

General Council

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WTO AGREEMENTS AND ELECTRONIC COMMERCE

This note has been prepared by the Secretariat to assist Members in their deliberations on trade-related issues pertaining to global electronic commerce pursuant to the Ministerial Declaration on Global Electronic Commerce. It briefly discusses how WTO Agreements and previously agreed work programmes relate to global electronic commerce. The note is not meant in any way to prejudge the range of issues that Members may wish to examine.

General Agreement on Trade in Services

Introduction

1. International trade in services is conducted to a very large and increasing extent through electronic means. Indeed, the revolution in computer technology caused many services, previously regarded as essentially non-tradable, to be recognised as eminently tradable and as potentially important contributors to international trade and development. More than any other factor, it overturned the old misconception of "trade in services" as a contradiction in terms. Cross-border trade in particular was greatly facilitated by the availability of electronic means of delivery and the ease with which services products can be converted into digitised information flows. The negotiation of the GATS established the first framework of international law and multilateral commitments within which this trade could take place on a secure basis.

2. In the realm of services trade, electronic commerce can be defined as comprising three different types of transaction, all of which require consideration:

- (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 digitised information flows;
- (c) the use of the Internet as a channel for distribution services, by which goods and services are purchased over the net but delivered to the consumer subsequently in non-electronic form.

The Legal Framework

3. The GATS covers all services except those supplied in the exercise of governmental authority, and all measures affecting the supply of services. It defines trade in services as the supply of a service through any of the four modes specified in Article 1.¹ The modes distinguish between services transactions on the basis of the territorial presence of the supplier and the consumer of the

¹ The four modes of supply are: (1) cross-border, where the service is supplied from the territory of one Member into another; (2) consumption abroad, where the consumer purchases a service which is delivered in the territory of another Member; (3) commercial presence, where the service supplier of one Member establishes a subsidiary or a branch in another Member to supply a service; (4) presence of natural persons, where the service is supplied by a person working in the territory of another Member.

service. The Agreement makes no distinction between the different technological means by which a service may be delivered - whether in person, by mail, by telephone or across the Internet. The supply of services through electronic means is therefore covered by the Agreement in the same way as all other means of delivery. As is the case throughout the WTO system, the legal regime which governs a given transaction is determined by the nature of the product which is traded, not by the technique of production or delivery: in the same way, if it were agreed that some category of electronically delivered products, hitherto unclassified, should be classified and treated as goods, their importation would be subject to whatever tariff bindings or other GATT obligations were applicable.

4. Legal obligations in the GATS apply to all measures affecting the supply of services: the term "affecting" has been interpreted² to cover not only measures which directly govern the supply of a service but also measures which indirectly affect it. Measures affecting the electronic delivery of services are "measures affecting trade in services" in the sense of Article I of the GATS, just as they would be if imposed on delivery by any other means. Thus, for example, a charge on the import of a service by electronic means - "import" here meaning transactions under any mode of supply - would be a measure affecting trade in services. This means that when a Member has scheduled a commitment on a given service, it may not impose a charge on the import of that service, whether done electronically or otherwise, if that would impair the level of access guaranteed in its national schedule.

5. The GATS legal framework contains two types of provisions: general obligations and specific commitments. Some general obligations apply to all services, whether or not market-access commitments have been undertaken on them. Most notable of these are provisions relating to MFN treatment, transparency, domestic regulation, participation of developing countries and monopolies and exclusive service suppliers. Other general obligations are applicable only to sectors where a Member has scheduled specific commitments. These include certain disciplines on domestic regulation and the behaviour of monopolies, payments and transfers and, of particular relevance to electronic commerce and the Internet access providers who make it possible, the provisions in the Annex on Telecommunications which ensure suppliers of scheduled services access to and use of public telecommunications networks and services. The second part of the legal framework consists of specific commitments to grant market access and national treatment, subject to whatever limitations may be entered in the schedule, to foreign suppliers of the specified service. The national treatment commitment covers any measure that affects the supply of the service in question.

6. Because of the way in which it can render the distance between supplier and consumer virtually irrelevant, it is perhaps natural to think of electronic commerce essentially in terms of cross-border trade - GATS modes 1 (cross-border supply) and 2 (consumption abroad). But it is important to bear in mind that Mode 3 and 4 also cover the electronic delivery of the service. A company supplying financial services, for example, on the basis of a commitment under Mode 3, would be entitled to supply its services electronically unless the schedule stipulates otherwise. In many service sectors, this is of such fundamental importance that a commitment which excluded the right of electronic supply would be of little value. Equally, under Mode 4, a professional who is supplying a service in the territory of another Member is entitled to deliver the service by electronic means.

