

WTO PLURILATERAL NEGOTIATIONS ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE

Taxation of Physical Goods in the Context of E-commerce: Avoiding Non-tariff Barriers through Simple and Consistent Design

SUMMARY RECOMMENDATIONS

Indirect tax regimes, if poorly designed, can create non-tariff barriers to the supply of physical goods. Where goods are ordered via platforms or otherwise electronically, the same issues can arise, creating obstacles to micro, small and medium-sized enterprise (MSME) growth through digitally-enabled trade.

ICC believes that the ‘digital dimension’ to goods transactions is an important consideration. To this end, we encourage governments to consider the following guiding principles in any associated discussions under the scope of the Joint Statement Initiative (JSI):

1. Minimise discrimination between domestic and non-domestic businesses in registration requirements, and ensure tax systems are technology-neutral in application.
2. Allow suppliers, where relevant, to collect and remit taxes away from the border.
3. Maintain or establish appropriate *de minimis* thresholds, allowing customs agencies to focus on safety and security rather than domestic tax collection.
4. Ensure that registration and tax payment processes are simple, consistent and non-discriminatory.
5. Do not require a place of business or fiscal representative in the country of destination in order to supply goods.

CONTEXT

Growth in digitally-intermediated goods transactions, from consumers buying on marketplace platforms to global supply chain management and fulfilment platforms, has completely changed the way that buyers and sellers interact. Consumers and buyers can now interact with each other online, unconstrained by geographic location.

Online shopping has brought greater choice for consumers and opened global markets to entrepreneurs at remarkable speed. The number of online shoppers in Africa, for instance, has increased by 18% annually since 2014, surpassing the world average growth rate of 12%¹. If you have the right product at the right price, a consumer can buy that product, no matter where you or they are. Never has such an opportunity existed for MSMEs in developing and least developed countries to access global markets.

However, it has also brought about challenges. In addition to the well-known challenges of technology and skills gaps, and e-commerce related trade frictions (such as those outlined in the recent ICC Baseline Position), MSMEs face another potential barrier to market access and cross-border commerce: complex, costly and inconsistent indirect tax collection processes.

We believe the JSI negotiations offer the potential to frame WTO disciplines that ensure behind the border measures are non-discriminatory and avoid the creation of non-tariff trade barriers. For indirect taxation, this means designing regimes that are consistent, simple, and ensure a level playing field between domestic and international businesses—while balancing the dual objectives of protecting domestic revenue bases and creating an enabling environment for MSMEs to trade internationally.

¹ UNCTAD B2C E-Commerce Index 2018: Focus on Africa (UNCTAD Technical Notes on ICT for Development, No. 12) 15.

INDIRECT TAXES

Value-Added Tax (VAT) and Goods and Services Tax (GST) are indirect or consumption taxes, borne by the final consumer in the jurisdiction of consumption and charged/levied on supply of goods and services at the time of supply. The place of taxation (consumption) is determined based on the destination principle. Business collects the tax on behalf of, and pays to, governments via periodic tax declarations.

With the advent of e-commerce, consumers are increasingly buying goods online from sellers in foreign jurisdictions, creating challenges for national governments in their collection of domestic VAT/GST from businesses located beyond their jurisdictions.

Traditionally, many countries have established *de minimis* thresholds on imports, refraining from the imposition of tax at the border because the cost of collection is too high to warrant it. Growth in the volume and value of digitally-intermediated B2C goods transactions, however, has created pressure for countries to abolish *de minimis* thresholds and collect domestic VAT/GST.

Safeguarding VAT/GST revenues and ensuring a level playing field are highly important for business too. The key elements for this to be achieved are:

- > the destination and neutrality principle
- > simplicity, consistency, feasibility and proportionality, and channel neutrality when it comes to VAT/GST collection
- > cooperation and exchange of information between tax administrations to ease compliance

Consideration should also be given to automation (given the millions of transactions and hundreds of thousands of business parties involved), as well as ensuring consultation with business and appropriate lead times.

COMPLEX AND INCONSISTENT DESIGN CREATES BARRIERS TO TRADE

ICC recognises that, with the rise of digitally-intermediated goods transactions, national governments are concerned with the protection of fiscal revenue. The imposition of indirect taxes on physical goods purchased online from third countries has an important place in the policy mix. However, a balance needs to be struck between tax collection and ensuring that collection processes are neither overly complex nor discriminatory as to create non-tariff barriers to trade.

Unfortunately, some jurisdictions clearly discriminate between domestic and non-domestic retailers in the sale of physical goods, to such an extent that MSMEs in developing and least developed countries may be unable to access these markets.

Some jurisdictions are introducing proposals which include VAT/GST collection processes as well as additional customs declarations at the border, even though the intention is only to collect VAT/GST and minimize non-compliance, rather than the collection of import duties. Some are even requiring businesses, regardless of size, to either register a permanent place of business in their jurisdiction or employ the services of a fiscal representative.

Such proposals not only place substantial cost and administrative burdens on businesses, but local customs officials as well. Customs have stated for some time that the sheer volume of small consignments being imported is placing a heavy burden on resources. Today, most of these shipments are cleared via manifests. If these consignments suddenly require a customs declaration the impact on resources and clearance times for all shipments will be negatively impacted.

GOOD PRACTICE

To date, Australia—with other countries in the process of doing the same—has introduced a model for collecting GST which ICC believes should be looked at carefully as a potential solution to enhance indirect tax collection models in other countries. The process has delivered revenue in excess of expectations and compliance is high. Though this GST regime is relatively new, early experience suggests that it is an efficient and effective way of taxing physical goods sold via digital platforms.

Supposing that in a fiscal quarter a third country trader sells 1,000 units to Australia-based recipients (B2C sales only), each unit with a value below AU\$1,000, the key features of the system are below:

- > obligatory registration if B2C shipper/vendor has sales > AU\$75,000 per annum (otherwise *de minimis* of AU\$1,000 applies)
- > 1,000 invoices to buyers
- > 1 monthly or quarterly GST return (depending on the choice of the B2C shipper/vendor; fixed GST rate always 10% of sale price)
- > 1 payment of GST (monthly or quarterly depending on the choice of the B2C shipper/vendor)
- > No customs declaration required: registration number of the B2C shipper/vendor is conveyed to Customs on the cargo manifest
- > The B2C shipper/vendor can file directly: there is no requirement for physical presence nor a fiscal representative/intermediary in Australia.

We also kindly encourage JSI participants to look at the VAT/GST work already done in this field, particularly on efficient VAT/GST collection mechanisms, by other international organisations such as the OECD:

[OECD VAT/GST Guidelines](#)

[OECD Report—Mechanisms for the Effective Collection of VAT/GST—Implementation Guidance](#)

[OECD Report—The role of digital platforms in the collection of VAT/GST on online sales](#)

RECOMMENDATIONS

We believe the ongoing negotiations represent a major opportunity to establish principles ensuring that behind the border measures are non-discriminatory and avoid the creation of non-tariff barriers. For indirect taxation, this means regimes applicable to e-commerce shipments of physical goods that are simple and consistent, in order to enable MSME trade while protecting revenue collection. We encourage all governments participating in the JSI to consider whether these principles might usefully be captured in WTO disciplines contained within any future agreement on e-commerce.

Whether or not JSI participants ultimately determine that this agreement should contain such provisions, their impact needs to be better understood, especially given the very considerable increase in cross-border supply of goods enabled by digital platforms.

WTO PLURILATERAL NEGOTIATIONS ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE

The business case for a permanent prohibition on customs duties on electronic transmissions

SUMMARY

The moratorium on customs duties on electronic transmissions (“moratorium”) has become an indispensable aspect of the modern trading system and a central piece in the 70+ year long-term trend towards an international trading system as free as possible from barriers to the global exchange of goods and services.

It is now time to make the moratorium permanent by prohibiting customs duties and formalities on electronic transmissions.

