle on attributes of the product or supplier per se rather than on the means by which the product is delivered’. However, no consensus could be reached on this matter.
6. **Application of GATS Article XIV regarding general exceptions to e-commerce:** Online content regulation as well as measures applied for the protection of privacy and public morals and the prevention of fraud were identified as regulations likely to be permissible under GATS Article XIV. But it was also stressed that measures should be subject to a necessity test and should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

Although the WTO Work Programme on Electronic Commerce is still ongoing and periodic reports claim a ‘reinvigoration’ of efforts to move ahead, progress is extremely slow. The most recent review of the Programme was released in July 2015, but no new actions were taken besides the extension of the moratorium on tariffs on electronic transmissions.

4.3 Overview of the negotiations on e-commerce outside the WTO

4.3.1 E-commerce in Preferential Trade Agreements

In parallel with the WTO Work Programme on Electronic Commerce, the international trade policy landscape has been characterised by the proliferation of preferential trade agreements (PTAs), which, in view of the stalled WTO Work Programme, provided the opportunity for major proponents of e-commerce trade regulations to pursue their rule-making objectives in bilateral and regional contexts. These developed and developing countries with offensive e-commerce interests have changed their negotiating strategies in the early 2000s and started to include provisions on e-commerce in bilateral and plurilateral PTAs. Not only have the problems encountered in the WTO prompted these countries to focus increasingly on PTAs, but also to recognise that since cross-border delivery of services is becoming an important issue, PTAs too have to discipline e-commerce – hence the increasing inclusion of chapters on e-commerce in bilateral and regional trade agreements. These new PTAs increasingly innovate in terms of regulating cross-border services delivery, cooperation on ICTs, chapters on e-commerce and TRIPS plus provisions related to e-commerce (Wunsch-Vincent and Hold, 2012). According to Weber (2015), e-commerce-related provisions typically concern the field of ICT, transparency obligations, interoperability and non-discrimination, consumer and online personal data protection, as well as the authentication and certification of electronic signatures. In addition to the topics of market access and equal treatment, many PTA partners have sought the conclusion of additional understandings on e-commerce.

The 2003 Singapore–Australia Free Trade Agreement (SAFTA) was the first PTA containing a whole e-commerce chapter. This chapter refers to the general principles of WTO law and the UNICTRAL Model Law on Electronic Commerce; furthermore, it contains a catalogue with definitions, a commitment to transparency and to reduce trade barriers in e-commerce, as well as a duty-free moratorium for digital products. It also addresses issues of e-certification and paperless trading as well as consumer and data protection (Weber, 2015).

The United States has developed its trade policy governing cross-border e-commerce transactions largely through recent FTAs (Bieron and Usman, 2012). A major turning point in US trade policy with respect to e-commerce occurred even earlier, as the Clinton administration included in the FTA concluded with Jordan (2000) provisions on ‘free trade in electronic commerce’ (Schott, 2006). All FTAs concluded by the US, after the US–Jordan FTA, contain a chapter on electronic commerce with more comprehensive rules and stronger commitments.⁶ The trade negotiating objectives

of the US regarding e-commerce in the context of PTAs are well described by a US International Trade Commission (USITC) study on the US–Morocco FTA (USITC, 2004). The US was seeking that Morocco (1) affirms that it will allow goods and services to be delivered electronically, and (2) ensures that it will not apply customs duties on digital products and will not unjustifiably discriminate among products delivered electronically. With respect to the physical delivery of digital products, Morocco has agreed to apply customs duties on the basis of the value of the carrier medium and not its services content, i.e. customs valuation is to be made on the basis of the carrier medium, i.e. the ‘box’ (the paper or the plastic) and not its content (USITC, 2004).

Comprehensive chapters on e-commerce are also contained in the Canada–Peru FTA (2008) and in the Canada–Colombia FTA (2008) among others. Rules on e-commerce are also part of the ASEAN–Australia–New Zealand Free Trade Area (AANZFTA) of 2009 (Tietje, 2012).

The European Union has also pursued since the late 2000s the policy of including separate chapters, or at least certain provisions, on e-commerce in new-generation ‘full and comprehensive’ and ‘deep and comprehensive’ FTAs. For example, the EU–Colombia & Peru Regional Trade Agreement (2013), the EU–Singapore FTA (2014)⁷ and the EU–Vietnam FTA (2016)⁸ all contain a separate chapter on electronic commerce.

