Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

4-2017

Can WTO law keep up with the Internet?

Henry GAO
Singapore Management University, henrygao@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research

 Part of the Asian Studies Commons, and the International Trade Law Commons

Citation

GAO, Henry. Can WTO law keep up with the Internet?. (2017). *Proceedings of the ASIL Annual Meeting: Washington, DC, 2017 April 12-15*. 108, 350-352.
Available at: https://ink.library.smu.edu.sg/sol_research/3213

This Conference Proceeding Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

CAN WTO LAW KEEP UP WITH THE INTERNET?

By Henry Gao[*]

The regulation of Internet activities presents special challenges to the World Trade Organization (WTO), as its rules were mostly formulated in the pre-Internet era. The first difficulty lies in determining whether Internet activities should be classified as goods or services, as they are subject to different regulatory frameworks. Traditionally, the General Agreement on Tariffs and Trade (GATT) only applies to goods. It was not until the establishment of the WTO in 1995 that services trade was finally brought within the scope of the multilateral trading system. While some activities, such as the online delivery of books and audiovisual products could arguably be classified as goods according to the technology-neutrality principle, most activities conducted via the Internet share more similarities with services trade. For example, many Internet activities are intangible and non-storable like services. Similarly, many Internet activities are produced with joint input from suppliers and consumers and thus are tailor-made according to the needs of specific consumers, like other services.

Once we conclude that Internet activities shall be classified as services, we shall apply the disciplines under the General Agreement on Trade in Services (GATS). Unlike the GATT, which applies a uniform set of rules to most products, the GATS adopts a different regulatory approach. First, according to the "positive listing" approach, WTO members only assume obligations for sectors that they have included in their schedule of specific commitments. Thus, we have to determine which sector or sub-sector Internet services fall under and check the respective schedules to see if they are covered. Second, even for services covered in its schedule, a WTO member can choose among different levels of liberalization by inscribing commitments ranging from "none" (which means "no limitation" or "fully liberalized") to "unbound" (which means "no commitment") in the market access and national treatment columns. Third, while both agreements allow WTO members to deviate from the obligations of these agreements by citing the "General Exceptions" clauses, the preferred exceptions are different. Under the GATT, the most commonly cited exceptions are the ones to protect public health and the environment. In contrast, the favorite clause under the GATS has been the public morals exception. Because of their unique nature, Internet services pose challenges to the GATS regulatory framework on all three issues. In the following sections, I will discuss the regulatory difficulties,[1] as well as policy suggestions that could address these problems.

CLASSIFICATIONS

Under the GATS, services are classified according to the Services Sectoral Classification List, which classifies all services into 12 sectors and 160 sub-sectors. While this system does a good job in classifying most other services sectors, it has not been so useful in classifying Internet services. To start with, the Classification List is outdated as it is based on the United Nations Provisional Central Product Classification (CPCprov). The CPCprov was published in 1990, when the Internet was still in its infancy and many Internet services, such as search engines, did not even exist. It does not provide direct reference to many Internet services

[*] Associate Professor of Law, Singapore Management University; Dongfang Scholar Chair Professor, Shanghai Institute of Foreign Trade.

[1] Some of the regulatory difficulties are discussed in Henry Gao, *Google's China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS*, 6 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 347–85 (2011).

that are common today. Instead, they are often scattered over many sectors. For example, search engine services can arguably be classified under either telecommunication services or computer and related services. Paradoxically, some of the classifications under the Services Sectoral Classification List also overlap with each other. For example, under the List, online info processing and data processing share the same code under CPCprov, but are grouped under telecommunication services and computer services respectively.

To better capture the reality of Internet services, the current classification system needs to be reviewed and redesigned in a systematic manner. Depending on the nature of the services, different approaches should be taken. On the one hand, for Internet services which have been supplied through traditional channels before the advent of the Internet, they should be grouped under the original sector as per the technology-neutrality principle, unless of course their nature has been changed by the online delivery. Thus, online banking services shall be classified under banking services, and online universities shall be classified under educational services, etc.