Internet Access Services

7. Electronic commerce requires access to the Internet network. In recent years what is essentially a new service has arisen - the commercial provision of Internet access - which must be distinguished from the supply of other services through the medium of the Internet. Companies provide access in return for a fee, which in competitive markets is quite low. For this purpose they

² See report of the Panel on "European Communities - Regime for the Importation, Sale and Distribution of Bananas - Complaint by the United States" (WT/DS27/R/USA).

need access to telecommunications networks, usually by way of leased circuits. In many countries where the provision of telecommunications services is still a public monopoly, the monopoly provider is likely to be the only supplier of Internet access. In countries which have liberalised their telecommunications regime, competing internet access providers (IAPs) may offer access to the Web, with a different array of supporting services. Ten Members have made explicit commitments on the supply of these services in the negotiations on basic telecommunications. Such explicit commitments are clearly necessary where monopoly or other access limitations apply to most telecoms services, but it is desired to liberalize Internet access. Members which have committed to full liberalization of basic telecoms have not in general felt it necessary to specify Internet access services, because they list a number of services often available over Internet. The status of IAPs in relation to GATS rights and obligations in some instances would appear to merit further examination. As with all services, the absence of commitments does not of course mean that market access for IAPs is impossible: it may indeed be the case that provision of the service is not permitted, but it may equally mean only that there is no guarantee of continued access.

8. In the context of the negotiations on Basic Telecommunications, the Chairman proposed in January 1997 an interpretative note, which was adopted by the Group on Basic Telecommunications and attached to its report to the Services Council and which confirmed the principle that commitments undertaken were technology-neutral: in the absence of an indication to the contrary, any commitment would be assumed to cover local, long distance and international services for public and non-public use, on a facilities or resale basis, and using any technological means of supply (cable, radio, satellite, Internet, etc.). It also indicated that any commitment on private leased circuit services, unless otherwise indicated, would permit suppliers to sell or lease any type of network capacity for the supply of services listed in any other telecommunications service sub-sector.

9. Article VIII of the GATS, on monopolies and exclusive service suppliers, contains relevant disciplines on discriminatory and anti-competitive behaviour, and other behaviour that would undermine specific commitments, by monopoly suppliers. It could require governments to ensure that exclusive suppliers of Internet services (e.g. a national telecoms monopoly) do not frustrate commitments made on other services which are being supplied by Internet. Moreover, where competitive IAPs are extended market access, Article VIII and the Telecoms Annex would require that they be given reasonable and non-discriminatory access to the leased circuits they require. Additional commitments on the behaviour of major suppliers of telecoms services were assumed by the great majority of participants in the basic telecommunications negotiations. The regulatory principles embodied in the "Reference Paper" which has been scheduled by the great majority of participants in the basic telecoms negotiations govern anti-competitive cross-subsidization, the terms of interconnection, the misuse of information, licensing criteria, transparency and other matters relevant to the prevention of abuse of dominant market positions.

Electronic Supply of Services

10. The great bulk of commerce and of international trade conducted over the Internet is the sale of services. In this section we consider the supply of a service to the customer in digitised form – in which the entire transaction takes place electronically. It is impossible to quantify the value of services sold in this way because, in addition to the well known inadequacies of services statistics, most transactions carried out over the Internet go unrecorded: but the vast scale of electronic delivery of services can be appreciated from the mere fact that currency and securities trading is overwhelmingly done electronically. There are many services which can be supplied electronically, but there are some in which electronic delivery is especially important: they include financial services, telecommunications, the entertainment sector and many professional services.

11. Electronic banking and securities trading have long been the norm in transactions between financial institutions and are increasingly becoming so between businesses. Most of the world's major securities and derivatives exchanges provide electronic transactions facilities and the settlement and

clearing of financial transactions are also done electronically. On the other hand, on the retail level, only relatively few of the world's major banks yet provide on-line banking services. This situation is expected to change rapidly, as the cost of handling a transaction at a traditional branch is estimated to be more than a hundred times greater than the cost of using the Internet. In the insurance sector, on-line sales and service are expected to replace most traditional sales through agents or telephone services. Various forms of financial advice and personal services are well adapted to electronic delivery, but the speed of their development may depend on the security and privacy of financial transactions over the Internet.

