

PREPARATIONS FOR THE 1999 MINISTERIAL CONFERENCE

Work Programme on Electronic Commerce

Communication from Indonesia and Singapore

The following communication, dated 8 July 1999, has been received from the Permanent Mission of Singapore.

I. PROPOSAL

1. As e-commerce involves cross-cutting issues that straddle the GATT, GATS and TRIPS commitments, we propose that there should be an overarching guide in the form of an Understanding on the interpretation and application of e-commerce in relation to existing GATT, GATS and TRIPS commitments. This is so that Members will have some form of guidance on how trade-related issues relating to e-commerce are to be treated in accordance with WTO principles.

2. The proposed Understanding would set out how the existing framework of rules under GATT, GATS and TRIPS would be applied to trade-related e-commerce.

3. In this respect, a working group could be established to prepare such an understanding and oversee its implementation.

II. BACKGROUND

4. The Second WTO Ministerial Conference adopted a declaration on e-commerce in which Ministers:

- (i) reached a political agreement to continue the current practice of not imposing customs duties on electronic transmissions until the next Ministerial Conference; and
- (ii) directed the General Council to establish a comprehensive work programme to examine all trade-related issues relating to global e-commerce.

The General Council is to report on the progress of the work programme and any recommendations for action at the third WTO Ministerial Conference.

5. For purposes of the work programme, the Ministerial Declaration on Electronic Commerce held that the term "electronic commerce" is understood to mean "the production, distribution, marketing, sale or delivery of goods and services by electronic means". The work programme adopted by the General Council directs various subsidiary bodies to examine issues affecting the

various WTO legal framework, while the General Council itself will consider any cross-cutting issues and the issue of imposition of custom duties on electronic transmissions.

III. ELEMENTS FOR THE PROPOSED UNDERSTANDING ON THE IMPACT OF E-COMMERCE ON EXISTING WTO RULES

6. With the advent of e-commerce, there is a need to examine its impact on existing WTO rules and commitments. This is especially so with regard to the interpretation of existing WTO rules *vis-à-vis* e-commerce.

7. This paper attempts to highlight some possible elements for the proposed Understanding. In this context the following three elements need to be considered:

- (a) Legal framework – e.g.
 - definitional and classification issue
- (b) Market access – e.g.
 - what constitutes trade barriers to e-commerce
 - what are the modes of liberalization
- (c) Technical assistance and capacity building for developing countries

A. LEGAL FRAMEWORK

Current WTO rules

8. For most products traded through e-commerce, nothing has changed except in terms of mode of delivery be it simply the delivery of the order or the service. In this respect, e-commerce is simply a means of connection akin to the telephone.

9. The advent of digitized products however has blurred the boundary between goods and services. The issue arises as to how the contents of such an electronic transmission should be treated.

Classification of digitized products

10. In attempting to classify digitized products one possible criterion that has been raised is to consider whether the product has a tangible counterpart in the physical world. This criterion could then be applied to over-the-counter purchases of books, music and software even if such purchases are delivered as digitized products and not in terms of their physical counterparts.

11. An alternative is to just consider the contents themselves. Books, music and software are not in themselves new commercial products. It is just that prior to the advent of e-commerce, they were treated as goods because they had to be delivered in the form of a carrier media, be it paper, cassettes or diskettes etc. and those carrier media were classified as goods. Now that those forms of tangible carrier mediums are no longer necessary maybe what we need to consider is whether the software and music would continue to be classified as goods, or it might be more appropriate for them to be classified as services.

12. It may also not be a coincidence that all these three examples, without a carrier medium are intangible goods considered under the ambit of intellectual property rights. Could such products than

be simply considered as trade in intellectual property rights and not be classified as a good or a service?

13. What is paramount though is that the criteria for classification should provide legal certainty on how the good, the service or the intellectual property right is to be treated. The consequences of this are considered in the following paragraphs.

B. MARKET ACCESS ISSUES

14. Following from the above, it would appear that there are two main categories of e-commerce products, viz. those that would be classified as services and those that would be classified as intangible intellectual property rights. Whatever the classification, the basic principles of MFN and national treatment have to apply in order to ensure fair, open and transparent market access for e-commerce. This would be the building block for market access commitments to be considered.

Reconciliation with existing GATS commitments

15. As for services, the issue to be considered is what impact it would have in terms of existing GATS commitments and whether new barriers to trade are created.

