



**Asia-Pacific
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E-Commerce in the World Trade Organization

Submitted by: King & Spalding LLP



**Free Trade Area of Asia-Pacific Capacity
Building Workshop on E-Commerce Elements
in Free Trade Agreements and Regional Trade
Agreements
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E-commerce in The WTO

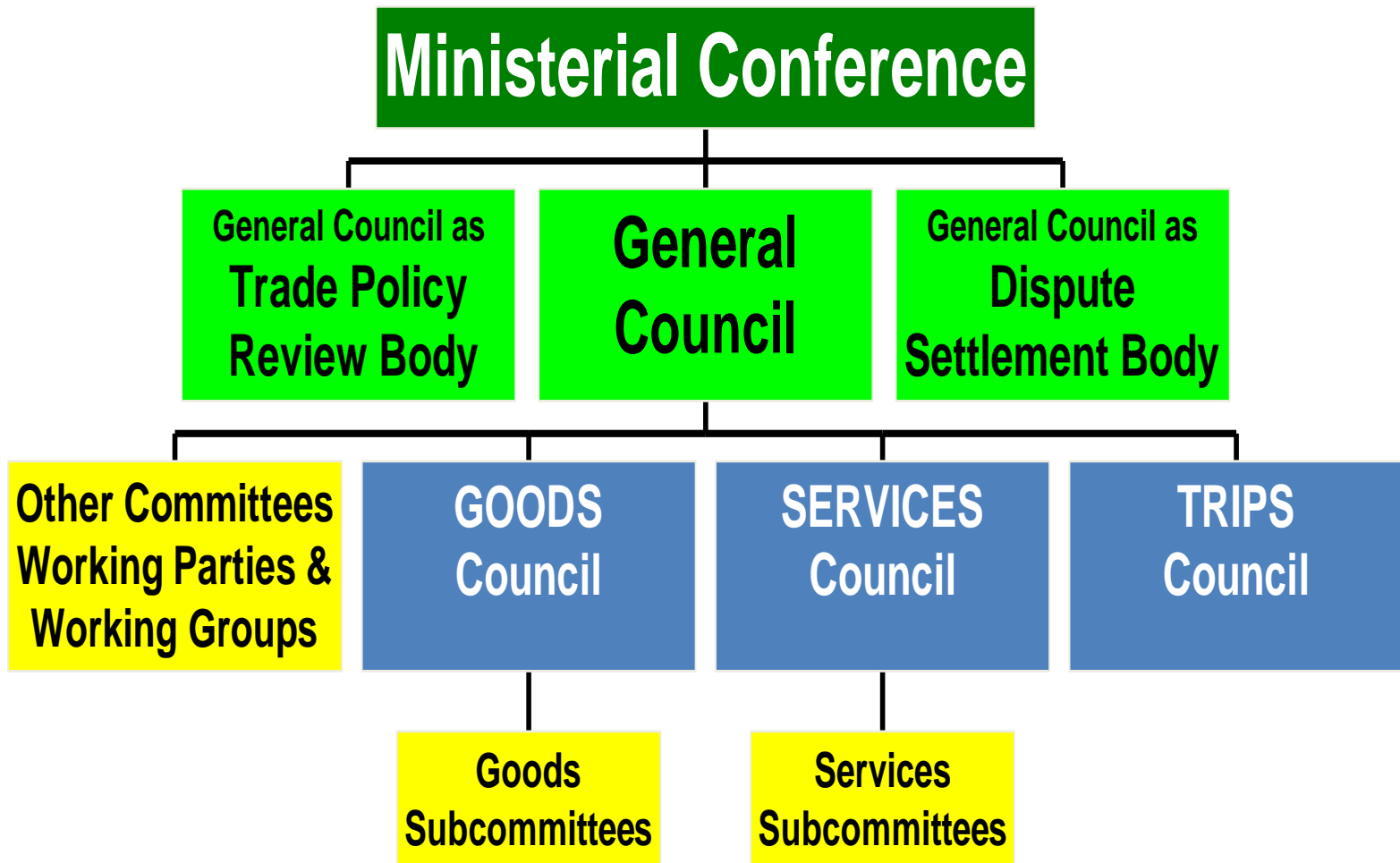
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September 2019