In the context of ongoing World Trade Organization (WTO) negotiations on electronic commerce, as well as the upcoming Ministerial Conference, the International Chamber of Commerce (ICC) emphasises the following:

1. For the Joint Statement Initiative on E-Commerce (JSI) process, global business views agreement on a permanent prohibition as a necessary signal by JSI participants of commitment to a high standard outcome.
2. Within the broader WTO Membership, a decision by the General Council in December 2019 to extend the moratorium is essential for digital trade.
3. Customs duties and formalities on electronic transmissions are virtually impossible to implement and enforce.
4. The calculation of tariffs for electronic transmissions is unworkable: an ad valorem assessment will not work for the majority of electronic transmissions; a non-ad valorem assessment will have highly distortive impacts on the digital economy.
5. The moratorium’s economic benefits far outweigh any potential tariff revenue from digitalised goods and services, including for developing and least developed economies. This is especially the case given that there are more efficient and practical behind-the-border options for revenue collection.
6. WTO Members, in particular developing countries, have legitimate concerns regarding revenue loss from the digitalisation of the economy. But traditional tariff measures and formalities are not the answer. Achieving global consensus on direct and indirect tax regimes based on international best practices is the optimal way to deal with this public policy concern.

I. CONTEXT

Since the [Declaration on Global Electronic Commerce](#) at the Second Ministerial Conference in 1998, WTO Members have continued the practice of not imposing customs duties on electronic transmissions (the “moratorium”).

The moratorium has enabled digital trade to flourish, preventing the creation of trade barriers and burdensome customs duties or tariffs. The moratorium has helped consumers access new products and services, and enabled businesses, in particular micro, small and medium-sized enterprises (MSMEs), to access new markets. It also made a powerful statement: the default position with new forms of trade arising after the conclusion of the WTO Agreement is with no tariffs.

As a result, digital trade has been an immense economic driver: enhancing productivity, innovation and competitiveness and reducing the cost of doing business in an increasingly digitalised world.

II. ICC PROPOSAL

a. On the Joint Statement Initiative

ICC joins many of the WTO Members participating in the JSI process in calling for a permanent prohibition on customs duties on electronic transmissions.

There have been efforts by Asia-Pacific Economic Cooperation countries to make the moratorium permanent through the Pathfinder Initiative, and many countries have made similar commitments in trade agreements. It is now time for JSI countries to signal their commitment to a flourishing digital economy by agreeing to a legally binding permanent prohibition on customs duties on electronic transmissions.

Such a prohibition will give the private sector the necessary confidence to build the technology infrastructure of the future and will demonstrate a commitment on the part of JSI participants to lead in the development of innovative digital trade policies.

Indeed, a permanent prohibition is viewed by global business as an essential element of any high standard outcome.

ICC proposes the following model provision as one example of how a permanent prohibition could be given effect:

Customs Duties

1. Members shall not impose customs duties or customs formalities on or in connection with electronic transmissions, including content transmitted electronically, between a person of a Member and a person of another Member.
2. For greater certainty, paragraph 1 shall not preclude a Member from imposing internal taxes, fees or other charges on electronic transmissions, provided that such taxes, fees or charges are imposed in a manner consistent with the rules as set out in the WTO Agreements.

b. Within the Broader WTO Membership

Conscious of the need to continue the legal effect of the moratorium beyond 31 December 2019, ICC calls for a decision of the General Council in December 2019, ideally to extend the moratorium to the 13th WTO Ministerial or, at a minimum, through to the 12th WTO Ministerial in June 2020 to provide an opportunity for further negotiations.

III. THE ECONOMIC CASE FOR A PERMANENT PROHIBITION

The imposition of customs duties leads to declines in domestic output and productivity, increases in unemployment and inequality.¹

This holds even more for industries undergoing high levels of innovation, such as many involved in the digital economy. One-sided, inward-looking analyses presuppose that a new raft of protectionist tariffs in the absence of the moratorium will protect nascent industries in developing countries such as, for instance, the 3D printing industry.² What this overlooks, however, is that the unilateral imposition of tariffs on electronic transmissions will likely lead to countermeasures by affected third countries, directly interfering with the ability of MSMEs in developing countries to scale and access international markets.

According to a comprehensive scenario modelling study undertaken by the European Centre for International Political Economy (ECIPE),³ potential tariff revenue losses are far outweighed by the GDP losses that would accrue from the unilateral imposition of tariffs ("Scenario 1", an optimistic outcome) or, what is more likely, the reciprocal imposition of tariffs ("Scenario 2").

Under Scenario 1, tariffs on electronic transmissions (using the average tariff rates assumed by UNCTAD on a Most Favored Nation basis) lead to immense GDP losses. The projected GDP loss for the Indian economy,

¹ See, eg, Furceri, D et al, 'Macroeconomic consequences of tariffs' (IMF Working Paper WP/19/9) 6.

² See, eg, Rashmi Banga, '[Growing Trade in Electronic Transmissions: Implications for the South](#)' (UNCTAD/SER.RP/2019/1) 32.

³ European Centre for International Political Economy, 'The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions' (ECIPE Policy Brief No. 3/2019).

for instance, is US\$716 million as against expected tariff revenue of \$US39 million.⁴ Further investment (domestic and foreign direct), jobs and welfare losses are also suffered.

As the ECIPE paper notes, if one or a small number of countries impose tariffs on electronic transmissions, “it is a political fallacy to assume that a broader group of WTO Members would not follow suit and begin to consider their own tariffs”.⁵ Net losses are even more pronounced in Scenario 2. The GDP losses for India, for instance, would amount to US\$1.9 billion, against expected tariff revenue of US\$31 million.⁶

In addition to these losses, there would also be considerable losses in domestic taxes.⁷ Considered in totality, the projected economic losses from the imposition of tariffs on electronic transmissions far outweigh projected revenues.

IV. WILL THE UNILATERAL IMPOSITION OF CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS FRAGMENT THE INTERNATIONAL TRADING SYSTEM?

Bans on the imposition of customs duties on electronic transmissions are plentiful within bilateral, regional and mega-regional trade agreements. Fifteen APEC members, for instance, have entered into agreements containing a ban since 2008.⁸ Some agreements contain affirmations of the moratorium as agreed in WTO Ministerials.⁹ Many, however, are truly “WTO-plus” obligations, creating permanent bans on the imposition of customs duties on electronic transmissions between parties to the relevant agreement.

A notable feature of these agreements is that they have increasingly aligned with the spirit and substance of the moratorium. Its lapse would therefore create a further added degree of complexity on the interaction between the multilateral trading system and the growing web of bilateral and regional trading agreements. Ironically, given its widespread adoption in preferential trade agreements, suspending the moratorium at this juncture will actually contribute to the ‘spaghetti bowl’ phenomenon.

Mega-regional example: Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Article 14.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.
2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

Regional example: US-Mexico-Canada Agreement (USMCA)

Article 19.3: Customs Duties

3. No Party shall impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically, between a person of one Party and a person of another Party.
4. For greater certainty, paragraph 1 does not preclude a Party from imposing internal taxes, fees, or other charges on a digital product transmitted electronically, provided that those taxes, fees, or charges are imposed in a manner consistent with this Agreement.

⁴ Ibid 9.

⁵ Ibid 11.

⁶ Ibid.

⁷ Ibid 13–15.

⁸ APEC, 2016 Committee on Trade and Investment Report to Ministers (November 2016), Appendix 26-1: Pathfinder Initiative Proposal for a Permanent Customs Duty Moratorium on Electronic Transmissions, Including Content Transmitted Electronically —Submission by Australia, Brunei, Canada, Chile, Japan, Korea, Mexico, New Zealand, Peru, Singapore, the United States, and Chinese Taipei.

⁹ See, eg, Australia-China FTA art 12.3.1.

Article 10.4: Digital Products

5. A Party shall not apply customs duties or other duties, fees or charges on or in connection with the importation or exportation of digital products by electronic transmission.

Note: The obligation in paragraph 1 does not preclude a Party from imposing internal taxes or other internal charges provided that these are imposed in a manner consistent with Article III of GATT 1994 and its interpretative notes as incorporated into this Agreement by Article 2.2

In addition to the above examples, Table 2 contains a non-exhaustive list of bilateral and regional trade agreements that include a ban on customs duties on electronic transmissions.

