

**ELECTRONIC COMMERCE**

**AND**

**THE INTERNATIONAL TRADE RULES**

**Report on Workshop  
Discussions of Key Trade Policy Issues**

October, 2000

## **Introduction**

During May and June, 2000, the Government of Canada chaired a series of six workshops across Canada on the subject of electronic commerce and the international trade rules.

May 15	Ottawa, Ontario
June 13	Vancouver, British Columbia
June 14	Edmonton, Alberta
June 20	Montréal, Québec
June 27	Saint John, New Brunswick
June 28	Toronto, Ontario

Prior to the workshops, a discussion paper was circulated to participants which outlined a series of international trade policy issues grouped according to three themes:

- The first theme explored issues that affect access to global markets.
- The second theme considered issues related to the regulation of e-commerce and the manner in which trade rules affect such regulation.
- The third theme discussed the upcoming international negotiations on trade in services, and the way in which e-commerce might fit within the negotiations.

The participants at these workshops represented a wide variety of perspectives, including information technology businesses, telecommunications services providers, cultural industries, labour unions, provincial economic development departments, public interest advocates and consumer advocates. For a full list of the participants please see the Annex to this report. The participants provided us with very useful information about Canadian interests and concerns in relation to e-commerce and the international trade rules. In addition, we would welcome the views of anyone who did not participate in the workshops. In this regard, please see the websites listed on page 4, which provide contact names for ongoing discussion of various issues including e-commerce.

## **Purpose of the Workshops**

The workshops were intended to serve three purposes. First, it was hoped, through the discussion paper and the workshops, that information about the trade policy issues under consideration would be made further available to Canadian stakeholders. Second, it was intended that the workshops would be an excellent opportunity for the Government to learn about the interests and concerns of Canadian stakeholders on the subject of e-commerce and the international trade rules. Third, it was anticipated that the workshops would help to identify a network of people and organizations interested in the issues for future discussion and consultation.

The information gathered during these workshops will be a very useful part of the preparations for two international processes; the general work of the World Trade Organization (“WTO”) on e-commerce and the international trade rules, and the new WTO negotiations on international trade in services.

In 1998, a Ministerial declaration launched the WTO Work Programme on Electronic Commerce. The WTO then proceeded to examine how e-commerce, which had developed and evolved greatly since the negotiation of the WTO trade agreements, fit within these agreements. The work has not yet been completed, and the WTO is presently considering how best to continue to examine the issues raised by e-commerce. Many of the issues discussed during the workshops in May and June have been raised during the discussions under the WTO work programme, and the input received will contribute to the formulation of the Canadian position on these questions.

Secondly, the views expressed during the workshops will help in the formation of the Canadian negotiating position in the new negotiations on international trade in services at the WTO. Although the launch of a comprehensive new round of international trade negotiations (i.e., covering all aspects of international trade and not just services trade) at the WTO did not take place in Seattle in December, 1999, a new series of negotiations on international trade in services began in 2000. The launch of negotiations on services at this time was built into the General Agreement on Trade in Services (the “GATS”). Input received during the workshops is an essential element of the trade policy-making process and will help form Canada’s negotiating position.

The formation of Canadian positions and negotiating strategies is an on-going process. The speed with which the GATS negotiations and other WTO discussions take place is difficult to predict, and Canadian positions and strategies will continue to evolve throughout the negotiating process. As a result, we would be grateful for your ongoing participation in the process. For contact names and further information please see the websites listed on page 4 of this report.

### **The format of this report**

This report seeks to reflect closely the views conveyed by the participants to the Government representatives, rather than to offer conclusions or decisions on the trade policy questions. As the views of the participants were sometimes diverse, the summary reflects the sometimes contradictory, but very important views of all of the participants on key trade policy issues related to e-commerce.

This report contains a brief introduction to each of the issues discussed during the workshops. Following the introduction, our notes regarding the comments of the participants have been arranged in bullet points.

## **On-going Consultations**

These workshops are part of a broader and on-going consultative process. On-going consultations are conducted through the Sectoral Advisory Groups on International Trade (SAGITs), through formal consultations with provincial representatives (the C-Trade process), through consultations with Parliamentary Committees (such as the Standing Committee on Foreign Affairs and International Trade), through website dissemination of information and solicitation of views, and through additional cross-Canada stakeholder consultations.

In addition, the views of Canadian stakeholders are invited on a continuing basis. Information with respect to the GATS negotiations as well as Governmental contacts on different issues relevant to the negotiations are available at the following URL: [http://strategis.ic.gc.ca/sc\\_mrkti/services/engdoc/homepage.html](http://strategis.ic.gc.ca/sc_mrkti/services/engdoc/homepage.html) (English) and [http://strategis.ic.gc.ca/sc\\_mrkti/services/frndoc/homepage.html](http://strategis.ic.gc.ca/sc_mrkti/services/frndoc/homepage.html) (French).

Additional information is available on the Department's website at [www.dfait-maeci.gc.ca/tna-nac.gc.ca](http://www.dfait-maeci.gc.ca/tna-nac.gc.ca) or at the Government's website for the GATS negotiations at <http://services2000.ic.gc.ca>.

## **Electronic Commerce and The International Trade Rules: Discussion of Key Trade Policy Issues**

The discussions at the workshops followed the trade policy issues outlined in a discussion paper entitled “Electronic Commerce and the International Trade Rules: discussion of Key Trade Policy Issues.” The text of this discussion paper is not reproduced here, but may be consulted on the Department’s website for further details on each of the trade policy issues discussed below. The comments received from the participants are arranged in bullet points following a brief introduction to each trade policy question.

### **Accessing Markets: Electronic Transmissions as Goods or Services?**

#### **Background**

One of the issues that arose during the WTO work programme on e-commerce was whether electronic transmissions should be treated as goods or as services under the international trade rules. It seems uncontroversial that the electronic delivery of services would be treated as trade in “services”, just as if they were delivered in person. Similarly, physical goods that are ordered and paid for on-line retain their character as “goods” and must be transported and delivered in physical form across borders.