Of direct relevance for many Commonwealth developing countries are the Economic Partnership Agreements (EPAs) proposed to be concluded with African, Caribbean and Pacific (ACP) countries.⁹ So far, the most elaborate chapters on e-commerce can be found in the EPA concluded between the CARIFORUM States, and the European Community and its Member States.¹⁰ In the CARIFORUM EPA, the parties laid down certain principles on issues on which the WTO Work Programme could not yet deliver:

- the EC and CARIFORUM Parties agreed that the development of electronic commerce must be fully compatible with the highest international standards of data protection, in order to ensure the confidence of users of electronic commerce;
- they also agreed that deliveries by electronic means shall be considered as the **provision of services** (see the issue of classification not yet settled in the WTO), which cannot be subject to customs duties (i.e. a **permanent settlement** of the issue of no-duty which is not yet achieved in the WTO).

Moreover, the CARIFORUM EPA provides for **dialogue** on regulatory issues raised by electronic commerce. In comparison with other EU FTAs and with FTAs of the US, one might conclude that the CARIFORUM EPA is not regulating a series of areas related to e-commerce and overall is much less constraining on developing country partners.

The so-called ‘mega-regionals’ also contain or will contain provisions on electronic commerce. The recently concluded Trans-Pacific Partnership (TPP)¹¹ states that the provisions on ‘electronic commerce’ (Chapter 14), apply to measures ‘that affect

trade by electronic means'. This broadly includes transmissions of data, information, and digital products over the internet or over private electronic networks. Such transmissions by financial services firms are excluded from coverage under this TPP chapter.¹²

Box 4.2 Technical summary of TPP's electronic commerce chapter

- Commitment to facilitate the use of electronic commerce as a means of trade.
- Enhances the viability of the digital economy by ensuring that impediments to both consumers and businesses embracing this medium of trade are addressed.
- Ensures that the Parties will not discriminate against or impose custom duties or other charges on online digital products.
- Includes provisions protecting the free flow of information across borders.
- Prevents governments in TPP countries from requiring the use of local servers for data storage.
- Prevents governments in TPP countries from demanding access to an enterprise's software source code.
- Includes commitments by the Parties to maintain measures to protect users from the unauthorised disclosure of their personal information, as well as from online fraudulent and deceptive commercial practices.
- Includes commitments by the Parties to maintain measures to protect users from unsolicited commercial electronic messages, or spam, in order to build trust and confidence in the use of electronic commerce.

Source: www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/13-E-Comm.aspx?lang=eng

The EU's text proposal on e-commerce (EU, 2015) tabled in the still ongoing TTIP negotiations is more comprehensive than the CARIFORUM EPA's provisions, but also includes exclusions that do not exist in the CARIFORUM EPA. The EU's proposed e-commerce chapter contains eight articles. The first article provides a definition of e-commerce which is much wider in scope than that adopted for the purpose of the WTO Work Programme: accordingly, e-commerce is 'trade enabled by telecommunications and/or other information and communication technologies'. The same article excludes from the scope of the e-commerce disciplines the following: gambling services, broadcasting services, audio-visual services, services of notaries or equivalent professions and legal representation services. (In the CARIFORUM EPA there are no product exclusions.) Under the proposal, the Parties would agree

that electronic transmissions are considered as cross-border supply of services, which cannot be subject to customs duties. It is also proposed to agree on the principle of no prior authorisation. Other principles would include: contracting by electronic means; admissibility of electronic trust and electronic authentication services; and consumers' protection against unsolicited direct marketing communications. Finally, the proposal foresees a dialogue on regulatory issues raised by electronic commerce, similar to the CARIFORUM EPA.

Besides the various PTAs, e-commerce-related international rule-making is also taking place in the framework of **preferential trade areas**. Examples include the harmonisation of ASEAN member states' domestic legislation on e-commerce under the e-ASEAN Framework Agreement of 24 November 2000, and the East African Community's EAC Regional Task Force on Cyber Laws established in 2008 (Tietje, 2012).

To conclude, attention should be drawn to the possible negative effect of the creation of an e-commerce 'spaghetti bowl' that would undermine the prospects for future WTO rule-making in this area (Herman, 2010). Indeed, the proliferation of diverging bilateral/regional trade rules (especially those of mega-regionals) on e-commerce bears a dual risk, especially for the excluded developing small states and LDCs: a general risk for the multilateral system is that consensus on harmonised WTO disciplines will never be achieved, or should WTO rules be established, multilateral rule-making would simply follow the established rules of the 'mega-regionals' thus without the effective participation of non-PTA small countries. Therefore, Commonwealth small developing states' and LDCs' interest is to preserve as much as possible the pre-eminence of WTO rule-making and to participate effectively in the WTO Work Programme on Electronic Commerce and e-commerce-related Doha negotiations. However, small developing countries and LDCs appear not to have shown particular interest in these discussions, possibly because e-commerce is perceived as not being an acute issue for them, the issues discussed seem esoteric, they might lack a deeper understanding of the benefits of e-commerce for their economies, and partly because of a lack of appropriate negotiating capacities.

