

Updating the Multilateral Rule Book on E-Commerce

WTO: PATHS FORWARD

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This policy brief seeks to provide a birds-eye perspective on current and possible future developments in e-commerce rules in the context of the World Trade Organization. The Joint Statement on Electronic Commerce (WT/MIN(17)/60) issued by 70 members at the WTO's Eleventh Ministerial Conference in December 2017, which aims to “initiate exploratory work toward future WTO negotiations on trade-related aspects of electronic commerce,” marks an important moment. This brief presents the most salient issues around the organisation of discussions on e-commerce in the WTO as well as possible options relevant for the development of frameworks for international and multilateral rule-making in this area.

1. Introduction

E-Commerce is a defining feature of the new economy. It continues to transform domestic and international markets with unseen speed and depth. Policymakers around the world face a scenario dominated by swift changes, socioeconomic transformations, and the urgent need for a new approach to regulatory design and implementation. With new business models challenging conventional assumptions behind current frameworks, trade rules are under stress and, to many, appear insufficient or inadequate.

Recognising this reality, 70 countries issued a Joint Statement on Electronic Commerce aimed to “initiate exploratory work toward future WTO negotiations on trade-related aspects of electronic commerce” at the Eleventh Ministerial Conference of the World Trade Organization (MC11) in December 2017.¹ WTO members also agreed to the continuation of the Work Programme on Electronic Commerce established in 1998.

In this context, this policy brief presents the most salient issues, questions, and possible options relevant in the development of frameworks for international e-commerce in the WTO. By highlighting major technical and policy challenges, ICTSD seeks to contribute to facilitate a collective and informed process through the provision of analysis, knowledge levelling, and discussion.

E-commerce has become an essential element in domestic and international markets and production methods. Trade rules and disciplines may affect the impact of e-commerce in societies and economies at different levels of development; they may define how, when, and where e-commerce evolves, but may perhaps not thwart its forging ahead. That is a vector rather determined by technology, innovation, and consumer demand.



International Centre for Trade
and Sustainable Development

¹ Joint Statement on Electronic Commerce, WT/MIN(17)/60. Eleventh Ministerial Conference, World Trade Organisation. 13 December 2017.

