

A Framework Agreement for Electronic Commerce Regulation under the GATS

I. Introduction

The WTO began examining issues related to electronic commerce after the Singapore Ministerial Conference in May 1998. At that time, WTO members agreed to continue the duty-free moratorium on electronically delivered transactions. WTO members also initiated a work program that asked each of the WTO Councils (Trade in Goods, Trade in Services, Trade-Related Aspects of Intellectual Property, Trade and Development) to examine the impact of electronic commerce on the WTO agreements. This work was largely completed in July 1999. In July 2000, after the failed Seattle Ministerial Conference, the WTO General Council asked the subsidiary Councils to resume their work. The Councils then delivered reports in December 2000 that largely repeated what had been previously stated. Since then, the WTO electronic commerce work program has essentially been on hold.

The Doha Ministerial Declaration, issued on 14 November 2001, calls for the reinvigoration of the electronic commerce work program. The Declaration states that “electronic commerce creates new challenges and opportunities for trade for Members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce.” The Declaration then requests the General Council “to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference [in 2003].”¹

The Doha Declaration should reignite the WTO electronic commerce work program. This is particularly important given the uncertainty that exists between the regulation of services provided via the internet (“E-Services”) and the General Agreement on Trade in Services (GATS). With the internet increasingly being used to provide E-Services that have traditionally been supplied and regulated on a national basis (e.g., tele medicine, distance education, database management, and data processing, etc.), the interaction between GATS and domestic regulations is becoming increasingly important. Thus, in order to “maintain an environment which is favourable to the future development of electronic commerce,” it is vital to clarify their relationship.

II. Classification of E-Services under GATS

The first issue that must be resolved when considering E-Services regulation and the GATS is the proper classification of E-Services. The GATS rules are listed on schedules that contain eleven basic service sectors and four different modes of delivering services.² Each WTO member lists its market access and national treatment commitments provided to foreign services suppliers on a service sector and mode of supply basis.³

¹ WT/MIN(01)/DEC/W/1, par. 34.

² The service sectors are construction, environment, health, tourism, transport, recreation, financial, distribution, business, communications, and education. The modes of delivery are as follows: cross-border (Mode 1); consumption abroad by natural persons from one member while in the jurisdiction of another member (Mode 2); commercial presence of a supplier from one member in the jurisdiction of another member (Mode 3); and presence of natural persons from one member in the jurisdiction of another member (Mode 4).

³ See the OECD document “Electronic Commerce: Market Access Issues – Existing Commitments for Online Supply of Services” prepared by the OECD Trade Directorate and made available to participants at the October 12-13, 1999 OECD Forum on Electronic Commerce for an analysis of the existing Mode 1 and Mode 2 commitments applicable to those services that may be supplied online.

It has been argued elsewhere that a preferred method for classifying E-Services in the existing GATS structure is as a Mode 1 form of delivery.⁴ In effect, this means that the existing Mode 1 commitments listed on each WTO member's GATS schedules would apply to the delivery of services via the internet. This would provide foreign service suppliers a transparent set of rules regarding the specific level of market access and national treatment to which any given WTO member has committed itself for the provision of E-Services. If accompanied by an increase in the scheduling of Mode 1 services, this would help provide the certainty needed to maintain a favorable environment for the development of E-Services.

III. E-Commerce Regulation and GATS Commitments

However, this would not resolve all ambiguities regarding the treatment of E-Services under the GATS. In particular, there still may be uncertainties regarding the potential for electronic commerce regulation to inhibit any market access or national treatment commitments on the GATS schedules. Any resulting uncertainty could potentially inhibit the beneficial development of E-Services as service suppliers would not be certain of their right to supply in a given country or to citizens from a given country. This could occur regardless of whether E-Services are classified as a Mode 1, Mode 2, or some combination of Mode 1 and Mode 2.

As an example, consider the now-infamous EU Data Privacy Directive. This directive, which prohibits the transfer of personal data to countries that do not provide an "adequate" level of privacy protection, has threatened to shut down personal data transfers from the EU to the U.S. This could lead to a severe disruption in the ability to provide E-Services. Faced with this threat, the EU agreed to suspend application of the directive while the EU and U.S. negotiated a safe harbor regime that would allow U.S. companies to certify their compliance with the EU privacy regime. While it remains to be seen if this approach will successfully resolve the potential bottleneck in data flows, it is notable that there was little public consideration during the negotiation of the Safe Harbor regime of whether the implementation of the EU Privacy Directive could potentially prohibit the provision of E-Services that the EU may have committed not to restrict on its GATS schedule.

