



# Note

## Work Programme on Electronic Commerce

A brief overview of its evolution in the WTO

By Julian Mukiibi

### Summary

Over the past few months, electronic commerce has received renewed interest in trade debates. While emphasising the need to prioritise remaining DDA issues, developing country delegates want to better understand what is at stake in this area. This note reviews the existing WTO work programme on e-commerce, which has deliberated in detail various aspects of the issue since it was launched in 1998 and is likely to form the basis of any renewed WTO work on the matter.

## Introduction

The WTO 10<sup>th</sup> Ministerial meeting held in Nairobi, Kenya in December 2015, in its declaration provides *inter alia* that some WTO members would like to explore a new architecture for concluding the ongoing Doha round of negotiations.<sup>1</sup> In this regard, the Director-General WTO in his speech at World Trade Symposium in London<sup>2</sup> on the state of global trade, intimated that from his discussions with leading business personalities and WTO members, amongst the issues being suggested for inclusion in the main stream negotiations is electronic commerce.

A review of electronic commerce work in the WTO would be informative to the current debate on the subject. In a broad sense, international electronic commerce (e-commerce) involves cross-border and/or cross-country transactions over the internet which generates substantial savings in transaction costs. The most important cost-saving aspect of e-commerce is reduction in travel, administration, communication and market search costs. In addition, e-commerce not only enables local producers to participate in global networks but also promotes possible new kinds of trade in services. While the growth of e-commerce is widely acknowledged, it imposes numerous integration challenges for the multilateral trading system.

Soon after the establishment of the WTO, members acknowledged the growth of e-commerce and its role in creating new trade opportunities. At the 2<sup>nd</sup> WTO Ministerial meeting it was decided to establish a comprehensive work programme to

examine all trade-related issues with a bearing on global electronic commerce (including those to be identified by Members).<sup>3</sup> It was also agreed that members would continue with the practice of not imposing customs duties on e-commerce.

Following the above Ministerial declaration, the WTO General Council (GC) in September 1998 adopted the work programme on e-commerce. For purposes of the programme, e-commerce was defined as “production, distribution, marketing, sale or delivery of goods and services by electronic means”.<sup>4</sup> Four WTO Bodies were charged with carrying out the work programme, these were: The Council for Trade in Services; Council for Trade in Goods; Council for Trade Related aspects of Intellectual Property rights (TRIPs); and the Committee on Trade and Development. These committees regularly report to the GC on their work, which in turn reports to the Ministerial Conference in this regard.

## Review of the Work Programme

Drawing from reports of the above committees, what follows, is a review of developments on the work programme on electronic commerce in the WTO since its inception, till the 10th WTO Ministerial Council meeting that provided for the possible consideration of other issues to be included in the ongoing negotiations.

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<sup>1</sup> WTO 10<sup>th</sup> Ministerial Conference Declaration paragraph 32

<sup>2</sup> See speech uplinked at [www.wto.org/english/news\\_e/spra-e.htm](http://www.wto.org/english/news_e/spra-e.htm)

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<sup>3</sup> WT/MIN (98)/DEC/2

<sup>4</sup> WT/L/274 The work programme on Electronic Commerce Adopted by General Council on 25th/09/1998

## **Council for Trade Related Aspects of Intellectual Property Rights (TRIPs)**

The Council for TRIPs was mandated to deliberate on the evolvement of e-commerce with regard to intellectual property rights. The issues of discussion included: the protection and enforcement of copyrights and related rights; protection and enforcement of trademarks; and new technologies as well as access to technology.<sup>5</sup>

It has been observed in the council's work that creating a secure and legal framework for intellectual property rights enhances the process of developing e-commerce. In addition that more effort was needed in order to distinguish between which specific intellectual property rights' issues can be resolved by the right holders themselves, and which require certain governmental intervention on an international level<sup>6</sup>.

A number of discussions were held by the council during the period 1998 till 2000. These included: issues of copyrights and related rights, with focus on the potential role of electronic networks in folklore-related rights and rights concerning traditional expression in general. Further, the WTO Secretariat, in response to Members request prepared notes on the progress of work of the World Intellectual Property Organization (WIPO) concerning particularly the WIPO copyright treaty and the WIPO Performances and Phonograms treaty<sup>6</sup>. The Council therefore was briefed about ongoing work at WIPO concerning internet domain name process, and that on the law of trademarks as well as the implications of the internet use of trademarks on industrial designs

and geographical indications<sup>6</sup>.

On trademarks, the Secretariat note expounded on the connections between trademark and internet use (in particular their territorial nature, their protection, and their connection with internet domain names). Furthermore, on the issue of new technologies and access to technology, discussions were held on the role intellectual property rights play in the promotion of technological development in connection with electronic communications network, which facilitates access to technology. The Council was also updated on the work program of WIPO on global network and intellectual property services<sup>6</sup>. A number of issues were discussed concerning the enforcement of intellectual property rights on a territorial basis with the growth of use of global electronic networks. The Council agreed that there should be more studies on intellectual property rights in order to better understand the mechanisms of the various issues involved, of course with the continuing work of the WIPO and other inter-governmental organizations dealing with these issues.

