

India's E-Commerce Policy and the WTO

The World Trade Organisation (“WTO”) is the world’s largest, (and on many issues, the only) multilateral body for trade related negotiations. Its sluggishness on negotiations notwithstanding, the WTO has been a bulwark for fair trade and the principles that entail this high objective. It was therefore inevitable that concerns over an issue as pervasive as e-commerce would eventually spill over to the multilateral forum.

Potential discussions on e-commerce were initially considered in the WTO at the Council for Trade in Services in 1999. Further deliberations on these issues did not resurface until the discussions on e-commerce were revived at the 10th WTO Ministerial Conference in Nairobi (“MC10”).

Ever since, there seems to be growing pressure at the WTO to address e-commerce and to agree upon common minimum thresholds of fair trade in this arena. For example, the **Friends of E-Commerce** is one group of WTO members pushing for negotiations at the WTO on e-commerce. Additionally, many members of the WTO have also put forth their suggestions in the form of “non-papers” to take the discussion forward.

India’s position at the WTO on e-commerce has been reticent. Compared to the strong proposals put forth by the developed West and other interested Member countries of the WTO, India has seemed reluctant to make commitments on multiple fronts relating to e-commerce. Even before India’s new Draft National e-commerce Policy (“**Draft Policy**”) was released, it was clear that India sought to balance its fair-trade obligations with an evening of the playing field – to not just be a resource for the “new oil”, but also to use it as fuel to power domestic growth.

Regardless of whether India finally accedes to the Friends of E-Commerce, it is important to assess the Draft Policy under the lens of the core principles and disciplines canvassed by the WTO.

For instance, the United States submitted a non-paper in 2016 suggesting that the non-discrimination principles should be secured for e-commerce. These non-discrimination principles largely pertain to the “Most Favoured Nation”¹ and “National Treatment”² principles.

The Draft Policy does not appear to explicitly take a discriminatory stance as far as the MFN principle is concerned. However, the same cannot be said for national treatment. The Draft Policy makes explicit its intention to even the playing field by encouraging domestic players to engage with the digital economy in various capacities – be it research and development, capacity building, e-commerce platforms, data analytics and the like.³ As and when the above stated objectives are shaped into law,

¹ Under the aegis of the WTO, member nations have committed to avoid discriminating between their trading partners except in some specific exceptional instances. For example, granting a particular nation a lower customs duty rate for one of their products imposes an obligation on the granting nation to offer the same duty reduction to all other WTO members. This is known as most-favoured-nation (“**MFN**”) treatment.

² National Treatment is another core principal under the WTO wherein all goods, whether locally sourced or imported into the country, have to be afforded the same treatment within the nation. This means that there cannot be differential taxation, standards, intellectual property regulations applicable to the imported products once the products enter the local market.

³ Page 14-15 of the Draft National Ecommerce policy, February 23, 2019

it can be foreseen that they will be in the form of incentives and financial stimulants. If these stimulants are classifiable as violative of core WTO principles – an example would be a subsidy contingent on domestic content – some of these policies would be subject to challenge at the WTO, potentially even without a specific negotiation on e-commerce.

Apart from the above, various other countries have also proposed expanding existing WTO principles of fair-trade to e-commerce. Post MC10, the discussion on e-commerce related issues under The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) was revived by Brazil and Russia. Communication received from Russia identified gaps under the TRIPS in the context of e-commerce.⁴

Similarly, countries have also proposed various ways in which e-commerce can be perceived under the lens of trade in services, specifically under the General Agreement on Trade in Services (“GATS”). EU and Canada among other countries have taken the position that e-commerce would be covered under Mode 1.⁵ Categorization of e-commerce under Modes 1, 2 or a Mode 5 specially carved out for this purpose would alter the implications for each Member depending on their commitments under the GATS. Once countries take a position on which mode would best categorize e-commerce, they can negotiate upon their commitments under the GATS. The policy does not appear to take any position on how India classifies e-commerce under these modes.

Aligning Policy Objectives with WTO Obligations

In view of the illustrative principles identified above, it is worth revisiting some of the Draft Policy’s objectives – identified in part at page 16 of the policy.

At the outset, it remains to be seen whether these objectives truly fulfil the overarching goals set by the Government of India. Crucially, it must be borne in mind that members of the WTO are looking to negotiate on these issues and secure commitments to free trade from other members. India would be well-served by framing its policy mechanisms in the context of not just its existing WTO obligations, but also those being promulgated by some of its co-signatories at the WTO.

⁴ WAYS TO MOVE FORWARD Communication from the Russian Federation, JOB/GC/131, 14 July 2017.

⁵ TRADE POLICY, THE WTO, AND THE DIGITAL ECONOMY Communication from Canada, Chile, Colombia, Côte d'Ivoire, the European Union, the Republic of Korea, Mexico, Paraguay and Singapore, JOB/GC/97/Rev.1, 22 July 2016