

METI Proposal on WTO's approach to E-commerce

Towards eQuality:

Global E-Commerce presents a Digital Opportunity to Close the Divide Between Developed and Developing Countries

1. Introduction

This proposal reflects our firm belief that the future of the Internet and e-commerce shall be for the betterment of all people and all nations. E-commerce is, and will become more, vital not only to business, but also to society as a whole. Improving the quality of life of every person in the information society will hinge on the creation of a reliable and stable network system. Our policy goal is to build the confidence of ordinary people (those who would ordinarily have had no contact with the Internet) as well as business towards activities on the Internet. We must create a society which enables everyone everywhere to participate in and enjoy the economic benefits of a global information society.

E-commerce presents opportunities for all consumers and small businesses to obtain easy access to the world market via the Internet. In the past, only large global companies located mainly in developed countries had ready access to and reaped profits from global-scale markets. E-commerce is a new and powerful medium which can help close the digital divide among countries and achieve global "eQuality" in the new world economy. This can only be accomplished if member countries continue to implement legitimate policies which provide a balance between consumer and business profit, locating these within an international e-commerce framework which has been designed to benefit both developed and developing countries. To create the kind of international framework essential in achieving eQuality, this proposal focuses on the trade-related aspects of e-commerce, identifying issues to be addressed and a procedure for doing so in the new WTO round from the perspective of advancing free trade.

II. "E-commerce"

1. The "e-commerce" which this proposal addresses comprises the following transactions¹:

- (1) goods and services transactions whereby goods or services purchased via the Internet are subsequently delivered by non-electronic means;
- (2) goods and services transactions whereby goods and services purchased via the Internet are also

¹ A paper released by the WTO Secretariat (WT/GC/W/90) on 14 July 1998 defines e-commerce as follows in terms of services trade: "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 business 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;
- (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.

In addition, a WTO paper adopted by the Council for Goods includes "trade in goods related to electronic commerce (e.g., computers)" to the definition of e-commerce (G/C/W/158)(26 July 1999).

delivered via the Internet in the form of digitized information flows;

(3) the various types of transactions conditional for (1) and (2) transactions

2. Specific examples of (1) to (3) are as follows:

(1) One typical case is B-to-C e-retailing, which covers a wide range of products from books through music CDs, videos, cars, computers, pharmaceuticals, food products, pet-related goods, sporting goods, home electronics and toys². A variety of business models are also developing swiftly for B-to-B e-commerce—the “procurement hub”³ model, for example, which optimizes raw materials procurement systems, or “one-to-one”⁴ transactions, which bring a business version of Internet shopping for general consumers to the B-to-B market.

(2) While all sectors apart from those where the provision of services in the form of an Internet-based electronic transmission is physically impossible (e.g., transport and distribution) have potential, e-commerce is growing particularly quickly in such sectors as finance, law, accounting, and real estate. In addition to this electronic provision of services, business software⁵, and, in recent years, music and image transmission⁶ as well as electronic books have been gaining momentum. However, as is explained later, considerable debate has arisen as to which WTO discipline should apply to these, GATT or GATS (the digital content transmission classification issue).

(3) For example, the following transactions can be listed: electronic authentication services, Internet access services, other Internet-related services (Web services, bulletin board and chat services, etc.), and sales of e-commerce-related products (computers, etc.).

III. Procedures and issues to be considered

To draw on the results of the considerations of the Work Program on E-commerce currently being conducted under the leadership of the General Council and take these considerations a step further, Japan proposes the following. The Doha Ministerial Declaration, which we would like to call for a new round to be launched, should clearly note the importance of e-commerce in advancing free trade, and also include reference to the establishment of the “E-commerce Committee” (provisional title) under the auspices of the General Council. The new Committee should follow the progress of negotiations at the various Councils, providing guidance to them where appropriate, while also conducting its own considerations centered on cross-cutting issues beyond the mandates of individual Councils. The Committee should examine the issues listed below over the year following the launch of the new round.

² For example, Amazon.com, which handles Internet mail orders for not only books but also a broad range of other products, and Dell Computers, which has succeeded with its Internet-based built-to-order system, are particularly well-known

³ The most typical example is the “Covisint” site set up by the Big Three, in which Toyota also announced that it would participate. The site is a massive Internet market intended to allow the more efficient and rational procurement of car parts and related services which these car manufacturers need for their car assembly process.

⁴ Often given as a representative example is Staples.com, developed by the US office-supplies major Staples to provide office supplies through the Internet. In the same field, another success story well-known even in Japan is Askul, an Internet sales company set up by the Plus Corporation, a major stationery manufacturer.

