

THE MSME MORATORIUM

Stories from MSMEs in South Africa and Kenya
on the WTO Moratorium on Customs Duties
on Electronic Transmissions



Table of Contents

I.	Acknowledgments	03
II.	Abbreviations	04
III.	Executive Summary	05
IV.	Introduction	10
V.	MSME Stories From The Field	15
	South Africa	16
	Kenya	25
VI.	Survey Results	33
VII.	Conclusion and Recommendations	44
	APPENDIX I: Methodological and Conceptual Approach to Survey Design	47
	APPENDIX II: Summary of Relevant Laws and Regulations Assessed	52

Acknowledgments

This report is an independent study developed by the New Markets Lab, a non-profit law and development center. The principal authors of the report are Katrin Kuhlmann, New Markets Lab and Georgetown University Law Center, and Tara Francis, New Markets Lab. Alejandro Solano, New Markets Lab, and Milad Said, New Markets Lab, provided additional drafting support. The authors would like to thank Verdentum, NML's technology partner, for their invaluable support in digitizing the results of this study and providing visual representations of the study's findings. The authors would also like to thank Robin Mwesigye Ahimbisibwe for his field support in Kenya and Laura Valencia Cossio and Edith Amofoa-Smart, who were legal fellows at the New Markets Lab at the time the report was developed, for their excellent research support.

The authors would also like to acknowledge the invaluable support and input provided by stakeholders from the public and private sectors in South Africa and Kenya, including Alastair Tempest (E Commerce Forum of Africa), Glenn Gillis (Sea Monster Entertainment), Nick Cloete (Animation SA), Bobby Amm (Commercial Producers Association of South Africa), Raymond Ledwaba (Itthynk Smart Solutions) and Mike Nyenes (the Small Enterprise Development Agency).

Citation: Kuhlmann, Katrin and Francis, Tara, "The 'MSME Moratorium': Stories from MSMEs in South Africa and Kenya on the WTO Moratorium on Customs Duties on Electronic Transmission," New Markets Lab (2024).

Graphic design: Midhun George,
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Abbreviations

CECA	India-Singapore Comprehensive Economic Cooperation Agreement
CET	Common External Tariff
CETA	Canada-EU Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DEPA	Digital Economic Partnership Agreement between New Zealand, Chile, and Singapore
DPA	Data Protection Act of Kenya
DST	Digital Service Tax
EAC	East African Community
EU	European Union
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GST	Goods and Services Tax
GVCs	Global Value Chains
ICC	International Chamber of Commerce
ICT	Information and Communications Technology
IMF	International Monetary Fund
ITC	International Trade Centre
KSH/KES	Kenyan Shilling
LDCs	Least-Developed Countries
MSME	Micro-, Small, and Medium-sized Enterprise
OECD	Organization for Economic Co-operation and Development
RTAs	Regional Trade Agreements
WTO	World Trade Organization
UNCTAD	United Nations Conference on Trade and Development
US	United States
USMCA	US-Mexico-Canada Agreement
VAT	Value Added Tax

Executive Summary

Inexpensive and uninterrupted access to cross-border digital goods and services is vital for the growth of micro-, small-, and medium-sized enterprises (MSMEs) on the African continent. MSMEs in Africa have been able to tap into a more expansive and global digital market due to the immeasurable opportunities presented by digital trade. Due to their cost effectiveness, MSMEs in the Africa market offer a highly competitive market segment for digital services; however, many opportunities still remain unexplored.

At the World Trade Organization (WTO) Ministerial Conference in February 2024, trade ministers from around the world will need to decide whether to renew the WTO Moratorium on Customs Duties on Electronic Transmissions (Moratorium). The Moratorium's expiration would have wide-ranging implications for MSMEs, including in the form of additional tariffs and administrative burdens, yet few have studied the impact that lifting the Moratorium will have on MSMEs. **Due to the importance of the Moratorium to MSMEs, it could aptly be called the "MSME Moratorium."**

WTO Member countries first agreed to the Moratorium in 1998 when they committed to "continue their current practice of not imposing customs duties on electronic transmissions,"¹ and the Moratorium has been regularly renewed and continuously debated since that time. While the Moratorium has been an important policy instrument for the

¹ World Trade Organization, "Declaration on Global Electronic Commerce," 1 (1998), available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/MIN98/DEC2.pdf&Open=True> [hereinafter WTO 1998].

development of the modern digital economy, it is not widely known or understood,² and as this study demonstrates, particularly among MSMEs, as this study demonstrates. The existence of the Moratorium and its continuation take on even greater significance with the growth of digital trade in recent years, which has been an important source of economic and social development for MSMEs.

As this study demonstrates, this decision will have a significant impact on MSMEs in South Africa and Kenya, but very few of them have been consulted on the Moratorium.

Indeed, the majority of MSMEs surveyed were not aware that a policy change could be imminent. An abrupt policy change that would result in new and potentially complicated customs administrative requirements and related administrative costs could render MSMEs less competitive and widen the digital divide. Further, additional customs tariffs would add on to the price of MSMEs' goods and services that are sold in other markets. This leads to the conclusion that a change in the longstanding status of the Moratorium will be disruptive and economically damaging to MSMEs.

There is a pressing need for deeper empirical work to understand how new trade rules, including those relating to digital trade, will impact stakeholders such as MSMEs. As summarized in Table 1 below, the study led to a number of important findings including knowledge gaps, inconsistency in consultations, and lack of empirical study on the implications of expiration of the Moratorium. The study's findings and recommendations could also inform future MSME engagement in the development of trade rules more generally.

² WTO, "Chair Cite "Clear Desire" of Ministers to Deliver Outcomes at MC13," (2023), available at: https://www.wto.org/english/news_e/news23_e/mc13_11dec23_e.htm.

Table 1: Summary of Study Findings and Recommendations

GAPS	ACTIONS	ACTORS
<ul style="list-style-type: none"> The ease with which MSMEs are able to engage in local, regional, and global digital and electronic transactions is taken for granted, and an abrupt end of the Moratorium would result in moderate or significant administrative burdens and costs for MSMEs. 	<ul style="list-style-type: none"> There is an urgent need for greater empirical assessment of the potential impact of lifting the Moratorium on MSMEs – in Africa, Asia, Latin America, and globally. To follow up on this pilot study, a broader assessment and set of consultations should be done before considering any changes in the Moratorium’s status. As further empirical work is considered, the study emphasized the need for in-person engagement, which is much more likely to produce meaningful information on MSMEs’ views than other means, including digitally administered surveys. This work could be undertaken by building in activities under the WTO Work Programme on E-Commerce, whereby national governments and WTO staff could engage with MSMEs more directly to build awareness around the Moratorium and gather MSME input, including through “roadshows” to travel and spread knowledge of the Moratorium, ideally coupled with consultations to gather the views and priorities of MSMEs. 	<ul style="list-style-type: none"> WTO Work Programme on E-Commerce WTO Member States WTO Secretariat
<ul style="list-style-type: none"> Regarding the Moratorium, even though MSMEs’ business activities are reliant on technology and digital/electronic transmissions, the study findings show that the majority of MSMEs were unaware of the Moratorium and the potential for new customs duties on electronic transmissions if the Moratorium expires. At a higher level, the majority of MSMEs were unaware of possible policy changes due to decisions at the WTO and are not consulted by their governments as changes in trade rules are considered. 	<ul style="list-style-type: none"> Open and accessible channels between MSMEs and national governments are critical to ensuring that the international policymaking process and resulting decisions are inclusive and representative of local stakeholders and communities. The study also highlights the importance of bottom-up analysis before trade policy decisions are made – this is central to more inclusive trade policy. 	<ul style="list-style-type: none"> National governments MSME representative bodies
<ul style="list-style-type: none"> More technically, with respect to the Moratorium, the term “electronic transmissions” is not clearly defined, which creates a great deal of uncertainty. 	<ul style="list-style-type: none"> A clear definition would help create more predictability on the scope of the Moratorium and its application. 	<ul style="list-style-type: none"> WTO Member States Technical Experts
<ul style="list-style-type: none"> The end of the Moratorium could pose a myriad of challenges to MSMEs, both economically and from a compliance point of view. 	<ul style="list-style-type: none"> In the event the Moratorium is ended, countries should explore the possibility of continuing it among a plurilateral group of Members, integrating language on the Moratorium into Regional Trade Agreements (RTAs), such as the new protocols to the Agreement Establishing the African Continental Free Trade Area (AfCFTA). In fact, this is currently already under discussion in the context of the AfCFTA Protocol on Digital Trade. 	<ul style="list-style-type: none"> WTO Member States

This study is based on both in-person consultations and structured digital surveys of MSMEs in Kenya and South Africa and focuses on three inter-connected issues: (i) What MSMEs knew about the Moratorium; (ii) Whether they have been consulted leading up to a decision among trade negotiators regarding the Moratorium; and (iii) How they might be impacted by a change in policy.

MSME Awareness of Moratorium and its Possible Expiration

MSMEs found it worrisome that a decision on the Moratorium may be taken without any engagement or consultation with them. Out of the 447 MSMEs surveyed, 56% (252 of 447) of MSMEs expressed that they were not aware of the Moratorium (Figure 1).

Figure 1: MSME Awareness of Moratorium



Source: New Markets Lab 2024

In addition, more than half of the MSMEs surveyed (55% or 248 of 447) were not aware of the Moratorium's upcoming expiration (see Figure 2)

Figure 2: Awareness of Possible Expiration of the Moratorium in 2024



Source: New Markets Lab 2024

Impact of Possible Government Regulations on Expiration of Moratorium

According to NML's survey, a baseline finding shows that the majority (74% or 330 of 447) of MSMEs surveyed indicated that they did not have sufficient capacity to comply with additional customs administrative requirements (Figure 3). Further, only 26% (117 of 447) of the MSMEs indicated that they have sufficient capacity to comply with additional customs requirements.

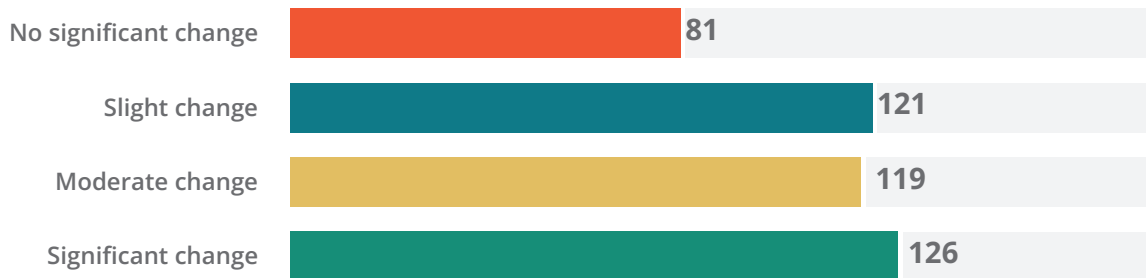
Figure 3: Lack of Capacity to Comply with New Customs Administrative Requirements



Source: New Markets Lab 2024

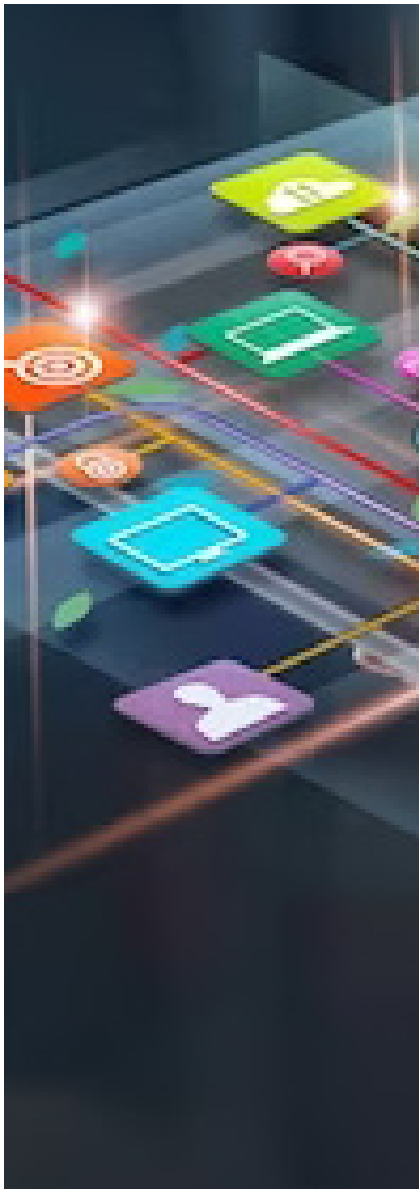
From a growth and competitiveness perspective, **an overwhelming majority (82% or 366 of 447) of MSMEs surveyed reported that they would experience an impact (significant, moderate, or slight) on potential growth due to potential import tariffs and additional customs administrative requirements following the expiry of the Moratorium.**

Figure 4: Additional Costs Could Impact Growth and Competitiveness of MSMEs



Source: New Markets Lab 2024

Introduction



THE NEED FOR A BOTTOM-UP APPROACH TO THE MORATORIUM

Trade policymaking often occurs at a very high level, with decisions made by negotiators or ministers without a full assessment of the impact on vulnerable stakeholders.³

Although there are mechanisms for consultation in the trade policymaking process, this is not always comprehensive or consistent and often leaves out the actual needs of stakeholders such as MSMEs and women.⁴

As proposed in recent work by Kuhlmann, applying a “micro approach” to trade rulemaking would help ensure that high-level rules are better suited to equity and inclusion.⁵ Here, a bottom-up, micro approach should include additional empirical study, applying methods such as interviews, surveys, questionnaires, case studies, and policy scenarios that take into account the circumstances, or context, facing vulnerable stakeholders. This study focuses on an empirical approach to assessing the expiration of the Moratorium as it impacts MSMEs, with contextual analysis incorporated throughout.

