

Non-discriminatory treatment of digital products (JSI)

The JSI draft text offers a definition of a digital product (“a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and can be transmitted electronically”), explicitly excluding digitized representation of financial instruments. Meanwhile, the views of the JSI participants on the nature of the digital products (as a good or as a service) are not reconciled.

The consolidated text reflects a broad national treatment and MFN obligation with respect to treatment of the like digital products, originating (“created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another [Party/Member], or [...] of which the author, performer, producer, developer or owner is a person of another [Party/Member]”), both from Parties and non-Parties. Meanwhile, provision of subsidies or grants to such products/ producers, including a government-supported loan, guarantee or insurance is excluded. One of the proposals also suggests not to apply these rules to broadcasting.

Customs duties on electronic transmissions (Moratorium)

In 1998, Members approved the WTO Declaration on Global Electronic Commerce. One of the key provisions of this declaration concerned the practice of not imposing tariffs on electronic transmissions (*"until the next ministerial conference"*). This decision, known as the *"moratorium"*, was extended at subsequent MCs.

On December 10, 2019, Members adopted a decision on the work programme on electronic commerce (WT/L/1079). This was necessary, given that the moratorium extended by the 11th Ministerial Conference was about to expire and the 12th Ministerial Conference was postponed until June 2020. According to the WTO, *"in this decision [Members] agreed revitalize the work program and renew the practice of not imposing tariffs on electronic transmissions before MC12. They also agreed to have structured discussions on all trade-related topics of interest raised by Members, including the scope, definition and impact of the moratorium on tariffs on electronic transmissions"*. Therefore, the Moratorium remains temporary in nature despite calls from some members to make it permanent.

A recent communication presented under the WTO Work Program on Electronic Commerce, jointly supported by developed and developing countries, based on relevant research conducted by the OECD, stresses on the need to account for the consequences of the moratorium on benefits to consumers, when considering its future. The same concerns were also presented to counterbalance a very strong position condemning the moratorium, maintained by UNCTAD, during the recent WTO webinar on the moratorium on customs duties on electronic transmissions.

Arguably, the moratorium has some positive influence on global digital trade. Nonetheless, a number of members are now calling for a reassessment of the moratorium, suggesting that it leads to significant revenue losses, which will worsen in the future. It is important to emphasize that the moratorium only applies to customs duties and does not deprive members of the right to impose internal taxes, fees and charges on content delivered in accordance with GATT. Ongoing discussions relate, among other things, to the scope of the term *"electronic transmissions"*, where disagreement persists whether the transmitted content (or a *"digital product"*) is included.

Besides the Work Programme, the moratorium also seems to have found its place in the discussions of the JSI.

Definition: the draft text defines *"electronic transmission"* or *"transmitted electronically"* as a transmission made using any electronic means. The Members disagree on the inclusion or exclusion of the *"content transmitted electronically"* from the scope of the definition.

Making the moratorium permanent: several members suggest making the Moratorium on customs duties on electronic transmissions (including on the content transmitted electronically) permanent.

Continuing current practices subject to a different decision on the matter taken within the framework of the WTO Work Programme on Electronic Commerce: two proponents support continuation of the current practice of non-imposition of customs duties, as indicated above. Meanwhile, one of them specifies, that the Moratorium should not be applicable to content transmitted electronically, and that *"the above shall not preclude a Member from applying*

custom procedures for public policy purposes". In justifying its caution about perpetuating the moratorium, this same Member, Indonesia, noted: *"This issue goes beyond the revenue perspective. It also concerns other issues such as trade statistics, equal opportunities between digital and non-digital products and, above all, state sovereignty. We must also keep in mind that the importance of electronic commerce will go far into the future. We believe e-commerce – and the digital economy – will shape the future of global commerce in ways we may not be able to imagine at the moment. So our discussion of e-commerce needs to have a certain degree of flexibility. It should also allow for improvements, in order to make today's debate relevant to future progress"*.

Côte d'Ivoire has also spoken out against the moratorium, albeit in a non-paper (thus, the text is not included in the draft): *"[i]n regard to the payment of customs duties, Côte d'Ivoire maintains that an inclusive agreement on electronic commerce must avoid all bans and should, on the contrary, continue the practice of concessions as in other agreements, while seeking to encourage the non-imposition of customs duty on electronic transmissions through a strategy which strengthens the production capacity of consumer States"*.

In addition to the "core" Moratorium prohibition, the submissions incorporated in the draft text of the JSI clarify that the collection of internal taxes [fees or other charges or revenue / profit generated from the digital trade], in a manner consistent with Arts. I:I and III:2 of the GATT and II:1 and XVII of the GATS, is not precluded.