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How 'Digital Trade' Rules Would Impede Taxation of the Digital Economy in the Global South

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PART 3: THE MORATORIUM ON TARIFFS ON ELECTRONIC TRANSMISSIONS

By Manuel Montes and Jane Kelsey

Abstract

Developing countries in the World Trade Organisation (WTO) and many free trade agreements (FTAs) are being asked to agree to a **permanent moratorium on levying customs duties on electronic transmissions** without a fully informed understanding of the possible impact on their public finances and the potential of their domestic enterprise sector to participate in those digital activities. That proposal constitutes the most immediate threat from trade rules to developing country public finances and to their industrial development.

Successive UNCTAD studies have warned that converting the moratorium into a permanent ban would have **serious future economic and development impacts**. This report supports that finding, although it projects a slightly lower level short-term impact. It places greater emphasis than UNCTAD on the potential for the moratorium to **diminish the tax policy space of developing countries** permanently and to disable tax policy over a wide swathe of internationally traded goods or services.

This risk arises because:

- developing countries are more dependent on trade tariffs than developed countries;
- there is considerable ambiguity in the scope of the current moratorium;
- the growth rate for digitalised products has been and will continue to be massive;
- although existing estimates of losses of tariff revenue from the moratorium appear to be relatively small at the present time, there is potential for explosive growth in the future;
- contrary estimates from developed country analysts that there would be net losses from *not* continuing the moratorium use methodologies that are laden with problematic assumptions;
- non-tariff impacts on development, and the policy space for developing countries to diversify their economies, are not adequately factored into those assessments;
- the huge range in the estimated impacts of a moratorium on a country-by-country basis across the global South and unclear future trends reinforce the importance of retaining policy space; and
- claims that it is technically problematic to levy customs duties on electronic transmissions are overstated.

All of these arguments militate against a permanent moratorium on tariffs on electronic transmissions.

This report is Part 3 of the forthcoming book titled **How 'Digital Trade' Rules Would Impede Taxation of the Digital Economy in the Global South**.

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THE MORATORIUM ON TARIFFS ON ELECTRONIC TRANSMISSIONS

A KEY demand of the plurilateral negotiations on e-commerce that are proceeding without a mandate in the WTO is to make the temporary moratorium on levying tariffs on electronic transmissions permanent. The US identified that as a priority for the ministerial conference in 2020 (MC12).[1] The ministerial was postponed due to COVID-19, but the pressure has continued. At a time when the increasingly integrated digitalised economy is undermining traditional forms of taxation that countries in the Global South have relied on, the proposal for such a ban constitutes the most immediate threat to both their public finances and their industrial development.

3.1 The significance of tariffs for development

Customs duties or tariffs have been collected on the cross-border trade in goods for hundreds of years. Tariffs are a form of transaction tax and, if applied to physical goods, are relatively simple and easy to apply. They are levied on the importer of the goods based on a percentage of the import price of those goods. Tariffs are imposed on the cross-border transfer of goods, but not on the cross-border rendering of services, which were not traditionally viewed as tradeable. Consequently, international trade rules treat goods as qualitatively different from services, subject to different kinds of tax, and the tax exceptions in agreements on goods and services reflect that.

Since 1947, when a small group of largely developed countries adopted the GATT, free trade agreements have progressively reduced tariffs,[2] either product by product or using an across-the-board formula. According to neoclassical economics, the shift in demand towards lower-priced imports and away from less efficient local producers is expected to improve the efficient allocation of capital and human resources. Consumers also benefit from lower import prices (assuming the cuts are

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1 'US Engagement at the World Trade Organization. Remarks by Ambassador Dennis Shea', Asia Society, Washington DC, 6 February 2020. Available at: https://geneva.usmission.gov/2020/02/07/u-s-engagement-at-the-world-trade-organization/

2 Other mechanisms, such as quotas and important licensing, were converted to tariffs or subject to separate rules

passed on by the middlemen, of which there is no guarantee). Countries need to realign their fiscal policies to compensate for lost tariff revenue by reducing expenditure or by finding new sources of revenue, commonly by introducing a consumption tax that applies equally to domestic and foreign-sourced goods and services.

The importance of tariffs as policy tools for the Global South has been historically recognised through the centrality of special and differential treatment to the GATT. Tariffs serve a range of economic, social and employment objectives, including to protect domestic producers by making imported products more expensive. They are easily collectable sources of revenue, especially for developing countries that have rudimentary income and corporate tax regimes alongside large informal economies. Despite decades of trade liberalisation and structural adjustment programmes, tariffs remain an important source of revenue in the Global South. The World Tariff Profiles for 2019 show the level of tariffs for most developed countries range between 2% and 6% compared to 10% to 15% for most developing countries.[3] Some products have much higher bound tariff levels that set the maximum they can levy, even if the rate they apply is significantly lower.

When governments negotiate tariff cuts, they are necessarily informed by their assessment of economic, social and fiscal impacts, as far as negotiating asymmetries allow. That calculation was easier when trade negotiations were focused on traditional modes of cross-border trade in physical commodities, and governments and economists could anticipate trends and calculate the fiscal consequences. The rise of offshore digital marketplaces like Amazon significantly alters presumptions on which tariff commitments have been made, including the *de minimis* threshold below which imported goods are not subject to customs duties. This shift also affects the anticipated revenue from taxing domestic bricks-and-mortar businesses and from value-added taxes on consumption. Traditional forms of cross-border commodity exchange are also progressively being replaced by digital modes of transmitting products, including additive manufacturing printing or 3D printing. As digitised products have become intertwined with services and intellectual property it is debatable whether the Harmonised System (HS Codes) that classifies globally traded products even applies to them. All countries are grappling with these complexities, but the implications for developing countries are most severe.

[3] WTO (2019) 'World Tariff Profiles'. Available at: https://www.wto.org/english/res_e/publications_e/world_tariff_profiles19_e.htm

3.2 The history of the moratorium

The moratorium on customs duties on electronic transmissions has a long history. At their second ministerial conference in 1998 WTO Members adopted a Ministerial Declaration on Electronic Commerce[4] that resulted in a Work Programme on Electronic Commerce 'to examine all trade-related issues relating to global electronic commerce'.[5] Ministers also decided:

> *Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions. When reporting to our third session, the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.* [6]

The terms used in the Declaration were not defined, but it refers to 'customs duties' and not 'taxes'. A Secretariat paper produced at the time also stated that legally the moratorium did not apply to imported products ordered online but delivered in tangible form. [7]

Renewal of the moratorium became strategically linked to the renewal of another temporary moratorium, on the scope of disputes under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[8] At that time, the two moratoria were viewed as a quid pro quo. Both have been routinely rolled over by ministerial conferences since then.[9]

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4 WTO Ministerial Conference, Second Session, 'Declaration on Global Economic Commerce, Adopted on 20 May 1998', WT/MIN(98)/DEC/2

5 WTO 'Work Programme on Electronic Commerce, Adopted by the General Council on 25 September 1998', WT/L/274

6 The moratorium appears not to be enforceable under the WTO's dispute settlement system because it is a ministerial decision, and not one of the listed agreements to which the Dispute Settlement Understanding applies