³ Katrin Kuhlmann, “The Need for a ‘Micro’ Approach to International Economic Law,” Georgetown University Law Center Working Paper, (2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4628605. See also, Katrin Kuhlmann, “Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development”, 2 African Journal of International Economic Law 48 (2021).

⁴ Id.

⁵ Id.

⁶ Id.

WHAT DOES THE MSME MORATORIUM COVER?

For MSMEs, the Moratorium, which has been in place since 1998, is particularly relevant given the importance of digital activity in local, regional, and international markets. The Moratorium reads as follows:

*“Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, **we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions.**”⁷*

Although WTO members first agreed not to impose customs duties on the cross-border flow of “electronic transmissions” in 1998, there is still no clarity on the definition of the term “electronic transmissions.” Some discussions have focused on scope – whether the imposition of customs duties would apply to the content transmitted electronically (i.e., the good or service delivered digitally) or just the transmission (i.e., the delivery of a digital good or service).

According to the Organisation for Economic Co-operation and Development (OECD), the Moratorium is presumed to cover ‘digital delivery,’⁸ which means that it would not cover physically delivered goods ordered digitally. Further, a 2022 study prepared by the South Centre contends that the Moratorium applies only to ‘digitizable products’ (i.e., goods) and that expanding the definition of electronic transmissions to services would significantly enlarge the scope of trade that is subject to the Moratorium, limiting countries’ policy space to impose relevant measures.⁹ **For the purpose of this study, the term will be used to include e-commerce and digital goods and services unless otherwise noted.**

⁷ WTO 1998, supra note 1 at 1.

⁸ Andrea Andrenelli and Javier López-González, “Electronic Transmissions and International Trade – Shedding new light on the Moratorium Debate,” 9 (2019), available at: https://www.oecd-ilibrary.org/trade/electronic-transmissions-and-international-trade-shedding-new-light-on-the-moratorium-debate_57b50a4b-en.

⁹ Rashmi Banga, “WTO Moratorium on Customs Duties on Electronic Transmissions: How Much Tariff Revenue Have Developing Countries Lost?,” 3-4 (2022), available at: https://www.southcentre.int/wp-content/uploads/2022/06/RP157_WTO-Moratorium-on-Customs-Duties-on-Electronic-Transmissions_EN.pdf.

“A fragmented internet reduces market opportunities for domestic MSMEs to reach worldwide markets, which may instead be confined to some local or regional markets.”
-United Nations

RELEVANCE OF MORATORIUM FOR MSMEs

The Moratorium is due to expire by March 2024 if WTO Members do not reach a consensus for its renewal at the February 2024 Ministerial Conference. The Moratorium is the only multilateral agreement on digital trade, and its expiration would have an unprecedented impact on MSMEs, as it would lead to further fragmentation of the internet and digital markets. As noted by the United Nations, “a fragmented internet reduces market opportunities for domestic MSMEs to reach worldwide markets, which may instead be confined to some local or regional markets.”¹⁰ Similarly, a joint study between the WTO, OECD, and International Monetary Fund (IMF) found that, “customs duties on electronic transmissions would likely negatively affect those who can benefit the most from digital delivery or from the use of digital tools to trade, namely MSMEs and women-owned traders.”¹¹

Ending the Moratorium would have a significant negative impact on MSMEs and consumers of digital goods and services:

- It will become more expensive for consumers to import digital goods and services, which could reduce demand for such items, affecting MSMEs that produce these goods and services.
- Consumers are also enterprises that use electronic transmissions as inputs. Duties on those imported inputs would increase their operating costs and cost of production. Having to manage imports that occur through electronic transmissions would also result in administrative and compliance burdens, as well as an increase in the costs of doing business. They, in turn, may need to pass on those costs to their own customers who purchase their goods and services.
- Developing economies are not only consumers of digital

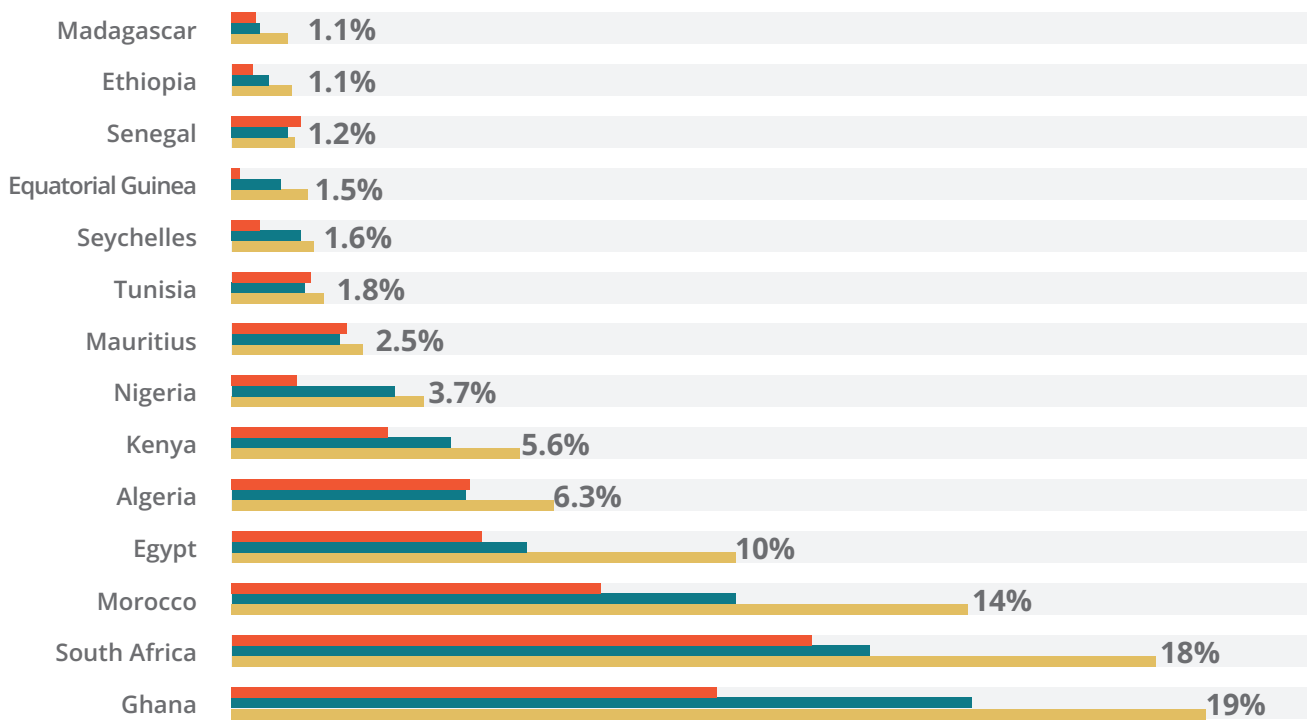
¹⁰ UNCTAD, “2021 Digital Economy Report”, (2021), available at: https://unctad.org/system/files/official-document/der2021_en.pdf.

¹¹ WTO, “Digital Trade for Development,” 35 (2023), available at: https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf.

items, but they have become exporters as well. Consequently, tariffs imposed on digital goods and services would affect their enterprises' costs and impact overall economic opportunities. In Africa, for example, the export of digitally deliverable services has increased in the recent years (see Figure 5). The Moratorium's expiration would have a significant negative impact on the burgeoning digital services export market in developing countries.

- Additionally, administrative costs that governments would incur to administer and ensure compliance with new regulations on customs duties on electronic transmissions could undermine any benefits captured. This also raises a "technical difficulty of assessing such duties, as arguably there are no "border[s] in cyberspace."¹²

Figure 5: Increase in Export of Digitally Delivered Services in Africa¹³



Several studies have analyzed the economic benefits of the Moratorium in relation to MSMEs. A recent study by Narayanan on MSMEs in India found that a 1% increase in digitally delivered imports is expected to lead to a 0.1-0.2% growth in Gross Value

¹² International Chamber of Commerce and International Trade Centre, "The WTO Moratorium on Customs Duties on Electronic Transmissions: What is really at stake?," 4 (2023), Joint ICC-ITC paper 01 WTO Moratorium (intracen.org).

¹³ WTO, "Digital Trade for Development," 18 (2023), available at: https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf.

Added and a 0.4-0.8% rise in employment of MSMEs; thus, highlighting the point that digitally-delivered imports have a positive impact on MSMEs.¹⁴ The same study underscores the importance of considering MSMEs' views and the need for an evidence-based approach at the multilateral (WTO) level on the discussions on the Moratorium.¹⁵

A recently published study by the Trade Experiences found that increasing costs of digitally-delivered goods could make women exporters less competitive. It also showed that there is a lack of gender-disaggregated data, which contributes to uncertainties around the scope of the impact of the Moratorium on women.¹⁶ In line with these studies, the NML study underscores the importance of an inclusive trade policymaking process that takes into account MSMEs' perspectives, highlighting that if policy is not formulated in an inclusive and consultative way, it could have a negative impact on stakeholders.

¹⁴ Dr. Badri Narayanan Gopalakrishnan, "The Impact of Cross-Border Digital Transmission on MSMEs Sector in India and the Benefits of WTO E-Commerce Moratorium," 17 (2023), available at: https://www.orfonline.org/wp-content/uploads/2023/05/TF-1_Cross-Border-Digital-Supply-Chains.pdf.

¹⁵ Id.

¹⁶ Trade Experiences, "How the WTO E-commerce Moratorium Impacts Women Across the World," 6 (2023), available at: <https://static1.squarespace.com/static/5d7025a4a7115800013abe24/t/64fd2059b48a5e6f727ee101/1694310493858/The+E-Commerce+Moratorium+%26+Women.pdf>.



Stories from MSMEs in South Africa and Kenya

on the WTO Moratorium on Customs Duties on
Electronic Transmissions



South Africa

According to the WTO, South Africa is one of the largest contributors to digitally-delivered services in Africa, accounting for an 18% share of Africa's export of digitally-delivered goods.¹⁷ South Africa also hosts most tech hubs and business incubator programs in sub-Saharan Africa, along with Kenya and Nigeria.¹⁸ As its MSME market grows in the digital space, it is important to maintain policies that foster its growth.

If the WTO Moratorium on Customs Duties on Electronic Transmissions expires, South Africa MSMEs would be placed at a significant disadvantage in the global digital marketplace. First, MSMEs in South Africa rely on their competitive pricing models and high quality of services to attract clients, most of whom are based outside of the country. The South African government's opposition to the Moratorium could deter investors

¹⁷ WTO, "Digital Trade for Development," 18 (2023), available at: https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf.

¹⁸ Mourine S. Achieng and Masika Malatji, "Digital Transformation of Small and Medium Enterprises in Sub-Saharan Africa: A Scoping Review," *Journal for Transdisciplinary Research in Southern Africa*, (2022), available at: https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2415-20052022000100027.