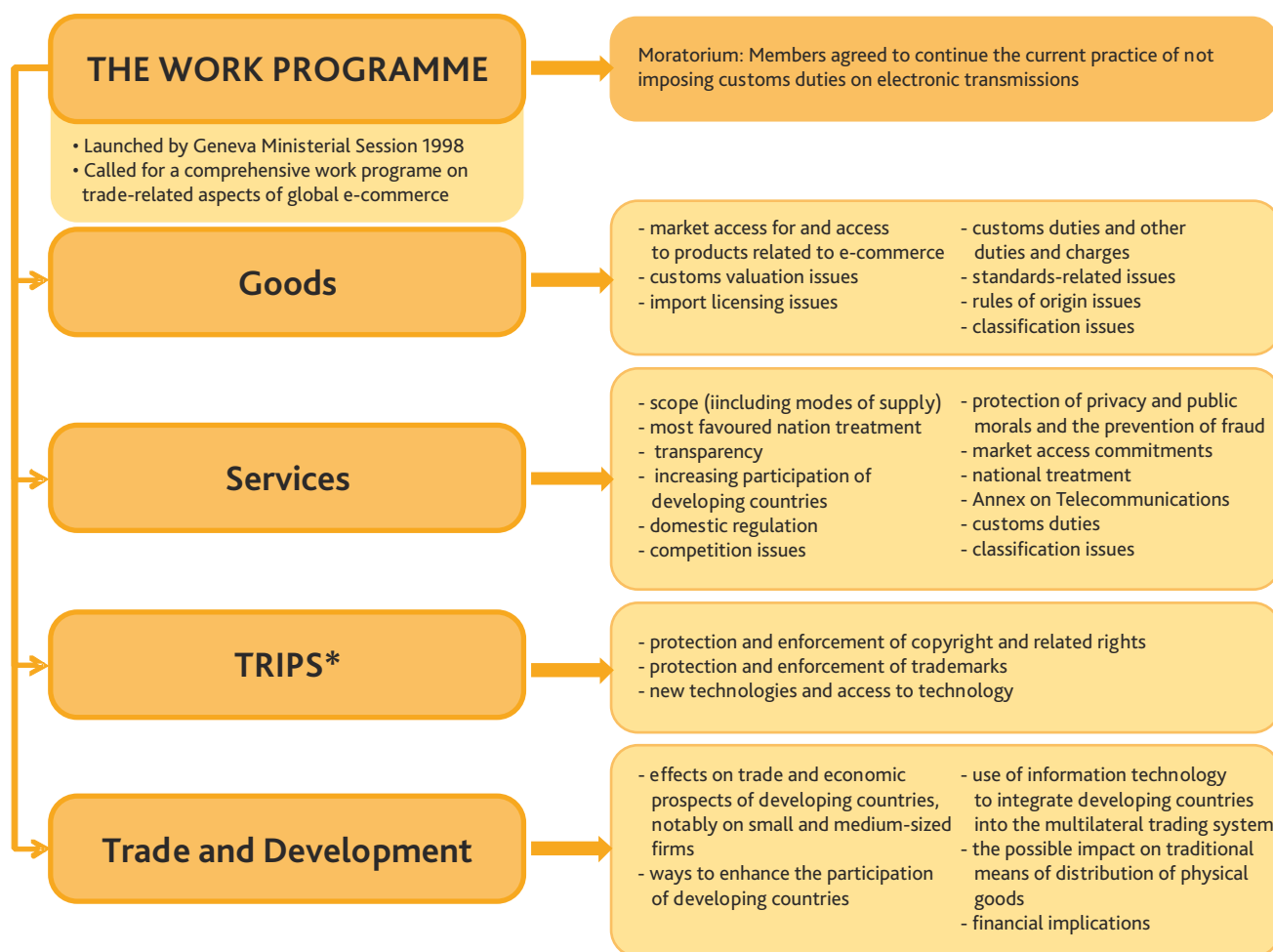
2. Trade Policy Frameworks Around E-Commerce

Multilateral level

E-commerce, in the way it operates today, did not exist during the path of multilateral negotiations leading to the creation of the WTO—the 1982-1993 process of definition of subjects for negotiations and their terms and the Uruguay Round talks. Hence, by fault of design, the system of “covered agreements” under the current multilateral trade system may not be entirely equipped to deal with the irruption and brisk evolution of digital technologies in international commerce.

In response and certainly in a visionary move into the future of trade, the WTO Second Ministerial Conference adopted a Declaration on Global Electronic Commerce that in turn resulted in the General Council’s enactment of a comprehensive Work Programme on Electronic Commerce (25 September 1998) “to examine all trade-related issues relating to global electronic commerce.”² This mandate was to be fulfilled by the three main councils of the WTO (goods, services, and trade-related intellectual property rights), and the Committee for Trade and Development (Figure 1).

