



# TOWARDS THE WTO'S MC11: HOW TO MOVE FORWARD ON E-COMMERCE DISCUSSIONS?

## Executive Summary

The WTO already has a mandate on E-Commerce. This is contained in the 1998 E-Commerce Work Programme (annexed). It sets out a very important task – for **Members to 'examine and report' on the treatment of electronic commerce within the existing WTO Agreements:** the GATS, GATT, TRIPS, and to examine the development implications of E-Commerce. The WTO Agreements were crafted before the advent of E-Commerce. How to bring E-Commerce and the WTO Agreements into alignment is extremely relevant and should be undertaken with urgency in order to ensure legal clarity and certainty.

However, rather than going down this track, some Members are now suggesting a completely new set of rules in E-Commerce, and they seem unwilling to pursue the 1998 E-Commerce mandate and the outstanding grey areas identified in that Work Programme. They suggest that discussions on issues in the Work Programme such as classification, and new services, are already exhausted. How can that be when there has been no definitive outcome from the Work Programme to date? Instead, key developed countries are pushing for new rules which are quite divorced from the existing WTO Agreements, and would even contradict with the existing rules (including Member's GATS schedules). Most likely, the existing Agreements are structured such that liberalisation is too gradual for key Members' corporate interests. The new rules these Members seek (US, EU, Japan et al) would instead bring about much more comprehensive market opening, and would make it difficult for others to put in place local content requirements in relation to data – data processing, storage, technology, infrastructure. If Africa and other developing Members want to put in place digital industrial strategies, the existing Agreements allowing for a slower paced and selective liberalisation, would be much more supportive of their development; and local content requirements in data would be an important industrial strategy.

The kind of new rules advocated by developed and some developing countries will not be discussed in MC11. Instead, a mandate is likely to be sought to i) introduce new issues into the current Work Programme such as free data flows, rules disallowing localisation requirements, no disclosure of source codes, E-authentication etc.; and ii) open the possibility for the present 'discussion' mandate to be a negotiating mandate. If this succeeds, proponents would have succeeded in positioning the institution such that discussions/ negotiations shift away from the existing WTO Agreements to eventually having new rules and comprehensive liberalisation.

Developing countries instead should reaffirm the existing Work Programme and its issues, and not agree to any expansion of issues outside the scope of the existing Agreements and the WTO. Developing countries have, and should continue to call for focused discussions on the issues the Work Programme has already identified. These issues are elaborated in this paper (Section B) and they include: classification, technological neutrality and Member's market access schedules, issue of 'likeness', new technologies and access to technology, development challenges etc.



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## A. CONTEXT: THE E-COMMERCE DEBATE AHEAD OF MC11

### I. The WTO's 1998 E-Commerce Work Programme and Its Inherent Logic

#### 1. Members in 1998 Agree to Examine the Treatment of E-Commerce within the Existing WTO Agreements

Members of the WTO adopted a Work Programme on E-commerce in 1998 (WT/L/274, see Annex 1). This was a comprehensive programme to look into the trade-related issues pertaining to global electronic commerce. Importantly, the **Work Programme mandated Members to 'examine and report' on the treatment of electronic commerce within the existing WTO Agreements**, primarily, the GATS, the GATT, and the TRIPS agreement, as well as the development implications of E-Commerce. This is an extremely important albeit complex task.

#### 2. To What Extent Do the Existing Agreements Apply to E-Commerce? More Discussion Is Needed

To what extent do the existing agreements apply to E-Commerce? Real advancements in E-Commerce only took place after the existing Agreements had already been agreed to e.g. the GATS in 1994. At the same time, the GATS is intended to apply to all services. Hence, the 1998 E-Commerce Work Programme very ably identified those areas under the GATS and GATT Agreements where examination is needed to clarify some grey issues. Under the GATS this includes: classification issues (is cloud computer under telecommunications or computer-related services); Members' understanding of their market-access commitments etc. These discussions, which have started must continue, to bring E-Commerce and the existing Agreements into alignment.

#### 3. Importance of the 'Relevant Bodies': Council for Trade in Services (CTS), Council for Trade in Goods (CTG), Council for TRIPS, Committee for Trade and Development (CTD)

The examination and discussions are mandated in the Work Programme (WT/L/274) to take place in the CTS, CTG, Council for TRIPS<sup>1</sup> and CTD. These bodies oversee the implementation of the WTO's GATS (Services agreement), GATT (Goods agreement), TRIPS Agreements, and the CTD looks at cross-cutting development concerns resulting from the implementation of all WTO Agreements. If the existing rules are to be examined and adjusted to incorporate E-Commerce, it is logical and a necessity that these relevant bodies undertake this examination. The General Council was tasked to look at cross-cutting E-commerce issues.

### II. Recent Attempts to Marginalise the Existing WTO Agreements And Introduce New Rules for E-Commerce

#### 1. Has the Membership Forgotten the Task that Members Had Set Themselves in the Work Programme - the Alignment of E-Commerce into the GATS and GATT?

Today, there seems to be a collective forgetfulness by proponents that Members had an important task they had set themselves – to align E-Commerce with the existing Agreements. Instead, there seems to be a rush to supplant existing rules with new E-Commerce rules which would effectively erode the existing legal frameworks that are fundamental to the WTO's body of law and begin negotiations on a whole different set of issues – many which are outside the scope of the WTO Agreements, can also be argued to be beyond the scope of the WTO itself (see later section), and have been or should be discussed in venues other than the WTO.

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<sup>1</sup> TRIPS stands for the Agreement on Trade-Related Aspects of Intellectual Property Rights.



## 2. US, EU, Japan et al Propose New Rules that Contradict with the Existing Agreements

The new rules put forward by proponents are contained in the US' non-paper submitted to the General Council on June 2016 (JOB/GC/94), and those elements were replicated in the EU et al's (JOB/GC/97, July 2016<sup>2</sup>) and Japan's submission (25 July 2016, JOB/GC/100). These rules include the following, amongst others:

- Free Flow of Data or Cross Border Transfer of Information by Electronic Means
- Prohibitions Regarding Localisation Requirements: prohibiting any requirement to have servers and infrastructure located domestically; prohibiting requirements to have local presence; and prohibition of local content requirements<sup>3</sup>
- Prohibitions Regarding Disclosure of Source Code: Members should not require the transfer, access to source code of software, as a condition of market access
- Ensuring Technology Choice by Companies: governments cannot mandate the use of local technologies. Instead companies can use the technology of their own choosing etc (submissions from US<sup>4</sup>, Japan<sup>5</sup>, EU<sup>6</sup>)
- Barring Force Technology Transfers: 'prohibit requirements on companies to transfer technology, production process or other proprietary information'.

Similar rules are in the stalled Transpacific Partnership Agreement (TPP), and the Trade in Services Agreement (TISA, which has also stalled).

## 3. Ahead of MC11, Proponents are Proceeding Incrementally But Surely

The new rules mentioned above are not the rules proponents will put on the table for MC11. They know that if they did, their attempts would backfire due to opposition from quite a large number of Members.<sup>7</sup> Given this, proponents are proceeding incrementally. Nevertheless, it is clear that the end objectives for the most powerful players remain the rules which have been non-exhaustively listed above. (The Member with the greatest interest in this area is the US. Although it is fairly silent in the negotiations at present, its interests are being actively supported and advocated by other Members). On 14 July 2017, three new submissions were presented: Japan (JOB/GC/130); Russian Federation (JOB/GC/131) and Singapore et al (JOB/GC/132). There are similarities across all proposals, however, there are also some important differences. Basically, the idea of proponents is to

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<sup>2</sup> Subsequently resubmitted as JOB/GC/116, JOB/CTG/4, JOB/SERV/248, JOB/IP/21, and JOB/DEV/42 on 13 January 2017.