Table 2 trade agreements containing the moratorium (non-exhaustive)

Regional Trade Agreements

Additional Protocol to the Framework Agreement of the Pacific Alliance
Canada-Honduras FTA
Colombia-Northern Triangle FTA
EFTA-Central America FTA
EU-Central America Association Agreement
EU-Colombia-Peru TA
EU-Japan EPA
EU-Singapore FTA
Gulf Cooperation Council-Singapore FTA

Bilateral Trade Agreements

Australia-China FTA
Australia-Hong Kong FTA
Canada-Jordan FTA
Costa Rica-Singapore FTA
Chile-Colombia FTA
Japan-Switzerland EPA
Korea-Singapore FTA
Korea-US FTA
US-Bahrain FTA
US-Colombia TPA
US-Morocco FTA
Singapore-Australia FTA
Sri Lanka-Singapore FTA

V. CAN CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS BE CALCULATED?

a. Ad valorem assessments are unworkable

Putting aside the unsettled and critical issue of whether an electronic transmission constitutes a good, service, or 'bundle of rights' akin to copyright or intellectual property, calculating the economic value of an individual electronic transmission is in many instances an impossible task.

Hypothetical 1—Live-streaming a performance

Consider the hypothetical performer—famous Bollywood actress and singer-songwriter “Priyanka”. Priyanka is debuting a song and opts to livestream it to her millions of fans across several channels. The performance is transmitted electronically to her approximately 44 million Priyanka followers in more than 100 countries.

If an “electronic transmission” is considered an intangible good (an unsettled area of trade law and the working assumption of the Government Indonesia in its new Chapter 99 to the Indonesian Customs Tariff Book¹⁰), then there are potentially millions of electronic transmissions of Priyanka’s performance, transmitted to as many as 100 countries.

Assessing the economic value per view in this instance is not possible.

There are countless forms of electronic transmissions that are practically impossible to quantify and track, not to mention difficult to value from a customs valuation perspective. Consider the steady flow of emails necessary to facilitate business-to-business and business-to-consumer transactions. Ascribing an arbitrary economic value to these electronic transmissions to enable customs declarations premised on *ad valorem*

¹⁰ Created pursuant to Perubahan Kedua Atas Peraturan Menteri Keuangan Nomor 6/PMK.010/2017 Tentang Penetapan Sistem Klasifikasi Barang Dan Pembenan Tarif Bea Masuk Atas Barang Impor (Regulation 17).

duty assessments will create perverse, unintended consequences, potentially placing a direct disincentive on electronic communication and stifling digital innovation.

Hypothetical 2—Business to business data flows—service optimization

Consider South African haulage and logistics provider Cyril, who has recently purchased trucks for his business from a prominent European firm. The trucks are equipped with on-board connected devices and sensors that capture data on the truck's performance, component wear and tear, safety and handling.

This data is then transmitted to a data centre managed by the European vendor, where it is analysed and processed to provide real-time insights back to Cyril in South Africa. This data enables Cyril to optimise the performance of his fleet, avoid unnecessary downtime, reduce fuel waste, and assess and improve driver skill.

Cyril is but one of the European firm's many customers worldwide. Hundreds of thousands of trucks covering billions of kilometres every year send to and receive data from the European firm. This amounts to billions of bits of data crossing multiple jurisdictions as the basis for this value-added service.

Assessing the value per data point in this business-to-business package service is not feasible.

b. Non-ad valorem assessments would be highly distortive

To undertake a non-*ad valorem* duty assessment, there must be some metric upon which an assessment can be made. Two methods of non-*ad valorem* assessment appear theoretically possible.

1. Number of bits

A possible form of assessment would be to base an applied rate of duty on the number of bytes or bits (series of zeroes and ones). Yet determining a customs duty based on file size will grossly distort the digital economy. If an incentive is placed on reducing file size many industries will be greatly affected, from advanced manufacturing to the creative industries.

Of note is that many developing countries claim a substantial trade surplus in their creative industries, including Indonesia and India.¹¹

2. Units as a whole

Given the difficulties in assessing value as the basis for determining a duty, and the perverse and unwelcome side effects of calculating a duty based on file size, it may seem attractive to calculate duty based on a single 'unit', where that is taken to mean an intangible good (such as operating software or a movie).

To do this would disregard the last 20 years of Internet infrastructure development. When an intangible is transferred electronically to a particular destination, elements of the intangible are often sourced from servers located in multiple jurisdictions, a fact explored in further detail below.

VI. IS THERE A SETTLED MEANING OF THE TERM “ELECTRONIC TRANSMISSIONS”?

The current conversation on the moratorium fails to acknowledge the lack of clarity surrounding the meaning of the term “electronic transmissions”. The key intellectual underpinning for new calls for a rethink of the moratorium on customs duties on electronic transmissions, a research paper from a member of UNCTAD's Secretariat,¹² written in her personal capacity, assumes that “electronic transmissions” means “[t]he online trade of digitizable products”,¹³ or the “on-line deliver[y], e.g., of music, e-books, films, softwares [sic] and video games”.¹⁴

Indeed, the Government of Indonesia has taken this approach in its new Chapter 99 of the Indonesian Customs Tariff Book, as set out in Table 1.

¹¹ UNCTAD, '[Creative Economy Outlook: Trends in international trade in creative industries](#)' (UNCTAD/DITC/TED/2018/3) 25.

¹² See Rashmi Banga, '[Growing Trade in Electronic Transmissions: Implications for the South](#)' (UNCTAD/SER.RP/2019/1).

¹³ Ibid 1.

¹⁴ Ibid 3.

Table 1—Indonesian Customs Tariff Book—Chapter 99

No	Tariff line/ HS Code	Description of goods	Import duty
	99.01	Software and other digital goods transmitted electronically	
10827	9901.10.00	> Operating system software	0%
10828	9901.20.00	> Application software	0%
10829	9901.30.00	> Multimedia (audio, video, or audio-visual)	0%
10830	9901.40.00	> Supporting or driver data for machinery system	0%
10831	9901.90.00	> Other software and digital goods	0%

Yet the term itself remains unsettled and is potentially very broad, capable of encompassing:

- > internet publishing, web search portals, directories and information services
- > online retail services
- > online photographic, motion picture and sound recordings
- > digital advertising
- > data hosting, system (e.g. cloud) services and data transfers.

To explore how electronic transmissions work in practice, consider the online streaming of video content.

According to the [Cisco Visual Networking Index](#), video will account for 82 per cent of global Internet Protocol (IP) traffic by 2022. The following hypothetical example illustrates just how technically, legally and operationally complex it would be to levy customs duties on just one form of electronic transmissions: the data packets required to stream a movie.

Hypothetical 3—Online Streaming

1. Nasra, based in Jakarta, subscribes to a streaming platform headquartered in the United States. She would like to watch a movie on her smartphone.
2. Under current technology, data are sent via packet switching—a process whereby data are divided into small units, called packets, and transmitted independently via the Internet. The size of a typical individual IP packet is anywhere from 1.5 to 64 kilobytes.
3. Browsing through the titles available to her, Nasra's smartphone receives electronic transmissions to the streaming platform's application on her smartphone. Those transmissions are stored on a third party's distributed system in the cloud, and are transmitted to Nasra's smartphone from Singapore, Hong Kong SAR, Mumbai and Sydney.
4. For Nasra's movie, there could be up to 5 million data packets, or electronic transmissions, sent to her smartphone. This number is not predetermined, as it is a function of the speed of her Internet Service Provider at any point in time—the streaming platform having developed sophisticated technology to determine the optimal video quality consistent with Nasra's internet connectivity. The higher the speed, the greater the number of total data packets.
5. When Nasra clicks play, the platform sends a signal to the 10 nearest servers to Nasra, a subset of the thousands of servers that the streaming platform maintains globally. Packets of data are received from Australia, Japan, Guam, New Zealand, South Korea and The Philippines, until the application determines that Singapore provides the more efficient connection.
6. Part-way through Nasra's streaming of the movie, the streaming platform engages in a routine redundancy check, momentarily suspending service through the region, causing the application to automatically receive data packets from a different geographic region, in this case from several countries within the European Union.
7. By the time Nasra has finished watching her movie, she has received millions of electronic transmissions from at least 9 separate jurisdictions.