12. Telecommunication services are an essential part of the infrastructure for electronic commerce, and GATS commitments on telecommunication services have great value in ensuring access to the infrastructure. Internet, while originally viewed as computer service, has with the convergence of telecoms and computer technology become widely considered a telecoms service. They are also among the services which may be delivered across the Internet. According to the understanding on the technological neutrality of basic telecommunications commitments, commitments on voice, fax and data, for example, would include the provision of such services over the Internet unless it is stipulated to the contrary in the schedule. The relevance of the Annex on Telecommunications and the Reference Paper on regulatory principles has been referred to above.

13. Professional services, including all forms of consultancy, accountancy, medical and education services are increasingly available on-line. Any information-based service is likely to lend itself to electronic delivery, and the accessibility of the Internet to individuals and small firms is likely to increase the ability of self-employed professionals and small businesses to compete in international markets.

Electronic Commerce as a Form of Distribution Services

14. The preceding section dealt with products which can be delivered electronically. It is important to distinguish from this a second form of electronic commerce in which goods, and services which cannot be delivered electronically, are ordered and paid for on-line but are delivered to the customer in tangible form. The electronic stage of such transactions is a form of distribution services – wholesaling or retailing – and one which is growing very rapidly. By far the greater part of these transactions hitherto have been business-to-business; companies have increasingly ordered and purchased their supplies on-line. However, electronic shopping by ordinary consumers is also increasing. On-line supermarkets have been followed by specialised retailers and wholesalers of products of all kinds. Commitments on distribution services under the GATS include electronic distribution, meaning the right to offer and sell goods and services on the Internet.

15. From a legal point of view the purchase of goods in this way is no different from ordering and paying for them by telephone or mail. If the goods ordered have to be imported, the importation will be subject to whatever tariff bindings and other GATT obligations are applicable. Tariffs applied to imported goods or services in this context are not covered by the standstill on customs duties on electronic transmissions which was agreed at the second Ministerial Conference in May 1998.

16. Services which cannot be delivered electronically are offered for sale and purchased on the Internet on a large scale. For example, travel and hotel reservations, and the sale of airline tickets, are large and rapidly growing forms of electronic distribution. The selling and marketing of air transport services and computer reservation system services are two of the sub-sectors of the air transport industry which are covered by the GATS and they are very largely dependent on access to the Internet.

17. It should be borne in mind that a commitment on distribution services is not a commitment to allow the supply of any service or good which may be offered for sale over the Internet. It is obviously possible to buy on the Internet goods whose importation is not permitted and services for which there is no market access commitment in the country of the buyer. In the same way, a fully liberal commitment on basic telecommunications confers rights to supply telecommunications services; it is not a commitment to allow the supply of any service – banking services for example – which can be provided by telephone.

Exceptions Provisions

18. Article XIV of the GATS contains general exceptions which are obviously relevant to electronic commerce. The Article permits Members to take any measure they think necessary to achieve certain public policy objectives, including the protection of public morals and the maintenance of public order. Since both forms of electronic commerce – the supply of services online and the electronic retailing and wholesaling of goods and services – depend to some extent on the security and privacy of communications, it is worth noting that Article XIV(c) permits Members to take any necessary measures to protect the privacy of the personal data of individuals and the confidentiality of individual record and amounts, and to prevent deceptive and fraudulent practices.

Article XIV *bis* provides similar legal cover for actions a Member considers necessary to protect its essential security interests. Like other such exceptions provisions, Article XIV is subject to a safeguard against abuse in that measures taken under it may be challenged by other Members on the ground that they are not necessary, or are more restrictive than necessary, to achieve the stated objective. Nor should they be applied in a manner which constitutes unjustifiable discrimination between Members or a disguised restriction on trade in services.