<sup>3</sup> Prohibitions regarding localisation are covered by US, EU and Japan. These last two elements – prohibiting local presence and local content are in the EU's submission.

<sup>4</sup> The US proposal states that 'Innovative companies should be able to utilize the technology that works best and suits their needs. For example, mobile phone companies should be able to choose among wireless transmission standards like Wi-Fi and LTE. Trade rules may play a role in ensuring technology choice by stipulating that companies are not required to purchase and utilize local technology, instead of technology of their own choosing' (para 2.8, JOB/GC/94, 4 July 2016).

<sup>5</sup> The Japanese proposal says that 'The use of particular technology including encryption technology should not become mandatory requirements in connection with business conduct in Member's territory' (para C, JOB/GC/100, 25 July 2016).

<sup>6</sup> EU's proposal does not state this explicitly, but the item on 'Disciplines with respect to localisation' may have the same effect. It says that 'Building on existing WTO obligations, disciplines addressing all forms of localisation, including local presence; localisation of computer servers; and local content requirements, subject to appropriate public policy exceptions'. This issue of allowing companies to choose their technology of choice may fall under disciplines on local content requirements.

<sup>7</sup> Even though the EU had included free data flows in its E-Commerce proposal of JOB/GC/97 (2016 and resubmitted in Jan 2017), it is not clear how far they are willing to go in this area. It is well known that there are fierce differences between DG Trade and DG Justice in the European Commission, the former being in favour of free data flows, and the latter being more defensive as it is concerned about possibly compromising the privacy of their citizens as a result of free data flows.

- Provide a new mandate for the membership to take a decision to change the present discussion /non-negotiating mandate on E-Commerce to a negotiating mandate, if not at MC11, then a year down the line (Japan's proposal), or at MC12 (Russia's proposal).
- Expand the issues under the existing Work Programme to include those which the digital companies are interested in – free data flows and rules on localisation etc. (See Japan's Illustrative list in the box below). Russia's approach is slightly different – it emphasises more the urgency to tackle the issues requiring clarification in the existing legal agreements (as the 1998 Work Programme had also emphasised). However, it also has an additional list for discussion of what it calls 'Specific Issues Relating to E-Commerce' to be added to the existing list in the Work Programme: *'network access, e-signatures, authentication, encryption, interoperability, e-payments, privacy and personal data protection, secure data flow, consumer protection, SPAM, security issues in the use of ICT.'* These are similar issues to the E-Commerce rules that EU would like the WTO to begin work on (see EU's May 2017 proposal TN/S/W/64 discussed below).
- Russia is suggesting having a Working Group on Electronic Commerce to serve as a unified platform. It does not call for dissolving the 'relevant bodies' (CTS, CTG, Council for TRIPS, CTD), but in effect, if a new body were created, it is likely that discussions would be focused in this new body rather than in the 'relevant bodies'. This proposal would detract from the logic of reinforcing the existing agreements inherent in the Work Programme.
- Japan's proposal (JOB/GC/130) deserves some detailed attention. It contains the following: Suggestion for Members to *'comprehensively evaluate whether the clarification or strengthening of the existing WTO rules are necessary over the course of next one year after MC11. Members may then decide to initiate negotiations without delay depending on the result of the evaluation.'*
- The issues Japan suggests for discussion in the Work Programme and possibly negotiation in the future is contained in their Illustrative List below. Clearly, this list completely veers away from the issues in the existing work programme and have nothing to do with the existing legal frameworks. If new rules are to be negotiated based on this list, Members would have instituted a completely different and new framework. This new framework would contradict with and supplant the existing E-Commerce rules.



**Box 1: Annex to JOB/GC/130 (Japan): Illustrative List of Issues**

**ENHANCED TRANSPARENCY**

- Greater focus on e-commerce/digital trade in Trade Policy Reviews
- DG Monitoring Report on protectionism could include a digital focus
- Exchange of information on e-commerce/digital trade related issues in regular WTO Committees

**REGULATORY FRAMEWORKS FACILITATING ELECTRONIC COMMERCE/DIGITAL TRADE**

- Recognition of electronic signatures/authentication and electronic contracts
- Addressing electronic payments and settlements
- Regulatory framework for consumer protection
- Regulatory framework for cyber security
- Regulation of unsolicited communications
- Removing regulatory bottlenecks at borders and unnecessary trade barriers
- Expediting movement of goods

**OPEN AND FAIR TRADING ENVIRONMENT**

- Non-discriminatory treatment in the formulation and application of the measures affecting e-commerce/digital trade
- Disciplines ensuring the cross-border flow of information, ideas, and knowledge
- Disciplines allowing users to access, process and store online information, ideas, knowledge, and services of their choice
- Ensuring internet users/service suppliers a choice of where to transfer, process, and store information
- Protecting necessary source code confidentiality
- Trade-related aspects of intellectual property rights
- Use of particular technology including encryption technology
- Tariff reduction/elimination for products related to e-commerce/digital trade
- Prohibition of custom duties on electronic transmissions

**INTERNATIONAL COOPERATION AND DEVELOPMENT**

- Aid for Trade/technical assistance
- Collaboration with relevant stakeholders.
- Addressing inadequate infrastructure and connectivity
- Addressing insufficient trade logistics
- Addressing lack of payment and settlement solutions
- Addressing insufficient human capacity
- Special and differential treatment provisions for developing and least developed members, including the possibility of adopting the approach prescribed in Section II of the TFA

*Source: JOB/GC/130, 14 July 2017, Possible Way Forward on Electronic Commerce, Communication from Japan*





#### 4. EU's Strategy in 2017: New E-Commerce Rules Via the GATS/ Services Negotiations?

As noted above, the EU like US and Japan was also at the forefront in 2016 into 2017 in pushing for E-Commerce discussions and negotiations based on an entirely new framework of rules ( JOB/GC/97). They had first submitted their proposal to the General Council, bypassing the 'relevant bodies' (CTS, CTG, Council for TRIPS, CTD). However, given the opposition by a large number of developing countries in 2016 to flout the mandate and have these 'relevant bodies' bypassed, the EU resubmitted its same JOB/GC/97 proposal in January to all the 'relevant bodies'. However, in May 2017, perhaps there was a change in strategy. The EU wrote a new proposal (TN/S/W/64) singling out 4 issues and submitted this new proposal to the Council for Trade in Services Special Session (CTS-SS). (Special Sessions in the WTO are negotiating fora and each Special Session has a specific mandate. In the case of the CTS-SS, this mandate was the new round of GATS 2000 negotiations which was then subsumed under the Doha Round negotiations). These are the issues:

- Consumer protection
- Unsolicited commercial electronic messages
- Electronic authentication and trust services, including electronic signatures
- Electronic contracts.

These issues were also in the EU's earlier proposal JOB/GC/97, but that earlier proposal had captured a very broad range of topics.

The issues chosen are rather peculiar. There was no convincing explanation by the EU on why these particular issues had been selected, and what the current problems are in relation to trade which they are attempting to resolve. E.g. Is Spam currently disrupting trade and therefore new rules are needed? Or Electronic Authentication? There is no evidence pointing to such problems. These issues also do not fall within the mandate of the CTS-SS negotiations or even within the mandate of the GATS. Further, some of them have been extensively discussed in other venues: there are widely accepted and implemented UNCITRAL Model Laws for electronic contracts and electronic signatures, and there are ITU standards and even a treaty provision regarding unsolicited commercial electronic messages (SPAM).

