

## *Trade and Technology: Rebooting Global Trade for the Digital Millennium*

### FOREWORD

*Shifting Sands: Taking Stock of an Extraordinary Year*

### EDITORIAL

Gautami Govindrajan & Ayushi Singh, *Curb Your Enthusiasm: The WTO E-Commerce Negotiations and the Developing World*

### ARTICLES

Mira Burri, *Digital Transformation: Heralding in a New Era for International Trade Law*

James J. Nedumpara, *Skirmishes over Digital Service Taxes: The Perils and Systemic Costs of Section 301 Actions*

Craig Atkinson & Nicolás Schubert, *Augmenting MSME Participation in Trade with Policy Digitalisation Efforts: Chile's Contribution to 'An Internet of Rules'*

Gabriele Gagliani, *Techno-Economic Governance in the 21<sup>st</sup> Century: Converging Models for WIPO and the WTO?*

Marta Soprana, *The Digital Economy Partnership Agreement (DEPA): Assessing the Significance of the New Trade Agreement on the Block*

# Trade, Law *and* Development

Vol. 13, No. 1

2021

## PATRON

*Hon'ble Prof. Poonam Saxena*

## FACULTY-IN-CHARGE

*Rosmy Joan*

## EDITORS-IN-CHIEF

*Amogh Pareek*

*Gautami Govindrajan*

## EDITORS

*Ayushi Singh*  
(SENIOR CONTENT)  
*Abhinav Srivastav*  
*Suvam Kumar*

*Sabil Verma*  
(MANAGING)  
*Anjali Sasikumar*

*Abilash V.*  
(TECHNICAL)  
*Sukanya V.*  
*Tania Gupta*

## ASSOCIATE EDITORS

*Aastha Asthana*  
*Nishant Sharma*  
*Shlok Patwa*

*Malaika Shivalkar*  
*Pranav Karwa*

*Neerali Nanda*  
*Rashmi John*  
*Swikruti Nayak*

## COPY EDITORS

*Akshita Saxena*  
*Jahnvi Srivastava*  
*Ria Chaudhary*

*Ananya Awasthi*  
*Maulik Khurana*  
*Vidhi Damani*

*Anushka Mathur*  
*Nidhi Lakhotia*  
*Yashvi Hora*

## CONSULTING EDITORS

*Ali Amerjee*  
*Manu Sanan*

*Aman*  
*Meghana Sharafudeen*  
*Shashank P. Kumar*

*Dishi Bhomawat*  
*Prateek Bhattacharya*

## BOARD OF ADVISORS

*B. S. Chimni*  
*Jagdish Bhagwati*  
*Ricardo Ramírez Hernández*

*Daniel Magraw*  
*M. Sornarajah*  
*Vaughan Lowe*

*Glenn Wisner*  
*Raj Bhal*  
*W. Michael Reisman*

## Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

## CURB YOUR ENTHUSIASM: THE WTO E-COMMERCE NEGOTIATIONS AND THE DEVELOPING WORLD

**GAUTAMI GOVINDRAJAN\* & AYUSHI SINGH\*\***

*The Joint Statement Initiative on E-Commerce (JSI) has emerged as an alternative “plurilateral” forum for collaboration on trade-related aspects of e-commerce. After the 11th Ministerial Conference (MC11) failed to convert the Work Programme on Electronic Commerce (Work Programme) initiatives into concrete solutions, the JSI invited all World Trade Organization (WTO) Members to enter into “exploratory work to formulate a high standard outcome on trade-related aspects of e-commerce” that would build on existing WTO agreements. Developed country members are pushing for the inclusion of comprehensive and binding provisions on e-commerce that is based on rules already enshrined in their Free Trade Agreements (FTAs). However, the proposals seem to ignore the pressing developmental concerns of developing countries and least developing countries that lack the digital ecosystem to comply with novel e-commerce rules. This paper shines a light on the specific concerns of the developing world like the digital divide and absence of robust digital trade policies and recommends the use of special and differential treatment (S&DT) to help pull up the developing world into the digital millennium.*

### TABLE OF CONTENTS

- I. INTRODUCTION
- II. A BRIEF HISTORY OF DIGITAL TRADE NEGOTIATIONS AT THE WTO
- III. THE JOINT STATEMENT INITIATIVE ON E-COMMERCE
- IV. ADDRESSING THE DEVELOPING WORLD’S CONCERNS ON DIGITAL TRADE
  - A. MORATORIUM ON CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS: TIME FOR A REBRAND
  - B. ADDRESSING THE DIGITAL DIVIDE
  - C. REGULATION OF CROSS-BORDER DATA FLOWS

---

\* Gautami Govindrajan is a final year student at National Law University, Jodhpur, India and the current Editor-in-Chief of Trade, Law & Development Journal. She may be contacted at gautami.govindrajan[at]tradelawdevelopment.com.

\*\* Ayushi Singh is a final year student at National Law University, Jodhpur, India and the current Senior Content Editor of Trade, Law & Development Journal. She may be contacted at ayushi.singh[at]tradelawdevelopment.com.

1. DATA PROTECTION AND PRIVACY
2. CYBERSECURITY AND CONSUMER PROTECTION
3. MAINTENANCE OF LAW & ORDER

## V. CONCLUSION

### I. INTRODUCTION

Upon returning from his \$28 million trip to space, Jeff Bezos — the chairman and founder of tech giant Amazon — thanked his employees for paying for his eleven-minute monumental space tour.<sup>1</sup> Bezos — whose net worth reportedly spiked by \$86 billion during the COVID-19 pandemic<sup>2</sup> — expressed his gratitude to those Amazon workers who, ironically, have accused his company of forcing them to work in medically unsafe conditions during the pandemic<sup>3</sup> and firing workers that demanded better work conditions at the workplace.<sup>4</sup> Amazon — a BigTech giant by virtue of its success in the e-commerce space — has also been accused of using AI to place its workers under a ‘surveillance workplace’ by constantly tracking the productivity of its workers and using that information to lay off workers that don’t complete daily goals.<sup>5</sup> While BigTech companies like Amazon, Facebook, Alphabet, etc., can be credited for revolutionising the digital landscape, the burgeoning wealth of its founders and CEOs stand in unfortunate contrast to the rising trends of economic inequalities in almost every country (or ‘user’ base) at once during the COVID-19.<sup>6</sup>

---

<sup>1</sup> Gino Spocchia, *Jeff Bezos criticized by Amazon workers and customers after thanking them for funding space launch*, INDEPENDENT (July 21, 2021), <https://www.independent.co.uk/news/world/americas/amazon-workers-slam-jeff-bezos-b1887944.html>.

<sup>2</sup> Chase Paterson-Withorn, *How Much America’s Billionaires Have Made During the COVID-19 Pandemic*, FORBES (Apr. 30, 2021), <https://www.forbes.com/sites/chasewithorn/2021/04/30/american-billionaires-have-gotten-12-trillion-richer-during-the-pandemic/?sh=21bd88fff557>.

<sup>3</sup> Michael Sainato, *‘I’m not a robot’: Amazon workers condemn unsafe, grueling conditions at warehouse*, THE GUARDIAN (Feb. 5, 2020), <https://www.theguardian.com/technology/2020/feb/05/amazon-workers-protest-unsafe-grueling-conditions-warehouse>.

<sup>4</sup> Kari Paul, *Amazon found to have illegally fired workers who advocated for Covid safety measures*, THE GUARDIAN (Apr. 5, 2021), <https://www.theguardian.com/technology/2021/apr/05/amazon-illegally-fired-two-workers-pandemic>.

<sup>5</sup> Spencer Soper, *Amazon employee fired by a robot: It’s you vs machine’s algorithm*, BUSINESS STANDARD (June 28, 2021), [https://www.business-standard.com/article/international/amazon-employee-fired-by-a-robot-it-s-you-vs-machine-s-algorithm-121062801581\\_1.html](https://www.business-standard.com/article/international/amazon-employee-fired-by-a-robot-it-s-you-vs-machine-s-algorithm-121062801581_1.html)

<sup>6</sup> Esmé Berkhout et al., *The Inequality Virus*, OXFAM INTERNATIONAL, <https://www.oxfam.org/en/research/inequality-virus>.

The COVID-19 pandemic has only further exacerbated the structural chasms prevalent between socio-economic groups with low-incomed, disenfranchised and minority groups bearing the greater brunt of the pandemic.<sup>7</sup> In the international realm, developing countries and Least Developing Countries (LDCs) have struggled to obtain equitable access to medical devices, protective gear and vaccine doses for its citizens.<sup>8</sup> However, the COVID-19 pandemic seems to have brought astronomical gains for BigTech companies due to rise in online shopping and work-from-home conditions. Alphabet reported a 34% increase in revenue from the previous year,<sup>9</sup> while Amazon reported a 200% rise in profits.<sup>10</sup> As tech giants and their founders accumulate unimaginable amounts of wealth and political influence, the governments of their consumer markets are becoming increasingly wary of BigTech's growing influence. Economies like the European Union (EU), India, Australia, etc. have introduced digital service tax laws to counteract BigTech's profit-shifting activities.<sup>11</sup> Developing countries like India have started to recognise the potential profitability of 'data' as a resource in the 'Fourth

---

<sup>7</sup> See Joe Myers, *5 things COVID-19 has taught us about inequality*, WORLD ECONOMIC FORUM (Aug. 18, 2020), <https://www.weforum.org/agenda/2020/08/5-things-covid-19-has-taught-us-about-inequality/>; Randall Akee & KJ Ward, *Missed opportunities to understand racism in the COVID-19 era*, BROOKINGS (May 13, 2021) <https://www.brookings.edu/blog/up-front/2021/05/13/missed-opportunities-to-understand-the-prevalence-of-racism-in-the-u-s-in-the-covid-19-era/>; Clare Bamba et al., *The COVID-19 pandemic and health inequalities*, 74(11) J. EPIDEMIOLOGY & COMMUNITY HEALTH 964-8 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7298201/>; *Risk of Severe Illness or Death from COVID-19: Racial and Ethnic Health Disparities*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-illness.html>; *COVID-19 Vaccine Equity for Racial and Ethnic Minority Groups*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/vaccine-equity.html>.

<sup>8</sup> See *Vaccine inequity undermining global economic recovery*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news/item/22-07-2021-vaccine-inequity-undermining-global-economic-recovery>; Lori Hinnant et al., *COVID-19 vaccine inequity: Inside the cutthroat race to secure doses*, L.A. TIMES (July 18, 2021), <https://www.latimes.com/world-nation/story/2021-07-18/covid-19-vaccine-inequity-inside-the-cutthroat-race-to-secure-doses>.

<sup>9</sup> *Google's and Microsoft's Profits Soar as Pandemic Benefits Big Tech*, N.Y. TIMES (Apr. 27, 2021), <https://www.nytimes.com/live/2021/04/27/business/stock-market-today>.

<sup>10</sup> Rani Molla, *As Covid-19 surges, the world's biggest tech companies report staggering profits*, VOX (Oct. 30, 2020), <https://www.vox.com/recode/2020/10/30/21541699/big-tech-google-facebook-amazon-apple-coronavirus-profits>.

<sup>11</sup> Amie Ahanchian et al., *Digital Services Tax: Why the World is Watching*, BLOOMBERG TAX (Jan. 6, 2021), <https://news.bloombergtax.com/daily-tax-report/digital-services-tax-why-the-world-is-watching>.

Industrial Revolution’ and have introduced measures to regulate the cross-border flow of its ‘gold-mine’ of ‘Indian data’.<sup>12</sup> By controlling the movement of data outside its own territory via local processing and data localisation measures, governments aim to stop the unabashed appropriation of its citizens’ data by foreign BigTech giants. If ‘data’ is in fact the twenty-first century’s ‘gold’, ‘spice’ or ‘oil’, developing countries and LDCs wish to attain the technological know-how to profitably apply its *own* abundant ‘data’ resources for its *own* development by preventing its exploitation by modern ‘neo-imperialist’ BigTech forces.

