

EMERGING GLOBAL TRADE PARADIGM ON E-COMMERCE AND INDIA'S POLICY CONUNDRUM: WHAT ALL IS AT STAKE?

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ABSTRACT

The digitization of the world economy has fundamentally transformed the nature of international trade and is creating new challenges for the global trading system. There is an intense discussion at the rule-making institutions like World Trade Organisation (WTO and in Regional Trade Agreements on trade rules and their role in addressing the challenges of digital trade in world economy. The rule shaping at multilateral and regional level creates centripetal and centrifugal forces for making a base for rule making at world level. Rapid changes in rule making coupled with robust trade and commerce in digital economy is creating ambiguous, uncertain and biased benchmarks at global level, which will pose significant trade challenges for developing economies like India to cope up with them. In this context, this paper attempts to analyse the developments on E-commerce rule-making in ever-evolving multilateral/regional trading system and inherent structural challenges that participating countries like India have to face in framing new rules on E-commerce at the World Trade Organisation. In the same vein, it must be mentioned that two categories of rules-Substantive and Adjective, currently exist in the current trade regime and it is significant to analyse how both the type of rules contribute in creating a conducive environment

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for International Electronic Commerce Trade Regime. In this light, the paper attempts to elucidate upon this contemporary rule regime while at the same time attempting to analyse the emerging challenges for E-commerce trade rules in context of bilateral, regional and multilateral trade agreements including the stance of India's policy makers.

Keywords: E-Commerce, Digital Economy, Digital Trade rules, India, E-commerce Policy.

1. BACKGROUND: THE NEW DIGITAL PARADIGM

Electronic-commerce¹ (e-commerce) has emerged as one of the most important “new issues” in the global trading system. The importance of E-commerce in the global economy has increased manifold due to its role in transforming domestic and international production structures, nature of global trade, service supply and cross border transactions.² The emergence of digital economy is opening up vistas of business opportunities for enterprises to leverage “digital platforms” to connect with global markets. E-commerce enabled business models are increasingly using the electronic platforms for production, marketing, and distribution of their goods and services. E-Commerce has the immense potential to offer benefits in the form of enhanced participation in the Global Value Chains, increased

1. There can be various definitions of the term e-commerce. OECD defines the expression E-commerce as: ‘the sale or purchase of goods or services, conducted by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, Governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail’. The Work Programme on Electronic Commerce of the General Council in 1998 defines it as: ‘Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term “electronic commerce” is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.’ For, the purpose of this paper, we have adopted a wider definition to depict the nature of international trade i.e “digital trade” or “trade in digital goods and services”. The paper examines two types of rules pertaining to e-commerce trade-rules pertaining to e-commerce regulation and rules of digital trade facilitation which contribute towards e-commerce.

2. World Trade Organisation, *World Trade Report 2018: The Future of World Trade: How Digital Technologies are Transforming Global Commerce* (2018).

market access and reach, improved internal and external market efficiency and lowering transaction costs.³

As per the World Trade Organisation (WTO) database, the global digital trade increased from US\$ 19.3 trillion in 2012 to US\$ 27.7 trillion in 2016. The growth in digital trade has been witnessed in both Business-to-Business (B2B) and Business to Customer (B2C) while the share of latter is quite significant. Global cross-border B2C E-commerce sales are likely to reach to US\$1 trillion by 2020.⁴ The growth of global digital trade is to be augmented by the rise of new technologies such as 3D printing, artificial intelligence, smart goods, robotics and Internet of things (IoT).⁵ Trade rules in digital products are broadly segregated into four categories: i) cross border transactions that takes place through E-Commerce; ii) use of digital platforms such as Ebay, Amazon, Flipkart, and Alibaba; iii) products that are digital delivered such as software and eBooks; and d) 3D printing or additive manufacturing.⁶ The first two categories are more or less similar as goods and services are delivered through digital platforms while the third category includes both delivery of physical products and services. This category has a large number of products that are delivered in physical form but recent technological advancements enabled their delivery in electronically. Products such as media and software products, printed materials and CD-ROM are largely delivered through digital networks. The final category of 3D printing or additive manufacturing is an emerging and disruptive technology but it is difficult to ascertain how digital products will be delivered through it.⁷

New business models dominated by digital platforms are not only disrupting the conventional structure and pattern of global trade but are

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3. United Nations Conference on Trade and Development, *Information Economy Report 2015*, 17.
 4. E-Marketer, *Worldwide Retail ECommerce Sales: EMarketer's Updated Estimates and Forecast Through 2019* (2015); E-Marketer Report 2015, *Worldwide Retail Ecommerce Sales: EMarketer's Updated Estimates and Forecast Through 2019* (December 2015) <<https://www.emarketer.com/Report/Worldwide-Retail-Ecommerce-Sales-eMarketers-Updated-Estimates-Forecast-Through-2019/2001716>> accessed 1 July 2024.
 5. World Trade Organisation, *World Trade Report 2018: The Future of World Trade: How Digital Technologies are Transforming Global Commerce* (2018).
 6. B Dhar, 'Electronic Commerce and the WTO: The Changing Contours of the Engagement' Briefing Paper No 21 (2017).
 7. OECD, 'Towards a G20 Initiative on Measuring Digital Trade: Mapping Challenges and Framing the Way Forward' (2016) <<http://www.oecd.org/g20/summits/hamburg/Towards-a-G20-Initiative-on-Measuring-Digital-Trade.pdf>> accessed 28 June 2024.

also creating the new ones. Trade in goods and services through digital platforms is expanding without a legally binding international trade agreement. Absence of comprehensive trade rules specially for regulating digital trade creates massive challenges to the multilateral trading system to regulate cross border transactions of digital products.⁸ The demand to formulate new trade rules for digital trade is increasing at multilateral level. At this juncture, it is imperative to mention that, there can be two categories of overarching rules to regulate digital trade.

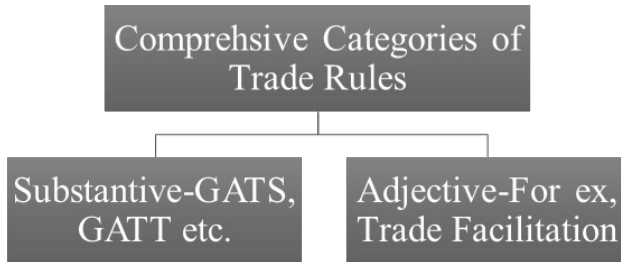


Figure 1: Comprehensive Category of Trade Rules (Source: Authors)

The first category of rules being substantive in nature to govern and regulate the digital trade transactions, like rules contained in GATT (General Agreement on Tariffs and Trade) and those in GATS (General Agreement on Trade in Services). The second category of rules being adjective rules in the nature of looking after the procedure through which substantive rules are being implemented. This category of rules may include rules of Trade Facilitation etc. It is significant to have both the category of rules in place in order to have a comprehensive regime of governance. In the context of Electronic-Commerce, dearth is of substantive rules and not much on adjective rules especially in the context of Developing countries like India. Developed countries have already negotiated rules on E-commerce through bilateral and regional trade agreements (RTAs) while developing countries are relatively reluctant to negotiate rules on digital trade due to their capacity constraints, different levels of development, infant industry and non-existence of domestic digital policies. India is also facing the conundrum in the context of regulatory governance of digital trade and especially on the international platform. The idea behind this paper is to dissect the India's regulatory and adjective position with respect to trade in digital goods and services.