EU's proposal was not particularly well received by some Members. EU was questioned on the issue of mandates. Why the CTS-SS when the EU had earlier defined the same issues as E-Commerce issues in its previous proposal? These issues are also not covered in the GATS (at most, consumer protection has only a tangential place in the GATS):

- Consumer protection – the GATS does not make rules on consumer protection. The GATS Art XIV says that GATS cannot stand in the way of the prevention of deceptive and fraudulent practices, although measures taken cannot be a disguised restriction on trade in services. In the Progress Report to the General Council adopted by the Council for Services (S/L/74, 27 July 1999), the CTS says that *'It was also noted that, as Art XIV constitutes an exception provision, it should be interpreted narrowly, and its scope cannot be expanded to cover other regulatory objectives than those listed therein'*. This view of the Membership seems to contradict with what the EU is now attempting.
- Unsolicited Commercial Electronic Messages (SPAM) – It is unclear how SPAM is related to trade in services. SPAM is not mentioned in the GATS.
- Electronic Authentication and Trust Services including Electronic Signatures – this issue fits into the GATS if it were about trade in authentication services. However, the EU is not asking for market access negotiations but is proposing rules governing electronic authentication. (E.g. Members shall not deny the legal effect and admissibility of electronic authentication in legal proceedings; Members shall not maintain measures that would prohibit parties to an electronic transaction from mutually determining the appropriate electronic methods for that transaction).



Electronic authentication and the methodologies governments may choose to prescribe or not is not a trade issue per se and does not fall under the current scope of the GATS.

- Electronic contracts – these are transactions, not services. The EU wants to ensure that Members’ legal systems allow for contracts to be concluded by electronic means. To what extent is this a trade barrier right now? What if members have resource constraints or good reasons in some sectors not to engage via E-Contracts. How is this a GATS issue when contracts are not part of trade law?

Some of these issues have important market access and regulatory ramifications (e.g. rules on authentication) and should not be seen to be ‘easy’ issues to agree on. The EU’s strategy, it would seem, is to choose some issues that appear innocuous in order to change the treatment of E-Commerce in the WTO: firstly to move away from the existing legal frameworks which do not open markets adequately (see below); and secondly, to convert the discussions on e-commerce to negotiations. Presumably, this explains the attempt to put these negotiations in the CTS-SS, in order to bypass the fact that there is no negotiating mandate under the E-Commerce Work Programme.

#### 5. Why the Marginalisation of the Current Work Programme and Its Objectives for New Rules?

Until now, no reasons have been given by any of the E-Commerce proponents why they are jettisoning the work on the existing Agreements and bringing in a different set of rules based on a different paradigm of treating E-Commerce.

It is likely that for the big digital companies, the existing rules governing E-Commerce, principally the GATS, is not far-reaching enough to supply with ease to global markets. The GATS is based on a positive list approach. Even within a sector, some sub-sectors are opened and others closed. This would be highly inconvenient for electronic commerce suppliers that do not want to deal with fragmented markets. Furthermore, the ‘new services’ today are often a hybrid of many different sectors and subsectors, making supply to global markets complicated if some sectors/ subsectors are opened but others closed. E.g. social networking sites such as Facebook could be said to be offering social networking services, advertising, entertainment, audio-visual services, value-added telecommunication services, basic telecommunication services, video conferencing etc.

Furthermore, with digitalisation of goods and services, business models are shifting away from commercial presence to cross-border supply. This cuts costs for suppliers. Localisation regulations mandated by governments - for foreign investors to be located locally or for localisation of servers and data - can be costly and can likewise fragment the market. According to one study by McKinsey & Co, *‘Data localisation regulations may mean that banks’ long-standing plans for global consolidation of technology platforms are no longer viable, and they would need to rethink their data and technology architectures’*.<sup>8</sup>

Clearly, digital suppliers do not wish to have their market access hindered. It is in their interest that the current WTO architecture is not used to govern Electronic Commerce, particularly that Members’ existing GATS schedules (containing market access and national treatment limitations) are put aside. Instead, they want a new set of rules opening up electronic commerce much more comprehensively, and ensuring that new regulations are not put in place to close off markets in the future. If for example, free data flow becomes the rule at the WTO, schedules limiting market access in certain services where data flow is important would not hold. Similarly, rules disallowing localisation requirements could contradict with Members’ objectives when they have market access limitations on foreign ownership.

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<sup>8</sup> Kaplan J and Rowshankish K 2015 ‘Addressing the Impact of Data Location Regulation in Financial Services’, in *A Universal Internet in a Bordered World*, published by Global Commission on Internet Governance, p. 44.

According to Professor Jane Kelsey, a major goal of these current rules *'is to future-proof new services and new technologies from regulation.'*<sup>9</sup>

### **III. Jettisoning Existing Rules for New Rules have Far-Reaching Implications for Developing Countries: Difficulties to Have Digital Industrialisation**

The GATS architecture is designed to allow for 'progressive liberalisation'. Members open up their services sector at their own pace. Whilst of course inconvenient for global suppliers impatient to absorb markets, it allows developing countries' suppliers time to try to catch on and catch up, and open up markets only when domestic suppliers grow in competitiveness. This principle of strategic liberalisation has been in operation in the GATT and now WTO for the last 70 years, and is still being used by all Members even up to today (e.g. protection by developed countries in agriculture to support domestic producers).

For developing Members, localisation requirements, technology transfer requirements, disclosure of source code, are exactly the policies needed for digital industrialisation:

- Developing countries need infrastructure to be located domestically in order to support a domestic data industry – hence localisation of physical infrastructure and servers can be very important
- They need more and more data to be processed domestically in order to build the data analytics industry - data being the most valuable commodity of the digital economy
- They require technology transfer and access to source codes in order to bridge the huge technological and digital divide, as well as build their domestic knowledge base. Promoting the use of local technology is also extremely important.

Given the existing digital and technological divide, moving in the direction of the new rules would leave developing countries as consumers in the digital economy, rather than supporting much of the developing world to excel at being suppliers, even if this is first and foremost to their own domestic and regional markets.

### **IV. The New E-Commerce Rules Will be Good for Developing Countries' MSMEs?**

The proponents of the new E-Commerce rules are pushing to open the door to new E-Commerce rules on the pretext that these rules would work wonders for small exporters in developing countries (the Micro and Small and Medium-Sized Enterprises or MSMEs). Indeed there are some winners, but by and large, the infrastructure, technology and knowledge / skills gaps are realities with far-reaching implications that cannot be wished away. In addition, these gaps are not going to decrease but increase. Some are running far ahead with new technologies such as Artificial Intelligence which is increasingly being imbibed into a broad range of goods and services in this so-called 4<sup>th</sup> Industrial Revolution, whilst others are still struggling with catching up to the technologies of the 2<sup>nd</sup> or 3<sup>rd</sup> industrial revolutions.<sup>10</sup>

Furthermore, the digital economy is highly concentrated, and this concentration will increase as cutting edge technology is developed and owned by only a few. A feature of the Digital Economy is the very powerful 'network effects'. The first mover has a tremendous advantage - the successful become even more successful because their large customer base gets them access to the most valuable commodity today – data - which is generated by this network. This data in turn serves to improve the products/ services further, making the gap between the first mover and its competitors even larger.<sup>11</sup>

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<sup>9</sup> Jane Kelsey, forthcoming, 'The Risks for ASEAN if Mega-FTAs Promote the Wrong Model of E-Commerce'.

