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ELECTRONIC COMMERCE AND TRADE POLICY – THE GOVERNMENT'S ROLE[†]

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I. INTRODUCTION

It has become almost a cliché to say that electronic commerce will be the single most important factor in expanding international trade in the next century. Predictions range from Yankee Group's \$144 billion (U.S) to ActivMedia's \$1.5 trillion (U.S) by the year 2002.¹

The government's role in electronic commerce is no mystery – to promote the public interest. This applies as much to electronic commerce trade policy as to any other sector of government policy. The trade policy tools that governments have at their disposal – use of existing international disciplines, trade liberalization, and placing controls or restrictions on trade – apply as they always have. At this particular point in time, just a few months prior to what will surely be a landmark WTO Ministerial meeting in Seattle, the moment is particularly well-chosen to consider the future trade agenda and how electronic commerce fits in.

Those of us in the international trade community will recall that, in the summer of 1997, in the midst of formal preparations by the Organization for Economic Cooperation and Development (OECD) for a Ministerial meeting on domestic framework issues in electronic commerce a year later, electronic commerce also began to be considered as a discrete area of trade policy.² The

[†] The views expressed in this document are those of the authors and do not reflect the position of the Government of Canada with respect to any of the issues discussed. This Article was written in April, 1999.

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¹ See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, THE ECONOMIC AND SOCIAL IMPACT OF ELECTRONIC COMMERCE: PRELIMINARY FINDINGS AND RESEARCH AGENDA 27 (1999) (visited June 29, 1999) <www.oecd.org/subject/e_commerce/summary.htm>.

² See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, DISMANTLING THE BARRIERS TO GLOBAL ELECTRONIC COMMERCE (1997) (visited June 29, 1999) <www.oecd.org/dsti/sti/it/ec/prod/dismantl.htm>.

White House released its *Framework for Global Electronic Commerce*, which included several trade policy elements, including a proposal that products delivered electronically should be free of customs duties.³ Over the following year, APEC, the FTAA, and the WTO all launched work programs on trade-related aspects of electronic commerce.

Within the WTO, the U.S. government has been particularly active in advocating that WTO Member States should immediately agree to permanently refrain from applying customs duties to electronically delivered products. Because of the binding legal nature of WTO disciplines, most other Members were unwilling to make any commitments which might have implications for how future WTO panels might interpret previous commitments under the WTO family of agreements.

It was for this reason that the Government of Canada was a key proponent of the “two-track” strategy that was embodied in the WTO Declaration on Global Electronic Commerce in May 1998.⁴ On the one hand, Members made a political commitment to refrain from imposing customs duties on electronically delivered products. This commitment would be reviewed at the 1999 Ministerial Conference and would be without prejudice to the outcomes of a year-long WTO work program on trade policy aspects of electronic commerce.

The WTO Work Programme has been implemented by the subsidiary bodies of the WTO since September 1998. Discussions to date demonstrate that there are two fundamental issues. The first issue is that of classification, i.e. how should an electronic transmission be classified for the purposes of WTO disciplines? Should it be classified as a good or a service, and if a service, what type of service? The second key issue is that of WTO disciplines on domestic regulation related to electronic commerce.⁵

Before continuing further, it is important to establish a few additional points of definition.

First, the phrase “electronic commerce” can encompass at least three different types of commercial activity. The first type of activity is that in which a product is advertised or ordered electronically, but is delivered physically. In this case, the advertising, payment, and telecommunications services involved in the transaction are services covered by the General Agreement on

³ See President William J. Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, July 1, 1997 (visited June 29, 1999) <www.iitf.nist.gov/eleccomm/ecom.htm>.

⁴ See World Trade Organization, Declaration on Global Electronic Commerce, Conf. Doc. WT/MIN(98)/DEC/2, May 20, 1998 (98-0000). The Declaration is available online at <<http://www.wto.org/wto/anniv/ecom.htm>>.

⁵ See *id.*

Trade in Services (GATS), which applies to all services.⁶ The importation of the product itself is covered by the disciplines of the General Agreement on Tariffs and Trade (GATT) which applies to all goods.⁷

The second type of commercial activity is that in which delivery is made electronically, as in the case of software delivered over the Internet rather than as a shrink-wrapped unit. This is usually referred to as “electronic transmission,” for want of a better term. The problem with the phrase “electronic transmission” is that it conjures images of all sorts of intangible things, such as electricity, radar signals, or infrared garage-door signals that really are not part of what we are talking about when we talk about electronic commerce.⁸ Perhaps a more accurate description would be discrete units of digital information that constitute coherent products (remembering that a product can be a good or a service) which exist only as transmissions of digital data over electronic information networks, though they may previously or later be transferred onto physical media, in which case they become goods. In this Article, out of kindness to the trees, we will stick to the WTO convention of calling these products “electronic transmissions.” Some of these electronic transmissions have a physical equivalent.

