

# ClientAlert

## International Trade

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### The WTO Work Programme on Electronic Commerce

At the 9th Ministerial Conference of the WTO in December 2013, Ministers adopted a Decision that the Work Programme on Electronic Commerce should be “substantially invigorated.” The Work Programme merits attention in light of the recent decision by the US Federal Communications Commission (FCC) to reclassify Internet access provision as a telecommunications service under Title II of the *Telecommunications Act of 1934*.

Ministers stated that the Work Programme should continue to examine the trade-related aspects of enhancing Internet connectivity and access to information and telecommunications technologies and public Internet sites, the growth of mobile telephony, electronically delivered software, cloud computing and the protection of confidential data, privacy and consumer protection. Special consideration should be given to the situation in developing countries, particularly in least-developed country Members and least-connected countries. Ministers also agreed to maintain until December 2015 the current practice of not imposing customs duties on electronic transmissions (the “moratorium”).

#### Background

The Work Programme was launched in 1998, in recognition of the rapid growth of global electronic commerce and the legal issues to which it could give rise in the WTO. The term “electronic commerce” was understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. It can be defined as comprising three different types of transaction:

- (a) the provision of Internet access services themselves—meaning the provision of access to the net for businesses and consumers;
- (b) the electronic delivery of services, meaning transactions in which services products are delivered to the customer in the form of digitized information flows; and
- (c) the use of the Internet as a channel for distribution services, by which goods and services are purchased over the Internet but delivered to the consumer subsequently in non-electronic form.

The question whether existing rules and obligations under the WTO Agreements would apply to e-commerce, or whether new rules should be developed, was a critical underlying issue. In particular, the General Council was instructed to examine all issues relating to the imposition of customs duties on electronic transmissions.



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Under the aegis of the General Council, this work has been carried out by the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS and the Committee on Trade and Development. After 2001, the General Council's continuous review of the Work Programme was delegated to "Dedicated Discussions" focused on horizontal issues cutting across more than one of the WTO Agreements.

## The Moratorium on Customs Duties

The moratorium on customs duties is a political undertaking by all Members not to impose tariffs on "electronic transmissions." It has never been made permanent and legally binding but has been renewed six times at Ministerial Conferences, until the date of the succeeding Conference. The current moratorium will expire in December 2015 unless renewed at the 10th Ministerial Conference at Nairobi in that month.

In this context, the term "electronic transmissions" has never been precisely defined; moreover, debate on their classification has never reached a conclusion. It is generally understood, however, that a customs duty in the sense of the moratorium would apply to the transmission itself—not to the value of its content. This is sometimes referred to as a "bit tax." No country has yet sought to impose such a charge, and it has never been clear how such a charge would be levied. This fact has certainly made it easier to agree to the successive renewals of the moratorium; conversely, the possibility or hope of a tax with such revenue-raising potential underlies the reluctance of many developing countries to make the moratorium permanent. The United States and other developed countries have argued for a permanent and binding moratorium, fearing that electronic commerce could be stunted by tariffs.

It must be understood that the moratorium does not apply to tariffs on goods purchased on the Internet and imported in physical form; ordinary tariff bindings apply to those. The same would be true of a tariff applied to the import of a service. There are currently very few, if any, tariffs on services, but the possibility exists. (However, when a Member has scheduled a commitment on a given service, it may not impose a tariff on the import of that service, whether done electronically or otherwise, if doing so would impair the level of access guaranteed in its GATS schedule of commitments.)

## Nature of the Work Programme

The Work Programme essentially has been a process of discussion, analysis and classification. It has produced no binding decisions or new rules, but it has usefully clarified the general understanding of the application of existing rules to e-commerce, particularly on trade in services. Increasing the participation of developing countries in e-commerce and improving their access to the necessary technology have been constant concerns and the main focus of the work of the Council for Trade and Development. A very wide range of technical and legal issues have been proposed for discussion and analysis, and such proposals are still being made; however, in the past ten years the work on substantive issues has flagged, despite periodic instructions from Ministers that it should be reinvigorated.

## Electronic Commerce and Services

The greater part of the WTO's work on electronic commerce has been done in the Council for Trade in Services (CTS), for two reasons. First, the vast bulk of international trade and commerce done over the Internet is the sale of services; for instance, currency and securities trading, and most other financial services, are overwhelmingly done electronically. Second, telecommunications and Internet access provision are themselves vitally important services, underpinning the entire fabric of electronic commerce. Intensive work in the GATS Council in 1998 – 99 resulted in the adoption of a Progress Report, which recorded the common understanding of Members on all the issues that had been assigned to the Council for consideration. Though they are not legally binding, these understandings have survived intact and in some important cases have been confirmed by the findings of dispute settlement Panels.