16. As already noted in the Australian paper (S/C/W/108), the GATS covers all services, except those supplied in the exercise of governmental authority, and it encompasses all measures affecting the supply of services. The range of service transactions carried out through e-commerce is thus already covered under the GATS. The concept of "technology neutrality" would also mean that electronic supply of services would be permitted in accordance with Members' scheduled commitments.

17. Nonetheless, the fact remains that as e-commerce is a relatively new technological innovation, most countries would not have factored it in when they scheduled their GATS commitments during the Uruguay Round. There may therefore be a need to evaluate the relationship between e-commerce and existing GATS commitments as electronic delivery could take place under any of the modes.

18. However, whilst such evaluation is being carried out, the guiding principle should be no backtracking of Members existing commitments. If necessary, Members should even undertake additional commitments, especially in light of the new types of services that have not existed before, and/or are likely to arise in the future.

Relationship with existing basic telecommunications commitments

19. There are some specific issues that need to be considered in relation to Internet Access Service Providers (IASP), a service that has only arisen with the advent of the Internet. E-Commerce requires access to the Internet. IASP in turn require access to telecommunication network, usually by way of leased circuits. There thus maybe a need to grant non-discriminatory access to IASP telecommunications networks.

20. The existing provisions in the GATS, the Basic Telecommunications Regulatory Principles, and the Annex on Telecommunications are sufficient safeguards against behaviour that could impede market access to telecommunications infrastructure for the delivery of e-commerce to another country. However there may be a need for explicit commitment to guarantee market access for IASPs under the Basic Telecommunications Agreement.

Relationship with existing tariff commitments - customs duties

21. The problems related to the imposition of tariffs on cross-border e-commerce transactions will be another key issue. The imposition of customs duties on digitized goods delivered electronically poses several complications. For example, there is presently no technology available that will allow us to tax electronic transmission for what is needed is the technology to somehow tag and differentiate e-commerce transactions from non-commercial electronic transmissions. As the value of the digitized goods cannot be inferred automatically by examining the bits of transmission coming through the border, the tags will have to somehow indicate the values. The Internet transmits information by breaking down a big chunk of transmission (say, software) into smaller pieces and allowing the pieces to arrive at the destination via different "pipelines" and reassembled. These "pipelines" may pass through different countries between the origin and destination. Attempts to tag, value and determine the origin of transmissions are likely to slow down the transmissions and thereby create new barriers to e-commerce.

22. A solution to this would be to extend the current practice of not imposing customs duties on digitized goods. This though could result in the discrimination in treatment between like products i.e. the digitized good and its physical counterpart.

23. This potential discrimination thus could be overcome by imposing a consistent tariff treatment of products that can be delivered physically and electronically. Expanding and accelerating the implementation of the Information technology Agreement (ITA) could do this. The ITA provides for the reduction of custom duties on IT goods including software. This may help to align the duty treatment of software delivered physically with the proposed duty-free treatment of software and products delivered over the Internet.

24. If such digitized products were classified as intellectual property rights (as explained in paragraph 9 above) though, the question of customs duties would not come into play. This is because it would be a question of royalties that have to be paid rather than tariffs. Whether the transmission is a cross-border or purely domestic one, the issue of royalties will remain. A system thus has to evolve whereby intellectual property right holders will be protected. This could be left to WIPO to look into.

25. Whilst these issues are being considered, the agreement to continue the current practice of not imposing customs duties on electronic transmissions should be extended.

Relationship with existing TRIPS commitments

26. Transmission of intellectual property rights via e-commerce ignores the concept of border crossing and border enforcement of intellectual property rights. Article 41 of the TRIPS Agreement does specify that enforcement procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse. This then would require further study in terms of practical application.

Removing technical barriers to e-commerce trade

27. The present technology for e-commerce involves the use of digital communication. To ensure that this does not inadvertently create a barrier to trade in terms of different forms of digital communication being used, international standards should be adopted e.g. UN/EDIFACT.

28. The TBT Agreement or the current work programme for the ITA, under which non-tariff measures are part of it, should be examined to ensure that standardization or licensing requirements for e-commerce related products or telecommunication services do not create any barriers to this new

mode of trade, or if any restrictions are indeed imposed, that these are within the permitted WTO exceptions.

C. TECHNICAL ASSISTANCE/CAPACITY BUILDING

29. As the benefits of e-commerce are directly related to the level of a country's infrastructure development and technology capacity, the WTO could play a role not just in terms of technical assistance programs in building infrastructure capabilities but also in terms of access to the requisite technology particularly for developing countries. In this respect, it would be useful if the WTO could work with WIPO, UNCTAD and other international agencies to determine the types of technical assistance and capacity building programs that need to be provided.