Thus, a useful second step in the process of providing increased transparency and certainty for E-Services would be to draft a framework agreement that provides principles for the interaction between national laws regulating electronic commerce and the existing GATS commitments. Such a framework agreement would not recommend a particular legal regime for electronic commerce⁵, but instead would be narrowly focused on providing a set of principles governing the creation of any such legal regime. The principles of such a framework agreement would be designed to ensure that any regulations do not inhibit the expansion of E-Services by conflicting with existing GATS commitments. These principles would be general in nature so that the WTO members retain the freedom to create legal regimes that satisfy any particular individual national concerns.⁶

⁴ See Emad Tinawi and Judson Berkey, "E-Services and the WTO: Inadequacy of the GATS Classification Framework" in the background documentation for the October 1999 OECD Forum on Electronic Commerce available at http://www.oecd.org/dsti/sti/it/ec/act/paris_ec/paris-ec_docs_2.htm

⁵ UNCITRAL has produced a Model Electronic Commerce Law and a Model Electronic Signatures Law that provide a legal framework for electronic commerce. The development of model laws is probably best left to organizations such as UNCITRAL that can take into account other concerns beyond trade. This allows the WTO to focus on the trade related aspects of such laws to ensure that their implementation and application do not violate most-favored nation, transparency, market access, and national treatment principles.

⁶ It is precisely the fact that WTO members are beginning to pass different national legal regimes that makes a framework agreement necessary. For example, the EU and the U.S. have passed federal electronic signature acts

IV. Framework Agreement

The WTO does have experience with framework agreements. The Understanding on Financial Commitments was an agreement entered into during the Uruguay Round negotiations to provide an approach to the scheduling of financial services commitments. The Understanding provides an alternative method of listing both market access and national treatment commitments that does not require any specific degree of liberalization. The Understanding covered such topics as standstills on existing non-conforming measures, consumer access to cross border trade, commercial presence rights of financial institutions, requirements for non-discriminatory measures, transfers of information, and the development of new financial services.⁷

A second possible model for an electronic commerce framework agreement is the Reference Paper on Telecommunications. Agreed to on April 24, 1996 as part of the continuing negotiations provided for in GATS, the Reference Paper contains a set of principles for establishing a regulatory environment for telecommunications services that is conducive to market entry by foreign service suppliers. The Reference Paper contains principles on topics such as interconnection and universal service. These principles are designed to set a standard of market access and national treatment that WTO members can specify in their GATS schedules.⁸

Thus, the following principles are offered as a possible framework agreement governing the development of national legal regimes for electronic commerce. Individual countries would commit to abide by the principles contained in this framework agreement when developing electronic commerce regulations. The principles, derived from those in the Understanding and the Reference Paper, are designed to provide guidelines for the development of electronic commerce legal regimes that do not inhibit the commitments made in GATS. The source for each principle is listed along with a brief description of its intent. These principles are not necessarily complete, but are only intended to begin a discussion of the relationship between national electronic commerce regulations and the GATS.

- **E-Services Presence** (Financial Services principles 5 & 6)

Members must not inhibit the right of suppliers to sell E-Services unless the sale of a particular E-Service is already prohibited in the member's GATS schedule. However, terms, conditions, and procedures for registering as a foreign E-Services supplier in the member may be required for consumer protection purposes as long as such terms, conditions, and procedures are not disguised means of circumventing this obligation.

This provision is intended to ensure that those E-Services that are currently permitted in the GATS commitments schedules are not prohibited as a result of new electronic commerce-related laws.

that differ in their technological preferences. In addition, the U.S. federal law was specifically passed because states were adopting different versions of what was intended to be a uniform state electronic signature law. See Prof. Dr. Heinz Hauser and Sacha Wunsch "A Call for a WTO E-Commerce Initiative" for a discussion of how market access commitments might be inhibited by subsequently implemented domestic regulations. Available from the author at Heinz.Hauser@unisg.ch.

⁷ For an analysis of the financial services commitments made by 105 developing and transition economies, see Aaditya Mattoo "Financial Services and the WTO: Liberalization in the Developing and Transition Economies," working paper (16 March 1998). Available from the author at aaditya.mattoo@wto.org.

⁸ As of January 1, 2000, 63 out of 69 countries making communications sector commitments had done so for their regulatory environments and 57 of these countries used the Reference Paper in whole or in part.

However, legitimate concerns regarding consumer protection can be used as a basis for requiring E-Services suppliers to meet certain certification (possibly through mutual recognition agreements) standards as required by national or local law. The most obvious is a requirement for medical certification before being allowed to provide telemedicine services.

