

E-commerce in the World Trade Organization:

History and latest developments in the negotiations
under the Joint Statement

January 2020

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1.0 Introduction

The surging growth of the Internet has spurred changes in business models and fueled the proliferation of e-commerce. During the Internet's early days in the 1990s, analysts identified a number of benefits likely to be associated with e-commerce, such as: shrinking the distance between producers and consumers, reducing costs and barriers to entry and offering small and medium enterprises (SMEs) many of the advantages enjoyed by their larger counterparts. (International Centre for Trade and Sustainable Development [ICTSD], 2017; Organisation for Economic Co-operation and Development [OECD], 2019a). As telecommunications and digital capacities continued their rapid evolution, e-commerce accelerated, offering new opportunities for growth and economic development (Kende & Sen, 2019). As quickly as it became a defining feature of domestic and cross-border trade and production methods, e-commerce has become one of the top items on policy-makers' agendas at the national, regional and international/multilateral levels since the mid-1990s (ICTSD, 2017; OECD, 2019a).

Electronic commerce was first recognized in the context of the World Trade Organization (WTO) at the Second Ministerial Conference in May 1998 in Geneva, where ministers adopted the Declaration on Global Electronic Commerce calling for the establishment of "a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members." The Declaration added: "the work programme will involve the relevant World Trade Organization ("WTO") bodies, take into account the economic, financial, and development needs of developing countries, and recognize that work is also being undertaken in other international fora" (WTO, 1998a). The WTO Work Programme on E-Commerce was established by the General Council (GC) in September 1998. It defined e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means" (WTO, 1998). This definition is considered broad compared to definitions used by other international organizations and forums. (See Box 1 discussing competing definitions and terms involving e-commerce).

Almost 20 years after the WTO's Second Ministerial, the world is witnessing an explosive growth in e-commerce activities. According to the U.S. International Trade Commission (USITC) (2017), global e-commerce grew from USD 19.3 trillion in 2012 to USD 27.7 trillion in 2016. Estimates from the United Nations Conference on Trade and Development (UNCTAD, 2019) place the global value of e-commerce at USD 29 trillion in 2017. The e-commerce landscape is continuously evolving, with new players, ways of doing business and policies emerging (OECD, 2019a). A recent study conducted by CUTS International found that as of June 2019, 84 regional trade agreements (RTAs) included e-commerce provisions either as standalone chapters or as dedicated articles and 60 per cent of those RTAs entered into force between the years 2014 and 2016 (Gaitan, forthcoming). This shows the growing interest in regulating cross-border e-commerce in recent years.

At the Eleventh Ministerial Conference in Buenos Aires on 13 December 2017, 71 WTO Members confirmed their intention to advance on the e-commerce front in the WTO and released the first Joint Statement on Electronic Commerce. The group stated that it planned to “initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce” (WTO, 2017). After a year of discussions, the number of signatories increased to 76 WTO Members, which issued a second Joint Statement in Davos on 25 January 2019 announcing the “intention to begin electronic commerce negotiations at the WTO... based on existing WTO agreements and frameworks” (WTO, 2019c).

This paper gives an overview of the e-commerce discussions in the WTO, with a focus on the latest developments under the Joint Statements and their progress toward reaching an outcome in the runup to the WTO’s Twelfth Ministerial Conference (MC12) in Nur-Sultan, Kazakhstan, in June 2020.

Box 1. E-commerce: Competing terms and definitions

E-commerce Definitions in Cross-Border Trade Context

There is no single agreed definition and/or use of the term e-commerce and what it comprises, with the WTO, its individual Members, international organizations, business entities and other relevant stakeholders using different formulations. When it comes to forums concerned with cross-border trade, two definitions are commonly used. These are the definition of the WTO work program on e-commerce, which refers to “the production, distribution, marketing, sale or delivery of goods and services by electronic means,” and the definition of the Organisation for Economic Co-operation and Development (OECD).

In October 1998, the OECD Ministerial Conference on E-commerce in Ottawa endorsed an OECD Action Plan for Electronic Commerce that continues to shape the organization’s approach to e-commerce to date. Since then, the OECD has developed several definitions for e-commerce that vary in scope, though since 2011 it has used a single classification. The OECD considers that “An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations” (OECD, 2011, p. 72). This definition is narrower than the one used in the WTO’s e-commerce work program, as it excludes sales or purchases done physically or not using digital network means (webpages, extranets, electronic data interchange [EDI] networks). For example, orders by telephone calls and manually typed emails are excluded.

E-commerce and Digital Trade

The terms "e-commerce" and "digital trade" are often, but not always, used interchangeably (Kende & Sen, 2019; Hufbauer & Zhiyao, 2019). As in the case of e-commerce, there is no single and recognized definition for digital trade. In 2017, López González & Jouanjean developed an analytical framework for digital trade based on their work on the OECD (2011) and the WTO (1998) working definitions for e-commerce. They also noted that there is a growing general understanding that digital trade "encompasses digitally enabled transactions in trade in goods and services which can be either digitally or physically delivered and which involve consumers, firms and governments" (López González & Jouanjean, 2017, p. 4). In 2019, the OECD referred to this approach in its policy note entitled "Trade in the Digital Era" and added that "[d]igital trade involves business-to-business transactions, including within [global value chains] GVCs, as well as transactions between consumers or businesses through online platforms. All of these transactions are underpinned by data, which is the lifeblood of digital trade" (OECD, 2019b, p. 1).