However, the situation is less clear with respect to information products such as software, music and books, which can be delivered either in a physical format or electronically (on-line). Trade in the physical diskettes, CDs and paper embodying this information has been treated as trade in “goods” under international trade rules. As for the on-line delivery of this information, there is much debate among countries about the characterization of these transmissions as services, goods, or something else.

Trade in goods is subject to a well-developed, comprehensive and rigorous set of trade rules. Trade in services, on the other hand, is subject to a more recently-developed and different set of trade rules. Therefore, due to the differences in the regime governing trade in goods and that governing trade in services, the classification of electronic deliverables that may have a physical equivalent may be important to particular industries.

#### **The Participants’ Comments**

*As reflected in the examples listed below, several participants suggested that the guiding principle should be that of “technological neutrality”. In other words, goods and services should continue to be treated as goods and services, respectively, regardless of the means of delivery.*

- Trade rules should not be dependent on the delivery medium. The principle of technological neutrality should be followed in order to ensure the certainty and predictability of the rules.
- The point of departure should be the principle of technological neutrality. We otherwise risk distorting commercial transactions and pushing behaviour toward less economically efficient modes of delivery.
- It is important that the electronic and physical forms of a given product be treated consistently. In other words, all forms of each given product should fall within one or the other classification (i.e., goods, services or other).
- What counts in an electronic transmission is the information content. The delivery medium is merely the means of conveying that information.

*Certain participants argued that the “goods” classification is critical to the success of the Canadian software industry, while others argued that the “services” classification is required to enable the continuation of Canadian policies with respect to the cultural industries. Some participants cautioned that not all members of the “software industry” or the “cultural industries” would necessarily have the same interests.*

- Due to the small size of the Canadian market, successful Canadian software developers are export-focused. In fact, Canadian software companies are serious competitors in the global market. Given the software industry’s export-oriented interests, the industry would definitely favour the goods classification for electronic transmission of software. The software industry has serious fears and misgivings regarding classification within the loose and restriction-prone provisions of the GATS.
- It is difficult to assess the interests affected by the classification decision. For example, the terms “software industry” and “cultural industry” are both broad and ill-defined sectors that may encompass conflicting interests depending on the particular product at issue.
- Although cultural industries might prefer a “services” classification, we should prefer the goal of opening markets to that of cultural protection because the old forms of cultural protection will be ineffective in the new era of information and communication technologies.
- While some sectors such as the cultural and audiovisual sectors may require protection, it is also important to ensure that international trade is not harmed and that Canadian information technology companies have access to foreign markets. The Government’s new initiative regarding the negotiation of an international

instrument on cultural diversity would be useful in protecting cultural diversity while permitting the growth of international trade. However, given uncertainty about when such an initiative will be completed, Canada must conserve its ability to enact cultural policies, which would point to a “services” classification.

- Electronic commerce offers substantial trade opportunities. It is important that it be promoted, while at the same time ensuring effective protection of our culture.
- Other countries will choose the goods or services classification based on their own interests. Canada should assess the competitiveness of our industries and do the same. It is necessary that an in-depth study of Canadian industries be conducted to determine the effects of the classification choice on our economy.
- Canadian competitiveness is promoted by trade liberalization and market access.
- We must take advantage of global opportunities without losing sight of the domestic cultural policies that are largely responsible for the success of our cultural industries.
- We should also ensure that Canada can export its cultural products.
- Liberalization of foreign markets is beneficial to Canada, as Canadian businesses are currently quite competitive due to the exchange rates.
- E-commerce transactions involving the transmissions of digitized content represent the sale of access to information, and not the sale of the information itself. As a result, the providers of content are providing a service.

*Some participants raised the concern that past WTO dispute panel decisions have revealed that the GATT and the GATS may both apply to a given governmental measure. As a result, attempts to ensure that only the GATS rules apply to transmissions of cultural content by classifying them as “services” may not produce the desired result.*

- Electronic transmissions are hybrid phenomena that cannot be classified as goods or services. Both the GATT and GATS might be applied to government measures affecting electronic transmissions.
- It is not clear that we can really choose a GATS or GATT classification for electronic transmissions. Although some industries prefer a services classification due to the assumption that it will offer more trade protection and a more flexible domestic regulatory environment, this may not be the case. Even if we choose one classification, we may find the rules under the other being applied to

governmental measures affecting electronic transmissions. The signal from the magazines case is that we thought our cultural policies were protected but they were not. We must approach the negotiating table with caution.

*Certain participants made proposals on how the question of classification of electronic transmissions with a physical equivalent could be addressed.*

- One possible solution might be to set aside the classifications “good” and “services”, and to create a new classification for electronically transmitted information products. This would avoid the classification debate although it would mean that new trade rules would need to be created for the new category.
- The distinction between goods and services could be modeled on the treatment of intellectual property rights. Where an unlimited use license is granted, involving a transfer of rights, the content should be treated as a good. However, where a limited right is granted, such as with a time-limited use period, the content should be treated as a service.
- Canada should establish and follow a set of overall goals and principles as guides in the negotiations. We should look at the principles developed prior to the WTO Seattle Ministerial to determine if they are still relevant.

### **Modes of Supply: Where does the E-Commerce Transaction take place?**

#### **Background**

The GATS defines trade in services according to four “modes” or forms of delivery of the service. These are cross-border supply (i.e., the supplier provides a service across a border to a consumer in another country), consumption abroad (i.e., the purchaser consumes the service in the country of the service supplier), supply through a commercial presence (i.e., the supplier establishes an office in the purchaser’s country) and supply by the presence of natural persons (i.e., a person travels temporarily to the purchaser’s country to supply the service there).

