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Moratorium on Custom Duty on Electronic Transmission

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ABSTRACT

To explore the scope of growth in global trade through electronic commerce, WTO in its 2nd MC on 20th May, 1998, decided to establish a comprehensive Work Programme (WP) to examine all trade related issues in electronic commerce. It was also declared that members shall not be imposing custom duties on electronic transmission(ET) for the time being. In 1998 itself the GC decided that four Councils of WTO, namely Committee on Trade and Development (CTD), Council for Trade in Goods (CTG), Council for Trade in Services (CTS) and Council for Trade Related aspects of IPRs (CTRIPR) would examine related issues in electronic commerce. In 2001, GC further included number of cross cutting issues involved in electronic commerce to be examined. In 2009 GC decided to include development related issues in Work Programme. Since then, on the pretext of pending examination of issues under the WP by the various committees, declarations were made, at subsequent MCs, to grant more time to the committees and to continue with the current practice of not imposing custom duties on electronic commerce transactions by the member countries. In fact, at WTO, members are yet to have consensus on the definition of 'electronic transmissions'. Since March, 2020, India is demanding faster completion of assigned work by the various councils under Work Programme on Electronic commerce that mandated work under WP in various committee as it felt that current moratorium on custom duty on electronic transfer is against the interest of developing countries and having negative impact on job creation and revenue generation. South Africa and other members of Africa Group supported India's stand.On the

other hand, in October 2021, G-7 countries including Canada, France, Germany, Italy, Japan, UK and US demanded that Electronic transmissions, including the transmitted content, should be free of customs duties and WTO Moratorium on Customs Duties on Electronic Transmissions. They supported a permanent prohibition of such duties. Present trend of physical trade of digitizable products falling substantially over the period resulting in tariff revenue for India. The surging trend in digitisation of greater number of products, especially increasing percentage of 3D printing of manufactured goods is showing further losses of tariff revenue. Emerging areas such as cyber security services, data annotation market, fintech market and global hub for electronic system design and manufacturing are going to make India a leading digital economy in the world. Banking, insurance, manufacturing, retail, media and entertainment all are adopting new tools and technologies including 3D printing. From India's perspective, we have to understand that this issue of moratorium on custom duties on electronic transmissions cannot be ignored any longer. Today, it's the time of the fourth industrial revolution, which will come through digital industrialization. We must not lose this opportunity. When developed countries can go to any extent in the interest of their companies and their economy and put pressure on countries like India, we also need to stop developed countries from disrupting our industrialisation, by taking other developing countries along, the imposition of tariff on electronic transmission will be the first condition for success in fourth industrial revolution, namely, digital industrialisation. Now the 12th Ministerial Conference of WTO is expected to be held soon. India has to unequivocally say that moratorium on customs duty on electronic transmission is very detrimental to the interest of developing countries and decision in this regard should be made immediately.

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Moratorium on Custom Duty on Electronic Transmission

The 12th Ministerial Conference of the World Trade Organization which was scheduled to be held in Geneva, Switzerland from 30th November 2021, is postponed and is expected to take place once pandemic recedes.

There are many examples from which it is clear that the agreements made in the past were asymmetric agreements, in which developed countries managed to include provisions aimed at gaining market access in developing countries by hindering their support to industry, agriculture and other sectors of the economy and thereby, development in these countries was severely affected. However, at the same time, wherever companies of developed countries could benefit, no stone was left unturned in ensuring the concessions from developing countries. In this ministerial conference also, all the efforts made by developed countries are being tried to prevent India from giving subsidies to their small fishermen, limit government procurement from our farmers and harm countries like ours by tinkering rules and processes of World Trade Organization. Though, there is a clear message emanating from official circles, that Government of India will protect national interests in the WTO; there is also a danger that the developed countries will try to isolate India by using their economic muscles.

It is said that trade is war. When the developed countries see the trade negotiations as weapons of war, then India also has to make the appropriate use of the trade negotiations to protect and promote interests of our nation. In this context, the time has now come to press for doing away with the 'temporary provision' of tariff moratorium on electronic products, which has been going on since the inception of the WTO. Significantly, at the time of the start of the WTO, trade in electronic products was very limited. In such a situation, the tariff on the trade of electronic products was temporarily suspended. There is a history of how the developed countries who have been the greatest beneficiaries of the moratorium on custom duty on electronic transmission, have been trying to delay and ultimately making this moratorium permanent.