Figure 1. Setup of the WTO Work Programme on Electronic Commerce



* Trade-Related Aspects of Intellectual Property Rights

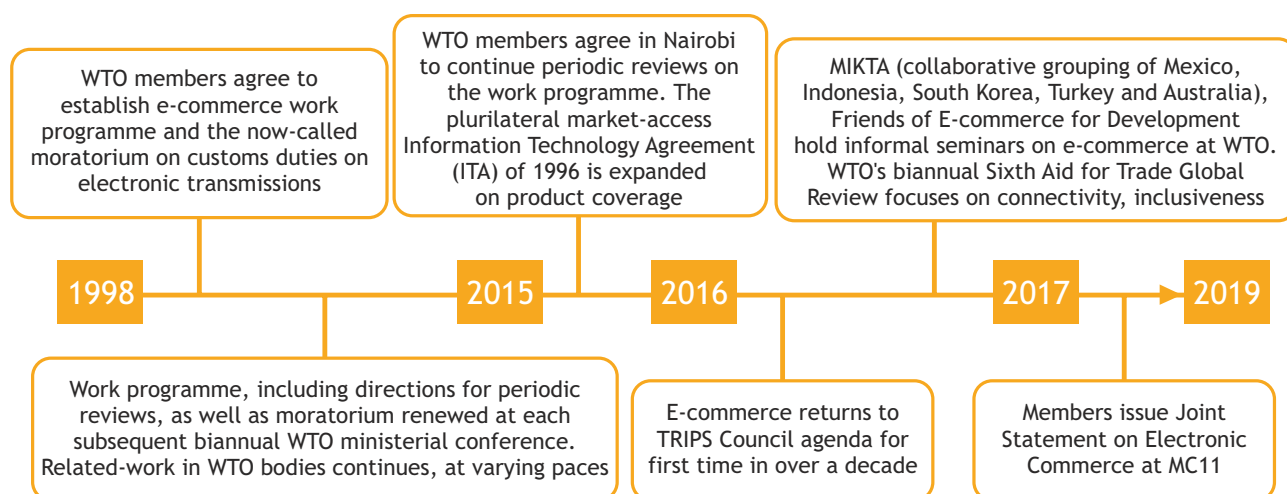
Source: ICTSD based on presentation by Lee Tuthill in the MIKTA Workshop on Electronic Commerce, Geneva, 5 July 2016.

Despite its auspicious beginning, the work programme has not moved the examination process forward and into a rule adjustment or making mode. Other than the successive renewal of the valuable practice of not imposing duties on electronic transmissions, the so-called Moratorium on the Application of Custom Duties on Electronic Transmissions, WTO members have not come to an agreement on how to better address any of the many relevant trade-related aspects of global electronic commerce.

2 Work Programme on Electronic Commerce, WT/L/274. General Council, World Trade Organization, 30 September 1998.

Some of the technical and political issues informing the discussions under the work programme are complex and remain unresolved. For instance, the discussion over whether e-commerce falls within the scope of the General Agreement on Trade in Services (GATS) mode 1 of services supply (cross-border) or mode 2 (consumption abroad), or the debate over the interpretation of pertinent market access commitments made by individual members, and exemptions established under GATS in a digital context. Do commitments always apply to digitally delivered services? Do business models such as services provided over the internet for peer-to-peer audio, text, and video communications by operators such as Skype or cloud computing constitute uncommitted “new services”? If so, what are the customs, taxation, consumer-protection, cross-border data management, and other policy, systemic, and commercial implications?