7 General Council, 'WTO Agreements and Electronic Commerce. Note by the Secretariat', WT/GC/W/90, 14 July 1998, para 15

8 The WTO dispute settlement procedures allow members to initiate a dispute if they consider that measures by another member are impeding the objectives or nullifying the benefits of a covered agreement, even if there is no violation of its obligations. Under Article 64.2 of the TRIPS agreement WTO Members agreed not to bring non-violation nullification and impairment complaints during the first five years, from 1995 to 1999. There have also been proposals to have that moratorium made permanent. See 'Proposal to Permanently Exclude Non-Violation and Situation Complaints under the WTO TRIPS Agreement. Background Note', South Centre, 20 September 2017. Available at: https://www.southcentre.int/wp-content/uploads/2017/09/Ev_170925_SC-Workshop-on-E-Commerce-and-Domestic-Regulation_Presentation-Background-Note-on-Non-Violation-Sept-2017-Nirmalya-Syam_EN.pdf

9 While the moratorium lapsed on two previous occasions it was renewed retrospectively. The ministerial conferences that concluded without formal declarations were Seattle in 1999, with the moratorium retrospectively extended in the Doha Declaration 2001, para 34, and in Cancun in 2003, after which the moratorium was extended by a Decision of the General Council on 2 August 2004, WT/L/579, para 1(h).

The US first sought to make the e-commerce moratorium permanent in 1999.[10] Over time it has gained support from other developed countries, notably Japan. An attempt to achieve this at the eleventh WTO ministerial conference in December 2017 (MC11) failed and the temporary measure was renewed for another two years, until December 2019.[11] However, the next WTO ministerial conference (MC12) was not scheduled until June 2020. At the General Council in December 2019, India and South Africa led the developing countries' opposition to a further renewal, saying the original quid pro quo was no longer valid and the impacts fell disproportionately on developing countries.[12] Ultimately, the moratorium was extended until the next ministerial. The postponement of the MC12 due to the COVID-19 pandemic deferred the battle over the moratorium to an as-yet undetermined date.

In parallel to these moves within the WTO, a number of FTAs, starting with the TPPA/CPTPP,[13] have made the moratorium permanent for parties to those agreements. Many developing countries are under now pressure to agree to include this provision in their FTAs with the US, EU and others. That would have a flow-on effect of reducing the number of countries likely to oppose a permanent moratorium in the WTO and foster divisions among the Global South.

Some countries have rejected such demands. A particularly significant counter-precedent was set by the electronic commerce chapter in the 16-country Regional Comprehensive Economic Partnership (RCEP), involving China, India, South Korea, Japan, Australia, New Zealand and the ten ASEAN nations.[14] The chapter was completed in 2019, although the agreement was not scheduled for signing until late 2020. Article 12 reiterates the parties' commitment to the WTO temporary moratorium, with any future adjustments to that position depending on outcomes within the 1998 WTO Work Programme on Electronic Commerce.[15] Further, the entire RCEP e-commerce chapter is unenforceable.

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10 WTO, 'Submission from the United States, Work Programme on Electronic Commerce', WT/COMTD/17, 12 February 1999, 3; General Council, 'Submission from the United States, Work Programme on Electronic Commerce', WT/GC/W/493/Rev.1, 16 April 2003, paras 20-22. For a detailed background see Sacha Wunsch-Vincent (2006), *The WTO, The Internet and Trade in Digital Products: EC-US Perspectives,* Hart Publishing, Oxford.

11 WTO, 'Work Programme on Electronic Commerce, Ministerial Decision of 12 December 2017', WT/MIN(17)/65

12 WTO Work Programme on Electronic Commerce, 'Moratorium on Customs Duties on Electronic Transmissions: Need for a rethink? Communication from India and South Africa', WT/GC/W/747, 13 July 2018; WTO Work Programme on Electronic Commerce, 'The E-Commerce Moratorium and Implications for Developing Countries. Communication from India and South Africa', WT/GC/W/774, 4 June 2019

13 TPPA/CPTPP Article 14.3

14 Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam. India has since withdrawn from the negotiation.

15 RCEP Electronic Commerce Chapter, Article 12. The leaked text is available at: https://bilaterals.org/?rcep-e-commerce-chapter-text-41085

3.3 Revenue implications of a permanent ban

Developing countries are being asked to agree to make the temporary moratorium permanent without a fully informed understanding of the possible impact on their public finances and the potential of their domestic enterprise sector to participate in those digital activities.[16] Successive UNCTAD studies have warned that converting the moratorium into a permanent ban would have serious future economic and development impacts.[17] This report supports that finding, although it projects a slightly lower level short-term impact; however, it places greater emphasis on the potential to diminish the tax policy space of developing countries permanently and to disable tax policy over a wide swathe of internationally traded goods or services. This risk arises because:

(i) Developing countries are more dependent on trade tariffs than developed countries;
(ii) There is considerable ambiguity in the scope of the current moratorium, especially the nature of what is being traded internationally, which gives rise to uncertainty and contest over its scope;
(iii) Assuming the moratorium applies to 'digitised products', the growth rate for this type of 'good' has been and will continue to be massive;
(iv) Although existing estimates of losses of tariff revenue from the moratorium appear to be relatively small at the present time, there is potential for explosive growth in the future;
(v) Contrary estimates from developed-country analysts that there would be net losses from *not* continuing the moratorium use different methodologies that are laden with problematic assumptions;
(vi) Non-tariff impacts on development, especially on the policy space for developing countries to diversify their economies into sectors that are facilitated by digital technology, are not adequately factored into current assessments;
(vii) A huge range in the estimated impacts of a moratorium on a country-by-country basis across the Global South, and an unclear trend in the future, reinforces the importance of retaining policy space; and

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16 During the December 2019 discussions, the US agreed to convene a workshop early in 2020 to assess its scope and the potential revenue implications. That was scheduled for 23-24 March 2020, but was postponed. Ravi Kanth (2019), 'US offers quid pro quo on e-commerce moratorium', *SUNS* #9023, 20 November 2019. Available at: https://twn.my/title2/wto.info/2019/ti191117.htm

17 UNCTAD, *Trade and Development Report 2018,* Chapter III; Rashmi Banga (2017), *Rising Product Digitalisation and Losing Trade Competitiveness,* UNCTAD (hereafter '*UNCTAD 2017*'). Available at: http://unctad.org/en/PublicationsLibrary/gdsecidc2017d3_en.pdf; Rashmi Banga (2019), 'Growing Trade in Electronic Transmissions: Implications for the South', Research Paper No. 29, UNCTAD/SER.RP/2019/1, February 2019 (hereafter '*UNCTAD RP.29 2019*'). Available at: https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf

(viii) Claims that it is technically problematic to levy customs duties are overstated, as evidence from some countries shows.

All of these arguments militate against a permanent moratorium on tariffs on electronic transmissions.

3.3.1 On the importance of collecting trade tariffs

Customs revenues are a major proportion of developing-country public revenues. This is a pattern that is almost historically preordained.[18] Collecting public revenues from goods that cross a border is easier than any other kind of tax.