The most important clarification concerns the scope of the GATS. It was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered. The GATS is technologically neutral in the sense that it makes no distinction between the various means by which services can be delivered, under any of the four modes of supply. All measures affecting the electronic delivery of services are therefore covered by GATS obligations.

This understanding on the scope of the GATS has been confirmed by Panel reports. In *US—Gambling*, for example, the Panel found that supply of a service through mode 1 (cross-border supply) includes all means of delivery, including online delivery, and in *China—Publications and Audiovisual Products*, the Panel found that the scope of China’s commitment in its GATS Schedule on “Sound recording distribution services” extends to sound recordings distributed in non-physical form, through technologies such as the Internet. These are important findings. In 1998, some were arguing that electronic commerce was *sui generis*, neither trade in goods nor trade in services, and that new rules might be needed to regulate it. This suggestion that GATS commitments and existing rules did not adequately cover the electronic supply of services would, of course, have voided the substance of the recently concluded agreement on financial services and many other GATS commitments; virtually all financial services and many others are supplied electronically. Most GATS-related dispute settlement cases have involved online or networked services. Jurisprudence under the GATS has obviated that danger.

It is also the general view that the GATS Annex on Telecommunications applies to access to and use of the Internet network when it is defined in a Member’s regulatory system as a public telecommunications transport service or network in terms of that Annex. In light of this view, the recent decision of the FCC to regulate network access provision under Title II of the *Telecommunications Act of 1934* is significant, as it implies that the United States would now accept that these services are covered by the Annex and by the GATS Reference Paper on Basic Telecommunications. From the viewpoint of the WTO, this would be a significant change; the United States has hitherto maintained that these are “value-added” and not basic telecoms services, and therefore not subject to the Annex and the Reference Paper. However, the US government has not yet stated how it views the potential GATS implications of the FCC’s reclassification of Internet access provision under Title II.

Many subjects have been proposed by delegations for further work in the CTS. They include electronically delivered software; classification issues; the protection of confidential data and privacy; consumer protection; consumer awareness; electronic signatures; unsolicited bulk electronic communications (i.e., “spam”); private standards; the availability of infrastructure for developing countries; Internet access; payment issues; non-discrimination; electronic authentication and trust services; and unequal access to information and communication technology.

Meanwhile, trade in ICT and ICT-enabled services continues to grow faster than overall economic growth. Global exports of computer and information services achieved annual growth between 2005 and 2013 of 14 percent, and exports of other business services totalled US\$1.2 trillion with growth averaging 9 percent annually between 2005 and 2013. Electronic commerce serving ordinary consumers (business-to-consumer sales) also is growing rapidly, achieving roughly 20 percent growth over each of the past three years, and is predicted to reach nearly US\$2.4 trillion by 2017.

### Other WTO Agreements

There has been no suggestion that the GATT and the Agreement on Trade-related Aspects of Intellectual Property Rights do not apply to electronic commerce. Questions deserving further consideration have been identified in both cases, however.

### Current State of Work

Despite the Decision by Ministers at Bali that the Work Programme should be substantially invigorated, there has been no significant progress since then. The Ambassador of Panama, Mr. Alfredo Suescum, was appointed to chair the Dedicated Discussions, which address issues cutting across different WTO Agreements, and having invited proposals from delegations, in the 10th Dedicated Discussion on February 17 he tried to animate discussion of future work and objectives. A submission had been made by the United States to the GATS Council on Cross-Border Information Flows, Localization Requirements and Privacy Protection, and on the coverage of Cloud Computing under Computer and Related Services. The WTO Secretariat also produced a comprehensive paper on the history of the Work Programme. However, these initiatives were not well received, particularly by some developing countries who questioned the authority for production of the Secretariat paper and suggested that substantive work would be premature given the state of work in agriculture and other issues in the Doha Round negotiations. No progress was made.

This is not very surprising, given the lack of response to earlier decisions by Ministers that the work should be reinvigorated. There is a great deal of important and relevant subject matter that could usefully be discussed in the Work Programme, but other elements of the Doha negotiations do not depend on this. It could be said that the essential point—to establish that the WTO Agreements apply fully to electronic commerce—has already been achieved. Further progress may be made more easily in regional and bilateral trade agreements.

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