This example serves to highlight the manifold complexities that arise when seeking to hypothesise a workable regime for levying customs duties on electronic transmissions. Given the carrier medium, regarding the entire movie as an individual electronic transmission is conceptually unsound. Given the underlying ICT infrastructure that supports it, a single certificate of origin or customs declaration for the entire movie is untenable. In this context, requiring customs formalities for every electronic transmission would be next to impossible to comply with, for businesses of any size.

Unilateral moves to define and characterise “electronic transmissions”, absent multilateral negotiation and agreement, will further fragment the international trading regime and strain already fraying dispute resolution processes.

VII. ARE CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS TECHNOLOGICALLY AND ADMINISTRATIVELY VIABLE?

Assuming the conceptual issues explored above can be overcome, it is an open question whether it would be technically feasible to operate a system for the collection of tariffs on electronic transmissions.

Given that “electronic transmissions” are the data making up an intangible good or service, customs declarations could run into the millions per good or service and be sourced from many jurisdictions. Requiring a custom declaration to accompany data flows would place an immense burden on the efficient functioning of global commerce and the free and open Internet upon which it relies. It would also place an enormous burden on customs bodies and could, assuming the value of electronic transmissions can be readily ascertained, impose administrative costs on customs bodies far outweighing the value of the electronic transmissions themselves.

VIII. A BETTER WAY TO ADDRESS REVENUE LOSS: NEGOTIATED AGREEMENT ON DIGITAL TAXATION POLICY

States, in particular developing and least developed countries, have legitimate concerns regarding revenue loss due to digital transformation of economic activities. However, for the host of reasons explored above, customs duties are not the answer.

Countries can already implement non-resident VAT/GST on electronically supplied services. Most digital companies are already complying (through collection and remittance) in several countries. So long as the tax is applied on a level playing field with domestic service providers, revenue can be realised in a non-discriminatory way.

ICC recommends that this issue be approached through consensus-based multilateral discussions within the OECD [Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy](#), with its 131 Inclusive Framework members.

The WTO Secretariat should ensure that Members are apprised of developments in the OECD and other political contexts, including through reporting of these developments to the General Council and the Ministerial Conference.

We also believe it would be useful for those Members who have implemented VAT/GST on intangible goods and services supplied from firms with no domestic presence to provide information to all Members on how these policies have worked and what level of compliance they have seen.

WTO PLURILATERAL NEGOTIATIONS ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE

Facilitating trade through digitalisation

FIVE KEY RECOMMENDATIONS TO FACILITATE TRADE THROUGH DIGITALISATION

1. Create disciplines to facilitate the digitalisation of trade and trade finance instruments
2. Ensure functional equivalence of digital data to paper-based documentation
3. Ensure functional equivalence of electronic signatures to their manual equivalents
4. Establish a preference for the use of electronic trade administration documents, including through the use of Single Windows and digital certification and authentication services
5. Include an obligation to minimise the regulatory burden on electronic commerce

CONTEXT

Global business believes that the Joint Statement Initiative on Electronic Commerce (JSI) presents an ideal opportunity to enhance trade facilitation and simplify trade finance processes. [The ICC Baseline Position for a High Standard Outcome](#) sets out, under Pillar 2, a number of ideas that build on the landmark Trade Facilitation Agreement within the context of a fast-growing digital economy.

Given the interest shown in recent months by JSI participants on paperless trading, the following issues brief includes a number of suggested provisions that could further facilitate trade through digitalisation.

Global trade is increasingly digitalised. Buyers, sellers, marketplaces and intermediaries now rely on technologies that enable commerce at a speed, scale and efficiency unimaginable just a few decades ago. Unfortunately, many customs administrations around the world are still in the infancy of adopting such technologies and processes. Often, customs procedures still rely on hard-copy paper documents, manual and inefficient processes, and other relics of a bygone era ill-suited for trade in the 21st century.

For example, according to the Global Express Association's [Customs Capability Database](#), 64 of 139 countries annually measured (46%) do not accept or electronically process the data required for release of shipments in advance of their arrival—what has become a global benchmark for efficient and secure customs processing.

While all companies face costs, micro-, small-, and medium-sized enterprises (MSMEs) engaged in cross-border e-commerce disproportionately shoulder the burden of such outdated customs procedures, including delays and added costs.

The JSI presents an opportunity to build on existing trade disciplines and global best practices in order to fully realise the benefits of digitalisation and paperless trade.

I. DIGITALISATION OF TRADE AND TRADE FINANCE INSTRUMENTS

Trade instruments are essential commercial tools. Their digitalisation can improve the speed and security of transmission, permit the reuse of data, and automate transactions using 'smart contracts'.

Though trade and trade finance instruments are capable of digitalisation, the lack of legal clarity surrounding their treatment prevents their broad use and associated benefits. Examples include bills of lading and negotiable instruments (such as bills of exchange and promissory notes).

Bills of lading are a basic element of most international sales of goods. Bills of lading:

- > act as a receipt for goods shipped on board;
- > function as a legal contract of carriage;
- > act as title to the relevant goods; and
- > are capable of passing title to the goods (transferable).

Negotiable instruments are other important forms of payment obligation. Through mercantile practice and legislation, these instruments have acquired legal recognition as independent obligations linked to but not conditional on the trade they may finance. They are also transferable by endorsement. This makes them powerful banking tools which are attractive to financial institutions and investors as they reduce much of the performance risk associated with the sale of goods. Their use has declined because they are (or are perceived to be) required to be in paper form to satisfy signature, originality and transferability requirements.

The 2017 United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Electronic Transferable Records* (MLETR), adopted by the General Assembly on 7 December 2017, provides the clarity necessary for widespread adoption of digitalised trade and trade finance instruments.

Important provisions include:

- > Article 7: an electronic transferable record 'shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form';
- > Articles 8-11: on the functional equivalence of electronic and manual records; and
- > Article 12: on general reliability standards for verifying signatures, integrity and other aspects of electronic records. Helpfully, this general reliability standard allows for the consideration of 'any applicable industry standard'.

Despite extensive negotiation and agreement, adoption of the MLETR has been low. At time of writing, only Bahrain has enacted laws based on or influenced by the MLETR.

The International Chamber of Commerce (ICC) believes that a provision calling for the adoption of the MLETR could add significant value to the eventual JSI agreement, as follows:

Article [X]: Electronic Transferable Records

Each Party shall maintain laws and regulations governing electronic transferable records based on the UNCITRAL *Model Law on Electronic Transferable Records 2017*.

II. EQUIVALENCE OF DIGITAL DATA TO MANUSCRIPT WRITING

A further high-value enabler of digital trade would be to include a discipline requiring the equivalent treatment of digital data to manuscript writing.

The UNCITRAL *Model Law on Electronic Commerce 1996* (MLEC) achieves this, stating at Article 6(1): "Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference."

At time of writing, 72 states and 151 jurisdictions have incorporated legislation based on or influenced by the MLEC.¹ Reference is made to the MLEC in various regional and bilateral free trade agreements.²

¹ See UNCITRAL, "[UNCITRAL Model Law on Electronic Commerce \(1996\)—Status](#)".

² For a helpful overview see Mark Wu, [Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trading System](#) (RTA Exchange, November 2017) 14-15.

ICC believes that a high standard outcome of the JSI process could usefully include a provision calling for the maintenance of laws and regulations based on the MLEC. A useful example and one that could guide JSI participants is Article 15.5 of the [Malaysia-Australia FTA](#):

Article 15.5: Domestic Regulatory Frameworks

1. Each Party shall [adopt or] maintain laws and regulations governing electronic transactions based on the UNCITRAL *Model Law on Electronic Commerce 1996*.

...

