

Most Favoured no more?

What the Joint Statement Initiative on e-commerce says about one of the WTO's most basic principles

In our recent alert in March 2024, we reported on the [World Trade Organization \(WTO\) Ministerial Conference's decision on a final extension of the moratorium on the imposition of duties on electronic imports](#). This moratorium will now expire at the end of March 2026 (or earlier, if the next WTO Ministerial Conference is earlier).

The circulation by the WTO of the draft text of an [E-commerce Agreement](#) making, amongst many other things, such a moratorium permanent may therefore have come as a surprise to many, if it was even noticed at all. So what is going on?

Multilateral vs plurilateral

First and foremost, it should be noted that the moratorium that was repeatedly extended was a multilateral one. That means that ALL WTO members had to agree on it for it to have effect. Arguably that has been no mean feat: it has been a challenge to get all WTO members to agree on pretty much anything of substance since the WTO was established in 1995.

Joint (Statement) Initiatives, on the other hand, are quite different. They are initiated ("convened") by one or – more commonly – a small number of WTO members to deal with a particular topic. The principles of discussion are initially written down ("textualized", in WTO jargon) and shared with all WTO Members. Each member is then free to "join" the group to participate in discussions and contribute to potential further written statements. So far, four such "JSI"s have been formed. Beyond the one on e-commerce, there are JSIs on investment facilitation, MSMEs and domestic regulation in services trade. Because they involve some but not all WTO Members, they are called plurilateral.

The JSI on e-commerce was co-convened by Australia, Japan and Singapore. Some recent press coverage has implied that this was a result of the recent final extension of the moratorium, but that is simply not true. It was convened as far back as 2017, although in hindsight the co-conveners may have had the foresight that the moratorium was doomed. It currently counts 91 participating members (listed on the WTO's website). Most Northeast and Southeast Asian territories are participants, with Vietnam a notable outlier. South Asian territories, including India, are generally not involved.

The initial co-conveners produced a draft text on behalf of 79 of these members, which was then published by the WTO. The text was called "stabilised", which in plain language means that it reflects a fairly finalised view of the outcome of all the discussions

between the contributors. It should be noted that 73 WTO Members did not participate in the discussions at all, and 11 did not want to put their name to the "stabilised text". Some of those are quite noteworthy, such as Indonesia and Taiwan, as well as Brazil, Turkey and the United States.

What is in the JSI on e-commerce?

Interestingly, and mostly ignored by press coverage, the JSI and draft "Agreement on Electronic Commerce" does not define what electronic commerce actually is. It does however state that the agreement will apply to "trade by electronic means". This is quite a narrow definition, and probably does not reflect what the average lay person thinks of when they hear the term "e-commerce". Online ordering and delivery of consumer products is more likely to hit that mark. Nevertheless, it is what it is, and provided we are all clear what we are talking about, that does not take away from the importance and potential of this draft Agreement.

The e-commerce JSI still goes well beyond the imposition of duties on electronic imports. Even though that is probably the most talked about aspect, it is but one of a wide and ambitious range of topics covered by the draft Agreement. In line with emerging multilateral Digital Economic Framework Agreements, or agreements with names to that effect, it tackles the possible barriers to and facilitation for e-commerce head on. There are many articles dealing with electronic documentation, be that invoices, declarations, contracts, signatures and so on. There is an article on electronic payments. There are articles dealing with data sharing and access. There are articles on data security and protection. Whatever matters to e-commerce, it is covered.

Generally, that is excellent news. The risk of territories individually designing and implementing measures to facilitate and protect e-commerce is all too real. Note for example the [initiative in the Philippines on e-invoicing](#). Hence any document that reflects not just an agreement between a significant number of territories, but also a commitment to core principles, will be welcome to businesses small and large. If nothing else, it is now more likely that any other agreements dealing with electronic commerce, or the parts of such other agreements covering electronic commerce, such as Free Trade Agreements, will borrow from or copy the text of the JSI. In turn that will lead to more consistency and predictability in the international regulatory landscape.

What happens next?

This is where things get really interesting, at least for those of us with a career in international trade. The original intention of the JSIs was to enable progress on more difficult or controversial matters that the WTO as a whole had no bandwidth or appetite to take on. Subsequent to that, the intention would be to finalise and integrate the draft Agreement into the multilateral WTO rulebook (essentially through the Marrakesh Agreement). Other JSIs have found that hard to achieve. The particular controversy around e-commerce, combined with the fact that some significant participants in the e-commerce JSI have not put their name to the draft Agreement, suggests that it may be nigh-on impossible to reach WTO-wide multilateral consensus on it.

If that were the case, the WTO members that do support the JSI may want to proceed plurilaterally with it. In the not-so-distant past ASEAN has used an ASEAN-minus-X approach, meaning that some ASEAN Members proceed with certain initiatives and agreements that others do not yet participate in but may do so later. Similarly, these WTO members participating in the e-commerce JSI could agree that the commitments and benefits of the Agreement would only apply between them, and not to other WTO Members. That, however, would conflict with the

WTO's principle of Most Favoured Nation Treatment, meaning that members cannot treat some members differently to others. Already, Free Trade Agreements are on thin ice, even though their allowability is specifically addressed by the WTO, and possible in certain circumstances (GATT Article XXIV).

No such provisions exist for JSIs. In fact, some WTO Members have already formally challenged the legality of these groupings, let alone their output. Increasingly, lesser developed nations are protesting against initiatives and measures they see as benefiting the "global north" only. Whether or not such a stance is supported by cold economic facts seems less relevant.

In conclusion

The e-commerce JSI is a very welcome development that can be expected to help provide clarity to businesses and facilitate growth in electronic commerce. Nevertheless, that is unlikely to happen in a multilateral fashion as envisaged by the principles of the WTO. Whether in turn that would undermine the relevance - if not very existence - of the WTO as we know it today remains to be seen. The writing, or should that be data, seems to be on the wall.

