

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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ISSN

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EVALUATION OF JOINT STATEMENT INITIATIVE ON E-COMMERCE

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Introduction

HISTORY- E-Commerce is generally defined as the process of production, distribution, marketing, sale or delivery of goods or services in which the electronic means are involved. The term e-commerce encompasses within its ambit online retail, sale of digital products like e-books, music, payment gateways like google pay, phone pay. The discussions on the E-Commerce in WTO started in the year 1998 when the Ministerial Declaration on the Global Electronic Commerce was adopted. This led to the launch of Working Program on E-Commerce. The main of this working program was building of an understanding around the trade related aspects of e-commerce but there was no aim of negotiating a new set of rules and it also was tasked with examining the economic, financial and the developmental needs of the developing countries.

Further a moratorium on custom duties on electronic transmission was imposed which was renewed in the subsequent ministerial conferences and was last renewed in the year 2022 at the 12th Ministerial Conference.

While the Working Program on E-Commerce had the involvement of all the WTO members the other initiative on e-commerce has the involvement of a subset of WTO members and that initiative is Joint Statement Initiative on E commerce.

The Joint Statement Initiative on E- Commerce was released at the 11th Ministerial Conference held in Buenos Aires and there were 71 signatories and the goal of the initiative was the exploration of future WTO negotiations in the field of trade related aspects of electronic commerce¹.

¹ World Trade Organization, 'WT/MIN(17)/60' (13 December 2017).

In the year 2019 at the World Economic Forum meeting the 76 members announced that they would begin negotiations at the WTO on e-commerce and its trade related aspects with the participation of as many WTO members as possible². In the year 2022 at the 12th Ministerial Conference the ministers of the Japan, Australia and Singapore who are the co-conveners of the agreement committed to revise the working of the joint initiative and wanted to expedite the progress made in the negotiation. In the same year a consolidated document on e commerce was arrived at.

Finally on 26th July 2024 the co-conveners of the agreement ie. Australia, Japan and Singapore announced that a stabilized text on "Agreement on E-Commerce" was arrived at³. The co-conveners of the agreement also stated that many of the issues of importance are not included in the stabilized text and would be negotiated upon in the future negotiations and the parties reserve the right to enter into future negotiation.

This is also important due to the fact that many of the issues initially part of the negotiations were ultimately dropped from the final text. Some of them are cross border data flow as many of the country advocate for the data localization which hinder the cross border data flow, E-Commerce taxation as many of the countries have introduced digital services tax and this has led to tensions between the countries.

WHAT IS JOINT STATEMENT INITIATIVE-

Article III.2 of Marrakesh Agreement talks about negotiation and states that WTO through its Ministerial Conference shall facilitate negotiation, and it talks about two types of negotiations, first is related to matters covered under the existing annexures, that is the multilateral agreements and negotiations concerning such multilateral agreement can only be conducted under the auspices of the WTO. The second kind of negotiation relates to topics not covered under the annexures and Ministerial Conference has been given the discretion to provide the forum for such negotiation and the role of the Ministerial Conference in such agreements is not restricted to the enforcement of such agreements.

Joint Statement Initiatives is basically a negotiating tool developed by the WTO members and is used when the members seek discussion on certain specific issue without the rule of

² World Trade Organization, 'WT/L/1056' (25 January 2019).

³ World Trade Organization, 'INF/ECOM/87' (26 July 2024).

consensus followed at the meetings of WTO interfering in such discussions. There are many examples of Joint Statement Initiative like Joint Statement Initiative on Investment Facilitation the negotiations for which were concluded in the year 2023 and Joint Statement Initiative on Services Domestic Regulations the negotiations for which were concluded in the year 2021.

There are diverging views with respect to the role of Joint Statement Initiatives, some view it as a key tool for achieving the trade liberalization as building a consensus of all the members may be a difficult task, while others view it as going against the consensus based decision making mechanism of the WTO and thus weakening the multilateral structure of the WTO.

The Joint Statement Initiative on E-Commerce is a plurilateral agreement. Plurilateral agreements in relation to the World Trade Organization are agreements between the subset of WTO members as opposed to multilateral agreements which involve all the WTO members. The trend of plurilateral agreements gained traction when there was little or no progress on the broad areas of Doha Development Agenda. The process was slowed due to the requirement in WTO that decisions would be taken on the basis of consensus among all the members. Further the states also realized that WTO covers limited areas and issue based plurilateral agreements it was realized can be effective drivers of liberalization and rulemaking in trade. Some of the important plurilateral agreements are, ITA (Information Technology Agreement), 1997 the main objective of which was elimination of tariff on the wide range of Information Technology products and included within its ambit computers, semiconductors etc. The other important plurilateral agreement is Government Procurement Agreement and it aimed at opening the government procurement markets to international competition and thereby ensuring a fair, non-discriminatory and transparent practice in the case of government procurement.

