

Global Discourse on E-Commerce *Way Forward for India*

This Briefing Paper discusses India's positions vis-à-vis the key issues involved in the on-going plurilateral negotiation by a group of developed, developing and least developed country members of the WTO on global e-commerce rules and provide policy suggestions.

Introduction

The importance of electronic commerce (e-commerce) in global trade is increasing at a fast rate. It is transforming the nature of global trade, service supply and cross-border transactions. As per WTO, global digital trade has reached US\$27.7tn in 2016 from US\$19.3tn in 2012 – more than 40 per cent increase over four years.

This comprises both Business-to-Business (B2B) and Business-to-Consumer (B2C) transactions where the share of the former is significantly larger (six times) than that of the latter.

Recognising the growth of global e-commerce, the Second WTO Ministerial Conference in 1998 had adopted a '[Declaration on Global E-commerce](#)', mandating the WTO General Council to establish a Comprehensive Work Programme to examine all trade-related issues relating to global e-commerce.

The WTO members also agreed to continue their current practice of not imposing customs duties on electronic transmissions (widely termed as 'moratorium'), which has further been agreed upon in subsequent WTO ministerial conferences.

In 2003, an effort to include e-commerce in bilateral/regional trade agreements was made in the Australia-Singapore Free Trade Agreement (FTA). It contains a standalone chapter on e-commerce. Provisions on e-commerce were also subsequently negotiated in many FTAs such as those between the United States and Chile, the U.S. and Australia, between Thailand and Australia, to name a few.

Since then, a total of 69 FTAs contain either a chapter or articles on e-commerce, which are either in force or under negotiations. It is important to note that 29 developing countries have negotiated rules on e-commerce in their FTAs.

In addition, there are texts/chapters related to e-commerce in regional trade negotiations such as Continental Progressive Trans-Pacific Partnership ([CPTPP](#)) and Regional Comprehensive Economic Partnership for Asia and the Pacific (RCEP). These developments clearly indicate the importance of this subject in an emerging global digital economy.

More recently, pursuant to agreeing upon 'exploring' negotiation during the 11th Ministerial Conference in Buenos Aires¹, 76 WTO members, issued a statement² during the 2019 World Economic Forum (WEF) at Davos in January, 2019, whereby they 'confirmed' their intention to commence negotiation on trade-related aspects of e-commerce.

In the absence of any mandate on 'multilateral' negotiation³, they agreed to initiate an open-to-all 'plurilateral' negotiation on e-commerce. If agreed, it will be akin to the Information Technology Agreement – a new generation plurilateral agreement by some WTO members, which is less restrictive in nature as compared earlier plurilateral agreement such as the one on government procurement.

Collectively, they (76 countries) account for 90 per cent of world trade in goods and services through electronic means.⁴ Thus, they constitute a critical mass (volume of trade) to initiate a plurilateral negotiation. However, they will later need consensus of all WTO members to get it included into the WTO acquis.

As per the said statement, these countries sought to achieve high standard outcomes that build on the existing WTO frameworks, taking into account the unique opportunities and challenges faced by members as well as micro, small and medium enterprises (MSMEs).

This plurilateral negotiation got further boost at the Osaka G20 Summit in June 2019 with the launch of "Osaka Track" and agreed to make substantial progress by June, 2020, when the 12th WTO Ministerial Conference will take place in Nur-Sultan, Kazakhstan.⁵

However, India and with a few other developing countries such as South Africa, Indonesia, Saudi Arabia opposed this Osaka Track though some other emerging economies like China and Brazil are among its proponents. Off late, even South Africa seems to be giving up its resistance.⁶

Key Issues

Other than a cross-cutting issue of building consumers' trust in cross-border digital trade, there are two crucial and contentious issues:

- restrictions on cross-border data flow; and
- opportunities for and challenges of MSMEs in developing countries.