⁵ Services in the form of application service providers (ASP) have boomed in recent years in the B-to-B market, leasing out accounting, and other business software over the Internet in return for monthly rents.

⁶ Major record companies are also getting into the music transmission business, spurred by the launching of operations by Sony Music Entertainment at the end of 1999. However, much remains to be done before music transmission can really take off, including the further development of telecommunications infrastructure. At the same time, with the emergence of the new MP3 compression technology (compression of music files to one-tenth to one-twelfth of their original size), future

1. Liberalization of e-commerce related services

E-commerce will open the door to international trade infinitely less encumbered than in the past, and as such, has the potential to become an invaluable tool to greatly help trade expansion. As borderless e-commerce entails the cross-border provision of telecommunications, settlements, distribution and other related services, market access also needs to be secured for these related services.

The US and the EU have attempted to define the scope of “e-commerce clusters” (or an “e-commerce value chain” in their proposals, listing up service sectors such clusters should embrace⁷. From the perspective of promoting the liberalization of trade in services closely related to borderless e-commerce, we supports the idea of selecting certain services as the “e-commerce cluster”⁸, in a manner of delimiting this to an appropriate scope in terms of facilitating the negotiations, but considers that concrete delineation of scope could be more realistically handled by the E-commerce Committee established in the Doha Ministerial Declaration. The Committee would select the services needed as a basis for cross-border e-commerce in both goods and services, as well as the most vital among those services provided in cross-border e-commerce, and define them as the “e-commerce cluster”⁹.

2. Consideration of domestic regulatory principles

(1) Work in the new round

Progress with liberalization of the services conditional for e-commerce (e.g., specific commitments) will push e-commerce ahead still further and consequently expand trade. At the same time, the basic unit of composition in contemporary society is still the sovereign state, and states continue to introduce a range of

technological innovations will bear observation.

⁷ The US and the EU have sought to group services in a form similar to clusters. See S/CSS/W/30(18 Dec. 2000) in regard to the US, S/C/W/183(30 Nov. 2000) for the EU paper. The US lists not only those telecommunications services (2C) and computer-related services (1B) which are most deeply related to e-commerce, but also a wide range of other services, including professional services (1A), financial (7) and transport services (11). The US also states as follows: “In addition to basic and value-added services, other key services are likely to be integrated into electronic networks in the near future. As a result, the market access commitments in telecommunications infrastructure could be substantially enhanced by market access commitments with regard to complementary services that could be negotiated on a sectoral basis. These include distribution services; computer and related services; advertising services; express delivery services; and certain financial services. Such services are some of the most obvious beneficiaries of efficiency gains and global reach provided by electronic networks . . .”

⁸ “Electronic Commerce: A Cluster Approach to the Negotiation of Input Services” (TD/TC/WP(2000)33/REV1)(15 Feb. 2001), produced by the OECD Trade Committee, recognizes the difficulty of delimiting a cluster, but also suggests that where this is strictly for the convenience of services negotiations, an appropriate cluster scope which is neither too small nor too large does exist (p. 12): “The central, and perhaps most difficult issue to resolve is that of delimiting a cluster: which services are to be considered essential among numerous services that are undeniably important? Some basic services involved in an Internet-based commercial transaction seem immediately obvious: telecommunications services, banking services, computer and related services and delivery services (postal and courier). Alternatively, a more extended cluster could be contemplated, covering these services as well as, for example, one or several of the following: advertising, legal, market research, photographic, web-site design, distribution. Again, the question arises: which of these services are the most relevant?” (p12)

“Bearing in mind that the greater the number of sectors making up the cluster, the less meaningful the cluster approach becomes, “drawing the line” for an e-commerce inputs cluster might best be done to include just the strict minimum of essential “core” input services.” (fn.32)

⁹ In considering delimitation of e-commerce cluster scope, the E-commerce Committee could make use of analyses conducted by the OECD Trade Committee and other international institutions. The OECD Trade Committee has already been investigating the impact on e-commerce development of service sectors closely related to e-commerce. For example, see “Electronic Commerce: A Cluster Approach to the Negotiation of Input Services” (TD/TC/WP(2000)33/REV1)(15 Feb.

domestic regulations to achieve their respective policy goals. These domestic regulations could potentially obstruct cross-border e-commerce and restrict trade, but at the same time, many such regulations have legitimate policy objectives and are not designed for protectionist ends.