<sup>10</sup> See UBS White Paper on 'Extreme Automation and Connectivity', 2016, <https://www.ubs.com/magazines/innovation/en/into-the-future/2016/fourth-industrial-revolution.html>

<sup>11</sup> Concentration in the digital economy is worsened by the oligopolistic practices of the big digital players e.g. under-pricing products to build their customer base: Uber selling rides below their real costs, and Amazon

Also, the biggest barrier to E-Commerce today in developing countries is the lack of affordable access. End-users in developing countries pay far higher prices for internet access than do users in developed countries, especially when prices are adjusted to per-capita GNP. If there were a sincere intent to facilitate E-Commerce in the interests of citizens, then there should be a focus on reducing the cost of internet access in developing countries. This issue is outside the scope of the WTO. However, developed countries could take concrete steps, for example in the ITU. There is an ITU Connect 2020 Agenda. However, to date, ITU reports that the connectivity targets will not be met.<sup>12</sup> Even more telling is the story of the Digital Solidarity Fund. Established in 2005 as noted in para 28 of the Tunis Agenda ‘to fund the growth of new ICT infrastructure and services’, it was closed in 2009 due to lack of funds.

#### **V. Proposed New Rules Undermine the WTO’s Existing Legal Frameworks, Throwing Up Many Contradictions with Existing Schedules**

The new rules proposed will, if implemented, throw up many legal contradictions in relation to the WTO’s existing legal frameworks, including Members’ schedules. This is likely to lead to even more dispute settlement cases.

For example, a Member may not have opened up in retail banking in Mode 1. However, if eventually free data flow becomes a rule, what does this mean for that Member’s WTO commitment in online retail banking? (In its latest proposal, Japan has suggested ‘disciplines ensuring the cross-border flow of information, ideas and knowledge’<sup>13</sup>).

Likewise, a few Members have proposed that there should be ‘*non-discriminatory treatment in the formulation and application of the measures affecting e-commerce / digital trade*’. This ‘non-discrimination’ is directly contradictory to Members’ GATS limitations. Which rules will take precedence? What are the broader systemic implications?

### **B. HOW CAN MEMBERS MOVE FORWARD ON E-COMMERCE IN A MANNER THAT SUPPORTS DEVELOPING COUNTRIES TO INDUSTRIALISE DIGITALLY?**

#### **I. Discussing the Issues Already Highlighted in the E-Commerce Work Programme**

There is an urgency to discuss E-Commerce issues at the WTO – since the grey areas pertaining to the existing legal frameworks should be clarified at the earliest time possible in order to ensure legal clarity and certainty.

The E-Commerce Work Programme had highlighted those issue areas. In the first years following adoption of the 1998 Work Programme, very serious discussions on these issues did take place. To move forward, these discussions must continue. Members at MC11 should reaffirm the 1998 Work Programme i.e. take up those issues that will give more clarity to the treatment of E-Commerce in the GATS, GATT and TRIPS, as well as to prioritise the E-Commerce and development issues in the CTD.

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undercutting other suppliers by making losses when entering new markets (e.g. losses of up to 80 million a month in India).

<sup>12</sup> ITU 2017 ‘Connecting the Unconnected: Working together to achieve Connect 2020 Agenda Targets’. A background paper to the special session of the Broadband Commission and the World Economic Forum at Davos Annual Meeting 2017.

<sup>13</sup>JOB/GC/130 2017 ‘Possible Way Forward on Electronic Commerce: Communication from Japan’, 14 July.

## **II. Why Not Add to the Work Programme Discussions on Free Data Flows, Localisation Disciplines, E-Signatures, SPAM etc?**

This will be the big question in the run-up to MC11 and probably also at MC11. Why not add more issues to those in the Work Programme – including issues which the big digital companies are pushing for? Developing Members will be told that they are being unreasonable if they choose to decline discussing (not necessarily even negotiating) such issues.

There are very good reasons why the scope of the existing Work Programme should be adhered to:

### **1. Mandates**

Art II.1 of the Marrakesh Agreement on the *'Scope of the WTO'* provides a clear and limited scope for the institution. The WTO is not tasked to discuss any issue that may catch the fancy of Members. Art II.1 says that *'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement'*.

This is reinforced in Art III.1 under *'Functions of the WTO'* which says that the WTO's function is to implement the existing Agreements.

The Marrakesh Agreement does provide room however for further negotiations. Negotiations can take place in 2 areas. Art III.2 says that

a) *'The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement.'*

b) *'The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference'*.

Whether further negotiations take place under the existing Agreements or whether new Agreements are negotiated, the issue must concern *'their multilateral trade relations'*.

Many of the issues which the E-Commerce submissions have highlighted are not either issues captured under the existing Agreements nor are they concerning Members' multilateral trade relations. In fact, the Illustrative List provided by Japan (in Box 1 above) are issues that have been raised in the discussions on Internet Governance in the UN and other bodies – E-Signatures; Spam; cyber crime, cyber security and free data flows; source code and security issues; consumer protection which touches on human rights etc.

For developing countries, respecting mandates is critical. If rules are not adhered to in this supposed rules-based organisation, the smaller Members will be the losers.

Furthermore, if internet governance issues are brought into the WTO, developing countries would compromise their own positions in the Internet Governance discussions. Rules and common understandings need to be forged amongst governments as we move into a global digital society. However, these rules should not be made primarily in the WTO with its narrow trade lens. Developing country governments have been pushing for a forum (either a multilateral governmental forum under the UN or a multistakeholder forum) that can deliberate and take decisions on these issues from a wholistic perspective.

### **2. Discussions will slide into negotiations**

The present mandate in the Work Programme is for discussions not negotiations. It is already clear that the recent proponents want negotiations in a range of new rules. If these 'new issues' are added to the Work Programme, clearly the next step would be an extremely strong push to begin negotiations on all these issues in the near future. These issues highlighted by proponents require, as noted above, a more wholistic perspective, not a trade focus.



3. GATS' progressive liberalisation and GATT strategic opening will be put at Risk

As noted in various places above, the new rules will compromise and contradict the existing legal frameworks, including Members' schedules. What will be the consequences on developing countries? Developing countries are the ones most in need of strategic liberalisation- liberalisation in selected sectors, and not necessarily liberalisation across the board.

4. Reinforcing the legal frameworks will Strengthen the WTO as an Institution. Injecting New Rules in Contradiction with Existing Schedules Will Weaken the WTO as an Institution.

There would be an erosion of the existing legal agreements if the issues put forward for negotiations by proponents will contradict with the existing agreements and schedules – as in fact they do.

The 1998 Work Programme provides room for Members to bring up issues not named in the Work Programme for discussion. Para 1.1 of the Work Programme notes that 'Further issues may be taken up at the request of Members by any of these bodies'. Clearly though, these would have to fall within the scope of the existing agreements, or have to do with the 'development implications of electronic commerce' (para 5.1 of the Work Programme WT/L/ 274) to be in accordance with the inherent logic of the Work Programme.

**III. Moving Ahead with Focused Discussions in the E-Commerce Work Programme: What are the Issues to be Discussed?**

How can WTO Members move forward in the E-Commerce Work Programme respecting the existing mandates, including the scope of the WTO, and also Members' interest to pursue digital industrialisation policies?

The following section highlights the issues which the Membership can and should have focused discussions on as we move forward on E-Commerce. It draws on discussions that have already taken place under the Work Programme.

