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EXPLORATORY WORK ON ELECTRONIC COMMERCE*

NON-PAPER FROM BRAZIL

The following non-paper, dated 11 April 2018, is being circulated at the request of the delegation of Brazil.

1. Brazil welcomes the Ministerial Decision on the Work Programme on Electronic Commerce adopted at MC11 in which Ministers stated that Members "will endeavour to reinvigorate" relevant work, "based on the existing mandate as set out in WT/L/274" (WT/MIN(17)/65). In the same spirit, on 13 December 2017, on the margins of MC11, 71 Members circulated the Joint Ministerial Statement on Electronic Commerce, calling for the initiation of "exploratory work [...] toward future WTO negotiations on trade-related aspects of electronic commerce" (WT/MIN(17)/60).

2. Brazil has already submitted three recent contributions on e-commerce¹, one of them with Argentina on electronic commerce and copyright and another one with Argentina and Paraguay on electronic signatures. This non-paper builds upon previous contributions from Brazil and other Members and is intended to provide technical input for the exploratory work.

1 SCOPE

1.1. The mapping of e-commerce issues presented by the co-sponsors of document JOB/GC/116/Rev.2 remains a useful reference for the exploratory work. Brazil is of the view that current discussions should encompass all trade-related aspects of electronic commerce.

1.2. In order to facilitate and organize the exploratory work, it might be useful to group issues under three headings², further developed in the next sections of the non-paper:

- a. **Principles:** Members might wish to discuss possible principles that would be applicable to electronic commerce;
- b. **Development:** Development should be a central and cross-cutting element in the discussions of the exploratory work;
- c. **Four negotiating pillars³:** possible issues for rule-making or market access negotiations could be grouped under four pillars:

* This document was originally circulated as JOB/GC/176 dated 12 April 2018.

¹ JOB/GC/98, JOB/GC/113/Rev.1 and JOB/GC/115.

² This schematic categorization is meant only to help organize the exploratory work and to give a better understanding of the different areas involved in the discussions and does not prejudice Brazil's positions on many of the issues, unless such positions are clearly stated. It is not an end in itself and it should not detract discussions from substantive issues.

³ The reference to negotiating pillars and to a possible reference paper in one of the pillars is not meant to prejudice the format of any negotiated outcome on electronic commerce.

- i. Market access: work under this pillar can be pursued under existing GATT and GATS rules and would not require, in principle, new rule-making;⁴
- ii. Electronic commerce facilitation: topics under this pillar would include issues that are enablers of electronic commerce. The technical, specific and rather uncontroversial nature of those issues suggests that they could be readily translated into rule-making provisions;
- iii. Electronic commerce development: the further development of electronic commerce is linked to developments in some key areas. Differently from the previous pillar, issues under this pillar are "issues on their own" and would require specific deliberation before turning into rule-making;
- iv. Electronic commerce reference paper: this pillar would include core-topics of electronic commerce and would most probably require rule-making.

1.3. The multi-layered nature of electronic commerce and the heterogeneity of Members' interests and constraints suggest the need of a flexible approach regarding any possible WTO outcome on the matter.

1.4. This flexibility could be achieved by allowing developing and least-developed Members to identify the components among and within the four pillars they are prepared to adopt and market access negotiations they are prepared to join. Commitments in this regard might include particular timetables for the adoption/implementation of specific components. The flexible combination of different outcomes might ensure a level of ambition that is tailor-made to each developing and least-developed Member, without necessarily reducing the overall level of ambition on electronic commerce negotiation as a whole.

2 PRINCIPLES

2.1. The exploratory work could include a discussion on some principles that would be applicable to electronic commerce:

- a. The Internet should remain free and open for all legitimate commercial and development purposes, including by allowing increased access to information, knowledge and new technologies. As a general rule, rights and obligations should be the same and apply equally offline and online.⁵
- b. Members shall retain the right to regulate in the public interest and to introduce new regulations within their territories so as to achieve public policy objectives.
- c. Electronic documents and electronic signatures shall produce the same legal effects as those of paper documents and handwritten signatures, subject to Members' domestic laws and regulations on electronic documents and electronic signatures. Members shall ensure that their legal systems allow contracts to be concluded by electronic means and that the legal requirements for contractual processes neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on the ground of having been made by electronic means.
- d. The application and review of policies and measures affecting e-commerce shall be transparent. To the extent possible, relevant stakeholders should have an opportunity to comment on proposed laws and regulations or changes to existing ones prior to their implementation.

⁴ The possibility of negotiating market access under new rules might be explored in the future.