Figure 2. Timeline of action at the WTO on e-commerce



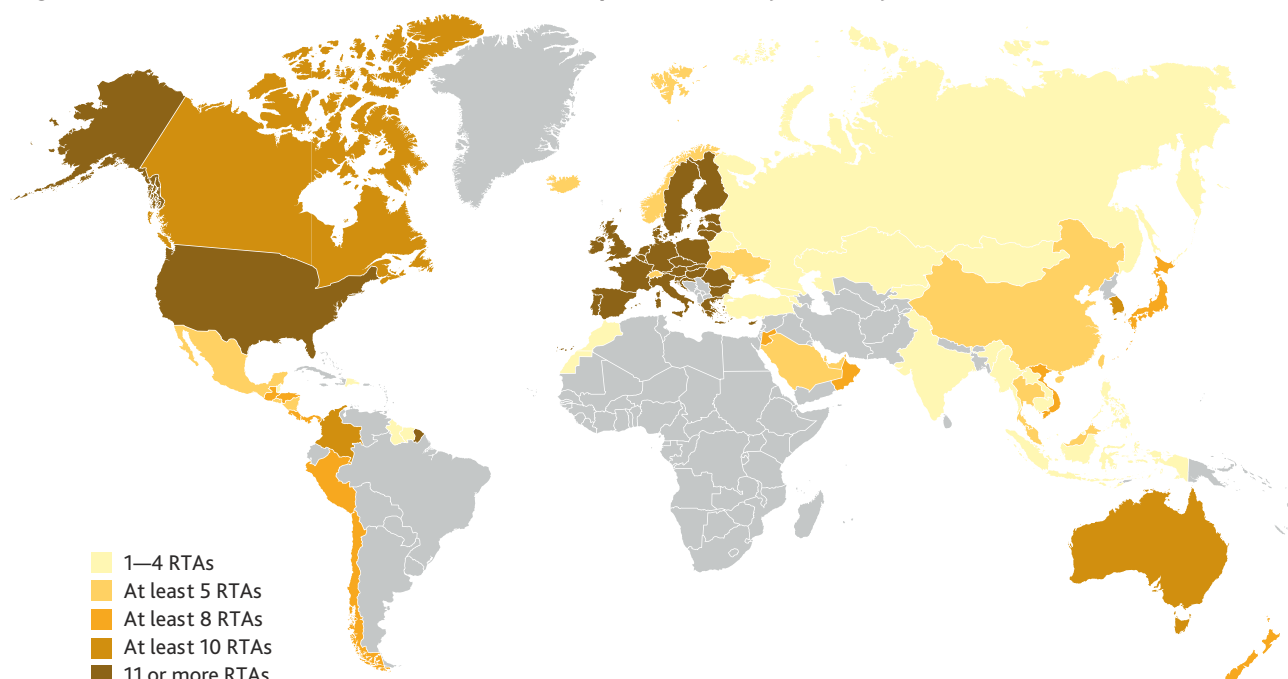
Regional and plurilateral level

While WTO members have been unable to advance on this front, including on the necessity of a negotiating mandate on e-commerce under the WTO, the establishment of provisions on e-commerce has been gaining momentum in bilateral and regional preferential arrangements. As Wu (2017) states, “[i]n the absence of a wide-ranging WTO mandate for digital trade, RTAs [regional trade agreements] have emerged as the primary laboratories for rules and disciplines.[...] Altogether, of the 164 members of the WTO, approximately half have entered into at least one RTA with an e-commerce provision.”

These insights not only illustrate the intensity of the RTA-driven rule-making activity outside the WTO, but also reveal the extent of developing country participation in crafting new frameworks for e-commerce. As of September 2017, 29 developing countries had engaged in RTA negotiations with a stand-alone e-commerce chapter or provision (Wu 2017). While some of these members remain sceptical of initiating a negotiation at the WTO, they are willing to participate in regional initiatives.

Convergence on the scope of the e-commerce-related disciplines under RTAs is limited to a specific universe of disciplines. For instance, rules on i) the elimination of custom duties on electronic transmissions; ii) consumer protection; iii) authentication methods/e-signatures; and iv) paperless trading can be found in half or more of the 69 RTAs with a stand-alone e-commerce chapter of provision notified to the WTO between the years 2001 and 2017 (Wu 2017). In contrast, rules on data localisation, cross-border data flows, and source code are rather scarce. In most cases they have been incorporated as soft law rather than as hard disciplines. The language found in the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP, former TPP) remains the most advanced binding provision on cross-border data flows agreed by a group of WTO members in a preferential context. It provides for three binding obligations, namely i) a prohibition to impose computing facility localisation requirements; ii) an obligation to allow the cross-border transfer of information; and iii) a prohibition to require the transfer of, or access to, source code owned by a person of another party.

Figure 3. Number of RTAs with e-commerce provisions, by country



Source: ICTSD based on Wu (2017).

Approaches to development in e-commerce-related international rule-making

Stand-alone chapters of RTAs do not include a systemic approach to levelling the playing field among countries at different levels of development. Instead, individual agreements may i) include a section or provision on technical cooperation or capacity building (e.g. Australia-China Free Trade Agreement, Article 12.10; Colombia-Korea Free Trade Agreement Article 12.6; Chile-United States Free Trade Agreement, Article 15.5); ii) introduce “buffer language” within a specific provision (e.g. CPTPP, Article 14.13, Location of Computer Facilities, “legitimate public policy objectives”); or iii) include some type of accommodation equivalent to the principle of special and differential treatment (e.g. different implementation time frames for members with lesser capabilities or a peace clause on dispute settlement application).

