

# The Joint Initiative on E-commerce in the WTO

Spotlight on challenges and LDCs'  
interests towards MC13



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## Abbreviations

AEO	Authorised Economic Operator
DEA	Digital Economy Agreements
GDP	Gross Domestic Product
GNI	Gross National Income
GRP	Good Regulatory Practice
IDB	WTO Integrated Database
ILO	International Labor Organisation
IP	Intellectual Property
IWG	Informal Working Group
LDCs	Least Developed Countries
LEI	Legal Entity Identifier
MC	Ministerial Conference
MLEC	Model Law on Electronic Commerce
MLETR	Model Law on Electronic Transferable Records
MSMEs	Micro, Small, and Medium Enterprises
NTBs	Non-tariff Barriers
NTM	Non-Tariff Measures
PPP	Public-Private Partnerships
RTAs	Regional Trade Agreements
SIDS	Small Island Developing States
SPS	Sanitary and Phytosanitary measures
TFA	Trade Facilitation Agreement
TPR	Trade Policy Reviews
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Programme
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
WBES	World Bank Enterprise Surveys
WTO	World Trade Organization

## Executive Summary

E-commerce expansion is providing opportunities for greater Least Developed Countries (LDCs) integration in cross border trade. Furthering the engagement of LDCs in on-going e-commerce rule-making negotiations may be timely to ensure future agreement will contribute to unlocking e-commerce benefits for LDCs. This note brings LDCs up to date with recent developments under the Joint Statement Initiative (JSI) on E-commerce negotiations and brings some of the development asp of challenging issues for their consideration and enhanced contribution to the debate.

The note explains the package of 12 “parked” articles that the e-commerce JSI Members have achieved after nearly five years of negotiations, highlighting what the opportunities and challenges they may represent to LDCs. It also tackles some of the challenging themes where differences remain. It focuses on the following priority issues, subject to intensified talks at the time of writing with the objective to reach converged texts before the end of the year: ICT products that use cryptography, privacy, telecommunications and customs duties on electronic transmission. It examines these challenging issues from a development perspective highlighting potential interests and concerns for LDCs and possible pathways for addressing them.

## Introduction: E-commerce Negotiations and LDCs

The World Trade Organization's (WTO's) 2023 World Trade Report reveals that Least Developed Countries' (LDCs') exports of digitally delivered services grew at a rate surpassing the worldwide average in 2022<sup>1</sup>. An indication to how e-commerce presents numerous opportunities for LDCs and their micro, small, and medium enterprises (MSMEs), to increase their shares in cross-border trade and the increasingly digitalised economy. Against this background, furthering the integration of LDCs in on-going negotiations on e-commerce rules may be timely to pursue their interests and ensure globally acknowledged rules take into consideration their challenges and concerns.

To date, 90 WTO members<sup>2</sup> are participating in the JSI negotiations, with the objective of achieving a “high standard outcome that builds on existing WTO agreements and frameworks, with the participation of as many WTO Members as possible”<sup>3</sup>. Only five least developed countries (LDCs)<sup>4</sup> have officially joined the JSI negotiations, the latest is the Gambia in October this year. Ensuring the JSI negotiations, under the umbrella of the WTO, consider the challenges and limited capacities of LDCs may further encourage their engagement for an inclusive future e-commerce agreement that caters for their digitalisation and development aspirations.

Three main facets of the digital divide are areas for consideration as negotiations continue. The first relates to infrastructure and connectivity: the degree of access and use of the Internet and digital technologies. According to the International Telecommunications Union (ITU)<sup>5</sup>, 2.9 billion people – have still never used the Internet<sup>6</sup>, and 27 per cent of them (720 million people) live in LDCs<sup>7</sup>. The discrepancies in technological infrastructure between LDCs and other countries increase the barriers for businesses in LDCs to shift towards e-commerce.

The second is the regulatory capacity of LDCs when it comes to e-commerce legislation. The United Nations Conference on Trade and Development (UNCTAD) states that there have been significant advances in cyberlaw adoption by LDCs since 2015, but a wide gap separates them from the developed and developing world when it comes in areas of personal data protection and consumer protection which ensure a trustworthy e-commerce business environment.

The third is the capacity of LDCs to engage in negotiations on e-commerce. Their main efforts have been in drawing attention to this asymmetry to the WTO Work Programme on Electronic Commerce, as seen in the LDC Group submitting communication WT/GC/W/787 (November 14, 2019) to highlight the challenges LDCs face in using e-

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<sup>1</sup> WTO. 2023. *World trade report 2023*

<sup>2</sup> WTO. 2023a. *World Trade Organization, WTO*.

<sup>3</sup> Ibid.

<sup>4</sup> Digital Watch. 2024. *WTO JSI on e-commerce, Digital Watch Observatory*.

