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The WTO E-Commerce Tariff Moratorium: Permanent Fixture or Temporary Stopgap?^[2]

ABSTRACT

Since 1998, there has been an understanding between WTO member states regarding the upholding of a moratorium on tariffs when it comes to e-commerce. Originally intended as a temporary measure until the WTO could finalise an international agreement on e-commerce, the slow progress on the latter led to the WTO member states constantly renewing the supposedly temporary measure. This has not been to the preference of several developing countries, who have increasingly challenged the moratorium or have attempted to redefine its scope. The purpose of this paper is to examine the status quo, whether it can or should be maintained, and to highlight the various issues faced by the involved countries. By formulating these aims into three research questions and through an analysis of the official WTO documents and literature on the matter, the author aims to shed light on this situation and examine the potential future paths the e-commerce tariff moratorium could take.

Keywords: WTO ■ tariff ■ e-commerce ■ moratorium ■ digital trade
■ international trade law

I. INTRODUCTION

In 1998, member states of the World Trade Organization (WTO) created a multilateral work programme in order to address the topic of e-commerce from the perspective of international trade law. As part of

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this work programme, WTO member states approved a measure under which a moratorium was put in place regarding the imposition of tariffs or other duties on e-commerce (or electronic transmissions, in other words). This measure was intended to be temporary until the work programme reached its final conclusion, but the situation did not fully unfold in line with the expectations of WTO member states.

Over the ensuing two decades, the importance of e-commerce grew significantly. Nowadays, it is indisputably one of the major fields of commerce. As a consequence, the economic value of such commerce is greater than it was in the past, and consequently, the potential import tariff revenue from electronic transmissions would likewise be significantly greater than in 1998. Based on this heightened importance, it would be logical to assume that resolving the 1998 work programme on this topic would have been a foremost priority to WTO member states.

Contrary to this assumption, the topic of e-commerce fell prey to the malaise that has affected some other WTO work programmes as well: stagnation. Despite the vulnerability of the work programme, little progress has been made to resolve the matter of e-commerce from an international trade law perspective. No significant multilateral agreement on the matter was concluded. Similarly to other WTO work programmes, seemingly irreconcilable differences arose between WTO member states, sometimes on developing–developed country lines, and these differences grew more entrenched over time.

The topic of the tariff moratorium is particularly notable in this regard. While it was originally intended as a temporary measure, it has been repeatedly renewed, remaining one of the few points of agreement among the debating member states. Or is that really so? As evidenced by the latest Abu Dhabi Ministerial Conference in 2024, although the moratorium was once again extended until the next Ministerial Conference in 2026, it encountered significant opposition from various member states, notably India, South Africa, and Indonesia.^[3]

Meanwhile, ever since 2019, negotiations have been ongoing between WTO member states to create a plurilateral agreement on e-commerce. This would bypass the stringent requirements of a WTO multilateral agreement and would only apply to its specific signatories, rather than the WTO as a whole. As part of these negotiations, the question of turning the e-commerce tariff moratorium into a permanent solution has been raised and has received considerable support from developed nations, such as those of the European Union.

The purpose of this paper is to examine the current state of affairs regarding the e-commerce tariff moratorium, how this situation emerged, and the possible solutions for moving forward from the current impasse. The paper also touches upon other e-commerce trade law questions concerning IP, competition, and consumer protection, as they may be connected to the moratorium topic, which

[3] Bond et al., 2024.

naturally impacts such matters. As such, the following research questions would be posed and answered: Is the e-commerce tariff moratorium from 1998 suitable for becoming a permanent measure, or is it an outdated solution, from a trade law perspective? Is it desirable for a plurilateral agreement on e-commerce to contain a permanent tariff moratorium? Is it possible to reconcile the differences between WTO member states on the tariff moratorium and achieve a multilateral solution?

The research primarily employs a qualitative methodology, drawing on existing scholarship on and various reports by international bodies to formulate responses to the posed research questions. A few interdisciplinary references are also included, as beyond pure trade law, these topics are also heavily tied to questions of geopolitics and economics (specifically surrounding technological innovation and its impact on competitiveness between developed and developing countries).

