

## Current Developments and Issues in the Field of African FinTech: Digital Trade Customs Moratoriums and Digital Services Taxes

Alexander Beyleveld\*

### Question:

What laws do countries in Africa need to write for the digital economy as they relate to tech companies and platforms and what issues are being (and likely will be) contested between tech companies beyond data protection and privacy?

### Response:

Beyond data protection and privacy, countries in Africa will need to write laws relating to taxation and related matters in the digital economy. While there are and likely will be a plethora of specific issues contested by tech companies and platforms, only two broad issues are discussed here: (i) the potential imposition of customs duties on cross-border electronic transmissions; and (ii) the potential imposition of digital services taxes.<sup>1</sup>

#### *(i) Customs duties on cross-border electronic transmissions*

Since the 1998 Declaration on Global Electronic Commerce, World Trade Organization (WTO) Members have regularly renewed a moratorium, first agreed to via the text of the Declaration, on imposing customs duties on cross-border ‘electronic transmissions’. The most recent renewal came at the WTO’s 11th Ministerial Conference (MC11) held in Buenos Aires in 2019. Members agreed ‘to maintain the current practice of not imposing customs duties on electronic transmissions until the 12th Ministerial Conference’.<sup>2</sup> MC12 was initially scheduled to take place in Nur-Sultan, Kazakhstan from 8-11 June 2020, but the event was ultimately postponed due to the onset of the COVID-19 pandemic. WTO Members subsequently decided to hold MC12 in Geneva from 30 November to 3 December 2021, but the event was again postponed due to COVID-19-related complications, with no date yet having been set for MC12.

During the course of the build up to MC12, however, a number of Members, including India and South Africa, have made it known that they wish for the moratorium to be reconsidered.<sup>3</sup>

---

<sup>1</sup> The distinction between the imposition of customs duties on cross-border electronic transmissions and digital services taxes obviously depend on how each of these concepts are themselves defined. Given that each of these concepts are not used consistently and the scope of each remains strongly contested, it seems at least plausible that there will be overlaps between the concepts unless they are expressly defined to avoid overlaps. For purposes of this piece, however, the key distinction simply boils down to the idea that customs duties would be applied purely to foreign service providers (much in the way that a tariff would apply only to foreign goods imported into a particular jurisdiction) whereas digital services taxes would apply to domestic and foreign producers alike (much in the way that a sales or value added tax would). Even so, a digital services tax could still be applied in a fashion which *de facto* amounts to more or less the same thing as customs duties being applied to electronic transmissions. For example, a digital services tax could be levied only in respect of firms of a certain size, which could equate to applying customs duties only to firms from, for example, the United States because their tech firms tend to be much larger than tech firms from elsewhere.

<sup>2</sup> See WTO General Council Decision dated 11 December 2019 on the Work Programme on Electronic Commerce ([WTO document WT/L/1079](#)).

<sup>3</sup> See, for example, the communication from India and South Africa dated 10 March 2020 and titled ‘The E-Commerce Moratorium: Scope and Impact’ to the Members of the Work Programme on Electronic Commerce ([WTO document WT/GC/W/798](#)). See also in this regard Industrial Development Think Tank, ‘[Towards a Digital](#)

A number of commentators have also indicated that we should expect the moratorium to fall at MC12.<sup>4</sup> India and South Africa's logic is captured in a joint communication to WTO Members, wherein the countries note that '[t]oday Members are only waking up to the weighty impact of the moratorium ...' and that '[w]e are still at the cusp of the digital revolution' with '[t]he challenges of this digital revolution [being] even more daunting than anything we have seen before'.<sup>5</sup> As such, they argue that 'developing countries need even more support to industrialise including access to technology, infrastructure (including related to the digital divide), education of the labour force, and of course policy space and the use of tried and tested instruments to build production capacities including trade policies such as tariffs'.<sup>6</sup> According to India and South Africa, the continued imposition of the moratorium 'will be equivalent to developing countries giving the digitally advanced countries duty-free access to [their] markets', adding that '[a]ll countries trying to catch up need time for their industries to become competitive before full liberalisation can be optimal'.<sup>7</sup> In order '[t]o do so whilst industries are still struggling will consign many developing countries to be only consumers', they argue, concluding that '[t]his will be catastrophic for economic growth, jobs, and the attainment of SDGs'.<sup>8</sup>

In the event that moratorium falls as predicted, major contestation is likely to ensue should developing countries impose measures – which will undoubtedly be discriminatory in nature – that would potentially have violated the moratorium had it been renewed or made permanent. Contestation will likely focus on whether measures will effectively enable developing countries to better develop domestic industries, the extent to which measures enable revenue to be raised, and the extent to which costs will be borne by consumers and business (including which consumers and businesses, e.g. richer versus poorer consumers or larger versus smaller businesses).<sup>9</sup>