The third type of commercial activity associated with electronic commerce is the services infrastructure for electronic commerce and the access to that infrastructure that constitute basic and value-added telecommunications services such as packet-switched data services and Internet access services. These are obviously services covered by the GATS.

II. GOODS VS. SERVICES

The first issue is that of goods versus services, i.e. how should an electronic transmission be classified for the purposes of WTO disciplines – as a good or a service? This is not an arcane trade issue. It is fundamental because it allows us to understand what obligations currently apply to electronic commerce and it gives us a basis for mapping out where we would like to go. There are important differences between the GATT, which applies to goods, and the GATS, which applies to services. First, the principle of most-favored

⁶ See General Agreement on Trade in Services, *reprinted in* 33 I.L.M. 1168 (1994) [hereinafter GATS].

⁷ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁸ Even in the case of futuristic Internet solutions such as those being developed by Nortel Networks to deliver Internet Protocol data over electrical transmissions lines, for purposes of the WTO agreements as they currently stand, the electricity as an energy source with no informational value would have to be distinguished from the digital information being co-transported with the electrical power.

nation (MFN) applies to all commitments taken under the GATT; this means that any benefits offered with respect to importation of the goods of any one WTO Member, must be offered to all other WTO Members.⁹ For the most part, this is also the case under the GATS, with respect to trade in services; however, under the GATS, Members were given a one-off opportunity to establish exemptions to the MFN principle.¹⁰

Secondly, under the GATT, the national treatment principle applies to all goods,¹¹ while under the GATS, national treatment only applies to those service sectors for which Members have scheduled commitments.¹² Furthermore, Members may schedule limitations on their application of the national treatment principle under the GATS. This means that under the GATS, only when a Member explicitly includes a service sector in its schedule of GATS commitments does the national treatment apply, i.e. the WTO Member must treat the foreign service and the foreign service supplier in the same way as it does a local service or service provider.¹³ Interestingly, the most obvious contradiction to the national treatment principle, the application of customs duties to imported products but not to local products, is explicitly dealt with by the disciplines of the GATT,¹⁴ while there is no explicit reference to the application of customs duties in the GATS.

Finally, the WTO system of agreements includes various other provisions that apply to goods, but not to services. Under the GATT itself, there is a general prohibition on quantitative restrictions, while various agreements or understandings cover issues such as valuation, rules of origin, subsidies disciplines, dumping and safeguards, as they apply to goods.¹⁵

So, while the question of whether an electronic transmission is covered by the GATT or the GATS, or whether a telephone call on the Internet is a basic telecommunications service or a value-added service, may not seem

⁹ See GATT, *supra* note 7, art. I.

¹⁰ See GATS, *supra* note 6, art. II.

¹¹ See GATT, *supra* note 7, art. III.

¹² See GATS, *supra* note 6, art. XVII.

¹³ See *id.*

¹⁴ See GATT, *supra* note 6, art. III.

¹⁵ See *id.* art. XI (prohibiting quantitative restrictions); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31; Agreement on Rules of Origin, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31; GATT, *supra* note 7, art. VI (defining permissible anti-dumping actions); Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31.

immediately relevant to a business executive, the answer to this question will have a direct impact on government obligations.

It should be noted that the GATT (and other WTO goods agreements) and the Harmonized System are poorly suited to dealing with intangible digital products since they are based on physical characteristics of traditional goods. Trying to fit electronic transmissions into a "physical" regulatory world could create administrative problems and frustrate the development of electronic commerce. Such difficulties are already evident in trying to develop an international consensus on the customs valuation of software on traditional software carrier media such as diskettes and CD-ROMs.

Furthermore, all of the commercial transactions surrounding an electronic transmission per se are clearly services which are already covered by the GATS. In the case of software purchased and delivered electronically, for example, the telecommunications service that provides for the transmission of the software is a service covered by the GATS. The distribution service that rides on top of the telecommunications service – the service that responds to a request for the software by distributing it to the consumer – this, too, is a service covered by the GATS. The on-line advertising promoting the software – this is a service covered by the GATS. The electronic payment system that allows the consumer to have her credit card charged for the purchase – this is yet another service covered by the GATS.