Agreement on Trade-Related Aspects of Intellectual Property Rights

Introduction

19. The expected growth of electronic commerce is closely linked with the growing importance of intellectual property. Indeed, much of the trade on the Internet and other electronic communications networks involves selling or licensing of information, cultural products and technology protected by intellectual property. Selling books has become one of the most popular forms of commerce on the Internet, and selling other products such as sound recordings is growing. While many books, CDs or films ordered over the Internet are still delivered by mail, the Internet is increasingly used also as a means of delivering products to customers. This is common as regards news, articles and other commercial and technological information, and a growing share of computer software is sold this way. Once the capacity of the networks and end-users' equipment allows, communications networks will increasingly provide a vehicle to deliver products such as sound recordings and films directly to homes.

20. While this note mainly deals with issues concerning trade on electronic communications networks, it should be noted that intellectual property plays an important role also in promoting the development of the infrastructure of such networks, i.e. software, hardware and other technology that make up information highways. It provides protection to the results of investment in the development of new information and communications technology, thus giving the incentive and the means to finance research and development aimed at improving such technology. In addition, a functioning intellectual property regime facilitates transfer of information and communications technology in the form of foreign direct investment, joint ventures and licensing. The TRIPS provisions on intellectual property are designed to contribute to the promotion of technological innovation and to the transfer

and dissemination of technology to the mutual advantage of producers and users of technological knowledge.³

21. Information and communications technology will affect the way intellectual property is administered and managed. It is increasingly used to improve the efficiency of, and cooperation between, national, regional and international intellectual property offices (patent and trademark offices). This will benefit the clients of these offices in the form of better and faster services, including shorter periods in acquiring intellectual property rights and better access to industrial property information⁴. One of the basic objectives of the patent system is to facilitate the dissemination of technological knowledge. Communications networks can be used to facilitate access from anywhere in the world to the valuable and extensive technological information contained in patent documents. As regards copyright and related rights, collective management organizations have traditionally been among the first to utilize new information technologies in licensing the use of international repertoires of protected works and distributing revenues to numerous right holders in different countries. Communications technologies will enable collecting societies to improve the services they provide both to right holders and users of protected materials. Electronic copyright management systems may make individual licensing and distribution of revenue feasible in areas where the vast numbers of works, right holders and users have until now made collective arrangements necessary.

22. The basic notions and principles of intellectual property have survived over a century of rapid economic, social and technological change. The traditional objectives of the system as reflected in the current international norms would appear to remain valid even in "cyberspace". This would suggest that implementation of the TRIPS Agreement would have an important role in facilitating the development of electronic commerce and the necessary infrastructure. On the other hand, technological and economic developments have often prompted adjustments to existing types of intellectual property rights, and the creation of new types of rights, as well as giving rise to new problems of enforcement. In the same way the development of global electronic networks has raised new types of issues that may need to be addressed at the national and/or international level. The following discusses some of these issues that have been raised in the areas of copyright and related rights, and trademarks and other distinctive signs. The list of issues referred to is not intended to be exhaustive, and new issues are likely to emerge as more experience is gained with trade over communications networks.

23. Among the issues that have arisen are the problems that concern the difficulties in determining the applicable law in certain situations. While the following discussion is limited to copyright and related rights, and trademarks, it should be borne in mind that these problems reflect a more general legal question that relates to the "borderless" nature of the Internet, and to the difficulty of determining the applicability of territorially based laws and regulations to activities carried out on a global network. Finding workable solutions to these issues in the area of intellectual property, as well as in other areas, will require increased cooperation among governments and within the private sector.

Copyright and related rights

24. Digital technology has already fundamentally changed the way that protected materials are created, produced and used. It has also led to the emergence of new types of products, notably computer programs and databases. The Internet and other electronic networks now provide a new means for the distribution of protected materials. However, secure conditions for such distribution are a precondition for these new possibilities to be fully exploited. Copyright owners will be reluctant to

³ See Article 7 of the TRIPS Agreement.

⁴ Some intellectual property offices already exchange information over the Internet. In March 1998, the Assemblies of the Member States of WIPO approved the establishment of a Global Information Network for intellectual property offices (WIPONET).

put their protected materials on the net as long as they fear that the Internet may lead to uncontrolled dissemination and copying of phonograms, films, computer programs and other protected materials, which will seriously undermine copyright industries. Also service providers and others involved in the process of making materials available to end users will need clear rules to be able to plan how to develop their services.