Introduction

Recognising that global electronic commerce is growing and creating new opportunities for trade, World Trade Organisation (WTO) in its 2nd Ministerial conference (MC) on 20th May, 1998, adopted Declaration on Global Electronic Commerce and decided to establish a comprehensive Work Programme (WP) to examine all trade related issues relating to global electronic commerce keeping into account the economic, financial and development needs of developing countries. The General Council (GC), WTO's highest decision making body, was mandated to produce a report on the progress of the work programme and provide recommendation for action. It was also declared that members shall continue their current practice of not imposing custom duties on electronic transmission.[1]

In the GC meeting on 15th July, 1998, a detailed note was presented by the Secretariat to assist members in deliberations on trade related issues pertaining to global electronic commerce. The Note highlighted various WTO Agreements where electronic commerce was involved. The Note referred to General Agreement on Trade in Services (GATS), Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS), Agreement on Government Procurement, General Agreement on Tariffs and Trade (GATT) and Trade Facilitation.[2]

On 25th September, 1998, the GC adopted the WP on

Electronic Commerce to be taken up by four Councils,namely Committee on Trade and Development (CTD), Council for Trade in Goods (CTG), Council for Trade in Services(CTS) and Council for Trade Related aspects of IPRs (CTRIPR), based on a Note prepared in July 1998 by the Secretariat on WTO Agreements and Electronic Commerce. Exclusively for the purposes of the Work Programme, the term 'electronic commerce' was defined to mean '*the production, distribution, marketing, sale or delivery of goods and services by electronic means*'.[3] Each Council was given specific jobs to do in their specific areas.

In its meeting held on 8th May, 2001 and at an informal consultation held on 6th June, 2001, the GC prepared a list of cross cutting issues relevant to electronic commerce. The list, inter alia, includes- (i) Classification of the content of certain electronic transmission, (ii) development-related issues, (iii) fiscal implications of e-commerce, (iv) relationship between e-commerce and traditional form of commerce, (v) imposition of custom duty on electronic transmissions, (vi) competition and jurisdiction, and other legal issues.[4]

At the 4th MC at Doha on 14th November,2001, it was noted that examination of issues under the WP is not yet complete and therefore, it was declared that members shall maintain their current practice of not imposing custom duties on electronic commerce transactions until the next session.[5]

At the 7th MC on 2nd December, 2009, it was decided that the WP shall include, inter alia-(I) development-related issues; (ii) basic WTO principles including non-discrimination, predictability and transparency; and (iii) discussions on the trade treatment of electronically delivered software. It was also agreed to maintain the current practice of not imposing customs duties on electronic transmissions until next session.[6]

At the 8th MC on 17th December, 2011, it was decided that the WP shall also examine enhancing internet connectivity and access to all information and telecommunications technologies and public internet sites for the growth of electronic commerce with special consideration in developing countries and particularly in least-developed countries. The WP shall also examine access to electronic commerce by micro, small and medium sized enterprises, including small producers and suppliers. It was also agreed to maintain the current practice of not imposing customs duties on electronic transmissions until next session.[7]

Similar declaration of extending the moratorium of imposing custom duties of electronic transmission was adopted in all the subsequent ministerial conferences, till the 11th MC held from10-13 December, 2017 at Buenos Aires, Argentina.

Not much progress has been reported by the GC and the four committees constituted to look into various aspects of electronic commerce.

Tug of war on the issue of Electronic commerce at WTO

Presently, e-commerce discussions at WTO are divided into two different tracks-

(i) Multilateral negotiations at the GC through the WP supported by India and Africa Group, and

(ii) Plurilateral discussions outside the WP framework amongst a group of members who have agreed to initiate exploratory work towards future negotiation on trade related aspects of e-commerce. This is known as the Joint Statement Initiative.

Joint Statement Initiative (JSI)

At the 11th MC in December, 2017, agroup of 71 WTO members agreed to initiate exploratory work towards future negotiation on trade related aspects of e-commerce. They decided that participation would be open to all WTO members and will be without prejudice to participants' position on future negotiations and initiative would be undertaken without prejudice to existing WTO agreements and mandates.[8]

In January, 2019, 76 WTO members confirmed in a Joint Statement their intentions to commence these negotiations. They agreed to 'seek to achieve a high standard outcome that builds on existing WTO agreements and framework with the participation of as many WTO members as possible'. This JSI was jointly co-convened by Ambassadors of Australia, Japan and Singapore. India is not a participant in the JSI. Ministers representing the following members of the WTO are participating in the JSI:

Albania; Argentina; Australia; Bahrain, Kingdom of; Brazil; Brunei Darussalam; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Georgia; Honduras; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait, the State of; Lao PDR; Liechtenstein; Malaysia; Mexico; Moldova, Republic of; Mongolia; Montenegro; Myanmar; New Zealand; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore; Switzerland; Chinese Taipei; Thailand; the former Yugoslav Republic of Macedonia; Turkey; Ukraine; United Arab Emirates; United States; and Uruguay.[9]

As of January, 2021, there are 86 WTO members participating in these discussions, accounting for over 90 percent of global trade.