For MSMEs engaged in the ICT or MSMEs that depend heavily on technology, new regulatory requirements could be a breaking point.

by potentially increasing costs for the customers of these MSMEs, thereby creating uncertainty in the market for digital trade. Second, the Moratorium's expiration could also increase operational and production costs for its MSMEs. If the South African government begins to impose duties on imports of electronic transmissions, MSMEs would need to bear the costs of those imports and also incur the administrative burdens that accompany complying with a new and likely complicated duties regime. Third, many MSMEs and industry associations in South Africa have neither heard about the Moratorium, nor have they been consulted on the matter of its possible expiration. South African MSMEs should be consulted on this consequential policy change. Fourth, it is estimated that the tariff revenue foregone by South Africa would be less than 0.2 percent of all domestic tax revenue, and letting the Moratorium expire for this reason would be counterproductive.¹⁹

During the course of the study, NML spoke to 18 MSMEs in different sectors in South Africa and Kenya to understand the impact of ending the Moratorium and possible imposition of additional customs tariffs and administrative requirements on their business. These MSMEs spanned different sectors, such as the creative industry, the gaming sector, agriculture, the online payments sector, and business process outsourcing (BPO). These stories provided in-depth insight into the challenges MSMEs face in both countries. Generally, MSMEs face a number of hurdles, not only as a result of the business environment but also because legal and regulatory requirements come with a lot of red tape, delays, and complex compliance procedures. For MSMEs engaged in ICT or MSMEs that depend heavily on technology, new regulatory requirements could be a breaking point.

¹⁹ Daniel F. Rune and Thomas Bryja, "The Role of AGOA in Accelerating Africa's Digital Transformation," Center for Strategic and International Studies, (2023), available at: <https://www.csis.org/analysis/role-agoa-accelerating-africas-digital-transformation>.

I. MSME Stories from the Creative Industry in South Africa

The creative industry is a sector that would face challenges if the Moratorium were to expire. With the emergence of digital content, especially during and after the COVID-19 pandemic, foreign companies are looking to invest in creative projects across the globe, provided that the content is reasonably priced.

The Commercial Producers Association in South Africa (CPASA), an **aggregator of companies that produces TV commercials**, stated that more than half of the content produced by their members is for foreign clients. In the event tariffs were to be imposed on the digital content produced by them, this content would be far more costly and onerous for their members to produce. This is because the tariffs could make it more expensive for customers to purchase their content internationally. The industry is very competitive and global, and additional costs would increase business risks such that clients might choose to work in other markets if the services become more costly. This was supported by individual company experiences, as noted by a **company that produces virtual reality campaigns** for a wide international clientele. A company representative stated that if



Additional costs due to customs duties on electronic transmissions would significantly impact the MSME.

their customers would have to pay import duties for the digital services and content they provide, it would pose a significant challenge to their business as it would make their services more costly. An important point noted by the company was that it would be beneficial to have more clarity on the digital goods and services that may be impacted, and the status quo should be maintained until there is clarity on definitions, at a minimum.

Mind's Eye Creative, an independent, **award-winning 2.D animation studio** in South Africa would also be impacted, as the principal business of the company is to develop and produce digital goods and services. In fact, all animation companies trade in digital goods and services. A company representative also stated that virtually all software used in animation by the MSME is licensed internationally and would need to be purchased digitally. These include a plethora of software, including production tracking tools, animation software, and post-production tools. Additional costs due to customs duties on electronic transmissions (which is virtually all the work product developed by the company) would significantly impact the MSME. Depending on the duties, they could be prohibitively expensive and potentially stifle trade opportunities. Another **animation studio** stated that any additional duties would make it impossible to operate in South Africa.

II. MSME Stories from Agriculture Sector in South Africa

Over the years, numerous agri-tech startups have emerged in South Africa offering innovative solutions that could boost growth in the agricultural sector. This includes use of GPS-enabled tractors, management software, drone- and AI-driven machinery, precision farming, and other technological innovations. An **MSME based in Johannesburg**, but with operation throughout the region, created software that connects farmers to insurance agents,

As the company noted, “This would make us uncompetitive, adding to the massively increasing administrative load on their already thinly-stretched growing business.”

financing opportunities, analytics, and diverse input products through an online platform. As an MSME, their business strategy is to provide access to this platform at the lowest cost. Raising prices to compensate for additional tariffs and duties would impact their pricing strategy and ultimately affect their total available market.



III. MSME Stories from the Gaming Industry in South Africa

One of the industries that is growing at a steady pace in South Africa is the gaming industry, which has been getting a lot of attention from the government as well as investors. The sector already faces a number of hurdles affecting their growth as an industry, including lack of access to funding, high compliance requirements, and a challenging policy environment.

One of the **largest impact gaming studios in Africa, Sea Monster Entertainment**, stated that additional customs duties on digital transmissions would significantly increase the cost of doing business for the MSME. Their primary output is developed through internationally licensed software that is digitally downloaded and increasing the cost of accessing this license would increase their operating costs exponentially. As the company noted, “This would make us uncompetitive, adding to the massively increasing administrative load on their already thinly-stretched growing business.”

A **technical game development studio based in Johannesburg**, South Africa, 24 Bit Games, which is engaged in technical engineering services in the video game industry and specializes in co-development of games over various

platforms, would also be impacted. Their services include software development, technical art, optimization (related to both of these aspects), production and project management, and quality assurance. The majority of their clients are foreign, located in the USA, Canada, Europe, the UK, Mauritius, and Southeast Asia. Speaking about their experience with customs administration in South Africa, the company stated that it is common that their hardware is routinely impounded, and they have to engage with customs in order to answer questions, often causing lengthy delays and additional costs. If this were to expand to a potential scenario where additional digital goods or services are subject to scrutiny, it would create a significant administrative burden that most companies in their local industry would not be able to carry given their size and lack of support, and it might cause the local industry to stagnate or even shrink.

Another **small MSME in South Africa is developing video games** focused on environmental and political messaging. In addition to the challenges in securing funding and making a profit in the gaming industry, the MSME stated that any additional costs or tariffs could cause substantial challenges to their organization.

Lastly, an MSME, which is a **remote-only business that relies on digital goods and services** for their entire management and communication structure, stated that all of the tools they use are international digital goods, paid monthly. Any additional costs would immediately increase their overhead by thirty percent per employee. Their primary output is also developed using an internally licensed software, and additional costs could increase



running costs by another thirty percent per license (with multiple tools licensed to individual employees). The MSME conducts business globally by selling their digital goods through distributors across the globe, so any customs tariffs imposed would not only increase local costs of their goods but would also affect their relationship with their distributors. Overall, this would drastically increase their administrative overhead, and it is likely that many of the distributors would cease offering their products in South Africa, which would cut off their access to the local market.

IV. MSME Stories from the Online Education Sector in South Africa

After the COVID-19 pandemic, many South African schools and universities had to switch to online learning platforms. The South African online education market is expected to generate revenue of USD 443.6 million in 2023 and is projected to grow exponentially over the next few years.²⁰ The number of users in the market is expected to reach 12 million by 2028.²¹ However, most communities in South Africa still cannot afford access to e-learning content due to high costs of data and smart devices.

A **company that runs an online e-learning platform** stated that most of their digital goods and services integrate software as services (SaaS) platforms, which allows them to use applications such as Microsoft Office, Zoom, Gmail, and Slack. Any additional costs imposed on such software could result in added administrative costs, which the company does not have the capacity to absorb.



²⁰ Statista, "Online – Education – South Africa," available at: <https://www.statista.com/outlook/dmo/eservices/online-education/south-africa>.

²¹ Id.

“Larger companies in the same market would likely be able to absorb the costs much more easily, [...], which would make them less competitive and potentially drive other MSMEs out of business in the sector.”

V. Additional MSME Stories from the Information and Communications Technology Sector

A company representative from a **black-owned business in South Africa**, Itthink Smart Solutions, which provides innovative technology services to other companies, stated that the Moratorium’s expiration would stifle its growth. The company specializes in different software products, most of which are internationally licensed, delivered digitally, and offers services including cloud solutions, cyber security, and data analytics. They are also engaged in game development, where the focus is primarily on promoting African culture by highlighting African tales and developing games for kids to learn African languages through interactive storytelling sessions. As a small business, the company competes in a global market with multinationals and MSMEs in other countries. An added cost to their products or services would need to be passed down to consumers, making the business more expensive and less competitive. Further, larger companies in the same market would likely be able to absorb the costs much more easily and might not need to pass down additional costs to consumer, which would make them less competitive and potentially drive other MSMEs out of business in the sector.

VI. MSME Stories from the Business Process Outsourcing (BPO) Industry in South Africa

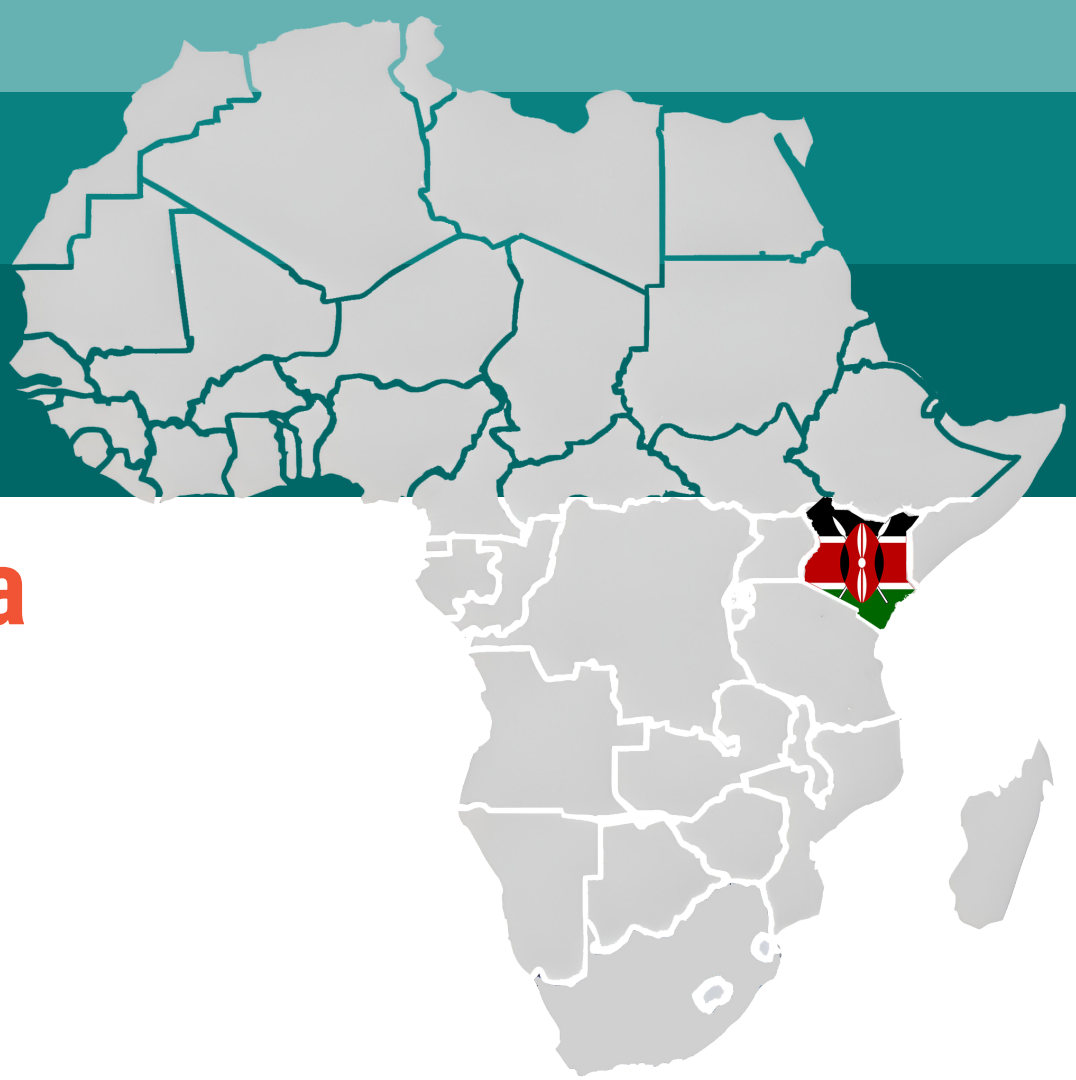
South Africa is an attractive location for investment in the BPO industry, and it stands out through its educated workforce, English proficiency, and high-quality of services. As a customer-centric industry, South African MSMEs in the BPO industry are under pressure to deliver innovative services at low costs. The ability for South African MSMEs in the BPO industry to keep costs down would be jeopardized if the Moratorium expires.

An **aggregator responsible for development of the BPO sector** in one of the major provinces in South Africa, stated that MSMEs form a big part of the BPO industry in the province. The delivery of offshore digital services has fluctuated in the province, and growth is dependent on digital transformation and competitive pricing. MSMEs provide a range of offshore BPO services to clientele in the United Kingdom (UK), United States of America (USA), Germany, France, Netherlands, and Australia, among others. This includes a host of digital goods and services, such as operation support systems software, application software, contact center software and recording software, video chats, chat bots, automated services, social media, and software that provides administrative support.