The structure of the research paper follows a classical structure. First, it defines the scope of the research and establish key definitions. Second, it examines and compares the state of play in 1998 and 2024 on the topic of the moratorium, while also highlighting key milestones on the long road of negotiations. Third, it outlines the primary differences of opinion between WTO member states that took part in the debate, comparing the perspectives of developed and developing countries. It also examines the proposals surrounding a possible plurilateral agreement on e-commerce and the debate surrounding the inclusion of a permanent tariff moratorium within such an agreement. Finally, it attempts to answer the posed research questions and create reasonable conjectures regarding the future of e-commerce regulation under the WTO's auspices, as well as what potential recommendations could be made on this topic.

II. SCOPE AND KEY DEFINITIONS

Before commencing the analysis, it is necessary to define the precise scope of the paper and clarify the key definitions employed. As explained in the introduction, the central topic of this paper is the e-commerce tariff moratorium WTO members agreed upon in 1998 and subsequently renewed on several occasions, along with its implications and recent developments. For the purposes of keeping the scope of this paper from becoming too broad, it does not address other aspects of digital trade law in which the WTO has become involved over time.

Our defined scope immediately raises three terms that must be clarified in order to examine the phenomenon in depth: tariffs, the meaning of a moratorium, and e-commerce.

To begin with, the concept of tariffs is relatively easy to define. Tariffs are one of the major forms of trade barriers (and in fact, are very often contrasted with so-called non-tariff barriers to trade), including customs duties imposed by a

country's government on imports arriving in the country's market. As such, it is essentially an additional burden designed to limit trade by imposing a financial obligation on the importer, implicitly forcing them to increase the final price of the imported good or service, in order to make up for the loss caused by the tariff. This financial obligation is usually calculated as a percentage of the market value of the goods or services concerned, although it may also take the form of a fixed amount payable by the importer; however, such fixed tariffs are less common than percentage-based tariffs.^[4] Naturally, the side-effect of the tariff is an increase in cost to domestic consumers and producers who rely on the imported good for input.^[5] Within the particular context of the e-commerce tariff moratorium, the term refers to customs duties, and it can therefore be argued that it excludes internal taxes.^[6] In the present paper, the imported goods or services are those covered by e-commerce (which we will define a bit later in this chapter). Accordingly, for the purposes of this study, a tariff may be defined as a financial obligation, specifically a customs duty, imposed on by the importing country on cross-border e-commerce.

The second key definition, moratorium, is also relatively straightforward to define. A moratorium is usually defined as a suspension of activity, which is typically of only a temporary nature, though it can have indefinite duration or be tied to the fulfilment of certain conditions.^[7] Within the context of WTO trade law, this definition of moratorium is also largely applicable. When WTO members agreed upon the e-commerce tariff moratorium, they essentially committed to a temporary suspension of imposing tariffs on e-commerce until a permanent agreement could be negotiated. Such moratoriums are not unheard of in trade law and are used as negotiating tools in cases where the parties could not reach an immediate agreement on a given issue, but nevertheless agree that they should attempt to do so in the future.^[8] This is exactly what happened with regard to the e-commerce tariff moratorium. Moratoriums are also used in different contexts within trade law. For example, the EU famously maintains a moratorium on the licensing of new GMO product imports to prevent such products from entering its market.^[9] However, for the purposes of this paper, we will adopt the first definition, as this is the meaning in which WTO members used it in 1998.

Out of the three terms, defining e-commerce poses the greatest challenge. E-commerce, or electronic commerce, has a rather wide range of meanings and definitions that it has accrued over the years. From our perspective, the princi-

[4] Radcliffe, *Investopedia: The Basics of Tariffs and Trade Barriers*, 2024.

[5] Nagy, 2019, 95.

[6] Andrenelli – Lopez-Gonzalez, 2023, 4.

[7] Hayes, *Investopedia: Moratorium: Definition, How It Works, and Examples*, 2024.

[8] See another example of a moratorium with regards to intellectual property: Stillwell – Tuerk, 2001, 2.

