

E-commerce JSI Negotiations Among WTO Members: State of Play and the Impacts of COVID-19

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Abstract

This brief builds on an earlier note published in 2020, providing an update on the e-commerce Joint Statement Initiative negotiations among a group of WTO Members. It describes how the negotiations have been affected by the new context of COVID-19 and highlights the pandemic's impacts on e-commerce, economic development, and gender equality and social inclusion (GESI) aspects. Finally, the brief gives an overview of the negotiations' key issues where there are indications of convergence, and others where divergence remains, as the group prepares for the WTO's Twelfth Ministerial Conference (MC12).

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List of Abbreviations

AU	African Union
AfCFTA	African Continental Free Trade Area
ASEAN	Association of Southeast Asian Nations
COVID	Coronavirus Disease
DEPA	Digital Economy Partnership Agreement
E-commerce	Electronic Commerce
EC	European Commission
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GATS	General Agreement on Trade in Services
GESI	Gender Equality and Social Inclusion
IFC	International Finance Corporation
LDC	Least Developed Country
MC	Ministerial Conference
MSME	Micro, Small, and Medium-sized Enterprise
ODC	Open Data Charter
OECD	Organisation for Economic Co-operation and Development
JSI	Joint Statement Initiative
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional Trade Agreement
SARS	Severe Acute Respiratory Syndrome
SME	Small and Medium-sized Enterprise
TFA	Trade Facilitation Agreement
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNICEF	United Nations International Children's Emergency Fund
UNCTAD	United Nations Conference on Trade and Development
US	United States
WEF	World Economic Forum
WHO	World Health Organization
WTO	World Trade Organization
YoY	Year on Year

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1.0 Introduction

On December 13, 2017, at the Eleventh Ministerial Conference (MC11) in Buenos Aires, 71 Members of the World Trade Organization (WTO) released a Joint Statement Initiative (JSI) on electronic commerce (E-commerce)¹. In this first JSI declaration, they announced that they would begin “exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce.” (WTO, 2017). On January 25, 2019, at the World Economic Forum (WEF) Annual Meeting in Davos, Switzerland, 76 WTO members released a second JSI announcing the launch of negotiations on trade-related aspects of e-commerce. The Statement indicated their intention to “achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible” (WTO, 2019). A year later, on January 24, 2020, Ministers of the participating WTO Members announced that they “agreed to develop a consolidated negotiating text by MC12”² from the various proposals submitted to date, confirming these plans in a joint press release following their informal meeting in Davos.

Less than two months later, the COVID-19 pandemic spread to Europe and throughout the rest of the world. In-person meetings were no longer a safe possibility. Consequently, several WTO and WTO-related meetings were cancelled, including JSI meetings, and the WTO’s then-Director-General Roberto Azevêdo confirmed that holding MC12 as initially scheduled in June 2020 is “no longer feasible”³. The General Council would then have to decide on new dates for MC12, which is now scheduled to take place in Geneva, Switzerland, during the week of 29 November 2021⁴. Amid these challenges and uncertainties, and after a break of a few months, the work under the JSI continued in 2020 in virtual and hybrid formats. On December 7, 2020, the JSI co-conveners Australia, Japan, and Singapore circulated a consolidated negotiating text among the participants, a group which now counts 86 WTO Members. They announced that in 2021 the work “will intensify... to further narrow differences and find potential landing zones” (WTO, 2020a).

This brief gives a stocktaking of the e-commerce JSI negotiations and sets it in the new context of COVID-19 outbreak since early 2020. It builds on a previous brief which covered the history of e-commerce in the WTO and the latest updates of the e-commerce JSI up to January 2020⁵. It highlights the pandemic’s impacts on e-commerce, economic development, and gender equality and social inclusion (GESI) aspects. It explores how the e-commerce JSI text reflects some of the issues that have emerged from COVID-19. Finally, the brief gives an overview of the negotiations’

¹ The terms “e-commerce” and “digital trade” are often, but not always, used interchangeably. There is no single agreed definition and/or use of both terms. This brief uses the term “e-commerce”, as this is the term recognised by the WTO in the context of its Work Programme (WP) on E-commerce established in 1998. For the purposes of the WP, e-commerce is defined as “the production, distribution, marketing, sale or delivery of goods and services by electronic means” (WTO, 1998b).