The WTO Members may undertake different market liberalization commitments for a given service depending upon the manner in which it is supplied. It is important to determine which mode of supply is involved in electronic commerce for two reasons. First, the conditions of access to a foreign market may differ depending on which mode of supply is applicable. Second, the choice of mode may imply something about the geographical location in which the transaction is deemed to take place, and, therefore, which country would have regulatory jurisdiction over the transaction. For example, if WTO Members agree to deem the supply of services over the Internet to be “consumption abroad” by the consumer, then the consumption may be viewed as having



taken place not in the consumer's jurisdiction but in that of the supplier. Of course, this question is complicated by the fact that it is becoming increasingly difficult to determine the geographic location of parties communicating on the Internet.

### **The Participants' Comments**

*For some participants, the key consideration must be to ensure that the regulation applicable to e-commerce transactions are those of the consumer's own jurisdiction, rather than that of the seller of goods or services. Others questioned the need for Government to protect the consumer in the on-line world.*

- It is important that the interests of individual Canadians not be overshadowed by business interests. The mode 1 classification is preferable as it ensures that a consumer's own consumer protection legislation applies, and properly places the costs of providing services abroad on those businesses who wish to do so.
- However, the choice of mode 1 may just give consumers a false sense of security as it may be difficult to enforce Canadian regulations on a company with no local presence. For this reason, an agreement on international base standards is very important.
- The requirement that businesses comply with local rules if they wish to do business in another jurisdiction is nothing new. The rules should not be watered down for the on-line world.
- One possible solution to the problem of regulatory jurisdiction for e-commerce might be to apply a different set of rules for business purchasers as for consumers, who may require the additional protection provided by the application of their own domestic regulation. One example might be the EU Directive on Electronic Commerce.
- We need to make the electronic marketplace safe for consumers. But there is a question as to how to define consumers since small business people may need the same protection as individual consumers.
- Governments cannot effectively protect the consumer in a digital world. The consumer is more empowered in the digital world and must bear a greater responsibility to protect him or herself. Consumers may use on-line mechanisms to ensure that others hear about and avoid those companies using bad business practices on-line.

- In web-based transactions, there is often a “choice of jurisdiction” clause which may determine the forum and applicable laws with respect to disputes between parties.

*Other participants pointed out that, if the regulations of the consumer’s jurisdiction are applied to e-commerce transactions, this would make it extremely difficult for some enterprises (particularly small and medium-sized enterprises) to participate in international e-commerce.*

- A decision that the consumer’s domestic regulations will apply to e-commerce transactions would make it very difficult for businesses to operate on-line internationally. This approach would, thus, make it difficult for Canadians to take advantage of the tremendous potential of electronic commerce.
- The applicability of domestic regulations, including consumer protection rules, all over the world is a daunting prospect for would-be Internet businesses. Buyer anonymity prevents the vendor from knowing a buyer’s jurisdiction.
- Compliance with a wide variety of rules in different regulatory jurisdictions may be possible for larger companies, but will preclude the participation of small and medium-sized enterprises in international electronic commerce.
- The choice of regulatory jurisdiction, and thus, the issue of modes of delivery, is important for highly regulated business sectors. For example, if complex and conflicting licensing requirements are demanded in all regulatory jurisdictions, it would be extremely difficult to provide the services on-line.

*Some participants suggested a possible solution to the question of which mode of supply is applicable to e-commerce transactions.*

- One possible solution might be to create a new mode of delivery for electronic transactions. The downside of this approach is that none of the current market access commitments would be applicable.

*Some participants questioned whether the concept of modes was adaptable to the area of e-commerce.*

- It is difficult to determine the geographic locations involved in an e-commerce transaction. In fact, multiple servers located in different jurisdictions may be involved. The existence of mirrored websites and anonymity products and techniques also confuse the issue.
- It does not matter whether an electronic transmission passes through many jurisdictions - this is the case with many forms of transport such as trucking.

What matters from the trade perspective are the beginning and end points. However, the identification of the “beginning point” may be complicated where a business is located in several different places (*i.e.*, website, warehouses, offices).

*Some participants cautioned that it would be dangerous to rush to decisions given that the rapid evolution of e-commerce might render some decisions obsolete or impractical.*

- Given the rapid evolution of e-commerce, it is difficult to be sure what regulations may be required in the public interest. As a result, it is important to maintain our ability to regulate in the public interest.
- It might be preferable not to rush to a choice of modes, but to wait for electronic commerce to evolve. Flexibility is necessary as the environment is changing rapidly. However, this flexibility may also harm Canadian trade interests. Given the important economic and trade interests at stake, Canada must address this question in short order given that the services negotiations have already begun.
- Canada should determine the fundamental trade policy principles it wishes to follow, and then approach e-commerce according to those principles.

## **Customs Duties**

### **Background**

One of the issues under discussion internationally is whether WTO members should agree not to apply customs duties, or tariffs, to electronic transmissions. Customs duties differ from internal taxes such as income or sales taxes. Therefore, the issue of customs duties must be considered separately from the question of whether e-commerce should be subject to domestic taxation. Customs duties are due upon the importation of certain products, and traditionally apply only to goods, although they are sometimes applied to services that are embedded in goods. To date, no country has developed a system for collecting customs duties on electronic transmissions. Canada does not collect customs duties on electronic transmissions at present, and it is likely that the cost of any system to do so would exceed receipts. On the other hand, developing countries, which are generally more reliant on customs duties for governmental revenue, are concerned about any international ban on customs duties on electronic transmissions.