[9] Sindico, 2005, 1-2.

pal starting point is the original Work Programme on Electronic Commerce from 1998 (we will discuss this in more detail in the next chapter). According to this Programme, electronic commerce is defined as “the production, distribution, marketing, sale or delivery of goods and services by electronic means.”^[10] On a surface level, this definition seems simple and straightforward enough; however, we have to consider that this was created in 1998, when e-commerce was significantly less developed than it is today. Even if we disregard this aspect, there are some definitional issues we can immediately spot: namely, that the definition fails to make a distinction between physical goods and services that are sold and delivered via electronic means (ergo, the electronic means truly only serves an intermediary tool facilitating cross-border trade), and digital goods and services that are purely electronic transmissions in nature (that is to say, there are no physical goods or services at play, everything is purely digital). An easy example of this distinction can be seen by comparing the ordering a movie DVD via a webshop with the purchasing of a digital file of the movie (a digital product) via a webshop. Similarly, ordering a book online differs from buying an e-book. Since the late 1990s, online transactions have increasingly shifted towards the latter model, and this lack of clarity has created potential ambiguities in determining which forms of e-commerce the tariff moratorium should apply to. Furthermore, the definition provided by the Work Programme refers to both goods and services, which are traditionally treated as separate categories by WTO law, adding further complexity to precisely defining e-commerce in the context of the moratorium.

With regards to this issue, neither the General Agreement on Tariffs and Trade (GATT) nor the General Agreement on Trade in Services (GATS) provides a definition of e-commerce, nor is it distinguished from the similar term “digital trade”, though it appears that the scholarly consensus is that the two terms are interchangeable.^[11] We also have to note that the term “electronic transmission” occurs in various WTO documents on the topic of the moratorium^[12], suggesting that the moratorium itself applies to trade delivered via the internet, while physical trade that is ordered on the internet but delivered normally would fall under an appropriate WTO regime.^[13]

Even so, this lack of precise definition has also not escaped the attention of WTO members. In a 2022 WTO Communication from Indonesia, the country highlighted that, for instance, it is uncertain whether the term e-commerce in the context of the tariff moratorium also applies to “electronically transmitted content”, or just the electronic transmission itself.^[14] Indonesia’s argument in this case seems to be that it is unclear whether the content of an electronic

[10] WT/L/274, 1998, para. 1.3.

[11] Weber, 2015, 323.

[12] Examples include: WT/L/274, 1998; WT/MIN(98)/DEC/2, 1998; WT/GC/M/40/Add.3, 1999.

[13] Wunsch-Vincent, 2006, 21.

[14] WT/GC/W/859, 2022, para. 1.1.

transmission could be separated from the electronic transmission itself, and if so, whether it is possible to impose duties on the former, without infringing the moratorium.

Speaking of the content of electronic transmissions, this also ties back to the topic of goods and services. As previously mentioned, one is governed by the GATT regime, while the other is governed by the GATS regime. While digital trade could be categorised as a form of trade in services for certain parts of it, the emergence of the digital product (which we already used as an example a few paragraphs above) complicates the issue. And in any case, both GATT and GATS seem to have limited suitability to address the evolving field of e-commerce.^[15] Thus, even if the moratorium does not apply to the content of electronic transmissions, the nature of that content (and consequently which trade law regime should be applicable) could still pose significant questions to WTO members.

Overall, when it comes to e-commerce, we have raised numerous definitional issues, and there appears to be no clear consensus on every detail among WTO members. For the purposes of this paper, however, it is important to provide a definition of e-commerce. Based on the existing agreement, it seems that in the context of the 1998 tariff moratorium e-commerce applies, at a minimum, to cross-border commercial electronic transmissions (but not goods or services ordered digitally and delivered physically), and it might also apply to the contents of those electronic transmissions, depending on interpretation. As part of this paper, we will attempt to further clarify the matter in the following chapters and find an answer in the conclusions.

III. HISTORY OF THE E-COMMERCE TARIFF MORATORIUM

As we mentioned in our introduction, the history of the e-commerce tariff moratorium goes back more than 20 years, all the way to 1998, to the WTO Ministerial Declaration on Global Electronic Commerce. This Declaration included two main matters: first, it established that the General Council of the WTO should assemble in a special session and create a work programme that would develop and resolve issues of global e-commerce. Secondly, and most importantly for this paper, it included a joint recognition that the current state of affairs, in which customs duties are not levied on electronic transmissions by WTO member states, should be maintained.^[16] As we previously mentioned in the last chapter, the concept of electronic transmission seems to play a key role in the WTO's approach to the topic of e-commerce. The approach used here also interestingly indicates that, rather than the moratorium "suspending" existing customs duties, it instead calcifies the existing situation of no customs duties. This

[15] Weber, 2015, 324-325.