There are also varying iterations at the level of national governments. For example, the Australian Government defines e-commerce and digital trade as: "the trade of goods and services using the internet including the transmission of information and data across borders" (Department of Foreign Affairs and Trade, n.d.). Meanwhile, the United States prefers using the term "digital trade" and defines it as: "The delivery of products and services over the Internet by firms in any industry sector, and of associated products such as smartphones and Internet-connected sensors. While it includes provision of e-commerce platforms and related services, it excludes the value of sales of physical goods ordered online, as well as physical goods that have a digital counterpart (such as books, movies, music, and software sold on CDs or DVDs)" (U.S. International Trade Commission, 2017, p. 33).

It is worth noting that this interchangeable use of terms and the existence of various definitions means that the definition of e-commerce and/or digital trade are a matter of debate, with potential implications for the scope of the negotiations under the Joint Statement Initiative (JSI).

This brief uses the term "e-commerce", as the WTO does not use or define the term "digital trade." However, it will take into consideration the frequently interchangeable use of both terms.

2.0 Trade-Related Aspects of E-Commerce Captured in WTO Rules

The WTO and its rules-based system were established in 1995, following the conclusion of the Uruguay Round negotiations (1986–1994). This was the last and longest round of negotiations under the old General Agreement on Tariffs and Trade (GATT) system of 1947 (WTO, n.d.). At the time, it was not possible to predict the far-reaching and fast-paced evolution of digital technologies and their effect on trade that have led to the spread of e-commerce as we know it today (ICTSD, 2018). However, the WTO agreements that govern today's multilateral trading system cover a broad spectrum of cross-border trade aspects, including some related to e-commerce. Understanding the degree of their relevance to e-commerce was one of the key objectives of the WTO Work Programme on E-Commerce.

In Figure 1, López González & Ferencz (2018) provided a non-exhaustive mapping of WTO agreements and the aspects they found most relevant across three identified layers for e-commerce: the network infrastructure layer, the technical layer (codes that operate the network) and the content layer.

Figure 1. WTO rules and digital trade (e-commerce)

	Layer component	Relevant WTO trade regulation
Content	Goods	GATT TFA ITA
	Entertainment Books, films, music, games, television	TRIPS
	Telecommunications Access to networks, email, VoIP, etc.	GATS Annex on Telecommunications and Agreement on Basic Telecommunications
	Retail and supply chain management Online platforms, websites	GATT TFA
	Financial services Payments and other financial transactions	GATS Annex on Financial Services
	Other Social media, data storage and processing, cloud computing, etc.	TRIPS GATT TFA ITA
Technical	Domain names	TRIPS TBT
	IP addresses	
	Software	
	Internet Protocols (TCP/IP)	
Infrastructure	Undersea and terrestrial cables	GATT ITA GATS Annex on Telecommunications and Agreement on Basic Telecommunications
	Satellite and wireless networks	
	Internet exchange points	
	Devices (computers, smartphones, etc.)	TRIPS GATT TFA ITA

Source: López González & Ferencz, 2018.

The digitalization of the global economy, defined in UNCTAD's *2019 Digital Economy Report* as "the transition of businesses through the use of digital technologies, products and services" has proved capable of facilitating trade in physical goods, along with e-commerce itself (UNCTAD, 2019, p. 4). It has become faster and easier to order and process physical goods through online means. Crossing international borders, physical goods become subject to the obligations of the most-favoured nation (MFN) and national treatment provisions under the GATT.

The General Agreement on Trade in Services (GATS) is considered highly relevant to e-commerce. Figure 1 shows that most of the content subject to e-commerce transactions falls

within the scope of the GATS. It is distinct from the GATT, firstly, as it provides the potential for “opting out” of MFN treatment wherein WTO Members can unilaterally exempt themselves from obligations when drafting their respective schedules. Secondly, the GATS uses a “positive list” approach to its schedules of commitments, coded to a classification of categories of services and modes of supply. These govern market access and national treatment obligations, irrespective of the technological means through which these are delivered. This “technological neutrality” also allows the GATS to address “digital products” such as e-books and downloadable movies and music. These are electronic and intangible products that, unlike their physical analogs, therefore cannot be addressed by the GATT (Kende & Sen, 2019). In other words, the digitalization of the global economy also means that some products that would typically be classified as goods in their physical form are reclassified as services in their digital versions. Commitments made for cross-border supply (Mode 1) are considered the most relevant to e-commerce, especially in the context of digital delivery. In addition, specific rules exist within the GATS legal framework for telecommunications services (the Annex on Telecommunications and the Agreement on Basic Telecommunications services) and financial services (the Annex on Financial Services).

The Information Technology Agreement (ITA) also plays a role when it comes to trade in information and communication technology (ICT) products. These products are essential, as they form the infrastructure for e-commerce, such as computers and telecommunications equipment. The ITA covers MFN commitments among the agreement’s participants to eliminate tariffs on certain ICT products. It is worth noting that only a sub-set of WTO Members are participants in the ITA, unlike the other WTO agreements referred to here. While the tariff cuts under the ITA apply only to the agreement’s participants, those benefits are extended to the rest of the WTO membership on an MFN basis. At the 2015 WTO Ministerial Conference, members moved to update the product coverage and classification system set by the agreement to reflect the new IT realities and goods of the digital era (e.g., new-generation semiconductors, GPS navigation equipment, etc.). This updated version is known as the ITA-II, though its participants do not include all of those WTO Members that are current participants in ITA-I.

