

## Electronic Commerce

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*With the 11<sup>th</sup> WTO Ministerial Conference approaching, many member countries are engaging in a tug of war whether or not to discuss rules for global e-commerce. While the focus is on accelerating cross-border e-commerce trade, it must not result in backdoor multilateral liberalisation of industrial goods and services.*

### Introduction

E-commerce, an industry worth US\$22tn in (2016)<sup>[1]</sup>, has become a buzzword, both for consumers and businesses. The increasing contribution of e-commerce to global trade has prompted many policymakers to call for rules for cross-border e-commerce, at various levels, including now within the multilateral trading system.

The importance of e-commerce in trade may be assessed from its inclusion as a standalone chapter in new trade agreements, such as Singapore-Australia Free Trade Agreement (FTA), South Korea-Singapore FTA, US-South Korea FTA, the Trans-Pacific Partnership.

The first effort to adopt multilateral rules for e-commerce is traced back to 1998 with the establishment of a 'Work Programme on E-Commerce', following which the programme was discussed during the WTO ministerial conferences at Doha (2001), Hong Kong (2005), Geneva (2009 and 2011), Bali (2013) and Nairobi (2015).

With e-commerce is expected to be discussed at the 11<sup>th</sup> WTO Ministerial Conference at Buenos Aires in December 2017, countries are gearing up to engage with others in support or against having a multilateral mandate to negotiate.

### A Quick Recap

While the scope of proposed discussions on e-Commerce is limited to 'examining all trade-related issues relating to global electronic commerce', a few WTO members such as US<sup>2</sup>, Japan<sup>3</sup>, Canada, Australia, Chile, Korea, Norway, Paraguay and European Union (EU)<sup>[4]</sup> have been exerting substantial pressure to start negotiations for multilateral rules on trade-related aspects of e-commerce through their proposals submitted to the WTO.

On the other hand, a number of other members such as India, the African Group have argued against such a mandate for negotiations, claiming the existing scenario as premature. China has emphasised on prioritising easy issues first, for rule setting, to avoid conflicts among members at the multilateral

trading system. Some major issues are as follows

## **‘Open’ Source Code**

Software and algorithms are critical elements for e-commerce industry, as they assist in defining competitive edge. Since most of the bigger players in global e-commerce industry are from developed countries, it seems obvious for the US, EU, Japan to favour a mandate against handover of source code or proprietary algorithms to governments or competitors.

Their argument rests on the following:

- forcing handover of codes and algorithms to governments or local companies will possibly disrupt fair competition
- granting preferential market access (PMA) on the basis on open source codes gives foreign entities limited choice of either revealing their trade secret or falling behind the local players on market access

On the other hand, policies of a number of developing countries, such as China, Brazil mandate foreign entities to reveal their source code for granting market access. Few others, like India, South Africa, Russia, Indonesia, do not mandate source code revelation and have adopted policies favouring open source software for government procurements, thereby creating disincentives for proprietary software. Many others have provisioned a PMA to software with open source code.

The underlying rationales behind such policies are as follows:

- meeting legitimate regulatory and policy objectives like cyber security, conformity to standards, tackling deceptive practices, etc.
- incentivising indigenous innovation or pruning outlays on licensing fee for proprietary software
- avoiding future monopolies
- protecting smaller indigenous players from being decimated or bought out by the bigger players from developed nations
- access to source code and proprietary software will assist developing countries to come in forefront of new technologies
- protectionist aspect of source code may vastly favour companies from the developed world, meaning enhanced revenues being transferred from developing to developed world

There have been opinions that source code revelation aid cyber-attacks, while counter opinions state that it equally enhancing helps in defence capacity. This is because continuous peer reviews eliminate defects, which otherwise go unnoticed.

## **Data Flows and Server Localisation**

The rising economic value of data, along with the need to protect consumer data and data sovereignty, has prompted many countries to enact laws curbing cross-border data flow, while mandating organisations to establish servers and

data centres to process and store a copy of data locally.