The status quo maintained by the Moratorium has definitely helped to keep these services at a reasonable cost as the industry has grown; this growth has happened without extensive restrictions in the digital space. Further, South African BPO services are already considered to be more expensive than those in other countries like India, so if the Moratorium were to lapse and the South Africa government went ahead with imposing customs tariffs on the digital goods and services consumed by South African BPOs, most MSMEs would not be able to afford to take on additional costs. The aggregator was also not aware of the Moratorium and was alarmed by the possible imposition of additional customs tariffs. This is worrying, as it is important that industry representatives are included in the conversations around the Moratorium.

The status quo maintained by the Moratorium has definitely helped to keep these services at a reasonable cost as the industry has grown; this growth has happened without such restrictions in the digital space.

Kenya



Kenya is a rising economy in terms of e-commerce and digital technology. In Africa, Kenya accounts for 5.6% of the share of digitally-delivered services.²² The Kenyan government has also adopted policies that cater to the growth of the ICT sector in Kenya. These include the recently passed Kenya National E-Commerce Strategy and the Kenya ICT Policy. Kenya has also moved towards digitization and modernization of many trade practices, including the introduction of a National Single Window System.

Kenya has a vibrant MSME sector and holds a distinguished position in the African region as one of the fastest growing economies in the digital space. A change in the status quo of the Moratorium could disrupt this pace. This is because digitization offers great opportunities to Kenyan MSMEs to diversify their export markets by focusing on digital goods and services rather than traditional exports.²³ This would also be supported by implementation of

²² WTO, "Digital Trade for Development," 18 (2023), available at: https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf.

²³ Beru Lilako, "Digital Trade Developments in Kenya: Perspectives under AfCFTA," Tralac, (2022), available at: <https://www.tralac.org/blog/article/15850-digital-trade-developments-in-kenya-perspective-under-afcfta.html>.

the AfCFTA and its draft Protocol on Digital Trade, which could help Kenyan MSMEs overcome current challenges, including high transaction costs and lack of connectivity.²⁴ Further, Kenyan sectors have undergone significant digital transformation, the best example of which is the transformation of the financial sector through M-PESA, which has significantly expanded access to financial services and allowed for greater financial inclusion.²⁵ Other sectors such as manufacturing, education, entertainment, and agriculture are also undergoing digital transformation, and it is important that this growth is enabled and maintained.

NML spoke with MSMEs in different sectors in Kenya, ranging from the agricultural sector to the creative industries. Most MSMEs were not aware of the Moratorium and were quite concerned about the possible imposition of additional customs tariffs and administrative obligations on their businesses. Kenya has also implemented a Digital Service Tax (DST), which Kenyan MSMEs have already found challenging. The Moratorium's expiration would compound these challenges. Kenyan MSMEs benefitted from advantageous pricing models, and the imposition of customs duties or other administrative requirements could drive up their costs and make them uncompetitive.

²⁴ Id.

²⁵ Id. See Rajiv Lal, "M-Pesa: Financial Inclusion in Kenya," Harvard Business School (2016), available at: <https://www.hbs.edu/faculty/Pages/item.aspx?num=50788>.

Additional costs would also stifle innovation for such companies, and piloting their technology in other countries could also become an expensive if not an impossible endeavor.

I. MSME Stories from Agriculture in Kenya

An **agri-tech company that operates a digital learning platform for farmers** covering various issues such as agronomy, climate smart interventions, and food safety could be negatively impacted by the Moratorium's expiration. The company uses technologies such as interactive voice response, SMS, and cloud-based virtual call centers to provide learning support to farmers. Based in Kenya, the company has worked with farmers in Uganda and Tanzania and hopes to expand into the Ethiopian market as well. An additional tax or new customs administrative measures resulting from a government imposing duties on electronic transmissions would drive up costs, which the company would have to pass on to consumers of the business, i.e., farmers, many of whom are small-scale. This undermines the goal of digital inclusion, which is the purpose of the business. Such additional costs would also stifle innovation for such companies, and piloting their technology in other countries could also become a prohibitively expensive endeavor.



Policy decisions such as a change in the status of the Moratorium could discourage investors and put companies like hers out of business.

These concerns were confirmed by another MSME that uses digital technology to apply innovative solutions to agriculture. The company provides various services, such as weather and soil forecasts, market analysis, solar-powered cold storage, and solar-powered irrigation systems. This is all provided through an application managed by the company, which is stored on the online cloud. While speaking about the Moratorium, the company founder explained that taxes have become the biggest challenge for this MSME and for startups in general. The company does not have the capacity to take on additional tax obligations that could follow the expiration of the Moratorium. For this MSME, farmers would ultimately have to absorb additional costs.

II. MSME Stories from the Creative and Gaming Industries in Kenya

A **woman-owned MSME that curates cultural and creative experiences**, partnering with museums, studios, and digital media, worries that changes in the legal ecosystem for digital goods and services would negatively impact her company's potential. Services provided by the company include creating games on African stories, interactive sessions, and use of virtual reality to curate visual artistic experiences. Since the company's clientele is predominantly outside of Kenya, it relies on keeping costs of its services affordable in order to remain competitive. She stated that the industry is not organized, although it has potential and needs an enabling environment that supports its growth. Policy decisions, such as a change in the status of the Moratorium, could discourage investors and put companies like hers out of business.

Consultations with the owner highlighted that policymakers do not regularly reach out to MSMEs in this sector, and they are quite detached from the policymaking process. This leaves these MSMEs out of important issues like extending the Moratorium, with policymakers potentially making a decision without having full awareness of concerns that MSMEs might have on the issue. She highlighted



that there is tremendous potential for growth in the creative industry; however, restrictive policies like new customs duties on electronic transmissions could wipe out MSMEs at a critical stage in their growth.

These fears were confirmed by another **company that provides services at the convergence of games and African story telling**. As a gaming company, they rely on various software licensed from foreign companies. They also have to license individual software for their employees, all of which amounts to substantial costs of doing business for the company. Further, the company relies on software such as QuickBooks, Microsoft Azure, Zoom, and Slack, along with other software to run its business. Added costs that could be imposed upon expiration of the Moratorium could render the company uncompetitive.

III. MSME Stories from the BPO Sector in Kenya

MSMEs from the BPO sector in Kenya highlighted how lifting the Moratorium could be the final blow to their businesses, which are already struggling in the face of the newly introduced DST and existing value added tax (VAT) that applies to digital marketplace supply. Digital tax measures have not only made their services more expensive, but they have brought about added administrative obligations for which many of these MSMEs do not have compliance capacity. They noted that a change in the Moratorium would stifle their growth significantly and that they would have to pass down most, if not all, additional costs to

The company representative stated that such regulations are put in place without much consultation with industry.

consumers since they are small companies that cannot absorb higher costs

One such **company, based in Nairobi, Kenya, provides both onshore and offshore IT-based services**, which includes digitization, data management, digital skills training, machine learning, cloud and data protection, transcription, and coding for kids. The company also uses various licensed software products to run the administrative side of their business. Keeping their services affordable is critical, and the status quo maintained by the Moratorium has helped keep costs under control. Exports of digital services make up of 90 percent of the company's business, and most of their clients are based offshore. This makes it important that they provide their offshore services at affordable costs. The imposition of local DST and VAT have already driven up the cost of services, and, in the end, these costs have had to be passed down to the consumers. Further, Kenya is also not yet known for its BPO sector, which is a sector with strategic growth potential, so cost is a defining factor in maintaining competitiveness.

Speaking on the recent policy changes to impose DST and apply VAT, the company representative stated that such regulations are put in place without much consultation with industry, and, even when there is consultation, MSME feedback is not given weight or is not taken into consideration at all. The company representative stated that there is no bottom-up approach to trade policy formulation, and they often learn about policies after they come into existence, which leaves them scrambling to meet compliance obligations. Their success depends upon predictability and certainty in the enabling environment, which is important for investors and their clients, and lifting the Moratorium would cause greater uncertainty in an already

shaky environment.

A Kenyan BPO company that offers services such as customer support, data management and human resources services, stated that the country is now trying to position itself as an outsourcing hub in Africa. The MSME has created employment for women and youth in the East Africa region while catering to an international clientele. Since Kenya is an emerging market in the BPO space, pricing is key for the company to scale. An increase in price due to additional customs duties or administrative requirements would be passed on to consumers. However, the company's business model only allows it to increase prices annually, which means that the company would have to absorb any change in price until it could renew its annual contracts with clients. When asked about the Moratorium, the MSME stated that they have no awareness of it.



IV. MSME Stories from the Financial Sector in Kenya

Within the highly competitive space of digital lending, one standout is a **Kenyan MSME with a mission to bridge the financing gap for women owned MSMEs in Africa.** The company currently operates in Kenya but has plans to expand to other countries in Africa. The enterprise provides financial support in the form of assets and credit to women entrepreneurs, and, so far, it has supported more than 30,000 women-owned business. In the past the company has provided productive assets loans (for assets such as water tanks and sewing machines), smartphone loans (to tap into opportunities in the digital space) and working capital loans (for business operations). The women-owned businesses that are its clients have to be part of a registered savings group, as this helps to hold them accountable in the repayment of the loans.

The higher costs that result from a change in customs duties on electronic transmissions would have to be passed along to its end users, which include women and adolescent girls.

Customs duties on electronic transmissions would raise costs for the MSME, significantly undermining its business model. These costs are associated with use of licensed software and cross-border data transmissions. For example, the company's mobile application is hosted on Microsoft Azure. The higher costs that result from a change in customs duties on electronic transmissions would have to be passed along to its end users, which include women and adolescent girls who could be prevented from continuing to receive credit. Lifting the Moratorium would come at a very unfortunate time, as the company has plans to expand its work to the broader African region.



Survey Results

NML's study centered around a survey questionnaire that was delivered in a way to both gather statistically significant data and engage with stakeholders on the ground to better understand the potential impact on MSMEs if the WTO Moratorium were lifted.

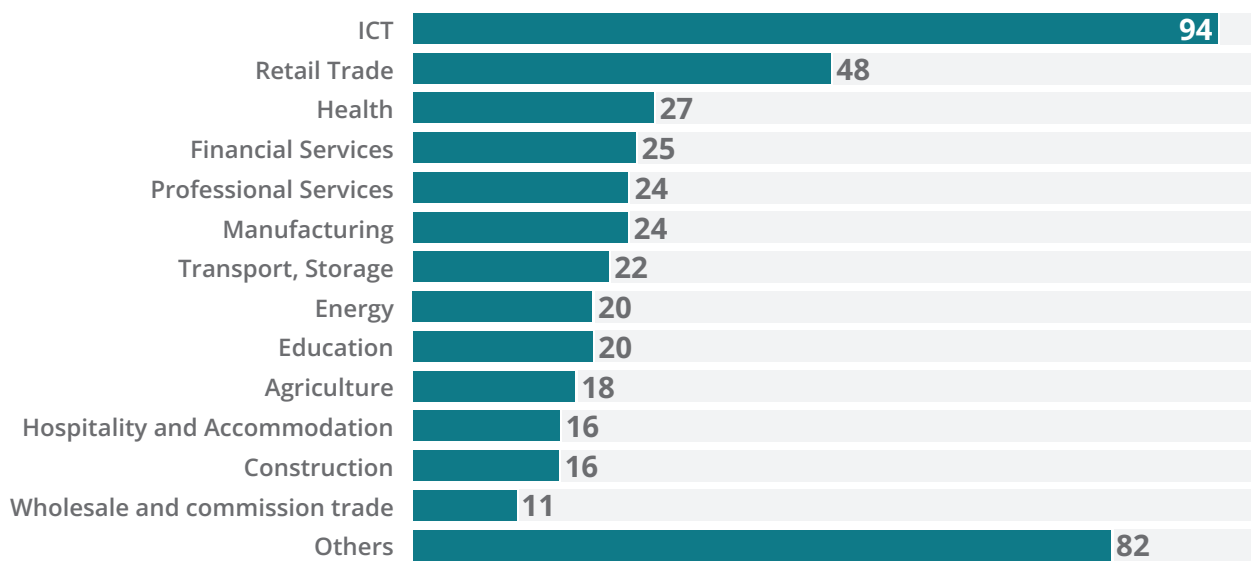
To properly assess the potential impact on MSMEs of removing the Moratorium, the survey questionnaire focused on four elements, each deemed essential to the overarching purpose of the study: (i) use of digital goods and services; (ii) awareness of the general government policymaking process (general and specific to import measures on e-commerce); (iii) awareness of government measures on electronic commerce; and (iv) impact on MSMEs of potential government regulations on electronic transmission due to a change in the status of the Moratorium (see Appendix I for detailed methodological approach underpinning the survey). The MSMEs surveyed had clear and consistent responses to questions tailored to the potential impact the expiration of the Moratorium would have on their business; however, it was more difficult for them to opine on future policymaking, most likely since they lacked engagement with government on such issues. The survey results are summarized below.

