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THE WTO AND THE JOINT INITIATIVE ON ELECTRONIC COMMERCE: BUT WHERE IS VIETNAM?

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Abstract

As e-commerce continues to transform global trade, regulatory frameworks have predominantly evolved through bilateral and regional agreements. However, since 2017, a plurilateral initiative within the World Trade Organization (WTO) has sought to establish a comprehensive global agreement on e-commerce. The continuation of the moratorium on e-commerce, as agreed upon by members at the 13th Ministerial Conference, emphasizes a collective commitment to revitalizing efforts within the Work Programme on Electronic Commerce and reaffirms the existing practice of refraining from imposing customs duties on electronic transmissions until either the 14th Session of the Ministerial Conference or March 31, 2026, whichever comes first. Despite the active involvement of over half of WTO members in these negotiations, Vietnam has notably abstained from participation. This article delves into the background and substance of the WTO joint initiative, while also scrutinizing Vietnam's decision and its consequences. It assesses the advantages that Vietnam could gain from participating in plurilateral agreements to bolster its standing in e-commerce and shape global standards. Additionally, it evaluates the risks associated with exclusion and explores the wider implications for Vietnam's trade strategy, considering the spectrum between multilateralism, plurilateralism, and regionalism.

Keywords: *e-commerce; joint initiative; multilateralism; plurilateralism; regionalism; World Trade Organization*

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The e-commerce issue emerged in the 1990s with the rise of the Internet. In many ways, this phenomenon has transformed the way we do business. The Uruguay Round and the creation of the World Trade Organization (WTO) in 1995 were a missed opportunity to be the prelude to consensual disciplines to govern what is now known as e-commerce.[1]

⋆ Authors' note: This analysis is based on several documents which are still restricted in the WTO database. As we were unable to access all the institutional documentation relating to the discussions and negotiations underway as part of the work program or the joint initiative, we make no claim to exhaustiveness. The authors would like to sincerely thank Ms. Huong Nguyen of the Vietnamese Permanent Delegation to the WTO for her indispensable collaboration in the conduct of this research.

1 For the purposes of this article, the definition proposed by the General Council in the Work Programme is used to define the term "electronic commerce", which "means the production, distribution, marketing, sale or delivery of goods and services by electronic means". This definition is thus more encompassing than the terms "digital commerce" or "online commerce", which are components of it. Nevertheless, this distinction may be of some interest, see Alschner W. (2024), 'E-Commerce or Digital Trade? Why the Difference Should Matter to Trade Lawyers', in Collins D., Geist M. (eds.) (2024), *Handbook on Digital Trade*, London: Edward Elgar, pp. 54-72.

At its second ministerial conference, held in Geneva, the brand-new organization adopted a declaration on e-commerce to finally address the legal issues that e-commerce poses for international trade.[2] This declaration led to the establishment a moratorium on customs duties on electronic transmissions and a work program on e-commerce under the aegis of the General Council.[3]

The stated aim of this article is to present Vietnam's role in developing international rules on e-commerce. As a major player in this new economy, Vietnam is particularly involved in the various regional integration processes. All recent agreements signed by Vietnam include specific provisions on e-commerce. However, Vietnam is absent from plurilateral and multilateral negotiations. Not only does Vietnam not take part in the joint initiative on e-commerce, but furthermore, it is the author (or, more precisely, co-author) of only one communication within the Work Programme on e-commerce.[4]

To fully understand Vietnam's role in e-commerce negotiations and discussions, it is essential to understand the importance of this issue for Vietnam and to be able to analyze the relevance of these discussions, which can be prioritized according to the level of governance (regional, plurilateral or multilateral) at which they take place. It is thus possible to observe the influence of its investment at the regional level (Part 3), but its lack of interest in other levels of governance. While plurilateral and multilateral negotiations are inevitably inspired and influenced by the results achieved at the regional level, the reverse is also true. Thus, if concrete results are achieved at the plurilateral or multilateral level, they could form a common foundation, a common legal framework that would, in turn, impose itself in practice on regional negotiations. To assess the scope of plurilateral and multilateral discussions and negotiations on Vietnam, we need to look at them as a whole. At the WTO, multilateral work and discussions have not led to any tangible results, but plurilateral negotiations have been launched within the framework of the Joint Initiative on e-commerce, and there is shared optimism that concrete commitments will be achieved.

1. The absence of formal negotiations at the multilateral level: Absence of interest or absence of opportunism?

If it is possible to speak of an absence of formal negotiations at the multilateral level, it is because the 1998 Ministerial Declaration on Electronic Commerce only provides for the establishment of a work program on

2 WTO (1998), *Declaration on Global Electronic Commerce*, No. WT/MIN (98)/DEC/2 (1998 Declaration).

3 *Ibid*.

4 WTO (2017), *ASEAN reflections on the lunchtime roundtable on 'Can e-commerce rules help MSMEs in developing countries?'*, No. WTO Doc JOB/GC/126.

electronic commerce, which is in no way intended to serve as a framework for negotiations. The declaration also provides for the adoption of a moratorium on electronic transmissions, which in principle is only temporary.

1.1. The temporary moratorium on electronic transmissions: An instrument in search of permanence

This moratorium responds to the most obvious problem posed by e-commerce. Traditionally, international flows of goods are physical flows. In other words, when a seller has customers in a foreign market, the products are physically exported, and when the border is crossed, the importing country imposes customs duties on the products. With goods increasingly traded digitally (digital books, music, films, streaming services...), electronic transmissions no longer involve physical border crossings. Consequently, the application of customs duties on these digital products faces obvious material difficulties.