III. DOMESTIC REGULATION

The other fundamental issue is that of domestic regulation related to E-commerce and its impact on trade. In a nutshell, the issue is this: how do we reconcile the need for governments, in promoting the public interest, to pursue legitimate public policy objectives in areas such as privacy, consumer protection, law enforcement, promotion of diversity, and national cultural identity, with the need to ensure that these do not become unnecessary barriers to trade across what is essentially a seamless global communications network?

Recent press reports demonstrate that courts around the world are indeed in the process of interpreting domestic law in a way that may have an impact on electronic commerce. A U.S. district court in Dallas ruled that the Quicken Family Lawyer software package provides legal advice which constitutes an illegal practice of the law.¹⁶ While shrink-wrapped versions of the software can no longer be sold in Texas stores, the software can be down-

¹⁶ See *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, No. Civ.A.3:CV-2859H, 1999 WL 47235 (N.D.Tex. Jan. 22, 1999), *vacated as moot* No. 99-10388, 1999 WL 435871 (5th Cir. June 29, 1999).

loaded off of the Web. How will authorities respond to this? *The Financial Post* reports that a Japanese court has convicted a man of distributing obscene images over the Internet, even though the server that stores and transmits the images is not located in Japan.¹⁷ *Wired News* reported that a London High Court judge ruled that an Internet service provider cannot claim to bear no responsibility for a libelous newsgroup posting hosted on its servers two years ago,¹⁸ while the Paris Court of Appeals ruled against a free Web site hosting service that hosts 47,000 Web sites in France because one of the Web sites contains unauthorized photos of a fashion model.¹⁹

Legislators and policymakers are also having their say. The European Parliament, largely as the result of extensive lobbying by musicians and film makers trying to protect their intellectual property rights, is still engaged in a debate on a proposed online copyright directive that would outlaw Web "caching," the temporary storage of the contents of a Web page in a server which is closer to a particular group of Web surfers, thereby speeding up access times for those surfers. A press release from the Library Association of Great Britain puts forth the opposing view: "Librarians and educators demand fair practice We must maintain a balance between the rights of authors and public interests, in particular for education, research and access to information."²⁰ The ongoing battle in the European Union between the European Commission and the E.U. Consumer Council on whether electronic consumer transactions should be governed by the consumer law of the vendor's jurisdiction or the consumer law of the consumer's jurisdiction is another example.

Related to the question of the applicable domestic regulatory regime is the question of GATS modes of delivery and the location of service delivery. In general, Members regulate Mode 1 and Mode 3 services delivered in their own territory, but not Mode 2 services which their nationals consume abroad.²¹ The E.U. Directive on Data Protection introduced a new twist on

¹⁷ See David Akin, *Internet Activity Jurisdiction Scrutinized*, FIN. POST, Mar. 23, 1999, at C5.

¹⁸ See James Glave, *Sweeping UK Net Libel Decision*, WIRED NEWS, Mar. 26, 1999 (visited July 1, 1999) <<http://www.wired.com/news/news/politics/story/18764.html>>.

¹⁹ See Heather McCabe, *France Weaves A Tangled Web*, WIRED NEWS, Mar. 4, 1999 (visited July 1, 1999) <<http://www.wired.com/news/news/politics/story/18274.html>>.

²⁰ See Library Association, *Librarians and Educators Demand Fair Copyright Practice in European Debate*, Press Release, Feb. 9, 1999 available at <http://www.la-hq.org.uk/directory/press_desk/199906.html>.

²¹ The four modes of service delivery are outlined in Article I of GATS. They are: 1) cross-border supply of services by a non-resident to a host country consumer, 2) consumption abroad, 3) commercial presence in a foreign country, and 4) temporary entry of natural persons to provide a service. See GATS, *supra* note 6, art. I; see also Bureau of Economic and

this concept by requiring E.U. Member States to apply regulatory tests to both ends of a Mode 1 transaction: E.U. Member States must enact legislation to ensure that transfers of personal data outside its boundaries are effected only to jurisdictions offering “adequate” protection to that data. In the case of a Mode 2 transaction, when E.U. nationals consume the services of foreign service suppliers while outside the E.U., they may be constrained in their ability to provide the foreign service supplier with data that may be essential for that supplier to provide the service; as a result, even when they are located temporarily in foreign jurisdictions, E.U. nationals and E.U. companies may prefer to choose European-based service suppliers over non-European service suppliers. Finally, non-European companies established in the E.U. (Mode 3) will be limited in their ability to transfer data back to their headquarters outside the E.U. if those headquarters are located in jurisdictions that do not meet the E.U. adequacy test.²²

The issue of jurisdiction for domestic regulatory purposes is also the focus of current U.S. securities regulations which require that securities brokers, whether American or foreign, register with the U.S. Securities and Exchange Commission and comply with U.S. regulations, if they “solicit” American clients, including those solicited through the use of a Web site. The only exception is if there is a prominent disclaimer on the Web site stating that the services are not available to Americans. At least one Canadian province, British Columbia, has a similar requirement for a disclaimer stating that services are not available to residents of the province of British Columbia.