Against this backdrop, this paper is divided into five parts. The first part of the paper throws light on the multilateral aspect of legal framework on

e-commerce and also analyses the challenges to the WTO legal framework to formulate new trade rules on E-commerce. The second part of the paper reviews the growth trajectories of existing rules on E-commerce in bilateral and regional trade agreements and their depth and scope. The third part of the paper puts to limelight the broad contours of existing proposals on E-commerce at the WTO vis-à-vis India's stance not to join E-commerce negotiations. The fourth part of the paper analyses the key factors which influenced India's decisions in the e-commerce talks. The last section of the paper concludes with remarks on policy implications in the context of ongoing e-commerce negotiations and joint initiative.

2. MULTILATERAL DEVELOPMENTS ON E-COMMERCE REGULATION AT WTO: WHAT ARE THE IMPEDIMENTS?

In order to systematically and holistically examine the overarching framework on E-commerce at a multilateral platform of WTO, the analysis in this section has been conducted by categorizing the framework into two types of rules under the umbrella of the WTO Law as follows:

2.1 Category A: Rules on Substantive Governance

The introduction of E-commerce in the WTO framework started in 1998 when members adopted the Ministerial Declaration on Global E-commerce and later turned into a "Comprehensive Work Programme on Electronic Commerce".⁹ The Work Programme had two objectives. The first was to "*examine all trade related aspects of global e-commerce*" while the second objective was "*non-imposition of customs duties on electronic transmission*"¹⁰ on imposing customs duties on e-commerce). The work programme formed three councils (goods, services and trade related intellectual property rights (TRIPS) would examine the relevant issues relating to market access of goods and services and the protection of intellectual property rights associated with digital commerce. It also placed the mandate to the Committee of Trade and Development (CTD) to examine the potential implications of E-commerce on development imperatives of developing countries and how they can be addressed through capacity building and policy interventions. Geneva's programme was not the only work programme considered by the Ministerial Conference. Ministers have considered the Work Programme on Electronic Commerce Ministers

9. WTO General Council, *Work Programme on Electronic Commerce*, WT/L274 (Adopted on 25 September, 1998) <https://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm> accessed 1 July 2024.

10. This is also referred to as the practice of 'Moratorium'.

at their Ministerial Conferences also held in Doha 2001; Hong Kong 2005; Geneva in 2009; Geneva 2011; and Bali 2013. At those Conferences, Ministers have taken note of the reports on electronic commerce and have instructed the General Council and its relevant subsidiary bodies to continue their work on e-commerce.

Name of the Ministerial Conference/Declaration	Year	Key Agenda's taken
Buenos Aires Ministerial Conference	2017	Hold Periodic Reviews; Agreed to maintain the current practice of moratorium.
Nairobi Ministerial Conference	2015	Hold Periodic Reviews; Agreed to maintain the current practice of moratorium.
Bali Ministerial Conference	2013	Instructed the General Council to continue substantially invigorating the work on e-commerce; Taking Forward the issues concerning the application of e-commerce in enhancing development opportunities in Developing, Least Developed and Least connected countries; Maintaining the practice of Moratorium.
Geneva Ministerial Declaration	2011	The Work Programme to also examine access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers; Instructed the General Council to look into development related issues of E-commerce for Developing and Least Developed Countries; Maintaining the current practice of Moratorium.
Geneva Ministerial Declaration	2009	Current Practice of Moratorium to be maintained.
Honk Kong Ministerial Declaration	2005	Current Practice of Moratorium to be maintained.
Doha Ministerial Declaration	2001	Current Practice of Moratorium to be maintained.
Geneva Ministerial Declaration	1998	To established a Comprehensive Work Programme on E-commerce; Practice of Moratorium to be maintained.

Table 1: Ministerial Declarations/Conference on E-Commerce (Source: WTO)

As can be observed in the above table, despite some positive developments, the work programme failed to deliver substantive output but it was able to sustain its valuable practice of *moratorium*. Recently also, the General Council in its meeting held on December 10, 2019 agreed to

maintain the current practice of not imposing customs duties on electronic transmissions until the 12th Ministerial Conference (MC12) in Nur-Sultan, Kazakhstan, scheduled for 8-11 June 2020. They also agreed to continue work under the existing 1998 work programme on e-commerce in the beginning part of 2020.¹¹

Insignificant progress on E-commerce at the WTO is fundamentally associated with “*structural incompatibility*” of the WTO framework to deal with digital products.¹² One of key issues is related to this is that the legal framework of the WTO is not equipped enough to deal with digital products. The General Agreement of Trade and Tariffs (GATT) and the General Agreement on Trade and Services (GATS) are two important agreements that deal with goods and services respectively. The classification of digital products under GATT or GATS will have far-reaching economic implications to digital trade, given the fact that the former is more liberalised than latter.¹³ This is because of GATT is a legally binding agreement while the GATS is only a framework agreement. Trade liberalisation under GATT has also made significant progress as compared to GATS. The fundamental problem is with their “*statistical classification*” under GATT or GATS. The hybrid nature of digital products falls under both agreements of the WTO. It is therefore, important to clarify under which agreement they fall. However, there is broad consensus that goods ordered electronically and delivered in physical form should fall under the scope of GATT. On the contrary, goods delivered electronically fall under the purview of GATS. Therefore, there is limited scope to debate on the application of GATT and GATS in the context of these two types of digital products. The issue of classification of digital products is evident in case of software and electronic products that are not delivered in tangible form but delivered through electronic transmission. This puts another important

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11. WTO General Council, *WTO Members Agree to Extend E-Commerce, Non-Violation Moratoriums* (WTO, December 2019) <https://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm> accessed 2 July 2024.
 12. Meltzer, P Joshua, ‘A New Digital Trade Agenda’ (International Centre for Trade and Sustainable Development 2015) <www.e15initiative.org/> accessed 1 July 2024; See also, Metschel, Manual, ‘The World Trade Organization in Times of Digital Trade Addressing Digital Protectionism?’, *Màster Oficial — Internacionalització: Aspectes Econòmics, Empresarials i Juridicopolítics* (2018) <<http://diposit.ub.edu/dspace/handle/2445/123738>> accessed 28 June 2024; Neeraj, ‘Trade Rules for the Digital Economy: Charting New Waters at the WTO’ (2019) World Trade Review 1.
 13. General Agreement on Trade in Services (15 April 1994); Marrakesh Agreement Establishing the World Trade Organization, Annexure 1B General Agreement on Tariffs and Trade 1994.

