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WORK PROGRAMME ON ELECTRONIC COMMERCE

THE E-COMMERCE MORATORIUM AND IMPLICATIONS FOR DEVELOPING COUNTRIES

Communication from India and South Africa

The following communication, dated 3 June 2019, is being circulated at the request of the delegations of India and South Africa.

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1 INTRODUCTION

1.1. Last year, India and South Africa jointly introduced the proposal 'Moratorium on customs duties on electronic transmissions: Need for a re-think'[1]. The objectives included examination afresh of the impact of the moratorium, given that the realities prevailing in 1998, when WTO Members agreed for the first time, to the temporary moratorium on customs duties on electronic transmissions, have changed significantly. Digital trade has acquired dimensions which were then unimaginable. The impact of the moratorium needs to be understood from the revenue point of view and, from a development perspective, we need to analyse how the moratorium is impacting the efforts of developing countries and LDCs to industrialize digitally and otherwise.

1.2. The proposal was discussed in the General Council on 26 July 2018 and again on 27 November 2018. The discussions were centred around the following thematic areas:

- Revenue implications of the moratorium on electronic transmissions;
- Scope and definition of electronic transmissions;
- Technical feasibility of imposing customs duties on electronic transmissions;
- Broader impact of the moratorium on trade and industrialization and any other issue with respect to the moratorium.

1.3. The e-commerce moratorium is a very important decision by the WTO and we agree with the then General Council Chair that its continuation should be driven by concrete facts and statistics. In this context, we are very grateful to the UNCTAD for their latest research paper, 'Growing Trade in Electronic Transmissions: Implications for the South'[2] (hereinafter referred to as UNCTAD 2019 Study).

1.4. This paper discusses the issues mentioned in paragraph 1.2., drawing largely from concrete facts and statistics, as presented in the UNCTAD 2019 Study.

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[1] WT/GC/W/747, 13 July 2018.
[2] UNCTAD Research Paper No. 29, UNCTAD/SER.RP/2019/1, February 2019.
Also accessible on: https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf

2 REVENUE IMPLICATIONS OF THE MORATORIUM

2.1. The UNCTAD 2019 Study is unique in so far as capturing the revenue implications of the moratorium is concerned, as it is the first study which estimates 'Electronic Transmission' or 'online trade' in digitizable products. All past studies, including the one by the WTO in 2016[3], estimated the impact of the moratorium on the basis of 'physical trade' in digitizable products. But it is important to understand that as online trade increases with digitization, the share of physical trade will correspondingly decrease, so customs revenue from 'physical trade' in digitizable products will decline and, therefore, examining the revenue impact of the moratorium on the basis of 'physical trade' in digitizable products will indicate a much lower loss in tariff revenues. A more accurate picture may emerge if the revenue impact of the moratorium on the basis of 'online trade' in digitizable products is assessed.

2.2. UNCTAD 2019 Study: Potential Tariff Revenue Loss due to Moratorium in 2017, at a glance[4]:

	Potential Tariff Revenue Loss using Average Bound Duties ($Mn)
WTO Developing Members	10,075
Sub-Saharan Africa	2,630
WTO LDC Members	1,506
WTO High-Income Members	289

- The potential tariff revenue loss to developing countries is estimated at $10 billion. Tariff revenue loss to WTO LDCs is estimated at $1.5 billion while for Sub-Saharan African countries, the loss is around $ 2.6 billion.

- The potential tariff revenue loss to Sub-Saharan African countries is almost ten times that of the WTO High Income countries, whereas for the WTO LDC Members, the potential tariff revenue loss is five times that of the WTO High Income countries.

- Developing country Members can generate 40 times more tariff revenue by imposing customs duties on ET as compared to the developed countries, many of which have almost zero bound duties on physical imports of digitizable products.

- The Study reveals that the top six countries which will face the maximum tariff revenue loss from the moratorium are: Mexico ($1.9 billion), Thailand ($1.7 billion), Nigeria ($580 million), India ($497 million), China ($493 million) and Pakistan ($367 million).