1. Council for Trade in Services  
a. Areas Requiring Discussion

**CLASSIFICATION**

A major area requiring much more discussion is 'Classification' issues. This has also been highlighted as an issue for further examination in the E-Commerce Work Programme. In recent debates on this matter (see S/CSC/M/78; S/CSC/M/77), mostly developed countries contended that discussion on this issue has already been exhausted. China, South Africa and India have refuted this and China pointed to agreements by the Membership to have further discussions.<sup>14</sup>

The classification subject covers several different issues:

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<sup>14</sup> In its rebuttal that the classification issue had been exhausted, China made reference to S/L/94, the 'Progress Report' that had been adopted by the CTS on 19 July 1999, highlighting the areas where Members had said more discussion is needed:

- i) In relation to 'technological neutrality', 'some delegations expressed a view that these issues were complex and needed further examination. (para 4)
- ii) On the distinctions between supply under Mode 1 and Mode 2 in the case of electronic commerce, 'no conclusion was reached as to how to clarify the matter, and it was agreed that further work is necessary' (para 5)
- iii) The discussion whether or not all products delivered electronically are services. Some asserted this to be the case, others disagreed. 'It was suggested that further work on this issue was necessary' (para 6).



- Scope of the GATS, including Modes of Supply. There is some lack of clarity about whether E-Commerce falls under Mode 1 (cross border supply – the service is consumed domestically, the service supplier is abroad) or Mode 2 (consumption abroad – the service is consumed abroad or the consumer is abroad). Members have different levels of commitments in Modes 1 and 2, hence clarification of this is important to understand better Members' existing commitments.
- New Services – The classification used in the WTO is the W120 which is based on the 1991 Provisional Central Product Classification (CPC) system of the United Nations. There is no agreement whether new services which have been created since 1991 are captured in the existing categories in the W120 or CPC, or if new categories should be created.
- Areas of overlap between sectors – for example, computer related services and telecommunications. 'Data processing' exists in both these sectors. This creates legal uncertainty. It is of urgency that these issues are clarified for the proper functioning of the WTO system.

Classification issues, particularly the issue of 'new services' have not only been discussed in the context of E-Commerce, but also in relation to the GATS Agreement more broadly. In fact, rather indepth discussions have taken place in the Committee on Specific Commitments. See for example JOB/SERV/180, which is a compilation of 2 years of work in the CSC on classification issues. The WTO Secretariat summed the two years of work (2011 – 2013) as follows:

*'The two-year exercise examined 14 sectors and sub-sectors.<sup>15</sup> While identified specific classification issues vary from one sector to another, discussions across the board pointed to the inadequacy of W/120 in capturing market realities. In sectors such as computer, telecommunications and audiovisual services where the impact of information technology is especially great, classification seemed to be even more challenging. In this regard, issues addressed in the exercise, inter alia, concern bundled or integrated or converged services, overlaps between sector/subsectors, distinction between new services and new means of delivery, as well as the scope of existing entries in W/120. In particular, it was observed to be a challenging task to map services labelled with technological and commercial terminology (e.g. cloud computing, mobile application, social network, etc.) into the GATS classification. It was noted in some other sectors (e.g. environmental services, postal and courier services, legal services) that the classification of W/120 appeared to be out of step with important commercial and regulatory changes and that alternative classifications might deserve consideration. The exercise also looked into issues related to such sectors as energy and logistics services, for which there were no separate sections in the current classification, despite their increasing economic importance' (para 3, JOB/SERV/180, 'Compilation on the Discussions on Classification Issues, Informal Note by the Secretariat', 14 March 2014).*

The WTO Secretariat also provided an interesting note JOB/SERV/189, 3 Sept 2014 on 'Services Without Explicit References in MTN.GNS/W/120 An Illustrative List'. This illustrative list highlighted the need for clarification not only on new services relating to E-Commerce/computer related services/ telecommunications (e.g. cloud computing, web-hosting, search engine, social network, Voice over Internet Protocol – VoIP, Video on Demand etc), but also new services in the area of environment and energy (e.g. carbon capture and storage services).

Clearly in relation to E-Commerce and the rapid developments there, the discussions are more urgently needed than ever. It is not clear why developed countries in the Committee on Specific Commitments continue to insist that this discussion on classification has been exhausted<sup>16</sup> when so many questions remain outstanding, including those highlighted in the Secretariat's note JOB/SERV/189 dated 3 Sept 2014. See also Annex 2 containing India's statement on 'New Services' delivered in the recent Committee on Specific Commitments arguing that more discussion is needed.

## **TECHNOLOGICAL NEUTRALITY / MEMBERS' MARKET ACCESS COMMITMENTS**

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<sup>15</sup> Financial services were not considered in this exercise as they are not within this Committee's terms of reference.

<sup>16</sup> See minutes of the Committee on Specific Commitments e.g. S/CSC/M/78 (May 2017) and S/CSC/M/77 (Nov 2016) as well as previous meetings of the Committee.

The other big issue closely linked to classification, or in fact is part of the classification discussion, is that of technological neutrality. Are GATS / WTO commitments and schedules technologically neutral? I.e., when a Member commits to retail banking in 1994, does that Member's schedule commit it to liberalise what is technologically possible today, even if that Member had not intended it to be so when it drew up its commitments in 1994? Is the GATS temporal in nature or not?

Developed countries have been arguing that the GATS is technologically neutral. However, there has been no multilateral decision on this matter. As noted in Footnote 12 of this paper, delegations expressed that further examination was required (S/L/74).

As with the classification issue, it is urgent that this issue is also clarified, so that Members have legal certainty regarding their WTO commitments. This will also shed more light on the existing rules in the WTO on E-Commerce, including an understanding of Member's level of E-Commerce market opening. Failing which, the WTO's dispute settlement system would be drawn upon even more to adjudicate on cases, which is far from ideal, as the DSB (Dispute Settlement Body) is not meant to replace decisions taken by the Membership.

#### **WHAT IS 'LIKENESS' - NATIONAL TREATMENT AND MFN OBLIGATIONS**

The issue of what is a 'like' service will impinge on how Members interpret their national treatment and MFN GATS obligations. Art II on MFN is a general obligation in the GATS, applying to all services sectors and all measures by Members, whether a sector has been opened or not (unless a Member has listed an MFN exception).

In national treatment (Art XVII), Members scheduling an opening in a sector / subsector must provide national treatment to 'like services and service suppliers' unless they have listed conditions and qualifications.

Is a service supplied electronically 'like' a service that has been delivered through other means? In the Work Programme discussions, it was noted that the issue of 'likeness' is legally very complex, and there is jurisprudence in the GATT that likeness can only be judged on a case-by-case basis. Others suggested that within sectors and modes, there can be agreement on likeness (See S/L/74). Clearly more discussion to clarify this question is required.

#### **PROTECTION OF PRIVACY AND PUBLIC MORALS AND PREVENTION OF FRAUD**

As discussed above, EU wants more negotiations on consumer protection. The Work Programme discussions, *'noted that, as Article IX constitutes an exception provision, it should be interpreted narrowly, and its scope cannot be expanded to cover other regulatory objectives than those listed therein'* (S/L/74, para 14).

How far can the WTO go into this issue which is multi-dimensional and has many aspects that go beyond trade (including security, human rights issues etc), taking into account both the scope of the WTO as *'a forum for further negotiations among its Members concerning their multilateral trade relations'* (Marrakesh Agreement Art III.2), and the scope of Art XIV as an exception provision? The limits to what can or cannot be brought into the WTO and the GATS must be respected.

#### **INCREASING PARTICIPATION OF DEVELOPING COUNTRIES - GATS Art IV**

Art IV.1 is about 'strengthening' developing countries' domestic services capacity. Art IV.2 says that developed countries should provide information concerning various issues, including the availability of services technology. Art IV.3 is the special priority for LDCs.



There should be a concerted effort by developed Members to find strategies to support developing countries in their participation in E-Commerce in services, including liberalisation commitments, and importantly, in terms of access to cutting edge technology that is indispensable to the digital economy.