question whether electronic transmission of such digital products would also be regulated by Annex 1A of the GATT such as the Agreement on Technical Barriers to Trade.¹⁴ This has become more important in view of increasing security concerns related to theft of personal data and influx of spurious products. There is a strong case for regulatory authorities to regulate the import of digital products to ensure that imported digital products do not contain any malicious backdoors and comply with mandatory technical standards. It essentially means that import of digital products has to comply with the rules of TBT Agreement but electronic delivery of such products (supply of services) eliminates the applicability of TBT Agreement.¹⁵

The hybrid nature of digital products and services makes it very difficult to understand the applicability of the GATT and GATS.¹⁶ However, some of members of the WTO and experts argue that digital products and service require a completely new category or agreement. Prime facie, it seems to be very appealing proposal but the scope of such an agreement at multilateral level is limited because the WTO is facing its existential crisis. The stalemate over the appointment of judges at Appellate body has emerged a major threat to its institutional credibility.¹⁷ Further, a number of issues of Doha round are yet to be concluded. A new agreement will fundamentally undermine the values of the existing agreements such as GATT and GATS.¹⁸ Moreover, digital products and services to be covered under the new agreement would have to be elucidated. This again leads to the fundamental question of classification of goods. The scope of a new agreement at a multilateral level is limited as most of members are moving

14. Agreement on Technical Barriers to Trade, World Trade Organisation, Annex 1A.

15. Metschel, Manual, 'The World Trade Organization in Times of Digital Trade Addressing Digital Protectionism?', Màster Oficial — Internacionalització: Aspectes Econòmics, Empresarials i Juridicopolítics (2018) <<http://diposit.ub.edu/dspace/handle/2445/123738>> accessed 28 June 2024.

16. F Farrokhnia and C Richards, 'E-Commerce Products under the World Trade Organization Agreements: Goods, Services, Both or Neither' (2016) *Journal of World Trade* 793-817.

17. Robert Basedow, 'Strengthening the World Trade Organization — Critical Demands for Imperative Success: Identifying Politically Viable Options for an Incremental Reform' (Global Economic Dynamics, Bertelsmann Stiftung, 27 April 2017) 16 <https://www.bertelsmannstiftung.de/fileadmin/files/BSf/Publikationen/GrauePublikationen/MT_Strengthening_the_WTO.pdf> accessed 28 June 2024.

18. S Fleuter, 'The Role of Digital Products under the WTO: A New Framework for GATT and GATS Classification' (2016) *Chicago Journal of International Law* 153-177.

towards restrictive trade regime due to their unfavourable experiences with existing agreements of the WTO.¹⁹

The rise of new technologies such as additive manufacturing poses insurmountable challenges to the existing framework of the WTO.²⁰ The gradual expansion of additive manufacturing would completely change the mode of delivery of goods across borders as the Computer Aided Design file for 3D printing is transmitted from one country to another to be printed at a manufacturing centre.²¹ This raises a related question—how are such services to be treated. If goods delivered through 3D printing are considered services, the scope of imposing custom duties will be ruled out and it would fundamentally challenge the idea of protecting domestic industry through high import duties. The scale of 3D printing at a global level will determine the magnitude of its impact on the global trading system.

2.2 Category B: The Adjective Rules of E-commerce

As discussed in the introductory segment of this paper, if one is to examine holistically the legal framework of E-commerce in the multilateral paradigm, it would be imperative to look into both the substantive and adjective framework of rules relating to E-commerce. Hence, at this junction, it is significant to throw some light on the adjective rules within the paradigm of WTO Framework.

The idea of “*facilitating trade*” was not new to the countries even in the beginning of the trade negotiations. GATT, 1994 itself is equipped with certain provisions on Trade Facilitation. Even though GATT, 1994 had a mini-framework for the same, it was still not sufficient to meet the present-day needs of international trade standards and developments in the light of digital age as well. Beyond any shadow of doubt, Articles V, VIII and X of GATT, 1994 are the stepping stones on which the latest Trade Facilitation Agreement was based but those provisions alone could not have solved the

19. James Bacchus, ‘Might Unmakes Right the American Assault on the Rule of Law in World Trade’, Centre for International Governance Innovation (Centre for International Governance Innovation, 2018) <<https://www.cigionline.org/sites/default/files/documents/Paper%20no.173.pdf>> accessed 3 July 2024.

20. World Trade Organisation, *World Trade Report 2018, Is the WTO 3D Printing-Ready?* (2019) <https://www.wto.org/english/res_e/publications_e/opinionpiece_by_patrik_tingvall_and_magnus_rentzhog_e.pdf> accessed 28 June 2024.

21. Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard University Press, 2016).

problems of corruption, red Tapism and innumerable formalities while at the trade across borders.²²

The adjective rules informing the digitalization of international trade can be found in the Agreement on Trade Facilitation (TFA)²³ which was adopted in order within the framework of the WTO to elaborate upon Article V, VIII and X of the GATT, 1994, paving the way for formulation of detailed rules on expeditious clearance of goods across borders, minimisation of custom formalities and documentary procedure. Following table showcases the relevant provisions of the TFA which are significant for facilitating the Electronic Commerce:

Provision	Framework	Subject Matter/Language of the provision	Nature of the obligation	Relation with E-commerce Framework
Article 1.2.1 (a)	TFA	<i>'Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet: a description of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit.'</i>	Diluted Obligation as qualifier of possibility and appropriateness attached	Digital facilitation of trade procedure.
Article 1.2.1 (b)	TFA	<i>'Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet: the forms and documents required for importation into, exportation from, or transit through the territory of that Member.'</i>	Diluted Obligation as qualifier of possibility and appropriateness attached	Digital trade facilitation

22. See Third, Fourth and Fifth Recital of the Preamble, Agreement on Trade Facilitation (Proposed final text), WT/L/931.

23. The Agreement on Trade Facilitation came into force on 22 February 2017. India, being a member of WTO is also bound by the rules of the Trade Facilitation Agreement.

Article 7.2	TFA	<i>'Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.'</i>	Diluted Obligation as qualifier of practicability attached	Digital Trade Facilitation
Article 10.4	TFA	<i>'Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single-entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.'</i>	Best endeavour provision	Single Window system, one of the key measures of E-commerce procedure.

