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## **Overview of the Implications for Developing Countries/LDCs of the JSI E-commerce Text (Revision 5)**

Developing countries and least developed countries (LDCs) face growing pressure to participate in and adopt the outcomes of plurilateral negotiations on electronic commerce, known as the Electronic Commerce Joint Statement Initiative (JSI), that are being conducted by a sub-group of WTO Members outside the WTO's mandated procedures and bodies.

As the proponents seek to close out at least an initial tranche of the JSI in early 2024, this short memorandum highlights at a high-level some of the consequences for developing countries/LDCs. A separate memorandum will examine Revision 5 of the JSI text in more detail.

|   |          |
|---|----------|
| <b>THE JSI IS NOT A DEVELOPMENT INSTRUMENT.....</b>   | <b>3</b> |
| Systemic implications of the e-commerce JSI .....   | 3        |
| The Revision 5 text shows developing countries are rule-takers in the JSI .....               | 3        |
| The e-commerce rules are “disciplines” on regulation, not promoting digital development ..... | 3        |
| It is impossible to predict future development implications of e-commerce rules .....         | 3        |
| Whose global e-commerce rules are in the JSI? .....   | 4        |
| Balanced regulation of the digital domain is treated as a “trade barrier” .....               | 4        |
| The Trans-Pacific Partnership Agreement set the template .....                                | 4        |
| Lack of independent scrutiny.....   | 4        |
| <b>COLLISION BETWEEN DIGITAL REGULATION AND TRADE RULES .....</b>                             | <b>5</b> |
| Growing tension between national regulators and digital trade rules.....                      | 5        |
| Bracketed texts reflect divergent positions .....   | 5        |
| The US and EU are now rethinking their own digital regulation.....                            | 5        |
| <b>THE JSI AND TEXT REVISION 5 .....</b>  | <b>6</b> |
| The status of the JSI on e-commerce.....  | 6        |
| A likely two-tranche process.....   | 6        |
| What might be in a 1st tranche text.....  | 6        |
| Institutional, development and exceptions provisions would be required.....                   | 6        |
| <b>RELATIONSHIP TO THE GATS .....</b>   | <b>7</b> |
| Relationship to other agreements, especially GATS.....  | 7        |
| Broad coverage of both the GATS and the JSI.....  | 7        |
| The JSI would undermine GATS flexibilities .....  | 7        |
| Greatly expanded telecommunication services commitments.....                                  | 7        |
| <b>THE JSI LACKS DEVELOPMENT DIMENSIONS .....</b>   | <b>8</b> |
| A JSI-lite still raises important development concerns .....                                  | 8        |
| Developing countries’ proposed carveouts.....   | 8        |
| Indigenous Peoples’ carveout.....   | 8        |
| Reverse special and differential treatment.....   | 9        |
| Needs assessments to identify gaps in implementation capacity .....                           | 9        |
| Phasing implementation and related notifications .....  | 9        |
| Option 1: Limited flexibility, tight criteria, narrow time frames.....                        | 9        |
| Option 2: Implementation based on the TFA.....  | 10       |
| The TFA-style 3 category approach .....   | 10       |
| No analysis of the problems with the TFA .....  | 10       |
| No commitment to resourcing developing countries’ obligations.....                            | 11       |

|   |           |
|---|-----------|
| <b>ADOPTION OF THE JSI INTO THE WTO .....</b>                           | <b>11</b> |
| <b>3 hypothetical pathways.....</b>                                     | <b>11</b> |
| <b>The lack of consensus.....</b>                                       | <b>11</b> |
| <b>Recourse to schedules would be unlawful and would not work .....</b> | <b>11</b> |

## THE JSI IS NOT A DEVELOPMENT INSTRUMENT

### Systemic implications of the e-commerce JSI

The adoption of the JSI would lay the de facto basis for the WTO’s future approach to e-commerce/digital trade and pre-empt the development of multilateral rules through a mandated multilateral process in the Work Programme on E-commerce. That raises two systemic questions:

- is there a genuine development dimension to the substance and processes of the JSI, given it will be difficult to change them later?
- what are the implications for the WTO’s multilateral mandates and bodies more generally if rule-making Member states can initiate and conduct unmandated plurilateral negotiations on their preferred subjects to the exclusion of developing countries’ priorities?

