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## **WORK PROGRAMME ON ELECTRONIC COMMERCE**

### **REMOVING CYBERSPACE TRADE BARRIERS: TOWARDS A DIGITAL TRADE ENVIRONMENT WITH RECIPROCALLY EQUAL ACCESS**

#### *Non-Paper from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*

The following non-paper, dated 15 February 2018, is being circulated at the request of the delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

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## **1 INTRODUCTION**

1.1. The benefits that the Internet brings to international trade are already widely acknowledged, and enjoyed by traditional international trade operators and new Internet business operators alike. Across great geographical distances and strict political and state boundaries, both suppliers and customers are now able to find each other easily and freely in the cyberspace. The Internet reduces their costs of marketing, transaction and administration. Online systems streamline the order-placement process.

1.2. Several research studies indicate that land-locked developing countries and small- and medium-sized enterprises (SMEs) are benefiting more from the availability of the Internet than developed countries and large multinational companies, mainly because the Internet has enabled the former to connect with overseas customers that were either impossible or too expensive to reach before.

1.3. On the other hand, it is also widely agreed that the cyberspace should not be outside the law. The rules that govern offline activities should apply equally to online matters. Driven by a variety of policy objectives, government regulations on cyberspace activities can take different forms. Intervention into the data-flow is a commonly-used tool. For example, mandatory data localization requires that personally identifiable information (PII) be stored in domestic servers, protecting the privacy of the data owners and preserving the domestic authority's access to those data. Governments can also intervene in Internet traffic, directly or with assistance from Internet service providers (ISPs), to filter online requests and to block access to certain websites with immoral or illegal content.

1.4. It should be noted that, in the digital era, having access to the Internet and being able to reach or to be reached via the Internet is a fundamental and necessary condition of participation. Given the increasingly widespread use of the Internet in the practice of international trade, government intervention in the cross-border transmission of information by electronic means may well cause trade concerns. For instance, such government interventions increase the marketing, transaction and administration costs of suppliers, which weakens their positions versus

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competitors who have access to the Internet, and are able to reach or to be reached via the Internet.

1.5. In extreme cases, the supplier subjected to the interventions will find it very difficult to correctly convey its product or service information to potential customers, or even to be recognized by those customers. In the end, the supplier can be completely blocked out from any potential customers whatsoever, which is even more serious than just being denied market access.

1.6. For illustration purposes, this non-paper uses the term "cyberspace trade barrier" (CTB) to refer to the interventions by governments in the cross-border transmission of information by electronic means, which can have a restrictive or prohibitive effect on international trade. We note that trade barriers can also be created by the inaction of government, such as a lack of protection of Internet privacy or the absence of proper signature legislation. However, in order to maintain the focus, this dimension is not considered here.

## 2 CLARIFICATION OF THE MEANING OF "DATA"

2.1. In the ongoing WTO talks on e-commerce, concerns about CTB measures have been raised to some extent in certain proposals. For example, in the United States' non-paper, three issue items are listed separately to address data-flow concerns<sup>1</sup>. The first description, "enabling cross-border data flows" relates to the tension between the free flow of information and consumer data protection. The second item, "promoting a free and open internet" seems to have an eye on the general openness of the Internet. And, the third item, "preventing localization barrier", aims to address the mandatory local data-centre requirement; data-flow is not specifically mentioned.

2.2. In the very comprehensive mapping list proposed by Canada, Chile, Colombia, Côte d'Ivoire, the EU, Korea, Mexico, Moldova, Montenegro, Paraguay, Singapore, Turkey and Ukraine<sup>2</sup>, the data-flow and localization issue is placed under the title "measures ensuring openness". Brazil's proposal<sup>3</sup>, which places "measures ensuring cross-border data flow" also under the title "Measures ensuring openness", suggests a similar approach to and understanding of the issue.

2.3. On the other hand, Japan, in its non-paper<sup>4</sup>, gives the item "Cross-border Transfer of Information by Electronic Means" a clear description, *viz*, "[t]he free flow of digitally encoded information, which enables both consumers and suppliers to gain the maximum benefits of the digital environment, should be allowed across borders, when this activity is for the conduct of business."

2.4. We also note, however, that the terms "data" and "information" may be understood in overlapping but different ways across the above-mentioned proposals. In some, the term "data" seems to equate to "personal data" or "transaction data", because the privacy protection or consumer protection issue is involved. In others, the data-flow issue is contemplated in a broader context, such as a free Internet.

2.5. As mentioned above, the term "cyberspace trade barrier" (CTB) applies here to the trade restrictive effects of government interventions in the cross-border transmission of information by electronic means. In this context, the term "data" or "information" should refer to its broadest scope: all types of information transmitted via the Internet. Note should also be taken that data here refers not only to data generated during the course of, or after the transaction (e.g. personal data provided to foreign online vendors for shipment), but also to data transmitted before a transaction is made (e.g. online communications with the vendor regarding price negotiation) and even before the parties match (e.g. as the consumer searches the Internet to find the best vendors).