Table 2: Relevant Provisions in the TFA concerning Electronic Commerce
(Source: TFA & Authors)²⁴

The above table clearly depicts that there is a binding Multilateral Agreement especially dedicated to making the trade process smoother and easier. It also contains provisions which have contributed in digitalization of trade and hence are one of the significant components of Electronic Commerce. However, as shown above, these provisions contain obligations which even though seem binding at first glance, but are actually in the nature of diluted obligations owing to the use of legal language, like for example-“to the extent possible”; “shall endeavour”; “to the extent practicable” etc.²⁵ These qualifiers give ample regulatory autonomy to the member countries in terms of the implementation of the agreement. In this sense, the digital trade facilitation provisions in the TFA can be said to in the form of “softer obligations” or “flexibility provisions.”

When member States or State parties to any international treaty or agreement negotiate the provision of the same, one of the choices before

the parties is to include the provisions which are either in the nature of soft law²⁶ or hard law, which has also been referred as ‘choice of form’²⁷ by some international scholars. This has a great deal to do also with the drafting language of the text of the agreement. These are essentially referred to as ‘design elements’²⁸ of international agreements. The design elements of an international treaty have a huge impact on ascertaining the credibility and effectiveness of the agreement and potential of the agreement in question to effectively bind²⁹ the States. Some international scholars have classified soft law obligations as those which are binding and yet not as impactful as hard law obligations.³⁰ This may be stand true even in the case of obligations under TFA and the SPS Agreement. With soft law obligations in the TFA comes the flexibility in implementation. According to Abbott and Snidal,

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26. There is no agreement amongst the scholars of public international on a concise definition of soft law agreements or treaties. Some have defined it as international law which is not hard law. Some have clarified that, soft law is not be construed as a purely a political undertaking without any legal compliance or without any legal component. Some define it as law which does not fulfil the requirements of the classical definitions of international law. While some say, that soft is definitely international law and but has weaker implementation as compared to hard international law. Other scholars have classified customary international law as soft law obligations, etc. For literature of Soft law obligations under international law, see, Abbott and Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 Int Org 421, at 422; Wellens and Borchardt, ‘Soft Law in European Community Law’ (1989) 14 E L Rev 267; Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 ICLQ 850; Raustiala, ‘Form and Substance in International Agreements’ Mimeo (2002); Sykes, ‘Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’ (1991) 58 U Chicago L Rev 255; Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 Am J Int’l L 413, at 414 n.7; Dupuy, ‘Soft Law and the International Law of the Environment’, (1990) 12 Mich J Int’l L 420; O’Connell, ‘The Role of Soft Law in a Global Order’, in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 100, 109-110; etc.
 27. See Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90 Calif L Rev 1823; Also See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law.
 28. See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law 583.
 29. Even though the distinction between binding and non-binding agreements is many times co-related with the distinction between hard international law and soft international law respectively, it may not always be a correct explanation in every situation. The case of WTO, the marrakesh agreement along with its annexed agreements is one of binding obligations, yet containing soft law provisions like that in the trade facilitation agreement.
 30. See for instance, Baxter, ‘International Law in “Her Infinity Variety”’ (1980) 29 ICLQ 549, at 554.

“Soft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text”.³¹

This flexibility is sometimes necessary for a variety of reasons. For instance, in the context of TFA, the flexibility is important to meet the objective of special and differential treatment in order to appreciate the different levels of economic development of member countries and hence allow them the space to implement certain obligations on the touchstones of ‘possibility’, ‘appropriateness’, ‘practicability’, etc. However, the same flexibility may reduce the value of the international treaty in question, i.e. the TFA in the current work.³² While the same flexibility in international agreements may also be used to take pro-active measures by some member countries to advance the objectives, goals or aspirations of the Trade Facilitation.

In the final analysis, given the existing fallacies in the overall e-commerce legal framework of the WTO, it is important for policymakers to recognise that future rule making on digital trade should address the fundamental issue of classification of digital goods within the framework of GATT and GATS. Further, the recent technological advancement such as additive manufacturing, robots and IoT also needs to be well analysed to understand how digital products are to be treated in international trade. It is therefore, important to keep these developments in mind while discussing substantive rules on digital trade. This requires systematic research on emerging technologies to understand their impact on the structure, composition and pattern of international trade.

3. RULES ON E-COMMERCE IN REGIONAL TRADE AGREEMENTS: DECONSTRUCTING THE REGIONAL EXPERIMENT

Trade rules on E-commerce have received significant importance in regional and bilateral trade agreements. It is widely believed that the growth of E-commerce provisions in RTA/BTAs happened due to lacklustre progress in the work programme of 1998.³³ Rules on E-commerce in

31. See Abbott and Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 Int Org 421, at 445.

32. See Andrew T Guzman, ‘The Design of International Agreements’ (2005) 16(4) The European Journal of International Law 592.

33. However, this may not be fair assessment since the work programme was not mandated to formulate rules on E-commerce.

trade agreements received significant attention post 2000. The digital transformation of trade requires a careful review of digital trade rules in regional trade agreements.³⁴ The New Zealand and Singapore³⁵ FTA was the first agreement to include provisions on E-commerce.

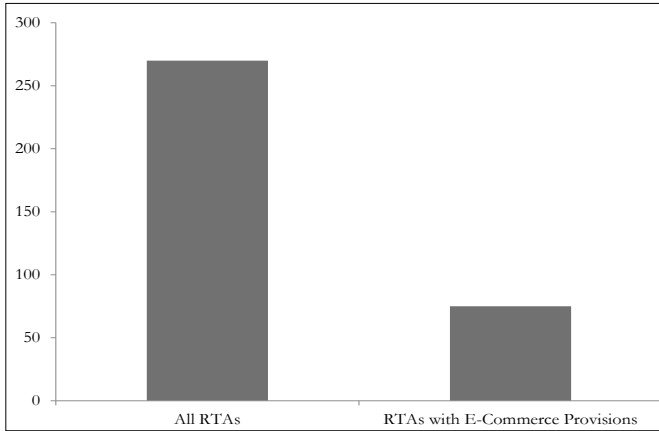


Figure 2: Number of RTAs Containing Provisions on E-Commerce (Source: WTO, RTA Database)

The Australia –Singapore Free Trade Agreement (2003) was the first agreement to include a standalone chapter on e-commerce.³⁶ The provisions on E-commerce subsequently negotiated in United States–Chile FTA, US–Australia FTA and the Thailand–Australia FTA. The total seventy-five RTAs/BTA contain a chapter or articles on E-commerce of which twenty-nine RTA/FTA are signed by developing countries. This demonstrates that developing countries have shown their keen interest in rulemaking on E-commerce through RTAs/BTAs. The number of paperless trade