In 1998 Work Program on Electronic Commerce was entered into which mandated the members to examine the trade related issues in the Global Electronic Commerce but it did not allow them to negotiate on such issues and when the parties failed to get mandate for multilateral negotiation on the Electronic Commerce 43 parties in 2019 formally launched own plurilateral negotiation and invitation was sent to all the parties to WTO to join the negotiations.

IMPORTANCE OF ELECTRONIC COMMERCE-

Electronic Commerce is the buying and selling of products and services over the internet. It has various types-

- a. Business to Consumer- Here the companies sell the product directly to consumer and does not distribute it to the intermediaries. Amazon and Netflix are the examples of this model.
- b. Business to Business- The companies sell the product to another business. India Mart and Zoho is the example of this form of business being carried in India.
- c. Business to Government- Here the companies sell the goods and services to the Government agencies. Wipro and Tech Mahindra are the examples of this form of business model.
- d. Consumer to Consumer- In this the individual sell their product to other individual and the company acts as facilitator. OLX and E-Bay are the examples of such form of business being carried out in India.

Trade plays a very important role in economic growth and the expansion of the global value chains has been the driving factor behind this growth. In 2023 approximately 2.64 billion people engaged in e-commerce and the global e-commerce market was valued at 6.3 trillion dollars and e-commerce is one of the main drivers of economic growth in the contemporary world. The digital form of trade fosters economic growth by improving the allocation of resources, allowing economies to take advantage of scale and foster innovation.

INTERPRETATION OF LEGAL TEXT-

The stabilized text with respect to the joint statement initiative on e commerce was arrived at on the 26th July 2024 and is divided into eight sections.

Section A of the agreement talks about the scope of the agreement⁴, it contains important definitions and lastly it states the relation of the initiative with other international agreements⁵ and states that the initiative does not create any rights or obligations for the WTO members who have not accepted it nor does it diminish any of the rights and obligations of the parties available to them under the WTO, GATT OR GATS.

Section B of the agreement talks about the enablement of e-commerce. Under this section it is stated that the parties shall establish a uniform legal framework electronic transaction⁶, it also

⁴ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 1' WTO Doc INF/ECOM/87 (26 July 2024).

⁵ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 3' WTO Doc INF/ECOM/87 (26 July 2024).

⁶ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 4' WTO Doc INF/ECOM/87 (26 July 2024).

encourages the parties to use interoperable electronic authentication and states that parties shall not deny legal effect to electronic signature solely because it is electronic and also states that legal effect shall be given to the electronic contracts. It further encourages the parties to use single window of data exchange in international trade and allow electronic submission of document for import, export or transit⁷. It also encourages the parties to create a safe, efficient and accessible cross border electronic payment and for achieving that they should adopt international standards⁸.

Section C of the Initiative talks about Openness and Electronic Commerce under which the most important topic covered is Moratorium on Custom Duties on Electronic Transmission⁹ and emphasizes that parties shall not impose custom duties on cross border electronic transmission. There was diverging views at the time of negotiation as some countries advocated that a permanent moratorium should be imposed on such custom duties while others wanted the decision on the imposition of moratorium should be taken at the multilateral level. Thus a caveat was inserted which states that moratorium would be permanent but the parties would review it after 5 years of the initiative coming into force. It also encourages the states to share non-confidential public data which is collected by the public authorities¹⁰.

Section D of the initiative talks about trust and electronic commerce. It mandates the states to take measures for protection of consumers from misleading, fraudulent and deceptive practices in e-commerce and it also states that the parties to the initiative shall ensure that the suppliers provide accurate information, deal fairly with the consumers and ensure the safety of goods and services¹¹. Lastly it also urges the parties to the initiative to build their cybersecurity capabilities and should look at collaborating with each other on mitigating cyber threats¹².

Section E of the initiative covers the topic transparency, cooperation and development. It

⁷ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 9' WTO Doc INF/ECOM/87 (26 July 2024).

⁸ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 10' WTO Doc INF/ECOM/87 (26 July 2024).

⁹ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 11' WTO Doc INF/ECOM/87 (26 July 2024).

¹⁰ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 12' WTO Doc INF/ECOM/87 (26 July 2024).