#### *(ii) Digital services taxes (DSTs)*

Another likely issue for contestation is the imposition of DSTs. A number of countries – mostly European countries, but also including the likes of India, Turkey and Kenya – have already imposed DSTs, with most regimes essentially aiming taxes at large multinational enterprises.<sup>10</sup> Given that most tech firms to which DSTs apply or are likely to apply to are based in the United

---

[Industrial Policy for South Africa: A Review of the Issues](#) (17 July 2019) 26, where the IDTT calls for South Africa to 'work with other countries at the WTO to resist the push by the global technology companies for digital transactions to be exempt from tariffs'.

<sup>4</sup> See, for example, Deborah Elms, 'The Impending Collapse of a Key Digital Rule' (Asian Trade Centre [Talking Trade blog](#), 18 November 2021).

<sup>5</sup> See communication from India and South Africa (n 3), para 4.1.

<sup>6</sup> See communication from India and South Africa (n 3), para 4.1.

<sup>7</sup> See communication from India and South Africa (n 3), para 4.2.

<sup>8</sup> See communication from India and South Africa (n 3), para 4.2.

<sup>9</sup> Debates on this front have already begun. See, for example, Rashmi Banga, 'Growing Trade in Electronic Transmissions: Implications for the South' ([UNCTAD Research Paper 29](#), February 2019); compare Simon J Evenett, 'Is the WTO Moratorium on Customs Duties on E-Commerce Depriving Developing Countries of Much Needed Revenue?' ([St Gallen Endowment for Prosperity Through Trade Brief](#), 12 November 2021).

<sup>10</sup> See, for example, the relevant discussion in Amie Ahanchian et al, 'Digital Services Tax: Why the World is Watching' ([Bloomberg Tax](#), 6 January 2021).

States, the US has often threatened to impose retaliatory customs duties on the basis that DSTs unfairly discriminate against US firms.<sup>11</sup>

Recently, however, Organisation for Economic Co-operation and Development (OECD) Members and other jurisdictions that form part of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting have agreed to a so-called two-pillar solution to address the tax challenges arising from the digitalisation of the economy (**OECD Two Pillar Solution**).<sup>12</sup> A recent statement on the OECD Two Pillar Solution, and an annexed implementation plan, seems to show that a compromise has been reached between the US and others. It is indicated that the multilateral convention (MLC) which will be concluded in order to give effect to the Solution ‘will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future’, but other taxes against large firms will be permitted in turn.<sup>13</sup> It is also noted that ‘[a] detailed definition of what constitutes relevant similar measures will be finalised as part of the adoption of the MLC and its Explanatory Statement’.<sup>14</sup> Moreover, parties also agreed that ‘[n]o newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC’.<sup>15</sup> This sets up further room for contestation as it appears unlikely that all countries that currently form part of the OECD Two Pillar Solution will simply forego the imposition of DSTs.<sup>16</sup> It also seems plausible, as some have argued,<sup>17</sup> that were the WTO moratorium to come to an end, tariffs could also effectively be imposed on services (not only on goods), which will render the OECD Two Pillar Solution definitions even more contestable, especially insofar as what would constitute a ‘relevant similar measure’, which conceivably includes, at least under some definitions and interpretations, the imposition of customs duties on electronic transmissions.

---

<sup>11</sup> See, for example, the relevant discussion in Amie Ahanchian et al (n 10).

<sup>12</sup> See ‘[Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy](#)’ (8 October 2021). As at 4 November 2021, 137 jurisdictions – including numerous African jurisdictions – had signed up to the OECD Two Pillar Solution.

<sup>13</sup> See OECD Two Pillar Solution (n 12) 7.

<sup>14</sup> See OECD Two Pillar Solution (n 12) 7.

<sup>15</sup> See OECD Two Pillar Solution (n 12) 3.

<sup>16</sup> Canada, for example, has already supposedly disregarded the moratorium on DSTs contained in the Solution by continuing with a DST proposal that was due to come into effect on 1 January 2022. See Gary Clyde Hufbauer and Megan Hogan, ‘Canada’s Digital Services Tax Threatens Global Effort to Curb Tax Havens’ (Peterson Institute for International Economics, Trade and Investment [Policy Watch blog, 15 December 2021](#)).

<sup>17</sup> See, for example, Hosuk-Lee Makiyama and Badri Narayanan, ‘The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions’ ([ECIPE Policy Brief 3, 2019](#)) 7.