⁵ This principle has already been suggested by Brazil and the United States in documents JOB/GC/98 and JOB/GC/94, respectively.

- e. The promotion of increased access and participation of women both as consumers and as traders in electronic commerce should be a key element of any electronic commerce outcome in WTO.
- f. Any outcome in the WTO on the matter should address the needs of and challenges faced by Micro, Small and Medium Enterprises (MSMEs) regarding electronic commerce.⁶

3 DEVELOPMENT

3.1. Development is a central element of the discussions on electronic commerce. It has a horizontal nature and needs to be embodied into any WTO outcome on electronic commerce. In this regard, the E-Commerce for Development Agenda suggested by Costa Rica (JOB/GC/139) constitutes a good basis for further work, as it would enable the assessment of the needs of developing countries in relation to e-commerce and would facilitate focused dialogue on the challenges and opportunities they face. In particular, discussions might address the difficulties that a number of companies and services suppliers from developing countries must tackle in order to participate in large digital platforms.

4 FOUR NEGOTIATING PILLARS

4.1 Market access

4.1. Some Members may be interested in engaging in electronic commerce-related market access negotiations. Such negotiations could target:

- (i) services and non-services sectors related to new business models based on digital environment; and
- (ii) services and non-services sectors related to the infrastructure of the digital environment.

4.2. Under category (i):

- The services component might benefit from a discussion of the classification of the sub-sector 1.B "computer and related services" of the Services Sectoral Classification list (document MTN.GNS/W/120) - document TN/S/W/60 could be a useful reference in this regard. Consideration about the negotiation of new associated GATS Article XVI and Article XVII commitments could also be relevant.
- The non-services component – meaning the commercialization of goods by electronic means – might include the discussion of topics suggested by China under section 2 of document JOB/GC/142, for example. Should a commercial transaction through an electronic platform in which a good is provided or delivered physically be considered as electronic commerce or should it be considered a traditional transaction based on the technological neutrality principle applied to the GATT?

4.3. Under category (ii):

- The services component could entail the consideration of the negotiation of new GATS article XVI and article XVII commitments under sub-sector 2.C "Telecommunication services" of the Services Sectoral Classification. A reassessment of the Telecommunication Reference Paper might be useful as well. As Brazil pointed out in an earlier submission (JOB/GC/98), in order to ensure an open and free environment for the development of e-commerce, telecom operators/Internet service providers should not be allowed to discriminate data packages by its content, origin and destination, service, terminal or application, through public networks, except for emergency communications and for technical requirements indispensable to the adequate provision of services and applications. In this regard, the principle of network neutrality would have to be discussed.

⁶ JOB/GC/127 is a useful reference.

- Dealing with the non-services component might lead to a discussion involving tariff reduction of goods related with digital infrastructure.

4.4. In case of negotiations under paragraphs 10 and 11, revisiting the issue of technological neutrality of the GATS might prove unavoidable. Jurisprudence has already made it clear that "a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member's Schedule." WT/DS285/R, para. 6.285). Nonetheless, it seems unreasonable to assume that commitments undertaken by Members in the early 90's can be automatically extended, under the technological neutrality argument, to cover the completely new and revolutionary businesses models based on digital environment. In order to avoid long and possibly inconclusive debates, it might be useful to consider a separation between new and old commitments.

4.5. Some consideration might also be given to the cyberspace trade barriers referred to by Chinese Taipei in document JOB/GC/170 and the relation to GATS article XVI restrictions. Discussions could include, for instance, the issue of transfer and/or access to source code.

4.6. Members should consider the convenience of adopting a common understanding that commitments regarding cross-border electronic transmissions are covered exclusively by Mode 1, as raised by Brazil in document JOB/GC/98, or by both Modes 1 and 2.

4.7. It is to be expected that a number of delegations will be interested in discussing the practice of not imposing customs duties on electronic transmissions on a permanent basis. Discussions shall also include the views reflected in paragraph 6.5 of JOB/GC/144 submitted by the African Group, in document JOB/GC/171 from Chinese Taipei and in document WT/MIN(17)/68 from Indonesia. It is possible that such an outcome would be part of a broader and balanced set of commitments.

4.2 Electronic commerce facilitation

4.8. Under the electronic commerce facilitation pillar, several issues could be discussed as important enablers of e-commerce:

- a. Electronic authentication, trust services and electronic signatures. The drafting language proposed by the European Union in document TN/S/W/64 and the contribution made by Argentina, Brazil and Paraguay in document JOB/GC/115 are useful input for the discussions on the matter.
- b. Unsolicited commercial electronic messages. The drafting language proposed by the European Union in document TN/S/W/64 is a useful input for the discussions on the matter.