² See a joint media statement by Australia, Japan, and Singapore release on 24 January 2020 in Davos. Retrieved from: <https://www.meti.go.jp/press/2019/01/20200124004/20200124004-2.pdf>

³ See WTO. (n.a.), Twelfth WTO Ministerial Conference, https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm

⁴ See WTO. (n.a.), Twelfth Ministerial Conference to take place in Geneva in late 2021, https://www.wto.org/english/news_e/news21_e/minis_01mar21_e.htm

⁵ For more on the history of E-commerce in the WTO from the establishment of the WP until the emergence of the JSIs in 2017 and the progress of their negotiations until January 2020, see Ismail, Y. (2020a). *E-commerce in the World Trade Organization: History and latest developments in the negotiations under the Joint Statement*. <https://www.iisd.org/system/files/publications/e-commerce-world-trade-organization-.pdf>

key issues where convergence appears to be taking place, and others where divergence remains, ahead of the new MC12 date of December 2021.

2.0 COVID-19 and E-commerce: Impacts, challenges, and opportunities

On March 11, 2020, World Health Organization (WHO) Director-General Tedros Adhanom Ghebreyesus declared COVID-19 a “pandemic” (WHO, 2020). Since then, governments worldwide have been grappling to contain the disease. As of this writing, they are adopting and regularly reviewing various social distancing measures ranging from enforcement of mask-wearing in public places to curfews and total lockdowns restricting social and economic activities. “In a matter of days, physical movement of goods and people were widely restricted, remote working became the rule, and digital platforms the primary mean for safe communication, online ordering and transactions.”(Ismail, 2020b). People turned to the internet to work, socialize, entertain, and shop. Their demand for online shopping exposed an unprecedented opportunity to accelerate digitalization and e-commerce adoption, though some of the early research on the subject indicates that this transition has also had unequal impacts.

2.1 The accelerated adoption of e-commerce

Prolonged lockdowns and confinements to flatten COVID-19’s exponential growth curves led to a surge in internet use for business and entertainment purposes. According to an article published by Forbes in late March 2020, “total internet hits have surged by between 50% and 70%”⁶. Based on Analysis Mason, telecoms operators could report an increase in daytime traffic of between 20% and 70% in late April 2020 (Adjovi & Flores, 2020). According to Laberge et. al. (2020), the consulting firm McKinsey surveyed executives and senior managers from various regions and industries in July 2020 and found that the digitization of their business operations, supply chains and communications with customers has accelerated by seven years than before the pandemic. Indeed, the experience of e-commerce acceleration in China, following the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003, had already indicated that such public health emergencies and their related containment measures can spur a rise in e-commerce, both domestically and across borders (Ismail, 2020b).

Leading e-commerce platforms reported a substantial increase in demand for online shopping and sales due to the pandemic. For instance, according to Jumia Technologies AG (2020), the leading online retail platform in Africa, its annual active consumers reached 6.4 million, with a year-on-year (YoY) increase of 51% in the first quarter of 2020. The Jumia Technologies AG financial report also mentioned that online orders reached 6.4 million, a YoY increase of 28%. In Latin America, Mercado Libre, Inc. (2020) reported unique active users’ growth of 45.2% and a YoY increase in live listings of 26.2% for the second quarter of 2020. The Mercado Libre, Inc. (2020) financial report also found that the “mobile wallet consumer base grew by 109.3% compared to the second quarter of 2019, reaching 9.5 million unique payers.” These region-specific findings confirm some of the trends seen early in the crisis, where those consumers and businesses who were reticent to adopt digital technologies and platforms were forced to make an abrupt shift

⁶ <https://www.forbes.com/sites/markbeech/2020/03/25/covid-19-pushes-up-internet-use-70-streaming-more-than-12-first-figures-reveal/?sh=5b9985263104>

(Ismail, 2020b). E-commerce business models proved critical for sustainable recovery and resilience to future shocks (Ungerer et. al., 2020).