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34. Mark Wu, Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System International Centre for Trade and Sustainable Development, November 2017 <<http://e15initiative.org/wp-content/uploads/2015/09/RTA-Exchange-Digital-Trade-Mark-Wu-Final-2.pdf>> accessed 1 July 2020. See also J Antonio Monteiro and Robert Teh, Provisions on Electronic Commerce in Regional Trade Agreements, *WTO Working Paper* (2017).
35. New Zealand Foreign Affairs and Trade, Protocol to Amend the Agreement Between Singapore and New Zealand on a Closer Economic Partnership and Associated Instruments (October 2018) <<https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/Singapore-FTA/Singapore-CEP-Upgrade-FINAL-NIA.pdf>> accessed 1 July 2024.
36. Singapore Australia Free Trade Agreement (SAFTA), (Chapter 14, Page 101) <<https://wits.worldbank.org/GPTAD/PDF/archive/Singapore-Australia.pdf>> accessed 2 July 2024.

measures in RTAs has also been constantly increasing as is demonstrated in the following diagram:

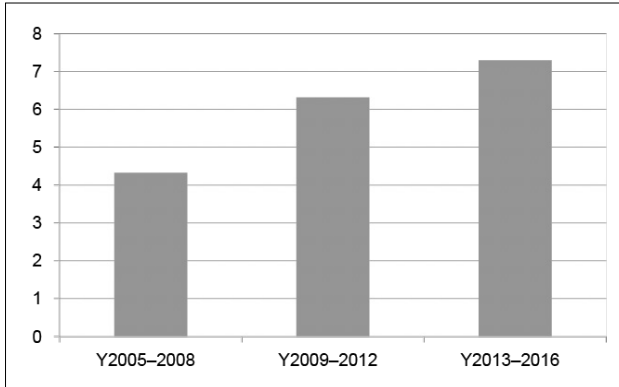


Figure 3: Number of Paperless trade measures in RTAs (From 2005-2016)³⁷

Provisions relating to E-commerce in trade agreements are broadly categorised in three parts a) general provisions; b) trade facilitation; c) conducive environment and d) technological issues. General provisions focus on all set of regulations in E-commerce and are primarily related to promoting cooperation, transparency and non-discriminatory treatment of digital products. Trade facilitation measures emphasis on seamless and efficient movement of goods and services across borders to reduce the cost and time of doing trade. These measures focus on provisions relating to customs duties, paperless trading, electronic signature, and electronic certification. Conducive environment relates to provisions on consumer protection, personal data, unsolicited emails, free and open internet and cyber security. These provisions emphasised on improving the quality of transaction across frontier and the introduction of new issues of the digital economy. Technological issues are associated with location of computer facilities; transfer of source code and cross-free flow information.

	US – Australia	US-South Korea	Australia -Japan	Australia-China	EU-Japan	USMCA	CPTPP	RCEP
A. General Provisions								
Cooperation	No	No	Yes	Yes	Yes	Yes	Yes	
Transparency	No	No		Yes				

37. Yang Duval, K Mengjing, Digital Trade Facilitation: Paperless Trade in Regional Trade Agreements, ADBI Working Paper 747, 2017 <<https://www.adb.org/sites/default/files/publication/321851/adbi-wp747.pdf>> accessed 1 July 024.

Non-discriminatory treatment of digital products	Yes	Yes	Yes	No	No	Yes	Yes	
Domestic regulatory frameworks and international treaties	No	No	Yes	Yes	Partial	Yes	Yes	
B. Trade facilitation and C. Conducive Environment								
Customs duties	Yes	Yes	Yes	Yes	Yes	Yes		
Paperless trading	Partial	Partial	Yes	Yes		Yes	Yes	
Electronic signature	Yes	Yes	Partial	Partial	Yes	Yes	Yes	
Electronic authentication	Partial	Yes	Yes	Partial	Yes	Yes	Yes	
Online consumer protection	Partial	Partial	Partial	Partial	Yes	Yes	Yes	
Personal data protection	No	No	Yes	Partial	No	Yes	Yes	
Unsolicited (commercial) email	No	No	Partial	Partial	Yes	Yes	Yes	
Access to and use of internet	No	Partial	No	No	No	Yes	Yes	
Cybersecurity	No	No	Yes	No	No	Yes	Yes	
D. Technological Issues								
Data Localisation	No	No	No	No		Yes	Yes	
Non-disclosure of source code	No	No	No	No	Yes	Yes	Partial	
Cross-border flow of data	No	No	No	No		No	No	

Table 3: Provisions relating to E-commerce in Selected Trade Agreements
(Source: Authors' construction based on text of trade agreements)

Yes: Contains a separate article and the definition of the provision is fully covered.

Partial: Provision exists as a separate article without a definition of the provision.

No: Provision does not contain the details on E-commerce in the agreement.

Most of FTAs cover provisions relating to elimination of customs duties on electronic transmissions, consumer protection, paperless trade and e-signature or authentication methods. Provisions on cross border data flows, data localisation and source code are negotiated only in soft rather than as hard disciplines. However, the Continental Progressive Trans-Pacific Partnership (CPTPP) and the United States Mexico and Canada (USMCA) are two most comprehensive trade pacts that contain legally binding rules on cross border trade flows, non-discriminatory treatment, prohibition on data localisation and transfer of source code.³⁸ Trade rules on E-commerce are under negotiations in Regional Comprehensive Economic Partnership (RCEP) are under-negotiations. The leaked “Terms of Reference”³⁹ for the Working Group on ecommerce (WGEC) shows that the scope of provisions on E-commerce have few critical areas such as cross border transfer of data, prohibition on requirement of source code and location of computing facilities.⁴⁰

Further, it is important to note that provisions relating to E-commerce in RTA are highly heterogeneous in nature.⁴¹ Most of common E-commerce provisions in trade agreements are related to E-commerce promotion and cooperation while reserving their existing stand of moratorium on customs duties. These provisions do not have any legal implications to the participating countries. The remaining provisions on E-commerce in RTA focus on the domestic regulatory framework and deal with specific issues such as consumer protection, electronic authentication, personal information protection and paperless trading.

4. BROAD CONTOURS OF NEW RULES ON E-COMMERCE AT THE WTO: WHERE DOES INDIA STAND VIS- À-VIS DEVELOPED MEMBER COUNTRIES?

A number of proposals have been tabled at the WTO on e-commerce, which reflects the position of members on different areas of negotiations.

38. Chapter on E-Commerce of Continental Progressive Trans-Pacific Partnership, <<https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf>> accessed 1 July 2024.

39. Terms of Reference, Working Group of Electronic Commerce (Regional Comprehensive Economic Partnership, 2015) <https://www.bilaterals.org/IMG/pdf/ecommerce_draft_terms_of_reference.pdf> accessed 1 July 2024.

40. Asian Trade Centre, Crafting Trade Rules for a Digital Age in RCEP (ATC, 2018) <<https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5bcd233c8165f55241feadc7/1540170559464/Policy+Brief+18-07+IP+and+EC+Oct+2018.pdf>> accessed 1 July 2024.

41. J Antonio Monteiro and Robert Teh, Provisions on Electronic Commerce in Regional Trade Agreements, WTO Working Paper (2017).