Where such domestic regulations contravene Articles 16 (Market Access) and 17 (National Treatment) of the GATS, they are clearly GATS-inconsistent, with exemptions provided only for those measures addressing the policy objectives listed in Article 14 (General Exceptions) and satisfying the requirements provided in its chapeau.

However, domestic regulations can also conflict with other elements of the GATS. According to Article 6.5, “In sectors in which a Member has undertaken specific commitments, ... the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which does not comply with the criteria outlined in subparagraphs 4 (a), (b) or (c) [i.e., based on objective and transparent criteria, and not more burdensome than necessary to ensure the quality of the service] and could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made”. This obviously holds even for domestic regulations which do not contravene Articles 16 and 17. Article 6.4 also directs the Council for Services to create the same domestic regulatory principles for all service areas, including those in which specific commitments have not been made. The Working Party on Domestic Regulations, a group under the auspices of the Council, has been considering these domestic regulatory principles including ones for professional services. (The work on accounting services were completed.) The E-commerce Committee should consider domestic regulatory principles for e-commerce, as well as criteria for determining in light of these¹⁰.

(2) Deliverables at Doha

Principles could be included in the Doha Ministerial Declaration to ensure objectivity, transparency and necessity (i.e., “no more burdensome than necessary”) in domestic regulations related to e-commerce, while the Declaration could also affirm that the E-commerce Committee should work toward the formation of the additional principles and the criteria for determining in light of these as mentioned above.

3. Classification of digital contents¹¹

2001).

¹⁰ This is basically clarification of the provisions in GATS Articles 6.4 and 6.5, but “transparency” and “necessity” standards can also be found in goods-related agreements such as the GATT and the TBT. Given the stockpile of theories and precedents in regard to the standards stipulated under these agreements, it would seem appropriate to organically build such existing work into the consideration process. It is why the work to consider principles on domestic regulations should be characterized as cross-cutting. And E-commerce extends beyond GATS provisions (which address only those services necessary for cross-border e-commerce) to include international transactions which fall under the GATT and Internet-based intellectual property rights infringements to which the TRIPs Agreement applies. This fact also proves a cross-cutting nature of this work.

¹¹ This issue is explained as follows in the progress report under the WTO Work Program on E-commerce submitted by the Council for Services to the General Council (S/L/74, 27 July 1999): “Some delegations were of the view that all electronic deliveries are services and could not see any non-services products, which could be delivered electronically. Other delegations suggested that it still remained to be clarified whether there were a number of electronically delivered products which should be classified as goods and therefore subject to the GATT rather than the GATS. . . . It was also

(1) Work in the new round

Our position on the above issue is that in those cases where the recording and cross-border transaction of digital contents via carrier media falls within GATT disciplines, it is appropriate that those same contents should still be considered under the GATT when transmitted via the Internet, with unconditional recognition given to MFN and national treatment and the total prohibition of quantitative restrictions. A proposal recently presented by Singapore¹² addresses this point by dividing digital contents supply into two stages, “transmission” and “immediate consumption or storage”, and designating the former as “services” (whereas the latter is simply consumption). It asserts that software and electronic books, which have to date been traded through media carriers as goods, should be given the same national treatment and market access as goods, albeit under the GATS.

We believe that if market access in the form of unconditional MFN, national treatment and the prohibition of quantitative restrictions is to be recognized, even under the GATS, the “goods or services” argument over digital contents could be rendered meaningless¹³. If member countries should agree in advance to ensure the GATT-level market access, as Singapore argues¹⁴, the option of applying GATS disciplines should not be denied. However, it takes further consideration concerning a concrete process and feasibility of reaching an agreement in this way. Moreover, Software and books are often presented as representative examples of digital contents which should be covered by “GATT-level disciplines” because they have traditionally been traded as goods, but the scope should not be limited to these^{15,16}. As long as the digital contents in question are at least to fall under the GATT where they are recorded on carrier media, and traded cross-border, such contents should also receive GATT-level treatment when distributed through the Internet¹⁷. For this purpose, it could be natural to think of making full use of the framework of GATT as the

suggested that there might be categories other than goods and services for classifying certain electronically delivered products; in some cases a downloaded product might be regarded as neither a good nor a service.” (p5)

¹² This proposal on e-commerce was presented by Singapore to the regular meeting of the General Council on 8 May (JOB(01)55, 26 April 2001).

¹³ Consider that in the B-to-B market in recent years, a growing number of transactions—ASP services, for example—have been not simply distributing completed software over the Internet, but in fact customizing this software for Internet distribution in line with customer needs, blurring the line still further between goods and services trade.