Figure 1 compares countries' dependence on customs duties. Reading from the bottom of the graph, the US (1% dependence on customs duties) and Japan (0.9% dependence), who are leading proponents of making the moratorium permanent, have minimal dependence on customs duties. All the developing countries are lined up above these two countries, ordered according to the extent of dependence on customs revenue as a proportion of total tax revenue. Many developing countries are up to 30 times more dependent on customs revenues than the US or Japan. For example, Bangladesh near the upper third of the figure is 28.9 times more dependent than the US, the Philippines near the middle is 18.8 times and India near the bottom 12.7 times more dependent than the US. Towards the bottom, even the notable exceptions of China (1.9%) and Brazil (2.2%) are about twice as dependent as the US at 1.0%.

3.3.2 The contested scope of the moratorium

Serious and unresolved ambiguities currently make it impossible to determine the scope of the moratorium. The 1998 Work Programme defined '*electronic commerce'* to mean 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'.[19] The programme would operate through the WTO bodies responsible for four principal areas: Council for Trade in Goods, which focuses on tariff liberalisation, non-discrimination and non-tariff barriers relating to goods; Council for Trade in Services, which addresses regulatory measures affecting services; Council for TRIPS, dealing with intellectual property rights; and development matters in the Committee on Trade and Development.

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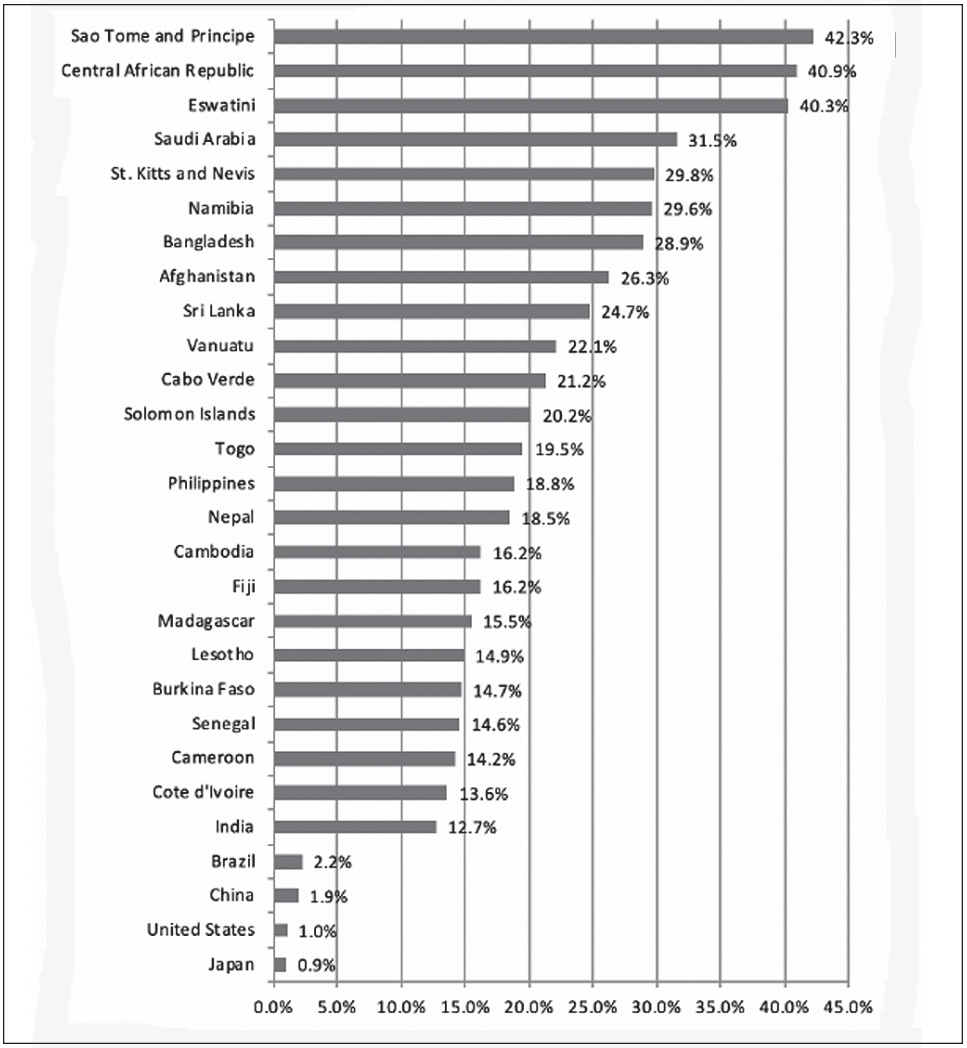
[18] In the United States, tariffs were the largest source of federal revenue from the 1790s to the eve of World War I, until it was surpassed by income taxes. South Centre (2012), 'Economic Partnerships Agreements in Africa: A Benefit-Cost Analysis', Analytical Note SC/TDP/AN/EPA/29, South Centre, Geneva, January 2012. Available at: https://www.southcentre.int/wp-content/uploads/2013/08/AN_EPA29_Economic-Partnership-Agreements-in-Africa_EN.pdf

[19] WTO, 'Declaration on Global Electronic Commerce' (the moratorium), adopted on 20 May 1998, WT/L/274; WTO, 'Electronic Commerce Gateway' (the web page contains citations to various materials), https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

Figure 1: Customs Duties as Share of Tax Revenue, Selected Countries (2016)



Source: Calculations by Co-author Manuel Montes

However, the moratorium (as distinct from the Work Programme) applied to '*the current practice of not imposing customs duties on electronic transmissions'.* None of the three key terms 'current practice', 'customs duties' and 'electronic transmissions' was defined. Despite various seminars, workshops and work programmes there is still no clarity on what they mean. These questions of scope have become much more acute because digitalisation has greatly accentuated two key trends: (i) the possibility for physical goods to be delivered in digital form, and (ii) the shift from sales of physical goods to the supply of services.

Two issues of interpretation are especially problematic. First, some commentators have sought to interpret the potential scope of the moratorium broadly to include the *digital delivery of services*, not just of *digitised products*.[20] That would expand the potential scope of the moratorium far beyond its original intention.

While the 1998 Work Programme defined *electronic commerce* in terms of goods and services, the moratorium applied to '*the current practice of not applying customs duties on electronic transmissions'*. The current practice was to apply customs duties to specified categories of goods described by HS codes that were bound under the GATT, subject to special and differential treatment. Although 'customs duties' are not defined in the GATT, the Article VII rules on customs valuation describe a dutiable item as 'merchandise', which in practice correlate to HS codes. The definition of 'customs duties' in the TPPA/CPTPP supports this interpretation: the term is defined as including 'any duty or charge of any kind imposed on or in connection with the importation of a *good …'* and excludes any 'fee or charge in connection with the importation commensurate with the cost of services rendered'.[21]

Services transactions between foreign suppliers and domestic consumers are governed by *regulatory* disciplines under the GATS, whose rules do not address the liberalisation of customs duties. Technically, there is an area of cross-over between the two agreements: the supply of computer services, including consultancy, development and implementation of software, is classified as a service,[22] whereas software in hard copy or digital form is a good, with an HS classification.[23] WTO rules on customs duties apply to the latter.