The United States has circulated a non-paper to the WTO on E-commerce and proposes comprehensive rules to liberalise E-commerce to stimulate the growth of digital economy.⁴² The key elements of the proposal are prohibition of customs duties on digital products, restrictions on sharing source code, non-discriminatory treatment, free flow of cross border data, free and open internet, and prohibition of data localisation and restriction of forced technology transfers. A proposal circulated by the European Union, Canada, Chile, Colombia, Côte d'Ivoire, Paraguay, Singapore and South Korea underpins the importance of technology to promote inclusive and sustainable growth in developing and least developed countries.⁴³ It proposes disciplines of key areas such as regulatory harmonisation, trade facilitation measures, free and open markets and enhanced transparency. It is worth noting that a large number of issues are in consonance with the United States's proposal on e-commerce. The non-paper circulated by Japan contains provisions of its E-commerce chapters of trade agreements. In 2017, a group of nine countries⁴⁴ Singapore, Colombia, Israel, and Hong Kong (China) submitted a proposal to the WTO and states that E-commerce has the potential to galvanise the growth and development of developing countries. China and Pakistan also circulated a paper⁴⁵ covering a number of measures that are required to create an enabling trade policy eco-system to facilitate the growth of digital trade. Their proposal underlines the importance exchange of information of regulatory measures, consumer protection, data privacy, publication of rules and regulations and administrative measures at multilateral level to expand the growth of digital trade. The Russia Federation has also circulated a paper⁴⁶

42. World Trade Organisation, Work Programme on Electronic Commerce: Non-Paper from the United States (WTO, July 2016) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/JObs/GC/94.pdf>> accessed 1 July 2024.

43. World Trade Organisation, Work Programme on Electronic Commerce: Trade Policy, the WTO and the Digital Economy, Communication from Canada, Chile, Colombia, Côte d'Ivoire, the European Union, the Republic of Korea, Mexico, Paraguay and Singapore (WTO, July 2016) <https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=230128&filename=q/Jobs/GC/97R1.pdf> accessed 2 July 2024.

44. World Trade Organisation, Work Programme on Electronic Commerce: Electronic Commerce and Development, Non-paper from Brunei Darussalam; Colombia; Costa Rica; Hong Kong, China; Israel; Malaysia; Mexico; Nigeria; Pakistan; Panama; Qatar; Seychelles; Singapore and Turkey (WTO, February 2017) <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/234444/q/Jobs/GC/117.pdf> accessed 1 July 2024.

45. World Trade Organisation, Work Programme on Electronic Commerce: Aiming at the 11th Ministerial Conference, Communication from the People's Republic of China and Pakistan (WTO, November 2016) <https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=232753&filename=q/Jobs/GC/110R1.pdf> accessed 1 July 2024.

46. World Trade Organisation, Work Programme on Electronic Commerce: Ways to Move Forward, Communication from the Russian Federation (WTO, July 2017)

in 2017 and stated that there are significant gaps in existing agreements of the WTO. These include network access, recognition of e-signature, e-payments, privacy, and personal data protection among others. In the Ministerial Conference of 2017 at Buenos Aires, Argentina, a number of countries submitted their proposals encompassing a diverse range of positions which include maintaining the existing work programme, new working groups, informal discussions to collate views on E-commerce and constituting a working party to prepare a roadmap for future negotiations on trade rules in e-commerce.

All in all, the proposals of the developed countries such as the United States, European Union, Canada, South Korea, Japan, Singapore and Australia demand for greater disciplines in E-commerce negotiations. Their proposals include prohibition of customs duties, free flow of cross border data, prohibition on transfer of source code, free and open internet, non-discrimination, data localisation, prohibition technology choice among others. On the other hand, the proposal of developing countries like India recognize the role of E-commerce in reducing poverty and regional inequalities in the global economy and seek a dedicated and structured discussion on different aspects of E-commerce to leverage the potential benefits of digital revolution.

India in its communication⁴⁷ to the WTO stated that it will continue to work on the existing WTO work programme on E-commerce and other relevant bodies. A group of African countries backed India's position and emphasised on working on the WTO work programme.⁴⁸ At the same time, India and African countries strongly objected to introduce new areas of discussion on E-Commerce as they go beyond the existing mandate of work programme. On 25th January 2019, seventy-six members⁴⁹ of the

<https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=%20238906,237890,237829,237783,237711,237609,237614,237615,237604,237591&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True%20> accessed 2 July 2024.

47. World Trade Organisation, Work Programme on Electronic Commerce: Communication from India (WTO, November 2017) <https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/240274/q/Jobs/GC/153.pdf> accessed 1 July 2024.
48. World Trade Organisation, Work Programme on Electronic Commerce: Statement by African Groups (WTO, December 2017) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/21.pdf>> accessed 2 July 2024.
49. World Trade Organisation, Joint Statement on Electronic Commerce by Albania; Argentina; Australia; Bahrain, Kingdom of; Brazil; Brunei Darussalam; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Georgia;

WTO issued a Joint Statement on Electronic Commerce to initiate “WTO negotiations on trade-related aspects of e-commerce”. As there was no mandate on a multilateral negotiation, the members agreed to initiate an open-to-all Plurilateral negotiation on e-commerce.⁵⁰

This Plurilateral negotiation got further boost at the Osaka G20 Summit in June 2019 with the launch of “*Osaka Track*” and was agreed to make substantial progress by June, 2020, when the 12th WTO Ministerial Conference was to take place in Nur-Sultan, Kazakhstan.⁵¹ The same has been currently delayed because of the current COVID situation and discussions by WTO members are being done over Kazakhstan’s Offer to host 12th Ministerial Conference in June 2021.⁵²

Amidst this, India along with other developing countries like Indonesia, South Africa etc., have Opposed the Osaka Track and have taken a firm stand of not supporting the negotiations on e-commerce.⁵³ In the same vein, India also presented a strong opposition⁵⁴ towards the draft proposed rules on e-commerce framework submitted by the EU.⁵⁵

Honduras; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait, the State of; Lao PDR; Liechtenstein; Malaysia; Mexico; Moldova, Republic of; Mongolia; Montenegro; Myanmar; New Zealand; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore; Switzerland; Chinese Taipei; Thailand; the former Yugoslav Republic of Macedonia; Turkey; Ukraine; United Arab Emirates; United States; and Uruguay (WT/L/1056, 25 January 2019) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True>> accessed 1 July 2024.