25. The TRIPS Agreement obliges WTO Members to comply with the substantive obligations of the Paris Act of 1971 of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The traditional principles of international copyright law as contained in the Berne Convention, originally concluded in 1886 and updated through periodic revisions, have proven to be sufficiently flexible to have been able to accommodate new categories of works, and ways of creating and using protected materials in the digital environment. The right of reproduction, provided under the Berne Convention and incorporated by reference into the TRIPS Agreement, continues to be a central element of protection even in the digital environment. The TRIPS Agreement reinforces the application of that and other rights contained in the Berne Convention through more effective enforcement, monitoring of compliance with the obligations, and application of the dispute settlement mechanism.

26. In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies or adds certain specific points. As regards digital technology, it confirms that computer programs, whether in source or object code, must be protected as literary works, and clarifies that databases and other compilations of data or other material must be protected as such under copyright even where the databases include data that as such are not protected under copyright. On-line communications have given rise to certain new issues, which have been addressed in two new WIPO treaties on copyright matters that were adopted, under the auspices of WIPO, in December 1996 (see Annex for details).

27. When discussing the impact of digital technology on copyright and related rights, we should not lose sight of the fact that the most immediate risk faced by copyright industries is the production and distribution through traditional means of pirated sound recordings, films, software, CD-ROMs, etc. Such products have become increasingly vulnerable to piracy, given the ease and diminishing costs of digital copying, and the fact that digital information can be copied over and over again without any loss of quality. In this respect, the TRIPS Agreement aims to ensure that effective means are available to right holders to enforce their intellectual property rights. The Agreement also provides for rental rights in respect of computer programs and phonograms, and in certain situations, cinematographic works, given that uncontrolled rental of such works, whether in digital or analogue form, may lead to widespread unauthorized copying. In addition, WTO Members have agreed to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. Experience in the fight against traditional forms of piracy, and increased cooperation between agencies responsible for enforcement, will also help to prepare for action against possible new forms of online piracy.

28. While we should not underestimate the challenges posed by global communications networks to the regulation and enforcement of copyright and related rights, we should bear in mind the great new opportunities such networks provide. For consumers, the Internet may give wider choice of information and cultural products irrespective of their place of residence, and for authors, publishers and producers, it may lower the costs of and barriers to entering the global market. Transaction costs and transaction times are likely to fall rapidly. However, this positive scenario requires that governments and the private sector are able to find and implement a proper mixture of regulatory, contractual and technological measures, and to improve public awareness of the role of copyright and related rights in the information society.

Trademarks and other distinctive signs

29. Protection of trademarks and other distinctive signs aims to stimulate and ensure fair competition between producers and to protect consumers by enabling them to make informed choices between various goods and services. In electronic commerce, brand recognition is essential for suppliers of goods and services. For consumers who buy products and services at a distance, it may be increasingly necessary to rely on the reputation attached to trademarks and other distinctive signs, as they do not have an opportunity to establish a personal contact with the seller of those products, or to inspect the products and services before buying them.

30. The TRIPS Agreement provides that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be capable of constituting a trademark. In order to obtain protection, a company generally registers a trademark in each country in which it operates.⁵ Registration is made in respect of specified goods or services. The owner of a registered trademark has an exclusive right to prevent others from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered, if such use would result in a likelihood of confusion. The Agreement contains additional obligations in respect of well-known marks: the registration of a mark must be refused or cancelled, and its use must be prohibited, if it conflicts with a well-known mark.

31. The use of trademarks on the Internet raises a number of questions. Under what circumstances and in which jurisdiction(s) does such use of a mark constitute an infringement of a registered trademark? If the use is considered to constitute an infringement in one country, what remedies should be available, in particular if the transmission originates in another country? Under national laws, use of a trademark may be a condition for registration, or for maintenance of registration; does the use of a trademark on the Internet satisfy such requirements, and if so, in which countries? Identical or similar trademarks may be owned by different persons in different countries; the use of such trademarks on the Internet by one or more of the right owners may lead to conflicts. Is the current territorially-based system of registration of trademarks sufficient for the emerging borderless electronic marketplace?

32. A specific issue that has received much attention concerns the relationship between trademarks and Internet domain names.⁶ Some of the problems stem from the fact that under each top-level domain name there can be only one of each particular second-level domain name, which are usually allocated on a first-come, first-served basis within each top-level domain name. On the other hand, the same trademarks may co-exist in different categories of products or services, and in different territories. In addition, there have been problems such as "warehousing" of second-level domain names corresponding to well-known trademarks for the purpose of selling them to trademark owners. At the same time, easily memorable domain names have themselves become commercially valuable assets, akin to intellectual property. One of the questions that has arisen is under what circumstances and under which jurisdiction(s) the use of a domain name that is identical or similar to

⁵ It is possible to obtain protection for trademarks in more than one country through certain regional trademark offices. The Madrid Agreement Concerning the International Registration of Marks provides for the international application of registration of trademarks at the International Bureau of WIPO.