On 18th February, 2021,a Joint Communication from the delegates of India and South Africa was circulated by the GC of the WTO on the legal status of JSI and their negotiated outcomes. India and South Africa clarified that negotiated JSI outcomes, even if offered on most-favoured nation (MFN) basis, cannot result in multilateral consensus to bring it under the umbrella of the WTO. Both countries argued that such a proposition shall be contrary to the fundamental principles and objectives of the multilateral system enshrined in the Marrakesh Agreement (which established the WTO). The JSI proponents intend to create a new set of agreements which are neither multilateral nor plurilateral as defined in Article II.3 of the Marrakesh Agreement. This new form of 'open agreements' is inconsistent with WTO principles. Any attempt to introduce new rules resulting from the JSI negotiations into WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement will be detrimental to the functioning of rule-based multilateral trading system. JSI members have the option to either seek consensus amongst the whole WTO members followed by acceptance by the required proportion of members according to Article X of the Marrakesh Agreement or seek amendments to the provisions of Article X to provide for the so called 'flexible multilateral trading system'.[10]

Osaka Declaration on Digital Economy

Japan attempted behind the scenes to legitimize the informal plurilateral negotiations on digital trade that were never approved at the WTO. On 25th January, 2019,during his presidency at the World Economic Forum summit at Davos, the Prime Minister of Japan Mr. Shinzo Abe launched the Osaka Declaration on Digital Economy.

The signatories to this declaration, termed as Osaka Track, were Argentina, Australia, Brazil, Canada, China, the European Union, France, Germany, Italy, Japan, Mexico, Republic of Korea, Russian Federation, Saudi Arabia, Turkey, United Kingdom, United States, Spain, Chile, Netherlands, Senegal, Singapore, Thailand, and Viet Nam. India was not a signatory to the Osaka Track. All these countries share the view that digitalization is transforming every aspect of our economies and societies, and data is increasingly becoming an important source of economic growth, and its effective use should contribute to social well-being in all countries.[11]

It was said that the launch of the Osaka Track demonstrates the commitment of these countries to promote international policy discussions on, inter alia, international rule-making on trade-related aspects of electronic commerce at the WTO and they renewed their commitment to work together building on the Joint Statement are encouraged by the progress made so far, and resolve to make further efforts to achieve substantial progress in the negotiations by the 12th MC. The Osaka Track will also play an important role in clarifying how far the WTO negotiations can cover, and where it should interface with other ongoing endeavors for maximizing the potential of digital era under other international fora, so that both will complement each other in order to achieve the above mentioned leaders' target and the ultimate goal of the Osaka Track.

The meeting at Davos on 25th January, 2019 was also attended by the Director General of WTO. While addressing the meeting, he referred to the JSI and said *"Prime Minister Abe has shown real leadership in placing a strong focus on the digital economy during this G20 Presidency. The Osaka Track commits the participants to promoting global rules on digital trade. We are working to deliver this through the WTO and we have already seen huge leaps forward being taken. Negotiations are now underway between 78 WTO members representing 90% of global trade. This is real revolution in global trade. Most G20 members are on board. If determination is there, there will be success."*[12]

At the G20 Summit held at Osaka in June 2019, India, South Africa, Egypt and Indonesia boycotted the Osaka Track. They argued that it overtly undermined "multilateral" principles of consensus-based decisions in global trade negotiations, and denied "policy space" for digital-industrialisation in developing countries.

In an informal Trade Negotiation Committee and HoDs meeting held on 12th October, 2020 at WTO, a statement of India was delivered by our Ambassador & Permanent Representative to the WTO. On the issue of E-commerce, it was stated:

"The pandemic has accelerated the shift to a digital

economy and also brought out the digital divide. The urgent need, therefore, is to build the capacity in areas such as digital skills and digital infrastructure, rather than negotiating binding rules on e-commerce in a plurilateral framework. Making rules at this stage will only freeze the non-level playing field in support of existing players and against the interests of new players from developing countries. It is all the more important to understand the scope of the existing temporary moratorium on custom duty on electronic transmission, its potential impact on the sustainability of the domestic industry and negative impact on job creation and revenue generation. We must move forward by reinvigorating the mandated work under the 1998 Work Programme on e-commerce in various Councils."[13]

The Commerce and Industry Minister, Government of India appraised the Parliament of India on the position taken by India and the outcome at the 11th MC held in Buenos Aires, Argentina:

"*The work programme on e-commerce remained dormant for many years as the proponents did not take necessary initiative. There was a strong push in the run up to MC 11 to inter alia, prematurely obtain a mandate to initiate comprehensive negotiations on all aspects of e-commerce, covering goods, services and IPRs without adequate deliberation to reach common understanding even on the definition and scope of the subject.*

A narrative is sought to be created that negotiations on e-commerce would be beneficial for development and would be in the interest of MSMEs. Global e-commerce is dominated by very few countries and the current proposals on the table would freeze the existing non-level playing field permanently against the interests of the vast majority of countries. We will have to keep a close watch on the course of events as rules framed by around 70 of 164 WTO members including US, may have an impact on any e-commerce related work by the WTO in the days to come. In the negotiations, India, the African Group and *several other developing countries has similar positions on these issues*."[14]

Observer Research Foundation (ORF) published an article titled 'Sovereignty in a Datafied World' published in its Issue Brief No. 501 in October, 2021 which summarised the development on e-commerce at WTO, as reflected in the following paragraphs:

"There are, therefore, two parallel tracks for e-commerce negotiations: multilateral negotiations at the General Council through the Work Programme, which requires all WTO members to reach a consensus vis-à-vis any decision; and separate plurilateral discussions outside the work programme framework, thus avoiding the consensus requirement. On 14 December 2020, the members of the JSI circulated a Consolidated Negotiating Text towards the creation of a legal framework for governing electronic commerce at the WTO. Further momentum was reported in July and September2021 by the JSI convenors, Australia, Singapore and Japan, as members reached a consensus on open government data and online consumer protection. JSI members continue to stress that the JSI process is open and inclusive, and will work for the interests of the developed and developing world alike.