WTO functions

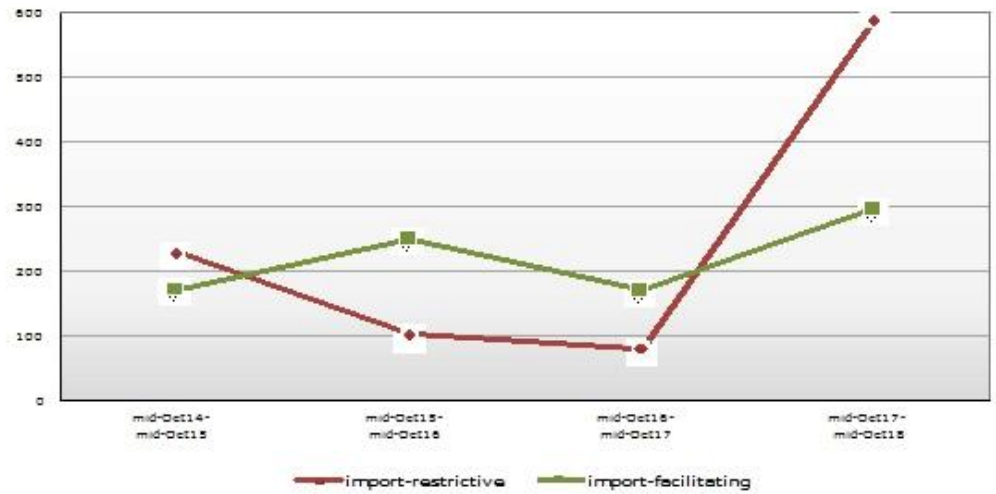
- Administer and implement the WTO agreements
- Forum for negotiations
- Administer the settlement of disputes
- Administer the trade policy review mechanism
- Technical assistance and capacity building
- Co-operation with other IOs

The WTO Structure



- A recent sharp rise in protectionist measures.
- The unilateral character of restrictive measures.
- Questionable legality.
- A relative slowdown in import facilitation measures.

Chart KF6 Trade coverage, current and previous reports
(USD billion)



The WTO's Existential Challenges

- The PHENOMENA, a “triangular challenge”:
 - Leadership deficit
 - Increasing complexity of trade policy issues
 - The “common purpose” is no longer “common”
- Failure of vital functions:
 - Negotiations
 - Dispute settlement
 - Administering compliance with WTO Agreements (regular bodies)

Specific Challenges

- Reforming the Negotiating function
- Updating the Rule Book
- The Trade and Development Debate(S&D)
- Reforming the Dispute Settlement System
- Revitalizing the Monitoring Machinery
- Reactivating the Deliberative Function

“WHY” E-commerce in the WTO?

- The WTO redefined international trade
- Trade through digital means
- Technology-driven innovative business models
- Trade-inhibiting regulatory responses
- The need to keep markets open as a means of growth and development (the “purpose”)
- Balance “liberalization” with the “right to regulate”
- Update the rule book

The Work Programme

- The need to understand trade implications
- Launched by Geneva Ministerial Session 1998
- Called for “deliberations” on trade-related aspects of global e-commerce (not negotiations)
- Specific topics assigned to Goods, Services and TRIPS Councils, and to Trade and Development committee
- ***Moratorium***: Members agreed to continue the current practice of not imposing customs duties on electronic transmissions
- Work Programme still ongoing

What is the scope of the Work Programme?

- For purposes of the programme, the activity ‘electronic commerce’ is understood to mean
 - ‘the production, distribution, marketing, sale or delivery of goods and services by electronic means’
 - Reuses the terminology of the GATS in defining the scope of the services *activities* covered
- E-commerce also touches on a wide range of individual service sectors and subsectors (e.g. telecom, financial, transportation, logistics, express delivery, distribution services ...)

Services Progress Report (1999) on 12 mandated issues

The Services Council was mandated to examine and make a progress report on these and other relevant issues:

1. Scope of the GATS: (Art I) GATS apply to measures affecting electronic supply of services, through any of 4 modes of supply, GATS is technologically neutral
2. MFN (Art II) applies to the supply of services through electronic means.
3. Transparency (Art III) applies to all laws and regulations affecting the supply of a service through electronic means.
4. Developing countries: (Art IV) participation of developing countries in electronic commerce should be enhanced inter alia by the implementation of Article, through the liberalization of market access in areas of export interest to them and through better access to technology

... Progress Report

5. Domestic Regulation: Crucial to maintain a balance between right to regulate and need to ensure that domestic regulatory measures do not constitute unnecessary barriers
6. Competition (monopolies and restrictive business practices) (Art VII and IX): The expansion of electronic commerce could help reduce the extent of restrictive business practices (Art. IX), inter alia, by facilitating market entry for smaller service suppliers.
7. Protection of privacy, public morals and prevention of fraud (Art XIV) Applicable, but measures not to be more trade restrictive than necessary to fulfil such objectives, and must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services.