For this reason, the moratorium did not impose customs duties on electronic transmissions.[5] The moratorium is not permanent, even though it is systematically renewed at each ministerial conference.[6] Several voices have been raised against making the moratorium permanent, notably because of its impact on developing and least-developed countries (LDCs). These include South Africa, India, and Indonesia, which suggest dissociating electronic transmission from the digital product transmitted.[7] The text of the moratorium focuses on electronic transmissions, suggesting that today, as technology allows, countries could apply customs duties not to electronic transmissions, but to the digital products contained in that transmission.[8]

Such an approach would become necessary in view of the continuing growth in trade in digital products,[9] but also because technical capabilities are evolving and the products that can be digitized are also increasing. The rise of 3D printing[10] illustrates this reality.[11] The main impact of the moratorium remains the loss of tax revenues. The moratorium primarily benefits the usual trading powers (China, the United States, and the European Union), which

5 *Ibid*.

6 The moratorium has been renewed until the MC14 (WTO (2024), *Ministerial Decision on the Work Programme on Electronic Commerce*, No. WT/MIN (24)/38 and WT/L/1193).

7 WTO (2020), Communication from South Africa and India, *Moratorium on Electronic Commerce: Scope and Impact*, No. WT/GC/W/798 [South Africa and India 2020].

8 *Ibid*, p. 2.1. For South Africa and India, electronic transmissions (i.e., the flow of immaterial electronic information and data) would not be subject to customs duties, as they have no market value as such. On the other hand, the products contained in these transmissions (films, video games, e-books, software, etc.) could be subject to customs duties on their market value.

9 *Ibid*, p. 2.2.

10 3D printing has seen annual growth of almost 30% since 2016. Like digital books, it's now objects of increasing complexity that can be shared digitally and reproduced through printing. See Karevska S. et al. (2019), '3D printing: hype or game changer?', *EY Global Report, Stuttgart: Ernst & Young GmbH*. Retrieved from: https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/advisory/ey-3d-printing-game-changer.pdf [accessed 11 Mar 2024].

11 WTO (2020), *supra* note 7, p. 2.4.

account for 80% of electronic transmissions.[12] Bearing in mind that most developing countries and LDCs are net importers of electronic transmissions, the loss of tax revenue would be $10 billion for developing countries and $1.5 billion for LDCs.[13] Conversely, since the customs duties applied by high-income countries are 0.2%, tax revenue losses are estimated at 289 million % by the United Nations Conference on Trade and Development (UNCTAD).[14] South Africa, India, and Indonesia have therefore come to formally propose the lifting of the moratorium on electronic transmissions for the CM12.[15] Other submissions by WTO members emphasize that the overall benefits of the moratorium (lower production costs, elimination of transport costs, increased demand, and consumer welfare...) far outweigh any potential tariff losses.[16]

Electronic transmissions pose one of the most obvious problems for electronic commerce and have been the subject of a temporary moratorium since the 1998 Ministerial Declaration on Electronic Commerce. This declaration also provided for the establishment of a Work Programme on Electronic Commerce.

1.2. The Electronic Commerce Work Programme: A mechanism without a clear purpose

The General Council established a Work Programme on Electronic Commerce at the request of the Ministerial Conference to study the further implications of electronic commerce for WTO agreements and international trade.[17] While the General Council oversees all work on e-commerce and examines cross-cutting issues, it has mandated four other WTO bodies to study the relationship between e-commerce and the WTO agreements for which they are respectively responsible.[18] These are the Council for Trade in Services, the Council for Trade in Goods, the TRIPS Council, and the Committee on Trade and Development.

One of the key issues dealt with by the Councils on Trade in Goods and Trade in Services concerns classification.[19] This involves determining whether products or services are exchanged via electronic transmissions. While the

12 Banga R. (2017), *Rising Product Digitization and Losing Trade Competitiveness*, UNCTAD Report No. UNCTAD/GDS/ECIDC/2017/3, Geneva: United Nations Conference on Trade and Development.

13 This estimate is calculated based on average consolidated customs duties for DCs and LDCs, see Banga R. (2019), *Growing Trade in Electronic Transmissions: Implications for the South*, UNCTAD Research Paper n°29, Geneva: United Nations Conference on Trade and Development.

14 *Ibid*.

15 WTO (2021), *Communication from South Africa, India and Indonesia*, No. WT/GC/W/838/Rev.2.

16 Two communications in particular point in this direction (WTO (2020), Communication from Australia et al, *Broadening and deepening discussions on the moratorium on customs duties for electronic transmissions*, No. WTO Doc WT/GC/W/799; and WTO (2023), Communication from Australia et al, *Moratorium on customs duties for electronic transmissions*, No. WT/GC/W889).

17 WTO (1998), *supra* note 2.

18 WTO (1998), 'General Council', *Work Programme on Electronic Commerce*, No. WT/L/274 at p. 1.2 [1998 Work Programme].

19 *Ibid*, p. 2.1 and 3.1.

physical purchase of video games, books, music, or films does indeed come under the heading of trade in goods, the situation may be different if these goods are digitized and transmitted electronically. In other words, when we buy a film on a video-on-demand platform, are we paying for the product or for the video-on-demand service? This question of classification goes even further when it comes to trade-in services. In the General Agreement on Trade in Services (GATS), a distinction is made between the different modes of supply of services (cross-border supply, consumption abroad, presence of natural persons, or commercial presence).[20] In the case of e-commerce, it is not always easy to determine whether the supply of the service is cross-border or whether it is for consumption abroad. However, this classification can have a significant impact, as states can make different commitments depending on the mode of supply of services.[21] The Council for Trade in Services is also responsible for issues relating to domestic regulation, privacy, public morality, consumer protection, and accessibility to network infrastructures.[22]

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council also plays a central role in this work program, since electronic transmissions can pose a major problem for the protection of intellectual property rights.[23] Electronic transmissions may contain cultural products or technologies protected by copyright (and related rights) and are generally subject to exploitation licenses.[24] These technologies have enabled the development of new works (such as computer programs or databases) whose protection regime has yet to be defined.[25] Digital commerce also raises issues relating to trademark law, notably concerning the use of trademarks on the Internet and domain names.[26] Thus, the evolution of digital commerce highlights the multifaceted role of the TRIPS Council in navigating these intricate issues.

