

WTO NEGOTIATIONS ON E-COMMERCE: SOME MYTHS BUSTED

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Myth: Developing countries have lots to gain from e-commerce, hence it is in their interest to negotiate binding rules on e-commerce

Developing countries must distinguish between gains from e-commerce *per se* and the impact of *WTO negotiations* on e-commerce. Even without multilateral rules, global e-commerce market, including cross-border e-commerce, has shown impressive growth. It is poised to grow at a faster pace in the coming few years. There is little in the proposals on e-commerce at the WTO, which could impart *significant additional momentum* to an already dynamic market. On the other hand, the outcome of the negotiations are likely to prevent redistribution of gains from e-commerce in favour of the developing countries. Binding rules on e-commerce would also prevent developing countries from following a digital industrial policy to catch-up with the developed world.

If negotiations on e-commerce are initiated at the WTO, then it is likely that the some of the provisions on e-commerce and telecommunications, as contained in the TPP, will form the basis of negotiations. The rules that are likely to emerge from the negotiations could require countries to adhere to the following: provide free flow of data, prohibit localisation of data and servers, prohibit any requirement for transfer of technology, mandate sharing of telecom infrastructure, non-discrimination in sale of spectrum etc. These provisions are unlikely to significantly enhance cross-border e-commerce. Instead, they will result in reducing the cost of operations of the global digital giants and raise their revenue. This will also make it more difficult for a new firm in digital business space in a developing country to establish and sustain itself.

The outcome of negotiations would require developing countries to give raw material of digital/information economy for free to global e-commerce giants, and would severely curtail the policy space of developing countries to nurture their domestic firms in the digital arena. On the other hand, the provisions are likely to mostly benefit the global e-commerce giants by limiting/eliminating competition from firms in developing countries and lowering the cost of their global operations.

Far from gaining from the outcome of negotiations on e-commerce, WTO rules on e-commerce would require developing countries to act against their own national interest and development priorities. Gains, if any, on this issue are likely to be extremely limited. It may not be in the interest of most developing countries to support negotiations on e-commerce.

Myth: If developing countries do not support WTO negotiations on e-commerce, then the world will move ahead and they will be left behind

Participation in e-commerce and benefitting from it is entirely different from gaining from binding WTO rules on e-commerce. No doubt, developing countries have been gaining from e-commerce. But the outcome of negotiations would be against the interest of most developing countries. As pointed out by Azmeh and Foster, economists at the LSE, in some of the key areas

relevant to the digital economy, policy space exists for late-comers to implement "digital industrial policy" to achieve technology catching-up with advanced economies. Many policy tools including "data localisation requirements, internet filtering and technology transfer conditions" have been used to promote national digital firms. The authors conclude that the digital trade agenda of US digital firms could "hinder the ability of catching-up countries to implement digital industrial policy in the future". The outcome of any WTO negotiations on e-commerce should be viewed from this perspective. Developing countries must not fall in the trap of believing that they would be left behind if they do not support the negotiations on rules on e-commerce. In fact, it is likely that the WTO rules on e-commerce will constrain them to fall further behind the developed countries.

Myth: If developing countries oppose negotiations on e-commerce, then the developed countries and other demandeurs will negotiate a plurilateral agreement on e-commerce

Given the power of WTO's Dispute Settlement Understanding , the developed countries would want to have rules on e-commerce within the WTO, and not outside it. Developing countries must not believe the threat of the developed countries that they will negotiate rules on e-commerce outside the WTO. Even if the negotiations start in a plurilateral mode, it would be difficult to conclude these negotiations, unless most of the emerging economies are on board. Further, the developed countries seek to target the existing, and progressively expanding, consumer base in the developing countries for e-commerce. If some of the larger developing countries do not join the plurilateral agreement, then one of the fundamental objectives of the developed countries in the negotiations would not be achieved. It is, therefore, unlikely that plurilateral negotiations on e-commerce would be an effective final option for the developed countries.

Myth: By participating in WTO negotiations on e-commerce, developing countries will be able to mould the negotiations according to their interests

A common argument made by some countries is that by agreeing to initiate negotiations at the WTO, developing countries would be able to influence the outcome of negotiations. In reality, this is just wishful thinking. In case negotiations commence, the final outcome would be almost entirely determined by the developed countries. Developing countries have rarely, if ever, managed to exert substantial influence on core issues in the final outcome of the multilateral negotiations and GATT/WTO. At best, they have managed to secure a few special and differential treatment provision. Given the pronouncements of EU Trade Commissioner in April 2016, it is extremely unlikely that in future special and differential treatment provisions will be available to all developing countries. Further, if the developing countries do manage to push their negotiating agenda and the negotiations start going against the core interests of the developed countries, the developed countries would just walk away from the negotiating table and not conclude the negotiations (as was the case on Agriculture in the Doha Round). It is, thus, a mere illusion that developing countries would be able to mould the substantive outcome of the negotiations on e-commerce in accordance with their own national interests.