The WTO Agreement on Technical Barriers to Trade (TBT) covers measures, regulations and standards applied by governments to ICT and electronic products (such as standards governing broadband networks or regulations on encryption).

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) is also highly relevant to digital commerce; the TRIPS agreement sets out intellectual property rights protections for technologies that enable e-commerce, such as computers, software, routers, networks, switches, and user interfaces. In addition, e-commerce transactions can involve digital products with copyright-protected content that contributes to its value, like e-books.

The recent WTO Trade Facilitation Agreement (TFA), which was adopted by ministers in December 2013 and entered into force in February 2017, can also be relevant since it requires governments to implement and maintain measures facilitating import and export processes. Simplifying customs procedures to ensure they are fast, cheap and efficient are among the most classical facilitation measures in traditional trade. However, introducing technological means can

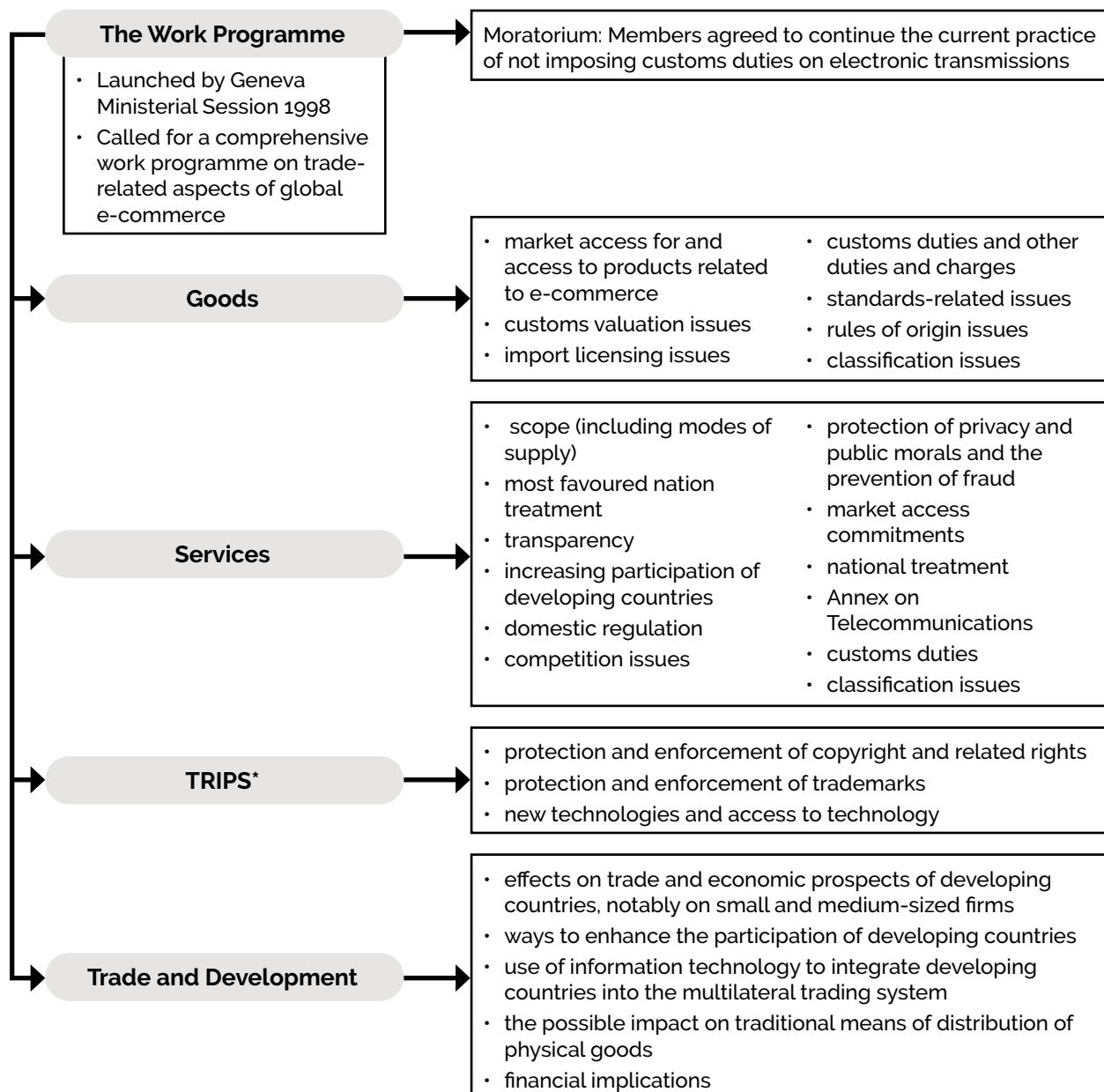
increase the efficiency of such a process, for example through electronic pre-arrival processing or the acceptance of electronic documents by the relevant authorities.