[16] WT/MIN(98)/DEC/2, 1998.

is consistent with the era in which the Declaration was adopted: in 1998, e-commerce was a rapidly growing but still new field of international trade. As such, it is reasonable to assume that WTO member states would likely not yet have any sort of tariffs in place. Thus, rather than a shift in direction, the moratorium was essentially just reinforcing the status quo in 1998.

It should also be noted that in 1996, WTO members created the Information Technology Agreement, which facilitated a tariff-free environment for a large number of IT products.^[17] Though not strictly concerning e-commerce, IT products are undeniably a heavily adjacent topic, and we can perhaps link the liberalisation of trade in IT goods with the e-commerce tariff moratorium.

In September 1998, the General Council acknowledged the Ministerial Conference's directive on the matter, and, as previously mentioned in the last chapter, also provided a definition of electronic commerce. Furthermore, it outlined the various tasks to be undertaken by key WTO bodies, namely, the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS,^[18] and the Committee for Trade and Development. For each body, the Work Programme instructed them to examine the issue of e-commerce from their own particular perspective, for instance, with regard to Trade in Services, the interaction between e-commerce and modes of supply under GATS^[19], the latter of which recognised four modes for supplying services: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.^[20] According to Weber, the first two modes of supply are most often raised in connection with e-commerce, while the last two modes are largely viewed as unconnected.^[21] For the purposes of our paper, it is perhaps important to highlight that an analysis of customs duties in relation to e-commerce was one of the assigned tasks for both the Council for Trade in Services and the Council for Trade in Goods.^[22] As for the General Council itself, the Work Programme noted that the topic of customs duties on electronic transmission will be a matter directly reviewed by the General Council as well.^[23]

With this document, work actively began in the WTO regarding e-commerce questions. For the purposes of this paper, it would be inadvisable to go through every single detail of this work. Instead, we will attempt to highlight key moments that are specifically tied to the ongoing customs tariff/customs duties moratorium on e-commerce. For this purpose, we can rely in part on the vari-

[17] Horváthy, 2020, 16-17.

[18] The TRIPS Agreement concerns trade-related intellectual property questions. It is a major agreement of the WTO framework.

[19] WT/L/274, 1998.

[20] For a more detailed overview regarding modes of supply in GATS, see: Shekhar, 2013, 3-5.

[21] Weber, 2015, 324. For a more detailed analysis regarding the place of e-commerce within GATS-modes, see: Weber – Baisch, 2013, 91-98.

[22] WT/L/274, 1998.

[23] WT/L/274, 1998, para. 1.2

ous General Council reports and meeting minutes that have been emerging since 1999 and continue all the way to the present day. Not all of these documents are publicly available, but we can still glean some important information regarding how the debate evolved over time.

We can begin this examination by using one of the first documents from this period as an illustrative example, namely the minutes of a General Council meeting from 1999. In this document, we can see that various divisions were already forming. At the time, the primary focus (in our paper's context) seemed to have been on debates concerning the classification of electronic commerce as either services or goods (this ties back to the issues we discussed in the previous chapter), with some WTO members such as Hong Kong or China suggesting that e-commerce should be classified under services, whereas other member states, such as Egypt, disagreed with this assertion.^[24] More closely to the issue of the moratorium, the continued suspension of tariffs on electronic transmissions was also a matter of debate. Some developed member states, such as the US and Australia, supported an indefinite extension of the moratorium. Other developed members, such as Canada and the European Communities, effectively supported the extension of the moratorium on a more temporary basis by tying it together with resolving the aforementioned issue of classification. Certain developing countries, such as Malaysia (representing all ASEAN members), were of the opinion that the classification issue should be settled before an indefinite continuation of the moratorium could even be brought to the table as a potential option. Bangladesh, meanwhile, was in favour of retaining the status quo while more studies were being conducted.^[25] Interestingly, the contents of the meeting seemed to indicate that rather than there being a clear divide between developing and developed countries, the situation was much more muddled in the 1990s, with countries on both sides of the development spectrum taking different approaches. We will be discussing these disputes in more detail within our next chapter.