India and South Africa have been at the forefront of efforts to counter the JSI's march forward. On 18 February 2021, the two countries circulated a joint communication criticising the JSI approach, and arguing that the initiative was legally inconsistent with WTO rules and was attempting to bypass the consensus model for driving a legally binding framework through the WTO. They argue that the JSI must garner consensus from the entire WTO to be legally valid. India and South Africa's argument is legally correct. Article X was incorporated into the Marrakesh Agreement that set up the WTO to prevent a limited group of countries engaging in clandestine negotiations and undermining the negotiation *function of the WTO.*

Thus far, this communication has had no impact on the efforts of JSI members who continue to maintain that the process is open to all. The resolution of this tussle between the two parallel tracks should be a high diplomatic priority for any country looking to shape the WTO data governance agenda, including India.

Fundamentally, the debate hinges on a question at the core of global trade: How much of sovereign policy space should a nation give up in order to reap the benefits of the global trading system? Given that the digital ecosystem of the developing world is still nascent, the retention of policy space becomes imperative to ensure that the domestic regulatory framework responds to domestic technological and socio-economic concerns rather than mandates imposed through the WTO.

For India, this is a high-stakes battle, both in terms of the evolution of its regulatory framework at home, and its economic and security posturing abroad."[15]

Attempt for permanent moratorium

Pathfinder Initiative

The Asia Pacific Economic Cooperation (APEC) has been active in the area of e-commerce since the late 1990s. The idea of APEC was firstly publicly announced by former Prime Minister of Australia Bob Hawke during a speech in Seoul, South Korea, on 31 January 1989. Ten months later, 12 Asia-Pacific economies met in Canberra, Australia, to establish APEC. The founding members were Australia; Brunei Darussalam; Canada; Indonesia; Japan; South Korea; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and the United States.

China, Hong Kong, and Chinese Taipei joined in 1991. Mexico and Papua New Guinea followed in 1993. Chile acceded in 1994. And in 1998, Peru; Russia; and Vietnam joined, taking the full membership to 21.

In 1998, APEC leaders adopted Blueprint for Action on Electronic Commerce. It was advocated that APEC economies should remain mindful of traditional trade issues presented through the digital medium. Old style trade barriers such as custom duties should not be placed on digital products (loosely defined as those products that can be electronically transmitted-such as books, videos, music, games, software and applications) as it would only impede trade in these products and run contrary to the idea of expanding economic activities over internet.

In a meeting in Shanghai in 2001, APEC leaders strongly endorsed the concept of 'Pathfinder Initiatives'. The concept is like JSI that new cooperative arrangements, initiated by some economies, take account of the interest of others and encourage them to join all such new arrangements at later dates.

Many APAC economies have gone beyond the incremental WTO commitment by binding the moratorium in FTAs/RTAs with other APEC member economies. In total, 15 APEC economies have entered into agreements containing the moratorium since 2008 and recently, a permanent commitment not to impose such custom duty was agreed by 12 economies participated in the Trans-Pacific Partnership (TPP) Agreement.

In 2016, the supporting APEC economies namely Australia, Brunei, Canada, Chile, Japan, South Korea, Mexico, New Zealand, Peru, Singapore, Chinese Taipei and the United States agreed to seek to enhance participation in the Pathfinder through continuous dialogue in relevant APEC fora and to identify capacity building opportunities for a permanent custom duty moratorium on electronic transmissions, including content transmitted electronically in the WTO.[16]

European Centre for International Political Economy (ECIPE) in its Policy Brief No. 3/2019 has published a study which examined the impact of imposing tariffs on electronic transmission by India, Indonesia, South Africa and China and has concluded that imposing such tariffs would be fiscally counter-productive for these countries. Each of the four countries would lose considerably more in gross domestic product than they gain in tariffs. For example, for India, the Study has shown GDP Loss of USD 1,930 Million as against USD 497 Millions of tariff potential.