In the period 2002-2003, there were further developments with regard to the work programme on e-commerce in the Council for TRIPs, following a 2002 General Council directive to continue work and keep track of WIPO and other intergovernmental organizations in this regard, so as to report to Ministerial Council meetings.<sup>7</sup>

Concerning transfer of technology to least-developed countries, developed country members provided information on their implementation of Article 66.2 of the TRIPS agreement available for the TRIPS council meeting in November 2002<sup>7</sup>.

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<sup>4</sup> WT/L/274 (30 September 1998)

<sup>6</sup> IP/C/18 (30 July 1999)

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<sup>7</sup> IP/C/W/128/Add.1 (15 May 2003)

Moreover, in its meeting in the following year (February 2003), the TRIPS council put in place a mechanism for the implementation of Article 66.2 in line with the WTO Doha ministerial conference.

The Council also addressed other topics such as the role of IP protection in the transfer of technology. It also addressed the role of information and communications technologies' potential to facilitate worldwide access to technological information contained in patent document, as a way of improving intellectual property offices' efficiencies in this regard<sup>7</sup>. Later the transmission over the internet of communication on public works was addressed in the panel report on *United States – Section 110(5) of the Copyright Act*. 24<sup>7</sup>.

## Council for Trade in Services

The Council for Trade in Services (CTS), with regard to the work programme on e-commerce was mandated to deal with the treatment of electronic commerce within the GATS legal framework. The issues to be considered were: scope (within modes of services supply); Most Favoured Nation (MFN) and National Treatment; transparency; increasing participation of developing countries; domestic regulation; standards and recognition; competition; protection of privacy and public morals; and the prevention of fraud; as well as market-access commitments on electronic supply of services (including commitments on basic and value added telecommunications services and on distribution services); access to and use of public telecommunications transport networks and services; customs duties; and classification issues<sup>8</sup>.

The scope of deliberating on the above issues was in the context of the four modes of services supply as

provided for in the GATS, i.e. cross border supply, consumption abroad, commercial presence, and presence of natural persons<sup>9</sup>.

The CTS in the period 1998-1999 recognized that it is possible for services to be supplied electronically under any of the four modes of supply mentioned above, but that there was a problem of distinguishing between supply under the first two modes in the case of e-commerce. There was divergence amongst Members on this issue and it was decided to reserve it for further deliberations<sup>10</sup>. At the heart of it, was the need for clarity on whether the GATS applies to all products delivered electronically and that such products are in fact services. Some delegations were of the view that it is not clear whether such products can be considered as services and therefore one cannot know if GATS rules would apply to them hence requiring further discussions<sup>10</sup>.

Concerning the MFN issue, the main question discussed was whether services which are electronically delivered (and those delivered in different ways) should be considered as similar services or what is referred to as "like services". However, the "likeness" issue is unresolved in both the GATS and GATT rendering it to be examined on a case-by-case basis<sup>10</sup>.

Regarding transparency, it was generally agreed that GATS in this regard also apply to electronically supplied services as well<sup>10</sup>. Furthermore, on the issue of increasing participation of developing countries, the CTS proposed the need more liberal markets and gaining more technology access that would enable better integration of these set of countries in e-commerce trade<sup>10</sup>. Issues of

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<sup>8</sup> WT/L/274 (30 September 1998)

<sup>9</sup> S/C/W/68 (16 November 1998)

<sup>10</sup> S/L/74 (27 July 1999)

domestic regulation, standards, and recognition have also been discussed in some detail, with a recommendation that GATS provisions in this regard also apply to the supply of services electronically<sup>10</sup>.

In case of competition, there was a general view that it would be easier for small service suppliers to enter the arena of e-commerce given the expansion of the sector as well as the fact that all suppliers will have the same internet space. It was however observed that the restrictive activities of big businesses along with monopolies may create obstacles to e-commerce<sup>10</sup>. Furthermore, it has also been noted that the protection of privacy and public morals and the prevention of fraud should apply although such objectives should not be fulfilled in a more trade restrictive manner<sup>10</sup>.

On the issue of market-access commitments on electronic supply of services, the CTS has in its work observed that means of delivery or commitments by members do not matter, rather they only permit the electronic supply of services<sup>10</sup>. Besides, national treatment commitments were considered to also cover the electronic supply of services, and it has been acknowledged that the Annex on Telecommunications applies to access to and use of internet network<sup>10</sup>.