¹¹ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 14' WTO Doc INF/ECOM/87 (26 July 2024).

¹² World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 17' WTO Doc INF/ECOM/87 (26 July 2024).

mandates the parties to disclose and publish all the measures which could effect the operation of this agreement¹³. It also mandates the parties to cooperate with each other and by sharing information on relevant issues and should work together for increasing the participation of the less represented groups like micro, small and medium enterprises¹⁴. Lastly the most important issue discussed in this section is development and it recognizes that the developing and the least developed countries may not be in the position to implement the various provisions of the agreement at the very onset and thus it gives them additional time of 5 years for the implementation and with a possibility of further extension of 2 years. It further states that the developed and the developing countries which are in a better position would provide the other developing and least developed countries with technical and capacity building support and help them in implementation of the initiative. Lastly such countries are also provided grace period from disputes¹⁵.

Section F of the Initiative features article on telecommunication wherein it is stated that the parties would foster the environment of fair competition and would focus on increasing interconnectivity of the telecommunication service providers¹⁶ and the parties who have not already agreed upon the commitments contained in the WTO reference paper: Negotiating groups on basic telecommunication¹⁷ shall do so.

Section G of the initiative talks about exceptions and states that general and security exceptions and prudential measures contained in Gatt and Gats shall apply mutatis mutandis that is in the same manner. Two new exceptions contained in it are personal data protection exception¹⁸ which allows the parties to maintain personal data protection and privacy measures as long as such parties allow the transfer of data subject to such conditions and Indigenous people exception which allows the parties to put favorable domestic measures in place for indigenous

¹³ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 18' WTO Doc INF/ECOM/87 (26 July 2024).

¹⁴ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 19' WTO Doc INF/ECOM/87 (26 July 2024).

¹⁵ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 20' WTO Doc INF/ECOM/87 (26 July 2024).

¹⁶ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 21' WTO Doc INF/ECOM/87 (26 July 2024).

¹⁷ World Trade Organization, Negotiating Group on Basic Telecommunications, Reference Paper, WTO Doc S/GBT/4 (24 April 1996).

¹⁸ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 25' WTO Doc INF/ECOM/87 (26 July 2024).

people as long as such measures are not arbitrary¹⁹.

The last section of the initiative is Section H which talks about Institutional Arrangement, and it states that Article XXII and XXIII of the GATT shall apply to consultation and dispute under the agreement and Dispute Settlement Understanding shall apply to the disputes under the agreement²⁰. Lastly it talks about the establishment of Committee on Trade Related Aspects of E-Commerce which shall have the participation of all the members and such committee shall carry out such of the responsibilities as are assigned to it either by the agreement or by the parties²¹.

EFFECT OF JOINT STATEMENT INITIATIVE ON THE DEVELOPING AND LEAST DEVELOPED COUNTRIES-

Joint Statement Initiative is a novel initiative on a subject which has become very important in the contemporary world. The Joint Statement Initiative offers many possibilities for the developing and least developed countries. The agreement talks about creation of uniform legal framework for electronic transactions these will offer legal certainty and thereby help these countries in getting investment and further reduction of regulatory barriers will enable their easy participation in global e commerce.

By providing for the recognition of Electronic signature and authentication as legally valid the Joint Statement Initiative will eventually facilitate secure and trustworthy electronic transaction across border and in turn help in increasing the participation of the businesses. Further by encouraging the use of interoperable electronic system and complying with international standards can help such countries in integrating more seamlessly and efficiently with the global supply chains.

Joint Statement Initiative appreciates that the Micro, Small and Medium enterprises have a major role to play in e-commerce and encourages the use of these service providers this can in turn lead to greater participation of MSME's in global e-commerce.

¹⁹ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 26' WTO Doc INF/ECOM/87 (26 July 2024).

²⁰ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 27' WTO Doc INF/ECOM/87 (26 July 2024).

²¹ World Trade Organization, 'Joint Statement Initiative on Electronic Commerce, Article 28' WTO Doc INF/ECOM/87 (26 July 2024).

Further the Joint Statement Initiative by providing for elimination of custom duties on electronic transmissions will help in reducing the cost associated with digital trade and will in turn make it affordable for businesses in these regions to access and distribute goods and will also encourage participation of businesses of these countries in international market. However it should be remembered that there is a flip side also as the incoming electronic transactions into these countries in the absence of custom duties can have adverse impact on the domestic industries.

The part of the initiative providing for consumer and data protection will help in enhancing consumer trust and will in turn increase e-commerce participation in this region and further the development of strong personal data protection laws in these regions can help in attracting international businesses and investments.