The arguments on which the study results have been arrived at are given below:

1. Duties shall have negative economic consequences in the form of higher prices and reduced consumption;
2. Duties would take a toll on domestic output that would depress tax collection; and
3. Duties shall involve very significant enforcement and compliance cost in implementing tariffs.[17]

A Joint Communication from India and South Africadated 10th March, 2020 was circulated to all the member states by WTO Secretariat on the WP where the member states clarified the following aspects relating to Moratorium on imposition of custom duty on electronic transmission:

"The communication narrated that in 1998 when the moratorium decision was taken, the digital economy was at its earliest inception. At that time, the WWW was only starting to be used by the general public. There was no clarity regarding how the economy would be transformed by digital advancements. Today, the digital economy is growing rapidly. With the advent of new technologies- 3D printing, big data analytics, artificial intelligence, our economy is being further transformed. Traditional trade in goods is expected to be completely changed with 3D printing.

Tariffs are a tried and tested policy tool for supporting infant and even matured industries. All successful economies have arrived at a higher levels of development because they started off first giving domestic industries the protection through tariffs to grow and gain competitiveness. The vast majority of developing countries are net importers of digital products. With zero tariffs, the moratorium is likely to make developing countries even more dependent on imports of digital products from the developed countries. If they are to develop and make progress on the SDGs, these counties require the use of tariff policies for the digital sector. The loss of the use of tariffs for the digitized goods as a result of the moratorium therefore poses very profound challenges for developing countries. Three counties namely, US, China and EU account for 80% of the cross-border e-commerce in the world which clearly show that the benefits of digital economy are highly uneven.

The communication also referred to UNCTAD's Research Paper (2019) where it was found that based on the identification of a small number of digitizable goods in five areas, namely printed material, music and video downloads, software and video games, it was estimated loss of tariff revenue of tariff revenue of more than $10 billion globally and 95% of which is borne by developing countries. As more and more goods are getting digitized with the advent of Industry 4.0 and the advent *of 3D printing technologies, the estimate of fiscal revenue forgone will snowball. Most of the developing counties are experiencing profound challenges due to infrastructure/technological divide, the skills divide and the rising concentration in digital markets, particularly the market power of global digital platform.*

Another argument given for removal of moratorium was that by no means that members will necessarily impose custom duties across the board. The key is policy space and to use such policy space appropriately for domestic digital industrialization and the generation of local jobs in the ear of industry.

The moratorium will be equivalent to developing counties giving the digitally advanced countries duty free access to our markets. This will be catastrophic for economic growth, jobs and the attainment of SDGs."[18]

International Chamber of Commerce (ICC)is the institutional representative of more than 45 million companies in over 100 countries. Its members include many of the world's leading companies, SMEs, business associations and local chambers of commerce. It represents business interests at the highest levels of intergovernmental decision-making, whether at the World Trade Organization, the United Nations or the G20.

The Working Group of ICC on WTO Plurilateral Negotiations on Trade-Related aspects of Electronic Commerce released a series of 4 parts of ICC Briefs to assist WTO member states in their Plurilateral negotiation in Geneva on the trade related aspects of e-commerce.In March, 2021, in ICC Issues Brief N0.2, it has recommended that it is time now to make the moratorium permanent by prohibiting custom duties and formalities on electronic transmissions. It has given the following arguments for its suggestion to make moratorium permanent:

1) The moratorium's economic benefits outweigh any potential tariff revenue from digitized goods and services including

for developing and least developed countries;

2) Custom duties and formalities on electronic transmissions are virtually impossible to implement and enforce and

3) The calculation of tariffs for electronic transmissions is unworkable. An ad valorem assessment will not work for majority of electronic transmissions and a non- ad-valorem assessment will have highly distortive impacts on the digital economy.

The ICC Working Group suggested that achieving global consensus on direct and indirect taxes regimes based on international best practices is the optimal way to deal with this public policy concern.

Through this, the ICC has joined the WTO members participating in the JSI process in calling for a permanent prohibition on custom duties on electronic transmission.

ICC has also referred to the efforts by APEC countries to make the moratorium permanent through the Pathfinder Initiative.

ICC has also referred to the ECIPE study discussed previously.

The ICC Issue Brief No.2 has also referred to a research paper from a member of UNCTAD's secretariat Rashmi Banga and has termed it a paper written in her personal capacity which assumes 'ET means the online trade of digitizable products or the online delivery'.ICC felt that such unilateral definition of ET. was not in accordance with multilateral negotiation protocol.[19]

In July 2021, India said at the GC meeting of the WTO that "*During the coming few months before MC-12, we need to engage constructively on various issues under the (e-commerce) work programme. We also need to have a clear understanding on the scope of moratorium, to enable us make an informed decision on extension or otherwise of the moratorium in the upcoming Ministerial Conference. As we have been repeatedly highlighting, a re-consideration of the moratorium is critical for developing countries, inter alia, to preserve policy space to* *regulate imports, generate revenue through a simple and direct instrument such as customs duties and achieve digital industrialization.*

It is incumbent upon proponents of moratorium extension to establish a clear and direct link showing that the moratorium on customs duties on electronic transmissions has had a substantive positive impact on the development of e-commerce around the world.