- **New E-Services** (Financial Services principle 7)

Members must permit an E-Services supplier that has established a presence in the member to supply additional E-services not already restricted, subject to the other provisions of this agreement.

This provision prohibits WTO members from imposing restrictions on the development and provision of new E-Services already permitted in the existing GATS commitments. Thus, it is intended to provide assurance for the continued liberalization and expansion of trade in E-Services. Reference is made to the other provisions of this agreement in order to allow countries to require additional requirements (e.g., certification) for the provision of certain new E-Services. An example would be a requirement for additional medical certification to provide additional telemedicine services different from those for which an E-Services supplier was first licensed.

- **Transfers of Information Necessary for E-Services** (Financial Services principle 8)

No member shall take measures that prevent transfers of information or processing of information necessary for the conduct of the ordinary business that the E-Services supplier is permitted to undertake. This shall not, however, restrict the right of a member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent this provision.

This provision explicitly permits laws such as the EU Privacy Directive as long as they do not constitute a disguised form of protectionism. This obviously would require a facts and circumstances determination. It may be the case that consumer protection laws in addition to those for data privacy should be explicitly referenced. Restrictions on consumer advertising are the most obvious example.

- **Non-discrimination for E-Services Suppliers** (Financial Services principle 10)

Members shall endeavor to remove or to limit any significant adverse effects on E-Services suppliers of (a) non-discriminatory measures that prevent the supply of E-Services and (b) other measures that affect adversely the ability of foreign E-Services suppliers to establish a presence in the member. However, any action taken under this paragraph must not unfairly discriminate against domestic E-Services suppliers.

This is intended to facilitate the expansion of E-Services by providing an explicit obligation for WTO members to remove and limit any adverse effects of national electronic commerce laws on E-Services suppliers. However, the provision is careful to note that fulfilling this obligation should not require WTO members to disadvantage their own domestic E-Services suppliers.

- **Scheduling of E-Services** (Financial Services preamble)

This agreement does not prejudice the right of a member to schedule its specific commitments in accordance with the approach under Part III of GATS. No presumption has been created as to the degree of liberalization to which a Member is committing itself under GATS.

This provision assures WTO members that they still retain the right to schedule commitments as they desire. The classification of E-Services under Mode 1 and the provisions of this agreement should not require WTO members to provide any additional market access or national treatment than that which they have already committed to provide. Thus, this recognizes the sovereign right of each WTO member to decide the degree of E-Services liberalization that it wishes to provide.

- **Consumer Access to E-Services** (Financial Services principles 4 & 11C; Telecommunications principle 3)

Members shall permit their residents to purchase E-Services from any E-Services supplier with a presence in the member. However, Members shall have the right to define the kind of access that they wish to allow as long as any limitations are administered in a transparent, non-discriminatory and technologically neutral manner and are not more burdensome than necessary.

This provision is intended to prevent the imposition of indirect restrictions (e.g., exchange controls, restrictions on use of transportation networks) that may be designed to hamper the provision of E-Services. By guaranteeing consumers the right to consumer E-Services, WTO members are agreeing to provide a corollary right to that provided for E-Services suppliers in provisions one and two above. However, this right is being balanced against the right of a member to determine the level of access that it wishes consumers to have to E-Services. Thus, members do retain some means to have cultural control if they so wish as long as this does not conflict with the level of market access and national treatment already provided for in the member's GATS commitments schedules.

- **Terms of E-Services Supply** (Telecommunications principle 2)

Legal regimes governing the sale and purchase of E-Services must (a) provide transparent terms and conditions, (b) provide clear rules for the settlement of disputes including provisions for the parties to contract to use alternative dispute settlement mechanisms, (c) contain technically neutral provisions to the most reasonable extent possible (d) promote a competitive environment and (e) should only be established where necessary.

This provision is an attempt to provide boundaries for the development of e-signature and e-commerce framework laws. Sub-provisions (a) and (b) are intended to allow all parties to be able to clearly determine the rules and standards applicable to their business relationship. Sub-provision (c) is intended to ensure that all modes of electronic communication and authentication are recognized and supported. Sub-provisions (d) and (e) are intended to preserve a role for private sector innovation and to express a preference for the development of standards by industry.

V. **Conclusion**

The framework agreement outlined above is not intended to resolve completely the relationship between electronic commerce regulation and the GATS. Indeed, such an agreement may not even be the preferred way of clarifying the relationship between national legislation that is being rapidly developed to provide a legal environment conducive to electronic commerce and an international trade agreement that was completed prior to the rise of E-Services on a large scale. It is hoped that the proposed framework will spark a dialogue on the potential effects of differing national legal regimes for the borderless internet and the provision of E-Services.