There is one element of the 1998 Work Programme that might suggest that customs duties do apply to services. In listing the topics to be addressed by each WTO body, the goods council was to consider 'customs duties and other charges as defined under Article II of the GATT'. The services council was also to consider

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20 Hosuk-Lee Makiyama and Badri Narayanan (2019), 'The Economic Losses From Ending the WTO Moratorium on Electronic Transmissions', No 3/Policy Brief, ECIPE. Brussels (hereafter 'ECIPE 2019')

21 TPPA Article 1.3

22 Sub-sector 1Bb in the classification used in the GATS Services Sectoral Classification List MTN.NGS/W/120, corresponding to UNCPCprov 842

23 For the GATT classification see HS code 49-HS 49119910 of Chapter 49

'customs duties', without any further elucidation. The accompanying note prepared by the Secretariat said it was only aware of one case where tariffs were applied to a cross-border service, which involved purchase by the US of ship repair services conducted offshore. However, the Secretariat treated this as indicating that customs duties could be applied and said there might be more unknown examples.[24] It further noted that 'digital products' are not restricted to digital goods and could include services.[25] The US subsequently corrected the Secretariat's interpretation and 'stressed that the US did not impose customs duties on services'.[26]

Further, the core GATS rules on national treatment and market access do not directly apply to a customs duty on a digital product that is supplied as a service. Customs duties would need to be brought within the scope of the GATS indirectly as a 'measure that affects the supply' of that service and breach one of the GATS rules.[27] A discriminatory tax, including a tariff, could be a measure that affects the competitiveness of a foreign service supplier vis-à-vis their local counterpart. However, that would breach a Member's national treatment obligations in the GATS only if the Member had taken commitments on the relevant service in mode 1 (cross-border supply). It is important to recall that developing countries insisted on the use of request-and-offer negotiations and positive list scheduling as a means to limit the scope of their GATS obligations.

It would be unreasonable and inequitable to extend coverage of the moratorium to services on the basis that such duties might have been possible in 1998, although even the Secretariat could find only one example, and to treat them as covered by GATS rules as a 'measure affecting the supply' of a service if a Member committed that service for that rule in that mode several decades ago. Indeed, the Secretariat itself, in a 2016 assessment of the fiscal implications of the moratorium, limited the scope to *digitisable goods*, and did not suggest that it might apply beyond that to services.[28]

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24 Council for Trade in Services, 'The Work Programme on Electronic Commerce. Note by the Secretariat', S/C/W/68, 16 November 1998, paras 34-35

25 There is no agreement between Members on where the boundary lies between digitised goods and services. One option is to treat all electronic transmissions that have physical counterparts, such as is the case with music, as goods, and the balance of transactions as services. Or they could all be treated as services, as the EU has recently proposed; see for example, Article X.3, EU Proposal to Indonesia; EU New Zealand Free Trade Agreement. Title [] Digital Trade, 25 September 2018, Article 7. Alternatively, all electronic transmissions could be treated either as goods or services without any distinction between the nature of what is being transmitted. The USMCA takes that side-step, saying the definition of electronic transmissions should not be understood to reflect a Party's view that digital products are a good or are a service, leaving this definitional question in the too-hard basket for now. That might imply the extension of the moratorium to digitised goods and services under the USMCA, but it is not the terminology used in the 1998 moratorium

26 Council for Trade in Services, 'Report of the Meeting Held on 14 and 15 December 1998. Note by the Secretariat', S/C/32, 14 January 1999, para 12

27 Council for Trade in Services, S/C/W/68, paras 34-35

28 General Council, 'Fiscal Implications of the Customs Moratorium on Electronic Transmissions: the case of digitizable goods', JOB/GC/114, 20 December 2016

There is a second disagreement on scope. Some developing countries have insisted that the scope of the moratorium is limited to the vehicle or medium of transmission and does not include the content being transmitted. At the MC11, Indonesia sought the insertion of a footnote to clarify that electronic transmissions do not include digital books, films, music, etc. The Director-General of the WTO reportedly assured Indonesia that the footnote was unnecessary because that interpretation was already clear. Indonesia subsequently put the Director-General's assurance on the WTO record:

> *In regard to the discussion on the moratorium on customs duties on electronic transmissions, it is our understanding that* ***such moratorium shall not apply to electronically transmitted goods and services.*** *In other words, the extension of the moratorium applies only to the electronic transmissions and not to products or contents which are submitted electronically. The Indonesian Head of Delegation shared this understanding with the Director-General and his team yesterday and today, in which they responded with a positive confirmation.*[29]

The Indonesian government subsequently introduced a new Chapter 99 to its customs tariff book on 'Software and other digital goods transmitted electronically', although it is yet to levy any product tariffs on these items.[30] Presumably this step is designed to allow them to charge tariffs on those goods in the future on the basis that they are unbound.[31] Noting Indonesia's Statement, India and South Africa called in June 2019 for a common understanding on the scope of the moratorium before it came up for renewal later in the year.[32]

Proponents of the permanent moratorium insist instead that the term 'electronic transmissions' covers digitised *products* themselves. The equivalent provisions in their own FTAs use varying definitions of their scope. The TPPA/CPTPP defines an electronic transmission as 'a transmission made using any electromagnetic means, including by photonic means',[33] and prohibits customs duties on 'electronic transmissions, including content transmitted electronically'. It defines customs duties to include a duty or charge of any kind or a surtax 'imposed on or in connection with the import of a *good*'.[34] It does not define 'content', which appears to be infinitely extendable as the digital technology evolves. The Digital Economic

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29 WTO, 'Statement by Indonesia. Facilitator's Consultation on Electronic Commerce, MC11 Declaration, and Other Relevant Plenary Sessions', WT/MIN/17(68), 20 December 2017. Emphasis added

30 Indonesian Government Regulation number 17/PMK.010/2018 ('PMK-17'), enacted on 15 February 2018. Available at: https://www2.deloitte.com/content/dam/Deloitte/id/Documents/tax/id-tax-info-apr2018.pdf

31 However, they could also do this by adding another digit to existing HS-codes to reflect the same good, transmitted electronically.

32 WTO Work Programme on Electronic Commerce, 'The E-Commerce Moratorium and Implications for Developing Countries. Communication from India and South Africa', WT/GC/W/774, 4 June 2019, para 3

33 TPPA/CPTPP Article 14.1

34 TPPA/CPTPP Article 1.3

Partnership Agreement (DEPA) between Singapore, Chile and New Zealand is the same.[35]

The USMCA provision is wider. It bans '*customs duties, fees and other charges*[36] *on or in connection with the importation or exportation of digital products transmitted electronically'* and defines 'digital products' as a 'computer programme, text, video, sound recording *or other product* that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically'.[37] These moves to constantly widen the scope of the moratorium may not matter so much for developed countries, which rely far less on tariffs, but it would have a significant impact on developing countries.

The EU's multiplicity of approaches highlights a further complexity. The EU's FTA with Japan simply says: 'The Parties shall not impose customs duties on electronic transmissions'.[38] The EU's proposal to the WTO e-commerce plurilateral from April 2019 follows the TPPA: 'members shall not impose customs duties on electronic transmissions, which include the transmitted content'.[39] However, the EU's approach in recent FTA negotiations is very different: 'Parties agree that *electronic transmissions are the supply of services* under the cross-border services chapter and neither party may impose customs duties on electronic transmissions'.[40] The implications of treating the moratorium as if it applies to services, rather than products under the GATT, are discussed above and again below. The point here is that developing countries are being pressured to adopt divergent, and potentially conflicting, versions of a permanent moratorium, which will heighten the already significant legal uncertainties.