Within this context, it is essential for developing countries and LDCs to be mindful of their regulatory and developmental ambitions while navigating the WTO efforts to negotiate e-commerce rules. Developed economies, i.e., the United States of America (USA), EU, Japan, etc. — where these BigTech companies are based — have been the frontrunners of the movement to negotiate multilateral e-commerce rules; so much so that an alternative forum i.e. the JSI was created.<sup>13</sup> While the importance of negotiating harmonious multilateral rules on e-commerce is not denied, however, the proposals submitted by developed countries at the JSI seem to propose neoliberal provisions that seek to control the boundaries of governmental regulations and domestic policy-making. Developed economies and its proposals expect developing countries’ and LDCs to comply with strict rules on cross-border data flows, data localisation and source code disclosures which are based around the digital policy regimes followed by developed countries. Developing countries and LDCs must be given the time and space to formulate their own digital governance policies that caters to their regulatory ecosystem and administrative capacity.

As the JSI negotiations on e-commerce attain ‘critical mass’, it is important to prevent the erasure of developing countries’ and LDCs’ developmental and regulatory concerns. This paper argues that the current JSI negotiations and the eventual consolidated text on e-commerce should contain inclusionary provisions for remedying the digital divide between the developed world and the developing world by promoting Access to Access (A2A) and Access to Knowledge (A2K). Developing countries should be accorded the regulatory confidence and policy space to formulate their own digital governance policy for the regulation of its citizen’s data. Lastly, e-commerce rules should enshrine robust technical assistance and capacity building provisions that will facilitate the organic growth of developing countries’ and LDCs’ digital ecosystem. A S&DT clause should be

---

<sup>12</sup> DRAFT NATIONAL E-COMMERCE POLICY (DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION, MINISTRY OF COMMERCE AND INDUSTRY, Proposed Official Draft 2019).

<sup>13</sup> World Trade Organization, Ministerial Conference Eleventh Session, Joint Statement on Electronic Commerce, WTO Doc. WT/MIN(17)/60 (Dec. 13, 2017) [hereinafter *Joint Statement on E-Commerce*].

formulated to allow developing countries and LDCs to accept and enforce e-commerce provisions only after its administratively and institutionally capable of doing so. Part II of the paper traces the history of e-commerce negotiations at the WTO until the establishment of the JSI. Part III discusses the JSI negotiations, its mandate and the criticism meted out against the forum. Part IV addresses distinct issues of the Digital Divide between the digital-North and the digital-South and the question of regulation of cross-border data flows. Part V the eventual repercussions of ignoring the individual concerns of the developing world and recommends solutions.

## II. A BRIEF HISTORY OF DIGITAL TRADE NEGOTIATIONS AT THE WTO

Though the rise of the digital economy is a relatively recent phenomenon, discussions and negotiations on issues such as e-commerce began over a decade ago. The Organization for Economic Co-operation and Development (OECD), in 1998, had extensive discussions on the development of a framework on e-commerce. However, these were limited by the virtue of their times, and focused on issues such as, *inter alia*, consumer protection, authentication, privacy and personal data protection.<sup>14</sup> In its quest to maximise benefits from e-commerce, the OECD highlighted the need to understand the social and economic impacts of a transition to a digital economy, from the perspective of *both* developing and developed countries.<sup>15</sup> The Action Plan further emphasised the importance of understanding the needs of market players and citizens in developing countries along with developed countries, so as to facilitate an environment where the benefits accruing from e-commerce could be maximised.<sup>16</sup> However, these discussions lacked an in-depth understanding of the constraints faced by developing countries.

In the WTO, the Second Ministerial Conference marked the first landmark event in this sphere. The Declaration on Global Electronic Commerce adopted in this Conference led to the establishment of a Work Programme that would examine

---

<sup>14</sup> OECD Ministerial Conference, *A Borderless World: Realising The Potential Of Global Electronic Commerce- Conference Conclusions*, SG/EC(98)14/FINAL, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=sg/ec\(98\)14/final&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=sg/ec(98)14/final&doclanguage=en).

<sup>15</sup> *Id.*, ¶ 4, page 6.

<sup>16</sup> OECD Ministerial Conference, *A Borderless World: Realising The Potential Of Global Electronic Commerce- OECD Action Plan for Electronic Commerce*, SG/EC(98)9/FINAL, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SG/EC\(98\)9/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=SG/EC(98)9/FINAL&docLanguage=En).

trade-related issues surrounding global e-commerce.<sup>17</sup> The Declaration highlighted the need to account for the “economic, financial, and development needs of developing countries” in the work undertaken by WTO bodies in this regard. The Work Programme was developed to be exploratory in nature, and aimed to develop an understanding about the trade-related aspects of e-commerce.

The Work Programme aimed to examine e-commerce issues in the following major sectors: trade in goods, trade in services, intellectual property rights, and trade and development. Developing countries were accounted for in various aspects of the Programme. The issues to be examined by the Council for Trade in Services included increasing the participating of developing countries.<sup>18</sup> More significant, of course, was the ambit of work delineated for the Committee for Trade and Development, which was tasked with analysing the implications of e-commerce on development, based on the various needs of developing countries. Some of the major areas of focus were the hurdles faced by developing countries in participating in e-commerce, and ways to enhance the same; the use of IT to better integrate developing countries in the multilateral trading system; the impact of e-commerce on developing countries’ trade, particularly in terms of Micro, Small and Medium Enterprises (MSMEs); the financial implications of e-commerce adoption; and the impact on e-commerce on traditional means of distribution of goods and supply chains.<sup>19</sup>

Discussions in the Work Programme, have, however, been inconsistent over the years. While there was a great deal of interest in these discussion at the initial stages, a lull set in after a few years. For example, no documents delineating the e-commerce related work undertaken by the WTO Bodies in the Work Programme between 2005 and 2009. Development-related issues seem to have featured significantly in discussions regarding e-commerce at the WTO right from the beginning, with delegations calling for a comprehensive approach to ensure

---

<sup>17</sup> World Trade Organization, Ministerial Declaration of 25 May 1998, WTO Doc. WT/MIN(98)/DEC/2, 25 May [hereinafter Declaration on Global Electronic Commerce].

<sup>18</sup> Council for Trade in Services, *Note by the Secretariat: The Work Programme on Electronic Commerce*, WTO Doc. S/C/W/68 (Nov. 16, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/C/W68.pdf&Open=True>.

<sup>19</sup> General Council, *Work Programme on Electronic Commerce*, WTO Doc. WT/L/274 (Sept. 30, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/274.pdf&Open=True>; Committee on Trade and Development, *Note by the Secretariat: Development Implications of Electronic Commerce*, WTO Doc. WT/COMTD/W/51 (Nov. 23, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W51.pdf&Open=True>.



developing countries could benefit from e-commerce.<sup>20</sup> The issue of access to basic infrastructure was raised, and the lack of such infrastructure meant that mere technical assistance would be insufficient.<sup>21</sup> The need for capacity-building in order to properly integrate developing countries into the digital era was once more emphasised in the Fifth Dedicated Discussion on E-Commerce.<sup>22</sup> One delegation also brought forth the suggestion that developing countries be integrated in the development of standards on e-commerce, to mitigate the problem of such standards creating barriers to entry for market players in developing countries.<sup>23</sup> Members took cognisance of the fact that work under the Programme was not progressing as planned. As a result, at the Sixth Session of the Ministerial Conference in Hong Kong in 2005, there was an agreement to reinvigorate this work, including development-related issues.<sup>24</sup> Following a lull in discussions in this sphere for the next few years, Ministers once again in 2009 decided to “intensively reinvigorate” the examination of issues under the Work Programme.<sup>25</sup>

Cuba, Ecuador and Nicaragua flagged out a plethora of factors limiting participation of Latin American economies in e-commerce through their communication to the WTO,<sup>26</sup> including lack of broadband connectivity,<sup>27</sup>

---

<sup>20</sup> General Council, *Summary by the Secretariat of the Issues Raised: Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 15 June 2001*, WTO Doc. WT/GC/W/436 (July 6, 2001), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W436.pdf&Open=True>, at 3 [hereinafter *Dedicated Discussion on E-Commerce* (July 2001)].

<sup>21</sup> *Id.*

<sup>22</sup> General Council, *Summary by the Secretariat of the Issues Raised: Fifth Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 16 May And 11 July 2003*, WTO Doc. WT/GC/W/509 (July 31, 2003), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W509.pdf&Open=True>, at 10.

<sup>23</sup> *Dedicated Discussion on E-Commerce* (July 2001), *supra* note 20, at 3.

<sup>24</sup> General Council, *Summary by the Secretariat of the Issues Raised: Sixth Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 7 and 21 November 2005*, WTO Doc. WT/GC/W/556 (Nov. 30, 2005), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W556.pdf&Open=True>, at 4.

<sup>25</sup> General Council, *Work Programme on Electronic Commerce: Report to the 17 November 2009 meeting of the General Council*, WTO Doc. WT/GC/W/613 (Nov. 9, 2009), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W613.pdf&Open=True>.

<sup>26</sup> General Council, Council for Trade in Goods & Committee on Trade and Development, *Communication from Cuba, Ecuador and Nicaragua: Effective Participation of Developing Countries in Electronic Commerce as a Means to Combat Poverty*, WTO Doc. WT/GC/W/635, WTO Doc. G/C/W/650, WTO Doc. WT/COMTD/W/179 (July 14, 2011),

inadequate banking facilities,<sup>28</sup> etc. In this vein, the communication proposes actions that could be undertaken to mitigate the hurdles faced by developing countries. The first of these was a call for access to Information and Communication Technologies (ICTs) required to develop e-commerce, on non-discriminatory terms.<sup>29</sup> They also proposed a permanent notification mechanism in the Committee on Trade and Development in case of obstruction of such access. Another proposal was to encourage direct international internet connections, increasing broadband connectivity, and the reduction of costs. The second major proposal was the establishment of a working group under the Committee on Trade and Development, on the relationship between e-commerce and development. This group would examine and formulate solutions to promote the achievement of goals related to training and capacity development, and increasing access to e-commerce for MSMEs. These proposals generated mixed responses in discussions between Members.<sup>30</sup> Another significant development in the Second Ministerial Conference was the imposition of a temporary moratorium on customs duties for electronic transmissions. This moratorium has been extended for an additional two years at every Ministerial Conference since, which has been the subject of considerable debate. Moreover, the actual of the impact of the moratorium has been difficult to assess, due to uncertainty about the scope of the same; its technological feasibility; and the revenue implications of the moratorium.<sup>31</sup>

Discussions under the Work Programme became more contentious before the Eleventh Ministerial Conference, with some developing countries opposing the negotiation of new rules at the WTO. This hinged on the fear that doing so would shift focus from the unresolved issues in the Doha Round. Further concerns regarding such new rules restricting the policy space available to developing countries were raised.<sup>32</sup> Another issue was that doing so would challenge the

---

<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/COMTD/W179.pdf&Open=True>.

<sup>27</sup> *Id.*, ¶ 8.

<sup>28</sup> *Id.*, ¶ 9.

<sup>29</sup> *Id.*, ¶ 24.

<sup>30</sup> See General Council, *Summary by the Secretariat of the Issues Raised: Eighth Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 20 and 28 October and 9 and 16 November 2011*, WTO Doc. WT/GC/W/644 (Nov. 29, 2011), [https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W644.pdf &Open=True](https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W644.pdf&Open=True).

<sup>31</sup> Rashmi Banga, *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD RESEARCH PAPER NO. 29, UNCTAD/SER.RP/2019/1 (2019), [https://unctad.org/system/files/official-document/ser-rp-2019d1\\_en.pdf](https://unctad.org/system/files/official-document/ser-rp-2019d1_en.pdf) [hereinafter Banga (2019)].