### The Revision 5 text shows developing countries are rule-takers in the JSI

A common rationale for developing country participation in the JSI is that they can influence the text by being at the table. Yet, Revision 5 of the JSI text<sup>1</sup> shows the developing countries are essentially rule-takers in the negotiation, seeking to secure exceptions to developed countries’ rules, along with phase-in periods and non-binding promises of technical assistance to implement them – ironically, at a time when those rules are being questioned by some of the Members that originally proposed them.

### The e-commerce rules are “disciplines” on regulation, not promoting digital development

The JSI proposes to establish global rules that restrict the policies and regulatory regimes that governments can apply to the digital domain, including data, platforms, services, social media, digital marketplaces, fintech. The rules are not designed to address the substantive challenges developing countries and LDCs face in taking advantage of digital technologies and building their own capacity to develop in ways most appropriate to them.

### It is impossible to predict future development implications of e-commerce rules

The present day impacts of the proposed disciplines are difficult to assess in the present day, and impossible to predict for the future, given the rapid and unpredictable evolution of digital technologies and services that are controlled by a small number of very powerful private corporations. There is a high risk that adoption of the JSI rules would increase

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<sup>1</sup> See [https://www.bilaterals.org/IMG/pdf/wto\\_jsi\\_ecommerce\\_text\\_rev\\_5.pdf](https://www.bilaterals.org/IMG/pdf/wto_jsi_ecommerce_text_rev_5.pdf)

dependency on the private oligopolies that currently dominate the data and digital technologies, platforms and payment systems that developing countries need for genuine digital development, and that implementation of the rules would divert resources from more pressing and productive uses.

### Whose global e-commerce rules are in the JSI?

The rules in the JSI text have their origin in the US Telecommunications Act 1996, which committed not to regulate the Internet. That enabled the US tech corporations to establish an almost impenetrable competitive advantage across the digital ecosystem domestically. In the late 1990s they sought to globalise that hands-off regime. Their decision to pursue this through trade agreements was strategic, because trade rules privilege commercial interests, are shaped by more powerful states, are binding and enforceable, and are negotiated in secret.

### Balanced regulation of the digital domain is treated as a “trade barrier”

Trade terminology was co-opted to describe moves to regulate data and the digital domain as trade barriers and protectionism, as well as impediments to economic development and small and medium enterprises’ participation in the digitalised economy. That is a predictable and deliberate consequence of locating global rule-making within the commercial arena of trade rules, which excludes other critically important development, social, and human rights considerations altogether or subordinates them as exceptions or interpretive preambles or principles.

### The Trans-Pacific Partnership Agreement set the template

The Trans-Pacific Partnership Agreement (TPPA)<sup>2</sup> electronic commerce chapter was described by the US Trade Representative (USTR) as the “most ambitious and visionary Internet trade agreement ever attempted”.<sup>3</sup> It was literally developed in the early 2010s by and for the US tech industry, based on a US tech industry wish list known as the “Digital 2 Dozen”. The deputy USTR who led negotiations was the former long-serving President of the US Business Software Alliance.<sup>4</sup> Despite growing criticism that those rules restrict countries’ digital regulation, the TPPA rules remain the basis for almost all subsequent agreements, including the JSI, with negotiations limited to adjusting the template.

### Lack of independent scrutiny

The secrecy surrounding free trade negotiations, including the JSI, has deprived governments, especially in developing countries and LDCs, of independent and critical analysis. Few trade negotiators have understood the implications of the rules as they were being developed, and other affected government agencies, digital experts and civil society have generally been excluded from providing input. Although the JSI text has leaked on

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<sup>2</sup> Available at <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpa/text-of-the-trans-pacific-partnership/>

<sup>3</sup> See <https://ustr.gov/sites/default/files/TPP-Ensuring-a-Free-and-Open-Internet-Fact-Sheet.pdf>

<sup>4</sup> See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/Ambassador-Froman-Welcomes-Senate-Confirmation-of-Robert-Holleyman>

several occasions, the negotiation process has not allowed for critical scrutiny and analysis, while the tech companies and lobby groups have been able to wield undue influence. That has principally disadvantaged developing countries and LDCs.