The “new deal” on differences in levels of development in multilateral rule-making introduced by the WTO Trade Facilitation Agreement, in force since February 2017, set a new standard on the relationship between development and the implementation of trade obligations. This new standard is likely to have an effect on any large plurilateral or multilateral negotiating process, and less likely to modify the negotiation dynamics of smaller agreements.

When an initiative seeks to engage a large number of countries with diverse levels of economic development, a systemic approach would be needed to effectively enable universal participation. As explained by Low (2017):

[i]f e-commerce is to deliver shared benefits to the WTO membership at large proper attention must be paid to the digital divide. The necessary infrastructure and accompanying access must be assured for communities in developing countries that will otherwise be even more marginalised as the rest of the world benefits from e-commerce.

In contrast, in a bilateral or plurilateral negotiation in which levels of development of participating economies is more harmonious, so-called development matters become specific to the participants rather than generic and systemic. This is an important consideration for any future trade talks at the WTO, regardless of the legal form of the initiative (e.g. multilateral, reference paper, plurilateral).

3. Mapping of Issues to Operationalise the Joint Statement

To operationalise the 2017 Joint Statement on Electronic Commerce and “initiate exploratory work toward future WTO negotiations on trade-related aspects of electronic commerce,” delegations will have to consider a series of issues. These include the following elements.

3.1 The sectoral coverage of the agreement

Given that the existing mandate of the Work Programme on Electronic Commerce covers all related trade aspects, what type of sectoral coverage would participants seek to achieve?

A first option may be a trade in services only approach, focusing on the GATS as the substantive blueprint. Since most of the technical discussion on e-commerce falls within the sub-sectoral scope of the GATS (e.g. telecommunications, distribution, transport, computer and related, financial, etc.), clarifying or developing GATS disciplines on e-commerce would be the simplest approach towards a future negotiation. On the other hand, by addressing only the services-related aspects, other important components of e-commerce business models and in affected value chains would be left out (goods, and trade-related intellectual property rights).

A second option may be to follow a comprehensive approach covering e-commerce-related elements through disciplines in trade in services, goods, and trade-related intellectual property rights. This approach would encompass the various aspects of e-commerce business models and affected value chains by integrating them under a single initiative and thus providing further coherence. Such process would be more complex as it would have to deal with multiple negotiation fronts and trade-offs.

A third option may be to embrace a GATS and goods approach, with services at the core, plus a goods component. This approach would be complementary to the first option and would allow a more extensive coverage of e-commerce business models and affected value chains, but it would add complexity to a services only initiative. Adding a trade in goods component (e.g. *de minimis* levels for small packages subject to customs-tariff control, simplification of custom procedures, etc.), may be advanced by linking an e-commerce (services) negotiation to the Trade Facilitation Agreement.

3.2 The scope of the disciplines

As reviewed above, e-commerce rule-making has taken place more recently primarily under RTAs. Therefore, in determining the scope of the new WTO talks, participants may do well to consider the stock of disciplines under RTAs as the reference for set-off.

In addition to disciplines, participants would have to evaluate whether to establish a market access component (such as a negotiation of specific commitments). This determination could be informed by the scope of the disciplines to be included in the exploratory talks. For instance, if the scope of obligations is initially limited to trade-facilitating measures, the need for a market access component is lesser. On the contrary, if the scope of obligations is set to include principles of non-discrimination and trade liberalisation (e.g. national treatment, most favoured nation treatment, local content, local presence, etc.), the case for the inclusion of a market access component becomes stronger, if not necessary.

Opting for market access may lead to linkages to the other two modules of the broader WTO market access negotiations, namely, agricultural and non-agricultural products. In this case, even a services only initiative would become significantly more complex.

3.3 A built-in development dimension

Recent analysis by McDougall (2018) finds that:

[c]ountries are increasingly wary of taking on new obligations that might limit their sovereign right to regulate or cost them dearly to implement. At the same time, continued expansion of WTO membership has only increased the diversity of interests and levels of development that are, at least in part, behind the difficulty in creating new rules. Hence, the challenge is to encourage continued rule-making at the multilateral level in a way that still accommodates differentiation in levels of development and capacity.