The next few years saw some curious developments from a negotiation perspective. While the matter was on the table during the Seattle Ministerial Conference in late 1999, the moratorium was not formally extended in the end. However, two years later, during the Doha Ministerial Conference in 2001, it was renewed.^[26] Then, once more, at the 2003 Cancún Ministerial Conference, it was again not reinstated. Since then, however, the moratorium was formally renewed during Ministerial Conferences. Despite these breaks, it also seems that WTO member states did not deviate from the moratorium in their policies and did not impose customs duties on electronic transmissions even during the brief periods when the moratorium was not formally extended. However, mounting criticism has also emerged, as the original 1998 Work Programme made little

[24] WT/GC/M/40/Add.3, 1999, 6-12.

[25] WT/GC/M/40/Add.3, 1999, 6-12.

[26] WT/MIN(01)/DEC/1, 2001, para. 34.

substantive progress in resolving e-commerce issues, and the moratorium situation showed no clear signs of resolution.^[27]

And as such, we arrive at the year 2024. During the 13th Ministerial Conference, the moratorium's extension was successfully negotiated once more, with strong backing from the US, the European Union and a mixture of developed and developing countries. This extension is supposed to last until the next Ministerial Conference or March 2026, whichever occurs earlier. However, in recent years, opposition against the moratorium has been growing amongst developing countries to a much greater extent than in 1998-1999, and the latest extension likewise faced criticism and opposition from countries such as South Africa, India, and Indonesia, all of which are relatively major economies on the world stage.^[28] We also have to note that this Ministerial Conference seemed to encompass a major effort to push a plurilateral agreement to the table, which we will be discussing as part of the next chapter. Overall, we can see how this nominally temporary yet in practice indefinite moratorium failed to evolve over the decades and has remained a permanent, if controversial, part of trade law.

IV. CONTROVERSIES AND DEBATES AROUND THE MORATORIUM

In this chapter, we will examine the various positions adopted by WTO members and scholars on the topic of the e-commerce moratorium, whether it was a necessary measure, and whether its continued maintenance is warranted. We will divide the chapter into three segments: first, we will present and discuss the arguments in favour of the e-commerce tariff moratorium. Second, we will examine the arguments against the moratorium. In the third section, we will briefly discuss the new plurilateral treaty plan that could potentially incorporate the moratorium.

To begin with, let us outline the argumentation in favour of the moratorium. These arguments can be categorised into two groups: arguments that preceded the inception of the moratorium and arguments that focused on why the moratorium should be maintained. Naturally, there is some overlap between the two categories. Still, with regards to the first category of arguments, an important political reasoning behind the moratorium was originally that e-commerce is an emerging field in international trade, one that needs to be examined and resolved by the WTO through its Work Programme (that we discussed in the previous chapter), preferably culminating in an e-commerce treaty, based on the investigation of various WTO bodies regarding the impact of e-commerce tariffs on trade. Until this can occur, the argument is that it would be improper to apply customs duties to electronic transmissions, hence the need for a suspension.^[29]

[27] Kallummal, 2020, 1-2.; Mitchell – Mishra, 2019, 27.

[28] WT/MIN(24)/W/7/Rev.1, 2024; WT/GC/W/911, 2023.

[29] Wunsch-Vincent, 2006, 15-16.; Weber, 2015, 332.

This was the original argument behind the moratorium, one that, in the author's opinion, obviously depended strongly on the notion that the WTO would be capable of resolving such issues in a timely fashion, a sentiment that we could say was typical of the 1990s and early 2000s.

Another aspect of this argument was that, as we have seen in the previous chapters, there were significant issues regarding the interpretation of e-commerce within the context of WTO law. Are electronic transmissions goods or services? Should there be a separation between the content of an electronic transmission and the transmission (in other words, the carrier medium) itself? These questions proved rather difficult to answer in 1998, which likely also paved the way for the moratorium's implementation.^[30] Thus, overall, it seems the justification for the creation of the moratorium lay in a combination of caution around an emerging field of trade and an impasse among WTO members over how to interpret that field from a trade law perspective.