Finally, while the WTO's established rules and agreements remain relevant to e-commerce, some WTO Members and other stakeholders have asked whether the organization's current rules "may not be entirely equipped" to deal with how the digitalization of the global economy is affecting the ways and means of business and trade. (ICTSD, 2018). One of the key challenges involving existing trade rules' ability to comprehensively address e-commerce is how these rules rely on the ability to identify whether an exchanged product is a good or a service, and the specific physical borders they are crossing. These lines have become increasingly blurred in the digital and e-commerce era. For example, firms are now increasingly operating through global value chains (GVCs), deploying services across various locations. This phenomenon is referred to as the "servicification of manufacturing" and it means that "the manufacturing sector is increasingly relying on services, whether as inputs, as activities within firms or as output sold bundled with goods" (Miroudot, 2017).

Another challenge is the fact that fast-moving e-commerce transactions rely considerably on the accessibility of data and information across the globe, which has raised concerns over privacy, consumer protections, and implications for public policy. (López González & Ferencz, 2018). Notably, the current Joint Statement Initiative (JSI) negotiations have focused considerably on issues related to data flows, localization and accessibility (See Section 4 below).

3.0 Tracking E-commerce in the WTO From the Work Programme (1998) to the Joint Statement (2017)

Figure 2. Setup of the WTO Work Programme on Electronic Commerce



Source: ICTSD (2018), based on a presentation by Lee Tuthill in the MIKTA Workshop on Electronic Commerce, Geneva, July 5, 2016

The WTO's 1998 Work Programme is of an exploratory and informative nature. It was mainly designed to build understanding around the trade-related aspects of e-commerce, without a pre-set objective to take the process further to negotiate new rules. Four WTO bodies are responsible for holding discussions on the e-commerce dimensions and considerations of their respective areas (See Figure 2): the Council for Trade in Services, the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the Committee on Trade and Development. The General Council reviews these bodies' work and recommendations. It also considers the examination of cross-cutting issues (WTO, 1998b).

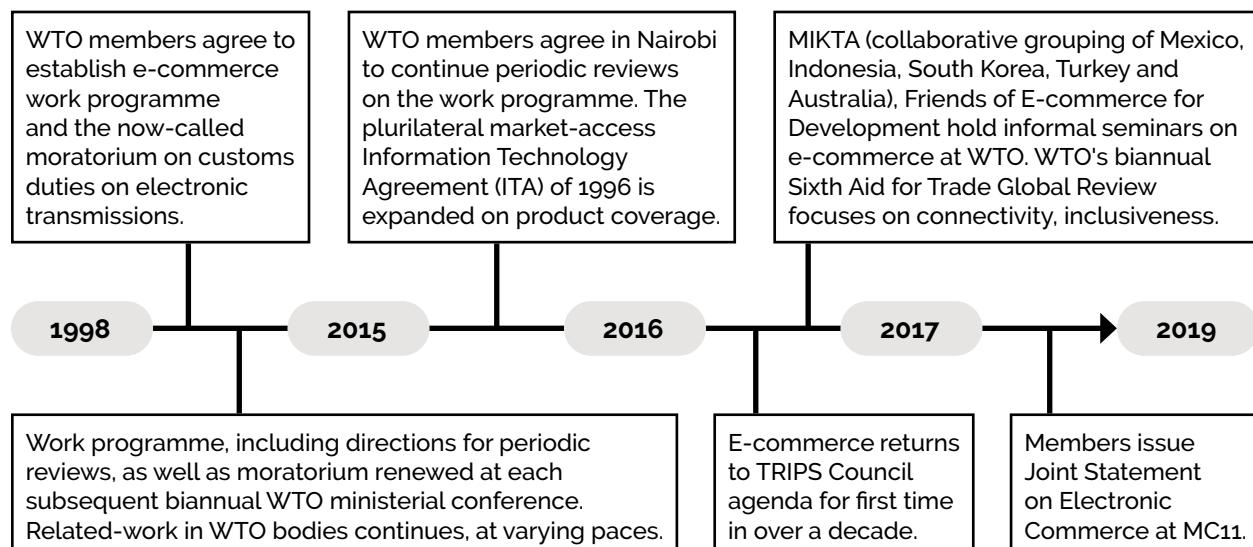
The imposition of a temporary moratorium on customs duties for electronic transmissions was also agreed by the ministers at the Second WTO Ministerial Conference in Geneva in May 1998. This was an existing practice at the time, and it covers only the electronic transmission aspect of e-commerce—in other words, the sale and delivery of digital products¹ (Kende & Sen, 2019). The moratorium has been extended at every subsequent WTO Ministerial Conference for an additional two years, including at the Eleventh Ministerial Conference in December 2017, though it is worth noting that the renewal of the moratorium was only agreed in the final hours of the conference. At the December 2019 meeting of the WTO General Council, members agreed to maintain the current practice of not imposing customs duties on electronic transmissions until the Twelfth Ministerial Conference, scheduled to take place in June 2020 (WTO, 2019b).

In meetings of the TRIPS Council and at recent ministerials, the moratorium has become the subject of intense debate, given differing views among the membership over whether to continue the practice of biennial renewal, to end the renewal entirely, or to make the moratorium permanent. Various developing countries have noted, for example, that they would like to better understand the impact of the moratorium on their tariff revenues, especially as more digital products are developed and substituting traditional physical goods. (Baliño, 2019; Banga, 2019). 3D printing is one of the recent trends in digital products. It creates three-dimensional objects from digital files, which means that “the end-product is a good; however it is intangible data (typically software) that can move across borders for a trade transaction using the Internet” (Kende & Sen, 2019, p.16).