### **The Participants' Comments**

*While no participants seemed to favour the application of customs duties to electronic transmissions, many emphasized that it is important that a moratorium on customs*

*duties should not have the effect of distorting the market in favour of a particular mode of delivery.*

- It is important not to artificially favour one type of delivery (electronic or physical) over another. It would, therefore, be relevant to determine the extent to which a moratorium on the application of customs duties to electronic transmissions would result in movement toward electronic delivery.
- In order to ascertain the effects of a moratorium on the application of customs duties to electronic transmissions, we must understand which types of products would be affected, what levels of duties are applied by other countries to these products and which countries would not take part in the moratorium.
- It is not worthwhile to apply customs duties to electronic transmissions. It would be quite difficult to establish a workable system and Canada would not benefit from such a system. Furthermore, an agreed moratorium on customs duties would help Canada by promoting electronic trade with other countries.

## **Telecommunications Services and the GATS**

### **Background**

E-commerce depends on the underlying telecommunications network services which carry the electronic transmissions. The treatment of telecommunications services under the international trade agreements is determined by the history of the international trade negotiations in that sector. This history has given rise to two different ways of dividing telecommunications services; (a) the distinction between public and private telecom networks and services, and (b) the distinction between “basic” and “value-added” telecom services. Both distinctions may be important.

Under the GATS Annex on Telecommunications, each WTO member must ensure that foreign service suppliers can obtain access to and use of public telecommunications transport networks and services for the provision of all services liberalized by that WTO member. As a result, it may be quite important from the perspective of services suppliers whether a type of telecommunications network or service is classified as public or not.

The importance of the distinction between basic and value-added telecom services flows from the fact that numerous WTO members have agreed to a set of pro-competitive regulatory principles and safeguards which apply only to basic telecommunications. There is some debate over whether certain Internet-related services should be classified as basic or value-added.

## **The Participants' Comments**

*Some participants emphasized the importance for Canada's cultural policies of the blurring between the areas of telecommunications and the provision of content.*

- The convergence of technologies, business sectors and markets deepen the difficulties of answering trade policy questions. With the mergers of major Internet Service Providers with major content providers, questions arise with respect to whether liberalization in telecommunications services will undermine our ability to protect Canadian cultural industries.
- The treatment of telecommunications services must be considered in a broader context than that of facilitating e-commerce. The blurring of carriage and content raises larger social questions.

*The participants had differing views of whether Internet-related services should be classified as "basic" or "value-added" telecommunications services.*

- The Internet must be considered to be a basic telecommunications service. It is "the" mode of communication, just as telephone used to be, and should be protected from monopolization.
- Internet access service should be classified as "basic" rather than "value-added". The notion of what is "basic" must evolve as technologies change.
- It would be preferable to classify Internet services as value-added telecommunications services as countries are more willing to liberalize these markets.
- Suppliers of value-added or enhanced telecommunications services also need the rights and protections provided by the Reference Paper on basic telecommunications. Canada should seek an extension of the Reference Paper principles to value-added services.
- Vibrant telecommunications competition is essential both for individual Canadian consumers as well as for business consumers of these services. This is applicable to both basic and value-added telecom services. It is important to avoid the monopolization of the key means by which people are doing business.
- It is important that we do not allow the development of a "digital divide" between those who have Internet access and those who do not. Both universal access as well as competition are necessary in this area - in this sense Internet-access services are a "basic" telecommunication service.

- If Internet-related services are classed as “basic”, this would give rise to more obligations being imposed on providers, such as with respect to licensing at the CRTC.

*Some participants suggested that the distinction between “basic” and “value-added” telecommunications services would become increasingly unwieldy with the migration of many types of traditional telecom services toward the Internet.*

- The distinction between “basic” and “value-added” telecommunications services will likely dissolve as more and more forms of communication (including traditional basic telecom services such as telephony) are conducted over Internet networks.
- Perhaps voice over IP (Internet Protocol) could be considered to involve an element of basic telecommunications (i.e., the Internet network) and a value-added element (carriage of voice).

*Some participants emphasized the importance of access to networks for the provision of Internet services. Others suggested that the distinction between public and private telecommunications networks will lose its significance as business incentives exist to ensure open access to networks.*

- The distinction between public and private telecommunications networks will become less important because the natural business incentives will promote open access to cable networks.
- Access to networks will be very important to ensure that Internet access rates are lowered. The choice of what is considered public and private will be important in this respect.

## **Striking a Balance of Rules for the Global Electronic Market**

### **Background**

Domestic regulations are closely related to the supply of services as well as to international trade in services. It is clearly important that governments retain the ability to regulate in the public interest and to pursue national policy objectives. However, domestic regulations may also be used, not for public policy objectives such as consumer protection, but simply as a means to shelter domestic industries from international trade competition. As a result, the GATS sets certain parameters on domestic regulation that affects international trade in services.

In the sphere of e-commerce, government regulation is a critical issue. Topics such as data privacy and consumer protection have been raised as matters requiring government intervention and/or private sector self-regulatory initiatives. Some believe that minimal regulation will best foster the development of e-commerce and suggest that the international trade rules be strengthened to limit government regulation that could create barriers to international trade. Others believe that issues such as privacy and consumer protection are particularly important in the digital environment, and that international cooperation is required to foster e-commerce. Therefore, they recommend that WTO Members negotiate a list of regulatory measures that governments must apply rather than a negative list of things that governments must refrain from doing. A middle road could be the negotiation of a set of principles that must be respected when enacting domestic regulations related to e-commerce.

### **The Participants' Comments**

*Some participants emphasized the importance of domestic regulations adopted to further legitimate public policy objectives, and noted that many are not aimed at e-commerce itself but flow from regulations governing services provided via e-commerce. Others cautioned that some domestic regulations, despite their expressed purposes, are adopted merely to exclude foreign competition.*

- E-commerce activities are surrounded by a wide variety of regulations representing legitimate public policy objectives including legal regimes related to financial services, privacy protection, consumer protection, and the regulation of professional services.
- Domestic regulations affecting e-commerce are not necessarily aimed at e-commerce itself, but flow from the regulations governing different services provided via e-commerce.
- In considering domestic regulations, we must remember both the desire to maintain our own domestic policies and the desire to ensure that we are able to sell Canadian products abroad.
- The principle of technological neutrality requires that consumers receive the same protection in on-line transactions as they would receive in off-line transactions.
- The regulation of banks is what has caused trust to develop in the financial services sector. An appropriate, moderate level of regulation is necessary. The trust that has resulted from this regulatory framework is an asset which can be used to generate business opportunities.