⁶ Domain names are part of the Internet addressing system, which consists of two elements. Each computer has its Internet Protocol address, a numeric identifier that looks very much like a telephone number. These numeric identifiers are paired with domain names, user-friendly substitutes for numeric identifiers. A domain name typed into a computer is automatically converted into the corresponding numeric identifier. For example, the WTO's website can be found at <http://www.wto.org>. The prefix <http://www> indicates the protocol to be used and that the site is located on the World Wide Web. The domain name must have at least two parts: a top-level domain name (TLD), in this case ".org", and a second-level domain name (SLD), in this example "wto". Anyone from any country can register in the main generic TLDs (gTLDs, also called international TLDs), currently .com, .org, and .net. The most popular of them is .com, which is reserved for commercial entities. Two-letter country code TLDs, which use the ISO 3166 country codes (e.g. .ch for Switzerland), are reserved for entities in a given country.

a trademark may constitute a trademark infringement, and what remedies should be available for the trademark holder. Further consideration is needed to determine whether the above mentioned problems call for adaptations to the international protection of trademarks. Conflicts between trademarks and domain names have brought to the fore also the more general question, not limited to intellectual property, of how best to develop the governance of the domain name system.⁷

33. While the above discussion has focused on trademarks, it should be borne in mind that similar issues may arise in respect of other distinctive signs protected by intellectual property rights. As regards geographical indications, the TRIPS Agreement requires that interested parties must have the legal means to prevent the use of indications which mislead the public as to the geographical origin of the good, and use which constitutes an act of unfair competition. Additional protection is provided for geographical indications for wines and spirits. Other relevant categories of distinctive signs include state emblems and trade names.

Agreement on Government Procurement

34. The development of electronic commerce is likely to have important implications for government procurement and international rules on government procurement. The increased use of electronic technologies is transforming government purchasing procedures as the way is opened to electronic advertising, qualification, tendering, selection, payment and, in certain cases, delivery. Quite apart from making traditional procurement procedures and practices more efficient, electronic tools could open up new ways of conducting procurement, for example through electronic qualification procedures that would facilitate selective tendering, the tendering of framework contracts and the selection of off-the-shelf products from electronic catalogues. At the same time, government use of electronic commerce faces many of the same challenges as private use: ensuring data privacy and security, interoperability of systems, and resolving legal issues such as the acceptance of digital signatures and electronic receipts.

35. While a number of WTO Members – developed, in transition and developing -- are seeking to harness electronic means of communication for the purpose of making public procurement procedures more efficient, they are at differing stages in this process. Some have yet to begin implementation; some others have, in whole or in part, adopted information technology, in particular the Internet, for publishing notices on procurement opportunities; some have gone further in also enabling tender documents to be ordered and maybe delivered through such electronic means; and some have already initiated pilot projects by which as much of the procurement process as possible, including all communications between purchasing entities and tenderers, is conducted electronically. The stage reached within individual countries often varies according to entities, contract values and the types of products or services being procured.

36. The main WTO rules that apply to government procurement are contained in the Agreement on Government Procurement (GPA) to which 26 WTO Members are signatories.⁸ Article XXIV:8 of the GPA foresees consultations, and if necessary, negotiation of modifications to the Agreement as the use of information technology in government procurement develops further. The consultations should ensure, in particular, that: (i) the use of information technology promotes the aims of open,

⁷ The relationship between Internet domain names and trademarks has been addressed in two recent initiatives to develop the Internet domain name system, namely a Memorandum of Understanding on the Generic Top-Level Domain Name Space of the Internet Domain Name System, signed in Geneva on 1 May 1997, and a Statement of Policy on "Management of Internet Names and Addresses", published by the United States Department of Commerce on 5 June 1998. Referring to this statement of Policy, WIPO announced on 8 July 1998 that it will undertake an international process to develop recommendations concerning the intellectual property issues associated with Internet domain names, including domain name dispute resolution.