Myth: Negotiations on e-commerce would benefit the MSME

Considerable literature is now available (see, for example LaVecchia and Mitchell, Lina Khan in Yale Law Journal) documenting how the MSMEs are adversely affected by many business practices of giant platform owners who are also e-retailers, including through the following:

- a) Vertical integration in retail and physical delivery may enable the platform owners/giant e-retailers to leverage cross-sector advantages in ways that are potentially anticompetitive;
- b) Platform owners/ giant e-retailers have opportunities to abuse cross-market advantages and foreclose rivals;
- c) Since the platform owners/giant e-retailers command a large share of e-commerce traffic, many smaller merchants find it necessary to use their sites to draw buyers, despite the small merchants and e-retailers being competitors;
- d) One of the platform owner/giant e-retailer seems to use its marketplace “as a vast laboratory to spot new products to sell, test sales of potential new goods, and exert more control over pricing”;
- e) One of the platform owner/giant e-retailer "uses sales data from outside merchants to make purchasing decisions in order to undercut them on price”;
- f) One of the platform owner/giant e-retailer gives its own items prominent placement under a given search, disadvantaging small merchants; and
- g) In some instances, a platform owners/giant e-retailer has responded to popular third-party products by producing them itself, thereby adversely affecting MSME producers and traders;

In a nutshell, a platform owner/giant e-retailer is exploiting the fact that some of its customers are also its rivals. In a note in the Yale Law Journal Lina Khan identifies the following three sources of this power: "(1) its dominance as a platform, which effectively necessitates that independent merchants use its site; (2) its vertical integration—namely, the fact that it both sells goods as a retailer and hosts sales by others as a marketplace; and (3) its ability to amass swaths of data, by virtue of being an internet company. Notably, it is this last factor—its control over data—that heightens the anticompetitive potential of the first two."

Given the power of platform owners/giant e-retailers over MSME producers and traders, it is unlikely that the outcome of negotiations will in any manner change this existing reality. It may, therefore, not be correct to assert that MSMEs would benefit significantly from the outcome of negotiations on e-commerce.

Myth: It is in the interest of developing countries to support free flow of data

An argument made by some countries that benefit from exports of IT and IT-Enabled Services is that it is in their interest to support free flow of data. These countries argue that restrictions imposed on free flow of data by some developed countries prevent outsourcing of business from these countries (mainly the EU) to the developing countries. Thus, a provision on free flow of data would help the developing countries to secure outsourcing business from the EU. Another strand of argument on this issue is that if free flow of data is not made mandatory, then countries would impose restrictions on data flows. This could adversely affect exports of IT and IT-

Enabled Services, as well as products embodying components that rely on cross-border data flows. These arguments are flawed from many perspectives.

First, it is extremely unlikely that WTO negotiations will result in an unconditional and absolute prohibition on measures restricting data flows. A more likely outcome would be a general prohibition on measures restricting free flow of data. However, given the strong concerns in the EU on data security and privacy, the general prohibition is likely to be accompanied with exceptions permitting countries to impose restrictions on free flow of data for protecting privacy. Thus, the gains that exporters of IT and IT-Enabled Services hope to make on account of business outsourcing by the EU, from a provision mandating free flow of data, is extremely unlikely to materialise.

Second, supporting free flow of data solely on the premise that it will facilitate exports of IT and ITES ignores the emerging reality that with increasing automation, the possibility of developing countries gaining from IT and ITES exports would decline in the future.

Third, another argument made is that those developing countries which have immense capabilities in software programming would gain from free flow of data. This argument, too, ignores the emerging reality that increasingly software writing is getting automated. Countries that have the human resources in programming, may not continue to enjoy gains from it in the future, if programming becomes automated.

Fourth, a prohibition on measures restricting free flow of data will result in developing countries gifting away the raw material of digital economy/ information age - data- to the global e-commerce giants for free. Using the raw material (i.e. data) obtained from the developing countries for free, the global giants would subsequently export digital products (goods and services) to the developing countries. The developing countries would have to pay for these products and services, which would be based on data obtained from them for free. This pattern of trade will put immense pressure on balance of payment position of most developing countries.

Fifth, superficially, there may be some merit in the argument that if free flow data is not made mandatory, then developed countries could impose restrictions on data flows thereby adversely affecting exports of developing countries. However, even today when there is no prohibition on measures restricting data flows, with the exception of the EU, other developed countries have not imposed restrictions on data flows. Given the fact that success of global e-commerce giants (mostly based in the developed countries) is underpinned by access to free flow of data, it is extremely unlikely that the developed countries will impose restrictions on data flows in the future. In the unlikely event of the developed countries imposing restrictions on data flows in the future, developing countries could respond by imposing restrictions on outflows of data from their territories.