Building consumers' trust

The need to address issues related to consumers' trust on cross-border e-commerce is a *sine qua non* for it to propagate further. There are multifarious elements upon which policy makers would have to work, which include:

- creation of relevant online consumer protection rules, including robust grievance redressal mechanism;
- personal data (privacy) protection;
- liability issues and variations of rules in different countries;
- enhanced international cooperation on e-commerce (from logistics to payments); and
- engagement in international e-commerce talks.⁷

Unless these issues are resolved, not only will there be inadequate consumer trust on e-commerce, but also countries may continue to intervene and restrict free flow of consumer information across borders.

Restrictions on cross-border flow of data

For global e-commerce, cross-border data flow is the lifeblood. Enhanced global flow of data in recent years is believed to have significantly helped big technology based companies in the new economy.⁸

Thus, keeping in mind the economic importance of access to users' data and being aware of winner-takes-all nature of the digital economy, countries are developing restrictions on global data flow to protect domestic firms and/or to create domestic champions.

For example, China has greatly used the policy of data localisation (restricting flow of data within its territory) in creating globally competitive national champions (read platforms). Few other countries, including India, seem to follow the same path.

Thus, the [draft National e-Commerce Policy](#) of India has treated 'data' akin to natural resources and hence a national asset that the government holds in trust, but rights to which can be permitted. Similarly, Indian rules require all the payment data to be stored only in India.⁹

Some arguments for data localisation are as follows:

- national security and consumer privacy;
- incubating, sustaining and protecting domestic companies, particularly start-ups and MSMEs; and
- avoiding data colonisation and ensuring their jurisdiction over data related disputes.¹⁰

Here, it is important to note that e-commerce negotiation at a regional level such as in CPTPP and RCEP contains legally binding rules on cross-border trade flows, non-discriminatory treatment, prohibition on data localisation and transfer of source code.

Similar provisions are being sought by the United States of America and the European Union¹¹ (EU) to be incorporated in the proposed rules for e-commerce under the proposed plurilateral agreement by some WTO members.

China, on the other hand, has called for more exploratory talks on data flow and storage, though agreeing at Osaka that it will engage in international policy discussions for harnessing the full potential of data and digital economy.¹²

Opportunities and challenges for MSMEs

Another issue that is at the core of this discourse is how opportunities for MSMEs, particularly those from the developing world, can be created through e-commerce.

MSMEs, considered as an engine for 'inclusive' growth, not only provide large employment opportunities but also make significant contribution to exports.

However and off-late, many countries are witnessing problems faced by MSMEs due to inventory-based model of large global e-commerce platforms (those having their own inventories).

Such platforms have been found (or alleged) to be discriminating between their inventories and other suppliers. There are also other competition concerns due to high degree of concentration in the digital economy, consequently only a handful of global platforms, acting as gatekeepers, tend to control the whole ecosystem.

Therefore, in 2017, a joint initiative by the WTO, WEF and the Electronic World Trade Platform (eWTP), called 'Enabling E-commerce', was launched during the WTO's 11th Ministerial Conference at Buenos Aires, to bring together leading voices from governments, businesses and other stakeholders to begin a high-level conversation on e-commerce policies and practices that can benefit small businesses.

It recognised that for MSME engagement in e-commerce to grow rapidly worldwide, reforms to industry practices and government policies are needed.¹³

Many other multilateral bodies are actively promoting MSMEs via cross-border e-commerce. For example, the multi-stakeholder initiative of the United Nations Conference on Trade and Development (UNCTAD) called 'eTrade for all', where CUTS International, among others, is a partner.¹⁴

India's Position

India's e-commerce market is expected to grow at 51 per cent annually to US\$120bn by 2020 from the existing level of US\$38.5bn.¹⁵ In February, 2019, India floated its [draft National e-Commerce Policy](#) - 'India's Data for India's Development'.¹⁶

This sector is expected to contribute to significant changes to Indian narratives on job creation and income generation, particularly for the country to generate more benefits out of its demographic dividends.