Those legal risks are compounded by other features of recent FTAs. The WTO moratorium appears not to be enforceable as it is not one of the listed agreements to which the Dispute Settlement Understanding applies, although it is still a binding legal obligation.[41] However, the ban on customs duties in FTAs is directly enforceable. Further, taxation exceptions in some FTAs exclude 'customs duties' from the definition of 'taxes and taxation measures',[42] so the tax exception would not apply to measures that breached the ban under those agreements.

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35 DEPA Articles 1.5 and 3.2

36 The TPPA (later the CPTPP), DEPA and USMCA say the ban does not preclude the imposition of internal taxes, fees, or other charges on content transmitted electronically, 'provided such taxes are imposed in a manner consistent with the Agreement'. In the TPPA/CPTPP and USMCA that means the tax measure must be consistent with the investment, e-commerce, financial services, telecommunications and transparency chapters – any of which might restrict the scope of the exclusion as a 'measure that affects' the relevant commercial activity. For example, TPPA/CPTPP Article 14.3.2

37 USMCA Article 19.3

38 Japan EU FTA Consolidated Text, 7 December 2017, Chapter 8, Article 3

39 'Joint Statement on Electronic Commerce. EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce', INF/ECOM/22, 26 April 2019, para 2.5

40 For example, Article X.3, EU Proposal to Indonesia; EU New Zealand Free Trade Agreement. Title [] Digital Trade, 25 September 2018, Article 7.

41 WTO, Agreement Establishing the World Trade Organisation. Annex 2: Understanding on rules and procedures governing the settlement of investment disputes, adopted at Marrakesh on 15 April 1994, para 2

42 TPPA/CPTPP Article 29.4.1

These questions of scope and interpretation are fundamental and will remain contested as digital technologies evolve and digital products substitute for traditional commodities. Other concerns aside, prior agreement on which products are implicated by electronic transmission at the level of HS system codes[43] should be a prerequisite for discussion of the future of the moratorium, with provision for renegotiating the list in the future. Without such clarity, developing countries would be surrendering tax policy in a very important part of the tax toolkit.

3.3.3 The accelerating rate of growth of this type of 'good'

Trade in digitalised goods is a major component of the rapidly expanding global digital economy. That dynamic is driven, in part, by the application of digital technologies to 'legacy' activities, such as telecommunications, banking and payments, and transportation; in part by the introduction of new mediums to enable transactions, such as digital platforms and market-places; and through the integration of digital technology with tangible goods, whether computer-readable products like books or films, or as smart products and the 'Internet of things'.

Recent estimates indicate a very high growth rate in the trade of digitisable goods, substituting for the equivalent physical goods. These estimates necessarily draw on historical data by analogy, because such goods have not previously been subject to tariffs. Both UNCTAD's 2019 paper and this paper apply historical data based on 49-HS categories over the period 1998-2010.[44] Both studies suggest a plateauing, if not a ratcheting down, of digital-equivalent physical goods imports after 2010.[45] The rapid penetration and substitution of these digitisable products can be attributed to lower transportation costs and possibly superior quality, alongside their lower cost due to exemption from tariffs applicable to physical imports.

The UNCTAD 2019 study uses the average annual growth rate of global imports of 49 digitisable products for the period 1998-2010 (8%) as a trend rate of growth, to estimate a figure for physical imports of these items in 2017 of $255 billion. Compared to the actual imports of these physical goods of $116 billion, this gives an estimate of the impact of substitution of $139 billion, or 55% of the total imports of digitisable goods. Using the average annual growth rate underweights the higher growth rates in the middle years of the data and overweights the final year, which was an unusual year because of the global downturn subsequent to the 2007-08 financial crisis. Also, estimates using historical growth rates do not recognise the possibility of an acceleration of the growth rate in the future.

There are two main studies supporting a ban on customs duties for electronic transmissions, one by the European Centre for International Political Economy

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43 As in UNCTAD 2017, 12 and UNCTAD RP.29 2019

44 See UNCTAD RP.29 2019, 10

45 UNCTAD RP.29 2019, 12, figure 1

(ECIPE)[46] and one from the OECD,[47] both published in 2019. These studies doubt that this rapid rate of substitution will continue, and suggest that there is a limit to how much of this kind of trade can be digitised, and hence that the estimates of lost tariff revenues may be overstated. An additional consideration is that trade in the 49 HS-category products used in the UNCTAD methodology to estimate digitisable products represents only 1.2% of the total trade,[48] and thus the potential additional tariff potential is relatively small.

This report agrees that there is much uncertainty over the paths and the speed that technological development will take. As in the previous industrial revolutions, digital technology is rapidly being applied in many areas of the economy and human activities. Successful application in one area often migrates into others; little did the camera industry expect that telephones would become the dominant method for taking still pictures and, to an increasing degree, video recording. The 49-HS categories, which involve physical goods such as films, books, sound recordings, and computer software,[49] are rapidly growing areas of human activity that have many interconnections with other products. More importantly, because of the continued evolution of digital technology, it is highly likely that digitisable products will expand beyond these 49-HS categories. For example, the introduction of additive manufacturing (3D printing) allows for physical imports of equipment and components to be replaced by the transmission of the specifications for domestic assembly.

3.3.4 Estimates of and methodologies for tariff revenue and economic activity lost

Divergent estimates of the impact of the moratorium on developing countries reflect these ambiguities and uncertainties, as well as major differences in methodology. In making these estimates, the first step is to *estimate the potential losses in tariff revenue* from the moratorium. Estimating tariff revenues foregone requires assumptions about what might have been collected if the products had not been electronically transmitted, and about the future trends in digitisation of traded goods and services, as discussed above.

The second step requires *estimating the impact on the economy of lost tariffs*. The UNCTAD 2019 study confines itself to estimating tariff losses from 49-HS product groups. The estimate for value of online imports is calculated by subtracting the actually observed product-by-product physical imports after 2010 from an extrapolated estimate of the imports using growth rates before 2010.[50] The UNCTAD

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46 ECIPE 2019

47 Andrea Andrenelli and Javier López González (2019), *Electronic transmissions and international trade – shedding new light on the moratorium debate*, OECD Trade Policy Papers, No. 233, OECD Publishing, Paris (hereafter 'OECD 2019'). Available at: http://dx.doi.org/10.1787/57b50a4b-en

48 OECD 2019, 5 and 17

49 49-HS 49119910

50 UNCTAD RP.29 2019, 10

study estimates that by 2017 some 55% of global imports of the identified digitisable products are electronic transmissions, which escape customs duties, while 45% are physical imports, which do not.[51] Importantly, UNCTAD assumes that if the moratorium continues, all physical imports will be digitised and thus free from tariffs.

This report uses the same methodology, but applies the slightly lower 7% annual growth rate for electronic transmissions.[52] It also assumes that imports of electronically transmitted products now in physical form will effectively stay in physical form in the future and will *not* be replaced at any time in the future by their digitised counterparts. This contrasts with the UNCTAD study's assumption that, with a permanent moratorium, all physical imports of this type would be digitalised. The truth would be somewhere in between, but it is difficult to make a judgement where this would be.