⁸ Canada; European Community and its member States; Hong Kong, China; Israel; Japan; Korea; Liechtenstein; Netherlands with respect to Aruba; Norway; Singapore; Switzerland; United States

non-discriminatory and efficient government procurement through transparent procedures; (ii) contracts covered under the Agreement are clearly identified; and (iii) all available information relating to a particular contract can be identified. This provision of the GPA further states that when a Party intends to introduce innovations, it shall endeavour to take into account the views expressed by other Parties regarding any potential problems.

37. Furthermore, Article XXIV:7(b) and (c) of the Agreement calls for negotiations on improving the Agreement and extending its coverage not later than the end of 1998.

38. As preparation for these negotiations, the Parties have been reviewing the Agreement following a decision to this effect contained in the report of the Committee on Government Procurement to the Singapore Ministerial Conference in 1996 (GPA/8). In the context of a review item on simplification and improvement of the Agreement, the Committee has been carrying out work on information technology since February 1997. This work includes consideration of possible amendments to the provisions of the GPA to reflect recent developments in information technology and examination of whether procuring entities should have the option of using electronic means of publication and communication instead of hard copy ones and also whether the minimum periods that should be allowed to enable suppliers to bid could be reduced to reflect the speed of electronic communication. At its meeting held on 25 June 1998 the Committee agreed to a target of the third Ministerial Conference for the completion of the negotiations on the simplification and improvement of the Agreement (GPA/M/9).

Working Group on Transparency in Government Procurement

39. The Working Group on Transparency in Government Procurement was established by the Singapore Ministerial Conference in 1996 "to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement". Since November 1997, the Group has been pursuing its discussion of the issues before it and, in the context of its discussion of "other matters related to transparency", the Group has been addressing the implications for transparency of the application of information technology to government procurement. It has been suggested in the Working Group that a balance should be found whereby a transparency agreement would not constitute an unnecessary barrier to progress in the area of information technology and would accommodate the increasing use of information technology in government procurement in Members, while ensuring that, because of the lack of uniformity among countries' stages of development in this area, any requirements for use of information technology in government procurement should be optional and that the use of information technology tools should not undermine the basic transparency principle of guaranteeing access to information for all. It has also been suggested that the development of tools and provision of equipment for the application of information technology was an area that would fall within the scope of technical cooperation activities under an eventual transparency agreement.

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

40. In the area of customs valuation, the WTO Committee on Customs Valuation adopted, at its meeting of May 1995, the Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment, which had been originally adopted by the Tokyo Round Committee in 1984. This Decision applies in the case in which a carrier media bearing software, i.e., the tape or diskette containing data, is imported, and provides Members with two options: it allows them to levy duties on the basis, either of the value of the carrier medium (which is negligible), or of the value of the carrier medium and the value of the software (which is usually high). Whichever practice is adopted has to be applied on an MFN basis and notified to the Committee.

Ministerial Declaration on Trade in Information Technology Products

41. The Ministerial Declaration on Trade in Information Technology Products, referred to commonly as the Information Technology Agreement (ITA), sets out to eliminate tariffs and other duties and charges on a wide range of information technology products by the year 2000. The products concerned are identified in the Declaration and, in general, fall under six groups, viz., computers, telecommunication equipment, semiconductors, semiconductor manufacturing and testing equipment, software and scientific instruments. These products form the physical infrastructure of electronic commerce. Forty-four participants in the Ministerial Declaration have submitted their schedules of concessions on these products and will reduce their tariffs accordingly.

Trade Facilitation

42. Following the mandate by Ministers in Singapore to undertake exploratory and analytical work, drawing on the work of other relevant international organizations on the simplification of trade procedures in order to assess the scope of WTO rules in this area, discussions are on-going in the Council for Trade in Goods. These discussions encompass the rôle that electronic commerce has in facilitating the cross-border movements of goods and services, particularly within the transport sector and in the context of customs administration. Information-technology-based management of data which is received, manipulated and sent electronically by traders, government authorities, and other participants in the trade transaction process, bears considerable potential for savings in costs and time, both for governments and for importers and exporters, and may enable many small and medium-sized companies to engage for the first time in international transactions. It is widely understood that information technology is an essential tool to support the modernization and simplification of customs controls and procedures, including the application of risk assessment techniques which would allow selective examination of shipments. Elimination of these "invisible" administrative barriers to entry and cost factors would ensure that the benefits of market-access commitments are fully realized. The current revision process of the Kyoto Convention on the simplification and harmonization of customs procedures (carried out under the auspices of the World Customs Organization) contains numerous references to the use of information technology in customs administration, and will provide guidelines to ensure the application of best practices by customs administrations in this area.