2.6. Traditional trade barriers, which take the forms of customs duty, quotas or other non-tariff requirements, generally apply after the transaction has been formed or completed. By contrast, CTBs often prevent potential sellers and consumers from matching with each other via the Internet, thus barring any trade opportunities in the first place. Under such circumstances, if the

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<sup>1</sup> JOB/GC/94 (4 July 2016).

<sup>2</sup> JOB/GC/116/Rev.2 (15 June 2017).

<sup>3</sup> JOB/GC/98 (20 July 2016).

<sup>4</sup> JOB/GC/100 (21 July 2016).

discussions do not properly cover data associated with earlier stages in the trading process (i.e., the pre-matching phase), then they could not remedy the negative trade effects brought about by CTBs.

### 3 THE EXISTING WTO RULES ON INFORMATION FLOW

3.1. The existing WTO rules were largely developed before the dawn of the digital economy. Naturally, the information flow issue was hardly contemplated by the negotiators at the time. The analysis below demonstrates that while the GATS and the GATT may set out disciplines on certain aspects of this issue, the overall legal implications are somewhat limited, to say the least. This partly explains why no issues of this nature have ever been brought to the dispute settlement mechanism of the WTO.

3.2. Of the WTO Agreements, the GATS may be the one most relevant to the CTB issue. It applies to "measures by Members affecting trade in services" (Article I:1 of GATS), and with its technology neutrality, it applies to services supplied through all means, including electronic means, under each mode of supply. This means that WTO Members shall follow, in any event, Article II (MFN) and Article III (Transparency) in maintaining any CTB measure.

3.3. Beyond MFN and transparency, however, application of the GATS on the CTB issue could be limited. Articles XVI (Market Access), XVII (National Treatment) and VI (Domestic Regulation) of the GATS apply only to the service sectors and modes of supply under which the WTO Members make specific commitments. Members' commitments made in the early '90s, however, may well not match the technology realities of today. While the Central Product Classification (CPC) system keeps being updated by the United Nations Statistics Division, the version on which most WTO Members have built their schedules of commitments remains the 1991 version. New Internet business operators may find it difficult and controversial to fit their business models into the schedule subcategories.

3.4. Even for the e-commerce that is literally encompassed by the existing schedule categories, it is still questionable whether the six market access barriers defined in Article XVI of the GATS can cover CTB measures. The overall blockage of a foreign website, either for its failure to comply with data localization requirements or for any other reasons, may be considered a "limitation on the number of service suppliers" under Article XVI:2(a) of GATS given its equivalent effect of zero quota. It is questionable, however, whether "CTB measures filtering parts of the data flow" falls within the meaning of "limitations on ... the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test" as provided for in Article XVI:2(c) of the GATS.

3.5. In the case that a CTB measure has, in fact, a limiting effect on trade in goods (such as the blockage of a retailing online platform), one may wonder if Article XI:1 of the GATT can apply in the manner that the CTB measure is a restriction of a *de facto* nature on the importation of goods.

3.6. This argument has never been tested before panels or the Appellate Body of the WTO. A foreseeable challenge is how to establish the *de facto* nature, i.e. the causal link between the CTB measure and its alleged impact on trade. It is consistently decided by WTO adjudicators that a low level of trade in itself cannot be the sole evidence of the impact of a measure. The complainant would thus need to answer the difficult "what if" questions in various forms (e.g., *what if* there was no CTB measure in question?).

### 4 SUGGESTIONS FOR FUTURE WORK

4.1. This non-paper is of the view that the CTB issue should be an essential topic in future WTO talks on e-commerce. To leave out the CTB issue and to mandate further facilitation on other e-commerce aspects only would be of little help in enhancing the fairness and efficiency of global e-commerce. What matters is not the form of the measure but the objective and spirit of the rule dedicated to the fairness and openness of the trading system through the elimination of trade obstacles in cyberspace. It is thus essential to secure the free flow of information among Members via the Internet, and to ensure that all Members have an unequivocal right to access each other's network on a reciprocal and equal basis. Trading opportunities may thus be fully available to all participants, especially those of SMEs.

4.2. Members may first consider developing a set of non-binding guiding principles on the CTB issue, including but not limited to:

- Clarifying the existing WTO rules and commitments relating to CTB measures, and;
- While recognizing Members' right to regulate online activities, identifying the scope of legitimate policy objectives for which CTB measures can be justified.

4.3. In the long run, Members may further consider reaching concrete, legally-binding disciplines on the CTB issue. Under such disciplines, Members may then confirm their recognition of the undesirable effects of CTB measures and commit to ensuring and securing the free cross-border transmission of information by electronic means. In addition to clearly defining the legitimate policy objectives that Members may pursue by applying CTB measures, they may explicitly agree on the exceptionality of the circumstances under which CTB measures are allowed and set out the rules such that the application of CTB measures shall not cause unnecessary obstacles to international trade.

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