Table 2 compares the UNCTAD and this study's estimated tariff losses: whereas UNCTAD finds that developing countries would lose $4.46 billion in tariffs on electronically-transmitted goods based on bound tariff levels, this study finds, with the alternative estimated growth rate, the tariff losses to be about $4.42 billion.

3.3.5 Methodological flaws in studies supporting the moratorium

The methodologies of the two most recent studies supporting the moratorium, from ECIPE and the OECD, differ slightly from each other. Both studies estimate the benefits and costs of not having a moratorium by simulating the impact of an increase in tariffs on products where none are collected now. Reasoning that tariffs increase the cost of imported goods to domestic consumers/users of the product and so reduce consumption, which reduces GDP growth with negative welfare effects, they suggest that the quantitative losses in welfare exceed the benefits to be gained from collecting tariffs. Both studies make problematic assumptions and have significant methodological flaws.

The ***ECIPE study*** (2019), which acknowledges the support of the Global Services Coalition, evaluates the economy-wide impact after the imposition of tariffs. Whereas the largest *tariff loss* estimate in the UNCTAD study was $10 billion, the ECIPE study finds that developing countries would suffer *welfare losses* of $13 billion.[53] That calculation in effect portrays welfare losses as exceeding any gains in tariffs collected if the moratorium was eliminated. The study contends that public finances are threatened by the *non-extension* of the moratorium, because the imposition of tariffs on this subgroup of products would reduce economic activity and thus inflict even more public finance losses. In the scenario where all trading countries impose tariffs in retaliation for others' tariffs on digitisable products, it

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51 UNCTAD RP.29 2019, 11

52 The UNCTAD study finds an average annual growth rate of 8%, estimated by getting the straight average among the growth rates of the historical data. This study estimates the annual growth rate assuming a compounding process inside the historical data.

53 ECIPE 2019, 3

Table 2

Moratorium: Estimated per annum tariff revenue loss on electronic transmissions for WTO developing countries				
	Physical Imports of Digitisable Products ($Bn)	Estimated Online Imports or ET of Digitisable Products ($Bn)	Potential Tariff Revenue Loss using Average Bound Duties ($Bn)	Potential Tariff Revenue Loss using Average MFN Duties ($Bn)
This study	36.85	35.1	4.42	2.28
UNCTAD (2019)	28.4	51.56	4.46	2.79

Source: 'This study' data are from author's calculations: estimates for potential tariff losses are calculated by applying the average tariff estimates of 12.6% and 6.5% from Columns 5 and 6, respectively, in Row 2 in UNCTAD RP.29 2019 on estimated online imports from Column 3. All UNCTAD data derived from UNCTAD RP.29 2019: (1) For estimates of physical and estimated online imports see Columns 2 and 3 of Row 2 in Table 3; (2) For potential tariff losses, data are from totals over 58 countries of Columns 4 and 7 in Table 4.

Notes:

- Annual figures based on imports for the year 2017.
- Definition of ET follows UNCTAD RP.29 2019.
- This study's estimate of tariff losses does not include possible losses from imports that are now occurring physically. For example, if lost tariffs on physical imports, on the assumption that these are later digitised, were included in this study's estimates, the number in column 6, row 2, would be $9.24 billion, close to UNCTAD RP.29 2019's estimate of $10.1 billion in its Table 3, page 18.

estimates a welfare loss of US$13 billion for developing countries, representing 'between 12 to 244 times more than the tariffs' that could be collected.[54]

There are important flaws in the ECIPE methodology and its implementation.[55] The study applies the method of computable general equilibrium modelling (CGE) to estimate the economic impact. It uses a data set common to CGE trade modelling known as GTAP,[56] which does not have the actual electronically transmitted products

[54] ECIPE 2019, 11

[55] Rashmi Banga (2019), 'Modelling Impact of Moratorium on Electronic Transmissions Using CGE: A Critique', *Advances in Social Sciences Research Journal* 6(8), August 2019, 391-400 (hereafter 'Banga 2019') DoI:10.14738/assrj.68.6966

[56] The GTAP data set is heavily used in the numerical evaluations of trade policies. GTAP contains bilateral trade data for each of the major product categories for all countries (with a few exceptions in the case of very small economies). It is a very large data set. It is prohibitively costly to create a different data set for products not already in the data, because the data set seeks to be consistent so that the export of a product of one country is equal to the import of the bilateral partner. Users of GTAP often seek to shoehorn the existing data set for their purposes. In this case, that appears to involve applying fractions on the four bilateral services trade categories in the data set, those fractions being based on some estimate of how much of the services can be related to electronically transmittable products. For example, applying such a fraction would seek to exclude services that would involve the retail sale of automotive fuel, which is part of the 'retail and wholesale trade services' sector in GTAP

broken out separately as specific products. As noted earlier, the WTO moratorium applies to *digital goods*. The WTO Secretariat conducted a study in 2016 on the impact on online deliveries of *digitisable* goods, which are physical goods with the potential to be digitalised and then transmitted digitally.[57]

However, the GTAP model aggregates data that includes broad *services* sectors. The ECIPE study simply asserts that the term 'electronic transmissions' is 'potentially very broad and may be used to justify tariffs on the online provision of goods and services', with no attempt to relate that assertion to the moratorium itself.[58] From there, it focuses its assessment of the impacts of removing the moratorium in relation to *four services*: (a) wholesale and retail trading services, (b) recreational and other services, (c) communications services, and (d) business services not elsewhere classified. While these services are highly significant for e-commerce, they are outside the scope of the moratorium.[59] The ECIPE researchers then estimate the impact of potential tariffs that terminating the moratorium could unleash on these four service sectors – introducing another artifice, that of 'tariffs' on services. By treating electronic transmissions as services the study appears to be aligning its analysis with the novel position the EU has been promoting in its recent FTAs, noted above.[60]

Furthermore, CGE models are restricted to a static set of product and service sectors for which a sector-by-sector data set has been created or is available. When applied to trade issues, that necessarily means the main impact of tariffs is to reduce welfare through losses in the 'consumer surplus' (benefits to consumers of lower prices), because tariffs raise the domestic prices on goods on which they are levied. It does not reflect the possibility that higher tariffs on imports could stimulate domestic production, which generates new employment opportunities and additional incomes. The typical CGE model considers such effects to be outside the model and treats them with scepticism.

Consistent with other applications of the CGE methodology, ECIPE's concluding section appeals to the potential for greater trade liberalisation to stimulate growth and development, even though the methodology does not contain formal equations that embody these considerations. At its most basic, the study recites the familiar argument that removing obstacles to electronically transmitted imports will facilitate the rise of new internationally competitive enterprises and permit developing countries to participate more deeply in the digital economy.