<sup>32</sup> See Alberto F. Lemma, *E-Commerce: The Implications of Current WTO Negotiations for Economic Transformation in Developing Countries*, SUPPORTING ECONOMIC TRANSFORMATION (Dec.

mandate of the Work Programme itself.<sup>33</sup> It is important to understand the realities in developing countries and LDCs which form the bedrock to their opposition to these negotiations: the digital divide forms a crippling barrier for many countries, limiting their participation in digital trade. ICT estimates show that 87% of households have access to ICTs in urban areas of developed countries, with 81% having access in rural areas. On the other hand, urban developing countries have a household access of 65%, and whereas only 28% of rural households have access to ICTs. The numbers are even more stark for LDCs: with 25% of urban households and 10% of rural households having access.<sup>34</sup> While four in five people are online in developing countries, only one out of five are online in LDCs.<sup>35</sup> When access to ICTs remains limited, digital trade negotiations become tricky and restrictive for developing countries. Developed countries can afford to push for the liberalisation of the digital trade space, which may not be a luxury available for developing countries and LDCs.

The issues developing countries have been raising at the WTO Work Programme, since its inception, have been more fundamental to increasing their access to ICTs and overcoming barriers to participation in e-commerce. They were in fact, flagged out in a Note published by the WTO as early as 1998.<sup>36</sup> These issues have been categorised as “enabling issues”, and include a plethora of challenges faced by developing countries.<sup>37</sup> Prominent issues include:

- i. infrastructural barriers: which includes access to technology, availability of ICT skills and qualified personnel;
- ii. cost factors;
- iii. security and trust issues: which include issues of uncertainty of payment and legal frameworks;

---

2017), <https://set.odi.org/wp-content/uploads/2017/12/SET-WTO-Negotiations-E-Commerce.pdf>.

<sup>33</sup> Amir Ebrahimi Darsinouei, *Understanding E-Commerce Issues in Trade Agreements: A Development Perspective Towards MC11 and Beyond*, CUTS INT’L GENEVA, <http://www.cuts-geneva.org/pdf/STUDY%20-%20E-Commerce%20Towards%20MC11.pdf> [hereinafter Darsinouei].

<sup>34</sup> *Measuring digital development: Facts and figures 2020*, INT’L TELECOMMUNICATION UNION, <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2020.pdf>, at 6 [hereinafter ITU: Facts and Figures 2020].

<sup>35</sup> *Digital Economy Report 2019: Value Creation and Capture: Implications for Developing Countries*, UNITED NATIONS CONF. ON TRADE & DEV., [https://unctad.org/system/files/official-document/der2019\\_en.pdf](https://unctad.org/system/files/official-document/der2019_en.pdf), at 13 [hereinafter *Digital Economy Report 2019*].

<sup>36</sup> See Committee on Trade and Development, *Note by the Secretariat: Development Implications of Electronic Commerce*, WTO Doc. WT/COMTD/W/51 (Nov. 23, 1998), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W51.pdf&Open=True>.

<sup>37</sup> Darsinouei, *supra* note 33 at 19.

- iv. logistical barriers: which include delivery procedures, facilitation of returns and exchanges, and changes to traditional supply chains;
- v. digital knowledge barriers: which covers the issue of the lack of ICT knowledge.<sup>38</sup>

However, progress in the Work Programme has been unsatisfactory for a variety of reasons. The conflict regarding the ambit of work under the Programme, as well as its indecisive nature, has been a major issue. Moreover, the complexity of issues being discussed makes discussions contentious. Another major roadblock has been the stagnation of the Doha Round. As a result, discussion among the four bodies has been inconsistent.

Discussions on e-commerce and digital trade have developed considerably since these first initiatives. A consistent clarion call has been for the development of new rules to govern this space. The rationale behind this has been the perceived inadequacy of existing rules to account for the challenges and opportunities of digital trade.<sup>39</sup> Several developed countries have been pushing for the development of new regulation. However, LDCs and developing countries have been opposing the same due to the uneven footing they are placed at due to the ground realities of the digital divide. In the 2016 WTO Public Forum, Syed Tauqir Shah, Ambassador and Permanent Representative of the Mission of Pakistan to the WTO explained the barriers developing countries face in terms of e-commerce, such as the lack of proper infrastructure, payment solutions and digital skills.<sup>40</sup> In light of these challenges, he emphasised on the need to adequately discuss any new e-commerce rules, instead of rushing into developing regulation in this space. Similarly, the Permanent Representative of the Republic of Panama to the WTO suggested that the WTO should increase focus on infrastructural issues, as well as issues pertaining to intellectual property (IP).<sup>41</sup> This divergence in approaches was acknowledged in the Nairobi Ministerial Declaration — which recognised that many Members wanted to carry out work on the basis of the Doha structure, whereas others wished to “explore new architectures”.<sup>42</sup>

---

<sup>38</sup> *Id.*

<sup>39</sup> *Updating the Multilateral Rulebook on E-Commerce*, INT’L CENTRE FOR SUSTAINABLE TRADE & DEV., <https://ictsd.iisd.org/themes/services-and-digital-economy/research/updating-the-multilateral-rule-book-on-e-commerce>.

<sup>40</sup> Marília Maciel, *Updating the multilateral rulebook to foster development: Digital trade and beyond*, DIGWATCH, <https://dig.watch/sessions/updating-multilateral-rulebook-foster-development-digital-trade-and-beyond>.

<sup>41</sup> Aye Mya Nyein, *Digital trade for development: governance issues and the enabling environment*, DIGWATCH, <https://dig.watch/sessions/digital-trade-development-governance-issues-and-enabling-environment>.

<sup>42</sup> World Trade Organization, Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15)/DEC (2015).

The presentation held by the MIKTA Group, consisting of Mexico, Indonesia, South Korea, Turkey and Australia in 2016 was another significant development. The countries called for greater attention by the WTO on its digital trade agenda.<sup>43</sup> This needed to include newer issues such as data flows and localisation, along with a focus on technical work that could help improve understanding surrounding trade policy approaches and their impact on developed as well as developing countries.<sup>44</sup> A number of ideas were discussed, including, *inter alia*, using the Trade Facilitation Agreement to bolster e-commerce, enhancing metrics and insights on digital trade through regular work of WTO Committees, and using the Trade Policy Review Mechanism to examine digital trade barriers.<sup>45</sup>

Thus, there are broadly three groups of countries based on their approaches to fresh negotiations around e-commerce. The *first* includes a large number of developed countries who are calling for greater focus on e-commerce in the WTO agenda, such as USA, the EU and Japan. The *second* group opposes new negotiations around e-commerce, and wish to refocus attention on issues in the Doha Development Agenda that remain unresolved. This group would prefer that the mandate of the Work Programme of the WTO remain unchanged, and that e-commerce discussions continue under the same. LDCs and the large majority of developing countries prefer this model. The *third* group favours a middle path, calling for discussions around e-commerce that prioritise issues faced by developing countries; thus accounting for their concerns. The countries who prescribe to this view have formed the group, the Friends of E-Commerce for Development (FEDs). Argentina, Chile, Colombia, Costa Rica, Kenya, Mexico, Nigeria, Pakistan, Sri Lanka, Uruguay, and China are members of the FED.

In fact, the FED, in 2017, discussed the potential of e-commerce as a driver of growth in their first Ministerial Meeting.<sup>46</sup> This was a significant moment as it involved an in-depth discussion on long-term digital policy, coming from a group of developing countries. The seven main issues this presentation flagged out in WTO's work on e-commerce were:

- i. identification of strategies for e-commerce readiness;
- ii. access to ICT infrastructure and services;
- iii. trade logistics and trade facilitation;

---

[https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mindecision\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm), ¶ 34.

<sup>43</sup> *MIKTA e-commerce workshop reflections*, MIKTA, <http://mikta.org/document/others.php?pn=1&sn=&st=e-commerce&sc=&sd=&sdate=&edate=&sfld=&sort=&at=view&idx=235&ckattempt=2>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Developing countries launch roadmap for international trade and development policy*, FED PRESS RELEASE, <https://www.ip-watch.org/weblog/wp-content/uploads/2017/04/Press-Release-FED-Ministerial-Meeting-25.04.17-002.pdf>.

- iv. e-payment solutions;
- v. legal certainty and regulatory frameworks;
- vi. capacity building and technical assistance; and
- vii. access to financing.

### III. THE JOINT STATEMENT INITIATIVE ON E-COMMERCE

The JSO emerged as an alternative “plurilateral” forum to encourage collaborative negotiations on trade-related aspects of e-commerce, after the MC11 failed to convert the Work Programme initiatives into concrete solutions.<sup>47</sup> In 2017, the JSI invited all WTO Members to enter into “*exploratory work to formulate a high standard outcome on trade-related aspects of e-commerce*” that would build on existing WTO agreements.<sup>48</sup> As of 2020, participants of the JSI have expressed their collective intention to formulate a consolidated negotiating text for presentation at the 12<sup>th</sup> Ministerial Conference.<sup>49</sup>

The scope of the negotiations has been classified into distinct focus groups that deal with specific trade-related issues of e-commerce, i.e.;

- a. Focus Group A: Rules enabling digital trade including trade logistics and payment solutions
- b. Focus Group B: Openness and Digital Trade including legal and regulatory frameworks and competition/access to platforms
- c. Focus Group C: Trust and Digital Trade including Legal and Regulatory frameworks; Consumer Trust and Business Trust
- d. Focus Group D: Cross-Cutting Issues, i.e., ICT infrastructure and services; E-commerce skills; Technical Assistance; Access to Finance; Corporate Law Rules and Regulations
- e. Focus Group E: Telecommunications
- f. Focus Group F: Market Access and Customs Duties on Electronic Transmissions<sup>50</sup>

Currently, the participants of the JSI represent 90% of global world trade, i.e., eighty-six WTO Members have formally joined the JSI.<sup>51</sup> Out of these participants,

---

<sup>47</sup> *What is at Stake for Developing Countries in Trade Negotiations on E-Commerce- The Case of the Joint Statement Initiative*, U.N. CONF. ON TRADE & DEV. (2021), [https://unctad.org/system/files/official-document/ditctncd2020d5\\_en.pdf](https://unctad.org/system/files/official-document/ditctncd2020d5_en.pdf) [hereinafter UNCTAD (2021)].

<sup>48</sup> *Joint Statement on E-Commerce*, *supra* note 13.

<sup>49</sup> World Trade Organization, *Joint Statement on Electronic Commerce*, WT/L/1056 (Jan. 25, 2019).

<sup>50</sup> *Joint Statement Initiative on E-Commerce: Co-Conveners' Update*, WORLD TRADE ORGANIZATION (Dec. 2020), [https://www.wto.org/english/news\\_e/news20\\_e/ecom\\_14dec20\\_e.pdf](https://www.wto.org/english/news_e/news20_e/ecom_14dec20_e.pdf).

six participants are from the African sub-continent<sup>52</sup>, while only four participants are LDCs.<sup>53</sup> After overcoming initial scepticism, countries like China, Indonesia, the Philippines, Côte d'Ivoire etc. decided to join the JSI in 2019. China was motivated to join the JSI for the purpose of playing an active role in e-commerce negotiations by acting as a representative for developing countries and creating a framework that reflected the individual needs of different parties.<sup>54</sup> Similarly, Côte d'Ivoire joined the JSI in order to participate in discussions related to e-commerce issues under one single forum instead of having to follow multiple bodies under the WTO Work Programme.<sup>55</sup>

However, developing countries like India, South Africa, Viet Nam, Pakistan and a majority of Members from Africa, Caribbean and Pacific countries have chosen not to participate in these negotiations. In contrast, 'JSI-sceptic' WTO Members prefer the WTO Work Programme to be a more conducive forum for e-commerce negotiations. One of the reasons for this preference, as voiced by the African Group, is the 'bottom-up' structure of the Work Programme that allows specialised discussion over trade-related issues to be first carried out at their respective technical bodies, before being discussed and accepted by WTO Members at the General Council.<sup>56</sup>

Second, the resistant stance taken by JSI-sceptic Members reflect their concerns over the possible loss of domestic policy space needed to formulate their own e-commerce policy over issues like privacy, data protection and cross-border data flows. It is important to note that the predominant players of the JSI — USA, EU, Japan, South Korea, Singapore, etc. — already have fully realised e-commerce regimes and regulatory ecosystems to apply the rules negotiated under JSI. In the absence of a consensus-based solution for E-Commerce issues at the multilateral level, WTO Members consider FTAs to be a conducive laboratory to formulate their own set of digital trade provisions. WTO Members have been negotiating and

---

<sup>51</sup> UNCTAD (2021), *supra* note 47, at 9.