<sup>5</sup> ITU. 2021. *Telecommunication industry in the post-COVID-19 world: Report of the 7th ITU Economic Experts Roundtable*.

<sup>6</sup> ITU. 2021. *Facts and figures 2021: 2.9 billion people still offline*

<sup>7</sup> ITU. 2021. *ITU facts and figures: Focus on Least Developed Countries*.

commerce. Guglya and Maciel (2020)<sup>8</sup> warn that overlooking these asymmetries in JSI negotiations could only continue to discourage investments in digital infrastructure for countries with a poor and unfounded e-commerce ecosystem<sup>9</sup>.

As negotiations continue to ramp up, this note aims to bring LDCs up to speed with the latest developments of the JSI negotiations, including the opportunities and challenges ahead of achieving a substantive conclusion and reaching a clean and converged negotiating text by the end of the year. The note will also be pointing to some development considerations for LDCs when engaging on these remaining challenging issues in the negotiations.

## **1-The Joint Initiative on E-commerce: A Status Update**

After the ramped-up efforts in negotiation at MC12, the WTO Director-General encouraged greater efforts to be made in discussing topics of interest for LDCs, including e-commerce, at the Informal Ministerial Gathering organized by the Swiss government in Davos in January 2023<sup>10</sup>. The Deputy Director-General, Angela Ellard, similarly emphasised the importance of e-commerce<sup>11</sup>, highlighting the need to include the “E-commerce Capacity Building Framework” launched by Australia, Japan, Singapore and Switzerland as part of the JSI negotiations in order to support LDCs in benefitting from the digital economy.

In light of this emphasis on support for LDCs, the 13-16 February cluster meetings of the JSI negotiations saw increased discussions of implementation periods, notably for developing countries and LDCs. Also, discussions on “single windows” (see under section 2 below) were brought back.<sup>12</sup>

In the 27-30 March meetings, members engaged in discussion with the Organisation on Economic Cooperation and Development (OECD) and from the private sector to analyse the importance of the free flow of data.<sup>13</sup> Members also had discussions on electronic transmissions, legal architecture and e-payments.

In the cluster meeting between 22-25 May, a new small group on data flows and data localisation was announced to look closer into their dedicated text proposals. They also shared information on potential capacity-building programmes in a concerted push to close LDC asymmetries<sup>14</sup>.

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<sup>8</sup> Guglya , L. and Maciel, M.. 2020. *Addressing the Digital Divide in the Joint Statement Initiative on E-Commerce: From enabling issues to data and source code provisions.*

<sup>9</sup> Ismail, Y.. 2022. *Cooperation, Capacity Building, and Implementation Considerations of Developing Countries in the E-Commerce Joint Statement Initiative: Status and the way forward.*

<sup>10</sup> WTO. 2023c. *WTO must bolster cooperation in a fragmented world.*

<sup>11</sup> WTO. 2023. *DDG Ellard: Technology Presents Challenges and opportunities for future of Trade, WTO.*

<sup>12</sup> WTO. 2023. *E-commerce negotiations enter final Lap, Kyrgyz Republic joins Initiative.*

<sup>13</sup> WTO. 2023. *E-commerce negotiators advance work, discuss development and data issues.*

<sup>14</sup> WTO. 2023. *E-commerce negotiations maintain positive momentum, focus on key issues.*



Between 19 to June 22 2023<sup>15</sup>, progress was reported in finding landing zones on text proposals in areas such as cryptography, source code, privacy, “single windows”, telecommunications, and data flows and data localisation.

The heads of delegation meeting on July 6<sup>16</sup> has announced a total of 11 “parked” articles, namely i) electronic transactions framework; ii) electronic signatures/authentication; iii) electronic Contracts; iv) paperless trading; v) open government data; vi) access to and use of the Internet; vii) online consumer protection viii) unsolicited electronic messages (Spam); ix) Cybersecurity; x) transparency; xi) electronic invoicing. In the July 28 meeting, co-conveners announced convergence had been reached on “single windows”, bringing the total of “parked” texts to 12.<sup>17</sup>

On August 4, 2023, Document INF/ECOM/62/Rev. 4 was circulated to reflect the latest changes as explained above and reflect new proposals submitted on data flows and privacy in particular. On September 29<sup>18</sup>, co-conveners reported progress in areas still facing disagreements, as well as the creation of a new small group to start text-based negotiations on development issues. The latest cluster of negotiations took place on October 25 to 27. During those meetings, the United States announced the withdrawal of its proposals on Data flows, localisation and Source Code a few months after China submitted its long-awaited proposal on Data flows. With the United States (US) withdrawal, it is clear that a convergence of clean text on data flows and localisation as well as source code is highly unlikely to be part of the package of provisions that the co-conveners aim to present by the end of 2023.