- Recently emerging vertical industry portals threaten to monopolize certain online business activities. They demonstrate the need for an international mechanism to protect competition, including one within the WTO.
- We should identify which regulations are motivated only by trade protectionism and remove them.
- Canadian international trade policy should be to remove road blocks to international electronic commerce, to reward rather than punish initiative, and to eliminate uncertainty with respect to the trade rules and environment.
- We should not seek to shelter Canadian industries behind regulatory barriers. This leaves the impression internationally that Canadian businesses are weak and in need of protection.
- The new reality of e-commerce puts Canadian businesses in competition with others around the world. Government cannot protect Canadian businesses unless it closes the borders. It is up to Canadian businesses to protect themselves by becoming more competitive since it is the responsibility of businesses to provide their services profitably. The Government should ensure a framework of fair access to world markets. In other words, if a Canadian business has the right price, it should be able to win the business.

*Other participants noted the difficulties caused for international trade by the existence of a wide variety of domestic regulations and standards, and suggested that international harmonization would be useful.*

- The problems caused by the wide variety of domestic regulations and standards would be alleviated by global harmonization or standardization. Industry is moving quickly in this direction but regulatory and policy harmonization are moving very slowly.
- Some countries maintain very onerous licensing rules for the establishment of Internet businesses and for telecom service providers. It would facilitate the provision of services by commercial presence abroad if licensing conditions were eased.

*Some participants cautioned that e-commerce is evolving so rapidly that attempts by governments to negotiate detailed rules would be counter-productive.*

- The evolution of electronic commerce is proceeding at a pace which far surpasses the development of trade rules and governments' ability to keep up. This discrepancy leads to a lack of faith in regulatory solutions to problems.



- The e-marketplace is a moving target, and attempts to negotiate binding rules may be counter-productive. Instead, it would be better to identify the fundamental principles applicable to the e-marketplace. For example, principles such as the OECD privacy principles are helpful.
- Another problem flows from the rapid and constant evolution of electronic marketplaces. It becomes difficult to design rules that will be useful in the future. A better option would be to negotiate rules applicable for particular lengths of time - as was the case with the WTO customs duties moratorium for electronic transmissions. Time-limited commitments would also be less frightening for the WTO members to accept.
- It is preferable that the regulation of e-commerce be approached through the formulation of a code of conduct or a set of principles rather than through regulation. Individuals and consumers have the power to enforce the code of conduct.
- Because e-commerce is a broad phenomenon, including many different activities, it may be difficult to arrive at principles that we would wish to see applied. Instead, it may be better to identify regulatory principles applicable to different elements of the e-commerce “value chain.” Regulatory reference papers could be negotiated separately for the different elements of the “value chain.”
- It would be useful to develop a “Reference Paper” for e-commerce similar to the one that exists for basic telecommunications services. Such a Reference Paper could include competition safeguards that would protect smaller ISPs from monopolization of Internet-access services by large telecommunications companies.
- In any event, what is required is a mechanism that provides certainty with respect to the rules.

*The participants discussed the danger that businesses may relocate to regulatory havens. While some felt that the danger was minimal, others argued that the WTO negotiations should include the construction of a satisfactory set of rules to prevent this “race to the bottom.”*

- There is a danger of a “race to the bottom” with respect to standards as businesses adjust to operate electronically from regulatory havens. It is important that the construction of a satisfactory framework of rules be part of the WTO negotiations, or else the trade negotiations will have a deregulatory effect.

- There will be no “race to the bottom” because if websites have inadequate protections (e.g. privacy protection), the word spreads extremely rapidly and will put offending companies out of business. The economic imperatives and drivers will not push companies to regulatory havens.

## **Intellectual property issues and electronic commerce**

### **Background**

The Internet has delivered unprecedented challenges to the protection of intellectual property rights. These challenges are critical to those whose stock in trade consists of information or content that is digital or is easily digitized such as software, music, books and audiovisual content.

Canada has been supportive of the work of the World Intellectual Property Organization, or WIPO, to arrive at an international framework that facilitates e-commerce by addressing areas of concern such as the impact of digital technology on copyright and related rights, the interaction of trademark protection and domain names, the impact of the Internet on well-known marks, the development of principles governing ISP liability for intellectual property rights infringement, and the administration of patent systems on the Internet. It is not yet clear which problems may be solved by the holders of intellectual property rights and which require government intervention at the international level.

### **The Participants’ Comments**

- Creators of content are anxious that the international intellectual property rights regime is not developed in a manner that tends to promote the transfer of rights to large companies. It is important to remember the interests of the content creators.
- It is important to ensure that large producers do not monopolize the business of content provision on the Internet, thus preventing creators from posting their own content.
- Although the marketing power of large companies is often very important in the commercialization of intellectual property content, the Internet is giving creators new room to go directly to consumers without having to use large intermediaries.
- The patent term is too long in the area of e-commerce and information and communications technologies given the rapidity of change. The patent term goes too far in supporting monopoly power.

## **The GATS Negotiations Process**

### **Background**

New negotiations on trade in services under the GATS were launched this year at the WTO. Many of the services involved with e-commerce are likely to be discussed during these negotiations.

In typical trade negotiations, countries make offers to, and requests of, each other in relation to the liberalization of trade in certain sectors. Electronic commerce is not, in itself, a trade “sector”. Rather, it is a means of doing business and delivering goods and services that involves a wide variety of new and traditional supporting services. As a result, questions arise as to the best way to handle e-commerce related activities within the new GATS negotiations.