III. ACCEPTANCE OF ELECTRONIC SIGNATURES

The use of e-signatures has exploded, increasing efficiency in contracting and the delivery of products and services for both governments and enterprises. According to [MarketsandMarkets](#), the e-signature market is set to grow exponentially over the next five years. This raises concerns about the uncertain status of e-signatures in some jurisdictions and the potential for this to disrupt cross-border trade transactions.

The JSI process provides an excellent opportunity to create World Trade Organization (WTO) disciplines that confirm the legality of digital signatures and harmonise their necessary features.

Article 14.6 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides a useful template for consideration by JSI participants:

Article 14.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.
2. No Party shall adopt or maintain measures for electronic authentication that would:
 - a. prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
 - b. prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.
3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.
4. The Parties shall encourage the use of interoperable electronic authentication.

IV. USE OF ELECTRONIC TRADE ADMINISTRATION DOCUMENTS

The JSI negotiations present a valuable opportunity to encourage the use of digital trade administration documents, including through the use of Single Windows and digital certification and authentication services.

The recent communication from Brazil ([INF/ECOM/27/Rev.1/Add.1](#)) is helpful in this regard. It is drafted in such a way that two key objectives are achieved: (1) it uses accommodative language, providing a margin of appreciation for countries in their implementation of electronic trade administration systems that is mindful of the varying capacities of national customs systems, yet (2) establishes a strong preference for digitalisation.

One can see this in the proposed Article 1, copied below.

Article 1: Electronic trade administration documents

1.1 Use of electronic trade administration documents

- 1.1.1** Each member shall, whenever feasible, issue and accept electronic trade administration documents.
- 1.1.2** Whenever there is a viable electronic or digital version or copy of a paper trade administration document, Members shall, to the extent possible, accept it as a legal equivalent of the paper version.

...

V. MINIMISATION OF REGULATORY BURDEN ON ELECTRONIC COMMERCE

The ambition of the JSI is to achieve a high standard outcome—one that can further enhance the benefits of electronic commerce for businesses, consumers and the global economy.³

In our view, this means minimising the regulatory burden on e-commerce where appropriate. This also means consulting, as appropriate, with the private sector to ensure enabling regulatory frameworks. We think this approach is particularly important to achieving the benefits of paperless trading given the importance of (1) simplifying trade-related processes for small businesses; and (2) the manifold complexities involved in cross-border trade transactions.

ICC considers that this spirit should be captured in some way in the eventual agreement. Precedent can be found in Article 15.5(2) of the Malaysia-Australia FTA, which states:

Article 15.5: Domestic Regulatory Frameworks

...

2. Each Party shall:

- a.** minimise the regulatory burden on electronic commerce; and
- b.** consult, as appropriate, with industry in the development of electronic commerce regulatory frameworks.

A useful further provision could emphasise the importance of bringing objectivity and impartiality to regulation of electronic commerce. To that end, Article 8.74 of the EU-Japan EPA is helpful:

Article 8.74: Domestic Regulation

Each Party shall ensure that all its measures of general application affecting electronic commerce are administered in a reasonable, objective and impartial manner.

³ [Joint Statement on Electronic Commerce](#) (WT/L/1056) (25 January 2019).

WTO PLURILATERAL NEGOTIATIONS ON TRADE-RELATED ASPECTS OF ELECTRONIC COMMERCE

Electronic payment services and e-commerce

INTRODUCTION

Payments services are critical drivers of financial inclusion. In developing countries, they are often the first point of entry for consumers into formal financial services. Globally competitive electronic payment services (**EPS**) technology provides individuals, especially those in lower-income and remote segments of society, with easier, cheaper, and safer access to financial services.

Access to a diverse and competitive market in EPS is essential to increasing financial inclusion and reducing poverty. As almost two billion people in the world do not have access to affordable financial services, access to EPS systems through ‘mobile money’ and other digital financial services are critical to allowing access to international markets for micro-, small- and medium-sized enterprises (**MSMEs**).

What policymakers may not realise when they are discussing e-commerce is that payments services are indispensable ingredients to the growth and success of the digital ecosystem and its participants. If a consumer cannot make a safe and secure online transaction, they are unable to participate in the online global economy. EPS are what enable merchants to accept multiple payment types in real time. They can process retail card-present transactions through a virtual terminal or process card-not-present transactions online, allowing you to eliminate the costs associated with maintaining traditional point of sale hardware. Without EPS, there is no e in e-commerce.

SUMMARY

- > Electronic payment services are the fulcrum of global e-commerce and an essential topic to be addressed in the ongoing Joint Statement Initiative on trade-related aspects of e-commerce (**JSI**).
- > Facilitating international trade in EPS requires the development of new World Trade Organization (WTO) disciplines, including on cross-border data flows, data storage and localisation, to counter present and future barriers that ultimately impose significant costs on consumers, companies, government, and society at large.
- > ICC believes new rules will not secure the benefits of EPS for global e-commerce unless they are accompanied by commitments from WTO members to provide suppliers of these services with **market access** and **national treatment**.
- > This paper outlines the need for JSI participants to commit to revise their schedules under the General Agreement on Trade in Services (**GATS**) to provide unconditional commitments on market access and national treatment with respect to EPS.
 - Currently, many WTO members have scheduled few or no commitments on EPS—meaning they can deny market access or national treatment to foreign suppliers without violating WTO rules.
 - Others have scheduled incomplete commitments that impose a complex web of limitations on foreign suppliers. Only by removing these limitations can the full benefits of a WTO agreement on e-commerce accrue to JSI participants and their local economies, businesses, and consumers.
- > “Clean” commitments on market access and national treatment will promote open and competitive markets in EPS and facilitate the transition from cash-based payments to digital payments in both developed and developing countries. This would create a global ecosystem conducive to financial inclusion, economic growth, and innovation in ecommerce.

- > A diverse and competitive market in EPS can offer enormous benefits while protecting business and consumer interests in choice, affordability and security of financial products.
- > Importantly, governments will still have ample space under the WTO framework to act to protect the integrity of their financial systems and pursue these and other legitimate policy objectives in a manner consistent with market access and national treatment rules.

This paper is organised as follows:

- > **Section I** summarises the key benefits of open and competitive EPS markets, including increasing consumption and economic growth; advancing financial inclusion; enabling economic success of MSMEs, particularly in developing economies; promoting cybersecurity and securing the payments ecosystem; and surfacing local innovation and domestic talent.
- > **Section II** describes the limitations of WTO members' current commitments to provide EPS suppliers with market access and national treatment.
- > **Section III** examines the market access and national treatment barriers that inhibit the growth of digital payments in many WTO member countries. With respect to market access, these barriers include foreign equity caps, burdensome licensing requirements, and domestic processing requirements; and, with respect to national treatment, they include requirements to process through local competitors such as state-owned enterprises, data localisation requirements, co-badging requirements, and burdensome standards/technical requirements.
- > **Section IV** provides a high-level description of EPS and how such services are supplied.

I. BENEFITS OF OPEN AND COMPETITIVE MARKETS IN EPS

Transitioning to open and competitive markets would enable both developed and developing countries to expand the use of electronic payments and obtain the highest quality electronic payment services. Choice and a diverse supply of payment networks ensures substantial benefits for all segments of society. The specific benefits of open and competitive EPS markets that allow global networks to provide their services unhindered include:

- > **Advancing financial inclusion:** Electronic payments are often the first point of entry for consumers into formal financial services. Globally competitive EPS technology provides individuals, especially those in lower-income and remote segments of society, with easier, cheaper, and safer access to financial services. As noted by the World Bank, “[u]sing basic payment or savings accounts can gradually lead to access to and usage of other financial services, such as credit, insurance or pensions.”¹

A recent research publication² by the Consultative Group to Assist the Poor (**CGAP**) sets out a compelling theory of change that articulates how financial services impact the lives of the world's poor. The CGAP research found that improved access to financial services enables poor people to (i) build resilience—prepare for, deal with and recuperate after financial shocks; and (ii) capture opportunity—be it investing in a business, or furthering education and social networks.