50. In this context, it is important to note para 34 of the 12th WTO Ministerial Declaration (Nairobi Declaration) (WT/MIN (15)/DEC), according to which any decision to launch negotiations multilaterally on issues, other than Doha Agenda, would need to be agreed by all Members.
51. World Trade Organisation, Twelfth WTO Ministerial Conference (WTO, February 2020) <https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm> accessed 1 July 2024.
52. WTO General Council, WTO Members Discuss Kazakhstan’s Offer to Host 12th Ministerial Conference in June 2021 (WTO, May 2020) <https://www.wto.org/english/news_e/news20_e/gc_29may20_e.htm> accessed 1 July 2024.
53. Kirtika Suneja, ‘India to Oppose Global Rules on E-Commerce at G-20 Meet’ *The Economic Times*, June 2019 <<https://economictimes.indiatimes.com/news/economy/foreign-trade/india-south-africa-asks-wto-to-revisit-moratorium-on-customs-duties-on-e-commerce/trade/articleshow/69655080.cms>> accessed 1 July 2024.
54. CATR, ‘Is India’s E-Commerce Policy on the Right Track?’ (Trade Promotion Council of India, May 2019) <<https://ibt.tpci.in/blogs/is-indias-e-commerce-policy-on-the-right-track/>> accessed 1 July 2024.
55. World Trade Organisation, Joint Statement on Electronic Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce,

5. ANALYSIS OF INDIA'S STANCE ON WTO E-COMMERCE NEGOTIATIONS

India has been a staunch supporter of the multilateral trading system and has benefited from the WTO-led trade liberalisation— both in terms of volume of trade and revenues. But, India has refused to participate in the WTO E-commerce negotiations by stating that E-commerce negotiations should focus on building blocks to develop consensus on the broader E-commerce trade framework and should follow “*sequential approach*” based on the existing WTO work programme of 1998.⁵⁶ This is important to address the fundamental issues of E-commerce which include- the definition and scope of E-commerce that are critical for developing country like India to develop better insights on the potential implications of liberalisation of domestic digital economy.

Secondly, India's decision not to participate on E-commerce negotiations at WTO is also influenced from the existing position on E-commerce in regional and bilateral trade agreements. India is an active member of 15 trade agreements but it has not negotiated rules on e-commerce so far. This also reflects from its current position in the RCEP negotiations in which it has squarely opposed the inclusion of provisions relating E-commerce (Asian Trade Centre, 2018). In contrast to this position with respect to substantive rules, India's efforts in developing paperless trade measures in Regional Trade Agreements is remarkable. India, has already notified its commitments towards TFA and has made efforts at National and Regional level to include more and more paperless trade measures (TF measures). India leads the South Asian region with the highest number of RTAs involving paperless trade measures, three of which have the same or higher number of paperless trade measures than that in the WTO TFA.⁵⁷

Third, India's stand clearly reflects the fear that the joint initiative on e-commerce may significantly impact some of the existing trade rules, like GATT which allow a country like India to protect its domestic industries and GATS which allows to have some policy flexibilities. This concern

Communication from the European Union (INF/ECOM/22,26 April 2019) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/22.pdf&Open=True>> accessed 1 July 2024.

56. D S Randhawa, 'Understanding India's Reluctance at the WTO E-Commerce Talks' Institute of South Asian Studies, NUS, March 2019 <<https://www.isas.nus.edu.sg/wp-content/uploads/2019/03/ISAS-Insights-No-547.pdf>> accessed 1 July 2024.

57. Yang Duval, K Mengjing, Digital Trade Facilitation: Paperless Trade in Regional Trade Agreements ADBI Working Paper 747 (2017) <<https://www.adb.org/sites/default/files/publication/321851/adbi-wp747.pdf>> accessed 1 July 2024.

can also be seen in the recent guidelines issued by India on electronic commerce in February, 2019 to provide a level playing field to domestic players.⁵⁸

Fourth, India was specifically opposed to the draft EU proposal on two points-banning of custom duties on electronic transmissions and data localisation. India's draft e-commerce policy clearly unequivocally identifies data as a sovereign asset, which cannot be allowed to cross the borders of the country.⁵⁹

Fifth, On the moratorium for customs duties, India is apprehensive of the potential loss of revenue, especially for developing countries. The push for initiating negotiations on substantive obligations related to e-commerce includes elements like permanently accepting the moratorium on imposing customs duties on electronic transmissions. With increasing digitization, more and more products like books, music, films, video games, etc. are being traded electronically. By agreeing to the permanent moratorium, countries which have tariff schedules, which allow putting duties on these kinds of products, will give up these rights and lose revenues.⁶⁰

Sixth, the fundamental concern of India is that the E-commerce proposals are reflections of 21st century trade agreements of developed countries such as Trans Pacific Partnership (TPP), United States-Korea Trade Agreement, and United States Australia Free Trade Agreement among others. These agreements have strict provisions on transfer of technology, prohibition of localisation of internet servers, prohibition of customs duties, mandatory requirement for sharing telecom infrastructure, non-differential treatment, free flow of cross border supply of data and non-discrimination in sale of

58. CATR, 'Is India's E-Commerce Policy on the Right Track?' (Trade Promotion Council of India, May 2019) <<https://ibt.tpci.in/blogs/is-indias-e-commerce-policy-on-the-right-track/>> accessed 1 July 2024; *See also*, 'New FDI E-Commerce Rules in India: What it Means for Online Shoppers' *India Today*, February 2019 <<https://www.indiatoday.in/business/story/new-fdi-e-commerce-rules-in-india-what-it-means-for-online-shoppers-1449783-2019-02-06>> accessed 1 July 2024.

59. Department for Promotion of Industry and Internal Trade, Government of India, Draft National E-commerce Policy: India's Data for India's Development 14 (2019) <https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf> accessed 1 July 2024.

60. Department for Promotion of Industry and Internal Trade, Government of India, Draft National E-Commerce Policy: India's Data for India's Development 11 (2019) <https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf> accessed 2 July 2024.

spectrum etc.⁶¹ These provisions aim to cater the interest of large digital giants and will contribute to their growth and revenue. They would help them to eliminate competition and reduce the cost of their global operations. The multilateralization of these rules will completely eliminate the scope of new firm to enter into digital space and to grow and sustain in monopolistic environment.⁶² The direct implication of negotiating rules on digital trade at multilateral level will force country like India to hand over data/information to big digital giants, thereby reducing regulatory policy space to augment the growth of domestic firms in digital arena.⁶³

The Indian policymakers are of view that the growth of E-commerce is remarkable without any international legally binding agreement. A recent report⁶⁴ of Deloitte India and Retail Association of India shows that the E-commerce market is expected to reach to US\$ 84 billion in 2021 from US\$ billion in 2017. Therefore, the participation in WTO E-commerce negotiations and its likely outcome will have negligible impact on the growth of global E-commerce but a potentially legally binding agreement at WTO will have chilling effects on the regulatory space. It will curtail the space to implement “digital industrial policy” that is critical to stimulate the growth of E-commerce and address challenges posed by advanced technologies such as additive manufacturing, robotics. The scope of use different types of policy tools including restrictions on cross border data flows and data localisation would discourage the mobilisation of international investment in the development of domestic digital infrastructure.⁶⁵

The gist of India’s defensive stance on E-commerce is that it needs to develop digital capabilities and a strong domestic regulatory framework that helps in preparing to deal with complex issues related to data

61. South Centre & African Trade Policy Centre, The WTO’S Discussion on Electronic Commerce, Analytical Note SC/AN/TDP/2017/2 (January, 2017) <https://www.southcentre.int/wpcontent/uploads/2017/01/AN_TDP_2017_2_The-WTO%E2%80%99s-Discussions-on-Electronic-Commerce_EN-1.pdf> accessed 1 July 2024.