The Committee on Trade and Development is also responsible for examining the impact of e-commerce on development.[27] The aim is to identify the potential benefits of e-commerce for developing and LDCs, as well as the technical and structural obstacles that could prevent them from taking

20 *General Agreement on Trade in Services*, Article 1 p. 2.

21 WTO (2004), *United States - Measures Affecting the Cross-Border Provision of Gambling and Betting Services (Complaint by Antigua and Barbuda)*, No. WT/DS285/R (Panel Report), para. 3.29; in this case, classification had no bearing on the dispute, as the commitments were the same for all four modes of supply.

22 To the extent that electronic transmissions require the use of network services such as telecommunications and the Internet, providers who own these infrastructures may restrict the necessary access to foreign service providers. For further details, see WTO (1998), 'Council for Trade in Services', *Note to the Secretariat*, No. S/C/W/68, p. 19 - 30.

23 WTO (1998), *supra* note 18.

24 WTO (1999), 'Council for TRIPS', *Information note to the Secretariat*, No. IP/C/W/128, p. 27.

25 *Ibid*, p. 28.

26 WTO (2003), *Council for TRIPS, Information Note to the Secretariat Addendum*, No. IP/C/W/128/Add.1, pp. 19 - 28.

27 WTO (1998), *supra* note 18, p. 5.1.

advantage of it.[28] E-commerce offers a tremendous opportunity to lower transaction costs, increase economic efficiency, and intensify competition, which in turn "contributes to lower prices and higher global demand".[29] This translates into reciprocal benefits for consumers and producers in developing and LDCs. For consumers, "e-commerce should broaden the range of products on offer, lower their price, improve their quality and speed up delivery".[30] In addition to reaping the same benefits as consumers when producers are also importers of electronic goods, e-commerce can enable them to improve their export opportunities. The main benefit is to eliminate or even reduce "their traditional handicaps in the commercial field, such as their remoteness from markets and lack of information on outlets and supply".[31] This would materialize in the possibility of exporting goods and services without the need for intermediation, commercial presence, or the presence of natural persons while gaining visibility through worldwide advertising campaigns.[32]

However, developing countries and LDCs face numerous obstacles to seizing these opportunities, notably in terms of the availability and accessibility of the infrastructure needed to engage in e-commerce, and the development of the human skills required for e-commerce.[33] The Committee's mission is therefore to examine the impact of e-commerce on developing and LDCs while studying the specific challenges they face and the possible solutions to enable them to take full advantage of the e-commerce boom. This was the focus of the 12th Ministerial Conference, at which member states agreed to "reinvigorate work under the Work Programme on Electronic Commerce, on the basis of the mandate set out in Decision WT/L/274 and taking particular account of its development dimension".[34]

However, despite developments at the WTO concerning the moratorium on electronic transmissions and the progress of the Work Programme on Electronic Commerce, it must be said that their contribution remains particularly limited. The main reason for this is that the work program was initiated solely to study the impact of e-commerce, and not to develop reform proposals or to serve as a framework for multilateral negotiations on e-commerce. Despite the Working Program's interest in highlighting all the legal issues that can arise when dealing with e-commerce, the current context requires the WTO to provide answers to these challenges. The

28 WTO (1998), *Committee on Trade and Development, Development Implications of Electronic Commerce*, No. WT/COMTD/W/51, p. 6.
29 *Ibid*, p. 8.
30 *Ibid*, p. 11.
31 *Ibid*, p. 10.
32 *Ibid*, p. 14.
33 *Ibid*, p. 19 - 34.
34 WTO (2022), *Ministerial Decision on the Work Programme on Electronic Commerce*, No. WT/MIN(22)/32 and WT/L/1143.

growth in electronic flows, the conclusion of regional trade agreements that include these issues, and the race to dematerialize trade brought about by the COVID-19 pandemic make it more necessary than ever to develop a multilateral framework for e-commerce.[35] It was in this spirit that the Joint Initiative on Electronic Commerce was launched at the Eleventh Ministerial Conference, with the aim of reaching a series of agreements or commitments on the subject.[36]

2. Plurilateral negotiations on e-commerce, an agreement in prospect for CM13

It has been seven years since the e-commerce initiative was announced, and January 2024 marked the five-year anniversary of the official launch of negotiations. Before taking stock of the negotiations, we will first look back at the reasons behind the launch of the joint initiative, and then present the framework in which it is taking place.