However, 1998 was a long time ago, and so the question arises: why the moratorium has continued to be renewed repeatedly over the last two decades of WTO history. As we have seen from the previous chapter, the renewal of the moratorium was primarily supported by developed countries such as the US, Canada, and the EU (alongside a number of developing countries). The continuation of the moratorium was initially framed as a necessity in the face of persistent unresolved issues surrounding e-commerce and its regulatory status, as well as the absence of a final agreement capable of settling the matter. This argument, however, was also supplemented by the view offered by certain WTO members, mainly developed countries, that, regardless of the outstanding issues to be resolved, the moratorium on e-commerce customs duties was fundamentally beneficial to the world economy and also in accordance with the WTO's mission to liberalise trade. From the perspective of these supporters, ending the moratorium would potentially mean a rolling back of already achieved trade liberalisation, which was achieved with relative consensus and without the usual struggle that characterised later WTO efforts to reduce trade barriers.^[31] Thus, it could be said that ending the moratorium would run contrary to the WTO's purpose. Of course, in the author's opinion, this kind of approach was necessarily favoured by developed countries that were net exporters in e-commerce. For these countries, the benefits of trade in electronic transmissions without any customs duties outweighed any potential loss of revenue or other potential downside. From a legal perspective, we can also see that opening up the area for customs duties could intensify existing classification debates and the debates regarding the separation of content and carrier medium, due to the sudden increase in practical relevance, as customs duties on electronic transmissions would start popping up. In fact, the issue of classification as a debate between the EC and the US was

[30] Andrenelli – Lopez-Gonzalez, 2023, 7.

[31] Wunsch-Vincent, 2006, 35; Andrenelli – Lopez-Gonzalez, 2023, 10., 16; WT/GC/M/40/Add.3, 1999, 6-12.

a significant factor in hampering multilateral solutions and thus validated the moratorium's existence in a way.^[32] A further argument that could also be raised in support of the moratorium is simply a reference to the status quo in an economic sense as well. The field of e-commerce in the past two decades has developed with the suspension of customs duties being in place. It is indisputable that suddenly revoking the moratorium might result in a slew of new tariffs on electronic transmissions, which in turn could cause a potential disruption to the world markets as they would readjust the inevitable price changes. In essence, it could be argued that the moratorium is keeping trade uncertainty suppressed in the context of e-commerce.^[33] From the perspective of the moratorium's proponents, it would be inadvisable to change the existing arrangements too much.

When it comes to the opponents of the moratorium, three distinct but related lines of argumentation can be identified: first, the unique circumstances surrounding the moratorium's creation in 1998; second, the legal issues associated with the moratorium; and third, the economic arguments against the moratorium. The first argument essentially surmises that at the time of the 1998 Ministerial Conference, e-commerce as a field was still in its infancy, especially when it came to the stricter definition of electronic transmissions. This was part of the reason why there were no customs duties in place at the time. As such, the topic did not carry significant material weight, resulting in the moratorium's implementation. In relation to this, it was also argued that the moratorium was agreed upon without extensive research or consultation beforehand and was essentially a manifestation of the political will of the given moment. In the view of the moratorium's opponents, this meant that the (in practice) indefinite extension of the moratorium was unjustified, as it was a temporary stopgap measure born from the unique circumstances and lack of information in 1998, and which was unduly prolonged by the WTO members that had begun to benefit from its existence.^[34]

The second argument typically advanced by opponents of the moratorium is that it constitutes an undue restriction on the sovereign authority of WTO member states to regulate their own matters and unnecessarily restricts their policy space to respond to the changing circumstances of e-commerce. Unlike most WTO commitments, which arise from carefully negotiated international treaties, opponents argue that the moratorium originated from a Ministerial Conference's declaration. This also ties back to the previously mentioned argument that the moratorium was driven primarily by political will, without sufficient grounding in WTO work or research. In addition, given the increasing importance of e-commerce compared to 1998, opponents argued that WTO members seeking to meet their financial or developmental goals were unduly constrained by the moratorium.^[35] In the author's view, this argument raises an interesting question regard-

[32] Wunsch-Vincent, 2006, 35-36.

[33] Andrenelli – Lopez-Gonzalez, 2023, 16.

[34] WT/GC/M/81, 2003, para. 161.

[35] WT/GC/M/81, 2003, paras. 161-163.

ing the exact nature of WTO obligations: is it appropriate for a WTO obligation to arise not from a treaty, but from a Ministerial Conference's Declaration? One could argue that it is evidently the case, yet the opponents of the moratorium are not necessarily wrong to point out that it represents a fundamentally different kind of international obligation than that which would arise from a negotiated treaty. In relation to this, we should also mention that some states have already introduced measures that come close to violating the moratorium. A good example of this is Indonesia, which introduced intangible goods to its tariff system in 2018. Essentially, they added an additional chapter to the Indonesian Customs Tariff Book, which is meant to cover software and other intangible goods.^[36] This amendment in itself does not necessarily violate the e-commerce tariff moratorium, but it could be seen as paving the way towards a more detailed regulation on tariffs and e-commerce.