Progress in implementing the Work Programme was hindered by its indecisive nature, the complexity of the addressed issues and the deadlock of the Doha Round. Accordingly, e-commerce discussions were rather slow and scattered between the four designated bodies. Figure 3 shows the key e-commerce-related events/actions under the WTO from the launch of the Work Programme in 1998, until the issuing of the Joint Statement on Electronic Commerce at the WTO's Eleventh Ministerial Conference in 2017.

¹ In the case of a trade in physical goods, using electronic means, when the physical good is crossing borders, it will still be subject to customs duties.

Figure 3. Timeline of action at the WTO on e-commerce (Work Programme to Joint Statement)



Source: ICTSD, 2018.

From the launch of the Work Programme in 1998 until the Nairobi Ministerial Conference in 2015, discussions in those bodies did not see significant progress or lead to an effort toward a potential revision of the rules. The ICTSD (2017) noted that “for years, detailed discussions on e-commerce were completely absent from some meetings of these WTO bodies.” The lowest level of activity was in the TRIPS Council, which rarely addressed e-commerce issues or included the Work Programme on its agenda. However, from a practical point of view, one can argue that the program, despite its slow pace, and the interruption of discussions for several years in the context of the Doha agenda deadlock, allowed the identification of some pertinent trade-related aspects of e-commerce. Many of these continue to exist to date and are subject to ongoing negotiations under the Joint Statement (ICTSD, 2017).

The key trade-related issues of e-commerce discussed during the 1998–2015 phase are listed in Table 1. The table also shows which of the four main program bodies addressed them.

Table 1. Electronic Commerce issues discussed from 1998–2015

The Issue	Council on Trade in Services	Council on Trade in Goods	Committee on Trade and Development	Council on TRIPS
Classification	X	X	X	
Transparency	X			
Domestic regulation	X			
Competition	X			
Customs duties	X	X		
Interests of developing countries (access to technology/capacity building ... etc.)	X	X		
Consumer/privacy protection	X			
SMEs and MSMEs			X	
Market access	X	X		
Infrastructure	X		X	
Intellectual property and copyright				X

N.B. An “X” denotes that the issue was mentioned in the reports of the committee indicated.

Source: Garcia-Israel & Grollier, 2019a, (amended by the author) based on those bodies’ reports to the General Council and background notes from the secretariat.

The year 2015 was marked by the Tenth Ministerial Conference in Nairobi, Kenya, and its associated Declaration (WTO, 2015), which acknowledged some Members’ interest in exploring new approaches to the negotiations (para. 30). It recognized that “Many Members want to carry out the work on the basis of the Doha structure, while some want to explore new architectures” (para. 32). It concluded by stating that “any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members” (para. 34). Given the rapid growth of e-commerce and the absence of global rules to address them, especially under the WTO after almost 20 years of discussions under the Work Programme, some WTO Members called for e-commerce to be a priority among “new issues” for discussion and consideration.

On July 5, 2016, the MIKTA Group, consisting of Mexico, Indonesia, South Korea, Turkey and Australia, held a workshop on e-commerce at the WTO. Discussions at the workshop included calls for the WTO to “focus more attention on its digital trade agenda” (MIKTA, 2016) and identified data flows and data localization as key issues with relevance to trade policy. It highlighted the need for more technical work and discussions to unpack these issues.

On 25 April 2017, the Friends of E-commerce for Development (FED), which brought together Argentina, Chile, Colombia, Costa Rica, Kenya, Mexico, Nigeria, Pakistan, Sri Lanka and Uruguay, held their first Ministerial Meeting “to discuss what they foresee as the future of the conversation regarding E-Commerce and particularly its role as a tool to drive growth, narrow the digital divide and generate development solutions for developing and least-developed countries” (FED, 2017). They identified seven main issues regarding the support of e-commerce readiness and development objectives in the framework of the WTO’s e-commerce work. These were: identification of strategies for e-commerce readiness; access to ICT infrastructure and services; trade logistics and trade facilitation; e-payment solutions; legal certainty and regulatory frameworks; capacity building and technical assistance; and access to financing. As their press release observed, “this was the first time a diverse group of developing economies, globally represented in UNCTAD and the WTO, [had] present[ed] a comprehensive, long-term digital policy agenda.”

In the runup to the Eleventh Ministerial Conference in Buenos Aires in 2017, discussions under the Work Programme intensified, and several Members (or groups of Members), such as Japan, Singapore, Russia, and the EU, issued statements and proposals on potential issues for discussion. These included data flows, data protection, market access, infrastructure development and trade facilitation. Other submissions by some developing countries, especially African countries on an individual or collective basis, argued against negotiating new rules at the WTO, concerned that this will detract attention from the outstanding issues from the Doha Round, along with imposing constraints on policy space (Alberto, 2017).

The key trade-related issues of e-commerce discussed during the 2015–2017 phase are listed in Table 2. The table also shows which of the four WTO bodies addressed them. A quick comparison between Tables 1 and 2 shows the emergence of issues related to information/data flows, data localization, e-signatures, and electronic authentication in the period following 2015.