2.2 Unpacking the digital divide and GESI implications

Despite significant efforts by various governments to support the adoption and use of e-commerce during the pandemic, the crisis also showed that the ability to make this transition varied significantly (Organisation for Economic Co-operation and Development, 2020). This was due to gaps in critical e-commerce enablers, i.e., access to the internet and connectivity, digital skills, and developed postal infrastructure, between and within countries (Ismail, 2020b). Those that adapted to the crisis situation most quickly were large-sized businesses, many of which were already fully digital and enjoyed a sound and well-developed e-commerce ecosystem (UNCTAD, 2020b). According to OECD analysis (2020), small and medium-sized enterprises (SMEs) and retail businesses were less able to scale-up their processes and respond to increased demand for online shopping of goods and services. As a result, UNCTAD (2020a) explains that the acceleration of e-commerce has significantly taken place mainly in developed economies and relatively high-income developing economies.

According to the International Finance Corporation (IFC, 2020), the quarterly growth in internet usage during the first quarter of 2020 (compared to the same quarter in 2019), reached 12.8 percentage points higher in high-income countries and 7.5 percentage points higher in emerging economies. As for lower-middle-income countries, internet usage grew only 1.3 percentage points higher (IFC, 2020). In rural areas, where poverty rates are higher, and women are more likely to suffer from discrimination, more of the vulnerable were left behind (FAO, 2020). According to UNICEF (2020), over 70% of those who could not be reached by remote learning worldwide lived in rural areas with limited household assets and connectivity. Meanwhile, UN Women (2020) notes that, “the gender digital divide in rural areas has magnified women’s and girls’ marginalization, limiting their access to distance education, essential services, digital finance and life-saving information during the crisis.”

While e-commerce proved critical to ensure that businesses and economies could sustain themselves amid this crisis, it also demonstrated what the existing digital gaps could mean in practice, including for social and economic inequalities (Ismail, 2020b).

2.3 Recent developments in e-commerce regional cooperation and rule-making

In recent years, governments have been increasingly engaging in negotiating e-commerce and broader digital economy rules. Long before the JSI negotiations on e-commerce began, many governments had negotiated specific provisions or chapters on e-commerce in regional trade agreements (RTAs) with other countries (Gaitan G., 2020). The stated rationale for doing so, according to Ismail (2020b), is that improving e-commerce within a region can help in “scaling up conducive digital ecosystems and promoting digital societies through cooperation and sharing experiences.” Proponents of these rules have indicated that having such provisions or chapters in regional agreements can harmonize approaches to certain e-commerce issues that may otherwise differ significantly between countries, providing greater clarity and increasing the region’s attractiveness for foreign investments necessary to finance digital scalability (Ismail, 2020b).

Governments' efforts to conclude RTAs with e-commerce specific chapters, along with developing regional frameworks in related policy aspects, increased significantly over the past few months. On June 17, 2020, Chile, New Zealand, and Singapore signed the Digital Economy Partnership Agreement (DEPA) using electronic signatures⁷. The Regional Comprehensive Economic Partnership (RCEP), a mega-regional agreement with a chapter on e-commerce, was signed by 15 countries on November 15, 2020⁸, with the group of participants comprising a mix of developed, developing, and least developed economies in the Asia-Pacific. In Africa, the Assembly of the African Union (AU, 2020) in its thirteenth extra-ordinary session of December 5, 2020, decided in the Johannesburg Declaration on the start of trading under the agreement establishing the African Continental Free Trade Area (AfCFTA), specifically for "Phase I" on goods and services. In that same declaration, they also declared their intent "to conclude the negotiations on Phase II and Phase III by 31 December 2021." Hence, the e-commerce protocol negotiations (Phase III) will no longer be contingent on the conclusion of Phase II protocols on investment, intellectual property rights, and competition policy.

There has also been an increased interest in developing new regional strategies and frameworks and reforming outdated rules in existing regional settings. The Association of Southeast Asian Nations (ASEAN) has been accelerating its efforts at boosting internal cooperation in e-commerce-related aspects. The 10-country coalition adopted the Data Management Framework and the Model Contractual Clauses for Cross Border Data Flows in January 2021. ASEAN also adopted the Comprehensive Recovery Framework to serve as "a coordinated exit strategy from the pandemic" (ASEAN, 2020). The framework comprises five broad strategies for post-COVID-19 recovery, with e-commerce promotion included as an integral element of "Broad Strategy 4: Accelerating Digital Transformation" (Ibid, 2020). In Europe, the European Commission (EC) submitted a proposal for a regulation on a Single Market for Digital Services (Digital Services Act), which would overhaul the bloc's existing e-commerce legal framework, which has been in place for two decades (Directive 2000/31/EC)⁹" (EC, 2020a).

