

Webinar on the Moratorium on Customs Duties on Electronic Transmissions

Statement by Prof. Abhijit Das, Head, Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi

Excellencies, delegates, ladies and gentlemen,

I am grateful to the WTO Secretariat for organising this meeting and inviting me to share my thoughts on some aspects of the Moratorium on customs duties on electronic transmission.

I wish to make **5** key points.

1. Scope of Moratorium

First, the scope of the Moratorium is extremely crucial. Without clarity on the scope of the moratorium, there can be no predictability for business, trade and industry. More importantly governments would not know what their obligations and rights are. This underscores the importance of clearly defining the scope of the Moratorium.

At the WTO, there is no definition of electronic transmissions. However, from the perspective of determining the scope of the Moratorium, a definition of ET *per se* may not appear to be relevant. Instead of focusing on definition of ET, what is relevant is to discern the scope of “customs duties on electronic transmissions”. According to the World Customs Organisation (WCO), “**customs duties**” means the duties laid down in the customs tariff to which **goods** are liable on entering or leaving the customs territory. Thus, “customs duties” are linked exclusively to “goods” and not to services.

But what is the scope of the term "goods"?

A useful point of reference for seeking the definition of “goods” is the System of National Accounts 2008 (2008 SNA), which has been adopted by the UN. 2008 SNA provides certain criteria for “goods”. These include are *physical objects* for which a demand exists, over which ownership rights can be established and whose ownership can be transferred from one institutional unit to another by engaging in transactions on markets. The production and exchange of goods are quite separate activities. For customs duties to be applicable on a product, it must meet the criteria contained in the definition of “goods”. Clearly, ET cannot meet all the criteria.

However, if we relax the requirement of goods to be physical objects, then we can say with considerable confidence that the scope of the Moratorium is *Intangible* goods. There is also some indirect support for this approach from a few disputes at the WTO.

2. Services are not included in the scope of the Moratorium

The second point that I wish to make is that to my mind Services are excluded from the scope of the Moratorium. In this context it is relevant to note that while the term “customs duties” is mentioned in Article II of GATT 1994, its application is on “products”. As “goods” has not been explicitly mentioned in Article II of GATT, this has been misconstrued by some to argue that customs duties can be applied to services as well. Let us also note that GATS makes no reference to customs duties. It would, thus, be correct to conclude that customs duties are not applicable on services. Hence, Services are not included in the scope of the Moratorium.

In addition, it is relevant to note that during the negotiations on national treatment obligations on services during the Uruguay Round, some members were of the view that imports of services were not covered by customs duties at the border, as was the case with trade in goods¹. It is further relevant to note that in a submission JOB(02)/38 dated 8 May 2002, Canada provided a chart offering a snapshot of the existing rules “as they currently pertain to goods and services”. In respect of customs duties, Canada specifically indicated that it was not applicable to GATS.

3. Lobby groups include services within the scope of the Moratorium, and thereafter paint a doomsday scenario, if the Moratorium were to be removed

This brings me to my third point.

Some service industry lobby groups tend to include services within the scope of the moratorium and thereafter paint a doomsday scenario if the moratorium were to be removed. There is also an attempt at equating the Moratorium with cross-border data flows.

The prophets of doom posit that removal of moratorium will adversely affect MSME's ability to access value-added services and diminish their productivity. Another supposed negative impact of removal of moratorium is that it will adversely affect MSMEs in the services sector. Yet another alarmist scenario being painted is that tariffs will "break the internet". These cataclysmic scenarios are based on the faulty assumption that the scope of the Moratorium includes services.

4. Why is removal of the Moratorium important for many developing countries?

Point no. 4. Removal of Moratorium is important for developing countries from many perspectives, including giving a boost to government revenue as well as for giving fillip to domestic producers of intangible goods. Let us not ignore the fact that at different stages of their development, even the developed countries of today used tariffs, large scale subsidies and similar other policy instrument for stimulating their domestic production, as well as for revenue purposes. Some of the largest digital firms of today have been beneficiaries of huge

¹ GATT document MTN.GNS/10.15 October 1987. Note of the meeting of 15-17 September 1987.

government largess. This reality needs to be recognised by the entire WTO Membership. Let us not forget that Consumer Welfare cannot be, and has not been, the main objective of most government policies. Instead, all governments focus on employment generation and income creation. Removing the Moratorium will help developing countries in this direction.

Further, removal of the Moratorium will level the playing field for products whose physical deliveries attract customs duties, but face no customs duties if these are delivered as intangible products.

A few words about 3-D printing and the Moratorium. While it is not the case that developing countries should insulate themselves from technology advancements such as 3DP, it would, nevertheless, be important to facilitate a transition from traditional manufacturing to additive manufacturing in as less a disruptive manner as possible. An important policy instrument available for this purpose would be to impose customs duties on CAD files necessary for 3-D printing. However, if the Moratorium continues then countries may not have the flexibility to impose customs duty on CAD files. This could result in large scale disruption in traditional manufacturing, resulting in job losses and declining incomes.

Many of these issues of interest and concerns for the developing countries have been highlighted in the recent paper by UNCTAD. I compliment the authors - Richard Kozul-Wright and Rashmi Banga - for their substantive body of extremely insightful work in the past on the development implications of Moratorium and other aspects of digital economy.

5. One-size fits all does not work.

My fifth point is that the one-size fits all approach as required by the Moratorium does not work. Removal of the moratorium would provide an opportunity to domestic producers of digitizable products, which are at a nascent stage of development in many developing countries, for growth.

Lest anyone still has any lingering doubts, my message is loud and clear. Remove the Moratorium. This will provide flexibility to those who want to impose duties on some intangible goods to do so. If economic imperatives in some countries dictate in the opposite direction, then they may not impose customs duties. Let us not assume that once the Moratorium is removed, countries will automatically start imposing customs duties on ET. Countries will do what is good for them. Let us give them the choice by removing the Moratorium.

In conclusion, let us recall what US said when it introduced its proposal on the Moratorium in the General Council on 19 February 1998. According to the minutes of this GC meeting, it stated that its proposal "did not require a sacrifice or concession from any Member". Twenty-two years down the line, the reality is that the temporary Moratorium continues to demand a huge sacrifice from many developing countries. This one-sided and asymmetric concession by the developing countries must no longer be continued.