¹⁴ The Singapore proposal argues as follows: “If these products [which were traditionally treated as goods] when being delivered online come under the category of services, it is important that they should be accorded treatment no different from the physical counterparts, even though national treatment and market access are subject to specific commitments as scheduled under the GATS. In this respect, a probable solution could be an agreement among Members that products such as software would be accorded full national treatment and market access even though the products when being delivered online can come under the category of trade in services.” (Para. 16)

¹⁵ For example, we cannot accept the idea that the GATT-level treatment is given only to those digital contents which fall within the ITA, as Singapore hints. Limiting the coverage of GATT-level disciplines in such a manner while stipulating that “all digital contents fall within GATS disciplines” would create a problematic situation where “GATT-level treatment” is not extended to the remaining digital contents (including those products which have not at this point been commercialized and released on to the market).

¹⁶ Accordingly, where the recording of music and images on CDs, video and other media and the subsequent cross-border trading of these recordings is to be covered by GATT disciplines, it could be argued that the same market access should be provided for these contents when they are distributed via the Internet.

¹⁷ Related to the question of whether digital contents delivered via the Internet are goods or services is the issue of where these contents can be positioned in terms of tariff (Harmonized System codes) or service (Central Product Classification) classification. One function of HS classifications is to help collect tariff revenues at customs, and classifications are structured according to the carrier media (CDs, tapes, etc.), not according to the content. Digital contents are also no more than digital data at least until they have crossed borders and been downloaded on to a terminal, and are not embodied in any medium. It has therefore been argued that as digital contents cannot be placed within HS codes, they are not goods. On the other hand, digital contents such as software and electronic books do not seem to fit under any particular CPC category (one theory is that software comes under CPC842, but while the language describing this

best option.

In any case, this issue will need to be considered further by the E-commerce Committee even after the new round has commenced.

(2) Deliverables at Doha

Recognizing the slim likelihood of reaching a decision on this issue before the Doha Ministerial, the Doha Ministerial Declaration should suggest extending the tariff moratorium on the electronic transmission of digital contents until the next Ministerial, adding the condition that this not prejudice the positions of member countries on the issue.

4. Intellectual property rights issues

(1) Trademarks

Now that international guidelines on trademark use on the Internet is very much likely to be adopted by the next WIPO General Assembly and the Paris Union Assembly (September 2001), it could be contemplated that the same kind of policy also be built into the TRIPs Agreement to create a balance between the use of trademarks in borderless cyberspace and its impact on the one hand and the frameworks consisting of sovereign states granting trademark rights on the other.

The above guidelines stipulate that even in cases where Internet-based trademark use infringes the trademark rights of a certain member country, where the party claiming about an infringement of trademark rights in the member country in question advises of the infringement to an infringing party in another member country, (1) the infringing party shall be not be liable for the infringement prior to advice thereof where the use of the trademark in question is based on the intellectual property rights on another member country, and where the trademark has not been acquired or used in bad faith; and (2) the infringing party shall not be also liable after receiving advice, as long as the party immediately takes reasonable measures to eliminate the commercial effect and confusion in the member country where the infringement has occurred. These rules merit attention as an effort to adjust trademark right concerning trademark right infringements occurring in cyberspace taking into consideration the borderless nature of the Internet.

While the guidelines are not legally binding, we intends to work actively toward resolving the trademark problems arising from transactions in cyberspace, taking into account WIPO directions following its adoption of the guidelines, and will push for considerations to be undertaken on their implications for the

category could cover services related to software use, it does not cover the actual software), making it difficult to define these as services. It is in fact incorrect to determine the GATT or GATS positioning of digital contents according to whether they can be interpreted as falling into any particular category within the HP or CPC codes. Where digital contents transmitted cross-border electronically were determined as falling under GATT disciplines, the only problem which would arise from being unable to identify an HS code to which digital contents clearly belong would be in relation to GATT Article II (Concession Schedules), but as the imposition of duties on digital contents is hardly a viable prospect, selecting an HS code would still seem a fruitless exercise, and, in fact, where the permanent moratorium on the electronic transmission of digital contents for which the US has been pressing also came into being, meaningless.

TRIPS Agreement in conjunction with WIPO and other international institutions. More specifically, the E-commerce Committee should undertake this work in the course of the new round together with the TRIPS Council.

(2) Copyrights and related rights

Recognizing the urgency of establishing laws for internationally harmonized digital copyrights and related rights, WIPO achieved this by adopting the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT) in 1996, and Japan has almost completed the development of domestic legislation in response to the two treaties¹⁸.