62. Neeraj, ‘Trade Rules for the Digital Economy: Charting New Waters at the WTO’ (2019) 1 World Trade Review.

63. South Centre & African Trade Policy Centre (n 63).

64. Deloitte and Retailers Association of India, ‘Unravelling the Indian Consumer’ (February 2019) <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/consumerbusiness/Unravelling%20the%20Indian%20Consumer_web.pdf> accessed 1 July 2024.

65. Azmeh and C Foster, ‘The TPP and the Digital Trade Agenda: Digital Industrial Policy and Silicon Valley’s Influence on New Trade Agreements’ Working Paper Series, International Development, London School of Economics (2016).

localisation, sharing of source code, restrictions on cross border supply on data, data security and intellectual property rights. India is at formative stages of developing its capabilities in advanced technologies such as robotics, artificial intelligence, additive manufacturing. The opening up E-commerce sector is likely to create the potential risk of being swamped by global technology giants. Negotiating rules at this stage will subvert the ability of the country to leverage the benefits of digital revolution.

6. CONCLUDING REMARKS: THE WAY FORWARD

There is an intense discussion in India on the potential costs of non-participation in E-commerce negotiations and emerging challenges in the globalised digital economy. A standard argument is that India should not miss the E-commerce train at the WTO as it gives an opportunity to shape policies in its development interests. Prime facie, it looks very interesting and appealing proposition but it is important to understand whether India has the capacity to influence negotiations in its interest. This requires a careful review of India's experience in dealing trade negotiations at the WTO. A significant volume of literature shows that the rule-making at the WTO is largely shaped by developed countries. There is hardly any scope for developing countries like India to exert influence of "core elements" of negotiations. This was quite clear in agriculture negotiations during the Doha round when developed countries walked away from negotiating table. It is therefore, difficult to say that developing countries will be shape negotiations and their outcome when a large number of developed countries are jointly pitching rules on E-commerce at the WTO. Further, the United States and EU have already challenged the existing special and differential treatment,⁶⁶ which provides developing countries like India to seek special rights to get favourable treatment from developed countries (WTO). Interestingly, Brazil, a developing country has announced to forgo the existing special and differential treatment on self-declared basis.⁶⁷

It is widely argued that an international legally binding agreement will facilitate MSMEs (Medium and Small Enterprises) integration in the global economy by eliminating traditional challenges such as inadequate

66. WTO General Council, An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance: Communication from the United States (WTO, January 2019) <<https://www.tralac.org/news/article/13839-an-undifferentiated-wto-self-declared-development-status-risks-institutional-irrelevance.html>> accessed 1 July 2024.

67. Third World Network, Brazil's Tectonic Shift in Foregoing S&DT at WTO (March 2019) <<https://www.twn.my/title2/wto.info/2019/ti190311.htm>> accessed 1 July 2024.

economies of scale, procedural hurdles and lack of access to finance and technology. Digital platforms will help MSMEs to connect with global markets thereby enabling their entry in regional and global value chains.

However, the potential benefits of a global e-commerce agreement will favour of big digital giants and would cater their interest at the cost of MSMEs. This is because of the prevailing asymmetries in the market structure of digital economy in which dominant digital giants such as Amazon, Google and eBay hold a complete monopoly. In addition, there exists significant scope of predatory pricing as an instrument to eliminate competition in the market. MSMEs are unlikely to compete with digital giants due their sheer size, scale and financial strength. Moreover, global digital companies have already leveraged the benefits of digital industrial policies which extend financial and non-financial support such as subsidies; financial assistance for research and development, ownership of technologies, tax benefits and government-sponsored infrastructure etc. A study⁶⁸ by the International Trade Centre (ITC) also highlights the challenges encountered by MSMEs in the light of potential E-commerce agreement at the WTO. MSMEs are deeply concerned with the existing market structure in which digital platforms, e-payment solution and cross border delivery services governed by large online players. The asymmetries in market structure pose challenges for MSMEs and they also face severe constraints of financial resources, economies of scale and capacity. They are completely dependent on external suppliers for critical services for their international operations. The monopoly of digital giants on E-commerce platforms allows them to charge high membership fee for their cross-border transactions. Further, new rules on E-commerce at the WTO are likely to undermine the scope of digital industrial policies that are critical for the expansion of MSMEs in developing country like India.

Finally, proponents of E-commerce negotiations in India are of view that an agreement on E-commerce at the WTO will help India to promote the exports of information technology (IT) and information technology enabled services (ITES). It is important to understand that the rise of advanced technologies such as artificial intelligence, automation and robotics are already creating challenges for services exporting countries to remain

68. International Trade Centre, *New Pathways to E-Commerce: A Global MSME Competitiveness Survey* (ITC, September 2017) <[https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/New%20Pathways%20to%20E-commerce_Low%20res\(2\).pdf](https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/New%20Pathways%20to%20E-commerce_Low%20res(2).pdf)> accessed 1 July 2024.

competitive in global service trade. It is likely that the potential gains from IT and ITES exports would decline in future.

India's stance on WTO E-commerce negotiations underscores the importance of building blocks to develop the broader E-commerce trade framework. It demands for a "*sequential approach*" on the basis of the WTO work programme to address fundamental issues of E-commerce which include- the definition and scope of E-commerce that are more important for developing country like India to develop better insights on the potential repercussions of opening up the domestic digital economy. India's decision not participate in WTO E-commerce negotiations is influenced by a broad range of factors which include absence of robust domestic regulatory framework, digital infrastructure and lack of domestic capacity to negotiate hard trade rules on digital commerce. India strongly believes that the existing proposals on E-commerce at the WTO aimed to cater the interests of digital giants who are already ahead as compared to small digital companies of developing countries. Negotiating legally binding rules on E-commerce will curtail the regulatory space thereby undermining existing flexibilities to use newly evolved instruments such as "*digital industrial policy*" to address challenges of advanced technologies such as additive manufacturing, robotics. Finally, Indian policymakers also believe that the participation in the WTO E-commerce negotiations will not have a major impact on the growth of E-commerce sector. The global E-commerce industry continues to expand at a very fast pace without a legally binding agreement. The potential benefits from global E-commerce agreement for MSME are exaggerated given the existing asymmetries in the market structure where digital giants enjoy a complete monopoly.