## **COMPETITION – GATS Arts VIII and IX**

A recent article by the MIT Technology Review notes that, *‘when we look at what the digital economy has done over the past two decades, what becomes clear is that it has created an enormous amount of value for consumers and for a small group of big companies, even as it has diminished competition, centralised power, and made life much more difficult for businesses that produce content or try to compete with the economy’s dominant players’*. This is in reference to the ‘Big Five – Apple, Alphabet (Google), Microsoft, Amazon and Facebook. The article goes on to say that *‘In the industrial economy, the benefits were spread widely among companies, employees, and consumers. The digital economy is giving us a world in which the benefits are concentrated among consumers and the Big Five who serve them’* (Surowiecki J 2017 MIT Technology Review Vo. 120 No. 4 July/ Aug).

Can the competition clauses in the GATS be used to tackle this increasing concentration? Art VIII.5 on ‘Monopolies and Exclusive Service Suppliers’ says that a Member’s monopoly suppliers cannot act in a manner inconsistent with its obligations.

GATS Art IX (Business Practices) recognises that certain business practices may restrict trade in services. It allows for consultations *‘with a view to eliminating (such) practices...’*.

In the E-commerce Work Programme discussions, it was noted that *‘monopolies and restrictive business practices might pose obstacles to electronic commerce and that this issue needed further examination’* (S/L/74).

### **2. Council for Trade in Goods (CTG)**

#### **a. Areas of Agreement**

##### **GATT COVERAGE OF PHYSICAL GOODS**

In the course of the Work Programme discussions, there was agreement that *‘goods that were sold or marketed by electronic means, but still delivered physically across borders, would be subject to the existing WTO commitments and provisions related to trade in goods, e.g. customs duties’* (G/C/W/158, 26 July 1999, para 4.2).

#### **b. Areas Requiring Further Discussion**

##### **CLASSIFICATION/ VALUATION**

There were several questions over classification and electronic transmissions (see G/C/W/158):

- Is content transmitted electronically always a service? Are there times it is still considered a good? Or could this content be something else other than a service or good?
- It was observed in the discussions that electronic transmissions are not in the HS code. Is this a problem? Should the HS codes be updated or should the electronic transmission be classified as a book or a dress (even though it is in ‘soft’ copy) etc.?
- Is the electronically transmitted product and the physical product ‘like’ products to be treated in the same way?
- It was also noted that it would be difficult to assess the value of the electronically transmitted content.

Clearly as the digital economy evolves, these questions must be discussed to provide more certainty to existing WTO rules.

## OTHER ISSUES

It was also underscored in the Work Programme discussions that when the classification issue has been clarified in the area of the GATT, it will then be easier for some other issues to be brought forward for discussion – rules of origin, valuation issues etc.

### 3. Council for TRIPS

Several issues in relation to intellectual property and the E-Commerce have been brought to the table. However, the discussions on the Internet and Intellectual Property have been developed mostly in the WIPO – for example in the Standing Committee on Trademarks, and the Advisory Committee on Enforcement. The TRIPS Council can be kept abreast of these developments, but there is no need to duplicate those discussions in the TRIPS Council.

## COPYRIGHT

Brazil recently submitted a proposal (JOB/GC/113, JOB/IP/19, 15 Dec 2016) highlighting the need in the IP (intellectual property) system for

- More transparency in the area of copyright and related rights in the digital environment.
- Balance of rights and obligations – intellectual property obligations should not exclude the possibility for Members to enjoy exceptions and limitations to their intellectual property obligations. Those exceptions and limitations available for material in physical formats should also be available in the digital environment.
- The issue of territoriality of copyright – whilst the digital environment is borderless, the copyright system is based on national laws. This raises questions relating to remuneration.

Discussions on this issue have also been taking place primarily at the WIPO. Discussions can take place at the WTO, but once again, there is no need to duplicate these efforts.

## OTHER ISSUES

There are also various other issues (JOB/GC/73 ‘Background Information by the Secretariat’, 6 Feb 2015):

- Liability of internet service providers – whether and under what conditions, Internet Services Providers (ISPs) are liable for IP infringing content which they may have hosted;
- Online exhaustion – whether the principle of exhaustion applies equally to a product distributed electronically as compared to one distributed on a physical carrier medium.

## NEW TECHNOLOGIES AND ACCESS TO TECHNOLOGIES

It has been noted in the E-Commerce Work Programme discussions that the TRIPS Agreement and a functioning intellectual property regime should play a role *‘in promoting technological development, including in connection with electronic communications networks, facilitating access to technology, requiring disclosure of new technology, requiring under Article 66.2 incentives for promoting and encouraging technology transfer to least-developed country Members, and providing for measures and international cooperation to deal with anti-competitive practices relating to the transfer of technology’* (IP/C/18, para 8, 30 July 1999, ‘Progress Report to the General Council’).

As noted earlier, given the role of technology in the digital economy, the importance of this discussion cannot be over emphasised.

### 4. Committee on Trade and Development (CTD)

The Committee on Trade and Development was tasked in the Work Programme (WT/L/274) to *‘examine and report on the development implications of electronic commerce, taking into account the economic, finance and development needs of developing countries’*.

**FURTHER WORK /DISCUSSIONS / SEMINARS ON THE DIGITAL DIVIDE, IMPLICATIONS OF E-COMMERCE ON DEVELOPING COUNTRIES ETC**

In the E-Commerce discussions in the CTD, a major issue discussed has been the digital divide and its implications (WT/COMTD/26, 13 Nov 2000). This digital divide remains highly relevant today.

A whole range of issues can be addressed under this issue of the digital divide. In fact, the CTD proposed a number of issues that should be taken up for further study (see WT/COMTD/19, 15 July 1999). The box below provides the mandate for studies that should still be taken up (highlighting most of what had been suggested by the CTD in 1999):

Annex: Contribution by the Committee on Trade and Development to the WTO Work Programme on Electronic Commerce 15 July 1999 (WT/COMTD/19)

'Section E: Illustrative list of points for which further study has been proposed

7. What human resource development requirements are needed to address the needs of developing countries in e-commerce?

9. Further work on the issue of infrastructure development should be undertaken. The need and possibilities for technical assistance should be investigated.

10. What will be the effects of e-commerce on modes of supply such as commercial presence and the movement of natural persons?

11. Would unrestricted, unregulated electronic commerce provide increased market access for enterprises in developing countries?

12. How can developing country enterprises compete in e-commerce? What will be the impact of e-commerce on domestic producers in specific sectors?

13. How will supply and demand for particular goods and services be affected by electronic commerce on a disaggregated level? What are the substitution effects of e-commerce in trade? What effects will e-commerce have on competition in different sectors?

15. How will e-commerce affect Members' obligations and commitments in the WTO Agreements?

16. What impact is electronic commerce likely to have on customs revenue in developing countries? How significant are the duties on particular products traded electronically in specific countries? What is the likely effect of liberalization on revenues? How should fiscal policies relating specifically to customs duties be established in relation to e-commerce?

*Source: WT/COMTD/26 13 November 2000*

In 2001, the possible themes for seminars to be held in the CTD included what is contained in the box below:

WT/COMTD/35 (19 December 2001) provides a summary of the discussions in the CTD on E-Commerce. It notes that

'In order to allow for a more thorough analytical and educational process, delegations have asked for additional seminars on e-commerce and development. Approximately one seminar a year could be envisaged under the auspices of the CTD. Possible themes for seminars include:

**Revenue Implications:** A seminar could be organized dealing with the question of the revenue implications of e-commerce. For example, people and agencies who have done work on the likely effects of electronic commerce on customs revenue in developing countries could be invited to present their work and reply to questions.