- > **Increasing consumption and economic growth:** Expanding electronic payments spurs global growth by promoting consumption, reducing graft, increasing efficiency, and improving revenue

¹ World Bank Group, [Innovation in Electronic Payment Adoption: The case of small retailers](#) (June 2016). A 2016 report prepared by the World Bank Group's Committee on Payments and Market Infrastructure on “[Payment aspects of financial inclusion](#)” similarly concluded that payment accounts may “facilitate access to broader financial services. For example, often the underlying [payment service provider] itself provides some or even all of those other financial services, and by operating the transaction account, it can more easily obtain some of the key information it needs to offer those additional services, such as whether the customer has a regular income flow.”

² CGAP, [Toward a New Impact Narrative for Financial Inclusion](#) (October 2019).

collection, which in turn creates jobs and economic prosperity.³ These benefits accrue to countries at every level of development. Increased use of electronic payments over cash offers particular benefits for economies with sizeable informal sectors, by recording and tracking transactions, facilitating tax collection, squeezing out “off the books” transactions, and providing regulators and governments with more precise economic data to inform policymaking.

- > **Enabling economic success of MSMEs:** There is enormous potential to expand the use of digital payments by MSMEs.⁴ As is the case with consumers, electronic payments are often the gateway for MSMEs into formal financial services. Electronic payments allow MSMEs to establish a credit history and facilitate access to loans that bridge the financing gap. EPS also allow MSMEs to expand their customer base by selling into global markets, and they also open access to global suppliers that accept payments digitally. Other benefits include security and protections against fraud and theft, easier evaluation of revenue and cost flows, access to new financial services, and the ability to use value-added services.
- > **Promoting cybersecurity and securing the payments ecosystem:** A competitive market for EPS drives payment networks to invest in the most advanced cybersecurity and fraud prevention systems to offer the highest level of protection across the payment ecosystem and for all users of EPS. Centralised global processing ensures that EPS providers have access to broad data sets that enable the most sophisticated artificial intelligence-based cybersecurity and fraud prevention services, as such services depend on the aggregation and analysis of non-personally-identifiable global data sets.
- > **Surfacing local innovation and domestic talent:** In addition to pre-existing opportunities with domestic networks, global networks create new opportunities for local fintechs and other e-commerce startups to develop their own solutions on top of global payment technologies and platforms. Together, global networks and domestic firms, including both networks and fintechs, offer complementary electronic payment services that meet unique market needs. When those services are delivered by a broad range of suppliers, such tools can include access to established networks of tens of thousands of bank clients and billions of consumers, thereby helping local startups achieve scale quickly. Global payment networks may also offer fintechs, coders and entrepreneurs access to their proprietary Application Program Interfaces (**APIs**), opening the door for these local innovators to develop their own cutting-edge solutions.

Each government has an important choice to make with respect to the provision of EPS in their markets: subject to their WTO commitments and other legal obligations, they can choose to adopt or maintain substantial barriers to international competition, or they can choose to facilitate open and competitive EPS markets. In the current landscape, as discussed in Section II and III, many governments have opted against their interests for closed or highly restricted EPS markets.

³ Moody's Analytics analysed data for 70 countries/regions between 2011 and 2015, and concluded that “higher card usage contributed an [estimated] additional \$296 billion to consumption..., or a 0.1% cumulative increase in global GDP. ... [C]ard usage accounted for about 0.4% of growth in consumption, as well as an average increase of 2.6 million jobs over 2011-2015.” The study further concluded that “[i]ncreased electronic payments resulted in roughly the same percentage increase in GDP between 2011 and 2015 for emerging markets (0.11%) as for developed countries (0.08%).” Moody's Analytics, [The Impact of Electronic Payments on Growth](#).

⁴ See above n 1, p 5: “The global market opportunity for expanding the adoption of electronic payments by merchants is large, estimated at US\$19 trillion of payments made and accepted in cash and checks by micro, small and medium retailers (MSMRs) in 2015.”

II. EPS COMMITMENTS AND THE WTO

Unlike commitments on trade in goods, most WTO services commitments do not automatically apply to all of a country's service sectors. Rather, under the GATS, a country must specifically state which commitments it is undertaking (i.e., national treatment and market access), in which sectors, and by which methods of supply.⁵ A country's "GATS schedule" reflects its specific services commitments.

Most WTO members have incomplete, patchwork commitments with respect to trade in EPS, which frustrates the development of open and competitive EPS markets and the flow of related benefits. This section provides a snapshot of WTO members' commitments on EPS.

A. Coverage under "all payment and money transmission services, including credit, charge and debit cards, travellers checks, and bankers drafts"

Under WTO law, EPS are financial services that fall within the scope of paragraph 5(a)(viii) of the *Annex on Financial Services to the General Agreement on Trade in Services (GATS)*, which covers all "payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts." Consistent with the principle of technological neutrality, "all payment and money transmission services" includes payments through any technological means, including electronic payments.⁶

As the WTO panel in *China-Electronic Payment Services* stated, "all payment and money transmission services" covers "all services essential to payment and money transmission, all means of payment and money transmission (i.e., paper-based, card-based and others), and all associated business models."⁷ This category also includes "those services that 'manage', 'facilitate' or 'enable' the act of paying or transmitting money"⁸ and all services that "must operate together for the payment and money transmission services to be supplied," including both front-end and back-end processing services.⁹

B. Scope of existing commitments

1. WTO Staff Working Paper analysis

According to a recent WTO Staff Working Paper,¹⁰ only about 18% of all WTO members have a full Mode 1 (cross-border) commitment for "all payment and money transmission services," and another approximately 25% of all WTO members have a partial Mode 1 commitment. Only approximately 14% of all WTO members have a full Mode 3 (commercial presence) commitment in the sector, and another approximately 54% have a partial Mode 3 commitment.

These figures likely overstate the level of commitments WTO members have made with respect to EPS, as they do not explain whether some WTO members with partial commitments, in fact, may have extended those commitments only to sub-sectors *other than* EPS within "all payment and money transmission services."

⁵ In GATS parlance, the various methods of supply are referred to as "modes." Cross-border supply is "Mode 1"; supply to a foreign national who has travelled to the supplying country (referred to as "consumption abroad") is "Mode 2"; supply via a commercial presence in the foreign country is "Mode 3"; and supply by an individual to service consumers in the foreign country (referred to as "presence of natural persons") is "Mode 4."

⁶ See US—Gambling (Panel), para. 6.285 & fn. 836. The principle of technological neutrality means that, absent specific limitations to the contrary, GATS commitments apply to services delivered through any technological means. *Id.*

⁷ See Panel Report, China—Certain Measures Affecting Electronic Payment Services, WT/DS413/R, 16 July 2012, para. 7.99 (China—Electronic Payment Services (Panel)).

⁸ China—Electronic Payment Services (Panel), para. 7.100.

⁹ China—Electronic Payment Services (Panel), para. 7.180 ("we agree with the United States' characterization of subsector (d) as encompassing 'any service that is essential to "payment and money transmission"").

¹⁰ World Trade Organization, Economic Research and Statistics Division, [Elevating Services: Services Trade Policy, WTO Commitments, and Their Role in Economic Development and Trade Integration](#) (Staff Working Paper ERSD-2019-018, March 2019).

2. Summary and critique of the commitments of the members participating in the JSI negotiations

The JSI negotiations provide an opportunity for participants to commit to make full market access and national treatment commitments for Modes 1 and 3 with respect to EPS. Providing market access is important, but insufficient, because a payment network or processor would still be discouraged from entering a market (or maximizing and growing its existing investment) if the payment network or processor were susceptible to unfair treatment once it entered. By the same token, national treatment commitments would have limited value if a WTO member were not willing to provide the market access that foreign companies need to supply their services.

An examination of the WTO commitments of the WTO members that initiated the JSI negotiations shows that full EPS commitments are rare and exceptional. For example, it appears that few if any of the 13 non-EU OECD countries that initiated the negotiations—Australia, Canada, Chile, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Switzerland, Turkey, and the United States—have full EPS commitments. Some have no commitments at all, and some have partial commitments with difficult to interpret limitations.