## COLLISION BETWEEN DIGITAL REGULATION AND TRADE RULES

### Growing tension between national regulators and digital trade rules

The rapid emergence of powerful new digital technologies like Artificial Intelligence (AI), with many more as-yet inconceivable innovations yet to come, highlights the risks of an unregulated digital ecosystem and the need to retain policy and regulatory space. That is reflected in the growing trend to regulate digital corporations, services, technologies, platforms, data, etc. These moves to exercise regulatory sovereignty at the national level will increasingly clash with trade rules whose purpose is to fetter governments' ability to regulate existing and evolving technologies, services and products. Governments that seek to justify those regulations have to rely on exceptions, carveouts and flexibilities that are limited and outdated (e.g. for source code in the CPTPP). The tension between embedded rules, and attempts to develop new exceptions and flexibilities, is evident throughout the JSI.

### Bracketed texts reflect divergent positions

The square bracketed texts in the JSI reflect a trend in recent FTAs and Digital Economy Agreements by some countries to expand the TPPA, while others try to rein it in. Sometimes the rules have been expanded (for example, the US Mexico Canada Agreement explicitly extends the protection of source codes from disclosure to include algorithms). Sometimes parties have adopted new exceptions and flexibilities as regulators and trade officials better understand the risks and adverse consequences of the rules (also in relation to source code). In some cases, such as the Regional Comprehensive Economic Partnership (RCEP), problematic rules have been omitted and the entire chapter is not enforceable.<sup>5</sup> These tensions are apparent in the many square brackets in the JSI Rev 5 text, and underpin the decision of many WTO Members not to participate in the JSI.

### The US and EU are now rethinking their own digital regulation

The conflict between binding and enforceable international digital trade rules and requirements of domestic governance is evident even in the US<sup>6</sup> and EU<sup>7</sup> - countries that originated and championed these rules. The US's moves to withdraw its sponsorship of its own core rules on data flows and source code in the JSI goes further and implicitly acknowledges that exceptions will not provide sufficient protection for its regulatory space.<sup>8</sup> The rationale given USTR Katherine Tai applies to most other countries: the US lacks a robust regulatory infrastructure for rapidly evolving technology, such as AI, which affects the overall economy, and getting out ahead of domestic debates and decisions on digital

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<sup>5</sup> <https://www.dfat.gov.au/trade/agreements/in-force/rcep/rcep-text>

<sup>6</sup> See [https://www.warren.senate.gov/imo/media/doc/Tech%20Bill\\_Full%20Text.pdf](https://www.warren.senate.gov/imo/media/doc/Tech%20Bill_Full%20Text.pdf)

<sup>7</sup> See <https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/>; <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

<sup>8</sup> <https://ielp.worldtradelaw.net/2023/10/the-us-changes-its-mind-in-the-wto-e-commerce-negotiations.html>

trade would be “massive malpractice”.<sup>9</sup> The US is position not limited to the WTO negotiations. The USTR has taken the same position in the trade pillar of the US-driven Indo-Pacific Economic Framework (IPEF).

## THE JSI AND TEXT REVISION 5

### The status of the JSI on e-commerce

The recent decision by the US to withdraw its support for the data and source code provisions of the JSI has seriously disrupted plans to conclude the JSI text in early 2024. Even without that dramatic announcement, the fifth revision of the JSI text, dated 15 November 2023, has one provision marked “clean” and a small number that are “stabilised”, mainly on telecommunication services. Many square brackets remain, some of which reveal strong disagreements on core issues aside from those on data.

### A likely two-tranche process

If the participants want to deliver a finalised text in the near future, it will need to be a 1st tranche text, following the pattern of other recent agreements (eg the TRIPS waiver). Achieving even that seems impossible before the Ministerial Conference in February 2024 (MC13). More meetings are scheduled for 2024, but it is clear that a second tranche of politically sensitive issues will not be resolved until after the US election, if then, and its fate will depend on who is elected President and their attitude to the WTO.

### What might be in a 1st tranche text

A first tranche is expected to include number of “low-hanging fruit”, such as “enabling” and “facilitating” provisions like e-transaction frameworks, e-authentication and e-signatures,<sup>10</sup> e-contracts, e-payments, e-invoicing, paperless trading. The spam, transparency and cooperation provisions seem likely, as does Section E on telecommunications. Harder questions are whether open government data, access to the Internet, online consumer protection, privacy, cybersecurity and cryptography would be included, and the moratorium on customs duties on e-transmissions that remains highly controversial given the potential revenue and development impacts on developing countries.<sup>11</sup>

### Institutional, development and exceptions provisions would be required

A 1<sup>st</sup> tranche would also need to address development, capacity building and technical assistance, and implementation periods, as well as exceptions (those currently proposed are: general, essential security, prudential, development, Indigenous Peoples, taxation) and dispute settlement. Whatever is decided for those provisions in tranche 1 risks being carried forward into any later tranche, so carveouts and exceptions must be optimal from the start.