### **The Participants’ Comments**

*Certain participants noted the danger that, if seemingly new services are determined not to fall within existing commitments, existing trade liberalization may be lost in this important area.*

- Some services may not be covered in the current GATS commitments and nomenclature. The danger of new definitions and nomenclature is that the effect on existing commitments is unclear. Certain commitments may be lost even though the new services could arguably fall within existing commitments.

*Some participants noted that the term “e-commerce” subsumes a wide variety of different activities. As a result, it will be relevant to discussions of many different services sectors and issues. Care must be taken to ensure that a coherent approach is taken.*

- It is not possible to deal with “e-commerce” as it is a generic term covering a lot of different activities and involving many disparate issues. Rather, it must be broken down into its component parts.
- It is important to remember that e-commerce is not a sector in itself. The negotiating groups responsible for other services sectors may all approach e-

commerce in a dissimilar fashion. It might be useful to develop a reference document which could be used by the sectoral groups.

*Some participants warned that care should be taken with respect to the “cluster” approach to e-commerce in the GATS negotiations. Others favoured the approach as it reflected the reality of e-commerce. Some participants emphasized that, if a cluster approach is adopted, the related social and regulatory issues must be addressed at the same time.*

- We should approach with care proposals that e-commerce be treated as a “cluster” for negotiating purposes. The “cluster” approach might permit certain influential countries to re-open and re-negotiate established rules and commitments to their own advantage. This approach is particularly dangerous for sensitive services sectors.
- Two of the fundamental enabling sectors for e-commerce are telecommunications and financial services. The WTO has recently completed negotiations in each of these sectors, and it may be difficult to raise interest in further negotiations in these sectors. The use of an e-commerce cluster would allow some of these areas of services to be reconsidered in a different context.
- The cluster approach would be beneficial because it would reflect the reality of e-commerce, namely that aspects of certain services (including telecommunications and financial services) are indispensable to the proper functioning of e-commerce.
- The cluster approach to e-commerce may not be particularly useful given that so many sectors are involved.
- One problem with the cluster approach might be that it would produce patchwork sets of commitments whereby only certain elements of a services sector would be dealt with.
- The cluster approach is useful in creating momentum and in focusing the energies of the WTO members.
- The danger of an “all or nothing” cluster approach is that failure to agree in one area might end up preventing consensus on all of the sectors included in the cluster.
- Depending on the use to be made of the cluster, one problem might be that those who would wish to participate may be deterred if they are required to commit to a minimum level of liberalization commitments.

- Developing countries may see the cluster approach as an attempt to “bundle” together services that they may not wish to liberalize.
- Although a cluster makes sense, it is critical that related regulatory and social issues also be dealt with at the same time. These include issues related to consumer protection, privacy and labour. The experience of Seattle should underscore the importance of considering issues other than business interests.

*Some participants cautioned that, whatever approach is adopted to e-commerce, great care should be taken not to create a rigid set of rules that may quickly be rendered obsolete by the rapid evolution of e-commerce.*

- The negotiations on e-commerce will be difficult because they are slow and the electronic marketplace may have evolved greatly, rendering any agreed rules obsolete at inception. On the other hand, it is dangerous to try to anticipate the evolution of e-commerce and to make rules that will be effective in the future.

### **The Participants’ comments on the international trade rules and the World Trade Organization**

During the workshops, there was general discussion about the international trade regime and the WTO.

*Some participants expressed concerns with respect to the maintenance of the Government’s freedom to regulate in the public interest. Others expressed concerns with respect to ensuring the health of the Canadian economy by ensuring Canadian access to international markets.*

- Some participants characterized the WTO agreements as designed to control governments and to restrict their legislative freedom. They were of the view that the development of global corporations has led to the deterioration of the bargaining position between business and governments and that the WTO further empowers businesses to operate globally and to overpower the regulatory ability of governments.
- Some participants stated that important domestic values, reflected in domestic regulations, are being swept into the WTO trade regime. They felt that this is a key problem because the WTO mandate is concerned with trade liberalization and not with the competing or conflicting interests. They argued that Canada should not give up its freedom to choose its own domestic regulatory standards or to maintain public services in order to obtain market access for certain Canadian business interests.

- Some participants commented that the WTO dispute settlement panels approach disputes with a bias toward liberalization and a bias against domestic regulation. They suggested that this mechanism thus threatens our society by undermining our ability to regulate in the public interest.
- Some participants stated that it is important to Canadians, including small businesses, that we promote Canadian participation in international trade. The success of Canadian businesses is important to our economy generally as well as to individual Canadians trying to build businesses or employed in businesses in Canada.

### **The Participants' Comments on the consultative process**

As noted above, these workshops are part of a broader and on-going consultative process. On-going consultations are conducted through the Sectoral Advisory Groups on International Trade (SAGITs), through formal consultations with provincial representatives (the C-Trade process), through consultations with Parliamentary Committees (the Standing Committee on Foreign Affairs and International Trade), through website dissemination of information and solicitation of views, and through other cross-Canada stakeholder consultations. Stakeholders are encouraged to convey their views on an ongoing basis. Contact names and coordinates for various issues are available on the GATS2000 website:

- [http://strategis.ic.gc.ca/sc\\_mrkti/services/engdoc/homepage.html](http://strategis.ic.gc.ca/sc_mrkti/services/engdoc/homepage.html).

*During the e-commerce workshops, several participants commented on issues surrounding the consultation of Canadians in formulating Canadian positions and strategies, and posed questions about the consultative process.*

- Some participants stated that, with their greater resources, industry representatives are better able to get the “ear” of Government than are representatives of the general public interest. The Government should provide the resources necessary for these parties to be properly represented to the same degree as business interests are represented. Non-business representatives need to be involved at every level.
- Some participants stated that consultations should reach a large and representative sample of the Canadian population and that the Government must ensure that the Canadian public and public interest are represented, not just private business interests.
- Some participants expressed the concern that consultations are merely *pro forma* and that the real positions are already determined in favour of trade liberalization.