One more cluster of negotiations remains in November before the end of 2023 and the circulation of another revised negotiating text to reflect progress in the negotiations. All efforts are now turning to the following remaining challenging issues where discussions are moving forward: ICT products that use cryptography, privacy, telecommunications or update of the telecommunications Reference Paper and customs duties on electronic transmission. The aim now should be to realise progress on the aforementioned four issues and to lock as many of them as possible. With the substantive conclusion of the negotiations, the following year’s discussions can be dedicated to clean remaining brackets, on cross-cutting issues, such as development and the general provisions, including the legal architecture and how the future agreement will be integrated into the WTO legal framework.

In the next section of this note, we will give an overview of the package of 12 “parked” articles by the JSI negotiations, highlighting some of the opportunities and challenges they provide for LDCs. It is followed by a zoom-in on the main challenging issues where convergence was not possible yet at the time of writing, while highlighting some

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<sup>15</sup> WTO. 2023. *E-commerce negotiators continue to seek ‘landing zones’ on text proposals.*

<sup>16</sup> WTO. 2023. *Co-conveners of e-commerce negotiations review progress, reflect on way forward.*

<sup>17</sup> WTO. 2023. *E-commerce co-conveners to issue updated negotiating text.*

<sup>18</sup> WTO. 2023. *E-commerce co-conveners call on negotiators to intensify efforts, exercise flexibility.*



potential development aspects to consider for a future agreement that reflects the interests of the lower-income countries.

## 2- “Parked” Rules on Trust, Openness and E-commerce Facilitation

The consolidated negotiating text of August 2023, INF/ECOM/62.Rev.4 included 12 “parked” articles, which the initiative’s participants have completed the deliberations on and have reached convergence on thus far. These 12 articles constitute the base of the package of “parked” rules that the co-conveners aim to present in the upcoming consolidated text at the end of the year. They are the result of 5 years of intensive negotiations and represent a package which builds and locks in best practices from Model laws and promotes interoperability and harmonisation of key e-commerce facilitation rules. Here’s a brief explanation of the significance of each article with a spotlight on opportunities and challenges for LDCs:

- 1- Online Consumer Protection:** Only 41% of LDCs adopted online consumer protection laws compared to 80% of developed countries, according to the UNCTAD Cyberlaw Tracker<sup>19</sup>. Online consumer protection laws and establishing effective redressal mechanisms are key to boosting consumers’ confidence and clarifying the procedures to follow in case of disputes, especially across borders. The JSI text is inspired by the United Nations Guidelines for Consumer Protection (UNGCP) adopted in 1985 and revised in 2015 to address the challenges of the digital era<sup>20</sup>. The text encourages cooperation and sharing of experiences among the JSI participants, which can be utilised to serve LDCs interests, promoting online consumer protection laws adoption among LDCs.
- 2- Electronic Signatures and Authentication:** The clean text on e-signature and e-authentication is inspired by provisions developed under some of the existing Regional Trade Agreements (RTAs)<sup>21</sup> and also the Model laws on Electronic Commerce and the Model Law on Electronic Signature of The United Nations Commission on International Trade Law (UNCITRAL)<sup>22</sup>. The clean text enhances cooperation between JSI participants regarding mutual recognition of e-signatures, facilitating cross-border e-commerce and offering new opportunities for LDCs’ MSMEs. UNCTAD highlighted that “LDCs may not have the capacity or technology to implement these laws”<sup>23</sup>; hence, enacted cooperation and technical assistance will be needed to unlock their benefits.
- 3- Unsolicited Commercial Electronic Messages (SPAM):** SPAM generates considerable challenges for E-commerce businesses that rely heavily on online marketing through emails and social media platforms, as they can be invasive and harmful to them and their customers. The clean text is inspired by provisions concluded under some RTAs. It encourages stricter enforcement of SPAM control,

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<sup>19</sup> UNCTAD, *Global Cyberlaw Tracker*.

<sup>20</sup> UNCTAD. 2016. *United Nations Guidelines for Consumer Protection*.

<sup>21</sup> Gaitan G., L. 2020. *Electronic Commerce in Trade Agreements: Experience of Small Developing Countries*.

<sup>22</sup> UNCITRAL. . 2009.. *Promoting confidence in electronic commerce*.

<sup>23</sup> Banga, R. 2021. *Joint Statement Initiative on E-Commerce . JSI .*

specifically regarding cross-border SPAM, which is a cause of concern for all countries and promotes cooperation between countries to address this common challenge.