The third type of argument opponents of the moratorium often raise is the economic impact. This argument centres around the idea that by not adopting customs duties for electronic transmissions, countries, especially developing ones, face a significant loss of revenue, and are therefore disadvantaged. Over the past two decades, economists have conducted several studies on the matter, attempting to assess the economic impact of the moratorium on countries, particularly developing ones. The results were mixed. Back in the late 1990s, one early example of an attempt at calculating the impact of the moratorium resulted in only conjecturing very modest revenue effects in most countries.^[37] Another research on the topic, not long after, estimated that while developing countries would incur 63% of the total tariff revenue losses caused by the continued extension of the moratorium, the share of customs revenue affected would translate into only relatively modest losses in overall government revenue..^[38] This would mean that while developing countries did bore the majority of the revenue losses caused by the moratorium, the actual total losses were relatively small. In the 2010s, most of these projections were re-examined (as e-commerce had become a much more dominant force in the world market and less outright conjecture was necessary compared to the earliest studies). At the time, some economists estimated that revenue losses range from USD 280 million to USD 8.2 billion, while other economists posited that the GDP losses from imposing tariffs on e-commerce would far outweigh any revenue gain in the context of developing economies.^[39] Regardless of these analyses, as previously mentioned, some WTO member states, such as India, Indonesia, or South Africa, nevertheless strongly oppose the moratorium on the grounds of potential revenue loss.^[40]

[36] Baker McKenzie: Intangible Goods are Now Subject to Import Duty, 2018

[37] Schuknecht – Pérez-Esteve, 1999, 11-12.

[38] Teltscher, 2000, 19, 24-25.

[39] Andrenelli – Lopez-Gonzalez, 2019, 11-12.

[40] Bond et al., 2024.

With the arguments of both supporters and opponents summarised, we can now turn towards addressing the so-called draft e-commerce agreement. This agreement originated from the 11th Ministerial Conference in 2017, where 71 WTO members agreed to initiate work on the matter. In 2019, this number expanded to 76 WTO members, who jointly agreed to commence negotiations. By 2024, the initiative included 91 WTO members, and at the end of July 2024, a stabilised draft text was announced.^[41] The draft for an e-commerce agreement contains numerous issues related to e-commerce, such as electronic contracts, online consumer protection, paperless trading, among others; however, from our perspective, the relevant part of the draft is found in Section C, Article 11, which concerns customs duties on electronic transmissions. In this Article, the drafters attempted to resolve the earlier disputes surrounding the definition of electronic transmissions by explicitly stating that it includes the content of the transmission. They also reference the work programme we discussed in the previous chapter and cite the moratorium as an important aspect of how the digital economy evolved. As such, the draft agreement also posits that its parties should not impose customs duties on electronic transmissions between parties of the agreement. It, however, points out that fees, internal taxes, or other charges are not necessarily prohibited, provided that they are in line with the principles of the WTO Agreement. The Article also posits that due to the evolving nature of e-commerce, its contents should be reviewed by the parties five years after entering into force.^[42] What is interesting to note here is that while the agreement's draft incorporates the moratorium into itself, it does not necessarily make it a permanent part of the agreement. The final clause of the Article provides for a mandatory review of the customs duties prohibition after five years. In the author's view, this could represent a compromise among the negotiating members, some of whom were longstanding opponents of the original tariff moratorium (such as Indonesia). It appears likely that this final clause was incorporated in order to both assuage the concerns of such WTO members while retaining flexibility in a rapidly changing area. The feasibility of this measure will be discussed in the conclusions of this paper.

V. CONCLUSIONS

Having provided an overview of the pertinent issues surrounding the e-commerce tariff moratorium, we now turn towards answering the research questions and drawing our final conclusions regarding the topic.

Our first research question concerned the nature of the moratorium, whether it can be characterised more as a temporary stopgap measure or whether it is

[41] WTO: Joint Statement Initiative on E-Commerce.