Declaration on Global Electronic Commerce

43. The Ministerial Declaration on Global Electronic Commerce adopted on 20 May 1998, (WT/MIN(98)/DEC/2), has two key elements:

44. First, the General Council is required, by its next meeting in special session, to establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members. The work programme will involve the relevant WTO bodies, take into account the economic, financial and development needs of developing countries, and recognize that work is also being undertaken in other international for a. The General

Council should produce a report on the progress of the work programme and any recommendations for action to be submitted at the Third Session of the Ministerial Conference.

45. Secondly, Members declared that, without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, they would continue their current practice of not imposing customs duties on electronic transmissions. When reporting to the Third Session of the Ministerial Conference, the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.

ANNEX

On-line communications and the new WIPO Treaties on copyright matters

1. Two important new treaties on copyright matters were adopted under the auspices of the World Intellectual Property Organization (WIPO) in December 1996, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The treaties enter into force three months after 30 instruments of ratification or accession by states have been deposited with the Director General of WIPO.⁹ These new instruments are self-standing treaties, which build on the Berne Convention and the TRIPS Agreement, but in some respects go further. The implementation of these new treaties will greatly facilitate the creation of a secure and predictable legal environment that will foster the development of electronic commerce involving online distribution of protected materials.¹⁰

2. The main improvements that relate to the use of works and phonograms on the Internet and other communications networks concern the right of communication, circumvention of technological measures and integrity of rights management information. Authors, performers and phonogram producers enjoy an exclusive right of authorizing the communication or making available to the public of their protected material, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them. These rights cover, for example, on-demand delivery of works over the Internet (Article 8 of the WCT, and Articles 10 and 14 of the WPPT). The treaties recognize the role that technological measures used by right holders have in facilitating effective protection. In order to ensure the effectiveness of such measures, contracting parties to the treaties must provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights, and that restrict acts, in respect of their protected material, which are not authorized by right holders concerned or permitted by law (Article 11 of the WCT and Article 18 WPPT). Individual licensing and collective management of protected materials on the Internet can be facilitated by electronic rights management information that can be attached to digital copies of works and other material. The treaties require contracting parties to provide adequate and effective legal remedies against any person, who, without authority, removes or alters such information or distributes copies of protected material knowing that such information has been removed or altered without authority, and knows or, with respect to civil remedies, has reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by the treaties (Article 12 of the WCT and Article 19 of the WPPT).

3. Both the TRIPS Agreement and the WIPO Copyright Treaty recognize that copyright protection covers compilations of data or other material, which by reason of the selection or arrangement of their contents constitute intellectual creations. In the course of the preparation of the Diplomatic Conference that adopted the aforementioned new WIPO treaties, it was discussed whether there is a need to supplement this by providing additional protection to economically valuable elements of databases that require the investment of considerable human, technical and financial resources but may not benefit from copyright protection. While the Conference did not take any

⁹ The Treaties were open for signature until the end of 1996. There are 51 signatories to the WCT and 50 signatories to the WPPT. At present, two countries have ratified the WCT and one country the WPPT.

¹⁰ Certain issues were not addressed in the treaties but were left to be determined at the national level. These include the issues of online service provider liability and the scope of the reproduction right, i.e. whether transient reproductions that are produced when protected material is communicated over the Internet are covered by that right. These two issues relate to the more general question of which law(s) should apply to the use of protected material on the Internet. The "borderless" nature of the Internet may also make it difficult to determine the "country of origin" of works first published in an electronic form. Draft Article 3 of the Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions concerning the Protection of Literary and Artistic Works to be considered by the Diplomatic Conference (WIPO document CRNR/DC/4) contained a clarification in this respect, but the provision was not included in the final text of the WIPO Copyright Treaty.

action on the draft treaty on this matter submitted for its consideration, the delegations participating in the Conference recognized that databases are a vital element in the development of a global information infrastructure, and expressed their interest in examining further the possible implications and benefits of a sui generis system of protection of databases at the international level. This examination is underway under the auspices of WIPO.