The WTO Trade Facilitation Agreement (TFA) marked the beginning of a new understanding on the nature and scope of special and differential treatment.

On the one hand, the agreement preserves the integrity of the multilateral system by allowing for very little differentiation in its substantive obligations. The necessary differentiation is accomplished through the mechanism for transitional implementation periods by developing countries and LDCs. But unlike the fixed limit transition periods that apply equally to a specified class of members found in many other WTO agreements, the implementation periods in the TFA are, within certain parameters, self-designated. Furthermore, this implementation can be conditioned upon the acquisition of capacity to do so, and the TFA creates a formal framework for the provision of assistance and support to acquire this capacity (McDougall 2018).

Although the TFA has only recently commenced implementation, the principles on which it has been built could and perhaps should be adopted in the context of other international trade negotiations, such as the open talks called for in the Joint Statement on Electronic Commerce. Presumably, economies at various levels of development and capabilities would be more inclined to participate in an e-commerce initiative that provides for such on-boarding built-in mechanisms.

3.4 The nature of the agreement

The joint statements says that, “participation will be open to all WTO Members and will be without prejudice to participants positions on future negotiations,” suggesting that such process would be initiated among a self-selected number of WTO members with the expectation of a multilateral result.

In the medium term, the content or scope of such work is likely to affect whether the crafting and eventual establishment of e-commerce disciplines is a plurilateral or multilateral outcome. If the scope of the initiative were limited to disciplines/rules for which significant convergence under RTAs has been identified, then the outcomes may be easier to multilateralise by consensus or through critical mass arrangement. As of today, convergence under regional agreements is limited to a few specific provisions. Striking the right balance between scope-depth of disciplines and participation may be one of the initial challenges in the operationalisation of the joint statement.

Most participants in the joint statement, as of writing, have favoured an open plurilateral process with the expectation of a multilateral result, materialised through consensus or by reaching a certain critical mass that would make the free-riding question effectively irrelevant.

Alternatively, if participants were to decide to pursue an initiative of scope-depth equivalent to the e-commerce chapter of the CPTPP involving, *inter alia*, binding provisions on cross border data flows, localisation requirements, and source codes, as well as a market access component, the result, and the process, may depart from a WTO-based open plurilateral mode. It could steer towards a RTA resembling the case of the unfinished plurilateral Trade in Services Agreement (TiSA), currently in state of suspended animation.

3.5 A new architecture

WTO members could begin exploring a new architecture for the negotiation of an agreement on e-commerce. Among other cutting-edge proposals, this could be based on a new design drawn from the specific features and distinctive manners in which digital trade is conducted—through the introduction of five new “modes” that include “business to business,” “business to household,” “household to business,” and “household to household” transactions as well as the capitalisation of data flows—and a shift from the traditional concept of “trade limitations” (e.g. market access and national treatment) to the broader idea of “trade frictions” arising from the diversity of interests and policies of major digital economies (Ciuriak and Ptashkina 2018). In the absence of a generally accepted taxonomy for the different types of e-commerce transactions, Ciuriak and Ptashkina (2018) suggest a classification based on delivery mode and the nature of the parties to the transactions to help organise this analysis.

Table 1. Modes of digital and digitally-enabled trade

Mode	Type	Examples and Business Models
Mode 1	“Digital to real” transactions, including provision of access to the internet	Web-search, e-learning, gaming, mobile applications, online gambling, communication services (such as WhatsApp and Skype), information services (such as maps and online encyclopaedias), online advertising, Netflix, etc.
Mode 2	“Real to real” B2H and B2B transactions with digital intermediation	Amazon and other distributional services. Also travel services (hotel bookings, flight reservations), purchasing software, etc. provided on a B2H basis (where “H” is understood as the household). For business services, this captures “trade in tasks” conducted on a B2B basis.
Mode 3	“Real to real” H2H transactions with digital intermediation	Peer-to-peer transactions (eBay, Uber, AirBnB) from household to household, digitally mediated.
Mode 4	“Real to real” H2B transactions with digital intermediation	Platform-based provides of household services to business (Fiverr, Upwork), which amounts to GATS Mode 4 trade (movement of persons) conducted through digital enablers. This captures trade in tasks conducted on a H2B basis.
Mode 5	The capitalisation of data flows	Personal data (Facebook, Google), data generated over the “Internet of Things,” financial and personal data of online consumers (Alipay) with cross-border flows on a “bot-to-bot” basis, with no receipts or payments attached and value captured through secondary processing of accumulated data acting as the capital stock for industrialised learning.