[42] INF/ECOM/87, 2024, article 11.

suitable as a more permanent fixture of international trade law. Based on the events of the past two decades, as well as the existing economic research on the topic, it appears that the latter interpretation might prove the stronger argument. In the author's opinion, the two most convincing arguments in this regard are, first, that e-commerce developed with the moratorium in mind, and therefore ending it could theoretically lead to disruptions in the world economy; and second, the more legalistic argument that the unique characteristics of e-commerce make it difficult to interpret under traditional WTO law (especially in light of the classification debate discussed earlier), and that it is thus more practical to prevent any such difficulties from arising by upholding the moratorium. In the author's view, the idea that the moratorium is unduly restricting the policy space of developing countries seems relatively less well-founded, and based on the various economic research conducted on the matter, the impact on their economies seems relatively small or even beneficial.^[43] Therefore, to answer this first research question, the author's conclusion is that the suspension of customs duties on e-commerce seems like a convincing policy decision, one that is suitable for becoming a permanent element of WTO trade law.

Our second research question concerned the feasibility of the current e-commerce draft agreement with regard to the tariff moratorium. As we have seen in the paper, the draft agreement in its current form does include the tariff moratorium, but we can point to a few issues with this approach. First of all, the draft agreement would be a plurilateral agreement. Though a significant number of WTO members are taking part in the negotiations, not all of them are doing so, including some major economies that have previously expressed concerns about the *carte blanche* prohibition of customs duties on electronic transmissions, such as India. This inherently limits the usefulness of the agreement in resolving the matter, since even if a number of WTO members agree upon integrating the moratorium on a more permanent basis into the agreement, that would still leave the current status quo (where every Ministerial Conference involves a renegotiation of the moratorium's extension) in place. Furthermore, in the author's opinion, there are also some pointed absences in the current text of the draft. While resolving the classification issue is not as vital if a prohibition on electronic transmission customs duties is maintained, it would have still been advisable to include a concrete decision on whether such transmissions should be classified as goods or services, or at least to specify which kind of electronic transmissions should be considered one or the other. A related issue is that the draft is very abbreviated when it comes to defining electronic transmissions, which could likewise cause an undesired level of ambiguity in interpreting its provisions. On the other hand, the resolution of the content *v.* carrier medium debate is commendable, and so is the clarification of the agreement that this prohibition would only apply explicitly to customs duties. Thus, if we are to answer

[43] For a detailed overview of these appraisals, see: Andrenelli – Lopez-Gonzalez, 2019, 10-12.

the research question, we may conclude that the current draft agreement could be considered a step in the right direction in many ways, and despite its remaining issues, it appears definitely worthy of inclusion in the plurilateral treaty.

Our third research question is somewhat tied to the previous one. Is it possible to reconcile the differences between WTO member states on the tariff moratorium and achieve a multilateral solution? In the author's opinion, the existence of the plurilateral agreement, its inclusion of the moratorium, and the large number of WTO members participating in the negotiation seem to suggest that a possible future multilateral solution might not prove impossible. Furthermore, despite the strong debates surrounding the moratorium, the WTO has still repeatedly managed to renew it. This suggests that the question of customs duties surrounding e-commerce is not unsolvable. In the author's opinion, this is largely a matter of political will and of convincing more reticent WTO members regarding the economic advantages of maintaining the present status quo in a more permanent fashion. Perhaps the best road to a multilateral solution would be for the current plurilateral agreement draft to first succeed and come into force. Following the planned mandatory review of the tariff moratorium incorporated in Article 11, and assuming the review maintains the prohibition on e-commerce customs duties, the situation would likely be favourable for moving from plurilateralism to multilateralism.

Overall, it seems that with the success of the 2024 negotiations, it is possible that the question of the e-commerce tariff moratorium might finally be put to rest, eventually, after more than twenty years of extensions and little substantive results. So far, the evidence seems convincing that the moratorium was more beneficial than harmful, and that its indefinite extension might be the most practical solution, initially through a plurilateral agreement on e-commerce, hopefully followed by a multilateral WTO agreement on the subject. Still, there seem to exist a few thus-far unresolved issues, and in such a rapidly evolving field as e-commerce, it is difficult to estimate where exactly our trade law should head or what long-term consequences such important decisions might carry. The original 1998 moratorium was drafted in an environment where e-commerce was still in its relative infancy, whereas today, its importance has multiplied manifold. At the moment, it will be particularly interesting to observe the ongoing work on the e-commerce agreement, as its success or failure could likely prove a watershed moment in the fate of the moratorium itself.

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Szerényi Gábor grafikája