## ANNEX

### Workshop Participants

#### Ottawa - May 15, 2000

David Aaron	DFAIT	Ottawa
Jonathan Andresen	Teleglobe	Ottawa
Mara Bakich	Canadian Bankers' Association	Toronto
Tom Brandy	Price Waterhouse Coopers	Ottawa
Ramesh Chaitoo	Carleton University	Ottawa
Jennifer Chandler	DFAIT	Ottawa
Rick Clayton	Price Waterhouse Coopers	Ottawa
Bruce Couchman	Industry Canada	Ottawa
Barrie Crampton	Valley Heartland Community Development	Smiths Falls
William Crosbie	DFAIT	Ottawa
Luise Czernenko Reid	IPIC	Ottawa
Richard Dearden	Gowling, Strathy & Henderson	Ottawa
Jennifer Drysdale	Heritage Canada	Ottawa
Kirsten Embree	Osler, Hoskin & Harcourt	Ottawa
Peter Ferguson	Industry Canada	Ottawa
Lynn Fortin	Finance Canada	Ottawa
Michael Geist	University of Ottawa	Ottawa
Sara Gelgor	Canadian Bankers' Association	Toronto
Shirley-Ann George	IBM Canada	Ottawa
Randall Hofley	Stikeman, Elliott	Ottawa
Rafiq Khan	CANARIE Inc.	Ottawa
Laura Lane	AOL	Washington
Robert Leitch	Lanark Communications Network	Perth
Jim Lowe	Electronic Commerce Canada	Ottawa
Doug MacEwen	Industry Canada	Ottawa
David McLellan	DFAIT	Ottawa
Yasir Naqvi	Flavell, Kubrick & Lalonde	Ottawa
Tom Oommen	DFAIT	Ottawa
Lynne Pajot	Canadian Union of Postal Workers	Ottawa
Dave Paterson	CATA	Ottawa
Margot Patterson	Cdn Association of Broadcasters	Ottawa
Quan Pham	Industry Canada	Ottawa
Stéphane Roberge	Industry Canada	Ottawa
Daniel Roseman	Roseman Associates	Ottawa



Irving Silver	IRSA	Ottawa
Clifford Sosnow	Lang Michener	Ottawa
Cathy Steinhoff	Canadian Union of Postal Workers	Ottawa
Roger Tassé	Gowling, Strathy & Henderson	Ottawa
Robert Tritt	Bell Canada	Ottawa
Garth Whyte	Canadian Federation of Independent Business	Ottawa
Matthew Wilson	Alliance of Manufacturers and Exporters of Canada	Ottawa

### **Vancouver - June 13, 2000**

David Aaron	Foreign Affairs & International Trade	Ottawa
Richard Bourassa	Industry Canada	Ottawa
Michelle Brazeau	Vancouver Board of Trade	Vancouver
Jennifer Chandler	Foreign Affairs & International Trade	Ottawa
Paul Coronado	SmartSources.com Inc.	Vancouver
Bob Donnelly	DMR Consulting	Vancouver
Jennifer Drysdale	Canadian Heritage	Ottawa
Sandy Fleischer	Stratford Internet Technologies Inc.	Vancouver
Tony Fogarassy	University of British Columbia	Surrey
Jane Green	New Media BC	Vancouver
Burt Harris	Pacific Music Industry Association	Vancouver
George Hunter	BC Technology Industries Association	Vancouver
Gareth Jones	Paradata Systems Inc.	Whistler
Marc Lafrance	Pacific Music Industry Association	Vancouver
Marc Lee	Canadian Centre for Policy Alternatives	Vancouver
Gordon Locke	DMR Consulting	Vancouver
Patricia MacDonald	BC Public Interest Advocacy Centre	Vancouver
Ramona Materi	Ingenia Training	Vancouver
Tom Oommen	Foreign Affairs & International Trade	Ottawa
Xiaohui Peng	Faculty of Law, University of BC	Vancouver
Johanne Provençal	BC Association of Magazine Publishers	Vancouver
Gary Russell	Pacific Music Industry Association	Vancouver
Guy Seeklus	SMG Services Ltd.	Burnaby
Sid Shniad	Telecommunications Workers' Union	Burnaby
Richard Simpson	Industry Canada	Ottawa
Norm Trenaman	B.C. Economic Development	Victoria
Patrick Whelan	Tantalus Communications Inc.	Vancouver

## Edmonton - June 14, 2000

David Aaron	Foreign Affairs & International Trade	Ottawa
Bill Agamah	Ministry of Economic Development	Edmonton
Richard Bourassa	Industry Canada	Ottawa
Lisa Bowes	Office of the Chief Information Officer	Edmonton
Jennifer Chandler	Foreign Affairs & International Trade	Ottawa
Jennifer Drysdale	Heritage Canada	Ottawa
John Ellis	Industry Canada	Edmonton
Randy Goebel	University of Alberta	Edmonton
Royston Greenwood	Faculty of Business/University of Alberta	Edmonton
Daryl Hanak	Ministry of Intl and Intergovernment Relations	Edmonton
Craig McMahan	Ministry of Innovation and Science	Edmonton
Tom Oommen	Foreign Affairs & International Trade	Ottawa
Robert Perrin	Sask. Intergovernmental & Aboriginal Affairs	Regina
Larry Phillips	Consumers' Association of Edmonton	Edmonton
Bob Reczka	TELUS Corporation	Calgary
Justin Riemer	Ministry of Economic Development	Edmonton
Greg Rudolf	Alberta Government Services	Edmonton
Garry Russ	Ministry of Economic Development	Edmonton
Keith Scott	Ministry of Innovation and Science	Edmonton
Richard Simpson	Industry Canada	Ottawa
Tara Stevens	TRLabs	Edmonton
James Swanson	Swanson Streitmeier	Edmonton
Graham Walker	Industry Canada	Edmonton
Neil Warner	Alberta Government Services	Edmonton
Erin Wilkinson	ITC/Industry Canada	Edmonton