Table 2. Electronic Commerce issues discussed from 2015 to 2017

The Issue	Council on Trade in Services	Council on Trade in Goods	Committee on Trade and Development	Council on TRIPS
Transparency and domestic regulations	X			
Flow of Information: Information flows and localization requirements	X			
Personal information protection and privacy	X			
Customs duties on electronic transmissions	X			
Facilitating e-commerce transactions: Electronic signatures, payments and authentication	X			X
Cooperation and interests of developing countries, LDCs and SMEs	X	X	X	X
Infrastructure and connectivity (Internet and data access)	X	X	X	
Market access (for digital goods and services)	X			
Business trust and copyright				X
Consumer protection	X			
Non-discrimination of digital products		X		

N.B. An “X” denotes that the issue was mentioned in the reports of the committee indicated.

Source: Garcia-Israel & Grollier, 2019a, (amended by the author), based on those bodies’ reports to the General Council and background notes from the secretariat.

As e-commerce discussions intensified after the Nairobi Declaration, the WTO’s 2017 Buenos Aires Ministerial Conference witnessed the launch of the joint initiative for exploratory talks on the potential negotiation of trade rules on electronic commerce by 71 Members. (WTO, 2017). Since then, an expanded version of that group signed a second Joint Statement in Davos in January 2019, announcing the intention of the JSI’s signatories to begin negotiations.

4.0 The First E-commerce Joint Statement Initiative (JSI): The “exploratory phase” (December 2017–January 2019)

This phase started following the signing of the first JSI in December 2017 at the MC11 of Buenos Aires. A first meeting was held on March 14, 2018, to explore Members' expectations and approaches to e-commerce issues. The 71 signatories included developed countries, economies in transition, and developing countries, as well as two least-developed countries (LDCs), Cambodia and Myanmar. (Garcia-Israel & Grollier, 2019b). Nigeria was the only African country that signed the 2017 Joint Statement (WTO, 2017).

In 2018, Members involved in this joint initiative continued to meet on an almost monthly basis. A total of nine meetings were held, where members' proposals and submissions were discussed with the aim of setting and agreeing the agenda for the negotiations phase (Garcia-Israel & Grollier, 2019b).

Box 2. E-commerce Joint Statement Initiative Membership Pattern and Composition

Various changes in co-sponsorship occurred following the issuing of the 2017 Joint Statement on E-commerce. By the time of release of the Joint Statement on January 25, 2019, Cambodia and Guatemala left as co-sponsors, while China, El Salvador, Georgia, Honduras, Mongolia, Nicaragua, Thailand, and the United Arab Emirates joined the group, raising the number of participants to 76.

After the 2019 Joint Statement was released, Benin, Saudi Arabia, Kenya, Côte d'Ivoire, Cameroon, Philippines, and Indonesia also joined the group, bringing its total membership to 83.

The following can be observed regarding the current composition:

- It includes all developed countries.
- Only three LDCs joined the JSI. These are: Benin, Lao PDR and Myanmar.
- Five WTO Members from Africa are co-sponsors of the JSI (Benin, Nigeria, Côte d'Ivoire, Kenya and Cameroon).
- WTO Members from other regions, such as the Caribbean and the developing Pacific Island countries, are not part of the joint statement.

Source: Garcia & Grollier, 2019c (updated by the author based on latest JSI communications).

Proposals for issues to be added to the framework were tabled by both developing countries (e.g., Argentina, Brazil, Colombia, Costa Rica, and Singapore) and developed countries (e.g., Australia, Canada, European Union, Japan, New Zealand, and the United States). They covered the following issues: infrastructure for electronic trade; open trading environment/trade facilitation; electronic payments and paperless trading; customs duties; domestic regulation; intellectual property and source code; privacy protection; online security; data localization; developing countries and LDCs' interests; and inclusion, i.e., of MSMEs and women etc. (Garcia-Israel & Grollier, 2019b).

The discussion phase was concluded by the signing of the second Joint Statement of January 25, 2019, in Davos. That day, the number of co-sponsors increased to 76 WTO Members, who announced their intention to start the e-commerce negotiating process, based on the existing agreements of the WTO. It also invited more Members to join the JSI process, while acknowledging that the challenges associated with e-commerce are different for developing countries and LDCs (WTO, 2019c).

5.0 The Second E-commerce Joint Statement Initiative (JSI): The negotiations phase (January 2019 to date)

On March 6, 2019, Members involved in the JSI held the first meeting of the year, where they discussed the negotiation process and were invited to submit their textual proposals. The first negotiation round took place from May 13 to 15, 2019. As of the end of the year 2019, six negotiating rounds had been completed, and the number of Members increased to 83 Members (see Box 2 for more information on the Joint Statement Membership Pattern and Composition).

The sixth and latest negotiating round ran from November 19 to 22, 2019. The text proposals submitted by Members and subject to negotiation revolved around 15 categories of issues. Based on the facilitators' reports on the six negotiating rounds,² each negotiating round consists of four to six focus groups, each of which has been designated to discuss in detail proposals falling under one of the 15 categories. Table 3 provides a state of play of the negotiations by mapping the main categories of issues subject to the focus groups' discussions along with the sub-issues covered. It highlights the main issues of both convergence and divergence between Members.