The above shows that several governments are treating e-commerce as "critical to the global economic recovery," as recognized by the e-commerce JSI co-conveners in December 2020 update (WTO, 2020a). The same statement also said that COVID-19 magnified the urgency of e-commerce rule-making and the relevance of the e-commerce JSI negotiations (Ibid, 2020).

3.0 The JSI and the WTO Work Programme on E-Commerce: Highlights from 2020

3.1 Limited increase in the number of JSI Participants

In 2020, four WTO members officially joined the JSI on e-commerce: the Philippines, Burkina Faso, Guatemala, and Ecuador. At the time of this writing in February 2021, the total number of

⁷ See the joint press release: <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/06/Joint-Press-Release--Electronic-Signing-of-Digital-Economy-Partnership-Agreement-12-June-Updated-URL.pdf>

⁸ The 15 countries comprise the 10 Member States of the Association of Southeast Asian Nations (ASEAN) – Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam – and Australia, China, Japan, South Korea, and New Zealand.

⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

WTO Members formally participating in the e-commerce JSI negotiations was 86 Members (See Box.1 below). They account for slightly more than half of all WTO Members and 90% of global trade (WTO, 2020a; WTO, 2020b). With Burkina Faso on board, the number of participants from least developed countries (LDCs) increased to four, namely: Benin, Lao PDR, Myanmar, and Burkina Faso. The number of participating WTO Members from Africa increased to six: Benin, Nigeria, Côte d’Ivoire, Kenya, Cameroon, and Burkina Faso.

Box 1. WTO Members Negotiating the JSI on E-commerce Trade-Related Aspects

Albania	El Salvador	Latvia	Qatar
Argentina	Estonia	Liechtenstein	Romania
Austria	Finland	Lithuania	Russian Federation
Australia	France	Luxembourg	Saudi Arabia, Kingdom of
Bahrain, Kingdom of	Georgia	Malaysia	Singapore
Belgium	Germany	Malta	Slovak Republic
Benin	Greece	Mexico	Slovenia
Brazil	Guatemala	Moldova, Republic of	Spain
Brunei Darussalam	Honduras	Mongolia	Sweden
Bulgaria	Hong Kong, China	Montenegro	Switzerland
Burkina Faso	Hungary	Myanmar	Separate Customs
Cameroon	Iceland	Netherlands	Territory of Taiwan,
Canada	Indonesia	New Zealand	Penghu, Kinmen, and
Chile	Ireland	Nicaragua	Matsu
China	Israel	Nigeria	Thailand
Colombia	Italy	North Macedonia	Turkey
Costa Rica	Japan	Norway	Ukraine
Côte d’Ivoire	Kazakhstan	Panama	United Arab Emirates
Croatia	Kenya	Paraguay	United Kingdom
Cyprus	Korea, Republic of	Peru	United States
Czech Republic	Kuwait, the State of	Philippines	Uruguay
Denmark	Lao, People’s	Poland	
Ecuador	Democratic Republic	Portugal	

Source: Author’s adaptation of Aaronson and Struet (2020).

3.2 E-commerce Work Programme examines moratorium on customs duties

On December 10, 2019, the WTO’s General Council adopted a decision “to reinvigorate the work under the Work Programme on Electronic Commerce” (WTO, 2019b) (See Box. 2 below for background information on the WTO Work Programme on E-commerce).

Members also agreed that “the work will include structured discussions in early 2020 based on all trade-related topics of interest brought forward by Members, including LDCs, including on scope, definition and impact of the moratorium on customs duties on electronic transmissions. [And] The General Council shall report to the 12th session of the Ministerial Conference.” (Ibid, 2019b). This moratorium has been in place for decades, but is time-bound and must be renewed periodically to

remain in place. Both within the work programme and in other forums, members have considered whether to continue renewing it, to make it permanent, or to conduct further work on what the moratorium's impact has been over these past several years.