<sup>52</sup> WTO Members from the African continent are: Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Kenya and Nigeria.

<sup>53</sup> WTO Members from the LDCs are: Benin, Lao PDR, Myanmar and Burkina Faso.

<sup>54</sup> Henry S. Gao, *Across the Great Wall: E-Commerce Joint Statement Initiative Negotiation and China*, SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3695382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695382) [hereinafter Gao].

<sup>55</sup> WORLD TRADE ORGANIZATION, JOINT STATEMENT INITIATIVE ON ELECTRONIC COMMERCE, COMMUNICATION FROM CÔTE D'IVOIRE, INF/ECOM/46 (Nov. 14, 2019).

<sup>56</sup> WORLD TRADE ORGANIZATION, THE WORK PROGRAMME ON ELECTRONIC COMMERCE – STATEMENT BY THE AFRICAN GROUP, JOB/GC/144 (Oct. 20, 2017). *See also* WORLD TRADE ORGANIZATION, WORK PROGRAMME ON ELECTRONIC COMMERCE – COMMUNICATION FROM THE AFRICAN GROUP, JOB/GC/155 (Nov. 21, 2017).

including e-commerce chapters into the FTAs since 2001.<sup>57</sup> Since 2011, the pace of e-commerce provisions in FTAs have picked up exponentially.<sup>58</sup> Advanced developed economies like the USA and the EU have already negotiated and drafted comprehensive E-Commerce chapters in their respective FTAs. For instance, the first FTA to include a separate e-commerce chapter was entered into in 2003 between Australia and Singapore.<sup>59</sup> USA FTAs contain comprehensive e-commerce chapters that include binding provisions on personal data protection, prohibition of data localisation, consumer protection and cross-border data flows. Developing countries have also begun to commit to binding e-commerce chapters through their membership in bilateral agreements and comprehensive mega-regional agreements like Regional Comprehensive Economic Partnership (RCEP) and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that impose binding obligations related to cross-border data flows, non-discrimination and data localisation on its members. Even China has gradually begun to include E-Commerce chapters in its FTAs, however, the scope of these chapters is not as liberalised as USA's or EU's chapters.<sup>60</sup>

Lower income economies that have entered into FTAs with e-commerce chapters are often part of North-South FTAs wherein the other signatory party is an advanced economy holding the comparative strength to push for the inclusion of binding e-commerce provisions, especially related to establishment of a permanent moratorium on custom duties. For instance, India's FTA with Singapore is the only FTA where India has committed to binding e-commerce provisions related to permanent moratorium on custom duties, non-discrimination, etc.<sup>61</sup> Ukraine's FTA with Canada contains a comparatively short and soft e-commerce chapter consisting of only a binding provision establishing permanent moratorium on custom duties.<sup>62</sup> Similarly, Viet Nam's FTA with the EU only includes two e-commerce provisions i.e. a cooperation clause and a binding provision establishing

---

<sup>57</sup> Ines Willems, *Agreement Forthcoming? A Comparison of EU, US and Chinese FTAs in the Times of Plurilateral E-Commerce Negotiations*, 23 J. INTL. ECON. LAW 221-244 (2020).

<sup>58</sup> Mira Burri & Rodrigo Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, 23:1 J. INTL. ECON. LAW 1-34 (2020).

<sup>59</sup> WORLD TRADE ORGANIZATION, PROVISIONS ON ELECTRONIC COMMERCE IN REGIONAL TRADE AGREEMENTS, ERSD-2017-11 (June 2017), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201711\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201711_e.htm).

<sup>60</sup> Jie Huang, *Comparison of E-Commerce Regulations in Chinese and American FTAs: Converging Approaches, Diverging Contents, and Polycentric Directions?* 64 NETH. INTL. L. REV. 309-337 (2017).

<sup>61</sup> Comprehensive Economic Cooperation Agreement, India-Sing., Chapter 10, June 29, 2005, <https://commerce.gov.in/wp-content/uploads/2020/05/ch10.pdf>.

<sup>62</sup> Free Trade Agreement, Can.-Ukr., art. 8.2, Aug. 1, 2017, <https://www.cms-lawnow.com/ealerts/2017/07/canadaukraine-free-trade-agreement-in-effect-from-01-august-2017>.



a permanent moratorium on custom duties.<sup>63</sup> While it has been reported that out of 164 WTO Members, half of them have entered into at least one FTA with a dedicated e-commerce chapter<sup>64</sup>, LDCs and WTO Members from the African subcontinent have never entered into an FTA with e-commerce provisions.<sup>65</sup>

The absence of deep e-commerce provisions in the FTAs of developing countries and LDCs probably stems from the fact that these countries have yet to formulate their own domestic e-commerce policies and legislations governing issues like privacy, data protection, etc. The developing world needs to first carry out its own domestic ‘*exploratory work on e-commerce*’ before committing to binding multilateral rules that would forcibly dictate the terms of their domestic digital policies and legislations. For instance, India decided to stay out of e-commerce negotiations in order to protect its regulatory policy space for e-commerce issues like data protection, data localisation, etc. The Ministry of Commerce & Industry asserted India’s priorities of having to first complete the process of formulating a domestic e-commerce policy before entering into multilateral negotiations.<sup>66</sup> South Africa has also refrained from joining the JSI as it did not want to be “*bulldozed into a process without knowing the implications*” and has decided to wait till the release of the first negotiating text.<sup>67</sup> Similarly, the African Group fears that it does not have the regulatory capacity to accept any new rules and obligations related to e-commerce. Accepting binding rules of e-commerce would lead to further loss of their domestic policy space and would force them to catch-up with the policies of developed countries instead of formulating their own individual digital policy in an organic fashion. Therefore, in order to formulate a well-rounded negotiating text on e-commerce that fosters socio-economic diversity and protects internal policy spaces, it is imperative that the JSI embraces an inclusive approach to tackling the digital divide faced by developing countries and LDCs that supports the development of their e-commerce ecosystem without placing binding obligations on them.

Another important criticism meted out against the JSI is the issue of the legality of the negotiations taking place as these discussions are taking place outside the WTO

---

<sup>63</sup> Free Trade Agreement, EU-Viet., art. 2.7, June 12, 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:186:FULL&from=EN#page=8>.

<sup>64</sup> Darsinouei, *supra* note 33, at 11.

<sup>65</sup> *Id.*

<sup>66</sup> Kritika Suneja, *New E-commerce Policy Will Help India in WTO Negotiations: Commerce Department*, ECON. TIMES (Dec., 17, 2018), <https://economictimes.indiatimes.com/news/economy/policy/new-e-commerce-policy-will-help-india-in-wto-negotiations-commerce-department/articleshow/65346522.cms>.

<sup>67</sup> D. Ravi Kanth, *India, South Africa, other skip WTO negotiations on e-commerce at Davos meet*, LIVEMINT (Jan. 25, 2019) <https://www.livemint.com/politics/news/india-south-africa-others-skip-wto-negotiations-on-e-commerce-at-davos-meet-1548435856765.html>.

Framework. Article II:1 of the Marrakesh Agreement assigns the WTO with the role of providing an institutional framework for conducting trade negotiations related to all the legal instruments included in the agreement.<sup>68</sup> The Ministerial Conference is the assigned the authority to make decisions related to the multilateral trade agreements<sup>69</sup> wherein all decisions are to be arrived at via consensus.<sup>70</sup> While the JSI forum has provided participants with the opportunity to discuss vital trade issues in a structured manner, the mode of negotiation falls outside the purview of the institutional framework of the WTO Agreements. Given that the JSI functions outside the WTO multilateral framework, it is not clear as to how the ‘consolidated negotiating text’ — due to be presented at the Kazakhstan Ministerial Conference — will be enforced within the WTO agreement. Under Article X of the Marrakesh Agreement, a proposal to amend the provisions of the agreement or the Multilateral Trade Agreements listed under Annex 1 can be submitted by an Member of the WTO at the Ministerial Conference.<sup>71</sup> However, the decision to submit such a proposal for discussion to the rest of the Members has to be taken by consensus.<sup>72</sup> If the JSI negotiating text is submitted before the Ministerial Conference, developing countries that are sceptical of the text would most likely block the acceptance of the text. Similarly, if the JSI e-commerce text is intended to be treated as a plurilateral agreement, i.e., applicable on only those members that have accepted the rights and obligations of the text,<sup>73</sup> then any amendment to Annex 4 of the agreement would also require the consensus of all WTO Members at the Ministerial Conference.<sup>74</sup>

In a recent Joint Communication authored by India and South Africa, the countries expressed its concerns about the legality of the negotiations taking place within the JSI framework. It has been argued that the use of an alternative forum outside of the WTO framework could lead to fragmentation of the multilateral trading system.<sup>75</sup> Promotion of the JSI model of negotiation would probably encourage Members to formulate multilateral rules with ‘like-minded’ countries outside the WTO framework by disregarding the decisions made by WTO Members via consensus. This system would undo the mandate of the Tokyo Round that aimed to eradicate the *à la carte* fragmented system of the General

---

<sup>68</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

<sup>69</sup> *Id.*, art. IV.1.

<sup>70</sup> *Id.*, art. IX.1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, art X:1

<sup>73</sup> *Id.*, art. II:3

<sup>74</sup> *Id.*, art.X:4.

<sup>75</sup> WORLD TRADE ORGANIZATION, WORK PROGRAMME ON ELECTRONIC COMMERCE, THE E-COMMERCE MORATORIUM AND IMPLICATIONS FOR DEVELOPING COUNTRIES – COMMUNICATION FROM INDIA AND SOUTH AFRICA, WT/GC/W/774 (June 3, 2019).

Agreement on Tariffs and Trade (GATT) regime.<sup>76</sup> If JSI-texts are allowed to form part of the overall agreement, the success of the JSI forum would mark an end of the consensus-based system of decision-making in favour of plurilateral negotiations. In such a system, the specific concerns of developing countries and LDCs can be flippantly disregarded by introducing any new amendment and proposal to the WTO without obtaining the collective consensus of all Members.<sup>77</sup> Therefore, it would be counter-productive to the objectives of the JSI participants to alienate those countries that are hesitant about accepting binding e-commerce rules, if they aim to include the text within the overall agreement. A major step towards achieving consensus of all WTO Members would be to address the structural concerns of the developing world that seems to holding them back from flourishing within the digital landscape, i.e., the digital divide and the primitive state of their digital ecosystem.

#### IV. ADDRESSING THE DEVELOPING WORLD'S CONCERNS ON DIGITAL TRADE

##### *A. Moratorium on Customs Duties on Electronic Transmissions: Time for a Rebrand*

The 1998 Moratorium on Customs Duties on Electronic Transmissions (Moratorium) has been regularly extended by WTO Members in several Ministerial Conferences and General Council discussions. The reason for its prevalence stems from the lack of consensus between Members over the definition and scope of Electronic Transmissions (ET). WTO Members were not able to arrive at a harmonised definition for ET and therefore, it was not clear whether ET should be treated as a good and made subject to custom duties under Article II of GATT or as a service and subject to each Members' General Agreement on Trade in Services (GATS) schedules. Countries like USA, Singapore, South Korea and Japan treat ET as transmissions made using electromagnetic means.<sup>78</sup> The same definition has also been enshrined in the e-commerce chapters of these countries' FTAs such as in the CPTPP,<sup>79</sup> the U.S. - Korea FTA (KORUS),<sup>80</sup> the United States-Mexico-

---

<sup>76</sup> James Nedumpara & Shiny Pradeep, *The Crisis of the 'Consensus Principle' and the Joint Statement Initiative Approach*, REGULATING FOR GLOBALIZATION (Dec. 15, 2020), <http://regulatingforglobalization.com/2020/12/15/the-crisis-of-the-consensus-principle-and-the-joint-initiative-approach/>.

