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Trading Relationships and Technological Change: Electronic Commerce and Trade, the Government's Role--A U.S. Perspective

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TRADING RELATIONSHIPS AND TECHNOLOGICAL CHANGE: ELECTRONIC COMMERCE AND TRADE, THE GOVERNMENT'S ROLE – A U.S. PERSPECTIVE

M. Jean Anderson[*]

I am not sure that I am going to be discussing this from the U.S. perspective, since I am not in the government anymore. I certainly should not try to speak for the U.S. government. I would not know what to say. I am not sure they would know what to say. As you will hear in my remarks, I do not think there is a U.S. perspective on this. E-commerce is simply too complex and too new.

The government's role in E-commerce and trade is to look after the public interest. Government's role first and foremost right now should be to try to make some headway on negotiating international rules to restrict government's ability to regulate E-commerce in ways that impede trade or discriminate against the products or services of other countries. There is an important timing advantage right now.

There are important upcoming opportunities. There will be a WTO Ministerial Conference in Seattle in late November to launch the Millennium Round negotiations. There has been a moratorium on imposing customs duties on electronic transmissions, which is supposed to be addressed in Seattle. This will be an action-forcing event. It would be pretty traumatic if that moratorium were not extended in Seattle because, although it does not seem likely that anybody is going to rush to impose custom duties on electronic transmissions, in theory, countries could do so.

In addition, some governments and companies may see the Seattle meeting as conceivably being the last chance for several years for the WTO itself to make significant progress on E-commerce issues before the end of the Millennium Round. This is because of the adage that there are only two times anyone can have a big impact on a trade negotiation: one is at the beginning, and the other one is at the end. Participants must be active and on top of what is going on in that big middle. It usually lasts several years, but the fact is that the contours and focus of the negotiation process are often established

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early on. The deals are made at the end, and that is where the trade-offs happen. There is more flexibility to get a big deal in a trade round if it covers many sectors. So, there can be trade-offs in the end to get a big deal that covers most of the world. It means that there usually will not be interim deals. Consequently, it is hard to have what the United States so often calls an "early harvest," something I never believed was a good idea to try to get.

All of this means that there is an important opportunity in Seattle. It may not be more than a theoretical one, but there is an opportunity that goes beyond the moratorium on customs duties. If enough of a private consensus in government could be developed over the next six months, Seattle could be a time to try to establish some very fundamental principles and get some commitments to those principles on E-commerce, and have those principles take immediate effect. Given the pace of technological development in electronic communication, this may be imperative.

At this point, there are a multitude of opinions regarding what kind of principles might be proposed. Some of these principles include an understanding that WTO members would not impose any greater burdens on trade done by electronic commerce than on trade by other means. There could potentially be a pledge that any new regulatory restrictions would be applied in a way that restrict electronic commerce transactions as little as possible. Those kinds of principles are very vague, but it would not be the first time that the WTO adopted a vague principle that actually had a concept and did eventually develop into something that was quite well-defined. To be realistic, however, the chance of this happening by November is probably remote. The reason is that there simply does not seem to be enough of a consensus among the United States, the European Union, and Canada on what to do beyond the tariff moratorium and some general endorsement to work on E-commerce issues.

There is also an opportunity to set longer-term agendas for continuing work on E-commerce, and that also requires the development of some kind of consensus. The fact that there is no real consensus now creates a significant opportunity to influence the shape of upcoming negotiations for companies, business groups, non-business groups, and whoever else may have an interest in E-commerce.

Why is there not more of a consensus at this point? There are a number of reasons. One of them is obvious – electronic commerce is still a very new concept by the standards of international trade issues. We are all still trying to grasp its implications, even while it is burgeoning around us. Second, despite the mystery of E-commerce, in many respects, there have been surprisingly few problems today in terms of clashing government rules or private sector abuses. It is not that they have not happened, but they have not oc-

curred at a level that creates some sense of crisis where there was a rush to find an international rule to solve the conflict. This may be changing, however, because, as more and more court decisions and divergent national policies appear, the problem will worsen, as it has already.