We advocate an evidence based, data-backed decision on this subject. This will also help us understand how the growth of this sector depends on the extension of the moratorium and how will it be affected if the moratorium is not renewed." [20]

In October, 2021, G-7 trade ministers, including Canada, France, Germany, Italy, Japan, UK and US said in a Joint Statement that *"Electronic transmissions, including the transmitted content, should be free of customs duties, in accordance with the WTO Moratorium on Customs Duties on Electronic Transmissions. We support a permanent prohibition of such duties,"* [21]

What should be India's Stand on moratorium on custom duties on ET at WTO?

The answer to this question can be visualised from data on business prospects in the IT sector in India. India is emerging as one of the important players in all aspects of digital economy. The large availability of required talent pool in the country, steady foreign investment in tech companies as well as startups and reasonable support from the Government has contributed in this development.

UNCTAD- Research Paper No. 29 –Feb, 2019 authored by Rashmi Banga, Senior Economic Affair Officer made an attempt to define 'electronic transmission' (ET)as online trading of digitizable products.' 'Digitizable products' are those products which are traded both in physical form as well as online i.e., downloaded from internet e.g. music, e-books, software, video games etc. ET differs from cross border e-commerce as it excludes those products which are ordered online but delivered physically. The paper has few important findings as given below:

1) *ET is wiping out cross border physical global trade. As online trade increases, physical trade will decrease so custom revenue will decline. Physical trade of digitizable products is falling by 2.7% per annum since 2000. The global imports of these products amounted to US$ 94 billion in 2014 with MFN tariffs of 6.7%.*
2) *The loss of tariff revenue is estimated to be US$ 756 million, of which 92% is lost by the developing countries. It is highlighted that this loss is 0.26% of custom revenues.*
3) *Tariff revenue loss of moratorium on custom duties on physical imports of digitizable products for developing countries is 30 times more than that for the developed countries. The estimates show that 95% of world's total tariff revenue loss due to moratorium will be borne by the developing countries.*[22]

Research and Information Systems in Developing Countries (RIS) in its publication, E-commerce Issues at the WTO Discussions and India, issued in March, 2020 has highlighted the looming prospect of digitization of greater number of items and the surge in trade in such digitizable items vis-à-vis the trade in those very items in their physical form. It elaborated that 3D printing can be used for manufacturing products in the sectors including automobile, auto components, health and medicine, medical devises, aviation, aerospace components, electronics, construction equipments, and a host of consumer items such as toys, shoes, textile products, jewellery, furniture and household goods. According to a Report by Dutch Banking and financial services conglomerate, ING, 50 percent of manufactured goods will be 3D printed in the year 2060 and if investment doubles every five years, the possibility of 50 percent of manufactured goods being 3D printed could be achieved by 2040 itself.[23]

India Brand Equity Foundation (IBEF) has published on its website that:

"*According to STPI (Software Technology Park of India), software exports by the IT companies connected to it, stood at Rs. 1.20 lakh crore (US$ 16.29 billion) in the first quarter of FY22.*

The IT & BPM industry's revenue is estimated at ~US$ 195 billion in FY21, an increase of 2.3% YoY. The domestic revenue of the IT industry is estimated at US$ 45 billion and export revenue is estimated at US$ 150 billion in FY21.

Indian software product industry is expected to reach US$ 100 billion by 2025. Indian companies are focusing to invest internationally to expand global footprint and enhance their global delivery centres.

The data annotation market in India stood at US$ 250 million in FY20, of which the US market contributed 60% to the overall value. The market is expected to reach US$ 7 billion by 2030 due to accelerated domestic demand for AI.

Indian IT's core competencies and strengths have attracted significant investment from major countries. According to Gartner estimates, IT spending in India is estimated to reach US$ 93 billion in 2021 (7.3% YoY growth) and further increase to US$ 98.5 billion in 2022. The BPM sector in India currently employs >1.4 million people, while IT and BPM together have >4.5 million workers, as of FY21. The computer software and hardware sector in India attracted cumulative foreign direct investment (FDI) inflows worth US$ 74.12 billion between April 2000 and June 2021. The sector ranked 2nd in FDI inflows as per the data released by Department for Promotion of Industry and Internal Trade (DPIIT).

India is the leading sourcing destination across the world, accounting for approximately 55% market share of the US$ 200-250 billion global services sourcing business in 2019-20.

India is the topmost off shoring destination for IT companies *across the world. Having proven its capabilities in delivering both on-shore and off-shore services to global clients, emerging technologies now offer an entire new gamut of opportunities for top IT firms in India. The industry is expected to grow to US$ 350 billion by 2025 and BPM is expected to account for US$ 50 55 billion of the total revenue.*[24]

The U.S. Commercial Service, in its publication on Information and Communication Technology, published in October, 2021, devoted a chapter on India. As per the publication:

"Contributing over 13 percent to India's GDP, the Information and Communication Technology (ICT) sector and the Digital Economy are major economic drivers. India's digital economy generates approximately $200 billion annually from information technology (IT) and business process management (IT-BPM), IT-enabled services (ITeS), E-Commerce, electronics manufacturing, digital payments, and digital communication services. India aims to reach a $1 trillion digital economy and a $5 trillion GDP by 2025.