What all these examples point out is clear: notwithstanding the oft-repeated wishes of some that electronic commerce be completely free of regulation, such a position is a non-starter. Legislators, policymakers, and the courts are already knee-deep in electronic commerce – and this is not necessarily a bad thing. There is growing recognition around the world that the Internet and electronic commerce are going to be fundamental cornerstones of life in the 21st century and hence that public policy, to be effective in the next century, will have to take into account and incorporate the connected nature of society.

The trade policy community has, of course, a particular concern for ensuring that the implementation of these public policy objectives by national and subnational governments does not result in the creation of unnecessary

Business Affairs, *Making Sense of the General Agreement on Trade in Services* (visited July 12, 1999) <<http://www.state.gov/www/issues/economic/1gats.html>>.

²² See generally Council Directive No. 95/46/EC of October 1995 on the Protection with Regard to the Processing of the Personal Data and on the Free Movement of Such Data. 1995 O.J. (L 281) 31.

barriers to trade. In the case of services, Article VI of the GATS, which deals with domestic regulation, requires that “in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”²³ Article VI, by itself, is a tool for policing regulatory measures by Members of the WTO. However, it has two shortcomings with respect to electronic commerce. First, it does not explicitly recognize those policy areas where governments may be required to intervene in an electronic context, and secondly, it does not provide criteria against which policy measures in those sectors would be judged as “not more burdensome than necessary.” So, the dilemma for trade policy types is how to deal with these problems in the context of electronic commerce.

There are at least three types of approaches to rulemaking that are already part of the WTO system. The first one is the GATT-GATS approach. In this approach, paradoxically, increasing international regulation that applies to governments decreases regulatory constraints that applies to private companies. By deepening commitments under the GATT or the GATS, governments agree not to do certain things that otherwise act as trade barriers – these agreements constrain governments from acting.

Secondly, there is the TRIPS approach. In this approach, WTO Members agree to list things that governments must do. For example, in deepening TRIPS commitments, governments would agree to enact greater or more wide-ranging regulatory protection of intellectual property within their jurisdictions.

A third type of approach is embodied by the GATS Reference Paper on Regulatory Principles that apply to the provision of basic telecommunications services.²⁴ The negotiation and acceptance of the Reference Paper is the most significant achievement of trade diplomacy since the successful conclusion of the Uruguay Round.²⁵ In this approach, governments are required to do certain things, such as set up an independent regulator or prevent anti-competitive behavior, but how governments were to do this was left largely to the governments themselves. The Reference Paper established principles that governments must follow, but then left it to governments to determine what measures they should enact to implement the principles.

²³ GATS, *supra* note 6, art VI (1).

²⁴ See Negotiating Group on Basic Telecommunications, Reference Paper (visited June 29, 1999) <<http://www.wto.org/press/refpap-e.htm>>.

²⁵ An excellent analytical review of the Reference Paper and the Fourth Protocol to the GATS (the Agreement on Basic Telecommunications) is provided by C.E.J. Bronckers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, 31 J. WORLD TRADE L. 5 (1997).

This type of approach could be modified to deal with domestic regulation as it applies to electronic commerce services, for instance, listing principles for domestic regulation, which if followed, would result in regulation that is presumed not to constitute an unnecessary barrier to trade. WTO Members could agree that government measures taken with respect to protection of privacy, consumer protection, law enforcement, promotion of diversity, and promotion of national cultural identity are *a priori* in conformity with GATS disciplines if they meet certain criteria.

These have been just some thoughts on a limited number of issues related to electronic commerce and its interlinkages with international trade. There are, of course, many others: how to ensure that standards allow maximum interconnectivity and do not limit trade opportunities; how to adjust copyright laws to the realities of the Internet; and, to the extent that the WTO begins to grapple with investment policy and competition policy, how do these issue areas impact on electronic commerce?

The real challenge for WTO Members over the next few months before the Seattle Ministerial is to determine what issues are not adequately covered in the WTO agreements, what issues require new international trade rules, and what are the appropriate modalities for such a negotiation. This is clearly a formidable task.