2.1. The reasons for launching multilateral negotiations: A unanimous need for regulation

E-commerce began to take off in the early 1990s, meanwhile international institutions have not been particularly proactive in regulating this phenomenon - quite the contrary. However, the first element that reinforces the need for this joint initiative is that there is a pressing need for regulation.[37] As proof of this, over 7,700 proposals, modifications, or implementations of digital regulations have been carried out by states in the space of three years. These regulatory changes mainly concern the fields of taxation, competition, online content moderation, and, above all, data governance, which alone accounts for more than 3,100 of these initiatives.[38] However, the adoption of unilateral policies and regulations carries the risk of further widening the digital divide between the most advanced states and those that remain on the bangs of e-commerce, which observe the continued lifting of barriers to market entry.[39]

This widely observed need for regulation means that the initiative must be global. States have not waited for the WTO negotiations to cooperate bilaterally or regionally in the development of these new standards, and it is perhaps preferential trade agreements that have most extensively shaped

35 WTO (2021), *Joint Statement on the Electronic Commerce Initiative*. Retrieved from: https://www.wto.org/english/news_e/news21_e/ji_ecom_minister_statement_e.pdf [accessed 11 March 2024].

36 WTO (2017), *Joint Statement on Electronic Commerce*, No. WT/MIN(17)/60.

37 Ismail Y. (2023), 'L'initiative de déclaration conjointe sur le commerce électronique à la croisée des chemins en vue d'un aboutissement 'concret' d'ici à la CM13', *IISD Policy Analysis, Geneva : International Institute for Sustainable Development*. Retrieved from: https://www.iisd.org/fr/node/17514 [accessed 11 March 2024].

38 Digital Policy Alert. Retrieved from: https://digitalpolicyalert.org/ [accessed 11 March 2024]; for a detailed analysis of this data, see Evenett S. J., Fritz J. (2022), *Emergent Digital Fragmentation. The Perils of Unilateralism*, London: CEPR Press.

39 *Ibid*.

the regulatory environment for e-commerce.[40] With the conclusion of agreements such as the Regional Comprehensive Economic Partnership Agreement (RCEP) and the Comprehensive and Progressive Agreement for Trans-Pacific (CPTPP), which many authors describe as "mega-regional" agreements, the Asia-Pacific region has become the main centre of gravity of the emerging global governance of e-commerce.[41] The attractiveness of these agreements must also be emphasized in the case of the PTPGP, which has already been officially extended to the United Kingdom and is considering the accession of China and Taiwan. The influence of its e-commerce governance model could thus extend far and wide.[42]

Regional trade agreements are not the only instruments for cooperation in regulating e-commerce. Some states have signed specific agreements on digital issues. On the one hand, Singapore has launched a new kind of agreement known as the "Digital Economy Agreement", some of which it has already signed with Chile, New Zealand, Australia, the UK, and South Korea.[43] The Singapore government identifies three key objectives for this new kind of agreement: "Align digital rules and standards and facilitate interoperability between digital systems; support cross-border data flows and protect personal data and consumer rights; and, encourage cooperation between partners in emerging areas such as digital identities, artificial intelligence, and data innovation".[44]

Furthermore, in line with what is already being done for other regulatory issues, the European Union (EU) is setting up mutual recognition procedures with its partners. Particularly invested in the issue of data protection, the General Data Protection Regulation (GDPR) prohibits operators from transferring collected personal data outside the EU, unless the third country provides an equivalent level of protection, comparable to that guaranteed in the EU. To facilitate cross-border data flows, the EU adopts "adequacy decisions"[45] thus recognizing *a priori* this equivalence. The EU has already adopted twelve such

40 Burri M. (2022), 'A WTO Agreement on Electronic Commerce: An Enquiry into its Legal Substance and Viability', *Georgetown Journal of International Law*, Vol. 52, No. 02.

41 Frank N. (2021), *6 Degrees of Separation: The Topology of E-commerce Governance*, Working Paper n°2021-09, Canberra: Australian National University.

42 Burri M., *supra* note 40.

43 Ismail Y. (2023), 'Evolving context and dynamics associated with the WTO joint initiative on e-commerce', *IISD Report, Geneva: International Institute for Sustainable Development*. Retrieved from: https://www.iisd.org/system/files/2023-04/wto-joint-initiative-e-commerce-fifth-year-stocktake-fr.pdf [accessed 11 March 2024].

44 Singapore Ministry of Trade and Industry, 2020, quoted in Ismail Y. (2023), *supra* note 43, p. 5.

45 Possibility provided for in Article 45 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals regarding the processing of personal data and on the free movement of such data (General Data Protection Regulation).

adequacy decisions[46] and has just adopted a thirteenth, somewhat unusual one concerning the USA.[47] The saga of negotiations between the USA and the EU is not yet over. The Court of Justice of the EU (CJEU) has already ruled twice on the incompatibility of the two previous adequacy rulings.[48] Recognizing that US domestic law has never offered a level of personal data protection comparable to that guaranteed in the Union, it became necessary to establish a bilateral data protection framework (International Safe Harbor Privacy Principles, EU-US Privacy Shield, and Trans-Atlantic Data Privacy Framework) on which the adequacy rulings were based. However, the new protection framework, the Trans-Atlantic Data Privacy Framework, which has benefited from an adequacy decision since the summer of 2023, has been the subject of numerous challenges and is considered by many to be insufficient.[49]

The unilateral adoption of regulations in the digital sector fragments the legal framework applicable to exchanges and becomes an obstacle to data flows. However, it is necessary to regulate these new subjects, and states are doing their best to harmonize their regulations or to cooperate to this end. However, WTO negotiations are not truly multilateral. This is why it is essential to examine the singularity of these joint initiatives, which are by nature plurilateral within a multilateral organization.