- 4- Open Government Data:** Refers to the practice of making government-held data freely available to the public in a digital format, which can stimulate innovation and transparency. The JSI clean text recognises that government data can be utilised to promote development, competitiveness and innovation. In line with the International Open Data Charter (ODC) objectives and principles<sup>24</sup>, it adopts voluntary provisions to make government data accessible, usable, free, or at a reasonable cost to users. The text ends as well with an endeavours provision to promote cooperation.
- 5- Electronic Contracts:** The conclusion of contractual agreements without meeting in person can be challenging if e-contracts are not recognised as legally binding. The clean text instils mutual legal recognition and enforceability of e-contracts, which can be key to promoting cross-border e-commerce.
- 6- Transparency:** In a digital context, clear and publicly available rules and practices can elevate many of the challenges faced by cross-border businesses and save a lot of time and money. The clean text of the JSI ensures all participants will make their general rules and regulations related to e-commerce or the workings of the future agreement in question accessible to the public without delay.
- 7- Paperless Trading:** The clean text pertains to the transition from paper-based to electronic documentation for customs processes, with the aim of facilitating smoother and more efficient cross-border e-commerce. They define the roles and requirements for customs authorities and supporting documentation, encouraging participating Members to make all forms available electronically and recognise them as legally equivalent to paper forms. It also promotes cooperation and adherence to international standards for global convergence of electronic customs forms, which can be of benefit particularly to LDCs' MSMEs, reducing their compliance burden and facilitating their integration in cross-border e-commerce.
- 8- Cybersecurity:** Members participating in the JSI acknowledge in the cleaned text that cybersecurity threats can erode trust in digital trade. They recognise the necessity of evolving with these threats to safeguard e-commerce. They agree to enhance their cybersecurity incident response capability and collaborate on mitigating cyber threats, including combatting cybercrime and sharing information for better awareness and response strategies. Given the dynamic nature of cyberspace and its threats, cooperation, sharing experiences and technical assistance, especially for developing countries and LDCs, will be essential for practical concerted efforts limiting cyber threats.
- 9- Access to and Use of the Internet for e-commerce:** After defining an Internet "end user", the article emphasise their right to access and use legal Internet services and applications without discrimination or be subjected to unfair traffic management and to receive clear information about their internet service provider's network management. The footnote clarifies that providers offering exclusive

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<sup>24</sup> ODC. 2024. *ODC principles, Open Data Charter*.

content to their users are not violating these principles. Finally, a clarification is added that this article encourage participating Members' adherence to these principles and do not obligate them to amend or enact new policies. Having 90 Members of the WTO adhering to these principles can be translated into opportunities for greater and fairer access of LDCs end users to the Internet for more meaningful connectivity.

**10- Electronic Transaction Frameworks:** According to the UNCTAD Cyberlaw tracker, only 63% of LDCs adopted electronic transaction laws compared to 81% of developing countries and 98% of developed countries<sup>25</sup>. Electronic transaction frameworks are considered one of the key enabling policies for e-commerce. In the cleaned text of the JSI, participating Members endeavour to commit to developing a legal framework for electronic transactions in alignment with the UNCITRAL Model Law on Electronic Commerce 1996<sup>26</sup>. They also endeavour to incorporate principles from the UNCITRAL Model Law on Electronic Transferable Records 2017<sup>27</sup> into their legal systems. Electronic Transferable Records can be of particular interest to rising businesses such as fintechs and other businesses on the rise in developing countries<sup>28</sup>.

**11- Electronic Invoicing:** After defining “electronic invoicing” and “electronic invoicing framework”. The cleaned text outlines that the legality of an electronic invoice should not be refused on the basis of it being in electronic format unless local laws or regulations state otherwise. Recognising the benefits of such frameworks for e-commerce in terms of cost, efficiency, accuracy, and reliability, the text suggests that any measures developed related to electronic invoicing should promote cross-border interoperability, considering international standards and encouraging open standards. Additionally, parties are encouraged to exchange best practices on electronic invoicing to enhance its use and effectiveness. E-invoicing is an area where many developing countries and LDCs explore its benefits and can face technical challenges in their implementation. Practical cooperation under the JSI can include sharing best practices and implementation support.

**12- Single Windows:** The cleaned text addresses the implementation of the “single window”, as per the Trade Facilitation Agreement (TFA) Article 10.4.1. JSI Members are encouraged to create a system that allows traders to submit all required documents for the import, export, or transit of goods via one digital entry point to all relevant authorities. The construction and maintenance of this single window should align with international data standards, such as the World Customs Organization Data Model<sup>29</sup>, and ensure data protection and confidentiality. It should also employ a unique identifier for each transaction. The text also promotes sharing experiences and working toward harmonising data and customs procedures among JSI Members. Finally, the text considers the interests of MSMEs and their limited capacities, particularly in developing countries and LDCs, allowing them to focus on their core capacities and use service providers to interact with the single window on their behalf if they meet certain requirements.

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<sup>25</sup> UNCTAD . 2022. *E-commerce and The Digital Economy in LDCs*.

<sup>26</sup> UN, *UNCITRAL Model Law on Electronic Commerce. 1996. with additional article 5 bis as adopted in 1998*.

<sup>27</sup> UN. *UNCITRAL Model Law on Electronic Transferable Records. 2017.*

<sup>28</sup> *Ibid*

<sup>29</sup> WCO. *WCO Data Model*.