- The estimated potential tariff revenue losses does not include additional revenue losses accruing from loss of customs surcharges and additional duties, which according to UNCTAD (2000) were on an average 23% as compared to average tariffs of 6.9%.

- Potential tariff revenue losses, as above, are conservative estimates - it has been assumed that import of digitizable products during 2011-2017 has grown at the same rate as in the period 1998-2010 (of 8%). A growth rate of 8% for import of digitizable products is a very conservative estimate given that the average growth rate of global revenue from music streaming, Netflix, video games, e-books, and the revenue of Microsoft during the same period (2011-2017) was much higher[5].

[3] Fiscal implications of the customs moratorium on electronic transmissions: the case of digitizable goods, JOB/GC/114.

[4] Table 3, UNCTAD 2019 Study; Countries included in aggregate groups are listed in Table A.5, page 47-48 of UNCTAD 2019 Study.

[5] UNCTAD 2019 Study, page 11, last paragraph.

2.3. Some Members claim that tariff revenue loss due to the moratorium can be balanced by levy of other taxes and internal charges. However, experience suggests that it is very difficult to tax the super platforms. In fact, the OECD has published a number of reports on addressing the tax challenges of the digital economy, including the concept of 'Base Erosion and Profit Shifting' (BEPS) which refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. For example, Facebook generates huge profits from its India operations where a significant number of its global users are located, but pays abysmally low taxes to the Indian Government.

3 SCOPE AND DEFINITION OF 'ELECTRONIC TRANSMISSIONS'

3.1. While the WTO Ministerial Declaration and subsequent decisions apply the moratorium to 'electronic transmissions', there is no agreed definition nor any common understanding amongst the membership of what is covered under 'electronic transmissions'.

3.2. The position of some countries (as reflected in their interventions made in previous meetings of the General Council) is that the moratorium covers 'contents' transmitted electronically, which, in their understanding, has been confirmed by the 2016 WTO Study and also by many Members in their FTA practices. According to them, not covering 'content' will render the WTO decision on the moratorium meaningless.

3.3. However, this is not the understanding shared by all Members. For example, Indonesia has noted that[6], "*…it is our understanding that such moratorium shall not apply to electronically transmitted goods and services. In other words, the extension of the moratorium applies only to the electronic transmissions and not to products or contents which are submitted electronically*."

3.4. Given that there is a difference of opinion between Members on whether 'content' is covered in 'electronic transmissions', and the consequent significant implications this has for calculating revenue losses, it would be useful for the membership to arrive at a common understanding on this critical issue before the review of the e-commerce moratorium comes up in December 2019, to enable Members to take a well-informed decision on the matter.

4 TECHNICAL FEASIBILITY OF IMPOSING CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS

4.1. Electronic Transmissions / Intangibles (including digital products) are now being taxed by many Members. Some such examples, as mentioned in the UNCTAD 2019 Study, are noted below:

- **New laws have been framed to tax imports of digital products and services in Australia and New Zealand:** In July 2017, the Australian government introduced GST on imports of digital products and services[7]. Under this law, supplies to Australian consumers of digital products and services from non-Australian suppliers are to be charged Goods and Services Tax, provided these supplies are above 75,000 Australian Dollar. This includes supplies from non-Australian electronic distribution platforms. This implies that all non-Australian suppliers (of digital products or services) have to register for GST electronically. From 2018 onwards, these apply to B2C as well as B2B businesses. New Zealand changed its GST law in 2016[8]. Under this law, all supplies of remote services and intangibles carried out by suppliers outside New Zealand are subjected to GST. Suppliers outside New Zealand need to register for GST if the total value of supplies exceeds 60,000 NZ Dollar. But unlike Australia, GST is imposed only on B2C businesses while like Australia electronic platforms are also liable to pay GST.