Many developed countries, such as the US, Japan, EU, have opposed such restrictions. The US, through its submission of a non-paper to the WTO, has argued that:

- blocking data flow is disadvantageous for digital entrepreneurs and micro, small and medium enterprises (MSMEs) while also stifling competition
- it requires developing expensive physical infrastructure (servers and data houses) for companies, which may operate from anywhere through cost effective technologies, such as cloud computing
- free flow of data promotes better participation in global value chains

Contrary to such an opinion, developing countries, such as China, Russia, Vietnam, have enacted extensive data localisation laws. Some laws also mandate government or user consent for data transfers or restricted access to certain websites, thereby impeding cross-border data flows.

The rationales of these countries are as follows:

- protecting national security, consumer needs and their privacy
- incubating, sustaining and protecting domestic companies, particularly Startups and MSMEs from technologically superior transnational corporations
- avoiding data colonisation

- ensuring their jurisdiction over any data related disputes

Given this divergent opinion, the future debate on e-commerce should not compromise on data security and sovereignty, and should ensure fair competition in the market.

## **Customs Duties and Non-discrimination**

The US, along with the EU and Japan, is advocating for prohibition of custom duties on digital products and adoption of non-discriminatory principles on global trading system for goods and services. This would mean applications of the principles of National Treatment and Most-Favoured-Nation (MFN).

Their argument is based on the following:

- it will facilitate companies from developed nations to have deeper inroads into developing nations, thus enhancing their outreach and lowering cost of operations
- reduction/elimination of remote taxation and non-discrimination between local and remote entities will present greater opportunities and outreach for companies from developing countries including Least Developed Countries (LDCs), especially the MSMEs

However, few developing countries, like India, are unwilling to consider such provisions. The reason for this may be attributed to factors such as:

- no custom duties may obstruct the ambition of a country to enhance its manufacturing capacity
- it would result in diminished custom revenues and direct competition with global leaders, most of which are from developed countries
- absence of any safeguard mechanism for MSMEs will lead to their extinction or acquisition owing to unfair competition and technological constraints
- it may lead to expansion of scope, from digital products to other sectors, such as more and more tariff lines of industrial products may be asked to be considered for duty-free access, which will adversely impact future industrialisation of developing countries including LDCs
- it may also lead to the establishment of a free (from all conditions) and parallel trade route
- no proposal from developed countries refer to the aspect of lowering *de minimis* for their own markets to facilitate e-commerce in their own economies as well as those of developing countries including LDCs

## Way Forward

There is a split among some developed and developing countries about the treatment of trade-related aspects of e-commerce. At the same time and provided that there is concrete progress of developing countries' demands on agriculture, the MC11 may have a decision to establish a Working Group on Trade-related Aspects of E-Commerce.

Keeping that in mind and from the point of view of harnessing the potential of e-commerce for consumer as well as producer (particularly MSMEs) welfare, there should be:

- due consideration to concerns expressed by developing countries including LDCs
- deeper studies on socio-economic impacts of issues such as source code revelation, lowering custom duties, restrictions on cross-border data flow
- provisions for technology as well skills transfer from the developed to the developing world
- avoidance of 'winner takes all' scenario and facilitating adequate room for smaller indigenous companies from the developing world to take effective part in GVCs

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This Viewpoint Paper has been written by Rohit Singh, Policy Analyst and Sidharth Narayan, Research Associate, CUTS International. D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India. Ph: 91.141.228 2821, Fax: 91.141.228 2485, Email: [cuts@cuts.org](mailto:cuts@cuts.org), Web Site: [www.cuts-international.org](http://www.cuts-international.org).

Also at Delhi, Calcutta and Chittorgarh (India); Lusaka (Zambia); Nairobi (Kenya); Accra (Ghana); Hanoi (Vietnam); and Geneva (Switzerland).