In total, 447 MSMEs responded to the survey, 256 from Kenya and 191 from South Africa. Based on the survey administration methods discussed above, the highest number of survey respondents resulted from direct engagement with MSME rather than through dissemination through online methods or engagement through associations.

(a) General Information about MSMEs Respondents Surveyed

The MSMEs surveyed covered multiple sectors and industries, including ICT, retail trade, professional services, financial services, agriculture, education, and hospitality, among other sectors, in both countries (see Figure 6). The sectors surveyed track with those highlighted in the stories in the previous section. The majority of MSMEs surveyed (83%) frequently or often include women in key decision-making processes.

Figure 6: Scope of Industries of Businesses Surveyed



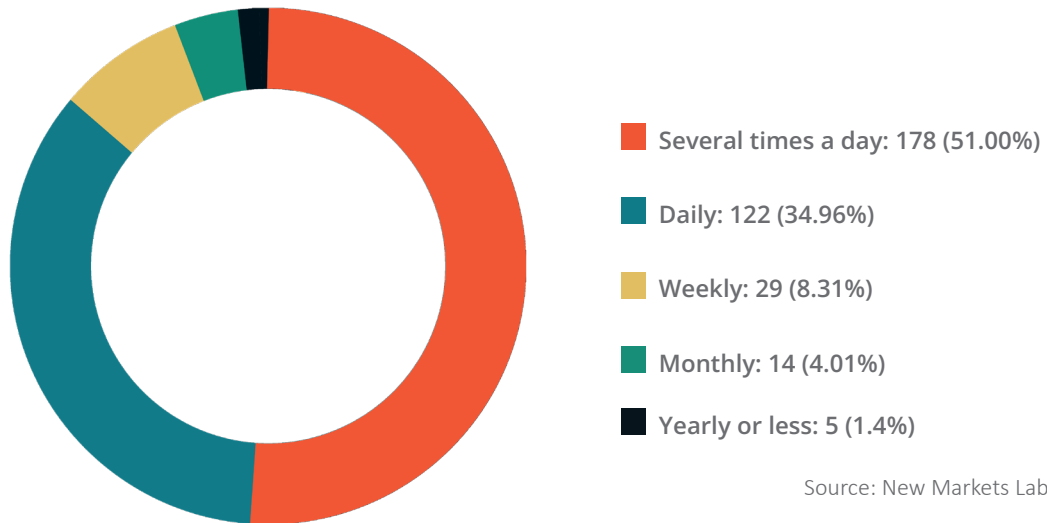
Source: New Markets Lab 2024

(b) Use of Digital Technology

Given the importance of digital technology to MSMEs, the study assessed two factors (i) frequency of engagement with activities involving digital technologies and (ii) ability of MSMEs to differentiate between local versus cross-border e-commerce activities.

The survey results showed that an overwhelming majority of MSME respondents (348 of 447 or 78%) rely on digital technology in their day-to-day business operations. Of these 348 relevant respondents, 51% do so several times a day (Figure 7).

Figure 7: Frequency of MSME Engagement with Activities Involving Digital Technologies



Source: New Markets Lab 2024

During stakeholder consultations, enterprises that relied on digital technology stated that access to cross-border data was crucial to running their day-to-day operations. This included accessing licenses for accounting software, day-to-day management, and access to sophisticated technology that allowed them to create further competitive products. Among the respondents, 38% (172 of 447) stated that they are unable to distinguish between local versus cross-border digital goods and services (Figure 8). This indicates that MSMEs would find it difficult to distinguish between digital goods and services that are imported versus local. In the event customs duties are imposed on electronic transmissions, it will likely be a significant administrative undertaking for the MSMEs to comply with such a regime.

Figure 8: MSMEs' Ability to Distinguish Between Local and Cross border E-Commerce and Digital Goods and Services



Source: New Markets Lab 2024

(c) Awareness of Government Policymaking Process (General & Specific to Import Measures on E-Commerce)

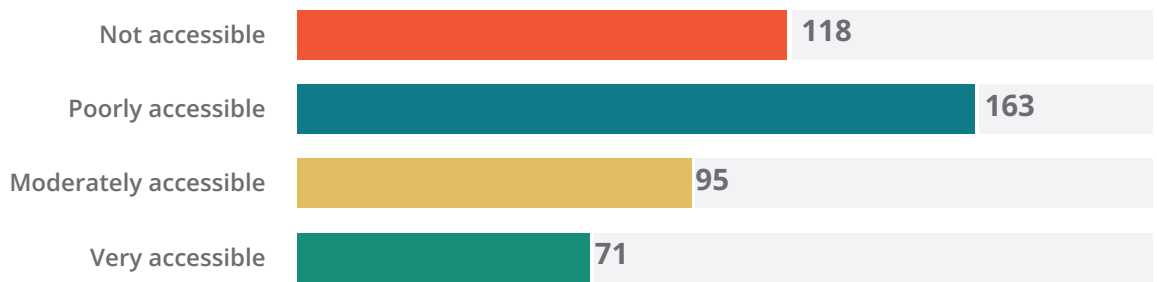
The study evaluated several factors regarding the engagement of MSMEs with their governments and trade associations, including (i) accessibility of MSMEs to government channels, (ii) sources

from which they gather information on policy changes, (iii) representation of their views by their government in international negotiations, (iv) MSME participation in trade associations, and (v) representation of MSMEs by trade associations. The survey results and consultations showed that companies do not find their government policymaking channels to be easily accessible and that their sources for knowledge of government policy reforms vary from business associations to word of mouth. Additionally, MSMEs stated that they do not feel well represented by their governments in international negotiations, and a minority of them signaled that they know whether they are represented by a business association before their governments.

(i) Accessibility of Government Policymaking Channels

A significant majority of MSMEs surveyed (376 of 447 or 84%) noted that government policymaking channels are not very accessible. Only a small percentage (71 of 447 or 16%) of MSMEs stated that they believe that government channels are very accessible (Figure 9).

Figure 9: Accessibility of Government Channels to MSMEs



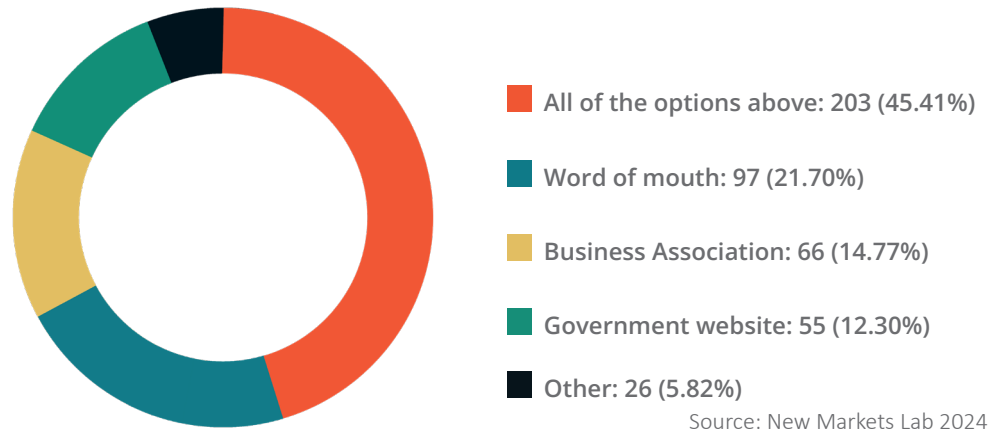
Source: New Markets Lab 2024

(ii) Accessibility of Communication Channels with Government Entities

Most of the respondents stated that their main source of information is through word of mouth, which represented 22% (97 of 447) of their information source. A small group of respondents (66 of 447 or 15%) stated that business associations are their main source of information on government proposals to amend laws and regulations. An even smaller group of MSMEs surveyed (55 of 447 or 12%) noted that they find out about policy reform initiatives through government websites, and the most (203 of 447 or 45%) said that they learn about policy proposals using

all of the above-noted sources. Another small group (26 of 447 or 6%) stated that they become aware of policy proposals using other sources, including social media, news, television, and email (Figure10).

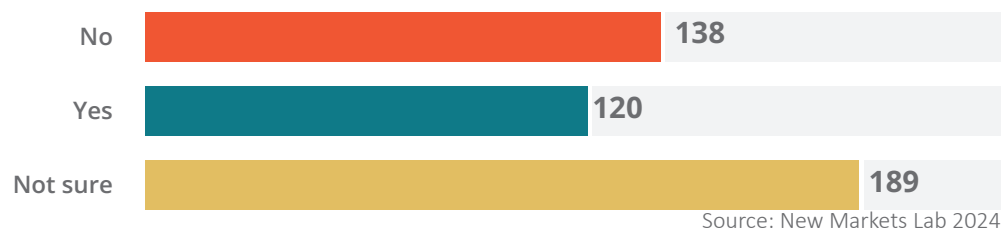
Figure 10: Sources of Information on Government Proposals to Amend Laws and Regulations



(iii) Representation by Government of MSME Interests in International Negotiations

Most of the MSMEs surveyed (189 of 447 or 42%) stated that they are not sure whether their government represents their business interests in international negotiations. Almost one-third (138 of 447 or 31%) of the enterprises do not consider themselves adequately represented by their government in international fora. Only a small group (120 of 447 or 27%) stated that they feel that they are well-represented by their government (Figure 11).

Figure 11: Representation by Government of MSME Interests in International Negotiations

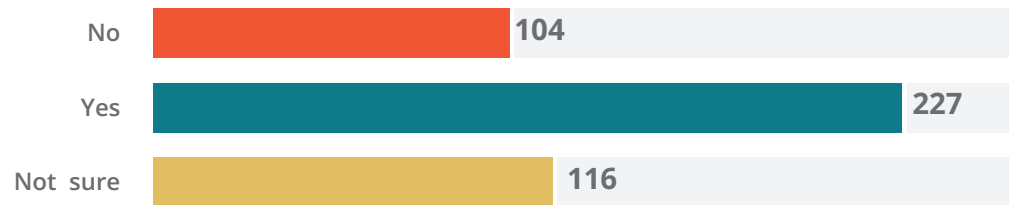


(iv) MSME Participation in Trade Associations

Of the MSMEs surveyed, only half (227 of 447 or 51%) of the companies are members of a business association. 26% (116 of 447) of the MSMEs surveyed expressed that they are unsure

whether their company belongs to one of these organizations, and the remaining 23% (104 of 447) noted that they are not part of a trade association (Figure 12).

Figure 12: MSME Participation in Trade Associations

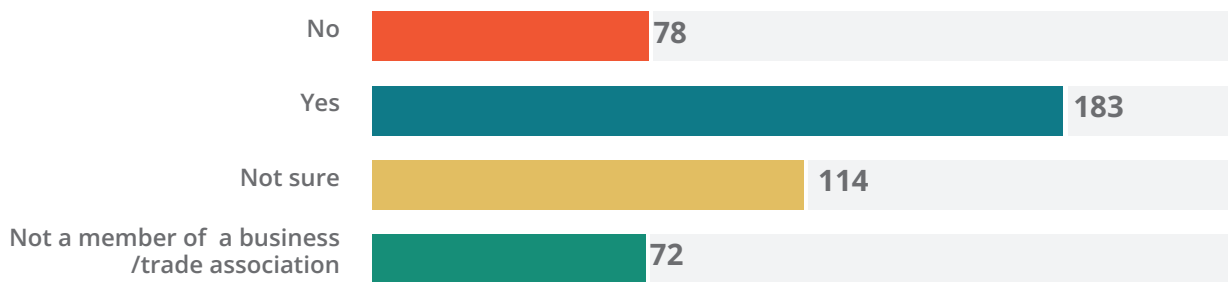


Source: New Markets Lab 2024

(v) Trade Association Representation of MSME Interests

The study also inquired about the representation of MSME interests by business associations before the government. Only 41% (183 of 447) of the MSMEs surveyed said that a business association represented them before the government, and 59% (264 of 447) of the companies were not sure or answered that no trade association acted on their behalf before government representatives or that they were not a member of a business/trade association (Figure 13).