4.4 Identifying areas that could be reinforced to enhance development

As noted earlier, the 1998 Geneva Ministerial Declaration establishing the WTO Work Programme on Electronic Commerce directed the General Council 'to take into account the economic, financial and development needs of developing countries' (WTO, 1998). While the development dimension of the Work Programme, as a cross-cutting issue, can and should be addressed at the request of developing countries in all bodies in charge of the Work Programme, the *par excellence* WTO organ where developing countries can pursue most fully their trade interests is the Committee on Trade and Development (CTD). And indeed, the Work Programme as adopted by the General Council directed the CTD to examine and report on the development implications of e-commerce, and more particularly on the following issues which were deemed to represent developing countries' areas of interest:

- Effects of e-commerce on the trade and economic prospects of developing countries, notably of their SMEs, and means of maximising possible benefits accruing to them;
- Challenges to and ways of enhancing the participation of developing countries in electronic commerce, in particular as exporters of electronically delivered products: role of improved access to infrastructure and transfer of technology, and of movement of natural persons;
- Use of IT in the integration of developing countries in the multilateral trading system;
- Implications for developing countries of the possible impact of electronic commerce on the traditional means of distribution of physical goods;
- Financial implications of electronic commerce for developing countries.

Despite the fact that e-commerce is a standing item on the CTD's agenda, developing countries have on the whole not been able to steer the many discussions held over almost two decades into action. The CTD's conclusions so far have remained at the level of generalities. For example, as Wunsch-Vincent and Hold, (2012) summarised:

There was consensus that e-commerce harboured great potential as a tool for economic growth and development. There was an understanding that the benefits of e-commerce to developing countries include: reducing the physical distance between buyers and sellers, reducing the need to maintain establishments abroad and for middlemen, and increasing efficiency in public procurement. There was concern that the benefits of e-commerce would not flow automatically to developing countries, and that steps must be taken to narrow the digital divide. Delegations recognized that developing countries, either as importers or as exporters, can benefit from the increased trade potential generated by e-commerce and IT, but that e-commerce is not a panacea for all trade problems.

And there was also consensus that pursuing trade liberalisation under the WTO is not sufficient to guarantee developing countries' participation in global digital trade (Wunsch-Vincent and Hold, 2012).

The CTD's programme on e-commerce, as presently structured, does not seem to be conducive to operational decisions. Indeed, the Work Programme foresees sharing country experiences by inviting 'one or several delegations (developing and/or developed) to present their experiences, either with respect to a particular aspect of e-commerce, or their general approach to e-commerce'. And to allow for a more 'thorough and analytical educational process', the CTD organises regular seminars on various themes on the basis of Members' suggestions such as revenue implications, effects on competitiveness, physical infrastructure needs and development and human infrastructure needs and development, and (in 2013) on 'Electronic Commerce, Development and Small and Medium-Sized Enterprises'. For some unknown reason, the CTD's work has not proved very sustained over the years: as noted in an earlier WTO document (WTO, 2003) 'the issue of e-commerce did not give rise to any substantial discussions at the 37th to the 40th Sessions of the CTD. [...] At the 42nd Session of the CTD the Committee proposed that the Secretariat prepare an update

of the work that had been carried out in relation to the CTD's Work Programme on E-commerce. As a result, document WT/COMTD/W/110 was issued for the 44th Session of the CTD.⁷ Members have since not made any specific proposals for further work on e-commerce in the CTD.

A statistical overview of written proposals submitted up to the present to the five WTO bodies in charge of the Work Programme (General Council, CTD, and the three sectoral Councils) reveals a low level of 'written' participation by developing countries in general, and LDCs, small states and sub-Saharan African countries in particular. Of the 40 submissions¹³ ten were developing country papers (made individually or jointly) and two were mixed developing/developed country proposals. No developing country written proposal was made in the Services Council and only one developing country – India – has submitted a policy paper to the TRIPS Council. There might be various reasons that may explain this situation, including capacity issues, lack of active interest, overall Doha negotiating strategy, etc.