India aims to create a framework for holistic growth of e-commerce sector and values the importance of data and inclusive growth. However, it remains non-committal to India's position on international negotiation on binding e-commerce rules.

It also guards against any move to make permanent the existing 'moratorium on imposing custom duties' (as is being demanded by the U.S. and the EU), since it will lead to loss of revenue for the government and may also harm domestic industries.

This draft Policy suggests retaining policy space to seek disclosure of source code for facilitating technology transfer and development of applications for local needs as well as for security.¹⁷ This is in contrast with the demands of the U.S. and the EU. Regarding 'data vis-à-vis digital economy', the draft Policy tends to support data localisation. It calls for the creation of a legal and technological framework for imposing restrictions on cross-border data flow, including those collected by IoT (Internet of Things) devices, e-commerce platforms, social media, search engines, etc.

In addition, it argues for the need for data sovereignty – "the data of a country is a collective resource, a national asset, that government holds in trust" and "India and its citizens have sovereign right to their data".¹⁸ It recommends for the development of a suitable framework for sharing community data that serves larger public interest with start-ups and other firms.

Furthermore, a draft Personal Data Protection Bill, 2018¹⁹, which was submitted to the Government by the Srikrishna Committee, is also under the consideration.

If the draft Bill becomes a law, India will have a good mechanism to protect the privacy of consumers – a necessary element to engender consumer trust in e-commerce. Interestingly, in comparison with the draft e-commerce Policy, the draft Personal Data Protection Bill seems to pose fewer hurdles on cross-border data flow.

On promoting exports by MSMEs through e-commerce, the draft e-commerce Policy recognises this mode to be cost-effective as it provides opportunities to sellers and consumers to communicate and connect beyond the limitations of geography and time.

It flags burdensome administrative compliance cost and on-boarding as hurdles to realise such export potential. It recommends various measures to rectify such hurdles.

Moreover, while restricting inventory-based model of e-commerce via a policy on foreign direct investment in e-commerce platforms²⁰, India wants to help MSMEs and small online retailers against discriminatory treatments by big, global platforms.

At the same time, the draft Policy does not mandate any such restrictions for domestic platforms, which can go against the interests of MSMEs and small retailers. Such favour for domestic platforms is also there with respect to access to 'community data' of Indians.

Costs and Benefits to India

Being a very large market and hence a large creator of data, India wants to leverage this new resource - 'data' - to nurture its domestic digital economy.

One of India's major concerns is that an agreement on e-commerce may compel it

to adhere to unrestricted free flow of cross-border data.

As a result, it may not be able to achieve its ambition of cornering higher gains in the digital global economy, including monetisation of its data – one of the most critical raw materials of the digital economy.²¹

However, it would be cost effective for MSMEs to use e-platforms and its logistics to sell their products in a wider geography. According to one estimate, about 75,000 Indian entities exported goods worth US\$1.2bn using e-commerce channel during 2018-19²², and there are immense opportunities that can be realised using optimal regulations and policies.

The question is whether 'data localisation' is the only way to achieve this end.

Increasing 'access to data' by domestic firms, irrespective of wherever the same is stored or not, could have been much better (or least restrictive) approach to achieve India's ambitions. India must do a cost-benefit analysis before finalising its stand on data localisation.

Enhanced 'access to data' by various competing firms would also act against much feared winner-takes-all feature of the digital economy. It seems ironic that while India is reluctant to participate in plurilateral e-commerce negotiation by some WTO members, it has ambitions to see its MSMEs and small players to realise export potential via e-commerce.²³ By not participating in this negotiation, India may lose its chance to

influence upcoming rules that could favour its MSMEs.

Such rules can be made more development-friendly by ensuring level playing field for small firms, platform neutrality, marketplace model of platforms, lesser costs of compliance and on-boarding, etc.

Here it is also important to note that in 2016 India has communicated a concept note to the WTO's Working Party on Domestic Regulations by proposing an initiative on Trade Facilitation in Services (TFS).²⁴

By participating in the plurilateral negotiation on e-commerce, India can push some of the elements of its proposed TFS into plurilaterally agreed rules on doing cross-border e-commerce.