Box 2. The WTO's 1998 Work Programme on E-commerce

E-commerce made its way into the World Trade Organization (WTO) more than two decades earlier, in its second Ministerial Conference (MC) in May 1998. In the Conference, Ministers adopted the "Declaration on Global Electronic Commerce" where they recognized that e-commerce "is growing and creating new opportunities for trade" (WTO, 1998a). They also agreed to impose a temporary moratorium on customs duties for electronic transmissions¹ to be extended every two years based on consensus. Later in September 1998, and on the basis of the Declaration, the General Council (GC) established "The WTO Work Programme on E-Commerce" with a mandate "to examine all trade-related issues relating to global electronic commerce" (WTO, 1998b). In its decision, the GC defined e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means"¹ (Ibid, 1998b).

"The WTO agreements that govern today's multilateral trading system cover a broad spectrum of cross-border trade aspects, including some related to e-commerce. Understanding the degree of their relevance to e-commerce was one of the key objectives of the WTO Work Programme... without a pre-set objective to take the process further to negotiate new rules." (Ismail, 2020a). The Work Programme's indecisive nature, the complexity of e-commerce, and the Doha Round's deadlock hindered efforts towards considering revised rules (Ibid, 2020a).

In December 2020, India and South Africa, who are not participants of the JSI, circulated a communication (WT/GC/W/812) that urged Members to go deeper in this subject area, given that it will "inform their decision on the Moratorium in MC12". They also reminded Members of a separate proposal (WT/GC/W/747) to structure the discussions on the moratorium around the following themes:

- i) revenue implications of the moratorium on electronic transmissions; ii) scope and definition of electronic transmissions; iii) technical feasibility of imposing customs duties on electronic transmissions; iv) broader impact of the moratorium on trade and industrialization and any other issue with respect to the moratorium.

A group of developed and developing country Members, including Australia, Switzerland, China, and Colombia, among others, contributed to the structured discussions and circulated communication WT/GC/W/799/Rev.1. In the communication, they referred to a recent study on the moratorium by the OECD¹⁰, and called for "a more holistic approach, by taking into account other relevant factors and their impact on consumers and on export competitiveness, and placing existing empirical evidence into a wider economic context." Finally, it is worth mentioning that

¹⁰ OECD trade policy brief, "Shedding new light on the debate about duties on electronic transmission", (December 2019) https://issuu.com/oecd.publishing/docs/shedding_new_light_on_the_debate_about_duties_on_e

the WTO secretariat organized a webinar on the Moratorium on July 13, 2020¹¹, which involved presentations from various experts and stakeholders, to support the structured discussions.

3.3 Challenges of Virtual Diplomacy and Negotiations

On March 10, 2020, the WTO suspended all meetings due to COVID-19. Consequently, after a round of JSI negotiations in February 2020, the following meetings had to be cancelled. In June 2020, meetings were able to resume in hybrid and virtual formats, depending on the restrictions in place in Geneva.

Converting to virtual meetings and negotiations was very challenging in the WTO setting, where delegates are used to negotiating in person at the organization's headquarters, with the option of simultaneous interpretation into any of the WTO's official languages and the assurance that the setting is secure (Dreyer, 2020). Trade watchers noted that the transition to virtual forms of engagement "raises questions of transparency, security and the feasibility of producing agreements at all," which was why the WTO needed to put meetings on hold in order to find the requisite technical solutions.¹² Another challenge was the difficulty of having informal conversations in an online setting, along with ensuring that the meeting and its content would stay confidential given the sensitive information involved.

These factors affected the proceedings of the JSI. However, the co-conveners ensured the continuation of the JSI negotiations, which now take place both in small group settings and in monthly plenary meetings. In 2020, according to the WTO interactive agenda, a three-day negotiating round was held in February, after which plenary meetings were held on at least a monthly basis from June 2020 onward, with the exception of the month of August.