While bearing in mind an appropriate balance with the Berne Convention, which has already been built into the TRIPS Agreement, the E-commerce Committee should work with the TRIPS Council in the course of the new round to amend the agreement to build in the new WIPO treaties outlined above.

(3) International jurisdiction and applicable laws

While this point has been debated by the Hague Conference on Private International Law, WIPO and various other fora, given that the dissemination and development of e-commerce is expected to boost the number of IPR-related suits in the years ahead, the issue should also be actively discussed as part of the WTO's effort to evolve the TRIPS Agreement a step further.

In terms of international jurisdiction, the Hague Conference, which is spearheading discussion on the issue, has been considering a "Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters". Diplomatic conferences will be held in June 2001 and early 2002 to adopt the convention. Depending on whether or not, it will be successfully adopted, it would be suggested that the E-commerce Committee work with the TRIPS Council to actively consider the issue, and, bearing in mind the results of work by the Hague Conference on international jurisdiction, go on to discuss applicable laws, which have not been adequately explored to date, and thus work toward the formulation of rules in the future.

5. Improvement of market access for e-commerce-related products

The ITA formed at the Singapore WTO Ministerial in December 1996 aimed to eliminate tariffs on information technology (IT) products by 2000. The IT products in question includes those products vital to the conduct of e-commerce, such as computers, telecommunications equipment, recording media and

¹⁸ The main feature of the treaties is the establishment of the "right of authorizing any communication to the public" (WCT Article 8) and the "right of authorizing the making available [of] to the public" (WPPT Article 14). The provision of publications via the Internet is a three-stage process comprising: (1) accumulation of the publication in a server as digital data; (2) connection of the server to a network; and (3) access by the public to the server and subsequent use of the transmitted publication. Establishment of the "right of authorizing any communication to the public" and the prior stage to this, the right of "authorizing the making available [of] to the public", has allowed the examination of copyright infringements at the stage where the server has been connected to the network and the digital publication has been made available for use by the public. In other words, the issue is no longer the traditional means of copyright infringement, namely reproduction.

software. Among the products not covered by the ITA are certain items essential to e-commerce operation. Recognizing that the reduction and elimination of tariffs on IT-related products will contribute to the promotion of e-commerce¹⁹, we suggest that market access be further improved for these products (in terms of products and countries covered). This would obviously necessitate sensitivity to the concerns of developing countries in determining product coverage. This issue should be also addressed within a relevant framework of tariff reductions and eliminations for a broad range of electronic products as a whole rather than under the ITA (or ITA 2).

6. Capacity-building for developing countries

Members should achieve global “eQuality” through contributions tailored to the diverse needs and conditions of developing economies to ensure that both developed and developing countries reap the maximum benefit from the swiftly-developing phenomenon of e-commerce. In doing so, maximum contribution should be made to items related to the fulfillment of existing agreements and to the impact of e-commerce on trade, taking into consideration and coordinating with the initiatives already being undertaken by various international institutions or by the private sector. The following could be the points we should take note of in particular.

Technical cooperation -- Developed members will undertake technical cooperation (e.g., development of the human capital for e-commerce, trade facilitation, participation in consultations on new international policies and technological issues related to e-commerce) intended to achieve wider use of e-commerce in developing members and share the benefits of global e-commerce with developing members.

Infrastructure requirements – To enhance the use of e-commerce, developing economies should focus on developing infrastructure. Member countries should provide technical cooperation, while the WTO should supply its expertise to assist in the formation of regulatory systems characteristic of e-commerce. To pool intellectual resources, the WTO should also cooperate closely with international and regional organizations such as the World Bank, the Asian Development Bank, the Inter-American Development Bank and the United Nations Development Programme.

Accumulation of best practices –The WTO should collect case studies from member countries and consider systems for e-commerce promotion (encouraging developing country participation in e-commerce, for example, and supporting the creation of national e-strategies), and provide assistance where appropriate. The WTO could act as a clearing-house for e-commerce and trade.

Policy dialogue -- Member countries need to promote policy dialogue as a means of sharing information and experience and promoting the understanding of developing and developed countries.

Cooperation with international institutions -- Member countries should note the progress being made in capacity-building in APEC and other international fora.

Respecting private-sector initiatives -- Member countries should work together and sustain close dialogue with private-sector fora such as the GBDe, the GIIC and consumer groups, among others.

¹⁹ See Pradip Bhatnagar “Telecom Reforms in Developing Countries and the Outlook for Electronic Commerce”, *Journal of International Economic Law* 695-712 (1999).

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