Conclusion and Way Forward

Trade multilateralism is facing several threats including those from its original protagonist - the United States of America - and abetted by China, which is one of its major beneficiaries.

The onus for its re-invention lies on emerging middle powers such as India, Indonesia. They have experienced some significant - though not as per their expectations - gains from the multilateral trading system.

Other than the plurilateral negotiation on e-commerce, it is important to note that the

RCEP negotiation is expected to be completed in October this year.

It may contain binding - as against 'best endeavour' types - rules on dealing with cross-border e-commerce. Similarly, there is an e-commerce chapter, with binding rules, in the CPTPP.

Several such rules - as in RCEP and CPTPP - are expected to be similar to those being negotiated by some WTO members for arriving at a plurilateral agreement.

Many ASEAN members and other-than-ASEAN participants of the RCEP, such as Australia, China, are also part of the plurilateral negotiation on e-commerce.

Countries such as India, Indonesia - who are part of the RCEP but not in the CPTPP and the plurilateral negotiation on e-commerce by a group of WTO members - have a major responsibility for up-fronting the imperative of development-friendly treatments to new and emerging issues such as e-commerce.

This can happen through an active participation of influential developing countries at the plurilateral negotiation on e-commerce, propounded by a large group of WTO members.

Such an approach will underline one of the beauties of the multilateral trading system under the aegis of the WTO - that one can be an ally in a room and an adversary the next door!

Endnotes

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- ¹ WT/MIN(17)/60, dated 13 December 2017. (EU and its members constitutes 29 of the 70 proponents)
- ² WT/L/1056, dated 25 January 2019
- ³ According to the Para 34 of the 12th WTO Ministerial Declaration (Nairobi Declaration) (WT/MIN(15)/DEC), any decision to launch negotiations multilaterally on issues, other than Doha Agenda, would need to be agreed by all Members.
- ⁴ https://www.wto.org/english/news_e/news19_e/dgra_25jan19_e.htm
- ⁵ https://www.g20.org/pdf/special_event/en/special_event_01.pdf
- ⁶ <https://timesofindia.indiatimes.com/business/india-business/india-looks-to-fight-alone-at-wto-on-global-e-commerce-rules/articleshow/69404594.cms>
- ⁷ <https://www.weforum.org/agenda/2019/03/five-ways-to-restore-trust-in-e-commerce/>
- ⁸ Popularly known as GAFAM: Google, Amazon, Facebook, Apple and Microsoft
- ⁹ Reserve Bank of India Notification on Storage of Payment System Data;
<https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244>
- ¹⁰ Electronic Commerce, Viewpoint paper, CUTS International, 2017; http://www.cuts-citee.org/pdf/Viewpoint_Paper_E-commerce.pdf
- ¹¹ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2016>
- ¹² *Supra* 5
- ¹³ https://www.wto.org/english/news_e/news17_e/ecom_11dec17_e.htm
- ¹⁴ <https://etradeforall.org/>
- ¹⁵ <https://www.ibef.org/industry/ecommerce.aspx>
- ¹⁶ The policy addresses six broad issues – data, infrastructure development, e-commerce market place, regulatory issues, stimulating domestic digital economy and export promotion through e-commerce.
- ¹⁷ Page 10, Draft National e-Commerce Policy
- ¹⁸ Page 14, Draft National e-Commerce Policy
- ¹⁹ https://meity.gov.in/writereaddata/files/Personal_Data_Protection_Bill,2018.pdf
- ²⁰ https://dipp.gov.in/sites/default/files/pn2_2018.pdf
- ²¹ <https://www.thehindubusinessline.com/opinion/e-comm-talks-india-must-stand-firm/article26092215.ece>
- ²² Commerce Ministry gearing up to boost exports through e-commerce; Business Standard, May 30, 2019
- ²³ *Supra* 22
- ²⁴ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=232684

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