Figure 13: Trade Associations' Representation of MSME Interests



Source: New Markets Lab 2024

(d) Awareness of Government Measures on Electronic Transmissions

The study also inquired about (i) consultations on the imposition of customs duties on digital goods and services, (ii) awareness about the existence of the Moratorium and its expiration, and (iii) knowledge about the government authority to impose such duties and customs administrative requirements on the importation of digital goods and services.

When MSMEs were asked whether they have been consulted

regarding the possible imposition of import tariffs on digital goods and services, the vast majority of those surveyed (289 of 447 or 65%) answered in the negative (Figure 14). Only 35% (158 of 447) of respondents noted that they had been consulted by their government on this issue.

Figure 14: Percentage of MSMEs Consulted by Government about Possible Import Tariffs on Electronic Transmissions



Source: New Markets Lab 2024

The survey results also showed that the majority (252 of 447 or 56%) of the MSMEs were not aware of the Moratorium. Only 44% (195 of 447) of consulted knew of the Moratorium's existence (Figure 15).

Figure 15: MSME Awareness of Moratorium



Source: New Markets Lab 2024

Similarly, more than half (248 of 447 or 55%) of enterprises surveyed were unaware of the possible expiration of the Moratorium in February 2024. Just under half (199 of 447 or 45%) of enterprises stated that they knew that it could be lifted in 2024 (Figure 16).

Figure 16: Awareness of Possible Expiration of the Moratorium in 2024



Source: New Markets Lab 2024

(e) Impact of Potential Government Regulations on Electronic Transmissions

The study also examined how the potential expiration of the Moratorium could impact MSMEs, including (i) the overall capacity of MSMEs to comply with customs administrative requirements, (ii) how added tariffs and administrative costs could impact MSMEs' ability to conduct business, and (iii) impact on the growth potential and competitiveness of MSMEs in international markets, among other aspects. Survey results regarding the impact on MSMEs of the potential expiration of the Moratorium are presented below.

To provide relevant context, a significant number of MSMEs operate with limited resources and have little ability to stretch to meet new requirements that require reallocation of scarce resources. When evaluating the potential impact on MSMEs of lifting the WTO Moratorium, this means that MSMEs would face additional administrative and compliance costs, such as import declarations, legal compliance, import/export licenses, payment requirements, recordkeeping on the country of origin, etc. The majority of MSMEs that responded to the survey (74% or 227 of 447) expressed that they lack capacity to comply with additional customs administrative requirements. Only a small portion of the respondents (26% or 117 of 447) expressed that they have sufficient capacity to comply with additional requirement (Figure17).

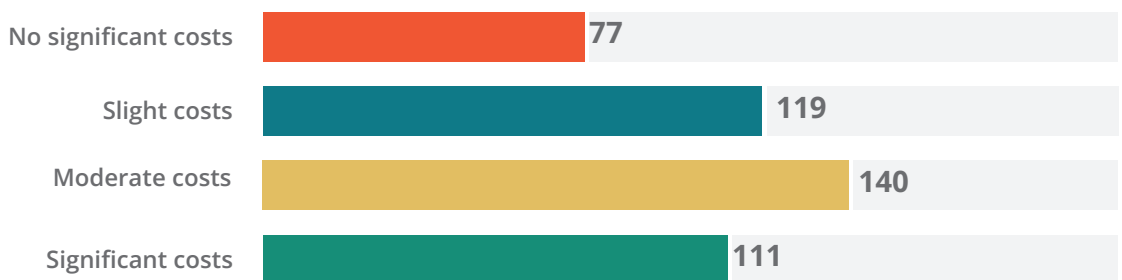
Figure 17: MSME Capacity to Comply with Additional Customs Administrative Requirements



Source: New Markets Lab 2024

Almost 83% (370 of 447) of MSME respondents affirmed that they would incur administrative costs (either significant, moderate, or slight) with enhanced customs administrative requirements related to e-commerce and digital goods and services, such as hiring for internal compliance (Figure 18).

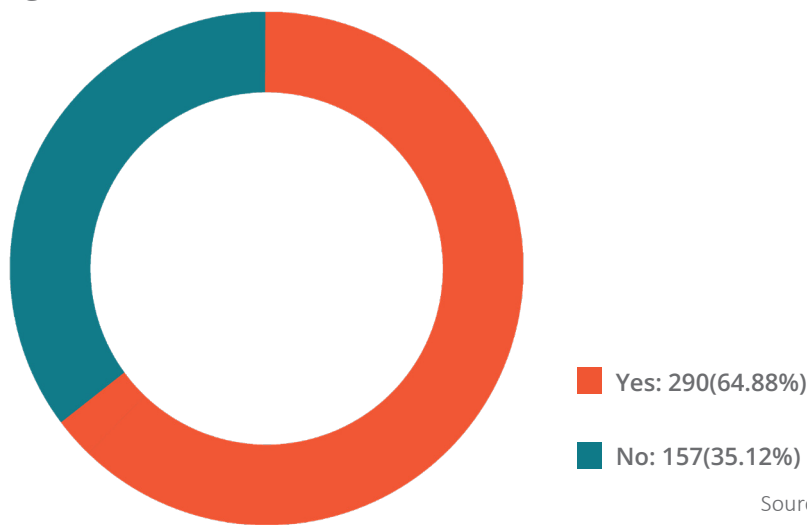
Figure 18: Additional Administrative Costs for MSMEs Arising from Enhanced Customs Administrative Requirements Related to E-Commerce and Digital Goods and Services



Source: New Markets Lab 2024

In addition, consumers would also be affected by added costs for MSMEs in the event the WTO Moratorium were allowed to expire. The majority (290 of 447 or 65%) of MSMEs reported that they would pass on additional costs associated with administrative costs to consumers (Figure 19). This highlights that consumers would likely face higher prices for a range of goods and services due to the WTO Moratorium's expiration.

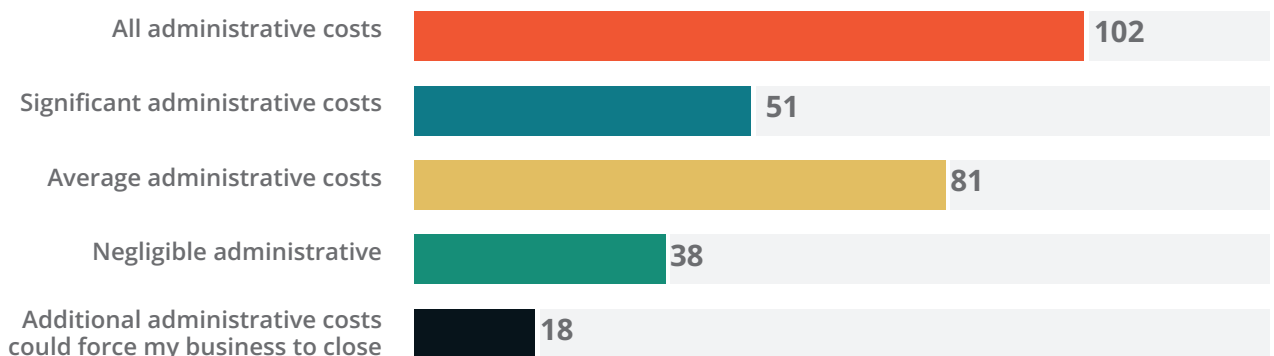
Figure 19: MSME Likelihood of Passing Added Customs Administrative Costs Along to Consumers



Source: New Markets Lab 2024

Of the 290 MSMEs that confirmed they would pass along additional administrative costs to consumers, 41% (120 of 290) of them stressed that they would pass **all of these added costs** along to their consumers or that additional customs administrative requirements could force their business to close (Figure 20). This signals the thin margin at which many MSMEs are operating and the potentially significant impact of added customs administrative costs.

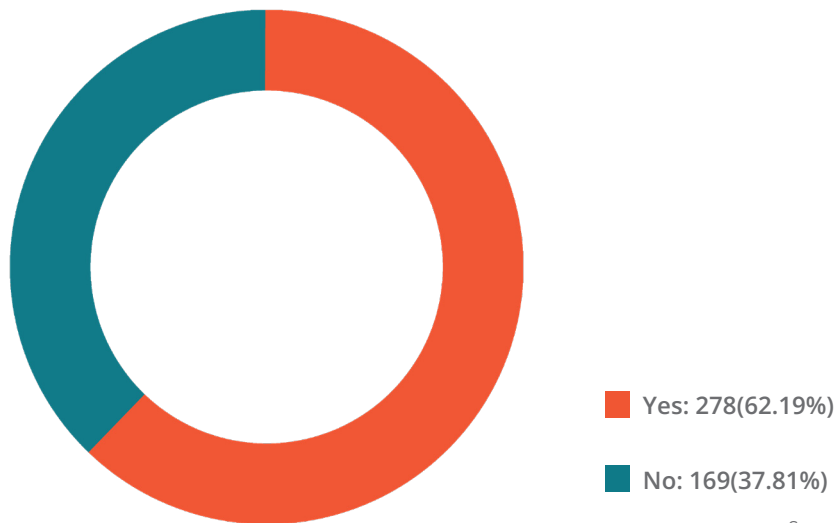
Figure 20: Degree to Which MSMEs Would Pass Along Additional Customs Administrative Costs to Consumers



Source: New Markets Lab 2024

To further understand the potential impact on consumers, the survey also focused on the direct tariff costs that would inevitably arise from new government initiatives following the expiration of the WTO Moratorium. On this note, the majority (62% or 278 of 447) of MSMEs reported that they would pass on additional tariff costs to consumers (Figure 21).

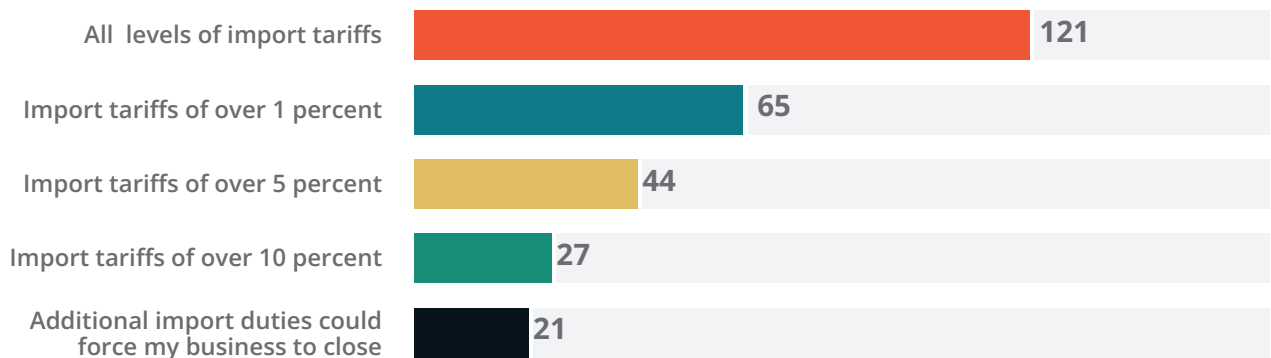
Figure 21: MSMEs’ Intention to Pass Added Tariffs Costs to Consumers



Source: New Markets Lab 2024

The survey also attempted to gauge how MSMEs might react to different tariff levels. Of the 278 MSMEs surveyed, 32% (142 of 278 MSMEs) stated that they would pass **all added costs to consumers regardless of tariff level** or that additional tariff costs could force their business to close. Others differentiated between costs associated with different tariff levels (Figure 22).