<sup>77</sup> *Supra* note 75.

<sup>78</sup> Rashmi Banga, *Joint Statement Initiative on E-commerce (JSI): Economic and Fiscal Implications for the South*, UNCTAD RESEARCH PAPER NO. 58 (2021) [hereinafter Banga (2021)].

<sup>79</sup> See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 14.1, Mar. 8, 2018, <https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf> [hereinafter CPTPP].

Canada Agreement (USMCA),<sup>81</sup> etc. The same definition has also been included in the leaked draft of the JSI consolidated text.<sup>82</sup>

Another bone of contention related to the Moratorium is the question of whether it should: (a) continue to be temporary; (b) be made permanent; or (c) modified and adjusted to account for Members' proposals and technological developments. Developed country participants of the JSI, i.e., USA, the EU, Singapore, Canada, etc. have recommended that the moratorium be made permanent in such a way that Members will be prohibited from imposing duties on all ET including the content being transmitted between Members. Most of the proponents of making the moratorium permanent have made similar commitments within the e-commerce chapters of their FTAs.<sup>83</sup> Advocates for the permanent establishment of the Moratorium have argued that the burgeoning growth of digital trade over the decades can be attributed to the Moratorium as it led to the removal of trade barriers in the form of customs duties. The freedom accorded by the free flow of ET is the reason for the creation of a global marketplace where businesses, consumers and MSMEs are able to access new products, services and consumer-bases.<sup>84</sup> It is feared that if custom duties on ET are allowed, it would lead to rise in the prices of goods and services that would adversely affect consumers in the e-commerce space.<sup>85</sup>

On the other side of the spectrum, a perfect account of the arguments against the permanent moratorium can be found in the Joint Communication to the Work Programme on Electronic Commerce submitted by India and South Africa.<sup>86</sup> The

---

<sup>80</sup> Free Trade Agreement, US-S. Kor., art. 15.1, June 30, 2007, [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file816\\_12714.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file816_12714.pdf) [hereinafter KORUS].

<sup>81</sup> United States-Mexico-Canada Agreement, art 19.1, Nov. 30, 2018, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>.

<sup>82</sup> WORLD TRADE ORGANIZATION, ELECTRONIC COMMERCE NEGOTIATIONS. CONSOLIDATED NEGOTIATING TEXT, INF/ECOM/62/Rev.1, at 36 (Dec. 14, 2020), [https://www.bilaterals.org/IMG/pdf/wto\\_plurilateral\\_ecommerce\\_draft\\_consolidated\\_text.pdf](https://www.bilaterals.org/IMG/pdf/wto_plurilateral_ecommerce_draft_consolidated_text.pdf) [hereinafter JSI Text].

<sup>83</sup> See Article 14.3 of CPTPP, Article 8.72 of EU-Japan FTA and Article 15.3 of KORUS.

<sup>84</sup> *WTO moratorium on customs duties – A primer for businesses*, INT'L CHAMBER OF COMMERCE (2019), <https://iccwbo.org/content/uploads/sites/3/2019/11/2019-icc-wto-moratorium-custom-duties.pdf>.

<sup>85</sup> Mary Amiti et al., *The Impact of the 2018 Trade War on U.S. Prices and Welfare*, 33(4) THE J. ECON. PERSPECTIVES 187-210 (2019).

<sup>86</sup> WORLD TRADE ORGANIZATION, THE E-COMMERCE MORATORIUM AND IMPLICATIONS FOR DEVELOPING COUNTRIES – COMMUNICATION FROM INDIA AND SOUTH AFRICA, (June 03, 2019), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-)

Communication recommends that the interpretation of the 1998 moratorium be modified to extend to the *act* of transmission, i.e., ‘the bits and bytes’ of the transmission, while allowing countries to apply duties on the transmitted ‘*content*’. India and South Africa urge Members to embrace a new interpretation for the Moratorium that more accurately accounts for the current technological landscape that has evolved drastically since the institution of the Moratorium in 1998. The development of technological infrastructure has made it feasible for countries to track the origin of a transmission, value the ‘*content*’ of an ET and impose customs duties on the *content* but not the *transmission* itself. In conclusion, the Joint Communication proposes that that Moratorium should prevail *de jure*, i.e., zero duties should be imposed on the act of electronic transmission. Zero duties on electronic transmissions would mean that countries would not be allowed to charge custom duties on the act of ET i.e., they will be prohibited from discriminating against e-commerce suppliers and traditional suppliers of like goods and services. However, importing countries should be allowed to apply customs duties on the digitised product and services being transmitted, akin to traditional goods and services.

The proposal to change the way the Moratorium is being interpreted in present day stems from developing countries’ and LDCs’ rising concerns over ‘revenue leakage’ caused by the removal of customs duties. Studies have estimated that the revenue loss suffered by countries range from \$280 million to \$8.2 billion depending on variables like trade flows covered and kinds of tariffs applied.<sup>87</sup> It is erroneous to believe that customs duties are ‘trade barriers’ to ET as it has been recognised by WTO Members that custom duties may not always be used ‘barriers’ to control foreign imports but they can also be used a means to earn revenue by the exporting country.<sup>88</sup> Ever since the institution of the Moratorium in 1998, the scope of digital products and services i.e. ‘*content*’ being transmitted electronically has increased to such an extent that it risks making commitments made under GATT and GATS schedules redundant. According to a study carried out by the United Nations Conference on Trade and Development (UNCTAD), 49 Harmonized System (HS) 6-digit tariff lines can be classified as an ET extending into the realm of services like wholesale and retail trading services, recreational and other services, communication services and business services, etc.<sup>89</sup> The imposition of the a permanent Moratorium will insidiously nullify the tariff schedules

---

DP.aspx?language=E&CatalogueIdList=254770,254764,254708,254719,254575,254574,254577,254349,254248,254192&CurrentCatalogueIdIndex=2&FullTextHash=237161575&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

<sup>87</sup> Banga (2019), *supra* note 31.

<sup>88</sup> Appellate Body Report, *India — Additional and Extra-Additional Duties on Imports from the United States*, WTO Doc. WT/DS360/AB/R (adopted Nov. 17, 2008).

<sup>89</sup> Banga (2021), *supra* note 78, at 13.

negotiated under Article II GATT and the services commitments made under the GATS, especially if new digital products and services continue to infringe into the domain of traditional goods and services. For instance, developing countries and LDCs face a major threat from the popularity of the 3D printing which can be used to electronically transmit digital products to 'print' physical products.<sup>90</sup> Use of 3D printing in manufacturing risk decimating the exporting advantages of manufacturing countries as 'digitised products' would be capable of being electronically transmitted to any part of the world without being charged a tariff as per GATT schedules.

Another argument made in favour of the Moratorium is that even though countries have had to suffer revenue losses, they should be treated as opportunity costs for enjoying the economic benefits gained due to the growth of digital technology which has led to the reduction in other costs like transportation costs.<sup>91</sup> However, this argument fails to consider the stark disparity between the revenue leakage suffered by developed economies and that suffered by developing countries and LDCs. Additionally, it ignores the fact that some countries maintain higher Most Favoured Nation (MFN) tariffs than others such that the former country would suffer higher loss in revenue than the latter. According to a 2019 UNCTAD study, high-income Members of the WTO suffered a revenue loss of only \$289 million as the average MFN tariffs of these countries was only 0.2%.<sup>92</sup> Developing countries may have suffered a potential revenue loss of \$10 billion per annum.<sup>93</sup> LDCs may have suffered a loss of \$1.5 billion per annum with African countries suffering a loss of \$2.6 billion per annum.<sup>94</sup> Further, the study noted that if the Moratorium was removed then LDCs would be able to generate five times more revenue than developed countries while developing countries could generate 40 times more revenue.<sup>95</sup>

### B. *Addressing the Digital Divide*

The benefits of the digital era, though significant, have not been equally enjoyed by all portions of the society. This was recognised as early as 2003, when Kofi Annan, in his address to the World Summit on the Information Society explained that the

---

<sup>90</sup> *Id.*, at 15.

<sup>91</sup> Andrea Andrenelli, A. & Javier López González, *Electronic transmissions and international trade - shedding new light on the moratorium debate*, OECD TRADE POLICY PAPERS, NO. 233 (2019).

<sup>92</sup> Banga (2019), *supra* note 31.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

digital divide was actually several gaps in one; including the gender digital divide.<sup>96</sup> In its announcement declaring the creation of the JSI, the participants recognised the particular challenges faced by developing countries, LDCs and MSMEs related to e-commerce and aimed to discuss these particular interests within its exploratory work.<sup>97</sup> In a WTO Secretariat Report reviewing the role of e-commerce during the COVID-19 pandemic, the authors noted the glaring need to bridge the digital divide within and across countries.<sup>98</sup> However, the degree of liberalisation proposed by developed country participants in their submission seems to assume that all the participants already have robust regulatory ecosystems, e-commerce policies and adequate internet infrastructure foundations in place to implement concrete deep provisions on e-commerce.

In order to encourage inclusivity and recognition of developing country and LDC interests, e-commerce rules should be drafted from a development and cooperation perspective that addresses the growing digital divide between developed economies with sophisticated digital regimes and developing economies that need policy space and time to create basic e-commerce policies. The OECD defines the digital divide as:

[T]he gap between individuals, households, businesses and geographic areas at different socio-economic levels with regard both to their opportunities to access Information and Communication Technologies (ICTs) and to their use of the Internet for a wide variety of activities. The digital divide reflects various differences among and within countries.<sup>99</sup>

In order to address the digital divide, multilateral negotiations have to focus on two aspects of digital access, i.e., access-to-access (A2A) and access-to-knowledge (A2K). Efforts to encourage A2A focuses on increasing access to computer hardware and ICTs along with building internet infrastructure to increase internet connectivity in remote-regions and to a wide population.<sup>100</sup> At the WTO, the

---

<sup>96</sup> *Secretary-General's address to the World Summit on the Information Society*, UNITED NATIONS SECRETARY GENERAL (10 Dec. 2003), <https://www.un.org/sg/en/content/sg/statement/2003-12-10/secretary-generals-address-world-summit-information-society>.

<sup>97</sup> *Joint Statement on E-Commerce*, *supra* note 13.

<sup>98</sup> WTO Secretariat, *E-Commerce, Trade and the COVID-19 Pandemic*, WORLD TRADE ORGANIZATION (May 4, 2020), [https://www.wto.org/english//tratop\\_e/covid19\\_e/ecommerce\\_report\\_e.pdf](https://www.wto.org/english//tratop_e/covid19_e/ecommerce_report_e.pdf).

<sup>99</sup> *Understanding the Digital Divide*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/sti/1888451.pdf>.