A third complicating factor in finding a consensus is that, at least in the United States, many of those at the leading edge of development in electronic commerce tend to be especially adverse to government regulations and are very suspicious that a WTO negotiation could create at an international level the very kind of rules and regulations that private sector interests detest at the national level. This concern is ill-founded because very few WTO rules establish norms or regulations. The TRIPS Agreement is the notable exception, and it basically adopts norms from other intellectual property agreements. Most WTO agreements are designed simply to put limits on the ability by countries to regulate in a way that impedes trade or discriminates against products or services of other countries. Nonetheless, there is much suspicion, at least in part of the U.S. business community about government involvement, whether at the national or international level. It might be fair to say that those suspicions have been exacerbated in the United States by the current Administration's sporadic consideration of regulations on such things as pornography, as well as its frequent suggestion that the WTO be used to establish positive labor and environmental standards. That scares people in the business community to think that, however much it is said that WTO rules are not that kind of regulation, maybe they really are.

The fourth reason for a lack of consensus is the problem of sorting out the extent to which existing WTO rules apply or could be modified to apply to electronic commerce. Many of the agreements that have some application to electronic commerce are themselves still quite new, such as the GATS or the TRIPS agreements.[1] Experience with those agreements, even without electronic commerce, is still in its infancy. Apart from the GATT and GATS, there are other agreements that are important, such as the Telecoms Agreement,[2] the TRIPS Agreement, and many others.

How do you deal with issues that are not so clearly covered by those agreements? Subjects that might be negotiated internationally can be put into three categories. First, there are issues on the subject matter of E-commerce content such as regulations adopted largely for social and consumer protec-

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[1] *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol 31; 33 I.L.M. 1168 (1994) [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31; 31 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

[2] Agreement on Basic Telecommunications Services, 36 I.L.M. 354 (1997).

tion reasons. These would also include jurisdiction, export controls, advertising, copyrights, trademarks, other intellectual property protection, and privacy, and perhaps even law enforcement, gambling, and pornography. That list is certainly not exhaustive. The second category entails regulations governing the processes of electronic commerce, including issues of electronic contracting, digital signatures, and so forth.

Third are the issues of government revenue, which may transfix governments in some respects, since they are in danger of losing huge revenue sources that they do not want to lose. That would include both duties and taxes on E-commerce.

The first category of issues on social and consumer protection arises because of the spectrum of uniformed customization of the content that may be provided or used in an electronic system. The spectrum has ranged from almost consistently uniform content displayed on static Web pages that every user in the world saw and has moved to a situation where companies engaged in E-commerce are now able to provide a specific catalog to a specific company showing pre-negotiated prices and product descriptions. The system is specifically customized for the individual who receives it.

Obviously, there are many kinds of Internet uses that fall in the middle between those two types of systems, such as a Web site carrying news headlines, as well as a categorization of other Web sites that are uniform for anybody who opens up that site. But, there might also be specialized news topics and stock quotes that the user has selected. So there is a combination, and obviously, it falls everywhere else on that spectrum. The uniform systems tend to create the problems for social and consumer protection across borders. One advertising question has already come up; the United States allows comparative advertising and Europe does not. It is a problem when the same content is available worldwide.

The export controls are also a problem for that same reason. There is a variation on the geographically localized content. The Yahoo! search engine has nineteen separate country Web sites. In principle, a geographically localized site can be restricted to users in that country. But apparently, for business and technology reasons, having these separate sites by country or area does not restrict them. As such, one can go onto Yahoo! and find the French Web site while browsing on the Internet from Cleveland. That, of course, poses the same problem. The site is not directed at people in Cleveland. It is directed at people in France. This raises the question of who has jurisdiction over the site and what laws apply if somebody in Cleveland visits that site?

Individually customized content imposes the most serious privacy problems. This area of the Internet probably offers the most potential for com-

mercial benefits, but it also requires the collection and processing of customer-specific data. Consequently, major privacy and security data issues arise.