The group of LDCs, small states and sub-Saharan African countries is a relatively diversified, heterogeneous group in terms of e-commerce infrastructure, access to the internet and availability of an enabling legal and regulatory environment. It is therefore difficult to identify with great detail common interests and common negotiating positions for these countries as a group at the WTO negotiating table. However, these countries might consider joining as co-sponsors the proposal (WTO, 2016) made recently by a no less heterogeneous group composed of Colombia, Costa Rica, Hong Kong, China, Israel, Malaysia, Mexico, Nigeria, Pakistan, Panama, Qatar, Seychelles, Singapore and Turkey. In this collective 'non-paper' related to e-commerce and development the authors note that e-commerce can be and has been leveraged to support development and that it has opened up new opportunities for businesses in developing countries, especially micro, small and medium enterprises (MSMEs). By reducing the cost of doing business, and allowing them to reach a wider market, it still presents a big well of untapped potential, which could boost economic growth and development in developing countries. Moreover, for MSMEs e-commerce presents an opportunity for expansion beyond their own backyards and lowers the high costs usually associated with penetrating foreign markets, which allows non-traditional players, such as home-makers and small handicraft suppliers, to enter the market and offer their products on the global marketplace. Against this background the 'non-paper' proposes to kick-start discussions and identify the e-commerce issues of interest and relevance to developing countries and puts forward some potential areas for discussion, which include:

- **Trade Facilitation and E-commerce** – Cross-border e-commerce often involves low-value shipments and/or digital transmissions over the internet. Once within the borders, logistics players also play a big part in ensuring smooth delivery of products. What can be done to further empower smaller business using e-commerce and lower their cost of conducting trade?
- **Infrastructure Gaps to Enable E-commerce** – Infrastructure gaps in developing countries have posed challenges (e.g. access to broadband) but also provided

innovative opportunities for businesses (e.g. rise of local payment solutions). Is there a way to better target technical assistance towards plugging the critical gaps?

- **Access to Payment Solutions** – Being able to find payment solutions is key to whether a business will go online. In the absence of secure online payment services, payment via mobile phones and the cash on delivery option have been used. How can we improve businesses' and consumers' access to more payment options to better enable them to conduct and access cross-border e-commerce?
- **Online Security** – Trust is a key factor in determining whether consumers are willing to engage in e-commerce. This includes trust in online payment services, the reputation of the online merchant and even whether there is enough legal protection to provide recourse should a transaction go awry. What can be done to build trust in online transactions and e-commerce and improve consumer protection? Is there scope for improved cooperation between countries on cyber crime?

Developing countries should take advantage of the different Aid for Trade initiatives in the area of e-commerce. In this sense, it is worth highlighting the UNCTAD's 'e-Trade for All' initiative, which is founded on the understanding that greater awareness of e-commerce will create opportunities for MSMEs to grow, become more productive and participate in global value chains, through holistic, cross-sectoral and cross-institutional approaches, making collaboration essential. The initiative focuses on seven key policy areas, considered of relevance to e-commerce development, namely: (1) e-commerce readiness assessment and strategy formulation; (2) ICT infrastructure and services; (3) trade logistics; (4) payment solutions; (5) legal and regulatory frameworks; (6) e-commerce skills development; and (7) access to financing (UNCTAD, n.d.).

Notes

- 1 Specifically documents JOB/GC/73 and JOB/GC/73/Corr.1
- 2 A written submission having one or more 'Rev' versions was counted as one.
- 3 Mexico, Indonesia, South Korea, Turkey and Australia.
- 4 This section draws heavily on Krogman and Khumalo, 2016.
- 5 This section draws heavily on Wunsch-Vincent and Hold, 2012.
- 6 The US FTAs with the following countries contain a chapter on e-commerce: Australia, Bahrain, Dominican Republic-Central America (CAFTA-DR), Chile, Colombia, Jordan, Korea, Morocco, Oman, Panama, Peru TPA and Singapore. NAFTA and the US-Israel FTA do not contain provisions on electronic commerce.
- 7 Finalised Agreement, not yet applied.
- 8 Finalised Agreement, not yet applied.
- 9 Interim EPAs do not contain provisions on electronic commerce.
- 10 The recently signed EPA with the SADC EPA Group – comprising Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland – does not include provisions on e-commerce.
- 11 The following are members of the TPP: Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States, Vietnam, Chile, Brunei, Singapore and New Zealand.
- 12 Available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>.
- 13 Revisions of a given proposal were not counted.

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