2.2. The singular nature of joint initiatives at the WTO: The case of the e-commerce initiative

The genesis of this initiative began at the Eleventh Ministerial Conference in December 2017, when a group of 68 members agreed to jointly engage in "exploratory work with a view to future WTO negotiations on trade-related aspects of e-commerce"[50]. It was only a year later, in January 2019, that these negotiations were officially launched by 76 member states.[51] By November 2023, 90 states, representing over 90% of world trade, were taking part in these negotiations, although they were officially open to all WTO members in the same way as all other joint initiatives. Despite the growing interest in these new initiatives, they suffer from major problems of representativeness. Firstly, there is the absence of key players in these negotiations, such as the

46 With the following countries: Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay.

47 EU (2023), 'Press release, Commercial sector: adequacy decision on the EU-US Data Privacy Framework'. Retrieved from: https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/eu-us-data-transfers_en [accessed 11 March 2024].

48 CJEU (2015), *Maximillian Schrems v Data Protection Commissioner aff C-362/14* and CJEU (2020), *Data Protection Commissioner v Facebook Ireland Ltd and Maximillian Schrems aff C-311/18*, Luxembourg: Court of Justice of the European Union.

49 For their part, the European Parliament and national data protection authorities have warned the Commission about the legal shortcomings of the new protection framework, and Max Schrems, the plaintiff in the two previous cases, has already announced that he will challenge the Trans-Atlantic Data Privacy Framework.

50 WTO (2017), *Joint Statement on Electronic Commerce*, No. WT/MIN(17)/60.

51 WTO (2019), *Joint Statement on Electronic Commerce*, No. WT/L/1056.

countries of the African group, South Africa, and India, who have already expressed their opposition in principle to all these initiatives.[52] Secondly, it may be worth recalling that in 2001, the WTO opened a negotiating round essentially focused on development, even though only four LDCs (Benin, Burkina Faso, Gambia, and Myanmar)[53] are taking part in the current e-commerce negotiations. Finally, the fact that the chairmanship of these negotiations is held by Australia, Japan, and Singapore will certainly convince those who still doubt that the mega-agreements concluded in the Asia-Pacific region have positioned it at the heart of this new governance.

In terms of working methods, the co-organizers share a "consolidated text" made up of all the papers submitted by participants in the initiative. Small informal working groups of delegates from different countries, led by facilitators, are set up to discuss specific articles in depth based on this consolidated text. The consolidated text is then regularly updated based on new communications and the results of the various working groups. The plenary sessions that may be held with senior officials from the various participating states also help to foster convergence and speed up the achievement of results on stumbling blocks. Although most discussions take place on the bangs of WTO meetings and in an informal setting, all communications and positions are notified to the Secretariat, which records them in the organization's documentation and circulates them to all member states, including those who have not expressed an interest in the negotiations. This publicity ensures the transparency of the negotiations, which remains relative insofar as this documentation is not accessible to mere observers.

Through press releases, however, the co-organizers highlighted the important advances made at recent meetings and reiterated their objectives to reach a consensus at WCD13, even if deep divergences persist on certain topics.[54]

2.3. WC13 as a perspective, state of play of e-commerce negotiations

On August 04, 2023, the fourth version of the consolidated negotiating text was released[55] bringing few structural changes, in contrast to the December 2022 version which reflected significant changes in dynamics compared to the 2021 and 2020 texts.[56] Here, then, is an overview of the articles according to the level at which negotiations are taking place.

52 WTO (2021), 'Communication from India and South Africa', *The Legal Status of 'Joint Statement Initiatives' and Their Negotiated* Outcomes, No.WT/GC/W/819.

53 The Gambia announced its participation in the initiative on October 23, 2023, see WTO (2023), *Communication from the Gambia*, No. INF/ECOM/82.

54 WTO (2023), 'Press Release, E-Commerce Negotiations Co-Hosts Call on Negotiators to Intensify Efforts to Show Flexibility'. Retrieved from: https://www.wto.org/french/news_f/news23_f/jsec_29sep23_f.htm [accessed 11 Mar 2024].

55 WTO (2023), *Negotiations on Electronic Commerce, Updated Consolidated Negotiating Text*, No. INF/ECOM/62/Rev.4.

56 Ismail Y. (2023), *supra* note 43.

Table 1. Status of negotiations on the joint e-commerce initiative

SECTIONS, SUBSECTIONS, AND ARTICLES	NEGOTIATIONS CONCLUDED	ONGOING NEGOTIATIONS
Section A: Facilitation of electronic commerce		
A.1 Facilitating electronic transactions		
(1) Framework for electronic transactions	August 2022	
(2) Electronic authentication and electronic signature	April 2021	
(3) Electronic contracts	July 2021	
(4) Electronic invoicing	February 2023	
A.2. Logistics and digital trade facilitation		
(1) Paperless trade	January 2022	
(2) Unique windows for data exchange and system interoperability / Unique reference numbers for shipments	July 2023	
Section B: Opening and e-commerce		
B.1. Customs duties on electronic transmissions		X
B.2 Internet and data access		
(1) Open public data	September 2021	
(2) Access to and use of the Internet for [e-commerce/digital trade].	September 2021	
Section C: Trust and e-commerce		
C.1 Consumer protection		
(1) Online consumer protection	September 2021	
(2) Unsolicited electronic commercial messages	February 2021	
C.2 Privacy		
(1) [Protection of personal information/ Protection of personal data].		X
C.3 Confidence of economic operators		
(1) Source code		X

(2) ICT products that use cryptography		X
C.4 Cybersecurity		
Section D: Cross-cutting issues		
D.1. Information flow		
(1) [Transborder flows of information by electronic means/Transborder data flows].		X
(2) Location of IT equipment		X
(3) [Financial information/Location of financial IT facilities for financial service providers covered].		X
D.2 Transparency, domestic regulation and cooperation		
(1) Transparency	July 2021	
(2) Cooperation		X
D.3. Capacity building		
(1) Options for capacity building and technical assistance		X
D.4. Implementation periods for developing and least-developed member countries		
(1) Implementation periods for developing and least developed member countries		X
D.5. Provisions on special and differential treatment for developing and least developed member countries		
(1) Options for capacity building and technical assistance		X