<sup>100</sup> Leonila Guglya & Marilia Maciel, *Addressing the Digital Divide in the Joint Statement Initiative on E-commerce: From enabling issues to data and source code provisions*, INT'L INST. FOR

Information Technology Agreement (ITA) was adopted to remove tariffs on ICT goods i.e. computers, telecommunication devices, semiconductors, etc.<sup>101</sup> The ITA-2 expanded the IT products protected under the agreement, i.e., it included new-generation semi-conductors, semiconductor manufacturing equipment, optical lenses, Global Positioning System (GPS) navigation equipment, and medical equipment such as magnetic resonance imaging products and ultra-sonic scanning apparatus. However, studies have shown that agreements had a detrimental effect on the trade competitiveness of many developing countries due to decline in exports of ITA products. The fall in exports had a direct effect on the domestic production of these products and affected domestic output and employment generation in these industries. India faced a decline in investments in the electronic manufacturing sector and faced large tariff losses due the impact of ITA-1.<sup>102</sup> According to a study carried out by K.J. Joseph, none of the Asian countries — except for China — benefitted from the ITA and did not increase their market share in the electronic manufacturing sector.<sup>103</sup>

In the midst of the digital revolution, A2A goals should aim to improve access to digital hardware like smartphones, computers, tablets, etc. in developing countries and LDCs. Statistics estimate that the number of smartphones users around the world will be rising to 7516 billion in 2026 since 3668 billion in 2016.<sup>104</sup> The highest number of smartphone users are found in China, India and the USA.<sup>105</sup> However, the growth in the number of smartphones has not taken place in an equitable manner to bring developing economies and LDCs into the digital space as well. According to studies, a citizen of a developed economy is more likely to have access to a smartphone than a citizen of a developing economy.<sup>106</sup>

---

SUSTAINABLE TRADE & DEV. (Dec. 2020), <https://www.iisd.org/system/files/2021-01/digital-divide-e-commerce-en.pdf> [hereinafter Guglya & Maciel].

<sup>101</sup> World Trade Organization, Ministerial Declaration on Trade in Information Technology Products, WTO Doc No. WT/MIN(96)/16 (Dec. 13, 1996).

<sup>102</sup> Rashmi Banga, *Implications of Signing Information Technology Agreement (ITA-1) and Expansion of ITA (ITA-2)*, (Centre for WTO Studies, Indian Institute of Foreign Trade, Working Paper No. CWS/WP/200/57), <https://wtocentre.iift.ac.in/workingpaper/WP%20Implications%20of%20signing%20ITAI%20and%20ITA%20Expansion.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> *Number of smartphone users from 2016 to 2021*, STATISTA, <https://www.statista.com/statistics/330695/number-of-smartphone-users-worldwide/>.

<sup>105</sup> *Number of smartphone users by leading countries as of May 2021*, STATISTA, <https://www.statista.com/statistics/748053/worldwide-top-countries-smartphone-users/>.

<sup>106</sup> Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RESEARCH CENTER (Feb. 5, 2019), <https://www.pewresearch.org/global/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/>.



Furthermore, access to a smartphone or a digital device does not necessarily ensure that people have access to the digital space. A2A is not complete without the complementary development of internet infrastructure and quality broadband penetration in even the most remote areas of a country. According to the World Bank, only 35% of the population in developing countries<sup>107</sup> have access to the internet in comparison to 87% in developed economies.<sup>108</sup> In the LDCs, only 19% of the population has access to the internet.<sup>109</sup> While there has definitely been an increase in the number of fixed broadband connections and mobile internet subscriptions, the growth of broadband penetration in developing countries and LDCs have taken place at a much slower rate than in developed countries. The percentage of the population of Sub-Saharan Africa that had access to mobile internet connectivity in 2019 was 26%.<sup>110</sup> Additionally, even when internet connectivity is available, LDCs are deterred from having access to the internet due to unaffordable prices.<sup>111</sup> According to the UNCTAD, the mobile data affordability indicator for LDCs is 30 while for the rest of the world, it is 63.<sup>112</sup>

---

<sup>107</sup> *Connecting for Inclusion: Broadband Access for All*, THE WORLD BANK, <https://www.worldbank.org/en/topic/digitaldevelopment/brief/connecting-for-inclusion-broadband-access-for-all> [hereinafter *Connecting for Inclusion*].

<sup>108</sup> *Measuring digital development: Facts and figures 2019*, INT'L TELECOMMUNICATION UNION, <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>, at 2 [hereinafter ITU: Facts and Figures 2019].

<sup>109</sup> *Id.*

<sup>110</sup> *Mobile Internet Connectivity 2020: Sub-Saharan Africa Factsheet*, GSMA, <https://www.gsma.com/r/wp-content/uploads/2020/09/Mobile-Internet-Connectivity-SSA-Fact-Sheet.pdf>.

<sup>111</sup> ITU: Facts and Figures 2019, *supra* note 108, at 11.

<sup>112</sup> *Least developed countries suffer digital divide in mobile connectivity*, UNITED NATIONS CONF. ON TRADE & DEV. (Apr. 1, 2021), <https://unctad.org/topic/least-developed-countries/chart-april-2021>.



**Figure 1: Fixed broadband subscriptions (per 100 people)**

*Source: The World Bank (2019)*<sup>113</sup>

The lack of knowledge and skills in using digital technologies, as well as affordability, are some of the major reasons behind the digital divide.<sup>114</sup> In a study carried out by the International Telecommunication Union (ITU), in 40 out of the 84 countries surveyed, only half of the population possessed basic computer skills like sending an e-mail.<sup>115</sup> It has also been reported that highly educated people are more likely to use the internet than less educated people. Another notable phenomenon of the digital divide is the disparity in accessibility of ICTs between genders.<sup>116</sup> While worldwide, 48% of women have access to internet as compared to 55% of men; in developing countries, the percentage drops to only 40% of the female population using the internet.<sup>117</sup> In LDCs, only 15% of the female population uses the

<sup>113</sup> *Fixed broadband subscriptions (per 100 people)*, THE WORLD BANK, <https://data.worldbank.org/indicator/IT.NET.BBND.P2?end=2019&start=1960&view=map&year=2019>.

<sup>114</sup> *Empowering women in the digital age: Where do we stand?*, OECD, <https://www.oecd.org/going-digital/empowering-women-in-the-digital-age-brochure.pdf>, at 8.

<sup>115</sup> ITU: Facts and Figures 2019, *supra* note 108, at 10.

<sup>116</sup> United Nations, *Gender Equality and the Empowerment of Women through ICT*, WOMEN2000 & BEYOND (2005), <https://www.un.org/womenwatch/daw/public/w2000-09.05-ict-e.pdf>.

<sup>117</sup> ITU: Facts and Figures 2020, *supra* note 34 at 8.

internet. Gender disparities also remain in the ownership of mobile phones,<sup>118</sup> which has proven difficult to bridge, particularly in low and middle-income countries.<sup>119</sup> Lack of familial support, and control over access to and use of the internet, further restricts women's opportunities in this arena.<sup>120</sup> Access to the internet is even more severely restricted for women living in rural areas, where stricter and more orthodox social norms compound the problem of lack of connectivity.<sup>121</sup> In India, for example, women are banned from using mobile phones in some villages.<sup>122</sup> Further, the burden of domestic work and unpaid care is unevenly distributed between the genders: it was found that women do 2.6 times the amount of such work than men do.<sup>123</sup>

---

<sup>118</sup> *Id.*, at 11.

<sup>119</sup> *Connected Women: The Mobile Gender Gap Report 2021*, GSMA, <https://www.gsma.com/r/wp-content/uploads/2021/07/The-Mobile-Gender-Gap-Report-2021.pdf>, at 12.

<sup>120</sup> *Id.*, at 52-53.

<sup>121</sup> *Id.*, at 65.

<sup>122</sup> *India: Banning women from owning mobile phones*, ALJAZEERA (Feb. 26, 2016), <https://www.aljazeera.com/news/2016/2/26/india-banning-women-from-owning-mobile-phones>.

<sup>123</sup> *Turning promises into action: Gender equality in the 2030 Agenda for sustainable development*, UNITED NATIONS WOMEN, <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf?la=en&vs=4332>, at 93.



**Figure 2: Mobile cellular subscriptions (per 100 people)**

*Source: The World Bank (2019)<sup>124</sup>*

Bridging the digital divide by addressing A2A goals can have complementary positive effects of societal and economic differences in developing countries and LDCs. According to the World Bank, efforts to raise the internet penetration to 75% of the population in all developing countries would end up adding as much as US\$2 trillion to their collective gross domestic product (GDP) and create more than 140 million jobs around the world.<sup>125</sup> Capacity-building programmes can play an important role in bridging the digital divide, particularly in developing countries. Digital training exercises can help people learn the basic skills required to use ICT services which can progressively lead to their initiation into the digital space. Additionally, initiatives funded by international organisations can make a significant difference in this area. In the domain of improving access to technology for women, the Tech Needs Girls project in Ghana, for instance, helped train over 4500 girls in Ghana and Burkina Faso on how to code and create technology.<sup>126</sup> The Caribbean Girls Hack – 2019 Hackathon encouraged the participation of girls

<sup>124</sup> *Mobile cellular subscriptions (per 100 people)*, THE WORLD BANK, <https://data.worldbank.org/indicator/IT.CEL.SETS.P2?end=2019&start=1960&view=map&year=2019>.

<sup>125</sup> *Connecting for Inclusion*, *supra* note 107.

<sup>126</sup> *Digital Economy Report 2019*, *supra* note 35, at 130.

in the ICT sector.<sup>127</sup> It was part of the International Girls in ICT Day programme of the ITU. Such programmes can encourage the participation of young women in Science, Technology, Engineering and Mathematics (STEM) studies and careers. Initiatives such as the UNCTAD's 'eTrade for Women', can help facilitate productive dialogue between various stakeholders on how to empower women in the digital economy.<sup>128</sup>

### C. Regulation of Cross-Border Data Flows

When the phrase "data is the new oil" became popular in 2017, the analogy was used to equate the competitive dominance held by oil companies in the 20<sup>th</sup> century with the dominance held by BigTech giants in present day.<sup>129</sup> Just as access to and ability to process oil was considered to be a lucrative business for oil giants of the industrial revolution, similarly, the ability to collect, mine and process information from the data collected by social media companies, e-commerce websites and digital service providers including the Internet of Things (IoT) is a profitable source of profits for digital companies.

While it is still important to encourage A2A endeavours, e-commerce rules need to direct its focus to the A2K. A2K refers to promoting access to knowledge and specialised information required to allow individuals, firms and innovators to develop new technologies and digital products. As data becomes the new 'oil', the digital revolution favours those players that have the capacity to process data to create new digital products and new technologies like machine learning and artificial intelligence. With the rising popularity of e-commerce websites, social media and digitisation of daily living through the proliferation of the IoT, the generation of data by individuals will be astronomical, especially from developing countries and LDCs that provide a huge user and consumer market for these companies. Unfortunately, it is not enough to just create, store and have access to data without having the technological know-how to process that data to obtain information that can be furthered harnessed and perfected to attain knowledge. The location of 25 of the top 100 digital companies shows how the technical know-how required to obtain specialised knowledge about digital innovation is

---

<sup>127</sup> *Barbados girls set to shine at regional girl's Hackathon*, LOOP NEWS, <https://barbados.loopnews.com/content/barbados-girls-set-shine-regional-girls-hackathon-0>.

<sup>128</sup> *Digital Economy Report 2019*, *supra* note 35, at 130; *see also*, *eTrade for Women*, ETRADE FOR ALL, <https://etradeforall.org/et4women/>.

<sup>129</sup> *See The world's most valuable resource is no longer oil, but data*, THE ECONOMIST (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

centred in the developed world, i.e., the US, China, EU, Japan, South Korea, etc.<sup>130</sup> BigTech giants like Facebook, Alphabet, etc. already have an enormous jumpstart over digital companies and governments based in developing countries and LDCs. Through the establishment of a ‘digital supply chain’, digital giants are able to access diverse consumer and business markets and complete electronic transactions at lightening speeds during which the data collected during the transaction navigates multiple territorial borders.

