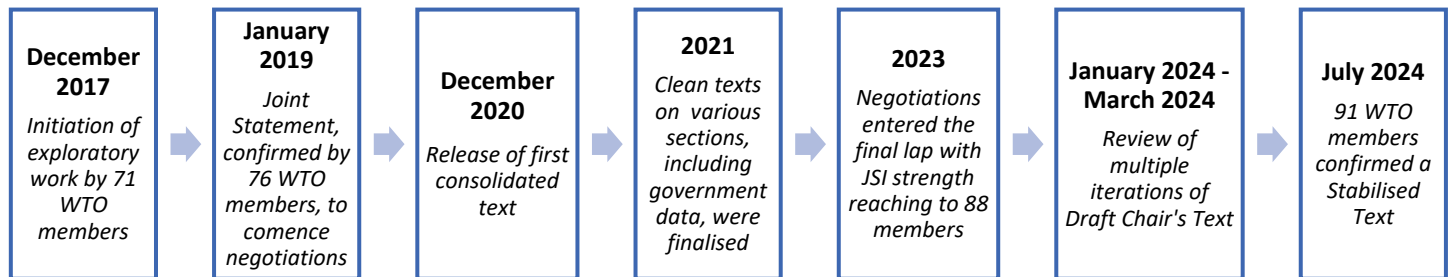




Stabilised Text of the Agreement on E-Commerce released by the Joint-Statement Initiative

On July 26, 2024, 80 members (**Members**)¹ of the World Trade Organization (**WTO**)² agreed on a ‘stabilised text’ for the Agreement on Electronic Commerce (**Agreement** or **Stabilised Text**).³ This note covers some of the key elements of the Stabilised Text.

Background to the Joint Statement Initiative (JSI) on Electronic Commerce: The WTO is currently engaging in two parallel tracks of discussions on trade-related aspects of e-commerce: the multilateral track, established by the 1998 Ministerial Declaration on Global Electronic Commerce⁴, and the WTO Joint Statement Initiative (JSI) on E-commerce, led by Australia, Japan, and Singapore with 91 participating members (**Parties**).⁵



Trajectory of the WTO Joint Statement Initiative on Electronic Commerce (2017-2024)

¹ Even though they are part of the JSI, Brazil, Colombia, El Salvador, Guatemala, Indonesia, Paraguay, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Türkiye and United States have not agreed to the text yet, due to “ongoing domestic consultations and considerations”. See Footnote on Page 1, Joint Statement Initiative on Electronic Commerce. Notably, some of these Members are reportedly concerned about the prohibition on customs duties on electronic transmissions (especially Indonesia, Brazil and Türkiye). Interestingly, Colombia and Taiwan have already agreed to higher standard digital trade rules in the Pacific Alliance – Singapore FTA (signed but not in force). However, the FTA has broader exception provisions. United States has expressed concerns about the Security Exception provision in the Agreement. See, Devon Whittle, ‘The WTO E-Commerce JSI’s Stabilised Text – what does it deliver, who couldn’t support it, and what are its next steps?’, Trade Notes (July 29, 2024) (Accessed at - https://tradenotes.substack.com/p/digital-the-wto-e-commerce-jis-stabilised?isFreemail=true&post_id=147055847&publication_id=1973050&r=idibg&triedRedirect=true)

² Bureau, ‘Eighty nations strike deal over e-commerce, but lack US backing,’ Thomson Reuters (July 26, 2024) (Accessed at - <https://www.reuters.com/markets/eighty-nations-strike-deal-over-e-commerce-lack-us-backing-2024-07-26/>)

³ Communication by the Joint Statement Initiative on Electronic Commerce, World Trade Organisation (July 26, 2024) (Accessed at - docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/87.pdf&Open=True)

⁴ Geneva Ministerial Declaration on Global Electronic Commerce on May 20, 1998. (Accessed at - https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm)

⁵ Joint Statement Initiative on E-commerce, World Trade Organization (Accessed at - https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm)

A central issue in these discussions is the E-commerce Moratorium on Customs Duties on Electronic Transmissions (**Moratorium**),⁶ which prohibits customs duties on electronic transmissions. Developing countries, notably India and South Africa, oppose the Moratorium, arguing it limits their ability to generate revenue and to protect emerging domestic industries.⁷ In contrast, developed countries support the Moratorium, emphasizing the economic benefits of a duty-free environment, including enhanced market access.⁸

Needless to say, the outcomes of the JSI on E-commerce discussions are likely to significantly impact future multilateral e-commerce negotiations. Although the Agreement will not directly alter the rights and obligations of non-participating countries like India, its implications on the global trade norms in e-commerce would be resounding.