**13- Privacy:** Most recently, convergence has been reached in agreeing to a commitment to having regulations on privacy. There is a recognition of the different existing frameworks with regard to privacy and data protection laws. Examples of non-binding regional frameworks include the Organisation for Economic Cooperation and Development (OECD) Privacy Framework<sup>30</sup>, the Asia Pacific Economic Cooperation (APEC) Privacy Framework<sup>31</sup> and the Association of Southeast Asian Nations (ASEAN) Framework on Personal Data Protection<sup>32</sup>. They set out principles of personal data protection for their Member States to implement in their domestic laws. Examples of binding regional agreements include the European General Data Protection Regulation (GDPR)<sup>33</sup> and the African Union Convention on Cyber Security and Personal Data Protection (known as the Malabo Convention)<sup>34</sup> which entered into force on June 8, 2023, after nine years of its adoption in 2014. See table 1 below. In order to ensure that the JSI remains inclusive and accessible to its members, it adopts a flexible approach that enable participants to still be a part of these various frameworks.

	<b>OECD Privacy Guidelines</b>	<b>APEC Privacy Framework</b>	<b>ASEAN Framework on Personal Data Protection</b>	<b>EU GDPR</b>	<b>African Union (Malabo Convention)</b>
<b>Enforceability</b>	Non-binding (principles)	Non-binding (principles)	Non-binding (principles)	Binding rules	Binding rules
<b>Objective</b>	Economic	Economic	Economic	Fundamental Rights	Fundamental Rights
<b>Application scope by jurisdiction</b>	Territorial – Subject to national law	Territorial- Subject to national law	Territorial- Subject to national law	Extra-Territorial	Extra-territorial
<b>Application scope by entity - Data controllers vs processors</b>	Data controllers	Data controllers + processors	Data controllers	Data controllers + processors	Data controllers + processors
<b>Accountability &amp; compliance provisions</b>	Principle	Principle + Voluntary mechanism	Principle	Principle + Voluntary Mechanisms + Legal Requirements	Principle + Legal Requirements
<b>Consent requirements</b>	Consent (where applicable)	Consent (where applicable)	Consent (where applicable)	Consent (freely given, specific, informed and unambiguous, and in some cases, explicit consent)	Consent (where applicable)
<b>Position on</b>	Promotes	Promotes	Promotes	Restrictive to	Restrictive to

<sup>30</sup> OECD . 2013. *The OECD Privacy Framework*.

<sup>31</sup> Asia Pacific Economic Cooperation Secretariat . 2005. *APEC Privacy Framework*.

<sup>32</sup> Association of Southeast Asian Nations . 2016. *ASEAN Framework on Personal Data Protection*.

<sup>33</sup> European Union . 2016. *Regulation . EU. 2016/679 Of The European Parliament and of the Council of 27*.

<sup>34</sup> African Union . 2014. *African Union Convention on Cybersecurity and Personal Data Protection*.

data flow	data flow	data flow	data flow	non-EU Members (unless meets adequate level of protection)	non-AU Members (unless meets adequate level of protection)
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Source: Adaptation of GSMA (2018)<sup>35</sup> based on African Union (2014)

### 3-Analysis of Some Remaining Challenging Issues

#### 14- ICT Products for Cryptography

Cryptography products and their use, enhance trust in digital businesses and enable e-commerce development. On the other hand, intercepting communications and messages is a historic and established practice of law enforcement authorities to investigate and prevent crimes and threats to national and individual security. It is argued that cryptography can disguise illegal practices and threatening acts. Allowing their wide use by businesses and individuals interferes with the ability of law-and-order forces to protect citizens and public safety<sup>36</sup>. Accordingly, the total or partial banning of commercial use of cryptography has been practised by many governments, no matter their level of development<sup>37</sup>.

It is also a fact that electronic information and communication are increasingly affecting individuals, businesses and governments, and there is a growing reliance and dependence on their uninterrupted operation. Governments probably know by now that commercial use of cryptography products allows for achieving confidentiality, authentication and data integrity in online businesses. A counterargument is that products that use cryptography may expose public safety and national security to risk if misused. The perceived conflict between confidentiality and public safety is at the core of the debate on cryptography. While, in some cases, law enforcement can lawfully access data and intercept communications, the use of cryptography can limit their access and ability to perform some duties. Therefore, it is critical to reconcile the need to foster online businesses' privacy and confidentiality to enable their growth while not jeopardising law enforcement's abilities to protect public safety<sup>38</sup>.

In the JSI negotiations, the scope of application of the article on "ICT products that use Cryptography" is subject to differences on whether it should be limited to products of commercial use only. Different views also still exist on the extent of exceptions to be granted to law enforcement authorities and the extent of protection that JSI Members should guarantee for disclosed proprietary information upon the Member's request. It is worth highlighting that these differences are very similar to the ones in the "source code" article. The withdrawal of the US's proposals on "source code" may mean that reaching convergence on ICT products that use cryptography may be very challenging or even unlikely before the end of the year.