According to the Global Internet Protocol Traffic — statistics that estimates the volume of data being generated and transferred throughout the internet space — the frequency of traffic in 2020 was estimated to be a 100,000 GB per second as compared to 100 GB per day in 1992.<sup>131</sup> This traffic is projected to increase to 150,000 GB per second by 2022.<sup>132</sup> Furthermore, it has been estimated that the number of IoT devices will increase to 75 billion by 2025.<sup>133</sup> Currently, 500 million tweets are published on Twitter every day,<sup>134</sup> and 319.6 billion emails are sent and received daily.<sup>135</sup> By 2030, 90% of the population older than six will be online,<sup>136</sup> leading to the creation of astronomical amounts of data flowing between multiple sovereign territories. Along with the enormous rise in the volume of data being generated, the nature of data being generated has also increased, ranging from critical personal data, non-personal data to even sensitive government data related to national security. The categories of data being generated in the digital economy include critical personal data or sensitive data, i.e., genetic data, health data, etc.; financial data generated for the conduct of business; personal data, i.e., data that

---

<sup>130</sup> *Forbes Releases Digital 100, The Inaugural Ranking Of The Top 100 Public Companies Shaping The Digital Economy*, FORBES (Sep. 20, 2018) <https://www.forbes.com/sites/forbespr/2018/09/20/forbes-releases-digital-100-the-inaugural-ranking-of-the-top-100-public-companies-shaping-the-digital-economy/?sh=201746c63cf2/>.

<sup>131</sup> *Crossing Borders*, THE WORLD BANK, <https://wdr2021.worldbank.org/stories/crossing-borders/>.

<sup>132</sup> *Id.*

<sup>133</sup> *Internet of Things (IoT) connected devices installed base worldwide from 2015 to 2025*, STATISTA, <https://www.statista.com/statistics/471264/iot-number-of-connected-devices-worldwide/>.

<sup>134</sup> *Twitter Usage Statistics*, INTERNET LIVE STATS, <https://www.internetlivestats.com/twitter-statistics/>.

<sup>135</sup> *Number of sent and received e-mails per day worldwide from 2017 to 2025*, STATISTA, <https://www.statista.com/statistics/456500/daily-number-of-e-mails-worldwide/>.

<sup>136</sup> Steve Morgan, *Humans On The Internet Will Triple From 2015 To 2022 And Hit 6 Billion*, CYBERCRIME MAGAZINE (July 18, 2019), <https://cybersecurityventures.com/how-many-internet-users-will-the-world-have-in-2022-and-in-2030/>.

can help identify a person and their characteristics; government data is data held or processed by or on behalf of a government.<sup>137</sup>

The exponential amount of raw data expected to be generated by users in digital platforms will create a lucrative mine of ‘raw materials’ for digital companies seeking to process this data to obtain valuable information about diverse user bases for the creation of more profitable digital products and services. In order to be able to maintain its stronghold over data extracted from its users across various sovereign markets, digital companies prefer regulations that allow free flow of data across sovereign territories to its data centres and restrict the use of measures that regulate the flow of such data, i.e., data localisation and data processing measures. In pursuance of these goals, the FTAs of developed economies like the USA, Japan, South Korea already include deep binding provisions governing cross-border data flows and data localisation measures within its e-commerce chapters. Article 14.11.2 of the CPTPP requires parties to allow the cross-border flow of information between parties by electronic means when this information is required for the conduct of business. In order to facilitate the furtherance of free-flow of data between parties, Article 14.13 CPTPP and Article 12 of the US-Japan FTA prohibits local data localisation measures. While recognising the importance of having rules regarding use of computing facilities for security and confidentiality purposes, parties are prohibited from requiring persons to use or locate computing facilities in the territory of the party, where business is to be conducted. The e-commerce chapters in USA FTAs and EU FTAs also prohibit the use of measures requiring source code disclosures from digital companies. Article 14.17 CPTPP and Article 8.73 EU-Japan FTA explicitly prohibits any requirements mandating transfer of or access to source code of software owned by a person of another party as a condition for import, distribution, sale or use of software or products in its territory. Based on proposals submitted by developed economies like the USA, Korea, Japan Canada and Singapore, the leaked consolidated text has also included provisions mandating cross-border flow of data by electronic means<sup>138</sup> by restricting the use of data localisation and data processing measures.<sup>139</sup> Similarly, members are prohibited from imposing measures that require transfer of and access to source codes of software owned by a person from another party as a pre-condition for import, distribution, sale or use of the software or products in the its territory,<sup>140</sup> based on the proposals of Canada, Japan, USA, EU, Singapore, Korea, etc.

---

<sup>137</sup> Guglya & Maciel, *supra* note 100, at 29.

<sup>138</sup> JSI Text, *supra* note 82, at 27.

<sup>139</sup> *Id.*, at 30.

<sup>140</sup> *Id.*, at 48.

The imposition of deep binding rules governing data flows based on proposals of developed countries only snatches away the agency of developing countries and LDCs to formulate their own domestic data governance policies. Developing countries and LDCs should be given the flexibility to design their own legislations and policies on data flows according to their own internal legislations, citizens' concerns and administrative capacities. Governments of developing countries and LDCs are also slowly becoming aware of the profitability of their citizens' data for the development of digital products and are seeking to exert control over the data that has been generated in their own sovereign territory. Proponents of 'data sovereignty' believe that data generated by users, businesses and organisations based in their country should be treated as a national resource for creating economic growth by regulating or controlling the movement of flow of data across borders. By mandating rules of data localisation and local data processing, developing countries aim to control not only the flow of data outside its territory but also protect equally important domestic concerns like privacy of citizens, national security, administration of law and order, etc. Issues related to data protection of citizens' data, national security, consumer protection, law and order, etc. fall within the parliamentary and administrative functions of sovereign government of developing countries and LDCs. Multilateral binding rules on data flows impinge into the sovereign legislative domain of developing countries and LDCs and demands that their internal laws be formulated into accordance with developed country's rules and standards instead of being based on the will of the citizens/users and the elected representatives of the country. Some of the arguments made in favour of upholding the sovereign regulation of data flows are:

### 1. Data Protection and Privacy

One of the reasons for the regulating of cross-border flows of data is to protect the privacy interests of users whose data is being extracted and used by digital companies. The amount of user data being generated on a daily basis is increasing at an exponential rate. The wide range of data being generated, i.e., health data, sensitive personal data, etc.; is now capable of being by digital companies for processing and identifying specific characteristics of its users. International scandals like the Cambridge Analytica scandal<sup>141</sup> show that citizens' data can be mined and used for exploitative purposes that can have a direct effect on their 'offline' choices like election behaviour, shopping choices, political ideologies, etc. Therefore, citizens are becoming increasingly more cautious about the use of their

---

<sup>141</sup> Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, THE N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html>.



data by digital companies by demanding that their government's formulate robust legislations for privacy and data protection.

However, there seems to be no international consensus on how privacy and data protection should be maintained by governments. The privacy jurisprudence varies depending on the socio-economic principles and digital governance policies of that country. For example, the USA does not have a principal federal data protection law in place. At the federal level, Free Trade Commission (FTC) is the considered to be the *de facto* data protection authority whose jurisdiction over data privacy is a product of the self-regulatory system followed by Internet companies in the digital space. Companies follow as voluntary standard of enforcing data privacy by entering privacy policy contracts with their users who have the right to "choose" how they wanted their data to be used by the companies.<sup>142</sup> At the State level, data privacy is governed by a circuitous system of overlapping provisions. All 50 States have independent systems of data breach notification laws with different thresholds for data breach and definitions of personal data.

Meanwhile, in the EU, privacy is treated as a fundamental right of its citizens enforced by General Data Protection Regulation (GDPR)<sup>143</sup> that establishes substantive and binding rules for enforcing data protection rules over personal information. In China, privacy is treated as a barrier to its national security<sup>144</sup> and its government seeks to maintain tight control over the flow of personal data to ensure domestic stability, regime legitimacy and the rule of the Chinese Communist Party.<sup>145</sup> In order to exert its control over the data of its citizens, China maintains unconditional restrictions on the flow of effectively all of its data by mandating local production, local storage and local processing.<sup>146</sup> In Russia, rules mandate local storage of citizens' personal data while companies are required to maintain mirrored data in local servers.<sup>147</sup>

---

<sup>142</sup> Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy* 114(3) COLUMBIA L. REV. 583 (2011).

<sup>143</sup> Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 2016 O.J. (L 119).

<sup>144</sup> Andrew D. Mitchell & Neha Mishra, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law can Contribute*, J. ECON. L. 1-28 (2019) [hereinafter Mitchell & Mishra].

<sup>145</sup> Gao, *supra* note 54.

<sup>146</sup> Cybersecurity Law of the People's Republic of China, (中华人民共和国网络安全法) Trial Guidelines (promulgated by the Standing Comm. Nat'l People's Cong., June 1, 2017, effective June 1, 2017).

<sup>147</sup> Портал персональных данных Уполномоченного органа по защите персональных данных [Amending Some Legislative Acts of the Russian Federation in as much as it

In India, privacy has been accepted as a fundamental right of its citizens.<sup>148</sup> The Draft Personal Data Protection Bill is heavily inspired by the data privacy rules of EU GDPR and classified data into ‘personal data’, ‘sensitive personal data’ and ‘critical personal data’. ‘Data fiduciaries’ are prohibited from processing personal data of a person unless it is done for a specific, clear and lawful purpose.<sup>149</sup> Critical personal data i.e. personal data as may be notified by the Central Government can only be processed in India.<sup>150</sup> Sensitive personal data is required to be stored in India and can only be transferred outside India upon receipt of explicit consent from the data principal prior to transfer.<sup>151</sup> For the purpose of protecting the privacy of its citizens, the government has frequently released data localisation rules in specific sectors governing e-pharmacies,<sup>152</sup> cloud services,<sup>153</sup> etc.

In Africa, only 52% of the countries have formulated privacy and data protection legislations — where countries like Namibia, Congo, Libya, Ethiopia, Sudan, etc. have no privacy legislations.<sup>154</sup> Out of 47 LDCs, only 21 countries have formulated privacy legislations.<sup>155</sup> The data protection laws codified and enforced in the African subcontinent are not harmonised and differ on major issues like the scope of coverage of data protection laws, definitions of personal data and the obligations held by data processors.<sup>156</sup> In some countries like Nigeria, Mauritius, Egypt, Kenya, etc, the EU’s GDPR has been used an inspiration for provisions

Concerns Updating the Procedure for Personal Data Processing in Information-Telecommunication Networks, Federal Law No. 242-FZ (July 21, 2014).]

<sup>148</sup> K.S. Puttaswamy v. Union of India, 2017 (10) SCALE 1.

<sup>149</sup> PERSONAL DATA PROTECTION BILL, 2019, § 4 (MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY, Proposed Official Draft 2019) [hereinafter PDP Bill].

<sup>150</sup> *Id.*, Section 33(2).

<sup>151</sup> *Id.*, S. 33(1).

<sup>152</sup> Anandi Chandrashekhar, *E-Pharma companies want more clarity on data sharing, localisation draft rules*, ECON. TIMES (Oct. 04, 2018), <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/e-pharma-companies-want-more-clarity-on-data-sharing-localisation-draft-rules/articleshow/66072096.cms?from=mdr>.

<sup>153</sup> Aditya Kalra, *Exclusive: India panel wants localization of cloud storage data in possible blow to big tech firms*, REUTERS (Aug. 04, 2018), <https://www.reuters.com/article/us-india-data-localisation-exclusive/exclusive-india-panel-wants-localization-of-cloud-storage-data-in-possible-blow-to-big-tech-firms-idINKBN1KP08J>.

<sup>154</sup> *Summary of Adoption of E-Commerce Legislation Worldwide*, UNITED NATIONS CONF. ON TRADE & DEV., <https://unctad.org/topic/ecommerce-and-digital-economy/ecommerce-law-reform/summary-adoption-e-commerce-legislation-worldwide> [hereinafter *Summary of Adoption of E-Commerce Legislation*].

<sup>155</sup> *Id.*

<sup>156</sup> Brian Daigle, *Data Protection Laws in Africa: A Pan-African Survey and Noted Trends*, J. INT’L COM & ECON. (Feb. 2021), [https://www.usitc.gov/publications/332/journals/jice\\_africa\\_data\\_protection\\_laws.pdf](https://www.usitc.gov/publications/332/journals/jice_africa_data_protection_laws.pdf).

governing the rights of data subjects, obligations of data processors and controllers, the requirement for data protection impact assessment, etc. However, countries like Ghana embrace a more flexible framework for defining the scope of personal data and data processing instead of accepting the prescriptive standards of the GDPR.