Figure 22: Thresholds at Which Added Tariff Costs Would be Passed Along to Consumers

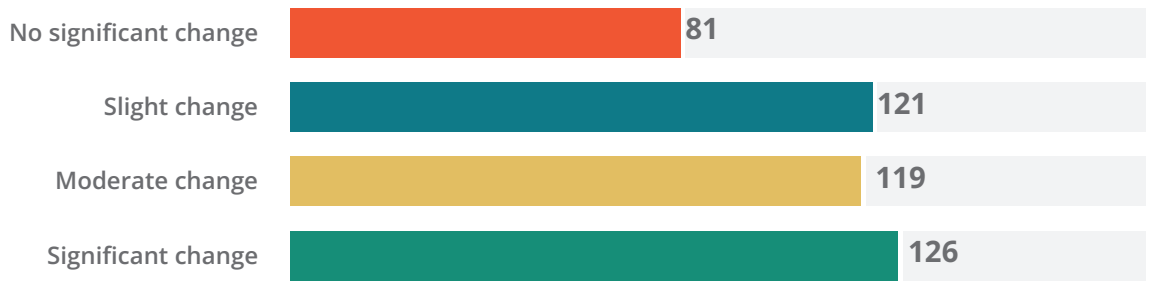


Source: New Markets Lab 2024

When considering the potential impact of the Moratorium on MSMEs, it is also important to look beyond just the cost perspective

and consider wider implications. For example, the prohibition on cross-border duties on e-commerce and digital goods and services has created a borderless digital market, which can give MSMEs a competitive advantage due to their size and reliance on digital goods and services. Accordingly, the Moratorium could be directly linked to the growth and competitiveness of MSMEs. **On this note, the majority (366 of 447 or 82%) of MSMEs surveyed reported that their growth potential would be impacted by potential import tariffs and additional customs requirements were the Moratorium to expire (Figure 23).**

Figure 23: Potential Impact on MSMEs’ Growth Due to Additional Administrative Requirements Following the Moratorium’s Expiry



Source: New Markets Lab 2024

Offering goods and services in the digital space also facilitates market access for many industries, thus allowing MSMEs to be better positioned to compete against larger enterprises, both locally and abroad. However, lifting the WTO Moratorium would ultimately usher in additional procedures and costs that would increase barriers to MSME participation in international markets. **Out of 447 MSMEs, the majority (358 of 447 or 80%) of MSMEs surveyed reported that their international competitiveness would suffer due to potential import tariffs and additional customs administrative requirements following the possible expiration of the Moratorium (Figure 24).**

Figure 24: Potential Impact on MSMEs’ Competitiveness in Global Markets Due to Additional Customs Administrative Requirements



Source: New Markets Lab 2024

Conclusion and Recommendation

Stories from MSMEs in South Africa and Kenya show that MSMEs stand to suffer significant negative impacts if the Moratorium is allowed to expire. MSMEs depend on digital goods and services to deliver core business activities and manage day-to-day operations. The digital transformation that happened during COVID-19 enabled MSMEs to flourish, and their growth should be fostered rather than suppressed.

As noted by many MSMEs, the expiration of the Moratorium could be a breaking point for them, and it is important that the Moratorium is maintained while governments engage with MSMEs as part of its process to reach a decision on this issue. This engagement is necessary in order for governments to fully assess the potential impact of the Moratorium, particularly if the government is contemplating a change in its position on the policy. The empirical evidence presented in this study highlights this need, as it shows that MSMEs are currently largely disengaged from high-level policy decision making, both with regard to the Moratorium and more generally. The recommendations below are intended to address this gap.

- a. **Maintain Moratorium Pending Further Research and Study:** Before a decision is made on the issue, WTO Members should more extensively study the potential impact of lifting

the Moratorium on MSMEs, using the WTO Work Programme on E-commerce to coordinate and compare results.

- b. Conduct Deeper Research on the Link Between MSMEs and the Moratorium:** There is limited understanding of the possible impact on MSMEs if the Moratorium were to be lifted. Research under this study, as well as a study done on MSMEs in India, indicates that the consequences would be both deep and wide-reaching. These studies should be expanded to cover additional countries and MSMEs.
- c. Define the Term “Electronic Transmissions” at the Multilateral Level:** The Moratorium refers specifically to electronic transmissions, yet discussions around the WTO Moratorium are surrounded by speculation. Much of this uncertainty is due to the lack of an official definition of “electronic transmissions.” Defining the term would help foster more predictability on how countries and stakeholders would be impacted by a potential change.
- d. Exchange Information on the Potential Impacts of the Moratorium:** Countries and international development organizations could share work around the WTO Moratorium, including potential impacts, benefits, and implementation challenges if lifted. Cross-border collaboration among organizations and a fluid exchange of research and input more generally would enrich the overall knowledge base and help stakeholders inform themselves of the broader implications of lifting the Moratorium.
- e. Create Awareness among MSMEs of Channels for Policy Engagement:** To make feedback systems between governments and MSMEs more inclusive and functional, governments could introduce programs that build capacity and raise awareness, with a focus on receiving feedback specifically from MSMEs to make informed policy decisions. Alongside more empirical work to better understand MSMEs' interests and needs, there should be transparent methods for tracking whether governments take these needs into account. Larger companies and business associations could also play a more active role in connecting MSMEs to government policy channels and ensuring that governments take their interests into account when designing new trade rules.

²⁶ Dr. Badri Narayanan Gopalakrishnan, “The Impact of Cross-Border Digital Transmission on MSMEs Sector in India and the Benefits of WTO E-Commerce Moratorium,” 17 (2023), available at: https://www.orfonline.org/wp-content/uploads/2023/05/TF-1_Cross-Border-Digital-Supply-Chains.pdf.

- f. Integrate Language on the Moratorium in RTAs:** Since the Moratorium remains temporary, countries should explore the possibility of incorporating a permanent moratorium in RTAs. However, questions of definition of electronic transmissions remain, and other factors, like rules of origin, are complicated. While only multilateral action could reduce uncertainty and inconsistency in the market overall, RTAs present a partial, near-term solution.

Appendix I: Methodological and conceptual approach to survey design

The overarching purpose of the survey was to create a statistically significant data set to effectively assess views on the Moratorium and its continuation and to gauge impact on MSMEs of a potential policy change at the international level. The survey served as an information gathering tool to help discern, among other aspects, whether the policymaking process was inclusive and whether there was a disconnect between policymaking and grassroots stakeholders, including MSMEs.

Two survey questionnaires were designed, one for each country (South Africa and Kenya). While questions were consistent across survey instruments, the differentiation was based on how relevant national laws and regulations categorize and define MSMEs.²⁷ To properly assess the potential impact on MSMEs of lifting the Moratorium, the survey questionnaire focused on four elements, each deemed essential to the overarching purpose of the study.

²⁷ There were two versions of the survey, one for Kenya and one for South Africa. This was based on how business size is classified under applicable local law. For Kenya, this involves the Micro and Small Enterprise Act of 2012, which defines Micro and Small enterprises under Section 2. Micro and Small Enterprise Act, Parliament of Kenya, Section 2, (2012), available at: https://www.otienocarey.co.ke/admin/documents/Micro%20and%20Small%20Enterprises%20Act%202012%20No%2055%20of%202012_.pdf. In Kenya, medium-sized enterprises are not defined by the law but have generally been considered as businesses with a turnover of between KES 5 million and KES 800 million and with 50 to 99 employees. Kenya Agribusiness and Agroindustry Alliance, “Challenges Faced by Small and Medium Enterprises in Kenya,” <https://kaaa.co.ke/challenges-faced-by-small-and-medium-enterprises-in-kenya/>; For South Africa this took into account the definition of micro, small, and medium-sized enterprises under Section 1 of the National Small Business Act. National Small Business Act, Parliament of South Africa, Section 1, Schedule, (1996), https://www.gov.za/sites/default/files/gcis_document/201409/act102of1996.pdf.

A. Elements of the Survey

ELEMENTS OF SURVEY	INDICATORS
<ul style="list-style-type: none"> Use of Digital Technology 	<ul style="list-style-type: none"> Engagement with activities involving digital technologies Local versus cross-border e-commerce activities
<ul style="list-style-type: none"> Awareness of General Government Policymaking Process (General & Specific to Import Measures on E-Commerce) 	<ul style="list-style-type: none"> Access to information regarding government proposals Accessibility of communication channels with government entities Government representation of MSME needs in international negotiations Membership in trade associations Awareness of possible import tariffs on electronic transmissions (e-commerce and digital goods and services)
<ul style="list-style-type: none"> Awareness of Government Measures on Electronic Transmissions 	<ul style="list-style-type: none"> Awareness of possible regulatory approaches Awareness of WTO Moratorium and its possible expiry in February 2024 Compliance Capacity
<ul style="list-style-type: none"> Impact of Potential Government Regulations on Electronic Transmissions 	<ul style="list-style-type: none"> Possible impact on MSMEs of additional import duties, including additional compliance costs Possible impact on MSMEs' customers due to additional import duties Impact on business competitiveness and business growth

The first element of the survey focused on **use of digital technology by MSMEs**, which involved assessing details of how intertwined the business operations of the relevant participants were with the subject matter that would be affected by changes at the WTO level. This was important for the study, as it would provide insight into how dependent MSME operations were on their use of digital technologies. The study approached this by investigating how frequently MSMEs use digital technologies in their day-to-day business activities and whether MSMEs could distinguish between domestic and cross-border activities related to the technology, as only cross-border goods and services relate to the Moratorium.

The second element of the survey focused on gauging **MSME awareness of general government policies related to e-commerce**. This was very relevant for the purposes of the study, as it provided insight into how closely grassroots stakeholders like MSMEs are integrated into high-level policymaking processes and actions on the part of their governments. It also helped discern how inclusive policymaking actions are vis-à-vis grassroots stakeholders. To incorporate this element, NML's survey assessed: (i) the methods MSMEs use to inform themselves of government proposals, (ii) MSMEs' opinion on how well their business interests are being represented by their governments, and (iii) whether

MSMEs interact with trade associations that could represent their business interests before government.

The third element of the survey involved a more **targeted look at awareness among participants of policies with the potential to change, specifically those related to the Moratorium.**

In this context, it was important to assess MSMEs' awareness of government measures on electronic transmissions, which are the subject of the Moratorium. This was essential, because changes in international policymaking related to the Moratorium could have profound impacts on the day-to-day lives of grassroots stakeholders. For the study, this meant that it was crucial that the survey helped show how aware MSMEs were of government measures that affect e-commerce and digital goods and services. The survey approached this by inquiring, for instance, about the respondents' particular awareness of the Moratorium and the respondents' awareness of the legal implications that could ensue if the Moratorium was allowed to lapse.

The fourth element of the survey focused on **potential impact on MSMEs by directly asking respondents how particular scenarios that could result from expiration of the Moratorium would affect them.** These questions were designed to make potential impacts palpable and simulate the effects of policy changes. NML designed several questions that embodied a diversity of reasonable and realistic scenarios that could materialize in the event the WTO Moratorium were to expire and provided MSME respondents with a scale of responses to share informed opinions on potential impact if such scenarios were to occur.

B. Survey Dissemination and Consultation

NML identified a number of stakeholders based on their roles in the e-commerce and digital goods and services ecosystems in the two focus countries and applied the following approach for dissemination of the survey:

- i. Survey Dissemination through Aggregators/Associations:** This approach was initially applied in South Africa, where consultations were first held, to understand how business associations and other aggregators could be a conduit for dissemination of the survey. Aggregators included

Proudly South African, WESGRO, Global Trade Solutions, and SEDA, all of which have a wide network of MSMEs among their members. The aggregators played a central role in identifying MSMEs in their networks, but responses based on dissemination through aggregators did not produce statistically significant results.

ii. Survey Dissemination by Direct Engagement of MSMEs:

This approach was primarily applied in Kenya and then extended to South Africa based on initial experience through aggregators, which indicated that a more direct approach would be needed to gather results. A team traveled to Kenya and later to South Africa to engaged in direct contact with MSMEs to request participation in the survey, which yielded better results in terms of survey participation. The survey delivery team took precautions to maintain anonymity and consent and to not influence the survey results in any way.

iii. Stakeholder Consultations: The NML team also traveled to both countries to consult directly with stakeholders who were best positioned to highlight local knowledge of the Moratorium and stakeholder awareness of relevant policy decisions. A number of these observations or “Stories” are included in Section III of the report..

NML’s approach placed particular emphasis on assessing (i) the extent to which legal frameworks in place are inclusive of relevant stakeholders, in this case MSMEs (with a gender focus incorporated as well); (ii) how MSMEs interact with and support existing economic and legal systems; and (iii) how these considerations would be impacted if the WTO Moratorium were to be lifted.

NML also digitized the survey, working with its technology partner Verdentum. The survey was designed as an open survey, and the distribution of the survey link was sufficiently safeguarded. The survey was also tested for its usability and technical functionality, and any deficiencies found were cured. Consent was obtained from all participants, with explanation of the purpose of the survey and use of data collected. To maintain the anonymity of participants in the data collection process, there were no identifiers in the survey (only in the separate consent form). All data analysis that ensued pertained only to the survey question results, thereby ensuring

the anonymity of the participants. The data was collected on a platform hosted by Verdentum, where it could be accessed by NML on a real time basis.

C. Sample Size Calculation Methodology

The study targeted MSMEs in both Kenya and South Africa, using a sample size to qualify a representative sample pool for this niche group of companies in Kenya and South Africa.

The survey on MSMEs in the region required a meticulous approach to formulating the sample size. The surveyed sample had to reflect the relevant MSME population accurately. A sample size calculator provided by Survey Monkey was used for this calculation.²⁸ The calculator allowed for adjustments to the variables as necessary to ensure the statistical robustness of the survey findings.