Legal Status of the Stabilised Text: The Stabilised Text contains the negotiated commitments among the Parties. However, for the Agreement to gain legal standing at the WTO (even at a plurilateral level), it would need to be incorporated into the WTO framework through the consensus of all Members.⁹ The Stabilised Text may also continue to exist as a 'standalone' treaty if it fails to get the consensus of all Members (such as India), without the institutional backing of the WTO.¹⁰

Key highlights: Through the years, various iterations of the Agreement have been circulated. The Stabilised Text represents the outcome of the negotiations among the Parties. Below are some of the key highlights from the Stabilised Text:

- **Application to non-participating Members:** The Agreement would not create new obligations or rights for Members who are not part of it¹¹ or reduce any Party's current rights and obligations under the WTO.¹² Therefore, even though non-participating Members would not be required to comply with the Agreement's provisions, they must be treated no less favourably than Parties to the agreement.¹³ For example, if the Parties agree not to impose customs duties on electronic transmissions, electronic transmissions made by non-Parties would also be subject to no customs duty due to the Members' obligation to provide most-favoured-nation treatment to all other Members, regardless of their status in plurilateral agreements.
- **Customs duties on electronic transmissions:** The Stabilised Text prohibits the imposition of customs duties on electronic transmissions by Parties.¹⁴ Additionally, the Stabilised Text does not include a provision which mandates the expiry of the prohibition on customs duties after a set period. This implies that the prohibition will remain in effect indefinitely unless the Parties agree otherwise in a future review or agreement. To that end, beyond the general review clause,¹⁵ the Stabilised Text has also included a review clause¹⁶ specifically for Article 11 which requires a review of the prohibition after the first five years of implementation of the agreement. Moreover, 'electronic transmissions' subject to the prohibition on the imposition of customs duties have been defined widely. The definition includes all types of transmissions made using electromagnetic means, which can include the internet, satellite communications, mobile networks and other digital transmission methods.¹⁷

⁶ Joint Statement Initiative on E-commerce, World Trade Organization (Accessed at - https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm)

⁷ India and South Africa's joint submission on 'E-Commerce Moratorium,' Ministry of Commerce and Industry, Government of India (March 10, 2020) (Accessed at - <https://www.commerce.gov.in/international-trade/india-and-world-trade-organization-wto/e-commerce/indias-joint-submission-with-south-africa-on-e-commerce-moratorium/>)

⁸ Yasmin Ismail, Rashmi Jose, 'E-Commerce takes centre stage at World Trade Organization in run-up to MC13,' IISD (January 11, 2024) (Accessed at - <https://www.iisd.org/articles/policy-analysis/e-commerce-developments-wto-mc13>)

⁹ Press Corner, 'Commission welcomes text of global E-Commerce Agreement negotiated at the WTO,' The European Commission (July 26, 2024) (Accessed at - https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4022)

¹⁰ Devon Whittle, 'The WTO E-Commerce JSI's Stabilised Text – what does it deliver, who couldn't support it, and what are its next steps?,' Trade Notes (July 29, 2024) (Accessed at - https://tradenotes.substack.com/p/digital-the-wto-e-commerce-jsis-stabilised?isFreemail=true&post_id=147055847&publication_id=1973050&r=jdibg&triedRedirect=true)