It should be noted that the leaked consolidated text of the JSI does not enshrine binding provisions any binding provisions related to administration and mode of data protection to be followed by its members. Instead, members recognise that protection of privacy and personal information is a fundamental right and has economic and social benefits and agree to ensure that the use of privacy norms does not place disproportionate and unnecessary barriers to cross-border data flows.<sup>157</sup> However, the text does mandate that each party compulsorily adopt and maintain a legal framework for data protection.<sup>158</sup> In this context, developed countries should accord developing countries and LDCs the legislative freedom to formulate their own iteration of data privacy laws that caters to their national security needs and public policy.

## 2. Cybersecurity and Consumer Protection

Governments are getting increasingly concerned about the chances of cybersecurity attacks on not only their citizens' data and privacy, but even on the national security infrastructure of their country. It has been reported that the number of cyberattacks by malware has increased in 358% in 2020 while attacks using ransomware has increased by 435%.<sup>159</sup> Phishing attacks account for over 80% of the reported cybersecurity attacks and it is expected to be primary risk to consumer's data safety in 2021. Cybersecurity breaches in hospitals that store sensitive personal health data instrumental in protecting the bodily privacy of patients have increased to such an extent that 90% of healthcare organisation have been a target of a security breach at least once in the last three years.<sup>160</sup> In order to protect their critical defence infrastructure from data breaches, data localisation measures are used to protect the flow of critical government data outside the sovereign territory of their country. For instance, the USA mandates the local storage of sensitive critical information concerning operational security used by the

---

<sup>157</sup> JSI Text, *supra* note 82, at 45.

<sup>158</sup> *Id.*

<sup>159</sup> Perry Carpenter, *Cybersecurity and Nation-State Threats: What Businesses Need To Know*, FORBES (Apr. 16, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/04/16/cybersecurity-and-nation-state-threats-what-businesses-need-to-know/?sh=4b9c6fa87c21>.

<sup>160</sup> *Id.*

Department of Defence.<sup>161</sup> New Zealand and Australia impose unconditional rules of local storage and local processing for specific sectoral data like tax records,<sup>162</sup> and sensitive health data,<sup>163</sup> respectively. In China, the internet firewall protects the flow of any data that could help in protecting their security vulnerabilities in critical network from cyber operations.<sup>164</sup>

Regulation of data flows also aim to ensure the protection of their citizens' interests as a consumer in the e-commerce space. The objective of consumer protection regulations is to create an environment of trust and certainty in the e-commerce space where consumers can feel safe to enter into market transactions. Under Article 14.7 CPTPP, parties are required to now mandatorily maintain laws and regulations for consumer protection. EU FTAs, Article 15.5 KORUS and Chinese FTAs contain cooperation-type provisions where parties recognise the importance of:

- a. Maintaining transparent and effective consumer protection measures for e-commerce that bolster consumer trust;
- b. Cooperation between consumer protection authorities
- c. Maintaining measures, laws and regulation to protect personal data of users.

As per the leaked consolidated text, Parties are required to maintain consumer protection law or regulations for the protection of consumers from misleading, fraudulent and deceptive commercial activities that could cause potential harm to the consumers in the e-commerce space.<sup>165</sup> These laws and regulations should include provisions that would mandate traders to act in good faith and abide by honest market practices, provides consumers with accurate information about the goods and services and grant ample redressal mechanisms for resolving consumer concerns.<sup>166</sup> Currently, out of 54 African countries, only 25 countries have formulated consumer protection legislations.<sup>167</sup> Only 19 out 47 LDCs and 26 out of 60 Asia-Pacific countries have consumer protection laws in place.<sup>168</sup> Developing countries and LDCs which have yet to codify specific laws on consume protection should be given the time and space to not only formulate primary legislations but

---

<sup>161</sup> Arindrajit Basu et al., *The Localisation Gambit – Unpacking Policy Measures for Sovereign Control of Data in India*, THE CENTRE FOR INTERNET AND SOCIETY (Mar. 19, 2019), <https://cis-india.org/internet-governance/resources/the-localisation-gambit.pdf>.

<sup>162</sup> *Personally Controlled Electronic Health Records Act 2012* (Cth) (Austl.).

<sup>163</sup> *Income Tax Act 2007* (Cth) (Austl.); *Public Act 2007* (Cth) (Austl.).

<sup>164</sup> Gao, *supra* note 54.

<sup>165</sup> JSI Text, *supra* note 82, at 42.

<sup>166</sup> *Id.*

<sup>167</sup> *Summary of Adoption of E-Commerce Legislation*, *supra* note 154.

<sup>168</sup> *Id.*

also build the administrative and regulatory mechanisms like consumer protection forums, consumer complaint resolution courts, etc. for enforcing these laws.

### 3. Maintenance of Law & Order

The maintenance of political, cultural and social order is an indisputable function of the sovereign state. Due to the nebulous circuit of laws governing ownership and access to data generated over the internet, countries are finding it increasingly difficult to carry out criminal investigations of crimes committed within its territory. Currently, there is no settled international framework for facilitating the access to extra-territorial data related to crimes committed within its territory.<sup>169</sup> The two prevailing methods of seeking extra-territorial evidence i.e. Mutual Legal Assistance Treaties (MLATs) and legal rogatories have been ineffective to obtain extra-territorial data for investigations.<sup>170</sup> MLATs have been criticised for being greatly time-consuming and can only be helpful if the country has entered into a treaty with the concerned country holding the evidence.<sup>171</sup> Legal rogatories which are not based on the presence of legal instruments between countries are merely discretionary in nature and may or not be a transparent or certain way of obtaining extra-territorial data. In order to remove these kinds of inefficiencies, countries prefer to apply data localisation measures to make sure that all incriminating data that is create within the territory of the country is held within the country itself for the benefit of criminal investigations and administration of law and order.

## V. CONCLUSION

In an instance of spectacular sooth-saying, Karl Marx had made some prescient speculations about the impact of technological change on world history. According to his theory, the development of a new technology is most likely to take place in wealthy regions of the world where innovators are able to find lucrative investment for research and development<sup>172</sup> — à la the boom of digital companies in the USA, South Korea, etc. in present day. However, the growth of a new technological cycle is accompanied with a strong tendency to place lesser or least developed regions into a vicious cycle. In this vicious cycle, countries with low capital reserves and low administrative capacity are unable to develop along with the technological development taking place in developed regions which lead to the creation of a

---

<sup>169</sup> Mitchell & Mishra, *supra* note 144.

<sup>170</sup> Stephen Mulligan, *Cross-Border Data Sharing Under the CLOUD Act*, CONGRESSIONAL RESEARCH SERVICE: CRS REPORT R45173 at 12–14 (23 April 2018), <https://fas.org/sgp/crs/misc/R45173.pdf>.

<sup>171</sup> *Id.*

<sup>172</sup> Tony Smith, *Marx, Technology, and the Pathological Future of Capitalism*, in THE OXFORD HANDBOOK OF KARL MARX (Matt Vidal et al. eds.).

technological gap — similar to the digital divide in present day. If such a digital divide continues to stay in place, developing countries are unable to catch up and meet the competitive environment in the world market and hence are left behind in the technological race. The technological differences and the absence of investment catering to the addressing the digital divide can lead to divergence of income and development between the North and the South — akin to the fragmentation of the digital space into the digital-North and the digital-South.

In order to foster inclusion of development needs of the developing countries and LDCs, the consolidated e-commerce text has to include robust S&DT mechanisms. *First*, the inclusion of S&DT clause would go long way in building consensus at the WTO framework. If developing countries and LDCs feel like their special interests are being recognised and they have been given the flexible policy space to build their regulatory ecosystem, they may even agree to allow the text to be introduced as a multilateral amendment. *Second*, proposals for technical assistance and capacity building programmes could be instrumental in improving the goals of A2A and A2K and assist in bridging the digital divide between the North and the South.

At the JSI, China submitted a proposal for S&DT provisions under which developed countries would be required to provide technical assistance and capacity building to developing countries and LDCs on mutually agreed terms and conditions in order for assisting them in the development of their digital ecosystem.<sup>173</sup> They suggested the establishment of an e-commerce for development program or a fund to support the integration of developing country members and LDCs into the digital economy. At the multilateral level, the WTO Aid for Trade initiative can help mobilise such assistance.<sup>174</sup> At present, only 1% of total funding provided under Aid for Trade programmes has been allocated to ICT solutions; and multilateral development banks are also lagging behind, with a mere 1% being invested in ICT projects.<sup>175</sup> The African Group has called for the development of Aid-for-Trade initiatives for channelling investment into the technological development in the developing world without any conditions demanding participation in new negotiations at the WTO.<sup>176</sup>

---

<sup>173</sup> WORLD TRADE ORGANIZATION, JOINT STATEMENT INITIATIVE ON ELECTRONIC COMMERCE, COMMUNICATION FROM CHINA, INF/ECOM/19 (Apr., 24 2019).

<sup>174</sup> *Step up efforts to link digital economy to development*, UNITED NATIONS CONF. ON TRADE & DEV., <https://unctad.org/news/step-efforts-link-digital-economy-development>.

<sup>175</sup> *Id.*

<sup>176</sup> WORLD TRADE ORGANIZATION, AFRICAN GROUP DECLARATION ON WTO ISSUES, WT/L/1054, WT/GC/199, TN/C/19 (Dec. 28, 2018).

Some JSI participants have noted the possibility of adopting an implementation model inspired by the WTO's Trade Facilitation Agreement (TFA); drawing the support of some developing country members, such as Argentina, Colombia, Costa Rica,<sup>177</sup> and Côte d'Ivoire.<sup>178</sup> By virtue of the Section II of the TFA, the implementation of the TFA provisions is subject to the development of necessary institutional capacity in the concerned country.<sup>179</sup> Developing countries and LDCs have been provided with the leeway to develop their administrative capacity as per their own implementation timeline such that the obligations of the TFA do not act as a regulatory burden on them. Further, LDCs have the discretion to adopt TFA obligations in a phased manner depending on their administrative capacities, financial health and trade capacities.<sup>180</sup> Developing countries and LDCs were also able to specifically decide the implementation timelines of TFA provisions during the negotiating process. For instance, provisions of the TFA were categorised into the following implementation groups:

- A. Category A: Provisions for immediate implementation (upon entry into force).
- B. Category B: Provisions the implementation of which is subject to a transitional period as decided by individual countries.
- C. Category C: Provisions the implementation of which is subject to a transitional period and to the acquisition of implementation capacity through the provision of capacity-building support by donor countries and agencies.<sup>181</sup>

With the global political environment becoming increasingly polarising, the internet and the digital space is the great equaliser that has brought a multitude of citizens, cultures, political ideologies, races, etc. closer together. The JSI negotiations must recognise the spirit of the digital space they seek to explore by recognising the urgent needs of the developing world.

---

<sup>177</sup> WORLD TRADE ORGANIZATION, NEGOTIATIONS ON TRADE-RELATED ASPECTS OF E-COMMERCE, ELEMENTS OF A POTENTIAL APPROACH UNDER THE FRAMEWORK OF THE JOINT STATEMENT ON ELECTRONIC COMMERCE – COMMUNICATION FROM ARGENTINA, COLOMBIA AND COSTA RICA, INF/ECOM/1 (Apr. 8, 2018), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx).

<sup>178</sup> WORLD TRADE ORGANIZATION, JOINT STATEMENT ON ELECTRONIC COMMERCE, COMMUNICATION FROM COTE D'IVOIRE, INF/ECOM/49 (Dec. 13, 2019), [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx).

<sup>179</sup> Agreement on Trade Facilitation art. 13, Feb. 22, 2017, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401.

<sup>180</sup> *Id.*, art 13.3.

<sup>181</sup> *Id.*, art. 14.