

February 2024

# Geneva Telegram

Multilateral Dialogue Geneva



## The E-Commerce Moratorium: 404 Not Found

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The "Geneva Telegram" explores events in Geneva-based multilateral organizations on a current topic. This time, we focus on the E-Commerce negotiations ahead of the 13<sup>th</sup> Ministerial Conference of the World Trade Organization, which will take place from 26-29 February in Abu Dhabi, United Arab Emirates.

*"We agree to maintain the current practice of not imposing customs duties on electronic transmissions until MC13..."<sup>1</sup>*

With days to go before the 13th Ministerial Conference of the World Trade Organization (MC13) is set to begin, delegates are probably dreading this current practice which has brought about a continued state of disagreement. Indeed, no agreement has emerged on the renewal of the moratorium on the imposition of customs duties on electronic transmissions (so-called "E-Commerce moratorium"). Instead, four different proposals are on the table (see Map of the Month February). Once a formality, the renewal of the Moratorium has now turned into a highly politicised issue. The current lack of consensus means that the prohibition on the imposition of customs duties on electronic transmissions (ET) is, once again, at risk of collapsing at the next ministerial conference.

### Why hasn't the moratorium been made permanent yet?

With only little understanding of where the digital revolution would take WTO Members in 1998, and with no agreement on its definition, they chose not to impose customs duties on ET. Fast forward to today, the Membership has still been unable to

define the scope of the moratorium nor extend its application beyond a biennial renewal.

Although the "current practice" might have to be considered as an achievement under the current political tensions, the renewal of the moratorium without other meaningful measures may result in bigger problems for the WTO in the future. As the economic value of global e-commerce continues to increase, the political cost of periodically renewing the moratorium will become higher and the chances of termination will therefore become more acute. To make matters worse, the potential economic impact of non-renewal is also rising with each passing year due to the growing share of electronic commerce in the global economy. To avoid losing the moratorium, Members must begin making progress on its scope and application. Otherwise, the stakes in the negotiations will become debilitatingly high and solutions ever more elusive. This requires a step away from the pro-contra-dichotomy surrounding the moratorium and to advance the discussions on the uncomfortable issue of defining what the moratorium covers in a meaningful way.

### The legacy of constructive ambiguity

Agreeing on the scope and definition of the moratorium is made additionally difficult by the fact that its vagueness may have served a political purpose. The constructive ambiguity established by

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<sup>1</sup> [Ministerial Decision adopted on 17 June 2022 on the Work Programme on Electronic Commerce - WT/MIN\(22\)/32; WT/L/1143](#)

the moratorium in 1998 reduced pressure on Members to agree on clear definitions over the past 26 years.

In addition, it is a poorly kept secret that the renewal of the e-commerce moratorium has regularly served as a bargaining chip in other WTO negotiations. The WTO's consensus principle in rule-making means that a single opponent of the moratorium can impede progress in other negotiations by leveraging its agreement to renew it. In light of the increasing importance of electronic commerce in the global economy, the political cost of renewing it will keep increasing while the political capital left to negotiate in other areas will shrink, thus further weakening the WTO's rule-making function.

### The definition conundrum

The difficulty of agreeing on the scope and application of the moratorium cannot be overstated. As it stands, it is difficult to know what exactly the moratorium prohibits. Indeed, since the WTO's inception, Members have had fundamental disagreements on what the moratorium covers. Do electronic transmissions include only digital goods that could also be sold in physical form like books and movies? Do they include subscription-based services like Netflix? Do they include goods that are sold online but delivered physically? What about downloadable software? What about services delivered online? If any of the above digital or digitizable goods and services already fall outside the moratorium, should they be dealt with under the GATT or the GATS (i.e. Software as a Service (SaaS) subscriptions such as Microsoft 365)? Or are these types of products to be understood as intellectual property rights, completely outside of both regimes? For each of these questions, staunch advocates can be found on both sides of the argument. Perhaps most fundamentally of all, there is still no official agreement on whether the moratorium covers the contents of electronic transmissions or the transmissions themselves. If the moratorium only covers customs duties on bytes (i.e. the transmissions themselves and not their content), it would open up an entirely new universe of questions.

As illustrated by the case of Indonesia, some members are already implementing customs regimes

for E-Commerce while the moratorium is still firmly in place. Although the customs regime does not currently involve the application of a tariff, should Indonesia decide to begin levying tariffs on intangible goods, it would arguably provide strong political and legal cover for other countries already critical of the moratorium to follow suit. This is not to suggest that the moratorium has no impact at all. The loss of the moratorium may open the flood gates to many other forms of tariffication of electronic transmissions. However, the renewal of the moratorium as it stands now, may not prevent the emergence of customs regimes as effectively as once believed.

Definitional difficulties notwithstanding, Members must begin to move the needle on these questions or else run the risk that the moratorium will fail at a later date, when the economic repercussions of a policy free-for-all would be even greater than they are today.

### A way forward?

It may be advisable for Members to see if they can find agreement on any of the questions listed above about the definition of electronic transmissions. Could they not consider renewing the moratorium on a temporary basis, but agree to permanently prohibit the imposition of customs duties on bytes of information, for example? At the next ministerial conference, the definition could be fleshed out a little further, in a piecemeal fashion. This approach would mean that the impact of a potential loss of the moratorium could be limited in magnitude.

Similarly, should Members perhaps consider extending the period of renewal? As mentioned previously, the renewal of the moratorium is costing large amounts of political capital, which could otherwise be spent on other areas of negotiation, like fisheries, dispute settlement or WTO reform. Although a longer extension would not solve the issue of regulating e-commerce, it would allow some breathing space to unblock disagreements.

Whatever other innovative solutions exist, Members will need to be the ones to agree, in consensus and to implement them. It becomes apparent that time to make progress significant progress is

running out. With the political cost and economic importance of renewing the moratorium going up every year, a real concern is emerging that companies and individuals may soon wake up in a world where the entirety of multilateral e-commerce regulation disappears overnight, with nothing to replace it.

## Conclusion

It must be noted that the majority of members still favour the moratorium's renewal. We will have to wait after February 29th to see whether it will get its way or if the moratorium falls victim to a trade-off on other issues.

The cross-border nature of the internet is one of its inherent strengths, despite having also led to

the rise of quasi-monopolistic companies from the US and China. However, there are ways to address the issues specific to the governance of digital trade other than by erecting customs areas online. In today's context it would seem almost unimaginable that 164 members would find consensus on such a sensitive issue and so the non-renewal of the moratorium would effectively be irreversible. Members must seize the opportunity to tackle the issue of defining electronic transmissions and the scope of the e-commerce moratorium with new strategies and momentum while it is still in place. The alternative would pave the way for e-commerce-related jurisdictional disputes which would require a flurry of newly negotiated bilateral, regional or plurilateral trade agreements.

### Note:

The views and opinions expressed in this paper are those of the authors and do not necessarily reflect the official policies or positions of the Konrad-Adenauer-Stiftung and the European Free Trade Association.

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