4.0 E-commerce JSI Negotiations: State of Play (February 2021)

On December 7, 2020, the JSI co-conveners circulated among participants a consolidated negotiating text based on Members' proposals and progress in the negotiations during 2020. The text forms the basis for negotiations in 2021. A revised version followed on December 14 and consisted of six sections and an Annex on the scope and general provisions. The Six sections mirror the main six themes advanced in Members' proposals (WTO, 2020d). These are: A) enabling electronic commerce; B) openness and e-commerce; C) trust and e-commerce; D) cross-cutting issues; E) telecommunications; and F) market access. Table 1 below gives an overview of the themes and the related issues and sub/issues currently considered in the e-commerce JSI negotiation.

¹¹ Access to the webinar agenda and presentations is available here:

https://www.wto.org/english/tratop_e/ecom_e/ecom_webinar_13jul2020_e.htm

¹² <https://blogs.die-gdi.de/2020/05/06/multilateral-negotiations-and-social-distancing/>

Table 1: Summary of Issues subject to JSI negotiations as per the latest streamlined text (INF/ECOM/62) under each thematic focus group

SECTIONS/ISSUES	SUB-ISSUES	
A. ENABLING E-COMMERCE	A.1 Facilitating electronic transactions	Electronic transaction frameworks; electronic authentication and e-signatures; electronic contracts; electronic invoicing; and electronic payment services
	A.2 Digital trade facilitation and logistics	Digital trade facilitation and logistics; paperless trading; <i>de minimis</i> ; customs procedures; improvements to trade policies; single windows data exchange and system interoperability; logistics services; and enhanced trade facilitation
B. OPPENNESS AND E-COMMERCE	B.1 Non-discrimination and liability	Non-discriminatory treatment of digital products; interactive computer services (limiting liability); interactive computer services (infringement)
	B.2 Flow of information	[Cross-border transfer of information by electronic means / Cross-border data flows]; Location of computing facilities; [Financial information / Location of financial computing facilities for covered financial service suppliers]
	B.3 Customs duties on electronic transmissions	
	B.4 Access to internet and data	Open government data; [Open internet access / Principles on Access to and Use of the Internet for [electronic commerce/Digital Trade]; Access to and use of interactive computer services; and competition
C. TRUST AND E-COMMERCE	C.1 Consumer protection	Online consumer protection; unsolicited commercial electronic messages
	C.2 Privacy	[Personal information protection / Personal data protection].
	C.3 Business trust	Source code; ICT products that use cryptography
D. CROSS-CUTTING ISSUES	D.1 Transparency, domestic regulation and cooperation	Transparency; electronic availability of trade-related information; domestic regulation; cooperation; cooperation mechanism
	D.2 Cybersecurity	
	D.3 Capacity building	Options for capacity building and technical assistance
E. TELECOMMUNICATIONS.	E.1 Updating the WTO Reference	Scope; definitions; competitive safeguards interconnection; universal service; licensing and

	Paper on Telecommunications Services	authorization; telecommunications regulatory authority; allocation and use of scarce resources; essential facilities
	E.2 Network equipment and products	Electronic commerce-related network equipment and products
F. MARKET ACCESS.	Services market access; temporary entry and sojourn of electronic commerce-related personnel; goods market access	
ANNEX 1: SCOPE AND GENERAL PROVISIONS.	Preamble; definitions; principles; scope; relation to other agreements; general exceptions; security exception	

Source: Author, based on the Consolidated Negotiating Text – December 2020, INF/ECOM/62/Rev.1. (Note: The square brackets are as per the consolidated document and their use is to reflect differences in proposals).

4.1 Ten small groups established for those issues on track to deliver progress

While the discussions throughout 2020 covered all the themes and relevant proposals, which were then streamlined to form the consolidated text of December 14, intensive work took place in ten small groups on the specific issues where progress can be observed. This approach was geared towards narrowing down differences. According to (EC 2020b) and WTO (2020a), these ten groups are devoted to: i) consumer protection; ii) spam; iii) e-signatures and electronic authentication; iv) paperless trading; v) digital trade facilitation; vi) source code; vii) open government data; viii) market access; ix) customs duties on electronic transmissions, and x) open internet access. Table 2 below highlights the advances seen in these small group negotiations.