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<sup>9</sup> Tai: Getting ahead of domestic digital trade debate would be ‘malpractice’, *Inside US Trade*, 7 December 2023, <https://insidetrade.com/daily-news/tai-getting-ahead-domestic-digital-trade-debate-would-be-malpractice>

<sup>10</sup> See [https://www.twn.my/announcement/TWN\\_esignatures2018-9.pdf](https://www.twn.my/announcement/TWN_esignatures2018-9.pdf)

<sup>11</sup> E.g. see [https://www.southcentre.int/wp-content/uploads/2022/06/RP157\\_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf)

## RELATIONSHIP TO THE GATS

### Relationship to other agreements, especially GATS

A 1st tranche would also have to address the significant overlap between e-commerce rules and General Agreement on Trade in Services (GATS) rules and commitments, notably in mode 1 (cross-border supply) of services sectors (eg. advertising, distribution, financial, travel agency and bookings, entertainment, news agency); CPC 84 Computer and Related Services (incl data processing, data base, software implementation, “other”); and Telecommunications Services (including online information and/or data base retrieval, online information and/or data processing (incl. transaction processing), electronic data interchange, code and protocol conversion, “other”).

### Broad coverage of both the GATS and the JSI

That overlap is heightened by the broad application of both agreements: the JSI would apply to “measures that affect trade by electronic means; the GATS applies to “measures affecting trade in services”, including purchase, payment and use of a service, with trade including production, distribution, marketing, sale and delivery of a service. All the likely tranche 1 rules would qualify as measures that affect the trade/supply of the various services under the GATS. This cross-over would have more implications for some, such as telecoms, open government data, access to the Internet, online consumer protection, privacy, cybersecurity and cryptography, than for others.

### The JSI would undermine GATS flexibilities

The GATS is subject to positive list schedules that enable Members to limit their exposure. Most developing countries and LDCs have made limited commitments in the relevant modes and sub-sectors,<sup>12</sup> although acceding countries have taken more. By contrast, the JSI text has no schedules and would override the Member’s GATS flexibilities where there is overlap. That impact would not be limited to the data rules. Developed countries already have more GATS commitments so the impact on developing countries would be disproportionate. Notably, the e-commerce chapters in the TPPA, US-Mexico-Canada Agreement (USMCA)<sup>13</sup> and others cross-reference to the GATS schedules, although unravelling them is extremely complex. No such cross-reference is being proposed in the JSI.

### Greatly expanded telecommunication services commitments

The JSI explicitly extends the GATS on telecommunications services. Under Section E, parties would have to adopt the Reference Paper on Basic Telecommunications,<sup>14</sup> which is currently voluntary and adopted by fewer than half the WTO Members. The Reference Paper has six binding and enforceable regulatory principles relating to anti-competitive practices, rights of interconnection, licensing criteria, allocation and use of scarce resources (eg frequencies and numbers), universal service, and independent regulators. This obligation alone would

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<sup>12</sup> See S/C/W/99, Table A1, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/S/C/W99.pdf&Open=True>

<sup>13</sup> <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

<sup>14</sup> [https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm)

be new for many developing countries and LDCs, and require them to undertake onerous legislative and administrative reforms,<sup>15</sup> whereas most developed countries already comply with the Reference Paper and its enhancements in the JSI. A square bracketed proposal would go further, and require JSI adoptees to extend the scope of the existing Reference Paper to include “value added” services (except for content and broadcasting services), despite the long-standing disagreement on where the boundary between basic and value-added lies in terms of Internet access.

## THE JSI LACKS DEVELOPMENT DIMENSIONS

### A JSI-lite still raises important development concerns

The JSI has no substantive development dimension. The Rev 5 text reveals a contrast between a TPPA-style hardline commercial and deregulatory approach, led by co-convenor Japan, and attempts by developing countries like Nigeria, Cote d’Ivoire and sometimes Brazil, to insert some kind of development dimension into the text. These contrasting positions are evident in the square bracketed texts on the principles (p.56) (although their effect is limited to context for interpretations of the substantive rules).