4.9. An item of crucial importance in the facilitation of electronic commerce is consumer protection. The drafting language proposed by the European Union in document TN/S/W/64 could serve as useful point of departure for the discussions on the matter. Although it embodies the principles raised by Brazil in document JOB/GC/98, further elements might have to be added to that draft. Another issue that could be considered is to clarify that the sale of a good by electronic means or a sale of an electronic transmission can only be considered completed after the return period has lapsed.

4.3 Development of electronic commerce

4.10. Under the pillar related to the development of electronic commerce, at least two important issues would have to be discussed:

- a. The remuneration of artists and performers is a market-place issue that rests upon the bargaining power of the different actors involved with the copyright ecosystem. The WTO could contribute to the reduction of the asymmetries of information between the relevant actors of this ecosystem by increasing the level of transparency regarding the remuneration of copyright and related rights in the digital environment. A second contribution of the WTO to improve the business environment in the electronic copyright trade is reaffirming the territoriality of copyright in the digital environment as a principle

of the international trading system. Finally, the principle that exceptions and limitations available in physical formats should also be made available in the digital environment should be discussed as well. Those elements have been previously addressed by Argentina and Brazil in document JOB/GC/113/Rev.1.

- b. Payments made via the Internet as well as mobile banking are key instruments to further develop e-commerce. The use of electronic payment systems depends, to a large extent, upon a proper domestic regulatory environment. Discussions might lead to explore ways to help Members improve their internal regulatory framework in this regard, in full conformity with their right to regulate and pursue public policies. The note by the Secretariat contained in document S/FIN/W/88/Add.1 contains useful input in this regard.

4.4 Reference paper on electronic commerce

4.11. This pillar includes core-topics of electronic commerce that would require rule-making, since they are not explicitly addressed in existing WTO agreements. Although disciplines relating to these issues may be easy to translate into WTO rules, its complexity and overarching consequences require an in-depth analysis of the matters involved.

4.12. The point of departure of the discussions might be the degree to and the conditions under which digital data shall be allowed to flow.

4.13. On the one side of the spectrum of positions in this regard is the view that there should be no limitations to the free flow of digital data⁷. Nonetheless, in fulfilling their duties, regulators will find themselves in situations where limitation of dataflow is unavoidable. The general and the security exceptions of GATS Articles XIV and XIV *bis* are useful provisions in this regard but both were not specifically drafted for the digital environment. Therefore, it might be useful to consider how improved disciplines would clarify the general and security exceptions appropriate for the digital environment.

4.14. The voluntary adoption of international standards of privacy by design and default and of security by design and default should be discussed.

4.15. Some of the issues that would have to be discussed in this regard are, among others:

- a. privacy of individuals, consumers and medical patients;
- b. cybersecurity;
- c. terrorism;
- d. crimes such as paedophilia;
- e. human rights (freedom of expression, of communication, of manifestation and of association; access to information; and non-discrimination);
- f. disinformation.

4.16. One challenging question regarding the digital environment is the issue of jurisdiction and the ability to enforce national law. This is one of the reasons behind some computing facilities/server's localization requirements enacted by some governments. It might be useful to discuss concepts like universal jurisdiction or choice of jurisdiction applicable to electronic commerce.

4.17. What seems to be a slightly different issue is whether disciplines on the usage of big data will require a jurisdictional debate as well.

⁷ JOB/GC/94.

4.18. Besides the situations and conditions under which regulators might put restrictions to the free flow of data, it could also be relevant to discuss possible rules applicable to the flow of digital data not limited by the reasons listed under paragraph 4.15 above.

4.19. One issue that should be discussed is the ownership of data produced in different jurisdictions. That is particularly relevant in the case of some categories of personally identifiable information. If ownership on this kind of data can be established, one might elaborate about possible conditionalities and rules that would be applicable for this data to move from one jurisdiction to another.

4.20. Another issue that would require attention is the necessity of rules applicable to online platforms and their algorithms. What type of responsibility should online platforms bear with regard to the database they own and administer? The issue of content responsibility should deserve close consideration in the exploratory work.

4.21. A final issue that might entail fruitful discussions is the treatment of large online platforms, since their position bear strong resemblance with traditional natural monopolies. Discussions on new approaches to competition policy can account for this issue. Issues like data portability and non-discriminatory access might be relevant concepts in this regard.