The part of the initiative which talks about technical and financial assistance being given to the least developed and developing countries by the developed countries is the most important in this respect. It will help these countries as they would get technical and other forms of assistance for implementation of the provisions of the agreement, further they would also get additional time for implementation of these provisions and the developed countries are also encouraged assist such countries in assessing and addressing the capacity gaps existing.

The developing and the least developing countries have been given additional time period of 5 years for the implementation of the agreement which is further extendable by 2 years, but there has no distinction been made between the developing and the least developed countries and least developed countries have not been given any extra time which ideally has been made historically like it was made in the Trade Facilitation Agreement²² given to them and it should also be remembered that implementation of regulatory changes especially in the field of digital economy may require more time as the developing and least developed countries have limited experience in this field and it is resource and time intensive process.

But the proponents of the agreement argue that it would be in the best interest of the developing and the least developed countries to implement the agreement as soon as possible as it would enable the developing and the least developed countries in establishing a secure and stable

²² World Trade Organization, Agreement on Trade Facilitation, WTO Doc WT/L/940 (27 November 2014).

environment for digital trade to occur. Further it is also argued that giving the countries flexibility to choose a time frame would result in indefinite delay in implementation of the agreement²³.

IMPACT OF THE JSI ON GLOBAL E-COMMERCE-

The WTO currently does not have any set rules which explicitly covers the area of digital trade. The Joint Statement Initiative is novel and a step in this direction. Having a consistent set of rules in the field of digital commerce is important as it cannot be easily constrained within geographical boundaries and having different set of regulations governing them can increase cost associated with such trade as diverse business environments needs to be managed.

Having a uniform legal framework on electronic transactions will help in simplification of cross border e-commerce, lowering of the cost associated with it and will streamline the transactions taking place globally and thereby help in fostering of a predictable and efficient environment for international trade to take place.

Further by providing for the creation of a single window for the submission of the documents for import, export and transit the agreement will help in facilitation of faster and efficient processing of goods at the borders. It also states that there should be use international data standards which will ultimately help in seamless flow of information reducing the delays in the cross-border trade.

The prohibition on imposition of custom duties on electronic transmission will ultimately reduce the cost associated with digital trade and will in turn foster a more integrated digital economy. By making it a requirement that the internal taxes on the electronic transmission should be compliant with the WTO rules it in turn ensures that a level playing field is ensured. The articles of the agreement requiring for the protection of personal and consumer data will ultimately ensure that the trust of the consumer is strengthened, and that user's rights are protected and ultimately result in the growth of the global e commerce.

The article which talks about Special and Differential Treatment being meted to the developing and the least developed countries in the sense that the developed countries would provide

²³ Rashmi Jose, 'What Developing Countries Should Know About Negotiations for a New Global Agreement on E-Commerce' (International Institute for Sustainable Development, 6 September 2024).

technical and financial assistance to such countries and further they would be given extra time for the implementation of the provisions of the initiative. This will help these countries to better participate in the digital commerce and will ultimately help in amelioration of the prevailing digital divide.

DIFFICULTIES IN IMPLEMENTATION OF JOINT STATEMENT INITIATIVE ON E COMMERCE

Adoption of a legal text is the first step in the long draw process. There are various ways in which plurilateral agreement can become a part of WTO framework.

For a plurilateral agreement to become a part of WTO agreement²⁴, it is required that there should be a consensus of all the WTO members which is a very difficult feat to achieve as currently the initiative has the membership of 91 members which amounts to half of the membership of the WTO so getting the consensus of the remaining WTO members who have not participated in the negotiation process is a very difficult task.

But there are two other processes which can be undertaken by the members-

1. Where the members of the plurilateral agreement constitute a “critical mass”, ie. Sufficient number of the countries forming a large chunk or share of global trade in the specific sector in which agreement is entered into and there is agreement among the members of the plurilateral agreement that the benefit of the agreement would be extended to the non WTO members on the MFN basis then it can be implemented in such manner. A meaningful reciprocity is established among the participants before it is extended to the non-members. The obligations under the agreement are not extended to non-members, only the rights are extended²⁵. The problem here lies in identifying whether the members constitute a critical mass or not as in its current state the initiative has the membership of only 91 members.

Some of the agreements implemented by this method is the International Trade Agreement, The Financial Services Agreement etc.

2. Further such initiative which is essentially is a plurilateral agreement can be implemented without it applying to other WTO members who are not part of the agreement and these agreements are called Discriminating Plurilateral, but for it to be

²⁴ World Trade Organization, ‘Annex 4: Plurilateral Trade Agreements’, Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154.

