

**KICK-OFF LUNCHEON WORKSHOP**

# The Significance of the WTO Electronic Commerce Declaration

Thursday 26 April, 12:00 – 15:00

**PRESIDENT WILSON HOTEL | GENEVA, SWITZERLAND**

## MEETING REPORT

This Kick-off luncheon workshop on "The Significance of the WTO Electronic Commerce Declaration" convened delegates from selected developing country delegations to discuss relevant issues in order to better inform discussions under the WTO E-Commerce Work Programme. Topics covered included an introduction to the Work Programme, data flows and localization, and the development dimension.

Discussions summarised in this report revolved around three main presentations on: (i) "Genesis, intention and issues around the Proposal of the E-commerce Declaration in 1998" by Alicia Greenidge, Summit Alliances International; (ii) "Data flows and data localisation" by Jovan Kurbalija, DiploFoundation; and (iii) "The development dimension" by Rashid S. Kaukab, CUTS International Geneva.

### At the WTO: Genesis of E-Commerce

In the late 1990s, new forms of electronic delivery such as e-books and downloaded software had started to emerge which brought the question of their treatment under WTO rules, and hence their definition as a good, a service or something in-between. Although no Member at the time considered electronic transmissions as importations and hence did not impose customs duties, the United States proposed to codify this practice in the WTO to reassure its software industry.

As a result, members adopted in May 1998 the "Declaration on Global Electronic Commerce", whereby: (i) *Work Programme*: they undertake to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, also taking into account the needs of developing countries; and (ii) *Moratorium*: they undertake to continue not imposing customs duties on electronic transmissions, to be re-considered at the next ministerial.

Subsequently adopted in September 1998, the Work Programme on Electronic Commerce planned for the issue to be examined under four WTO committees (goods, services, TRIPS, development), under the overall review of the General Council which would also handle cross-cutting issues as well as aspects related to customs duties on electronic transmissions. The Work Programme also provides a working definition of "electronic commerce", but does not define the meaning of "electronic transmissions".

## **Electronic Transmissions: Goods, Services or Data?**

Discussions under the Work Programme showed that there was a wide range of opinions and questions regarding the characterisation of the content of electronically transmitted digitalised data.

The Work Programme defines “electronic commerce” as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”, which is very close to how GATS Article XXVIII defines the delivery of a service. However, the contents of some electronic transmissions are close substitutes to goods which are subject to customs duties. A typical example would be a piece of software or music which can be either purchased as a physical CD or downloaded from the internet in the form of digitalised data. In this case, questions would arise why the latter should be exempt from customs duties when the former is not.

Yet, the inherently customisable nature of digitisation opened limitless possibilities for hybrid digital products, which would argue against classifying them as traditional goods. Similarly, discussions determined that transmitting data electronically would not constitute an importation in the sense of GATT Article II, and hence could not be subject to customs duties. In addition, the EU in 2003 supported the view that such transactions relate to the transmission of content information regardless of any physical support. As a result, the EU argued that the notion of “digitised products” was misleading, and that what members should aim to classify is the transmission of digitised information. The submission also argues that GATS already applies to the electronic delivery of services, including so-called “digitised products”, which could be seen as an effort to see electronic transmissions classified as services.

Even if agreed in theory, some delegations pointed to the difficulty of applying any distinction between “goods” and “services” on digital flows which only consist of ones and zeros in the cyberspace.

## **Moving Beyond Electronic Transmissions**

At the 2005 Hong Kong Ministerial, the US suggested to clarify the scope of the current practice under the moratorium by replacing the term "electronic transmissions" with the term "products that are transmitted electronically". Further, some Members suggested to extend the discussion beyond software to include all IT goods and services facilitating e-commerce. As a result, the language evolved in subsequent declarations until the 2013 Bali Declaration stated:

*“The Work Programme should continue to examine the trade related aspects of, inter alia, enhancing internet connectivity and access to information and telecommunications technologies and public internet sites, the growth of mobile telephony, electronically delivered software, cloud computing, the protection of confidential data, privacy and consumer protection.”*

Although this declaration was reaffirmed in 2015 in Nairobi, members at the 2017 Buenos Aires conference did not reaffirm previous decisions and declarations although they decided to “continue the work under the Work Programme on Electronic Commerce”.

## **New Focus: Data Flows and Data Localization**

Early on, it became clear that rules of origin may not be applicable to an electronic commerce setting. Indeed, the easy duplication and unlimited routing possibilities of digitalised data would make it difficult to find out where a transmission actually originated. Data flows are not single point-to-point transactions and the borders they cross depend on the real time conditions of the network through which they take the fastest route. In these conditions, data flows cannot be compared to definable, individual, cross-border transactions.

Nevertheless, recent years have witnessed a strong wakeup call from digital sleepwalking, with increasing discussions on controlling data flows and their implications on the society in terms of taxation, data protection etc. Nowadays, the mechanisms through which money is made online have become clearer, particularly in the wake of the Cambridge Analytica scandal and ensuing testimony of the founder of a major digital platform. Considered the “oil of the new economy”, monetisation of user data has become a key business model and is also fuelling the development of artificial intelligence. This has given rise to concerns over transparency in the use of such data, as well as debates around privacy and data localisation.

Recently for instance, the Russian supreme court ordered the Telegram service to provide encryption keys to let the Federal Security Service read messages by suspected terrorists. After Telegram publicly refused to do so on grounds of privacy, Russian authorities blocked IP addresses used by Telegram servers. Yet, with increasing integration of different platforms, it can be difficult to single out data flows originating from a single service. As a result, a significant number of the IP addresses blocked by Russian authorities appeared to be owned or used by Google, Amazon and other services whose users were also affected.

This is not an isolated case, since the country has previously banned several services for not complying with its 2015 Data Localization Law. Enacted by several countries in recent years, such laws require internet platforms to store personal data of their citizens only on servers located on their national territory. This is to ensure that law enforcement does not have to apply for international permits to access data stored on foreign servers. As an alternative, the EU has taken a different approach through its General Data Protection Regulation (GDPR), which does not impose data localisation provided the exported data of EU citizens is granted an adequate level of privacy protection.

Going forward in trade discussions, delegates were advised to: (i) use common sense when engaging in discussions; (ii) be aware of interdependencies, given that potential outcomes at the WTO may have implications in other areas including human rights; (iii) be part of the discussion rather than staying outside, since this will contribute to building capacities and understanding for policy makers.

## **The Development Dimension**

Discussions also reflected on the development dimension and the way forward for developing countries. It was recalled that, in 1998, most developing countries were surprised at the tabling of Electronic Commerce on the WTO table at a time when the issue was not well understood.

These members were suspicious, and expected any advances in this area would likely continue to benefit developed members at the expense of developing ones.

Interestingly, similar divisions continue to exist nowadays mainly because a knowledge gap remains between connected and less connected members. Building understanding remains important, and requires identifying the industry interests at play as well as learning from past transformational phases of similar magnitude.

Of course, business interests have advanced since the late 1990s and digital platforms have replaced the software industry as leading players of e-commerce debates. As a result, today's discussions go beyond electronic transmissions and customs duties to focus on data flows and their impact on society. In this context, issues of particular interest to developing countries may include jobs, competition, infrastructure etc.

Despite the launch of a parallel plurilateral process last year in Buenos Aires, discussions under the WTO Work Programme will continue and may be an opportunity to refocus the agenda around development issues. Creativity will however be required to ensure the parallel process does not divert attention from the Work Programme.