... Progress Report

8. Market access commitments: (Art XVI) The means of delivery does not alter specific commitments; they permit the electronic supply of the scheduled service unless otherwise specified in schedule.
9. National treatment: (Art XVII) Commitments cover the supply of services through electronic means unless otherwise specified.
10. Access and use of telecom public telecom networks (Annex on Telecommunications): applies to access to and use of the Internet when it is defined in a Member's regulatory system as a public telecommunications transport service and/or network in terms of that Annex.
11. Customs duties on electronic transmissions: No common view on desirability or feasibility (but now moratorium)
12. Classification issues: No clarity on how to classify novel ICT services

Relevance of GATS case law

- Some dispute settlement cases in services have involved on-line or networked services.
 - *Mexico Telecom (2004)* Case brought by the US, telecom services
 - *US Gambling (2005)* Case brought by Antigua, on-line gambling services
 - *China Publications (2010)* brought by US, audiovisual downloads
 - *China Electronic Payments (2012)* brought by US, on electronic card payment services
- Overall, these Panels (and the Appellate Body when appealed) confirm that GATS obligations and commitments apply to on-line services

Specific findings by Panels

- In *US Gambling (2005)*, the panel said "we conclude that mode 1 includes all means of delivery. We are of the view that when a Member inscribes the word "None" in the market access column of its schedule for mode 1, it commits itself not to maintain measures which prohibit the use of one, several or all means of delivery under mode 1 in a committed sector or sub-sector.
- In *China Publications (2010)*, the Panel found that the scope of China's commitment in its GATS Schedule on "Sound recording distribution services" extends to sound recordings distributed in *non-physical form*, through technologies such as the Internet.

The Bali Ministerial Declaration (2013)

Expanding mandate

- The Work Programme “should continue to examine the trade related aspects of, inter alia,”
 - enhancing internet connectivity, access to information & telecommunications technologies
 - growth of mobile telephony
 - electronically-delivered software
 - cloud computing
 - the protection of confidential data, privacy and consumer protection

Member submissions contain new issues

- Regulatory cooperation
- Network neutrality
- IPR protection
- Regulation of spam
- Data flows
- Open Internet/ networks
- Localization requirements
- Technology transfers
- Source code requirements
- Choice of technology
- E-signatures/ Authentication
- Network competition
- Encryption
- Infrastructure gaps
- Standards/ interoperability
- Electronic payments
- Trade Facilitation
- E-procurement
- Conformity assessment

WTO Work Gaining momentum

- Seminars and back room groups
 - Friends of E-commerce for Development
 - Rising interest among business community
- Ministerial Decision 2017 – Buenos Aires
 - Work Program / Moratorium continue
 - Questions about the Moratorium
- **Launching of plurilateral “joint initiative”**
 - Exploratory discussions on “trade related” aspects
 - Open to all Members

More issues

Cooperation with other IOs
Legitimate policy objectives,
DR & exceptions
Privacy/ personal data
Consumer protection/
confidence

- cybersecurity
- spam

Regulatory cooperation
Network neutrality
IPR protection

Market access commitments/
negotiations
Improve metrics and data
Trade monitoring
Classification
infrastructure gaps
Licensing/authorization
Customs duties
Electronic payments
e-procurement
Paperless trading

Resurgent Policy Concerns and regulatory responses

Cybercrime

Cyber security

Individual Privacy

Data protection

Consumer protection

IPR protection

National security

Recent developments

- Joint Statement Initiative (JSI) aiming at negotiations on:
 - TFA “plus”
 - ITA “plus”
 - GATS market access
 - Regulatory issues
 - “Horizontal” rules, i.e. across agreements
- JSI in Davos Starting the Negotiation- Jan 2019
 - Progress so far
 - Challenges

Main Challenges

- Complexity of balancing the “regulatory interface”
- The wide range of policy concerns
- The role of trade agreements on non-trade issues
- The multi disciplinary nature of “digital trade” across goods and services trade
- Distinguishing between WTO and RTAs outcomes
- Forms of regulatory cooperation
- The legal form of a negotiated outcome
- Capacity building

Complexity of balancing the “regulatory interface”

- The interface between trade liberalization and the right to regulate aims at:
 - Trade liberalization does not intrude on regulatory sovereignty
 - Trade rules ensure the “least trade restrictiveness” of regulatory interventions
- The concept is not new (e.g. TBT and SPS)
- Challenging in the case of digital trade because:
 - Intangible products
 - Absence of internationally agreed standards to establish a “rebuttable presumption” of least trade restrictiveness

The role of trade agreements on non-trade issues

- The WTO (and other trade agreements) is not a standard setting body (privacy, consumer protection, cybersecurity, etc..)
- The role of trade rules is to ensure least trade restrictiveness while not intruding on regulatory sovereignty
- Sound legal rules and disciplines to strike that balance and ensure it's continuity are critical

Distinguishing between WTO's and RTA's outcomes

- RTAs are, by definition, required to be more far reaching
- So often aim at deeper integration going beyond trade
- Some issues are critical for trade (e.g. recognition)
- Fertile grounds for innovative solutions among more “like minded” groups
- Different treaty architecture with different implications
- Complementarity of respective roles

Possible negotiated outcome

What are the working assumptions?

- The nature of the outcome- MFN or Non-MFN?
- A new standalone WTO agreement?
- Scheduling new commitments under the GATT and the GATS?
- Clarificatory interpretative statements on certain WTO provisions?
- Improved WTO provisions?

THANK YOU