With regard to customs duties, there are conflicting views with some members asserting that such duties on electronic transmissions could affect e-commerce while others opine that this issue is not relevant in the context of e-commerce. There were also conflicting arguments on current standstill on custom duties although it is acknowledged that the extension of the standstill is a political decision to be determined by the Ministerial council<sup>10</sup>.

In 2012, the United States of America and

European Union's submissions on a number of trade principles that could enhance network and develop e-commerce were discussed by the CTS. Later, in 2013, the CTS also considered a submission by the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu entitled "Protection of Personal Information and the Development of Electronic Commerce". It was then decided that a workshop be held in order to examine services-related issues for the development of e-commerce. The workshop took place in the same year with experts from international organizations, the private sector, government ministries and regulatory agencies facilitating. Members found the event useful in advancing the work programme since it elaborated in detail on the substantive issues<sup>11</sup>.

## **Committee for Trade and Development**

The Committee for Trade and Development (CTD) work on e-commerce deals with development consequences of the sector, focusing on developing countries and their various financial, economic, and development needs. In 1998, the CTD was mandated to deal with the following issues in this regard:

- Effects of electronic commerce on the trade and economic prospects of developing countries, notably of their small and medium-sized enterprises (SMEs), and means of maximizing possible benefits accruing to them;
- Challenges to and means of enhancing the participation of developing countries in electronic commerce, in particular as exporters of electronically delivered

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<sup>11</sup> WT/GC/W/676 (11 November 2013)

products including the issue of improved access to infrastructure and transfer of technology, as well as movement of natural persons;

- Use of information technology in the integration of developing countries in the multilateral trading system;
- Implications for developing countries of the possible impacts of electronic commerce on the traditional means of distribution of physical goods; and
- Financial implications of electronic commerce for developing countries<sup>12</sup>.

In the 2011 Ministerial decision on e-commerce the General Council was directed to shed more light and to focus more on the development dimension of e-commerce, which instigated the CTD to pursue further initiatives. A workshop was held in 2013 on the theme “e-commerce, development, and SMEs”. This workshop was addressed by a number of professionals from different domains (Inter Governmental Organisations, business, civil society, and academia). The event also afforded representatives of the SMEs and regulators of developing countries and LDCs to share experiences on e-commerce<sup>13</sup>. Issues addressed included the links connecting e-commerce with custom clearance as well as trade facilitation and aid for trade. Developing countries and LDCs were cautioned to be aware of the challenges arising from by e-commerce in order to harness the opportunities it provides, this would necessitate aiding SMEs towards accessing domestic and international markets.

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<sup>12</sup> WT/COMTD/W/51 (23 November 1998)

<sup>13</sup> WT/GC/W/676 (11 November 2013)

Assisting what is called “least-connected countries” (LCCs) was also emphasized in this workshop, as well as the importance of the variety of tools on the internet, which are mostly free of charge, and can be used by SMEs in a very helpful way.<sup>14</sup> However, such as infrastructure problems and lack of regular electricity supply which requires upgrading power grids remain to be addressed, in order for most developing and LDCs to harness benefits from e-commerce. Moreover, there are still difficulties in distribution processes of the electronically bought products with the common lack of electronic payment systems in the developing countries as well as lack of high speed cables<sup>14</sup>. It was further noted that to overcome the problems and challenges of e-commerce there has to be an entrepreneurial spirit<sup>14</sup>.

## **The Council for Trade in Goods**

The Council for Trade in Goods (CTG) on e-commerce is with regard to provisions of the General Agreement on Trade and Tariff (GATT) as well as trade agreements covered under Annex 1A of the WTO Agreement, and the approved work program. The issues examined by CTG contained: market access for and access to products related to electronic commerce; valuation issues arising from the application of the agreement on implementation of Article VII of the GATT 1994; issues arising from the application of the Agreement on Import Licensing Procedures; customs duties and other duties and charges as defined under Article II of GATT 1994; standards in relation to electronic commerce; rules of origin issues; and classification issues<sup>15</sup>.

Various discussions have been conducted in the

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<sup>14</sup> WT/COMTD/W/198 (27 June 2013)

<sup>15</sup> WT/L/274 (30 September 1998)

CTG. These discussions mainly revolved around keeping the delivery of digital products free of custom duties, as well as examining the link between e-commerce and development and how e-commerce can be used as a factor in reducing poverty in developing countries and LDCs. Over the years, members have consistently expressed their support towards enhancing the work program and hosted two new workshops sponsored under both the CTD and the CTS, which ended up with insightful ideas on several issues such as some non-tariff barriers in e-commerce<sup>13</sup>.

## Conclusions

Since its inception in 1998, the WTO work programme on e-commerce has deliberated in detail on several issues concerning the sector, in the way of specialised committees of CTRIPs, CTS, CTD, and CTG that were mandated with this task. This important work is therefore a basis for taking forward any negotiations on e-commerce, should the issue be formally introduced for WTO negotiations



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