Section E: Telecommunications		
E.1. Disciplines relating to telecommunications services		X
Scope of application and general provisions		
(1) Preamble		X
(2) Definitions		X
(3) Principles		X

(4) Scope of application		X
(5) Relationship with other agreements		X
(6) General exceptions		X
(7) Safety exception		X
(8) Native populations		X
(9) Prudential measures		X
(9 bis) Taxation		X
(10) Settlement of disputes		X
(11) Committee on Trade-Related Aspects of Electronic Commerce		X
Appendix		
(1) Logistics services		X
(2) Greater trade facilitation for cross-border e-commerce		X
(3) Use of technology for goods release and customs clearance		X
(4) Electronic payment services / Electronic payments		X
(5) Non-discriminatory treatment of digital products		X
(6) Access to online platforms / Competition		X
(7) Internal regulations		X
(8) E-commerce network products		X
(9) Access to the services market		X
(10) Temporary entry and residence of e-commerce businesspersons		X
(11) Market access for goods		X

While annexes and general provisions are traditionally the last points to be negotiated, there are still several stumbling blocks. It should be noted that a consensus could have been envisaged before WC13 on subsections "C.3. Confidence of economic operators" and "C.4. Cybersecurity", as well as on cooperation. However, there are still major differences of opinion on certain points, making the negotiations extremely complex.

On the one hand, the joint initiative faces the same problem as that raised concerning the moratorium on electronic transmissions in relation to the impact of customs duties on developing countries. A divide can be observed here between the developed member countries and the developing countries/LDCs. For the time being, this divide does not allow a consensus

to be reached on "B.1. Customs duties on electronic transmissions", which is also reflected in the negotiations on the implementation periods granted to developing countries and LDCs, and the provisions on special and differential treatment that could be granted to them.

On the other hand, the main point of contention, which is not limited to the usual North-South or developed/developing countries divide, concerns the protection of personal data. This cross-cutting issue has an impact on the negotiations in sub-sections "C.2. Privacy", "D.1. Information flows" and "E.1. Telecommunications". Personal data protection is not a common issue; on the contrary, there are few states for which it is a central concern.[57] The consensus to be reached therefore concerns acceptable prohibitions and restrictions on the cross-border transmission of information. The consensus today is in favor of restricting electronic transmissions for legitimate public policy objectives, but not for data protection. Three papers are currently under consideration and illustrate the scope of the debate. In its most recent communication, China proposes limiting restrictions on cross-border electronic flows and transmissions to public policy objectives.[58] However, such exceptions must be proportionate and necessary, and must not constitute arbitrary or unjustifiable discrimination.[59] The UK, while also recognizing exceptions based on a legitimate objective,[60] first proposes that only restrictions aimed at:

(a) requiring the use of computing facilities or network elements in the territory of [Party/Member] for processing, including requiring the use of certified or licensed computing facilities or network elements in the territory of [Party/Member];

(b) require data to be located within the territory of [Party/Member] for storage or processing;

(c) prohibiting storage or processing on the territory of another [Party/Member]; or

(d) making the cross-border transfer of information subject to the use of computer facilities or network elements on the territory of [Party/Member] or to location requirements on the territory of [Party/Member].[61]

In addition, it calls for the recognition of an exception for States wishing to restrict electronic transmissions to protect personal data if they meet four cumulative conditions:

(a) the main purpose of the measure, or the relevant elements of the

57 Among the countries in favor of binding data protection rules are Canada, Japan, New Zealand, the United Kingdom and the European Union and its member states.
58 WTO (2023), *Communication from China*, No. INF/ECOM/78.
59 *Ibid*, p. 5.
60 WTO (2023), *Communication from the United Kingdom*, No. INF/ECOM/79 p. 4.
61 *Ibid*, p. 2.

measure, is to ensure the protection of personal information;

(b) the [Party's/Member's] measure provides exhaustively for the manner in which personal information may lawfully flow across borders;

(c) the [Party/Member] measure provides for an instrument or set of instruments enabling the cross-border transfer of information, formulated in clear and objective terms; and

(d) such an instrument, or set of instruments, is not applied in a manner that is arbitrary or discriminatory, or that nullifies or impairs the benefits accruing to a [Party/Member] under any of subparagraphs (a) to (d) of paragraph 2.[62]

However, China explicitly ruled out the possibility of such an exception in its communication.[63] The third proposal was put forward by Nigeria, which called for recognition of a general exception in favor of developing countries and LDCs, which would no longer be subject to these provisions.[64]

These three proposals have been combined in a joint document drawn up by the facilitators of the restricted working group on data flows and the location of IT facilities.[65] This document, which was circulated on November 06, 2023, will be the starting point for further discussions on the subject.

It is impossible to deny that, with this initiative, the States intend to establish a common framework on the issue of e-commerce. Several approaches are being considered, influenced by previous developments at the regional level. It is therefore conceivable that plurilateral disciplines could take precedence over less ambitious regional agreements on certain regulatory issues. Having outlined the dynamics at both multilateral and plurilateral levels, we now turn to an analysis of Vietnam's place in the development of this new governance of e-commerce.