III. KEY EPS MARKET ACCESS AND NATIONAL TREATMENT BARRIERS

In today's environment of sub-optimal WTO commitments on EPS, electronic payments are subject to a wide range of trade barriers that have stunted the growth of open and competitive international markets. This section outlines key examples of such barriers, which are divided into market access and national treatment issues based on the GATS framework.¹¹ These types of barriers need to be eliminated—and unconditional WTO commitments on market access and national treatment are needed to replace the current insufficient commitments that have enabled these barriers—in order to expand the use of electronic payments and deliver the benefits of high-quality EPS services to all countries.

A. Market Access

Where a WTO member has made a market access commitment, subject to any limitation specified in its GATS schedule, that Member may not maintain or adopt certain types of market access restrictions—such as quantitative restrictions on the number of suppliers or volume of services, restrictions with respect to juridical form, or the imposition of caps on foreign equity investment.¹² Numerous WTO members have adopted market access restrictions with respect to the provision of EPS. For example, some countries have introduced restrictions including but not limited to: foreign equity caps, and burdensome processing requirements. Illustrative examples of such measures are described in the appendix.

B. National Treatment

Article XVII(1) of the GATS (National Treatment) requires that, “in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.” Numerous WTO members have adopted measures that raise questions about national treatment with respect to the provision of EPS. For example, some countries have introduced requirements to process through local competitors or SOEs, co-badging requirements and burdensome standards/technical requirements. Illustrative examples of such measures are described in the appendix.

¹¹ For the avoidance of doubt, some of the specific barriers discussed in this section may pose both market access and national treatment issues.

¹² See Article XVI of the GATS.

IV. EXPLANATION OF ELECTRONIC PAYMENT SERVICES (EPS)

EPS are services provided by payment networks that enable transactions to occur digitally among consumers, merchants, governments, or other accountholders, as an alternative to cash or check. EPS include services through which individual payment transactions are verified and through which transfers of funds between banks participating in the transactions are managed and facilitated.

EPS facilitate transactions conducted not only through payment cards (e.g. credit, debit, or prepaid cards), but also any other devices that enable digital payment (e.g. mobile phones or “smart” devices and their digital wallets) as well as devices leveraging application programming interfaces (APIs) and open banking models.

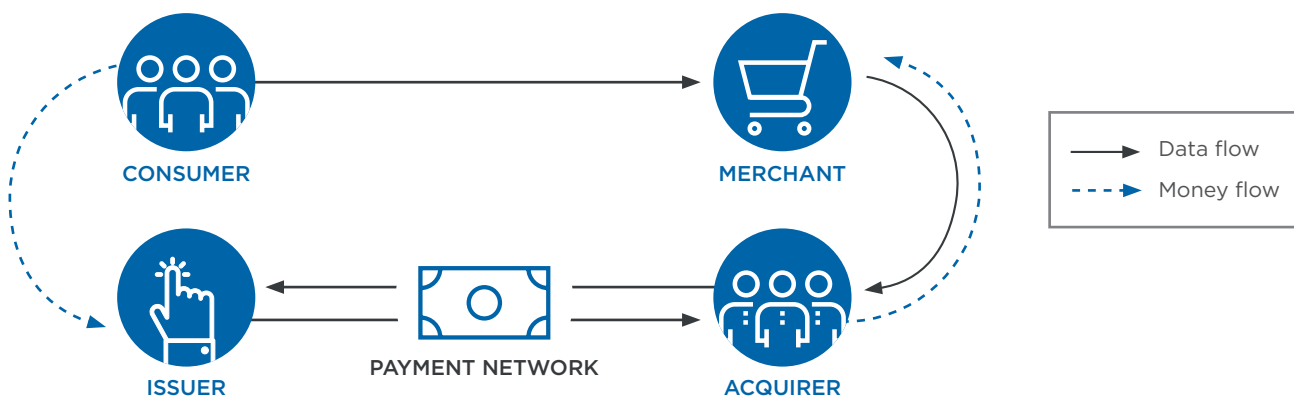
A variety of service providers offer innovative methods to pay in-person, and for transactions between two parties in disparate locations. EPS’ are critically important for e-commerce as they enable secure, convenient transactions between buyers and sellers regardless of their physical location or currency. To provide their services, networks rely on commercial partnerships with domestic banks as well as non-traditional partners such as fintechs to deliver solutions that are locally relevant and accessible. It is this ecosystem that produces the multiplier effect of benefits across local economies as discussed in Section I.

Four-Party Model

Many global payment networks—such as China Union Pay, Visa, and Mastercard—utilise the four-party model for the provision of EPS. In this model, the payment network enters into relationships with financial institutions (such as banks) that sit on either side of a transaction known as “issuers” and “acquirers.” An “issuer” would be a bank that is licensed by the network to offer a payment account to the bank’s customers to *pay* digitally—whether individual, small business, or government clients. An “acquirer” would be a bank that is authorised by the network to enrol customers—most often merchants—to *be paid* digitally.

In a typical transaction,¹³ the payment network fulfils three central functions: authorisation, clearing, and settlement. Diagram A depicts the four-party model, including the message flow that occurs during authorisation, as described below.

Diagram A



Typically, authorisation is initiated when a consumer enters payment information on a website and the merchant sends transaction details to its acquirer bank. The payment network typically provides the communication infrastructure to transmit messages between the acquirer bank and the consumer’s issuer to verify that the consumer has adequate funds. Global payment networks and other transaction stakeholders employ advanced fraud detection and analytics to assess the validity of each transaction, informing the ultimate decision of whether to authorise or decline a transaction. Authorisation occurs on a transaction-by-transaction basis, meaning each transaction is evaluated individually at the time of purchase.

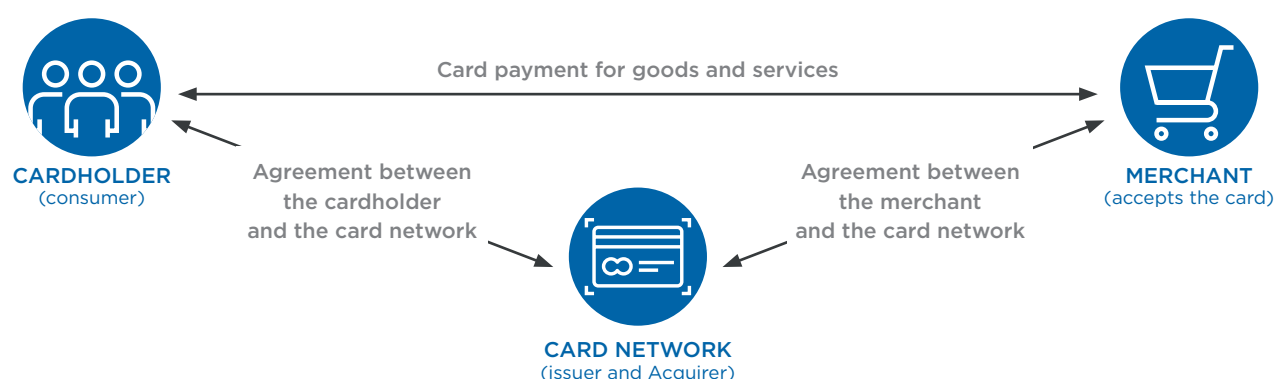
¹³ For clarity, this discussion describes a typical flow of information and funds within the basic four-party model of payment processing. In reality, payment processing, particularly for online sales, typically involves additional entities, including local firms, that facilitate the flow of information and funds among the four core parties.

Clearing occurs on a batch basis, and typically daily. In this step, the acquirer bank receives a daily transaction summary from each merchant, which it bundles and sends to the payment network. The payment network then aggregates transaction information from each client to determine each bank's net debit or credit position and sends payment instructions to each client. Settlement is the final step and refers to the actual exchange of funds between the issuer bank and the acquirer bank according to the amounts assessed by the payment network during clearing. The issuer bank sends funds to the designated settlement bank in the amount of the settlement obligation, and the designated settlement bank then transfers funds to the acquirer bank, which is also facilitated by the payment network.