- **The EU has also initiated a two-stage process for taxing the intangible imports of goods and services (mainly online) from outside the EU:** The first stage was implemented in 2015 where VAT obligations covered all companies outside EU carrying out cross-border online sales of goods and services to final consumers within EU, in line with the

[6] WT/MIN(17)/68.
[7] Australia, *A New Tax System (Goods and Services Tax) Act 1999*, Division 9-25.
[8] New Zealand, *Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016*.

principle of taxation in the Member State of destination. The second stage will enter into force in 2021 which is known as 'VAT e-commerce package'.

- **The Indonesian government amended its law in 2018** bringing electronic transmissions into the ambit of customs duties. Regulation 17 became effective from March 2018 which provided a new Chapter 99 covering intangible goods (i.e., software and other digital products) that were previously not covered under Indonesia's tariff system.

- **In 2017, India** also initiated compulsory registration under GST for foreign companies providing Online Information Database Access and Retrieval (OIDAR) services.

4.2. The above indicates that imposing customs duties on electronic transmissions may also be technically feasible.

4.3. On the other hand, if it is indeed the case that levying customs duties on electronic transmissions is not technically feasible, then it is not clear what purpose the moratorium seeks to achieve. In our view, the raison d'être of the customs duty moratorium exists precisely because it is feasible to impose customs duties on such transmissions.

5 BROADER IMPACT OF THE MORATORIUM ON TRADE AND INDUSTRIALIZATION

5.1. The moratorium will negatively impact the efforts of many developing countries, which are laggards as far as digital industrialization is concerned, to industrialize digitally. It could also undermine existing industries. Tariffs play an important role in protecting infant domestic industries from more established overseas competitors until they have attained competitiveness and economies of scale. Customs duty free imports of digital products may also hinder the growth of the infant digital industry in developing countries.

5.2. We also need to understand the ruinous impact of digitization on SMEs in developing countries and LDCs. As the UNCTAD study of 2017 points out, three countries, namely, China, USA and UK have captured around 70% of the cross-border e-commerce market while SMEs in other developing countries are facing huge challenges. Given low levels of broadband penetration and the fact that only 5% people in developing countries use e-commerce platforms, the probability of domestic e-commerce growing in these countries and benefitting their SMEs appears to be low. This is compounded by the monopoly pricing powers of behemoths that run platforms and can force sub-optimal contracts on SMEs. Thus, in developing countries, digital trade or ET is harming rather than helping the cause of SMEs, contrary to what some would want us to believe.

5.3. Further, with the advent of Industry 4.0, propelled by Internet-of-Things and new technologies like 3D printing and Artificial Intelligence, the number of products which can be transmitted electronically will increase exponentially. Thus, the GATT tariff commitment of Members i.e. bound rates, of these digitized products will get undermined as more and more trade moves online. As a logical extension, if virtually all non-agricultural manufacturing products can be digitized and, therefore, transmitted electronically, the moratorium on application of customs duties on ET will in effect reduce bound rates to zero on all manufactured products! In other words, the e-commerce moratorium will render meaningless the existing GATT bound rates, which are typically higher in developing countries and for which they have made payments in the Uruguay Round.

5.4. In short, with no customs duties on the imports of ET (i.e., software, data and computer aided design or CAD files – which are the core resource for 3D printing and which will increasingly be used in almost all manufacturing industries), the dependence of manufacturing sectors in developing countries on ET from the developed countries will considerably increase. This will also negatively impact industrialization, particularly digital industrialization, local employment creation and erode trade competitiveness of SMEs in developing countries.

5.5. Therefore, there is an urgent need for the developing countries and LDCs to develop their digital capacities for facing the growing challenge of digital trade. This will require developing national digital industrial policies which match the level and pace of their digital development. However, for designing such policies, it is extremely important for developing countries to preserve policy and regulatory space in the WTO.

6 WAY FORWARD

6.1. The decision on the e-commerce moratorium expires in December 2019. The General Council therefore needs to revisit the above key issues identified in the context of the e-commerce moratorium with the utmost urgency and in its entirety.