<sup>35</sup> GSMA. . 2018. *Regional Privacy Frameworks and Cross-Border Data Flows*.

<sup>36</sup> Castro, D.. 2023. *Why new calls to subvert commercial encryption are unjustified*.

<sup>37</sup> Ibid

<sup>38</sup> OECD, *OECD Guidelines for cryptography policy - OECD*.

## 15- Telecommunications

Telecommunication services form the cornerstone of e-commerce and the digital economy as they facilitate online trading for goods and services.<sup>39</sup> The sector proved to be robust during the 2020-2021 pandemic and contributed more than \$1.6 trillion in revenue, with mobile services accounting for 65 per cent of this total.<sup>40</sup>

Commitments in telecommunications services were mostly made in value-added services during the Uruguay Round (1986-94). The Ministerial Decision on negotiations of basic telecommunications, adopted in Marrakesh on April 15, 1994<sup>41</sup>, tasked the Negotiating Group on Basic Telecommunications (NGBT) to run further negotiations for further liberalisation in basic telecommunications. Hence, talks started in May 1994 and concluded in February 1997 with additional scheduled commitments under the GATS by 69 WTO members. They also resulted in the “Reference Paper”, called “RP”.<sup>42</sup>

The RP is “a set of regulatory principles that is legally binding only for those WTO governments which have committed to it by appending the document, in whole or in part, to their schedules of commitments.”<sup>43</sup> The document mandates specific obligations for competing basic telecoms suppliers to address concerns of anti-competitive practices by dominant firms at the time, which would put the expansion of telecommunication infrastructure at risk.<sup>44</sup>

The RP “is arguably the area of the WTO agreements in which competition policy concepts have been used most explicitly and which goes the furthest in committing Members to action against anti-competitive practices.”<sup>45</sup> It is worth observing that current competition-related concerns with regard to modern network infrastructures, for example, digital platforms operating cross-borders, are very similar to concerns previously raised in basic telecommunications, necessitating the adoption of the RP. Hence, suggestions for a modernised or updated RP have been subject to Members’ proposals in the context of the JSI on e-commerce to expand its scope and disciplines to address modern telecommunications services, mainly value-added services and concerns over anti-competitive practices by dominant service suppliers.

Back in February 1997, only 57 WTO members who scheduled commitments under basic telecommunications sub-sectors had committed either in part or in full to the regulatory principles of the RP under “additional commitments.” These members mainly consisted of developed or high-income countries. Today, the number of WTO Members who scheduled additional commitments to the entire RP or parts of it, rose to 105. Hence, a rising number of developing countries have adhered to the RP as they scheduled commitments to liberalising their basic telecommunications services under the GATS throughout the past decades. That said, more than 50 developing and LDCs have not yet adhered to the RP. Some of these Members have not scheduled commitments under Basic Telecommunications Services in the GATS. In contrast,

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<sup>39</sup> WTO. *Telecommunication services*.

<sup>40</sup> *Ibid*

<sup>41</sup> WTO. *Uruguay Round decision on negotiations on basic telecommunications*.

<sup>42</sup> WTO. *Post-Uruguay Round negotiations on basic telecommunications*.

<sup>43</sup> WTO. *Telecommunication services*.

<sup>44</sup> Anderson, R.D. et al.. 2018. *Competition policy, trade and the global economy*.

<sup>45</sup> *Ibid*

others have telecommunications services liberalisation commitments but did not include additional commitments to the RP.

The advantages brought by the RP to one of the most critical sectors of our time have been increasingly recognised.<sup>46</sup> A 2020 study conducted by the University of Adelaide found that policies aiming at lowering barriers to competition do not seem to have a statistically significant impact on imports of telecommunications services. They were found to have served their purpose of limiting anticompetitive practices by major suppliers of basic telecommunications, avoiding monopolies and allowing the entry of suppliers while fostering competition to the benefit of consumers and domestic supply.<sup>47</sup>

Interestingly, on the other hand, the Adelaide University study found that barriers to competition are negatively associated with imports of business services. These services often depend on fast and reliable telecommunications.<sup>48</sup>

In other words, removing competition barriers in telecommunications, while this may not necessarily result in an increase in imports of telecommunications services, it can, however, lead to an increase in the imports of online business services and data processing. Some developing countries, and particularly LDCs, have noted this impact as an area of concern. They worry whether the potential increase in business services imports can affect the growth of their still-nascent domestic digitally delivered services sector. In its latest World Trade Report 2023, the WTO estimates that the share of LDCs in digitally delivered services global exports may finally exceed the marginal 0.1 per cent in the future, given that “LDC exports grew faster than the rest of the world in 2022”.<sup>49</sup>

Another area of concern for developing countries and LDCs is the implementation burden of committing to adhere to existing RP or an updated version of it under the e-commerce JSI. The obligations would require these countries to extensively reform existing laws and institutions or create new ones.