¹¹ Article 3.1, Stabilised Text

¹² Article 3.2, Stabilised Text

¹³ Article I, GATT

¹⁴ Article 11.3, Stabilised Text

¹⁵ Article 35, Stabilised Text

¹⁶ Article 11.5, Stabilised Text

¹⁷ Article 11.1, Stabilised Text

- **Framework for electronic transactions:** The Agreement provides a framework for enhancing and standardizing electronic commerce practices among Parties. It encourages each Party to adopt or maintain legal frameworks for electronic transactions, aligning them with international standards such as the UNCITRAL Model Laws.¹⁸ This includes the recognition of electronic signatures and authentication methods, ensuring they are not denied legal effect solely based on their electronic nature.¹⁹ The Agreement also promotes the legal validity of electronic contracts²⁰ and invoices²¹, emphasizing the importance of interoperability²² and the use of electronic invoicing frameworks to facilitate cross-border transactions.²³ Moreover, it advocates for the elimination of paper-based forms in trade²⁴, urging the adoption of electronic formats to streamline processes and reduce administrative burdens.²⁵ Additionally, the Agreement addresses the development and regulation of electronic payment systems, highlighting the need for secure, efficient, and interoperable systems.²⁶
- **Personal data protection:** "Personal data" is defined as information related to an identified or identifiable person.²⁷ Each participating party is required to establish a legal framework to protect personal data.²⁸ These frameworks should consider international guidelines and ensure non-discriminatory protection of personal data.²⁹ Parties can adopt or maintain measures for data protection and privacy, including those related to cross-border data transfers.³⁰ However, Parties must allow data transfers under "conditions of general application," which are conditions that apply broadly and objectively to various economic operators.³¹
- **Cybersecurity:** The Agreement acknowledges the significant impact of cybersecurity threats on electronic commerce and the need for ongoing vigilance.³² It emphasizes the importance of strengthening national capabilities for responding to cybersecurity incidents and encourages collaboration among parties to mitigate malicious activities, such as intrusions and malware, that compromise electronic networks.³³ The Parties agree on the necessity of using risk-based approaches to manage cybersecurity threats, advocating for practices and standards that are developed transparently and consensually to both protect against cyber risks and minimize disruptions to trade.³⁴
- **Telecommunications:** Article 21.6 outlines provisions for the equitable assignment of frequency bands for public telecommunication services, with a focus on promoting competition and serving public interest. However, there is a shift in language between the Stabilised Text and the Draft Chair's Text leaked in March 2024.³⁵ Earlier, the Draft Chair's Text mandated that Parties 'ensure' the assignment of frequency bands through an open process that considers the public interest. In contrast, the Stabilised Text now merely requires Parties to 'endeavour'³⁶ to achieve this objective, reflecting a significant softening of the original commitment.
- **Securing developing and least developed countries:** A notable addition to the Stabilised Text is the inclusion of a dedicated provision designed to safeguard the interests of least developed and developing countries, specifically articulated in Article

¹⁸ Articles 4.1, 4.2, 4.3, Stabilised Text

¹⁹ Article 5, Stabilised Text

²⁰ Article 6, Stabilised Text

²¹ Article 7, Stabilised Text

²² Article 7.4, Stabilised Text

²³ Article 7.4, Stabilised Text

²⁴ Article 8, Stabilised Text

²⁵ Article 8, Stabilised Text

²⁶ Article 10, Stabilised Text

²⁷ Article 16.1, Stabilised Text

²⁸ Article 16.3, Stabilised Text

²⁹ Article 16.4, Stabilised Text

³⁰ Article 25, Stabilised Text

³¹ Footnote No. 19, Article 25, Stabilised Text

³² Article 17.1, Stabilised Text

³³ Article 17.2, Stabilised Text

³⁴ Article 17.3, Stabilised Text

³⁵ Article 27.6, Section F, Draft Chairs Text, INF/ECOM/85/Rev.2 (March 27, 2024) (Accessed at - https://www.bilaterals.org/IMG/pdf/jsi_ecomm_chair_text_rev2_27_march_2024.pdf)

³⁶ Article 21.6, Stabilised Text

20. Article 20 also begins with a clear acknowledgement³⁷ of the “digital divide” between developing and least-developed countries. Some of the key provisions of Article 20 include:

- Developing and least-developed countries have the option to self-designate³⁸ any provision of this agreement for which they require an implementation period of no more than five years by submitting a list of such provisions to the Committee on Trade-Related Aspects of Electronic Commerce (“**the Committee**”)³⁹. Additionally, they may request an extension of up to two additional years by notifying the Committee 120 days prior to the expiry of the initial implementation period.⁴⁰
- Dispute settlement provisions shall not apply to any least-developed country Party under any provision of this agreement for a period of seven years from the date of entry into force.⁴¹
- Dispute settlement provisions shall not apply against a developing country Party for non-compliance with a provision of the agreement that the Party has self-designated.⁴²
- Any request for consultation under Article 27 concerning a least-developed country Party shall take into account the special situation of the least-developed country.⁴³
- Assistance and support for capacity building can be sought by developing and least-developed country Parties from the Committee.⁴⁴ The Committee shall also be responsible for reviewing progress regarding technical assistance or capacity building support provided for the implementation of this Agreement.⁴⁵

Implications for India: As explained above, the implications of the JSI's outcomes on E-commerce are far-reaching and are likely to impact the multilateral track of e-commerce discussions as well. Since the Parties to the Agreement account for 90% of global trade⁴⁶, the Agreement is poised to set the stage for future norms and regulations in the digital economy. The collective influence of these countries means that the standards they establish are likely to become benchmarks for global trade, including non-participating countries. India's non-involvement in the JSI leaves it on the periphery of these critical discussions, potentially sidelining its interests in the rapidly evolving landscape of e-commerce.

