Global Counsel

E-commerce talks on the WTO chopping block

Blog post by Associate Alexander Bobroske, 22 September 2021

As WTO negotiators return after the summer hiatus, minds are inevitably starting to focus on the agenda for the 12th Ministerial Conference (MC12). For e-commerce negotiators, the WTO's most important conference will be seen as an opportunity to agree upon the remaining low-hanging fruit and create momentum to work out the more challenging chapters. But will e-commerce negotiations make it onto the high-level agenda, and is a breakthrough possible even if they do?

These plurilateral e-commerce deliberations, also known as the Joint Statement Initiative (JSI), face a deep divide between the global North and South as well as significant fractures within those groups. The four most contentious issues dividing the 86 WTO participants are rules around data flows, data localisation, source code, and upholding the WTO moratorium on electronic transmissions customs duties.

While developed countries generally want a more ambitious and liberalising agreement, developing economies seek policy flexibility in areas such as data localisation. They also differ in their approach to negotiations. While Brazil, Costa Rica, Cote d'Ivoire, and Nigeria have put forward draft texts reflecting the preferences of some developing countries, India and South Africa have taken a much more generally opposed stance on liberalisation and are even questioning the legality of the JSI process.

Progress to date has been sluggish but not stalled. Three years into talks, 'clean texts' have been achieved in six relatively uncontroversial areas, such as online consumer protection and open government data as well as restricting spam and recognising e-signatures. Negotiators now face the challenging task of harnessing momentum to turn to more difficult chapters. However, no major economies seem to be in a rush on e-commerce negotiations. High-level discussions on fisheries subsides, agriculture, an intellectual property waiver for covid-related goods, and broader WTO reform could all overshadow JSI work. Without additional pressure from national capitals, negotiators themselves will largely be responsible for reaching consensus on the low-hanging fruit. Without new clean texts, the JSI talks could stall entirely. The two key questions will be what happens on the moratorium on tariffs on electronic transmissions, and whether stalled progress sees negotiators break away from the original group. The long-standing moratorium on customs duties on electronic transmissions needs to be extended at MC12. If India, South Africa, and Indonesia block the renewal of the moratorium, e-commerce will likely be thrust back up the agenda – albeit in crisis management mode. If they hold the line on refusing renewal, exporters and importers potentially face a range of new attempts to tax cross-border electronic transmission of digital content.

If the moratorium issue is managed quietly, there will still be the question of whether progress can be made. The US-EU Trade and Technology Council (TTC) provides a potential platform for bridging some serious gaps in transatlantic approaches to areas such as digital privacy, which may allow the US and EU to come to JSI negotiations with a clearer common position and enhanced leverage. If they can ultimately include China in a common position down the road, which may require serious compromises, they will have a strong hand for isolating India and South Africa. But the recent AUKUS deal and general US-China tensions will make this hard, especially on top of Beijing's preference for a relatively low ambition agreement.

This will leave the question of whether some negotiators are ultimately tempted to walk away from stalled discussions to pursue an agreement with willing partners. This could also open the door to a two-track solution where all JSI participants agree to a narrow settlement, while a second closed group strikes a supplemental deal.

Both of these challenges are relevant for businesses. The moratorium on tariffs on electronic transmissions has done important work for two decades in blocking any instincts to tax digital content traded this way. While many WTO members would maintain it unilaterally or as part of bilateral commitments, some would not. The wider e-commerce consultation remains chiefly focused on locking in best practice and common approaches in some important areas. While this is unlikely to change much on the ground, it is an insurance policy that defines the minimum treatment businesses can expect and demand in export markets. In whatever format, negotiations probably have months if not years to run. But MC12 may be the point at which we get a new sense of the scope of the insurance policy – and who is likely to sign up to it.