As an initial step, the analysis focused on identifying the size of the population in question: the MSME population in South Africa. As of 2022, approximately 2.6 million MSMEs were operating in the country, so this value was considered for the sample size calculation.²⁹

Next, the confidence level and margin of error applicable to the survey were fixed. On the one hand, the sample size formulation incorporated a confidence level of 90% to ensure that the sample accurately represented the attitudes of the target population. On the other hand, the formulation used a margin of error of 6%, fixing the range within which the target population's responses might deviate from the sample's findings.

In light of the information above, the study's ideal sample size for South Africa was calculated to be 190. This sample size target was also considered for deciding on a sample size target for Kenya. The meticulous approach to determining the sample size laid a solid foundation for safeguarding the reliability and accuracy of the study's survey results.

²⁸ Survey Monkey, Sample Size Calculator, available at: <https://www.surveymonkey.com/mp/sample-size-calculator/#:~:text=Sampling%20confidence%20level%3A%20A%20percentage,between%20x%20and%20y%20numbers>. Burri and Polanco, supra note 116 at 198-199.

²⁹ OECD, "Financing SMEs and Entrepreneurs 2022 An OECD Scoreboard" (last visited Apr. 7, 2023), available at: https://www.oecd-ilibrary.org/industry-and-services/financing-smes-and-entrepreneurs-2022_4bada6a3-en

Appendix II:

Summary of relevant laws and regulations assessed

A number of national laws and regulations are related to the Moratorium. These include laws and regulations on MSMEs, e-commerce, digital goods and services, domestic tax laws, and import and export laws of South Africa and Kenya. RTAs also contain provisions that relate to the Moratorium, which were also part of the legal and regulatory review. The table below sets out a non-exhaustive list of legal and regulatory instruments assessed during the course of this study.

National and Regional Legal Instruments Relevant to the Moratorium as Assessed in the Study

INSTRUMENT	YEAR	PRIMARY CONTRIBUTION
Kenya		
Micro and Small Enterprises Act. ³⁰	2012	Defines MSME categories in Kenya.
Finance Act. ³¹	2019	Introduced the Digital Service Tax.
South Africa		
Customs and Excise Act. ³²	1964	Governs general tariff obligations in South Africa.
Value-Added Tax Act. ³³	1991	Governs how value-added tax is levied on companies in South Africa.
National Small Business Act. ³⁴	1996	Defines MSME categories in South Africa.
Electronic Communications and Transactions Act 2002. ³⁵	2002	Law enacted with the purpose of facilitating electronic communications and transactions.

³⁰ Micro and Small Enterprise Act, Parliament of Kenya, Section 2, (2012), available at https://www.otienocarey.co.ke/admin/documents/Micro%20and%20Small%20Enterprises%20Act%202012%20No%2055%20of%202012_.pdf.

³¹ Finance Act, Parliament of Kenya, Section 3B, (2019), available at <https://perma.cc/69K3-NP28>.

³² Customs and Excise Act, Parliament of South Africa, (1964), available at https://www.gov.za/sites/default/files/gcis_document/201505/act-91-1964s.pdf.

³³ Value Added Tax, Parliament of South Africa, Section 7, (1991), available at https://www.gov.za/sites/default/files/gcis_document/201505/act-89-1991s.pdf.

³⁴ National Small Business Act, Parliament of South Africa, Section 1, Schedule, (1996), https://www.gov.za/sites/default/files/gcis_document/201409/act102of1996.pdf.

³⁵ Electronic Communications and Transactions Act, Parliament of South Africa, Section 2(1)(p), (2002), https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf.

INSTRUMENT	YEAR	PRIMARY CONTRIBUTION
Regional Agreements		
East African Community (EAC) Common External Tariff (CET) ³⁶	2022 version	Incorporates a common tariff system applied to EAC Partner States, including Kenya, for goods imported, including from outside the EAC region.
African Continental Free Trade Area (AfCFTA) Agreement	2018	A Digital Protocol is under negotiation.

The assessment of national laws and regulations in Kenya and South Africa focused on four key elements: (i) classification of MSMEs under local law; (ii) laws governing MSMEs; (iii) domestic taxes on digital good and services; and (iv) cross-border taxes on digital goods and services. The relevant findings for each country are set out below:

Brief Overview of National and Regional Legal Instruments Relevant to the Moratorium

LEGAL ELEMENTS ASSESSED	SOUTH AFRICA	KENYA
Classification of MSME	MSMEs in South Africa are classified under local law. The relevant definitions fall under the “National Small Business Act,” which delineates the size of companies based on a combination of (i) number of employees, and (ii) company’s annual turnover of South African Rand (SARS) (local currency). ³⁷	According to the Micro and Small Enterprises Act of 2012, MSME classification is based on the number of employees, annual turnover, and capital employed. ³⁸
Laws Governing MSMEs (General Obligations)	General tariff obligations that apply to companies in South Africa, including MSMEs, are governed by the Customs and Excise Act of 1964, administered and enforced by the SARS. Moreover, the Value-Added Tax Act adds that VAT applies to vendors and importers, including MSMEs, who import goods in South Africa at a standard VAT rate of 15%.	General tariff obligations in Kenya are governed by the EAC CET and the Kenyan tariff schedules. The EAC CET sets out the common tariffs applicable to EAC Partner States, including Kenya, for imports from non-EAC countries. MSMEs in Kenya are generally subject to these tariff rates when importing goods, with rates varying based on the type of goods being imported. Moreover, the VAT Act of 2013 specifies that VAT is applicable to companies in Kenya, including MSMEs, under one of three VAT rates: (i) A standard VAT rate of 16%; (ii) a zero-rated VAT; or (iii) exempt.

³⁶ East African Community Common External Tariff, (2022), <https://kra.go.ke/images/publications/EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf>.

³⁷ Finance Act, Parliament of Kenya, Section 3B, (2019), <https://perma.cc/69K3-NP28>.

³⁸ Micro and Small Enterprise Act, Parliament of Kenya, Section 2, (2012), available at https://www.otienocarey.co.ke/admin/documents/Micro%20and%20Small%20Enterprises%20Act%202012%20No%2055%20of%202012_.pdf; See also Kenya Agribusiness and Agroindustry Alliance, “Challenges Faced By Small And Medium Enterprises In Kenya”, (2016), <https://kaaa.co.ke/challenges-faced-by-small-and-medium-enterprisesin-kenya/>.

LEGAL ELEMENTS ASSESSED	SOUTH AFRICA	KENYA
<p>Domestic Taxes on Digital Goods and Services</p>	<p>Research conducted did not identify a specific domestic tax in South Africa on digital goods and services provided within the country. To the contrary, the Electronic Communications and Transactions Act of 2002 was enacted locally to facilitate electronic communications and transactions.³⁹ Among its goals, under objective 2(1)(p), it seeks to promote MSME's engagement with electronic transactions.⁴⁰</p>	<p>Research included an assessment of domestic taxes in Kenya, specifically relating to digital goods and services, which could apply to MSMEs. On this note, Kenya implemented a Digital Service Tax (DST) on digital services provided by resident and non-resident entities to consumers in Kenya via the Finance Act of 2019.⁴¹ DST is applicable to income from services provided through a digital marketplace, and it is levied at a rate of 1.5% on the gross transaction value.⁴²</p>
<p>Cross-Border Taxes on Digital Goods and Services</p>	<p>MSMEs in South Africa are not subjected to additional cross-border taxes arising from digital goods and services, apart from the VAT previously covered.</p>	<p>The DST in Kenya applies not only to domestic transactions but also to services provided by non-resident entities in a cross-border mode to consumers in Kenya through a digital marketplace.⁴³ This means that foreign companies providing digital services cross-border to Kenyan consumers are subject to the DST, which is levied at a rate of 1.5% on the gross transaction value.⁴⁴ This tax was introduced to ensure that multinational companies offering digital services in Kenya contribute to the country's tax revenue.</p>

The ban on customs duties on electronic transmissions has also been addressed at the regional level.⁴⁵ There are variations in

³⁹ Electronic Communications and Transactions Act, Parliament of South Africa, Section 2(1) (p), (2002), available at: https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf.

⁴⁰ Electronic Communications and Transactions Act, Parliament of South Africa, Section 2(1) (p), (2002), available at: https://www.gov.za/sites/default/files/gcis_document/201409/a25-02.pdf.

⁴¹ International Trade Administration, "Kenya Digital Service Tax," (2020), available at: <https://www.trade.gov/market-intelligence/kenya-digital-services-tax>; See also Finance Act, Parliament of Kenya, Section 3B, (2019), available at: <https://perma.cc/69K3-NP28>; Kenya Revenue Authority, "Introducing Digital Service Tax", (2020), available at: <https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf>.

⁴² Id.

⁴³ A digital marketplace is a platform that enables direct interaction between buyers and sellers of goods and services through electronic means. Kenya Revenue Authority, "Introducing Digital Service Tax," (2020), available at: <https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf>; See also Finance Act, Parliament of Kenya, Section 3B, (2019), <https://perma.cc/69K3-NP28>.

⁴⁴ Kenya Revenue Authority, "Introducing Digital Service Tax," (2020), available at: <https://kra.go.ke/images/publications/Brochure-Digital-Service-Tax-Website.pdf>.

⁴⁵ Mira Burri and Rodrigo Polanco, "Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset", 198 (2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3482470.

approach on this issue across RTAs.⁴⁶ A first generation of treaties merely affirms the ‘existing practice of not imposing customs duties on electronic transmissions’ between Parties without creating a new obligation.⁴⁷ Examples of this approach include the US-Jordan FTA⁴⁸ and the Japan-Switzerland FTA.^{49 50}

A second group of RTAs incorporate an obligation for a permanent moratorium on customs duties on electronic transmissions.⁵¹ This approach includes binding provisions to forbid the imposition of customs duties on electronic transmissions, with examples such as the Australia-Chile FTA.⁵² Also, within this group are treaties that elaborate on the kind of duties that cannot be imposed.⁵³ The Mexico-Panama FTA, for example, establishes that neither custom duties, fees, nor charges shall be imposed.⁵⁴ This agreement is also noteworthy in that it refers only to digital products, so, in principle, this obligation would not apply to digital services. A third approach within this group taken mainly by the EU, classifies electronic transmissions as the provision of services which, therefore, are not subject to customs duties.⁵⁵

In the event the Moratorium were to expire, enterprises operating outside of the network of countries within an RTA that has made the Moratorium permanent would be at a disadvantage, since

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ “ARTICLE 7: ELECTRONIC COMMERCE 1. Recognizing the economic growth and opportunity provided by electronic commerce and the importance of avoiding barriers to its use and development, each Party shall seek to refrain from:
(a) deviating from its existing practice of not imposing customs duties on electronic transmissions;”

⁴⁹ “Article 76 Customs Duties.

1. Recognising the importance of maintaining the current practice of not imposing customs duties on electronic transmissions, the Parties shall cooperate to make this practice binding within the framework of the World Trade Organization, with a view to considering its incorporation into this Agreement.

2. In the context of paragraph 1, the Parties confirm their current practice of not imposing customs duties on electronic transmissions under paragraph 46 of the Hong Kong Ministerial Declaration of December 2005.”

⁵⁰ Burri and Polanco, supra note 15 at 198.

⁵¹ Id.

⁵² “Article 16.4: Customs Duties. Each Party shall not impose customs duties on electronic transmissions between the Parties”.

⁵³ Burri and Polanco, supra note 116 at 198-199.

⁵⁴ “Artículo 14.4: Derechos Aduaneros. Ninguna Parte podrá aplicar derechos aduaneros, tasas o cargos a la importación o exportación por medios electrónicos de productos digitales.”

Unofficial Translation:

Neither Party shall impose customs duties, fees or charges to the importation or exportation of digital products through electronic means.

⁵⁵ Burri and Polanco, supra note 116 at 199.

costs of production could be increased by the imposition of customs duties. However, in the absence of a global solution, many enterprises are likely to be located in or trade with countries that are not bound to maintain the Moratorium.

While integrating provisions in RTAs could help to create greater certainty for local enterprises and trading partners, this is only a partial solution, creating 'regional clubs' instead of securing multilateral solutions. Some experts stress that this phenomenon could accentuate the crisis within the multilateral trading system,⁵⁶ fragmenting global markets. However, regional approaches could be a next-best, more practical solution as the Moratorium continues to face uncertainty multilaterally.

⁵⁶ White and Case. William Burke-White Ed., "A World of Club and Fences. Changing Regulation and the Remaking of Globalization," 22 (2023), available at: <https://www.whitecase.com/insight-our-thinking/global-clubsfences>.