**Effects on competitiveness:** A seminar could be organized to respond to the questions of: How can developing country enterprises compete in e-commerce? What will be the impact of e-commerce on domestic producers in specific sectors, in particular on the development of small-and medium-sized

enterprises in developing countries? How will supply and demand for particular goods and services be affected by electronic commerce on a disaggregated level? What are the substitution effects of e-commerce in trade?

**Physical infrastructure needs and development.** A seminar could be organized on physical infrastructure for e-commerce dealing with the questions of: What are developing countries doing and what should they do with respect to infrastructure development? What needs and possibilities exist for technical assistance in the area of infrastructure development? How can developing countries ensure access to infrastructure and technology, including transfer of technology?

**Human infrastructure needs and development.** A seminar could be organized on human infrastructure for e-commerce dealing with the questions of : What are the human resource requirements to address the needs of developing countries in e-commerce? How can e-sources be used to address these needs, for example in education?

*Source: WT/COMTD/35, 19 December 2001*

## **DIGITAL INDUSTRIALISATION**

The African Group had organised a seminar at the WTO on 29 June 2017 on E-commerce and Development, focusing in particular on Digital Industrialisation. Given the structural transformation agenda of Africa, many of the questions highlighted for study by the CTD 16 - 17 years ago (in the boxes above) remain extremely relevant if not even more so today:

- How is 'Industry 4.0' changing the strategies of industrialisation? What are the building blocks for this new digital industrialisation? What implications for developing countries?
- Data is critical to this new digital revolution – what kinds of data strategies can be implemented by developing countries so that their firms can also enter into the data industry: data analytics - mining and processing of data, and thus also supply in real time, data-driven industrial products and services?
- What are the implications of the new emerging technologies (e.g. Artificial Intelligence being imbibed in many goods and services; virtual reality etc) on the digital divide and what strategies are needed to narrow the digital divide? What concrete actions can be taken for technology transfer?
- What are the challenges for developing countries resulting from the changed business models eg. Rise of the platform economy especially in critical sectors eg. Financial, health etc.
- What are the implications of the algorithms used in marketing and sales? Are there differentiated implications for developing countries?
- What are the best practices, policies and programmes that have been used to jump-start digital industrialisation?

## **C. CONCLUSIONS AND OPTIONS**

All Members big or small must confront the challenges of E-Commerce and, as far as is possible, put in place domestic policies and programmes to engage in digital industrialisation so that they too can be part of Industry 4.0. In fact, there is no other choice. Consumers in all countries including the developing world will want to consume the latest digital products.

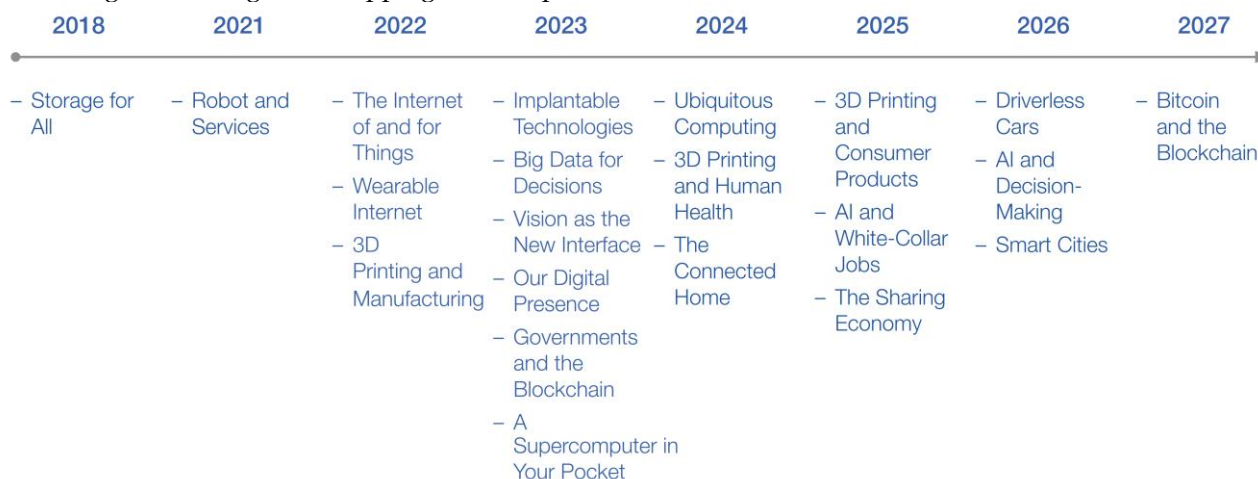
In this context, the challenges for most developing countries are daunting: from infrastructure, to technology, skills, and resources – human and financial etc.

At the WTO, there has been an unhelpful confusion between E-Commerce per se, and the new E-Commerce rules put forward by some proponents. The two have been conflated, one is equated with the other: If a country says no to the new E-Commerce rules, they are told that they are in denial of the inevitability of E-Commerce and that somehow they are saying no to E-Commerce and the emerging digital economy!



E-Commerce and the development of the Digital Economy is undeniable. In fact today, we are only at the fringes of what digitalisation will do and mean to the economy and society. The developments will rapidly accelerate in the very near future. The following diagram from the World Economic Forum provides a rough idea of the changes that may lie ahead.

Technologies - Average Year Tipping Point Expected to Occur<sup>17</sup>:



Whilst all developing countries must engage, the competitive challenges have increased multiple-fold. The challenge to industrialise is exponentially harder. Manufacturing and services are now intertwined with digitalisation – making ‘smart’ goods and imbuing Artificial Intelligence and other technologies in just about every good and service. The big companies (particularly the Big Five plus those that follow closely behind) have deep pockets and are based in countries with established infrastructure.

One option proponents are likely to suggest in MC11 is to begin negotiations in new E-Commerce rules that are completely divorced from the existing WTO rules that we already have, and which have the potential to completely open up markets unlike the GATS’ slower progressive liberalisation model. The starting point for the new rules could look fairly innocent e.g. rules about SPAM or consumer protection. In return, proponents will promise to simultaneously support developing countries in navigating the enormous digital divide. These promises of aid of various forms may be appealing to countries which have been left behind. Whether the promises can be satisfactorily fulfilled is another question. Is this a wise option? Can the many countries that are light years behind the forerunners be competing effectively with the giants with some infusion of aid? In any case, what has been the track record of providing aid? Why did the Digital Solidarity Fund established in 2005 at the time of the Tunis Agenda (para 28) close down in 2009? How is it that ITU’s existing Connect 2020 Agenda remains unable to meet its connectivity targets?

The other option is being proposed in this paper: for developing countries to support the discussions under the existing 1998 Work Programme to clarify the applicability of current WTO rules to E-Commerce. These existing rules, unlike the new rules proponents would eventually want to bring into the WTO, are about incremental or progressive liberalisation. The progressive approach, where WTO Members can negotiate liberalisation sector by sector (GATS positive list approach), can be adjusted to the timing of developing countries’ infrastructure, technological and skills development, and the building of their own domestic / regional digital industrialisation capabilities. Developing countries

<sup>17</sup> World Economic Forum 2016 ‘Deep Shift Technology Tipping Points and Societal Impact’, Survey Report, September 2015, Global Agenda Council on the Future of Software & Society, [http://www3.weforum.org/docs/WEF\\_GAC15\\_Technological\\_Tipping\\_Points\\_report\\_2015.pdf](http://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf)



should use this breathing space to develop their own data industry, build their own domestic / regional platforms (before their consumers buy in completely to the global platforms), and actively start inserting themselves into digital industrial production. The WTO can support these efforts by supporting technology transfer arrangements, exchange of best practices in policies, programmes and regulations.