Table 3. State of Play of the E-commerce JSI negotiations

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Facilitating electronic transactions	R1-R4	Electronic transaction frameworks; electronic contracts; electronic authentication and electronic signatures	The digital divide is evident. Many developing countries do not have any of those frameworks set in place and lack the technical understanding and capacities to implement them.
Non-discrimination and liability	R1-R4	Non-discriminatory treatment of digital products; interactive computer services (limiting non-IP liability for suppliers and users and infringement of persons' rights); principle of no prior authorization	The non-discriminatory treatment of digital products is also raising concerns of some countries with regard to their loss of revenues at a time when more and more physical goods are being transformed into electronic versions.

² INF/ECOM/R/1-2-3-4-5-6 (restricted documents seen by the author).

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Consumer protection	R1-R4	Online consumer protection; unsolicited commercial electronic messages/spam,	<p>On consumer protection: There was broad recognition of the importance of enhancing consumer trust and adopting and maintaining measures in this area. Members raised questions on the different modes of redress and practical examples of cross-border redress. Additionally, Members sought clarification on the Online Dispute Resolution (ODR), namely, what it entailed and how it could be implemented.</p> <p>On Spam: all proponents shared the objective of protecting consumers from unsolicited commercial electronic messages given the challenges posed by such messages. Three main approaches were identified: opting in/consent; opting out; minimization of unsolicited commercial messages.</p>
Transparency	R1-R4	Transparency; domestic regulation; cooperation	Questions about potential duplication with existing WTO transparency provisions were raised. Similarly, participants pointed to linkages with the ongoing discussions on transparency under the Joint Statement on Services Domestic Regulation.
Customs duties on electronic transmissions	R2-R6	The duration of the prohibition on the imposition of customs duties; its coverage; and the ability to impose internal taxes, fees and charges	Members indicated that the textual proposals were inspired by provisions in free trade agreements (FTAs). Despite the similarities between the proposals, the debate on having a permanent moratorium is still ongoing. The need to understand the implications of the moratorium in terms of revenue losses and exporting policies of developing countries.

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Flow of information	R2-R5	Cross-border transfer of information by electronic means/cross-border data flows; location of computing facilities; location of financial computing facilities for covered financial service suppliers	<p>Views with regard to data flows and localization issues remain split, whether between developed countries themselves and between developed and developing countries.</p> <p>Concerns over losing value creation from data ownership and over control in situations of security threats.</p>
Personal information protection/privacy	R2-R5	Adopting or maintaining legal framework or measure, definitions of personal information and data	<p>All proposals contain aspects that involve adopting or maintaining legal frameworks or measures that provide for the protection of personal information/data of users. There was common agreement on the importance of this provision in further enhancing digital trade, particularly with respect to the cross-border transfer of personal data. However, there were also slight differences in the terms used, such as personal "information" versus personal "data"; "legal framework" versus "measures"; and users of "electronic commerce" versus users of "digital trade." Members can further explore these distinctions.</p> <p>A key issue involved the consideration of best practices that already exist. Reference was made to OECD guidelines on the protection of privacy as well as initiatives at the G20. Some delegations also shared their national data protection laws. A question was raised on the relationship with the exceptions under data flows.</p> <p>"Shall endeavour" language versus binding language.</p>

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Cybersecurity	R2-R5	Foster existing mechanisms, creating new ones, encouraging cooperation and capacity building	<p>The importance of building the capabilities of national entities to respond to growing security concerns and to use existing mechanisms to cooperate.</p> <p>The digital divide was obvious and the lack of technical understanding by many countries.</p> <p>The need for clarifying terms like "Internet sovereignty."</p>
Telecommunications	R2-R5	Two proposals: a more comprehensive proposal suggesting the revision of the Reference Paper on Telecommunications and a second proposal focusing on transparency	<p>While there is logic behind the need for a reviewed reference paper due to developments in the field, some delegations questioned whether this was the appropriate forum for discussing a revised Reference Paper, given that not all of its parties were represented in the JSI negotiations.</p>
Digital trade facilitation and logistics	R5	Paperless trading/electronic trade administration documents; electronic transferrable records; customs procedures; improvements to trade policies; enhanced trade facilitation; de minimis; single windows data exchange and system interoperability; electronic availability of trade-related information; use of technology for the release and clearance of goods; logistics services	<p>Some members raised the concern of overlap between proposed texts and other commitments and obligations under the WTO.</p>

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Access to Internet and data	R3-R6	Open government data; access to the Internet; access to online platforms/competition	<p>On Open Government Data: All proposals recognize that "facilitating public access to and use of government data" is key to promoting economic and social development and innovation. There was a focus on cooperation in identifying ways to expand access to and use of government and to the exchange of information and experiences on open government data.</p> <p>On Access to the Internet: Many delegations supported the objective of having open access to the Internet.</p> <p>On Access to online platforms/competition: One of two proposals provides that Members shall endeavour to develop adequate approaches to promoting and protecting competition in digital markets and to strengthen collaboration mechanisms to mitigate market distortions from abuses of market dominance.</p> <p>While other delegations noted that competition policy was a key area that needed to be addressed in a holistic manner; others also pointed that many countries did not have competition laws and that it was difficult to reach consensus on this issue in the context of the WTO.</p>
Business trust	R3-R6	Source code; ICT products that use cryptography	The digital divide was also obvious in this discussion, as many countries raised questions about technicalities and highlighted their lack of understanding for existing internal frameworks to address them.