India imported over $2.2 billion in computer and electronic equipment (NAICS code 334) from the United States in 2017. India has emerged as the second largest manufacturer of mobile handsets in the world. At 1.2 billion (1.18 billion wireless and 20 million wired), India has the second largest number of telecom subscribers in the world. India has 778 million (755 million wireless and 22 million wired) broadband subscribers.

The broadcasting sector is comprised of television and radio services. India is the world's second-largest television (TV) market after China. At the end of March 2020, there were about 212 million households in India served by cable TV, DTH (direct to home satellite TV), HITS (headend in the sky satellite TV), and IPTV (internet protocol television) services, in addition to the Doordarshan TV network (India's public broadcaster). The pay-TV customer base consists of around 103 million cable TV subscribers, 70.26 million active DTH subscribers, and 2.15 *million HITS subscribers.*

Technology investments by Indian enterprises in India grew at an approximate four percent compound annual growth rate (CAGR), from $38 billion in 2017 to $45 billion in 2021. Major drivers of this growth include digitalization and the modernization of services. The banking, financial services, and insurance (BFSI), manufacturing, retail, consumer packaged goods, media, and entertainment industries are all adopting digital innovations to transform their business models. Enterprises are adopting new tools and technologies such as chatbots, natural language processing, robotic process automation, cognitive analytics, security operations centers, internet of things (IoT), 3D printing, data analytics, cloud computing, artificial intelligence, connected vehicles, blockchain, and augmented/virtual reality to improve services and experiences for their customers.

E-Commerce: India's E-Commerce market is one of the fastest growing in the world. India's cyber security service industry is growing rapidly as the country's digital economy and critical infrastructure sectors expand, and it is expected to reach $7.06 billion by2022 according to the Data Security Council of India (DSCI).

India is one of the fastest-growing Financial Technology markets globally. Digital payments are the primary driver of growth in this space, followed by digital lending, and other tech-enabled financial services. The Indian FinTech market is currently valued at $31 billion and expected to grow to $84 billion by 2025. FinTech transactions are poised to reach $138 billion in 2023, more than double the $66 billion in 2019.

India aspires to become a global hub for Electronics System Design and Manufacturing (ESDM), and the country's demand for electronics hardware is expected to reach $400 billion by2025. India's production of electronics grew from $29 billion to $75.7billion from 2014 to 2020, and the country's share of global electronics manufacturing grew from 1.3 percent in 2012 *to 3.6 percent in 2019. The production of mobile handsets rose to 330 million units in 2020, up from just 60 million units in 2014.'"*[25]

In a Workshop on the Moratorium on Customs Duties on Electronic Transmissions: Development dimension of the moratorium at WTO, Geneva, on 29 April 2019, NASSCOM, India made a presentation. While acknowledging that the customs moratorium on electronic transmission (ET) has enabled cross border e-commerce, it supported the customs moratorium as it has been conducive to innovation in technologies and has promoted knowledge and content based e-commerce. However, it emphasised that in the background of few distinct trends such as shift in the carrier (from physical to ET), digital product to digital services and Emergence of Remote Additive Manufacturing (3D printing), it is desirable to understand the implication of the moratorium on WTO's GATT-GATS framework. It is interesting to note that on the issue of difficulty in levying custom duty on electronic transmissions, It argued that the success in levy of consumption tax or GST on foreign based entities for digital products/ services shows that it might also be possible to levy customs tariffs.[26]

However, in July, 2020, NASSCOM made a presentation to Ministry of Commerce on the subject "Considerations surrounding the Custom Duty Moratorium on Electronic Transmissions". It expressed its opinion on moratorium on custom duty on electronic transmissions as mentioned below:

"Overtime, the technical feasibility of determination of custom duty on ET has improved and therefore, the case for an automatic rollover of the 'temporary' moratorium without assessing the economic implications has weakened. India's Software Products annual revenue is USD 7.1 billion out of which USD 2.3 billion are exports. Given that, India is a net importer with Software Products import at nearly USD 10 billion".

It further emphasised that both the economic impact and technical feasibility are directly related to what is considered under the scope of electronic transmission. A wide definition could present many challenges and make it impractical to lift the moratorium.

It suggested that a narrow definition could be a basis for a realistic evaluation of the merits and demerits of the moratorium. In framing a narrow definition, concerns such as classification of digitised products (as goods or services), and the scope and valuation of the dutiable object (whether the value should be limited to the carrier medium carrying content or subsume the content as well) need to be settled.