### Developing countries’ proposed carveouts

Two comprehensive carveouts have been proposed.

- Nigeria has proposed a self-judging carveout for developing countries and LDCs to the proposed rules on data location and data flows ([8] on pp.28, 31), with a requirement that dispute panels must find the exception applies if it is invoked. Currently, no co-sponsor is listed. That carveout only applies to the data provisions, so it would not be included in a tranche 1 agreement that excludes them.
- Cote d’Ivoire has proposed a broader discretionary carveout ([7] at p.38) that says developing countries and LDCs would not be required to implement the provisions until they had acquired the capacity to do so, and LDCs could only be required to adopt commitments to the extent consistent with their individual development, financial and trade needs and administrative and institutional capabilities. Again, this is in square brackets with no co-sponsor listed and contrasts with tenor of the other implementation proposals. It is also unclear how those different treatments would apply to an LDC that graduates.

### Indigenous Peoples’ carveout

While not strictly a developing country carveout, New Zealand has proposed a self-judging carveout for measures a Member deems necessary to protect or promote the rights, interests, duties and responsibilities of Indigenous Peoples, including to fulfil legal,

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<sup>15</sup> There is limited analysis of the Reference Paper implications for developing countries; for an early paper, see Boutheina Guermazi, “Exploring the Reference Paper on Regulatory principles”, esp pp.18-22 [https://www.wto.org › guermazi\\_referencepaper](https://www.wto.org › guermazi_referencepaper)



constitutional or treaty obligations. The interpretation of those obligations could not be challenged in a dispute. This proposal follows a finding of a domestic Tribunal that the TPPA e-commerce chapter breached the governments obligations to Indigenous Māori.<sup>16</sup> To date, there are no co-sponsors.

### Reverse special and differential treatment

The main development flexibilities in Part D.3,4,5 of the Rev 5 text relate only to implementation periods and resourcing to adopt the JSI rules. In practice, the JSI proposes a reverse “special and differential treatment”: because most developed country Members already comply with much of the agreement, the burden would fall principally on developing countries and LDCs. Some large developing countries, especially those in the OECD, might also be able to implement these rules. Smaller countries and LDCs would face onerous compliance obligations in return for accepting significant constraints on their policy and regulatory sovereignty, with no apparent benefit.

### Needs assessments to identify gaps in implementation capacity

International organisations and developed Members either must, or may, provide support for a needs assessment to identify gaps in the implementation capacity of developing countries and LDCs. This assessment would/should be concluded no later than 1 year after entry into force (EIF). The lack of any link between this needs assessment and the rest of the implementation provisions poses two problems: notification obligations on developing countries/LDCs under the JSI would *begin at the time of EIF*, not a year later once the needs assessment has been concluded; and the needs assessment could become the *de facto* basis for determining whether a country requires capacity building/transition periods, and for how long, rather than those determinations being self-judging.

### Phasing implementation and related notifications

There are two main options (their drafting is very difficult to reconcile, so these comments should be read provisionally). Both options require extensive notifications with short timelines that are linked to entry into force (EIF). But EIF refers to the Agreement itself, not when a Member adopts it. So the timelines are even more condensed for developing countries and LDCs that do not ratify the Agreement immediately or join after the Agreement enters into force. A developing country could lose its phase-in periods altogether if it delayed ratification beyond 1 year after EIF. That is extremely coercive and would like put many developing countries/LDCs in breach of the agreement.

### Option 1: Limited flexibility, tight criteria, narrow time frames

The proposal from the EU, Guatemala and Paraguay has extreme notification and implementation obligations and applies the same rules to developing countries and LDCs. Its flexibilities centre on whether or not specific articles/issues in the JSI require “public policy, institutional or legislative changes”. If they do not, the obligations must be implemented immediately the JSI comes into force. That would be before any needs assessment has been

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<sup>16</sup> <https://waitangitribunal.govt.nz/news/tribunal-releases-report-on-electronic-commerce-chapter-in-cptpp/>

conducted. It seems inconceivable that most developing countries, let alone LDCs, could meet that obligation.