Hence, one can argue that ensuring flexibility in adhering in part or in full to regulatory principles for the telecommunications sector and for contextual elaboration of those principles by regulatory and specialised bodies may be more useful and practical than an obligation to adhere to the regulatory principles and furthered rules in a lump sum. First, it allows countries to implement and adapt gradually at their own pace and in relevance to their existing systems, resources, and overall economic and development objectives. Second, flexibility in adopting regulatory principles gives room to re-examine and adapt how those principles are applied in response to a fast-evolving sector and the emergence of new digitally enabled technologies.

## **16- Custom Duties on Electronic Transmissions**

Since 1998, WTO member countries have agreed not to impose customs duties on electronic transmissions. This “moratorium” on customs duties for electronic is, however, not permanent. Members decide whether to extend it for another two years,

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<sup>46</sup> Guerhazi, B. *Exploring the reference paper on regulatory principles*.

<sup>47</sup> Nordås, H. K. 2020. *Trade in telecommunications and international trade agreements*.

<sup>48</sup> *Ibid*

<sup>49</sup> WTO. 2023. *World trade report 2023*.



usually at Ministerial Conferences. It has been extended at every WTO Ministerial Conference to date. The last time was at MC12. Despite the fact that it has been extended since its first adoption almost 25 years ago, it is subject to much debate, especially nowadays, as e-commerce witnesses remarkable expansion.

The first cause of debate is the lack of definition for electronic transmission, leading to different views on the moratorium's scope. It is not clear whether the moratorium applies only to the transmission, the carrier medium through which digital products (goods and services) are delivered, or to the content, in other words, the digital product, or both<sup>50</sup>. In their "Global Industry Statement on the WTO Moratorium on Customs Duties on Electronic Transmissions", submitted at MC12, a group of world businesses emphasised that the moratorium should ensure both transmissions and their content continue to be tariff-free<sup>51</sup>.

Given that the moratorium has been applied for more than two decades, during which cross-border e-commerce flourished, some WTO Members, particularly developed see the benefit of adopting it permanently and have expressed this intention in the WTO Work Programme on E-commerce, which faced opposition and doubts. many developing and least-developed countries. Some of these countries are also expressing interest in considering lifting the moratorium over concerns about foregone customs revenues, which could be used to finance their digital transition and to secure a better place for their businesses in the economy and trade of the future. International organisations attempted several estimates of the potential revenue losses.

However, these remain estimates that are not straightforwardly calculated given the lack of clarity on the moratorium's scope<sup>52</sup>. They also require validation at the country level. Developing countries and LDCs are also legibly concerned over the unfair competition that their MSMEs and their nascent digital businesses face in continuously free cross-border electronic transmission. It is worth noting that the current WTO moratorium is only about tariffs. Domestic or internal taxes are allowed. In a recent study by OECD concluded that "well-designed value-added or goods and services taxes (VAT/GST) can help offset potential foregone revenue in most countries"<sup>53</sup>. That said, taxes can also be a means to provide suitable protection for their nascent businesses. However, validating these findings at the national level remains crucial for enhanced evidence and enhanced position-taking in the moratorium debate.

In the e-commerce JSI, developed and developing countries have submitted proposals, and discussions have been intensifying with the view of converging towards one of the following three alternatives based and Members' submissions::

- First, to have JSI participants commit on a permanent basis to the moratorium. It remains unclear on the scope of its application, whether it is limited to the transmission or includes the content. This first alternative proposed by a group of developed countries also uses a language that may be understood as the moratorium is not limited to tariffs but any other fees that could relate to import and export, like taxes. A proposed paragraph is proposed to clarify clarifies that the text does not preclude Members from imposing taxes in line with the WTO

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<sup>50</sup> Andrenelli, A. and López-González, J.. 2023. *Understanding the implications of the WTO e-commerce Moratorium*.

<sup>51</sup> WTO. *Global Industry Statement on the WTO Moratorium on Customs Duties on Electronic Transmissions*.

<sup>52</sup> ICC and ITC. 2023. *Joint Policy Briefs*.

<sup>53</sup> OECD. 2023. *Understanding the potential scope, definition and impact of the WTO e-commerce Moratorium*.

agreement. In case this paragraph is not adopted, the wording can be vague and restrictive of tax use.

- The second alternative by developing countries clarifies that the moratorium does not apply to the content transmitted. It allows countries to choose or not to adjust their commitment to the moratorium under this future JSI agreement based on developments under the WTO Work Programme on E-commerce. It also gives room to adopt some custom procedures for public policy objectives. The same additional paragraph about the text not limiting Members from imposing taxes is suggested to be added to this second scenario.
- The third and final alternative suggested by other developing countries ensures that the commitment to the moratorium remains consistent with the decisions taken by all WTO Members in the context of the WTO Work Programme on E-commerce.