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Capacity building and technical assistance/ cooperation between stakeholders, agencies and international organizations	R3	Development aspects	<p>There was no specific textual language for capacity building and technical assistance for enhancing electronic commerce.</p> <p>Some Members noted its importance for LDCs and micro, small, and medium-sized enterprises (MSMEs) and called for avoiding "best endeavour" phrases.</p> <p>A key question related to this discussion is whether special and differential treatment (S&DT) will be applied, to whom and how, including in relation to the current discussions on S&DT reform.</p> <p>Worth noting that the Côte d'Ivoire submitted a text proposal on December 16, 2019, highlighting the importance of the development aspect to be considered in the e-commerce discussions. The submission recalled ministers' statement at Davos committing to take into account the unique challenges and opportunities faced by low-income developing countries. The submission may be subject to discussion in the upcoming negotiating rounds.</p>

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Market access	R3-R6	Services market access; goods market access	<p>When it comes to goods: Two of the proposals focus on the Information Technology Agreement (ITA) and its expansion, one of which includes a three-year deadline. These proponents encourage others to sign on to the ITA and the ITA-II. The third proposal is a "placeholder."</p> <p>In general, delegations welcomed discussions on market access for goods.</p> <p>Several delegations noted the link between the ITA and its expansion and electronic commerce. One proponent preferred not having the deadline of three years given that negotiations may take a while. In its view, signing onto the ITA should be mandatory.</p> <p>When it comes to services: Several proposals were submitted, some of which noted the need to ensure that disciplines apply to a broad range of sectors and not just the committed sectors under the GATS. Some encouraged interested Members to put forward detailed market access requests specifying the level of liberalization and to exchange potential market access offers in early 2020.</p> <p>Other proposals suggest that the focus should be on e-commerce-related sectors such as e-payments; logistics; trade facilitation and supportive services, etc.</p> <p>Several delegations sought further clarity on the scope of the proposals and the outlined provisions, given the difficulty in understanding broad definitions and terms such as "electronic commerce-related personnel," "cross-sector operation," and so forth.</p>

Focus group/main categories of issues	Negotiating round (R)	Sub-issues/topics	Comments/remarks
Cross-cutting issues/legal issues	R6	Capacity building; legal issues	Questions centred around possible legal architectural options, relationship with existing WTO agreements, the applicability of the dispute settlement system, and the applicability of the general and security exceptions.

Source: Author's own elaboration based on the facilitators' reports of the negotiating rounds to date.

6.0 The Road to MC12

Despite the fact that the facilitator's reports on the negotiating rounds have limited detail regarding individual Members' positions in relation to the proposed texts, three key issues can be identified as challenges in developing an MC12 outcome, along with defining what such an outcome might entail:

- The first issue relates to the lack of clarity and consensus on the scope and approach of addressing e-commerce trade-related aspects. Participants have discussed whether the approach should involve either a) creating new rules specific to e-commerce and all its related system components and enablers, or b) reviewing existing WTO rules. Members are facing a very fast-changing phenomenon whose full implications are not yet apparent or fully realized. According to the facilitators' reports, Members have raised the question of the potential approach, breadth and scope of negotiated rules in nearly all of the six negotiating rounds as well as in meetings of the related focus groups. The many cross-cutting issues related to e-commerce and the very wide definition used under the WTO Work Programme, along with the concurrent terms and definitions used in other contexts, have made it difficult to narrow down the scope of the discussions. Other terms related to the processes and elements of e-commerce, such as digital products and electronic transmission, also lack agreed-upon definitions, which adds further complexity
- The second issue is the digital divide between developing and developed economies. Most of the facilitators' reports mention how the discussions were very technical in nature, involving much explanation of terminologies and electronic frameworks and policies applied by developed country Members to other Members who are not familiar with the technology and do not have a suitable national policy framework in place. Hence, some WTO Members have challenges in engaging in the negotiation or in identifying the kind of assistance they can ask for to ensure they have the capacity to commit to and implement new rules and obligations. It is worth noting that the development dimension, as well as social inclusion and gender considerations, have rarely been referred to in the discussions to date. One textual proposal submitted by Côte d'Ivoire on December 16, 2019, attempted to emphasize those issues and how they can allow for the better participation of low-income developing countries (WTO, 2019d).
- Third is the controversy over "data" issues. While Members agree in principle on subjects like banning unsolicited commercial electronic messages, ensuring the validity of electronic contracts for trade and investment facilitation, protecting online consumers from fraudulent or deceptive commercial practices, and regulating competition in e-commerce, big differences exist between three leading Members—China, the European Union and the United States—but also between developed and developing countries when it comes to such areas as data flows, data localization, privacy invasions by data collectors, transfer of source code, imposition of customs duties and Internet taxes, and Internet censorship (Hufbauer & Zhiyao, 2019).

Finally, it is important to highlight that the e-commerce JSI discussions are taking place in a WTO context that has been witnessing a series of issues capable of affecting its overall functioning in the future. Many of these issues have influenced the ongoing e-commerce talks in Geneva. A core issue mentioned during the various negotiating rounds is the ongoing debate over whether to reconsider the organization's approach to special and differential treatment, especially in the light of the United States' proposed General Council decision (WTO, 2019a) setting out four categories of WTO Members that would not be able to use S&DT in future WTO commitments. This debate is raising many questions on whether and how a future agreement on e-commerce issues would feature S&DT and who would be able to access them.

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