## Montréal, June 20, 2000

Marcel Achard	Digits 'n arts Software Inc.	Montréal
Josée Beaudoin	CEFRIO	Montréal
Pierre Beaulieu	Groupement des chefs d'entreprise	Montréal
Suzie Bélanger	Consortium Multimédia CESAM	Montréal
F. Bertrand-Venne	Société professionnelle des auteurs et des compositeurs du Québec	Montréal
Richard Bourassa	Industry Canada	Ottawa
Chantal Carbonneau	COPIBEC	Montréal
Robert Delorme	Industry Canada	Montréal
Jannick Desforges	Option consommateurs	Montréal
André Dubois	Industry Canada	Ottawa
Jennifer Drysdale	Canadian Heritage	Ottawa

Pierre Langelier	Institut du commerce électronique	Montréal
Loris Mirella	Canadian Heritage	Ottawa
Tom Oommen	DFAIT	Ottawa
Martin Pagé	BCE Emergis Inc.	Montréal
Gaston Poirier	Ministère de l'industrie et du commerce	Québec
André Préfontaine	Groupe transcontinental	Montréal
Stéphane Roberge	Industry Canada	Ottawa
Louis Roquet	Investissement Québec	Montréal
Brenda Swick	Ogilvy Renault	Montréal
Jacques Véronneau	Francomédia	Montréal

### **Saint John, NB - June 27, 2000**

David Aaron	Foreign Affairs & International Trade	Ottawa
Barrie Black	Aliant Inc.	Saint John
Richard Bourassa	Industry Canada	Ottawa
Jennifer Chandler	Foreign Affairs & International Trade	Ottawa
Brad Chapman	Global Advanced Technology Corporation	Saint John
Jana Comeau	Electronic Commerce Centre, UNB	Saint John
Kelly Cuddihy	Innovatia Inc.	Saint John
Dan DeMatteis	DMR Consulting	Saint John
Herb Duncan	Fundy Computer Services	Saint John
Michael Dunn	Tourism Industry Association of NB	Fredericton
Tim Ellis	Grant Thornton LLP	Saint John
Marc Maurice	Coastal Internet International	Moncton
Conrad Melanson	Coastal Internet International	Moncton
Brad Mitchell	Cansupply.com	Saint John
Don Mitchener	Deloitte & Touche LLP	Saint John
Keith Murray	Information & Highway Division, Govt of NB	Fredericton
Tom Oommen	Foreign Affairs & International Trade	Ottawa
Cathy Pirre	BrunNet Inc.	Fredericton
Harry Quinlan	Economic Development/Tourism, Govt of NB	Fredericton
Shelley Rinehart	Electronic Commerce Centre, UNB	Saint John
Ray Wilson	Film New Brunswick	Fredericton

### **Toronto - June 28, 2000**

David Aaron	Foreign Affairs & International Trade	Ottawa
L. Assheton-Smith	Cdn Cable Television Association	Toronto
Vincent Beaulieu	Foreign Affairs & International Trade	Ottawa
Barry Bernstein	Oasis Technology Ltd.	Toronto
Richard Bourassa	Industry Canada	Ottawa

Bill Cameron	Identrus Project	Toronto
Duncan Card	Davies, Ward and Beck	Toronto
Jennifer Chandler	Foreign Affairs & International Trade	Ottawa
Bruce Creighton	Southam Inc. (Magazine & Info Products)	Don Mills
Paul Davidson	Stoddart Publishing Co.	Toronto
John Degen	Cdn Magazine Publishers Association	Toronto
Jennifer Drysdale	Canadian Heritage	Ottawa
Deborah Dugan	Cdn Gift & Tableware Association	Toronto
Peter Ferguson	Industry Canada	Ottawa
Brian Gordon	Ontario Ministry of Energy, Science & Technology	Toronto
Barry Grills	Writers' Union of Canada	Toronto
L. Haggerty-Minor	PBB Global Logistics	Fort Erie
Rob Harper	Ontario Consumer & Commercial Relations	Toronto
Eric Hutton	Ontario Ministry of Finance	Toronto
Jennifer King	Ontario Ministry of Economic Development	Toronto
Jean Herold Laval	Scotiabank	Toronto
T. On Lee	T.O. Lee Consultants	Richmond Hill
Carole Machtinger	Insurance Information Centre of Canada	Toronto
Sharon Maloney	Retail Council of Canada	Toronto
Doug Mander	Ontario Consumer & Commercial Relations	Toronto
James McIlroy	McIlroy & McIlroy Inc.	Toronto
Thomas McKaig	Thomas McKaig Intl. Inc.	Toronto
Bob McKellar	PBB Global Logistics	Fort Erie
Susan Mok	Scotiabank	Toronto
Bill Munson	ITAC	Mississauga
Tom Oommen	Foreign Affairs & International Trade	Ottawa
James Perttula	Ontario Ministry of Economic Development	Toronto
Richard Simpson	Industry Canada	Ottawa
William Skilton	Hewlett-Packard (Canada) Ltd.	Toronto
Art Smith	Electronic Commerce Council of Canada	Toronto
Walied Soliman	EDS Canada Inc.	Toronto
Bill Tam	AT & T Canada Corp.	Toronto
Ken Thompson	Canadian Recording Industry Association	Toronto
Margaret Vokes	Ontario Chamber of Commerce	Toronto
Todd Weiler	Faculty of Law, University of Toronto	Toronto
Ann Whitehead	Mississauga Technology Association	Mississauga
David Wolfe	University of Toronto	Toronto