Three-Party Model

In addition to the four-party model, some market participants in EPS utilise a three-party model.¹⁴ Examples of card schemes that utilise this model include American Express and Diners Club. In this model the same payments provider plays the role of both issuer and acquirer, providing accounts and payments hardware both to consumers and merchants (e.g. a point-of-sale (**POS**) terminal to a merchant and a card to a consumer). Diagram B depicts the three-party model.

Diagram B



Digital Wallets

A digital wallet is a software-based system for making e-commerce transactions. By using a digital wallet, online purchases can be easily made through many devices, including computers, tablets and smartphones. In general, bank accounts of individual users are linked with their digital wallet. In a digital wallet system, user credentials are securely stored and verified during transactions. Digital wallets are not only used for online purchases but also for user authentication. A digital wallet can store complete user information including credentials, transaction history and personal details. Digital wallets can also be used in combination with other mobile payment systems.

CONCLUSION

E-commerce will expand and thrive if electronic payments and the services that make them possible are permitted to reach their global potential. As set out above, a wide range of barriers to EPS exist in both developing and developed countries that prevent consumers, businesses of all sizes, and governments from securing the full benefits of EPS and e-commerce. These barriers are enabled by inadequate WTO commitments on EPS.

Creating open and competitive markets in EPS requires WTO members to make full, unconditional GATS commitments on market access and national treatment on EPS. WTO members that have no commitments on EPS in their GATS schedules would benefit from revising their schedules to make full, unconditional commitments, and WTO members that have qualified commitments on EPS (e.g., permitting foreign equity caps that would otherwise deviate from market access rules) would similarly benefit by eliminating those limitations. Such “clean” commitments can help ensure the seamless operation of global e-commerce and make the opportunity to participate in such commerce more available to all populations. New and modern consensus rules on e-commerce will enable WTO members to fully leverage EPS to make progress towards a digital economy, increase financial inclusion and boost economic growth.

¹⁴ Also known as a ‘three corner’ or ‘closed loop’ model.

APPENDIX

A. Market Access

1. Foreign equity caps

Foreign equity caps are limitations of the percentage of equity that a foreign company can obtain in a venture. WTO members have a wide variety of foreign equity caps in place with respect to EPS. Some impose stringent caps that permit only a nominal amount of foreign equity, some are designed to ensure that domestic companies maintain control of the venture, and on the other end of the spectrum, some require a nominal degree of participation in the venture by domestic companies. No matter the type or scale of the foreign equity cap, the common feature of these restrictions is that they prevent foreign companies from supplying EPS on their own to local markets.

Some governments view foreign equity caps as an effective way to facilitate the exchange of know-how and build up domestic capacity. However, in practice, the downsides of this approach are substantial. Smaller markets may find it difficult to attract international EPS companies at all, particularly in today's competitive landscape for access to capital. Bigger markets may attract international companies, but a partial opening to investment will yield only partial benefits in terms of access to technology, innovation, security and services.

2. Burdensome licensing requirements

WTO members are fully entitled to ensure that payment networks and processors meet certain requirements to protect the integrity of the financial system. WTO members also have different approaches to rulemaking and governance. However, some WTO members impose unnecessarily burdensome licensing requirements—including equity caps, as described in Section I—that discourage or even prevent foreign companies from entering the market or growing their investments.

For example, one WTO member requires companies interested in processing transactions denominated in the local currency to obtain a license, and to do so, the company must establish a domestic entity to apply for the license and provide the payment services, use domestic technology, and undergo an extensive pre-licensing preparatory phase. Another WTO member is considering requiring multiple, potentially duplicative licenses for companies to provide a range of intermediary payment services. In most instances, the principal payments players, such as banks, are already licensed to perform payment activities, and there is little apparent benefit to requiring licensing for companies providing supporting services.

These types of burdensome licensing requirements are in tension with GATS market access rules, where a government has made such a commitment. Providing a formal legal avenue for foreign companies to obtain market access is important, but not sufficient, if in practice the ability to enter to the market is frustrated or even rendered impossible due to burdensome licensing requirements that go beyond the need to protect the financial system or achieve other legitimate policy objectives.

3. Domestic processing requirements

The authorisation, clearance, and settlement of an electronic payment, discussed in Section IV, is a complex series of steps that are necessary to process the electronic payment. Payment networks and processors need the flexibility to process transactions outside the country in which the services are supplied so that they can competitively deliver the highest quality of services, including state-of-the-art fraud protection that is fundamental to continued and expanded use of digital payments. High rates of fraud, or decline rates, stunt the uptake of digital payments.

Some WTO members, however, currently require electronic payments to be processed in-country. As discussed below in the discussion of national treatment barriers, some WTO members go a step further and also require transactions to be processed domestically by local competitors such as state-owned enterprises. But, even if a foreign payment network were permitted to use its own

infrastructure to process electronic payments, where that infrastructure is required to be located in-country, such requirements are in tension with a WTO commitment to provide market access for Mode 1 (cross-border) supply of EPS. They also slow introduction of new technologies and best-in-class security to these markets. In practice, these requirements stymie the development of an open and competitive market in EPS.

B. National Treatment

1. Requirements to process through local competitors such as SOEs

The value of market access for payment networks and processors is substantially limited if they are required to go through local entities to process their transactions, given the central role that processing plays in an EPS transaction. The absence of international competition for processing will also reduce the overall quality of services offered generally, and also for underserved populations, which stand to gain the most from innovative and secure payment services. This is especially the case if there is also little or no domestic competition because processing is routed to state-owned enterprises or another domestic entity.

Notwithstanding the negative effects of these types of requirements to process through local entities, these requirements are increasingly commonplace. Some measures require transactions to be processed by local companies generally. For example, one WTO member requires any company with foreign equity greater than 20% to go through at least two switching institutions to process their payments onshore. The central bank must approve such business arrangements, and approval is contingent on the foreign company making a contribution to the national payment system, such as technology transfer. Other measures require transactions to be processed by state-owned enterprises or other state instrumentalities. For example, several WTO

members require transactions to be processed by entities owned or controlled by the central bank. These requirements are particularly egregious because they permit the state to act both as market regulator and participant, which is not conducive to creating a level playing field for foreign companies.

These requirements are not only in tension with WTO national treatment rules but may also raise concerns regarding market access to the extent that they result in local monopolies.

2. Physical Co-branding requirements

The enablement of dual network options on payment products improves efficiency and provides network redundancy. Free market access should not inhibit the ability of multiple networks to be available on a particular payment product. However, payment stakeholders should have flexibility to determine which brands and logos are displayed on their payment products provided such branding does not result in customer confusion about the payment product capabilities. Legitimate concerns regarding fair competition and choice can be addressed in a manner consistent with market access and national treatment rules.

For example, a WTO member had introduced a measure requiring that all debit cards issued domestically display the logo of the national payment switch in combination with other regional and/or international service marks. This requirement may dilute the value of the foreign payment network's trademark and impair the competitiveness of the foreign EPS payment network's services.

3. Burdensome standards/technical requirements

The international trade in goods and services benefits from agreement on core international standards and technical requirements. In the case of EPS, agreement on core consensus international standards and technical requirements enables inter-operability of cards and other payment devices across borders, as opposed to requiring consumers to use a separate and unique payment device in each country. In the EPS sector, however, some WTO members have recently established national standards

or technical requirements that deviate from international practice that complicate inter-operability and raise questions regarding national treatment because of the disproportionate impact on foreign service suppliers.

For example, a WTO member established a new national standard for QR codes that is based on the international standard but is sufficiently different to create inter-operability challenges for foreign companies. Another WTO member is considering establishing a requirement for any payment scheme wishing to participate in the government-supported national transit card system to use a specification that is currently not publicly available and that was developed and is owned by the largest domestic payment scheme. This puts foreign companies at an obvious disadvantage. It also presents an unnecessary barrier for tourism as it disadvantages foreign travellers, who are unable to use their existing cards to access public transit.