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57 WTO, 'Note by the Secretariat', JOB/GC/114, 2016, cited in Banga 2019, 393

58 ECIPE 2019, 7

59 S/C/W/68, 16 November 1998, paras 34-35

60 For example, Article X.3, EU Proposal to Indonesia; EU New Zealand Free Trade Agreement. Title [] Digital Trade, 25 September 2018, Article 7

In line with the position of developed countries, the ***OECD study*** (2019) released in November 2019 supports the effort to prohibit customs duties permanently.[61] The study examines the direct revenue impact of an extension of the temporary moratorium (not a *permanent* moratorium) on tariffs on electronic transmissions, based on the product list used in UNCTAD's 2019 analysis.[62]

The report finds the estimated potential foregone revenue for developing countries to be low (0.08% - 0.23% of overall government revenue), in large part because at the present time electronic transmissions represent only 1.2% of total trade. To generate its main numerical results the study relies on a sector-by-sector[63] calculation of the introduction of tariffs on the 49-HS product categories and tariff assumptions utilised by the UNCTAD study. The authors find that *welfare losses* exceed *gains in tariff revenue*, especially in developing countries, and concludes that 'customs duties on electronic transmissions will reduce the benefits associated to digitisation (lowering trade costs), prioritising government revenue over consumer welfare'.[64]

The OECD's analysis draws on two recent studies that use US trade data to evaluate protectionism provoked by recent US policies to impose tariffs.[65] These studies find that the costs of these policies are borne by domestic consumers, with harmful impacts on productivity, employment, and balance of payments. That methodology and its related policy arguments may well be applicable to developed countries, although it is notable that they can be disregarded in relation to specific sectors whose expansion these countries are themselves prioritising.[66] They are much less applicable to developing countries, which might be more willing to accept the estimated welfare losses generated from higher prices for specific HS products with the aim of creating new domestic enterprises in these sectors.

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61 OECD (2019), 'Trade in the Digital Era'. Available at: https://www.oecd.org/going-digital/trade-in-the-digital-era.pdf. This is a declassified version of Andrea Andrenelli and Javier Lopez Gonzalez, 'Electronic Transmissions and International Trade – Shedding new light on the Moratorium Debate', Working Party of the Trade Committee, TAD/TC/WP(2019)19/FINAL, 4 November 2019. This paper refers to the published form as OECD 2019

62 Inferred from OECD 2019, 6

63 The study uses econometric techniques to estimate the demand and supply schedules for each of the 49 HS-product category markets (OECD 2019, Annex C, 46-49) on which the welfare analysis can be applied

64 See OECD 2019, 44. The same and the following page report the main empirical results in Table A.3 'SMART Simulations – tariff reductions on digitisable goods, USD 1000'

65 See Pablo Fajgelbaum et al (2019), 'The Return to Protectionism', *NBER Working Paper Series*, No. 25638, National Bureau of Economic Research, Cambridge, October 2019. Available at: http://www.nber.org/papers/w25638; and Alberto Cavallo et al (2019), 'Tariff Passthrough at the Border and at the Store: Evidence from US Trade Policy', *NBER Working Paper Series*, No. 26396, National Bureau of Economic Research, Cambridge, October 2019. Available at: https://www.nber.org/papers/w26396

66 For example, the US undertakes extensive industrial policy measures, even while denying their existence. See Robert H Wade (2017), 'The American paradox: ideology of free markets and the hidden practice of directional thrust', *Cambridge Journal of Economics* 41(3), May 2017, 859–880. Available at: https://doi.org/10.1093/cje/bew064

The OECD study relies on a number of other unsubstantiated presumptions,[67] notably the reduction in transport costs (which would be welfare enhancing for consumers, but not necessarily for shippers) and the possibility that the increased use of imported inputs could stimulate 'export diversification, productivity growth and rising domestic value added in exports'.[68]

3.3.6 Non-tariff impacts on development

These proponents of a permanent moratorium support their arguments by appealing to economic factors that are not explicitly covered by their statistical modelling. The UNCTAD study and this report do not go beyond estimates of the impact on potential tariffs to be collected. While the ECIPE study's CGE methodology and the OECD study's partial equilibrium, product sector-by-sector methodology allow for a more complete evaluation of the proposals for a permanent moratorium, the crucial question is whether the outcomes reflect the totality of the development challenge to developing countries.

Both the studies rely on the assumption that there are a fixed number of product sectors in developing countries. That assumption ignores the main challenge that, in order to achieve structural transformation, developing countries must transit from being consumers of imported products to being producers. Historically, because new activities are not commercially profitable for domestic enterprises, successful efforts to introduce new economic activities require governments to subsidise investment and protect the activities from import competition until they can match their counterpart foreign products in cost and quality.[69]

If a government finds it in its long-term strategic interest to enter an electronically transmitted sector, for example, to upgrade domestic software design capacity, it must have the tools to undertake these policies. A permanent moratorium will prohibit protection through tariffs. Moreover, these kinds of policies often require subsidies for the priority industry. For example, a government might want to subsidise the import of a 3D printer, a physical good, to assist a domestic start-up to debug software that embodies designs of equipment and parts not presently available locally. Other strategies might use duty drawbacks on the import of the 3D printer for those importers in the priority list, but not for others. While not directly related to tariffs, such measures may fall foul of other trade rules on subsidies.

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67 OECD 2019, 27

68 OECD 2019, 29

69 Manuel F Montes (2017), 'Industrialization, Inequality, and Sustainability: What Kind of Industry Policy Do We Need?' in Civil Society Reflection Group (eds) *Spotlight on Sustainable Development 2017: Reclaiming policies for the public*, 89-97. Available at: https://www.2030spotlight.org/sites/default/files/download/spotlight_170626_final_web.pdf

The requirements of industrial policy go beyond the question of raising tariffs on all electronically transmitted products. Effective industrial policies involve tariff increases (and decreases) on specific imports targeted to the development of new economic activities. Developing country governments could subsidise importation through electronic transmissions for industrial development purposes. During the period when they are not yet prioritising the local manufacture or design of a specific electronically transmitted product, they could apply zero tariffs on inputs if that policy would accelerate the upgrading of the competitiveness of their participating enterprises. At a later time, when the potential to produce an electronically transmissible product emerges, they could then raise the tariffs to protect domestic start-ups entering the market.

The question of whether VAT could substitute for tariffs foregone, as suggested in both the ECIPE[70] and the OECD[71] studies, is emblematic of the problems when research focuses on tariffs without addressing the industrial development perspective. Suppose a country sought to break into producing 3D printers. A VAT on the physical ink of the printer, as those studies suggest, would be insufficient, irrelevant and contrary to the requirements of industrial development. At present, 3D printers are physically imported, and a tariff could be imposed on the physical import during the learning phase to stimulate domestic design and production of such printers. But if in the future the specifications and design of such printers can be electronically transmitted, the country must have the capacity to impose a tariff on this method of importing a foreign-designed 3D printer. A VAT on the ink of the printer might partially compensate for loss of tariff revenues, but it will not prevent the importation of the printer by electronic means.

3.3.7 Diversity of impacts among developing countries

When compared to developed countries, developing countries have a wider range of levels of development, colonial legacies, political and cultural traditions, geographical and population size and built-up capabilities, as well as different profiles of commodity exports and imports. They therefore have wide-ranging levels of interest and capability to export, and to absorb electronically transmitted imports, at present and potentially for the future.