It suggested that while defining the scope of moratorium, articulate that transmission of content anything that could have been originally transferred over a carrier medium in tangible form should be ideally be good and to ensure customised software development or where software is billed as service based on man-hours remain out of the ambit of goods.[27]

It is unfortunate that the developed countries, kept tariffs on the import of electronic products suspended on several pretexts. Today the situation is that more than US$ 30 billion of electronic products are being imported by India alone. That is, even if 10 percent tariff is imposed, then the Government of India will get revenue of more than US$ 3 billion. The issue here is not only about loss of revenue, it's a much larger issue for a country like India, where our start-ups and software companies are able to make a variety of electronic products, where we can make movies and other entertainment products in our own country, but when all such products are imported undeterred, without tariff, there is hardly any incentive to produce them domestically. This tariff moratorium on e products is benefitting US, European countries and China.

Along with this, we also have to understand that production processes in the world are also changing fast. Today, to import any item from abroad, it is not necessary to import it physically. By 3D printing that object can be made physically using software and other materials in the importing country itself. That is, if this happens, then the country may also be made to lose import duties imposed on the import of physical goods. That is, the issue is not only about loss of revenue on electronic products, but also of possible loss of import duties on physical goods in future.

There is still no clarity in the world about definition of electronic commerce nor is there any consensus in the understanding of its trade related aspects. Attempts are being made to confuse the subject of e-commerce and the scope of discussions on it using various tactics. India and South Africa are already working very carefully and aptly and have submitted their resolution to the WTO Council, where they have questioned the moratorium on tariffs on electronic products. The resolution states that the proposal for moratorium on tariffs on electronic transmissions (electronic products) in the 1998's ministerial conference needs to be reviewed. In this context, India and South Africa maintain that the 1998 resolution had not unanimously decided on the scope of the moratorium, and it was also unclear at that time that the digital revolution would spread so rapidly.

In December 2019, the member states extended this moratorium for six months till June 2020 (forthcoming 12th Ministerial Conference). Due to Covid 19, the 12th ministerial conference could not be held in June 2020, and it couldn't be held even in 2021 also. It was then said that the definition of electronic transmission would be clarified by the WTO member countries in the 12th Ministerial Conference. Now the 12th Ministerial Conference will be held soon. In this resolution of India and South Africa, wherein the views of many developed and developing countries have also been incorporated, it has been said that its now imperative for the WTO to review this tariff moratorium, in the interest of the developing countries; so as not to only regulate their imports, but also to give them policy space to formulate a prudent policy, to generate revenue directly by imposing tariffs and to achieve the objective of digital industrialization.

We have to understand that this issue cannot be ignored any longer. India missed the first three industrial revolutions, due to which our industrial development was hampered and stalled. Today is the time of the fourth industrial revolution, which will come through digital industrialization. We must not lose this opportunity. When developed countries can go to any extent in the interests of their companies and their economy and put pressure on countries like India, by taking other developing countries along, we also need to stop developed countries from disrupting our industrialisation. The imposition of tariff on electronic transmission will be the first condition for success in fourth industrial revolution, namely, digital industrialisation.

Conclusion

At WTO members are yet to have consensus on the definition of 'electronic transmissions. UNCTAD Research Paper No. 29-February, 2019 has made an attempt to define it and in the present scenario, the definition appears to be quite reasonable. There is no doubt that digital transactions are contributing substantially in global trade but the UNCTAD paper has highlighted present trend of physical trade of digitizable products falling substantially over the period and such fall has resulted into estimated loss of USD 756 Millions of tariff revenue. RIS also in its publication referred above has pointed out the surging trend in digitisation of greater number of products, especially increasing percentage of 3D printing of manufactured goods, resulting in reduction in trade of such digitizable products in physical form.

The data available on the website of IBEF as well as October, 2021 publication on ICT of US Commercial Services indicate all round growth of India in software, BPM export and software products exports. India has also emerged as prominent, sourcing and offshore destination of IT companies' world over. IT spending in India which was at USD 45 Billion in 2021 is also increasing exponentially. Technology investments by Indian enterprises is expected to grow beyond USD 45 Billion in 2021 and demand for electronic hardware is expected to reach USD 400 billion by 2025 ICT sector which is contributing 13% of India's GDP, is poised to increase its share. Emerging areas such as cyber security services, data annotation market fintech market and global hub for electronic system design and manufacturing are going to make India a leading digital economy in the world. On the other hand, banking, insurance, manufacturing, retail, media and entertainment all are adopting new tools and technologies including 3D printing. India has emerged as the second largest manufacturers of mobile handsets in the World.

NASSCOM in its presentation to the Ministry of Commerce in July 2020 has confirmed that India is net importer with software product imports at nearly USD 10 Billion and most of the ITeS and software exports from India is not likely to fall in the category of goods and therefore, shall be impacted if other countries also start charging custom duty onelectronic transmissions. As explained by UNCTAD paper and as confirmed by NASSCOM, if decided, implementing levy of custom duty on electronic transmissions is feasible.

Based on the present export from and import of goods and services in India digitally and considering the growth prospects of ICT sector in India, it can be easily concluded that not imposing custom duty on electronic transmission will be a losing proposition for India and therefore, India alongwith its ally Africa Group should strongly oppose extension of moratorium on custom duties on Electronic Transmission at all forum of WTO where this issue is being discussed.

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