There is more than a little bit of disjunction in this area in finding a consensus in the United States over E-commerce because there is a strict distinction between what the government thinks ought to be done to regulate this area and what the business community is afraid will be done. There is also a disjunction between the business community and the ordinary consumer. Recently, the headlines in the trade press in the United States have been full of stories regarding the E.U. Privacy Directive and the efforts led by the Undersecretary of Commerce to negotiate a safe harbor system of self-regulation in the United States.[3] I happen to think that is a wonderful idea, since I happen to be a believer in self-regulation.

However, it is not clear that the American public would agree with safe harbor principles. It is possible that they prefer more of a European-style approach to the protection of privacy. I will give you a couple of examples.

In February, it was reported that Amazon.com received payment for some of its book recommendations. It was getting paid for preferential placement on the Web site. The practice of payment for placement has been very widespread in traditional retail book stores, but it created a furor when it was made public that Amazon.com did this over the Internet. As a consequence, Amazon.com changed their refund policy to allow customers to return any book that Amazon.com had represented, no matter what the condition.[4]

Also, early this year, Intel announced its Pentium III processor had, for the first time, a serial number for each processor sold. It was promoted as a means by which corporations could track their computers and as a method for encouraging secure electronic commerce. The idea was that, because the serial numbers were embedded in the processor, it would be harder to forge the user's identity. There were legitimate and perhaps even excellent reasons for doing this. But, of course, privacy activists quickly recognized and asserted that number could be used to cross-reference a user's transaction at one Web site with a user's transactions at another Web site. There was a public uproar, and Intel announced they would encourage PC makers to turn

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

[4] For more information, see Doreen Carvajal, *Amazon.com Plans to Revise its Ad Program*, N.Y. TIMES, Feb. 10, 1999, at C5.

off the serial number as the default option so that it would only be enabled if the user personally activated it.[5]

Finally, IBM announced at the end of March that it will remove its advertisements from any Web site that does not publish clear privacy policies.[6] By doing this, IBM was trying to encourage other companies to develop and enforce privacy restrictions. This tells us that the issue is a bigger one than we thought. It is going to be a hard one to deal with in the United States, and, certainly, it will be extremely difficult to deal with on an international level.

In conclusion, I leave you with a few thoughts on how a negotiation over any of this disparate set of issues might go forward. The basic GATT and GATS disciplines will end up applying as negotiators figure out what applies and in what circumstances. But, also a number of other issues, such as copyright, patent, jurisdiction, and advertising, are not privacy issues. The WTO has not customarily addressed most of these issues, and as such, has no expertise in these areas. The WTO is not a standard-setting body. Its agreements do not generally contain norms. Its importance as a forum will probably pale in comparison to others, such as the OECD, and some of the traditional intellectual property organizations that will be active on this issue.

In fact, a lot of other organizations will play important roles in the development of norms and rules and systems for trying to avoid regulating E-commerce problems. The WTO, however, is likely to be a very important forum on the customs and tax issues, and maybe on the electronic contracting side. There is some enthusiasm for doing that in the WTO. It is certainly the right forum for establishing broad principles, and the sooner the better. Those broad principles could even be specific to certain areas of concern about electronic commerce, for example, in trying to set up a general safe harbor of certain kinds in different areas, such as data protection.

Maybe by the time the Millennium Round has been going on for several years, some of the results of negotiations in those other fora will find their way back into a WTO agreement, a little bit like TRIPS, which adopted intellectual property standards that had been negotiated in other organizations. That is certainly another possibility. An entirely different approach might be to try to negotiate a sectoral agreement on electronic commerce. Certainly, there are proponents for that view. In a sense, one could take something out of the existing WTO agreements and put it all together into one. Part of it would be a standard-setting exercise, and part of it would be a broader rule-

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[5] *See* Hiawatha Gray, *Intel Offers to Modify ID Chip, but Privacy Advocates Say It Isn't Enough*, BOSTON GLOBE, Jan. 26, 1999, at D6.

[6] *See* Jon A. Auerbach, *To Get IBM Ad, Sites Must Post Privacy Policies*, WALL ST. J., Mar. 31, 1999, at B1.

making exercise. For now, we can only look forward to Seattle in November with anticipation.

In any event, I would like to hear your views on that. I have talked for half an hour, mostly about process, and I end on the note that I do not have any idea about what the direction in which the process is going to go.