3. Regional e-commerce negotiations: Vietnam as a major player in Asia-Pacific negotiations

The global economy has undergone a profound transformation in recent decades thanks to technological advances. Vietnam, once primarily known for its manufacturing industry, has kept pace with this digital revolution. Current trends show that the country is positioning itself favorably on the world economic stage thanks to its transition to a digital economy.

Vietnam is becoming a major player in Southeast Asia's digital economy. In 2020, the estimated value of Vietnam's digital economy was US$14

62 *Ibid*, p. 3.
63 Communication from China, *supra* note 58 p. 3.
64 WTO (2021), *Communication from Nigeria*, No. INF/ECOM/65.
65 WTO (2023), 'Joint Statement on Electronic Commerce', *Flow of Information and Location of Computing Facilities*, No. INF/ECOM/83.

billion, with 450% growth since 2015. This growth is set to continue at a rate of 30% between 2020 and 2025, thanks to Vietnam's national digital transformation program.[66] This ambitious program aims to place Vietnam among the top 50 countries in the world in terms of e-governance, and for the digital economy to account for 30% of the country's GDP by 2030.[67] This bold vision demonstrates Vietnam's commitment to the digital economy and its desire to play a major role in the global economy.

One of the main drivers of this growth is e-commerce. Vietnam has seen a surge in digital commerce, thanks to affordable Internet access. According to a study commissioned by the Hinrich Foundation, the economic value of digital trade benefits to the Vietnamese economy is expected to increase 12-fold from 2018 to reach VND953 trillion (around US$40 billion) by 2030.[68] The main opportunities for harnessing digital commerce lie in sectors such as infrastructure, financial services, and manufacturing. This growth is accompanied by a significant increase in digital exports, driven by the development of digital infrastructure and online video advertising.[69]

Vietnam reports on new trade agreements with advanced commitments to e-commerce and the free flow of information, such as the CPTPP, the RCEP,[70] and the free trade agreement with the EU (EVFTA). The "Electronic Commerce" section in Chapter 8 of the EVFTA aims to foster the development of electronic commerce between the two parties through the elimination of customs duties on electronic transmissions (Article 8.51). Apart from this commitment, the section mainly encourages regulatory cooperation on issues such as the recognition of electronic signature certificates, the liability of online service providers, the management of unsolicited electronic commercial communications, and consumer protection. The parties undertake to dialogue and exchange information on their respective laws and regulations relating to e-commerce. General exceptions are provided to protect legitimate interests, and a specialized committee is set up to monitor and implement these provisions.

66 Huynh T. (2021), 'Vietnam Digital Economy and Regulatory Challenges', *International Trade Administration*. Retrieved from: https://www.trade.gov/market-intelligence/vietnam-digital-economy-and-regulatory-challenges [accessed 11 March 2024]. The National Digital Transformation Program to 2025 and Orientations to 2030 was adopted and promulgated by Prime Ministerial Decision No. 749 QD-TTg of June 3, 2020.

67 *Ibid*.

68 Bhatnagar P. (2019), 'The Database Revolution: How Vietnam Can Capture the Digital Trade Opportunity at Home and Abroad?', *Vietnam Digital Trade Report, Hinrich Foundation*. Retrieved from https://www.hinrichfoundation.com/research/wp/digital/vietnam/ [accessed 11 March 2024].

69 *Ibid*.

70 The Regional Comprehensive Economic Partnership Agreement, concluded in 2020. Signatories to the agreement are the 10 member states of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam) and its 5 partners, Australia, China, Japan, New Zealand and the Republic of Korea.

Chapter 14 of the CPTPP on e-commerce goes further, providing for the free flow of information and prohibiting data localization requirements and source code disclosure. It is often compared with Chapter 12 of the RCEP, which also deals with digital trade. The two chapters have similar language regarding cooperation, paperless trade, electronic authentication and electronic signature, online consumer protection, protection of personal information, unsolicited commercial electronic messages, the national regulatory framework, customs duties, and cybersecurity. Like the CPTPP, the RCEP does not apply to government procurement or "information held or processed by or on behalf of a Party [i.e. governments], or measures relating to such information, including measures relating to its collection" (Article 12.3.3).

The RCEP and the CPTPP diverge regarding provisions concerning the location of computer facilities,[71] the cross-border transfer of information by electronic means,[72] source code,[73] and dispute resolution.[74] Unlike the CPTPP, the RCEP adds national security exceptions: where the restrictive measure is necessary to protect the essential security interests of one party, that measure can apply without any risk of challenge by the other parties.[75] The national security exception is therefore absolute, making commitments to liberalize cross-border digital trade and data flows ineffective. Similarly, disputes relating to e-commerce will not be settled through the dispute settlement mechanism provided for in Chapter 19, the only authorized route being consultation (Article 12.17). If RCEP member states fail to resolve a dispute on their own through consultation, it is referred to the RCEP Joint Committee (at the ministerial level) for further discussion, but without the power to impose a decision. This means that the other commitments concerning e-commerce remain symbolic, and few obligations are non-binding.

Furthermore, although Article 12.14 of the RCEP echoes the terms of Article 14.13 of the CPTPP and entitles a member state to take restrictive measures on the location of computer facilities if it considers such measures necessary to "achieve a legitimate public policy objective", this

71 Article 14.13 of the PTPGP; Article 12.14 of the RCEP.

72 Article 14.11 of the PTPGP; Article 12.15 of the RCEP. The PTPGP requires parties to "permit", while the RCEP provides that parties "shall not prevent" the cross-border transfer of information by electronic means, with an exception granted to Vietnam for a period of 5 years after entry into force and to the other three ASEAN members (Cambodia, Laos and Myanmar) for the same period, with the possibility of a further 3 years.