Table 2: Progress in the e-commerce JSI's small group negotiations	
Small Group	Highlights
Consumer protection	For consumer protection, most negotiating members agree that a set of guiding principles is needed. But how to apply these, their forms and/degree of permissiveness for developing country Members is not yet precise. Guatemala and Ecuador are interested in finding out whether they would be given more time to implement online consumer protection texts.
Spam	The aim is to minimize “unsolicited commercial message” also known as “spam.” During the first plenary meeting of this year 2021, the facilitator announced the group “has finalized a clean text”. (WTO, 2021).
E-signatures and electronic authentication	Members are revisiting and exchanging views on the “facilitating electronic transactions” streamlined text, which (based on WTO, 2021) was last addressed a year ago. It aims for governments to establish domestic legal frameworks to avoid regulatory burdens and non-discrimination in e-commerce related aspects. Members are also discussing views to ensure electronic contracts are not denied legal effect nor treated differently. Other texts under discussion are electronic

	versions of invoices for the sale of goods or the provision of services, facilitation of e-payment services, and the treatment of service suppliers.
Paperless trading	While many members (particularly higher-income countries) favor rules for paperless trading, some others pointed that the United Nations Commission on International Trade Law (UNCITRAL) already addressed these issues in their model laws (Titievskaja, 2020). For example, the Model Law on Electronic Transferable Records of 2017 has not yet influenced national laws and regulations except in one developing country Member, the Kingdom of Bahrain and the Jurisdiction of Abu Dhabi Global Market in United Arab Emirates ¹³ .
Digital trade facilitation	Builds on the Trade Facilitation Agreement (TFA), with the aim of examining e-commerce related aspects of the TFA and strengthening them.
Source code	Most participants agree on the principle of not requiring disclosure of source code related to the protection of intellectual property. However, the discussions are ongoing to determine the scope of a source code, the exceptions to the obligation, and the procedures needed. In general, discussions on the source code are very technical, which some delegations have indicated makes this subject hard to follow ¹⁴ .
Open internet access	The proposals recognize the benefits of non-discriminatory access to the internet to be granted by the service providers. However, a group of developed countries say that Members should adopt measures for governments to be responsible for guaranteeing this access.
Open government data	The aim is to facilitate public access to data or information held by governments. Discussions are ongoing regarding how this data would be used and also what potential mechanisms could be established for the public to require the disclosure of certain information. Proponents are mainly signatories of the International Open Data Charter (ODC).
Customs duties on e-transmissions	Members have been adopting the moratorium on custom duties on electronic transmissions since 1998 and extending it every two years at the Ministerial Conference. However, some developing country Members have been questioning the utility of extending it further and called for the structured discussions in the WTO Work Programme to examine its scope, definition, and impact. On the other hand, some developed country Members have called for making it permanent. Should the existing WTO moratorium no longer be extended, the JSI offers an opportunity to reach an agreement reinstating the moratorium among like-minded Members (Dreyer, 2020). From the participating Members, Indonesia's position has

¹³ See the Status of UNCITRAL Model Law on Electronic Transferrable Records, here:

https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records/status

¹⁴ In the framework of the TAF2+ WTO Umbrella Grant project seminars held during the year 2020, many delegations, participating or not in the JSI negotiations, highlighted the difficulty to follow discussions on source codes given its very technical aspect. Similar views were expressed about issues related to data flows, data access, and privacy.

	been against the extension of the moratorium. The definition of “electronic transmission” is not yet agreed.
Services market access	<p>Negotiations are underway in this area given that there are existing commitments across the four modes of supply of the General Agreement on Trade in Services (GATS) in: business services, communications services, distribution services, financial services, and transport services. The update and additional obligations are considered under the Reference Paper on Telecommunication Services.</p> <p>The lack of clarity about the architecture of the e-commerce JSI outcome has been raised as a particular challenge for this small group, given how it may interact with current WTO rules and scheduled commitments.</p>

Source: Author, based on the Consolidated Negotiating Text – December 2020, INF/ECOM/62/Rev.1; WTO (2021); EC (2020b) and Titievskaja (2020)

4.2 Data access, data flow and privacy remain divisive

There is a high level of divergence among JSI participants over how to treat issues related to data flows, access, privacy, and cybersecurity. The proposed key approaches differ significantly:

The EU calls for the respect of fundamental rights... The United States (US) advocates free flows of cross-border data, including personal data, if it is for the business purposes... China views data flows as being subject to the precondition of security (Titievskaja, 2020).