Note: B2B = business to business; B2H = business to household; H2H = household to household; H2B = household to business
Source: Ciuriak and Ptashkina (2018)

4. Conclusion

The implementation of the Joint Statement on Electronic Commerce involves a series of policy, technical, and political challenges that could be tackled through a variety of avenues and deliver diverse outcomes. Were participants to come to an *ab initio* agreement on the basic scope of the initiative, or agree to initiate a process to determine such scope, then an open plurilateral at the WTO with the expectation of multilateralisation may be possible.

The joint statement constitutes a departure at the WTO. It is difficult to predict whether a process under the joint statement will end up delivering a concrete negotiated result. However, its higher value rests on its promise to provide a WTO-focused platform for dialogue towards a better definition of disciplines and a more adequate treatment of trade-related issues concerning global e-commerce.

The advancement of a negotiation platform on e-commerce at the WTO would constitute a significant and necessary update of the multilateral trade agenda, which could further facilitate the engagement of the WTO in other critical 21st century economy issues.

Table 2. Summary of issues and related scenarios

ISSUE	SCENARIO	ADVANTAGES	LIMITATIONS
Sectoral coverage	Services-only approach	Simpler trade-offs and avoidance of sensitive goods and intellectual property related issues. Bulk of the e-commerce discussion is addressed under trade in services.	Limited scope. Does not cover the full extent of the e-commerce-related value chains.
	Comprehensive approach	Optimisation of trade operations by covering main components of e-commerce-related value chains. Enhanced coherence among different components.	Complexity of trade-offs. Addressing difficult issues on goods market access and additional elements of intellectual property.
	Services plus one approach	Enhanced coverage of the value chains. Enhanced coherence/ interoperability of regulatory frameworks. Enhanced value of implementation of new trade rules.	Increases the complexity of a services-only approach. The overall expansion of the scope is not significant.
Scope of the disciplines	Limited to high-convergence group	Clearly identified group of disciplines/rules/provisions. Higher probability of agreement.	Limited to trade facilitating disciplines/rules/provisions. Dubious support by industry and lower market access value.
	Beyond high-convergence group	Clearly identified group of disciplines/rules/provisions. Strong support by industry and higher market access value.	Difficult to agree among a very large number of participants. Risk of becoming an RTA-like plurilateral.
Scope and nature of a built-in development dimension	Mechanism inspired in the TFA.	Enhanced participation of countries at all levels of development.	More complex negotiation and implementation than traditional special and differential treatment provisions.
Nature of the agreement	Waiver-based plurilateral	Would retain the outcomes within WTO system. More realistic prospect of multilateralisation.	Limited participation likely.
	Critical mass plurilateral	In principle, would retain the outcomes within WTO system. Creates an incentive for future multilateralization.	Uncertainty on the scope and nature of the outcomes, and on the level of participation. Uncertainty on the parameters defining the critical mass.
	Reference Paper	No consensus or waiver required. Large scope and depth. High trade value of additional commitments.	Additional commitments would be subject to the application of the most favoured nation obligation, which creates a mass of “free riders.” Limited participation likely to attract a group of high income and high-middle income countries.
Nature of the agreement	RTA-like plurilateral	Large scope and depth of provisions. Incorporation of sophisticated rules/discipline. Attractive to business providers and users of e-commerce technologies.	Limited participation. Would take discussion outside the WTO. Increased fragmentation of trade rules. Increased marginalisation of developing and least developed countries. Would not necessarily create an incentive for multilateralisation. Difficulties to agree on still divisive trade disciplines (localisation, data flows, data protection/privacy).

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