73 Article 14.17 of the PTPGP; Article 12.16 of the RCEP. While the PTPGP prohibits making the import of software conditional on the transfer of, or access to, source code, the RCEP only refers to the treatment of source code as a matter for consideration by its members.

74 Article 14.18 of the PTPGP; Article 12.17 of the RCEP.

75 Article 12.14 par. 3b, 12.15 p. 3b of the RCEP.

provision diverges with the addition of a footnote stating that only the party implementing such measures can determine the necessity itself.[76] This means that the legitimacy of any public policy that might require a company to locate IT facilities in a member state is self-assessed. In other words, anything can be considered legitimate if one party declares it so. Incidentally, in case the footnote was not enough, sub-paragraph (b) makes it clear that the article does not prevent a party from taking "any measure it considers necessary for the protection of its essential security interests".

Despite its commitment to the digital economy, Vietnam is one of the few countries in these RTAs not to have participated in the WTO's Joint Initiative on Electronic Commerce, which aims to negotiate a plurilateral agreement on "trade-related aspects of electronic commerce". This lack of participation would have several implications. Firstly, Vietnam will not be directly involved in the development of standards and rules for e-commerce on a global scale, which could deprive it of the opportunity to defend its interests and actively contribute to shaping the global digital business environment. Moreover, Vietnam's lack of participation in this initiative could complicate its international trade relations, particularly in the field of e-commerce. The country would face challenges such as non-tariff trade barriers, regulatory divergences, and disagreements on key e-commerce issues.

Furthermore, as we have analyzed, the rules drawn up in regional agreements concerning e-commerce are not sufficiently advanced to constitute a balanced legal framework in favor of the liberalization and facilitation of this trade. Indeed, of the three RTAs to which Vietnam is a party, only the CPTPP can be considered advanced in regulating e-commerce. It should also be noted that almost all of Vietnam's partners in these agreements are part of the Joint Initiative, enabling them to take part in the elaboration of future WTO standards in this important field.

Table 2. Participation by Asia-Pacific countries in digital trade regulation (as of November 10, 2023)

	Country	WTO initiative	CPTPP (Chap. 14)	RCEP (Chap. 12)
1.	Australia	x	x	x
2.	Brunei	x	x	x
3.	Cambodia	no	no	x
4.	Canada	x	x	no

76 Note 14: "For the purposes of this paragraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party".

5.	Chile	x	x	no
6.	China	x	no	x
7.	Korea	x	no	x
8.	Indonesia	x	no	x
9.	Japan	x	x	x
10.	Laos	x	no	x
11.	Malaysia	x	x	x
12.	Mexico	x	x	no
13.	Myanmar	x	no	x
14.	New Zealand	x	x	x
15.	Peru	x	x	no
16.	Philippines	x	no	x
17.	United Kingdom	x	x[77]	no
18.	Singapore	x	x	x
19.	Thailand	x	no	x
20.	Vietnam	no	x	x

On July 14, 2020, at a meeting with Vietnam's Finance Minister Ho Duc Phoc, WTO Director General Ngozi Okonjo-Iweala expressly encouraged Vietnam to actively participate in and contribute to the WTO's initiative to develop e-commerce. In response, the Vietnamese Minister asserted that this trend is inevitable on a global scale. After underlining Vietnam's efforts in successfully implementing the digitization of trade, particularly in the customs, taxation, treasury, and finance sectors, the Minister assured that he would take note of the WTO's proposals and report back to the Vietnamese government.[78]

Certainly, Vietnam still can benefit from the global digital economy. The country can still pursue the negotiation of bilateral and regional agreements that promote e-commerce and digital innovation and develop its own national regulations to promote and regulate e-commerce in an

77 On July 16, 2023, the parties to the PTPGP signed a protocol of accession with the United Kingdom, which awaits ratification by all members before coming into force.

78 HTQT, 'Minister Ho Duc Phoc: Vietnam always appreciates the cooperation with WTO', *The Ministry of Finance*, July 19, 2022. Retrieved from: https://www.mof.gov.vn/webcenter/portal/btcen/pages_r/l/newsdetails?dDocName=MOFUCM238968 [accessed 11 March 2024].

effective and balanced way. However, participation in the WTO's Joint Initiative on Electronic Commerce will give it more opportunities to express its interests and influence the process multilaterally.

Conclusion

In our view, the joint initiative on e-commerce at the WTO should be a response to the challenges posed by the rapid expansion of this sector. The need to regulate e-commerce is obvious, given the numerous unilateral proposals and initiatives emerging worldwide. The absence of common rules could exacerbate the digital divide between developed and developing nations.

However, born in a context where regional trade agreements, such as RCEP and CPTPP, have taken on increasing importance in the global governance of e-commerce and have influenced the dynamics of WTO negotiations, the joint WTO initiative presents shortcomings that cannot be overlooked. The CM13 raised questions about the possibility of reaching a consensus, particularly on key issues such as customs duties on electronic transmissions and the protection of personal data. Divergences between developed and developing countries complicate these discussions, illustrating the challenges inherent in the plurilateral nature of this initiative.

Vietnam, although emerging as a major player in Southeast Asia's digital economy, has chosen not to participate in the WTO's joint initiative. This hesitation risks compromising its ability to influence e-commerce rules at the global level, while weakening its position in more specific trade discussions. The rules established within the WTO frequently serve as the basis for subsequent bilateral or regional negotiations. This is why Vietnam's participation is important to maintain its negotiating strength and avoid being forced into non-negotiated commitments, which negotiated at plurilateral, or multilateral level would have become the norm. ●

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Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

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