These two options or approaches to E-commerce are in essence, once again, a fight over markets - who gets developing countries' markets in the digital era. The decision taken on E-Commerce at MC11 will determine the answer to this question for decades to come.



**ANNEX 1: WORK PROGRAMME ON ELECTRONIC COMMERCE WT/L/274****WORLD TRADE  
ORGANIZATION****WT/L/274**  
30 September 1998  
(98-3738)**WORK PROGRAMME ON ELECTRONIC COMMERCE**Adopted by the General Council on 25 September 1998

1.1 The Declaration on Global Electronic Commerce adopted by Ministers at the second session of the Ministerial Conference urged the General Council to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries, and to report on the progress of the work programme, with any recommendations for action, to the Third Session. The General Council therefore establishes the programme for the relevant WTO bodies as set out in paragraphs 2 to 5. Further issues may be taken up at the request of Members by any of these bodies. Other WTO bodies shall also inform the General Council of their activities relevant to electronic commerce.

1.2 The General Council shall play a central role in the whole process and keep the work programme under continuous review through a standing item on its agenda. In addition, the General Council shall take up consideration of any trade-related issue of a cross-cutting nature. All aspects of the work programme concerning the imposition of customs duties on electronic transmission shall be examined in the General Council. The General Council will conduct an interim review of progress in the implementation of the work programme by 31 March, 1999. The bodies referred to in paragraphs 2 to 5 shall report or provide information to the General Council by 30 July 1999.

1.3 Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The work programme will also include consideration of issues relating to the development of the infrastructure for electronic commerce.

1.4 In undertaking their work, these bodies should take into account the work of other intergovernmental organizations. Consideration should be given to possible ways of obtaining information from relevant non-governmental organizations.

**Council for Trade in Services**

2.1 The Council for Trade in Services shall examine and report on the treatment of electronic commerce in the GATS legal framework. The issues to be examined shall include:

- scope (including modes of supply) (Article I);
- MFN (Article II);
- transparency (Article III);
- increasing participation of developing countries (Article IV);
- domestic regulation, standards, and recognition (Articles VI and VII);
- competition (Articles VIII and IX);
- protection of privacy and public morals and the prevention of fraud (Article XIV);
- market-access commitments on electronic supply of services (including commitments on basic and value added telecommunications services and on distribution services) (Article XVI);
- national treatment (Article XVII);
- access to and use of public telecommunications transport networks and services (Annex on Telecommunications);
- customs duties;
- classification issues.





### **Council for Trade in Goods**

- 3.1 The Council for Trade in Goods shall examine and report on aspects of electronic commerce relevant to the provisions of GATT 1994, the multilateral trade agreements covered under Annex 1A of the WTO Agreement, and the approved work programme. The issues to be examined shall include:
- market access for and access to products related to electronic commerce;
  - valuation issues arising from the application of the Agreement on Implementation of Article VII of the GATT 1994;
  - issues arising from the application of the Agreement on Import Licensing Procedures;
  - customs duties and other duties and charges as defined under Article II of GATT 1994;
  - standards in relation to electronic commerce;
  - rules of origin issues;
  - classification issues.

### **Council for TRIPs**

- 4.1 The Council for TRIPs shall examine and report on the intellectual property issues arising in connection with electronic commerce. The issues to be examined shall include:
- protection and enforcement of copyright and related rights;
  - protection and enforcement of trademarks;
  - new technologies and access to technology.

### **Committee for Trade and Development**

- 5.1 The Committee on Trade and Development shall examine and report on the development implications of electronic commerce, taking into account the economic, financial and development needs of developing countries. The issues to be examined shall include:
- effects of electronic commerce on the trade and economic prospects of developing countries, notably of their small- and medium-sized enterprises (SMEs), and means of maximizing 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 information technology 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.



**ANNEX 2: INDIA'S INTERVENTION AT CSC INFORMAL MEETING ON 17 JULY 2017**

Good morning Chair and Thank you for your invitation to attend this informal consultation along with other members to discuss the future work of the Committee pursuant to its mandate.

Today, I would like to take this opportunity to share our thoughts on three important issues relevant for the working of this Committee, including those on which we have spoken earlier, not just in the meetings of this committee but also in other relevant Services forums at various points in time.

**I. New Services**

Let me first come to the issue of "new services". In our view, there are two distinct issues in this regard. One, there has been rapid evolution of 'new' service sectors. In fact after the CPC provisional (which was the basis for countries' Uruguay round commitments), a number of new classifications have been developed by the UNSD - for instance, CPC Version 1.0; CPC Version 1.1; CPC Version 2.0; and CPC Version 2.1. In this regard, we reiterate that while we are extremely appreciative of the work of the UNSD, the same is purely for statistical purposes and the scope of the existing commitments cannot be extended to new services. Members have undertaken commitments based on a positive list approach with the services committed according to the classification in W/120 which is based on CPC prov. Services that had not existed at that point in time were not mentioned in the CPC and therefore in W/120, and were clearly beyond a Member's contemplation. Clearly there is a temporal aspect to the existing commitments.

The second issue in this regard is the rapid evolution in the modes of delivery of existing services, thanks to emerging technology. We note there have been papers by the Secretariat in the past emphasizing on the principle of 'technological neutrality', which would imply that the GATS is technologically neutral and that means of delivery of services does not alter the scheduled commitments. In this regard, we urge members on the need to think of implications of this principle when technology results in a manner of service delivery that simply could not have been conceptualized in 1994 when commitments were taken. This is perhaps most stark in the context of 'Construction services'. If a Member specified restrictions on Mode 3 market access, it would mean that anyone undertaking 'Construction services' in the territory of that Member is expected to adhere to the specified market access limitations. In 1994, when commitments were made, if the same Member had specified 'None' for Mode 1, it would mean that any advisory or consulting activity on Construction, which was the only possible way in which to deliver the service under Mode 1, has no restrictions. But evolution of technology has made it possible for techniques like 3-D printing that has simply challenged our very notions of what may be done through Mode 1. This was simply inconceivable at the time of making commitments in 1994. The Mode 3 MA restrictions can now effectively be circumvented if we were to take the interpretation that the expression "None" in Mode 1 allows execution of Construction activity, through 3-D printing. In this scenario, should a "None" specification for Mode 1 in 1994, be allowed to defeat the Mode 3 restrictions on the undertaking of construction services through physical presence in the territory of a Member? We do not think the answers are straightforward and require deeper thinking on the implications of any over-broad interpretations.

Any discussion on this subject needs to keep its central focus on the very essence of positive list of commitments which is rooted in Members knowing the implications of what they are committing. The purpose of being able to specify limitations under Article XVI (Market Access) and Article XVII (National Treatment) is that Members can reserve policy space not only for existing, but also in respect of future measures. We highlight the need for a cautionary approach that ensures that this right is not extinguished because a Member did not anticipate how services may evolve. We would also like to caution that any broad interpretation to assume commitments on 'new services' is likely to have unintended consequences: for instance, it could lead to a regulatory freeze, i.e., Members may hesitate to regulate even for legitimate policy objectives for fear of violating a commitment. Equally, in any exercise for future liberalization, there will be a temptation of specifying overarching limitations, to preserve as much policy space for new developments, which dilute the ambit of specific commitments. A balanced approach is therefore critical so as not to make scheduling unnecessarily complicated.

Clearly, these are important issues which call for further in-depth discussion amongst the membership.