Aggregate estimates of developing-country losses from imposing tariffs (such as the ECIPE study) ignore a wide range of losses from non-imposition of tariffs. Whether to cut tariffs on electronic transmissions, and if so by how much, depends not just on the size of revenue losses, but most importantly on the industrial strategy of individual countries with regard to electronically transmitted products. Does the country already have sectors that would benefit in terms of more rapid growth and domestic innovation by facilitating access to – and thus lower tariffs on –

[70] ECIPE 2019, 3

[71] OECD 2019, 20

electronically transmitted products? Are there sectors whose expansion and upgrading it has decided to support by protecting them from competing imports through tariffs?

A particularly promising potential for developing countries' exports appears to be in specific areas of software products (such as web design, adaptation of software to local conditions, trouble-shooting), remote services (such as remote accounting and financial services and medical procedures), and the export of cultural products (such as movies and telenovelas).[72] Some leading developing countries and some LDCs, such as Bangladesh, are participating significantly in these sectors and have a huge growth potential. Most of these are services, not digitisable goods, and not subject to the moratorium – although they may be subject to restraints under the GATS and other trade in services agreements.

The crucial longer-term consideration is that a permanent moratorium would vastly reduce the policy space of developing countries to address rapidly growing, and poorly defined, trade in digitised goods. Because there are currently no bound tariffs for digitisable products which move online, developing and developed countries could raise them for domestic policy reasons in the absence of a moratorium. This means the actual potential tariff revenue loss could be higher than projected by both the UNCTAD study and this report.

It can also be argued that the share of tariff revenue loss incurred by developing countries might be lower (since there is no reason to presume that developed countries would be constrained to have similar duties as developing countries). That is a distinct possibility and another unknown. At present, the temporary moratorium mainly benefits large digitalised companies, almost all of which are US companies, and provides these companies with first-mover advantages to the disadvantage of all other countries. Even European countries are aggrieved about their inability to obtain sufficient tax revenues from their operations. These same European companies would potentially be disadvantaged in the same way as developing countries if the moratorium is made permanent.

To reiterate, developing countries exhibit a wide range of industrial development. Not all will want to levy tariffs on many electronically transmitted products. Some, perhaps many, of these countries might find it in their interest to extend the tariff moratorium on electronic transmissions at the present time – but they could opt to apply tariffs unilaterally without a moratorium. Other developing countries who seek to develop their own digital enterprises for industrial development purposes or even security reasons would prefer to have the policy space to be able to levy tariffs. For both types of developing countries, a permanent moratorium is neither necessary nor prudent.

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[72] See Country Profiles 2005–2014 in UNCTAD (2019), *Creative Economy Outlook: Trends in international trade in creative industries, 2002-2015*, UNCTAD, Geneva, 24. China reports a surplus of $29 billion in its creative trade in 2015, India, Thailand and Indonesia of around $2 billion each.

Table 3 presents an estimate of electronically transmitted exports from developing countries for the year 2017, based on historical data (2002-2010, the same period used to estimate the imports for the year 2017). For developing-country exports to developed-country destinations, the movement to online transmission is particularly significant.

Table 3 indicates that the movement to transmission online since 2006 was particularly acute for the region it consolidates as 'Greater China', which includes China, Hong Kong-China, Macao-China, and Taipei-China; for the other developing countries the movement to online transmission has been less severe. The last four rows in Table 3 provide an estimate of the tariff values that can be collected from developing-country exports based on different tariff levels. The elasticity of demand for these products determines the distribution of incidence (which population finally absorbs the cost) of the tariff. The total duty which a developing country might avoid with a moratorium on the exports of electronically transmitted products appears to be significantly lower than the tariff revenue it would lose with such a moratorium. That includes China,[73] which is a big exporter as well as importer of electronically transmitted products, but the value of its imports exceeds its exports, which were estimated as in the order of $37 billion in 2014. As such it is rational for the developing-country group not to support the continuation of the moratorium even at this present time.

3.3.8 Technical feasibility

The final argument to be addressed regarding the moratorium relates to the feasibility of levying customs duties on e-transmissions. ECIPE argues that it would be 'costly and technically complex' and 'impose undue administrative burden on not just producers and consumers but also tax authorities and carriers'.[74] South Africa and India expressly rebutted this argument in 2019, pointing to a number of countries, including Australia, New Zealand, the EU, Indonesia and India, that are now taxing intangible, including digital, products, which indicates that this should also be possible for electronic transmissions.[75] Likewise, some form of the mechanisms developed to impose VAT on the trade in services should also be suitable for the imposition of tariffs on electronic commerce, to the extent that a tariff can be analogised to a VAT.

Technical capacity is also not a valid argument in favour of a permanent moratorium on digital goods (or, perhaps, services or intellectual property payments) from a development perspective. It is an argument in favour of upgraded technology that not only gathers information on users, but also their origin of the transmissions.

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73 UNCTAD RP.29 2019, 8. China's export figure was based on a WTO note on Fiscal Implications of the Customs Moratorium on Electronic Transmissions, 2016-JOB/GC/114, 20 December 2016

74 ECIPE 2019, 15

75 WT/GC/W/774, 4 June 2019, para 4

Table 3. Estimated developing-country electronically transmitted exports (2018, $billion)

	All Developing Countries				Developing Countries Except Greater China		
	To Developing Countries	To Developed Countries	Total		To Developing Countries	To Developed Countries	Total
Total estimated exports of ET products	17.20	48.82	66.02		3.05	3.23	6.28
Actual recorded exports of physical ET products	12.40	17.57	29.97		2.89	1.97	4.85
Estimated exports of ET products moved online	4.80	31.25	36.05		0.16	1.26	1.43
Simple Average of Bound Duties in 2017 (%)	12.60	0.20			12.60	0.20	
Simple Average of MFN Duties in 2017 (%)	6.50	0.20			6.50	0.20	
Potential Tariffs on online ET exports using Average Bound Duties ($bn)	0.60	0.06	0.67		0.02	0.00	0.02
Potential Tariffs on online ET exports using Average MFN Duties ($bn)	0.31	0.06	0.37		0.01	0.00	0.01

'Greater China' includes the applicable bilateral trade statistics of China, Hong Kong-China, Macao-China, and Taipei-China. The assumption is that the internal trade of these jurisdictions interacts with other developing countries and with developed countries as an integrated entity, which might not apply to certain products. Some of the sums in the table are subject to rounding adjustments.

Source: Calculations by co-author Manuel Montes

The increasing occurrence of Internet crime, such as the profitable demands for ransom payments for restoring access to data needed by public authorities,[76] is prompting changes to the Internet protocol to facilitate the identification of transmitting parties and their location.

The participation of countries from the Global South in any WTO or FTA negotiations needs to be based on a clear understanding of whether a permanent moratorium on tariffs on electronic transmissions is in their interest. There is a profound disagreement over the potential impact of such a prohibition on developing countries' public finances and the potential of their domestic enterprise sector to participate in the same activities. The resolve of certain members of the WTO to pursue this demand is unethical and antithetical to the development acquis that the multilateral trading system has long espoused.

[76] Renee Dudley and Jeff Kao, 'The secret trick by firms using cyberhacking victims: pay the ransom', *The Guardian,* 15 May 2019. Available at: https://www.theguardian.com/technology/2019/may/15/ransomware-samsam-payments-bitcoin-scam