On the other hand, classification of services that only emerged with the birth of the Internet is more tricky. As the latest version of the CPC includes many such services, it is tempting simply to replace the reference to the CPCprov codes in the Services Sectoral Classification List with the corresponding codes in the new version. However, this approach is undesirable for the following reasons. First, as the Services Sectoral Classification List is not mandatory, not every WTO member uses it or includes explicit reference to the CPC codes in its schedule. Second, even for those that do use the CPC, the schedule cannot be simply updated with the new CPC versions. This is because the CPC often shuffles the codes around when the versions are updated, so the same codes under different versions might refer to entirely different services. Third, as cases like *U.S.—Gambling* have shown, it has been a challenge for WTO members to fully understand even their own commitments. Thus, they will not accept a comprehensive update of the schedules without careful scrutiny.

Because of these difficulties, even just an update of the schedules based on the latest CPC version probably cannot be achieved without major negotiation efforts. In addition, as many Internet services are closely linked together, it is probably better to take a cluster approach in the review and deal with them together.

Obligations

Other than the most-favored-nation (MFN) principle, most obligations under the GATS only apply when a member schedules relevant commitments. For each sector that a member includes in its schedule, the member may choose how much market access or national treatment that it is willing to offer. Moreover, such scheduled commitments are also subject to sector- or mode-specific limitations.

For Internet services, such regulatory framework creates the following problems. First is ambiguity in sectoral coverage. Even though a member may choose which sectors to include in its schedule, ambiguities could still arise due to imperfections in the classification system. A good example in this regard is the *U.S.—Gambling* case. In this case, the United States included in its schedule a sub-sector entitled "Other Recreational Services (except sporting)." While the United States argued that "sporting" includes gambling services, the WTO Panel disagreed and ruled that sporting does not include gambling services and thus should be included in the U.S. commitments. While this problem could arise in any services sector, Internet services are particularly prone to interpretive ambiguities due to the classification difficulties mentioned earlier.

The second problem is confusion on modes of supply. Under the GATS, services could be supplied in four modes: (1) cross-border supply, (2) consumption abroad, (3) commercial presence, and (4) movement of natural persons. For Internet services, it is quite difficult to tell if a service is supplied through Modes 1 or 2 as the service is provided in cyberspace. Further complications could arise in cases where the service supplier is located in another WTO member, but maintains a server in the home country of the consumer. It could be argued that Mode 3 shall apply in such cases. As a member may have different levels of commitments depending on the mode of supply, the confusion over mode of supply could lead to illogical consequences.

To address these problems, I make two suggestions. First, the WTO members should agree on a set of scheduling guidelines for Internet services. This would help clarify the meaning of schedules and avoid future complications. Second, a set of regulatory principles that sets a minimum regulatory standard for the Internet services sector should be formulated. In this regard, the Telecommunications Reference Paper provides a really good model due to the close links between the two sectors.

Exceptions

The General Exceptions clause allows a WTO member to deviate from its normal obligations. Under the GATS, the most frequently cited exception is the public morals exception. Interestingly, in both of the two cases concerning Internet services, i.e., the *U.S.—Gambling* case and the *China—Publications* case, the respondent cited the public morals exception to defend its measures. In their rulings, the WTO Panel and Appellate Body often accord wide discretion to national authorities in defining both the boundaries and depth of the exception, but this could lead to bizarre results. For example, in the *China—Publications* case, the Appellate Body encouraged the Chinese government to conduct censorship itself as this is supposedly better than outsourcing to private firms from the perspective of WTO law.

In my view, it is problematic to accord wide discretion to countries without democratically elected governments as the government's view on public morals is not necessarily truly aligned with that of the people. A good way to prevent the potential abuse of the exception is to adopt some universal benchmark on what may qualify as public morals, so that fundamental human rights, such as those enshrined in the Universal Declaration of Human Rights, will not be harmed under the disguise to protect public morals. As the core competence of the WTO is in trade, the Organization is ill-equipped for this task. Instead, we should consider adopting a mechanism similar to the one under the Sanitary and Phytosanitary (SPS) Agreement, i.e., having the standards formulated by another international organization with competence on public morals issues, and making it mandatory for the WTO to consult them when disputes arise.

Conclusion

In conclusion, while the GATS, in its current form, is not well-suited to the regulation of the Internet, it has the potential to keep up with the regulatory task. However, to make this happen, we will need new approaches in dealing with Internet services, especially on key issues such as classifications, obligations, and exceptions. Some of the preliminary policy suggestions are made in these remarks, in the hope that they will lead to more insights on these issues.