It is clear from the second and third proposed alternatives that some developing countries may be keen on keeping their policy space and ability to reconsider their commitment to the moratorium if its extension is not agreed upon in future WTO ministerial. Ensuring the future JSI agreement allows the use of domestic and national taxes and assists conducting national level assessments on their potential and design for LDCs and developing countries can make a difference towards a more audacious position on a permanent moratorium. As a reminder, the “lack of clarity on the nature of electronic transmissions and the ability of LDCs to apply internal taxes versus customs duties, where appropriate” has been stated by LDCs in their communication WT/GC/W/787, dated November 21, 2019, to the General Council on Work Programme and Moratorium on Electronic Commerce, as one of the key challenges they are facing for a meaningful engagement on e-commerce rules discussions.

## **17- Development**

The November cluster of meetings also found increased conversation around the topic of development and bridging together various proposals meant to overcome this issue. The article explores the ways to support developing and least developed countries, though the extent of support is still being discussed. Currently, there is discourse about providing a needs assessment in order to enter understand the areas that different LDCs require support in. There is also discussion on the topic of implementation periods, and the amount of leeway that will be given to LDCs, including discourse on protocol for windows of extension. Moreover, specifications on capacity building and the level of support that developed countries commit to are also being discussed.

## **Conclusion and Recommendations**

LDCs remain significantly under-represented in global rule-making efforts on e-commerce at the regional level and notably in the e-commerce JSI. However, LDCs have been increasingly interested in these ongoing discussions. The fifth and latest LDC WTO Member to join the JSI is the Gambia, in October 2023. Ensuring the future e-commerce JSI agreement will take into consideration their interests and limited capacities will be key for maximising the potential of this agreement for further integrating LDCs in world cross-border trade.

The e-commerce JSI has reached convergence on 12 articles, constituting a package of Model laws, standards and best practice-inspired rules for e-commerce facilitation. If these are accompanied by suitable special and differential treatment rules, flexible implementation periods, and an adequately funded capacity-building programme, the JSI may become genuinely attractive for more LDCs to join.

In fact, the JSI may be more attractive for developing countries and LDCs after the US withdrew its proposed texts on data flows, localisation and source code, constituting the most controversial set of rules. Four other substantive policy issues remain subject to differences between JSI participating Members, at the time of writing: ICT products that use cryptography, privacy, updating the telecommunications reference paper and the attempt to make the customs duties on electronic transition permanent. One must not underestimate the importance of these issues for LDCs.

Cryptography and the protection of personal data or privacy are key for enhanced trust in the e-commerce ecosystem. LDCs are the most in need of adopting such policies at the national level, as many of them have not, and others may be facing issues in ensuring these rules are well-balanced and enforced. Ensuring they will be accompanied when adopting and implementing rules on cryptography and privacy and provided with the funded technical assistance and capacity building may mean a positive impact on the predictability and trustiness of their e-commerce environment and their attraction of businesses and investments. Before reaching implementation, the more LDCs are able to contribute to the design of these JSI rules, the better they will be able to highlight their concerns and difficulties over a potentially burdensome policy adoption or reform procedure and enforcement of the rules.

The Reference Paper on basic telecommunications can become more attractive to LDCs, which are now facing the problems that developed and developing countries faced before them to encourage competition in the ICT infrastructure sector and promote connectivity. However, a study shows that LDCs' fear of negatively impacting their nascent digital business services on the rise can be founded. Hence, ensuring the JSI future rules allow the current WTO flexible approach of committing to the RP, instead of obligating participants to commit in a lump sum, may be key for attracting LDCs. The flexible scheduling approach is particularly needed if the JSI participants agree on extending the scope of the RP to cover value-added services as well. It is also worth that the donor community supports national-level studies in LDCs on the impact of adhering to the RP under various basic and value-added services, on enhancing access to and use of ICT services, and their potential adverse effects on local business and data processing services and recommending possible flanking measures.

Finally, the moratorium on customs duties and electronic transmission remains an issue where many developing countries and LDCs are reluctant to make it permanent. The proposed texts by some developing countries in the JSI, indicate their preference to safeguard their policy space, especially as decisions regarding the moratorium have been originally mandated to the General Council and the multilateral track of the WTO. For LDCs to be able to consider adopting a permanent moratorium, studies and

evidence still need to be gathered and validated at country-level. It is particularly in the interest of LDCs to examine if taxes offer a better alternative for generating revenue from electronic transmissions than customs duties and how. Hence, it can be beneficial to have the initiative's "E-commerce Capacity Building Framework" supporting national studies in LDCs on tax revenues from electronic transmission and the best design for these taxes based on the circumstances of countries.

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