Meanwhile, not all participating JSI members can engage effectively in negotiations on data, and several of them lack data businesses and expertise at home (Aaronson A. and Struet, 2020). Hence, data talks and attempts to reach agreement on regulating it occur more outside the WTO premises, e.g., at the G7 and G20.

According to the co-conveners, Japan and Singapore organized a session on data flow and localization in November 2020 (WTO, 2020a). Various experts were invited, including from the private sector. The objective was to build understanding around the technical aspects of data and how these relate to trade, in order to support those delegations involved in data-related negotiations.

4.3 Limited progress in addressing MSMEs, gender and LDCs

According to the thematic framework of the e-commerce JSI and the meetings’ agendas, “the unique opportunities and challenges faced by Members, including developing countries and LDCs, as well as by [micro, small and medium enterprises] MSMEs, will be taken into account across each of the Focus Groups” (WTO, 2019c). However, based on WTO (2020d), very few proposed provisions can be tracked in the consolidated document that are specifically linked to these. When it comes to MSME-related concerns, only a few proposals to support them can be found under improvements to trade policies, provision of trade facilitating and supportive services, single windows data exchange, interactive computer services, cooperation, privacy, and the Preamble.

Brazil and China were among those who submitted proposals referring specifically to MSME interests.

As for capacity building and technical assistance to support developing countries or LDCs, China and Indonesia are the only JSI participants to submit text proposals on related provisions. Indonesia's proposal suggests providing support upon request from developing country Members or LDCs to ensure their ability to implement the prospective rules on e-commerce. This support is to be delivered by those developed and developing Members able to do so. Another proposal by China and Indonesia calls for, as described in the consolidated document of December 14, "exploring the possibility of establishing an E-commerce Programme for Development in the WTO" intending to "voluntarily provide assistance to LDCs." It is also worth mentioning that China is the only Member to propose a text addressing the "digital divide," encouraging Members to "adopt recommendations and practical measures that contribute to improving the electronic commerce infrastructure and technical conditions of developing Members, to help enterprises and citizens realize digital transition" (WTO, 2020d).

Finally, on gender, only two gender-inclusive provisions were advanced by Canada to be considered in the negotiations. These are under the Preamble and the sub-section on protecting personal information, according to the latest consolidated negotiating text of December 2020. They adopt a general non-discrimination approach.

5.0 Prospects towards and for MC12

In the context of COVID-19 and its impacts on the pacing of the JSI negotiations, what this will mean for the shape of an MC12 outcome remains unclear.¹⁵ The co-conveners announced in December 2020 that the small working groups outlined in table 2 above "will intensify work in the coming months to further narrow differences and find potential landing zones" (WTO, 2020a). In parallel, dates for monthly plenary meetings have been set until the WTO summer break. These are¹⁶:

- Tuesday, March 16
- Tuesday, April 20
- Thursday, May 20
- Monday, June 21
- Friday, July 23

The first meeting this year took place on February 5. During the meeting, facilitators of small groups shared updates on their discussions. The facilitator of the small group discussion on "spam" announced that the group had finalized a clean text. According to CRS (2020) and EC (2020a), customer protection and e-signatures can be next in line to reach a final text in the run-up to MC12. "Ambassador Hung Seng Tan (Singapore), co-convenor of the initiative... urged the small groups

¹⁵ While Members have not yet agreed on the dates and venue for MC12, it is generally expected to be held later in 2021.

¹⁶ World Trade Organization. (n.a.). Joint statement Initiative on Electronic Commerce: Schedule of Meetings for 2021. (Restricted Access).

to prioritize cleaning up issues that have been extensively dealt with so that the initiative can address other issues.” For this purpose, the co-conveners are considering involving ministers in small group discussions to help resolve the challenging issues.

While several issues in the e-commerce JSI negotiations’ agenda are expected to make substantive progress, the desired outcome remains unclear. At the same time, many developing country Members are pushing to reinvigorate the WTO Work Programme on E-Commerce and significantly broaden the agreed structured discussions on the moratorium’s impacts. Given that the moratorium on customs duties on electronic transmissions will be up for renewal at MC12, negotiations on the issue among the full WTO membership are expected to intensify in the coming months.

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