For example, countries have been unable to agree on multilateral norms for cyber security. This has led countries to forge bilateral agreements for cooperation in the cybersecurity space. For instance, India is collaborating with certain Parties (Japan⁴⁷ and Israel⁴⁸) regarding various issues pertaining to technology, including cybersecurity. If India doesn't actively participate in shaping the global norms on cybersecurity norms, it might miss the chance to advocate for its own interests and perspectives. This could lead to the adoption of standards that do not fully align with India's needs or capabilities.

Similarly, the Stabilised Text also creates a framework for digital trade. India's non-participation in the JSI means it will not have a say in shaping these frameworks. Moreover, unlike its counterparts, India hasn't signed any exclusive digital trade agreements which could have probably offset the impact of its non-participation in the JSI. This puts

³⁷ Article 20.1, Stabilised Text

³⁸ Article 20.6, Stabilised Text

³⁹ A Committee on Trade-Related Aspects of Electronic Commerce is established under Article 28 of the Stabilised Text

⁴⁰ Article 20.7, Stabilised Text

⁴¹ Article 20.12, Stabilised Text

⁴² Article 20.13, Stabilised Text

⁴³ Article 20.14, Stabilised Text

⁴⁴ Article 20.18, Stabilised Text

⁴⁵ Article 20.19(c), Stabilised Text

⁴⁶ Joint Statement Initiative on E-commerce, World Trade Organization (Accessed at - https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm)

⁴⁷ Economic Diplomacy Division, 'India-Japan sign Memorandum of Cooperation in the field of Cybersecurity,' Ministry of External Affairs, Government of India (October 7, 2020) (Accessed at - <https://indbiz.gov.in/india-japan-sign-memorandum-of-cooperation-in-the-field-of-cybersecurity/>)

⁴⁸ Harinder Mishra, 'India and Israel sign agreement to expand cooperation in cyber security,' Livemint (July 16, 2020) (Accessed at - <https://www.livemint.com/news/world/india-and-israel-sign-agreement-to-expand-cooperation-in-cyber-security-11594893659048.html>)

India in a disadvantageous position, as it lacks alternative platforms to influence global digital trade norms and to secure favourable terms for its digital economy.

The Stabilised Text also lays out a framework for data privacy and cross-border data flows, a crucial area of concern in the digital age. India has recently introduced the Digital Personal Data Protection (“DPDP”) Act, which grants the government the authority to restrict data flows to certain countries by notification. Furthermore, India has implemented sector-specific data localization requirements, underscoring its emphasis on data sovereignty and security. India’s absence from the JSI may limit its ability to influence international frameworks on data governance, potentially leading to global standards that may not fully align with India’s policies or strategic interests. As data becomes an increasingly vital asset in the global economy, India’s involvement in these discussions is essential to ensure its regulatory frameworks are harmonized with global practices, while also safeguarding its national interests.

To preserve its interests, India may also be required to enter into bilateral agreements with key trading partners to draw a carve out from the global trade norms on issues such as data privacy, cross border flows, and other critical issues.

Second, given the asymmetrical nature of the existing global e-commerce, any additional rights/obligations which may arise out of the Agreement, may be harmful for India’s position in the global e-commerce market. For example, the non-imposition of duties by the Parties, and the imposition of the duties by India would make India a less favourable market for electronic transmissions. This is bound to impact India’s development goals, including its commitment to ‘Digital India.’ On the other hand, if India continues to not impose duties to remain competitive, India is in a position to lose tariff revenue of about USD 500 million every year.⁴⁹

Third, the Stabilised Text includes a significant provision, Article 20, specifically designed to protect least developed and developing countries from the expanding digital divide by permitting the self-designation of protections. Despite this, India’s resolute opposition to plurilateral agreements could undermine its reputation as a consensus builder. India now faces the challenge of balancing its advocacy for equitable treatment of developing and least-developed nations with the broader objective of facilitating global trade agreements. This is the tightrope that India will have to walk to protect its influence and leadership within the WTO framework.

We hope you have found this information useful. For any queries/clarifications please write to us at insights@elp-in.com or write to our authors:

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⁴⁹ Kirtika Suneja, ‘India pitches re-examination of customs duties moratorium,’ The Economic Times (March 1, 2024) (Accessed at - <https://economictimes.indiatimes.com/news/economy/foreign-trade/india-pitches-re-examination-of-customs-duties-moratorium-on-e-commerce/articleshow/108117635.cms?from=mdr>)