²⁵ Warwick Commission, The Multilateral Trade Regime: Which Way Forward? (University of Warwick 2007).

included in Annexure 4 the consensus of all the WTO members are required which again is a tedious task.

Joint Statement Initiative on e-commerce which if implemented would be discriminatory would require the consensus of all the WTO members to be included within Annexure 4. One of the prominent Plurilateral Agreement to be implemented by use of this process is Government Procurement Agreement²⁶.

The other problem faced by the Joint Statement Initiative is the fact that many of the developing countries like South Africa and India which have a significant impact on the global e-commerce are not a part of the agreement. Some of their objections are-

1. First of all, they objected the very legality of the Joint Statement Initiatives and have said that such Initiatives violate the fundamental principles and objects of the multilateral systems as they go against the consensus-based decision making required in such multilateral systems. Further they contended that the addition of the new rules which emanate from the Joint Statement Initiative Negotiations into the WTO framework without following the rules enshrined in Article IX and Article X of the Marrakesh Agreement would have detrimental effect on the multilateral trading system²⁷.
2. These Countries oppose the moratorium on the custom duties on electronic transmission as they deem it to be against their fiscal interest as for a country like India which heavily depends upon the custom duties for its revenue the losses are significant. The UNCTAD has estimated that the losses by imposition of such moratorium for the developing countries would be around 10 billion dollars every year²⁸.

Further it should be remembered that there is no mechanism like imposition of sanction upon non-compliance of the provisions of the agreement and it is a purely voluntary exercise and the countries can commit to it without ever taking steps for the implementation of the texts arrived at.

The agreement talks about technical and financial assistance being provided to the developing and the least developed countries but there is lack of clarity as to who will support such

²⁶ Jane Kelsey, 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO' (2022) 25 J Int'l Econ L 2.

²⁷ World Trade Organization, 'Joint Proposal' WT/GC/W/819/Rev.1 (28 April 2021).

²⁸ United Nations Conference on Trade and Development, Developing Countries and Trade Negotiations on E-Commerce (UNCTAD, 19 February 2021) <https://unctad.org>.

countries as there is no authority for overseeing that the provision is carried out in its letter and spirit and this could discourage other developing and least developed countries from joining this initiative.

It should also be remembered that for the whole of the negotiation has been done mostly by the developed countries and the concerns of the developing was not represented to the extent it should have been, and this can be a deterrent for the developing countries in joining the initiative and its successful implementation.

Lastly, it should be remembered that what has been arrived at on 26th July 2024 is a “stabilized text” that is it is not the final text rather there is more room for negotiation but this is the text after negotiation with which most of the members are satisfied but not all its members, like United States has stated that this text needs more work.

CONCLUSION-

The Joint Statement Initiative on E-Commerce is a novel initiative in the sense that there is no international legal framework for regulating a topic like e commerce which has a cross-border operation. E-Commerce really has become an integral part of the world economy with the value of the global e-commerce being pegged at more than 6 trillion dollar and it is high time a common legal framework is adopted as variation in the legal practices at the domestic level can have adverse effect on the e-commerce.

Many of the provisions in the “stabilized” legal text are commendable like provisions on paperless trading and recognition of e contracts which have a potential of going a long way in making the global trade seamless. Further the provision on Special and Differential Treatment of the developing and least developed countries is an important step as such countries don't have developed legal or technical infrastructure for implementation of this initiative and need the helping hand of the developed countries for coming at par with them, but the provision lacks as there is mechanism to oversee that the provisions are complied with and the initiative does not clearly define on whom the burden lies for providing such technical and financial assistance.

One of the elements lacking in the JSI on E-Commerce is creation of the body which would oversee the implementation of the provisions of the agreement and should have in place some

mechanism for penalizing the states which go against the mandate of the text.

Further many of the topics which were on the table in the initial rounds of the negotiation data localization and cross border data flow, privacy and cybersecurity standards, intellectual property rights have been dropped from the stabilized text and for the initiative to be successful there should be negotiation on those issues as well as they are relevant for the functioning of the E-Commerce industry.

Further the Joint Statement Initiative should have been negotiated with the collective involvement of all the WTO members, but rather it has been negotiated as a Plurilateral Agreement and even after arrival of the final text it would be difficult to include it within the framework of the WTO as it would require the consensus of all the WTO members.

The agreement does not have participation of India and South Africa which are major players in the field of e-commerce and efforts should be made to bring such countries on board as any legal initiative on the topic without their participation would be redundant.

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