A developing country/LDC may designate specific articles/issues in the JSI that require “public policy, institutional or legislative changes”, but it must submit the list of those articles *on day of EIF* – a year before the needs assessment is concluded. They have one more year to notify the definitive dates for implementation of those provisions, ie when the needs assessment is meant to be concluded. Implementation can be deferred for up to 3 years from EIF (p.41), with a possible 2 year extension provided notice is given early enough, with reasons and an account of action taken to date. That is an incredibly short period for developing countries/LDCs that have scarce resources and other priorities.

There is also an option to designate articles/issues requiring the acquisition of capacity to implement. The same narrow timelines apply.

## Option 2: Implementation based on the TFA

Cote d’Ivoire has proposed to import the approach to implementation used in the text of the Investment Facilitation (IF) JSI (pp.42-50), which was based, in turn, on the time frames and notifications for three categorisations of rules in Trade Facilitation Agreement (TFA). The analysis required for the original designation and the numerous notification requirements constitutes a significant burden, especially for developing countries also involved with the TFA and IF.

## The TFA-style 3 category approach

The Cote d’Ivoire proposal would allow developing country and LDC Members to allocate the JSI rules to three categories (A,B,C) which carry different time frames and criteria.

**Category A** obligations that a developing country Member designates at the time of EIF would be implemented by developing countries on entry into force and 1 year after that by LDCs.

**Category B** obligations would be notified at the time of EIF with a designated later implementation date; after 1-year definitive dates for implementation must be notified, with provision to seek more time if prior notice is given.

**Category C** obligations that require the acquisition of implementation capacity would be notified on EIF and dates to implement them would be based on acquiring capacity and support required.

Further notification of arrangements is due 1 year after EIF, and progress updated after another 18 months. LDCs have more time and flexibility.

## No analysis of the problems with the TFA

It is worrying that each time this model has been proposed, it has been applied to more onerous rules and notification and implementation burdens, especially for countries involved in more than one agreement. This roll-over is occurring without recognition that

many developing countries have struggled to comply with even the TFA,<sup>17</sup> and some notifications are still overdue.<sup>18</sup>

### No commitment to resourcing developing countries' obligations

As with the TFA and IF JSI, there is no firm commitment from developed countries to provide funding, capacity building, etc. Collective promises are made that have no compulsion on any individual Member. An institutional framework and a Committee on Trade-related aspects of E-commerce are proposed to monitor donors' contributions and how they are used, as well as developing countries' needs, requests and use of resources. This notification and monitoring in itself is onerous with no guaranteed outcome: a developing country/LDC that adopts the JSI could face the combination of short periods for implementation and lack of resources to meet those obligations, but that would not excuse their failure to comply. Again, the poor participation of donors in the TFA is ignored.<sup>19</sup>

## ADOPTION OF THE JSI INTO THE WTO

### 3 hypothetical pathways

If the JSI sub-group does conclude a tranche 1 text, it is unclear how they would seek to adopt it within the WTO. The Marrakesh Agreement sets out the means for adopting new agreements. There are three possible options:

1. a new Annex 4 plurilateral agreement;
2. a new Annex 1 agreement, or
3. adoption of new rules through the modification of schedules.

### The lack of consensus

Options 1 and 2 require consensus. Despite attempts and pressure to increase sign-ons, there is clearly no consensus to support its adoption. The fate of the e-commerce JSI is likely to depend on what happens with proposals to adopt the Investment Facilitation JSI as a plurilateral agreement under Annex 4. That also suggests any attempt to adopt even a JSI lite on e-commerce would occur after the status of the IF has been determined.

### Recourse to schedules would be unlawful and would not work

Recourse to schedules to adopt the JSI would be very problematic. That is being attempted with the Services Domestic Regulation JSI, which relates solely to the GATS. Attempts to amend the GATS rules through schedules of sectoral commitments, and development of the SDR reference paper outside the mandated processes and bodies, are subject to objections. Attempts to use of schedules for the JSI on e-commerce would be much more problematic, as its proposed rules span the GATT and GATS, and arguably TRIPS (source code) and TBT (cryptography) which don't have schedules. This is not a realistic option.

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<sup>17</sup>See <https://www.tfadatabase.org/en/implementation>

<sup>18</sup> See <https://www.tfadatabase.org/en/overdue-notifications/by-member>

<sup>19</sup> See, *inter alia* notifications on assistance and support for capacity building, <https://www.tfadatabase.org/en/notifications/assistance/221-yearly-breakdown>