The Commonwealth

ISSUE 152

Trade Hot Topics

Emerging New Technologies: Implications for Services Commitments

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Introduction

Technology has had a transformative impact on various aspects of our lives. The way we rely on technology today, for communicating with people, shopping, hailing taxis, making airline and hotel bookings, watching movies or even learning new subjects, was unfathomable even a decade back. Technology has evolved so rapidly that regulatory mechanisms across countries in several sectors are simply playing catch-up. This is true for both developed and developing countries.

Let us take the example of Uber, Lyft, Ola and other ride-hailing services, which exist in many countries. Are these transport/taxi services or are these digital application-based services? It was only as recently as December 2017 that the European Court of Justice (ECJ) ruled against Uber's argument that it was a computer service business providing a technology platform that connected passengers with independent drivers. Instead, the ECJ ruled that Uber was a transportation company, subject to the same rules as taxi services instead of the lighter regulatory framework governing the digital space.

Several states in India have enacted specific rules that mandate that online taxi aggregators need to obtain licences. In several states of the USA, laws governing ride-sharing businesses are different from traditional regulations governing taxis. However, recently, legal interpretation has evolved to provide employment benefits to Uber drivers (in a New York Department of Labor ruling), rejecting Uber's argument that its drivers are 'independent contractors' and not full-time employees. In August 2018, New York City Council passed legislation authorising limits on the number of licences for ride-hailing taxi services, with a view to regulating the number of vehicles operating on such apps.

These experiences reveal that the promise of technology also presents challenges to the nature and extent of regulatory controls over such technologies and their operators. Governments cannot anticipate with certainty the evolution and

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impact of technology; the evolution of the law has therefore occurred as a response to the social and economic impacts of new technology.

What does all of this mean for negotiating commitments on trade in services under the World Trade Organization (WTO) and other trade agreements? This issue of *Trade Hot Topics* seeks to discuss some of the main issues that countries need to consider while negotiating trade in services, and interpreting commitments on trade in services, in view of rapid technological evolution.

Scheduling of commitments under the WTO's General Agreement on Trade in Services

The WTO's General Agreement on Trade in Services (GATS) envisages that trade in services can occur in four ways, depending on the territorial presence of the supplier and the consumer at the time of the transaction:

- When the service supplier delivers services from the territory of one country into the territory of another, it is Mode 1, or 'cross-border trade'.
- When the service consumer of a country goes across to the territory of another country to avail of services, it is Mode 2, or 'consumption abroad'.
- When the service supplier of one country sets up a commercial presence in the territory of another country, it is Mode 3, or 'commercial presence'.
- When natural persons of one country deliver services by being present in the territory of another, it is Mode 4, or services through the 'presence of natural persons'.

The GATS does not address 'technological issues' regarding the supply of services. Its focus is on the supply and consumption of services. During the Uruguay Round negotiations, countries took on specific commitments, set out in schedules, under which they specified the sector and mode of supply of services, and the terms, conditions and limitations pertaining to these.[1] The Scheduling Guidelines, adopted by the Group of Negotiations on Services in 1993, strongly recommends, among other things, that the committed sectors be defined as clearly as possible.[2] The Scheduling Guidelines asked members to take a cautious approach when dealing with the issue of technology, and to enter 'Unbound*' for sectors where technology could not be envisaged as capable of a certain type of service delivery. The Guidelines note that:

> In some situations, a particular mode of supply may not be technically feasible. An example might be the cross-border supply of hair-dressing services. In these cases the term UNBOUND* should be used. The asterisk should refer to a footnote which states 'Unbound due to lack of technical feasibility'. *Where the mode of supply thought to be inapplicable is in fact applicable, or becomes so in the future, the entry means 'unbound'.* (Emphasis added.)

This principle under the Scheduling Guidelines does not address itself to possible circumstances where the reach of technology could not have been anticipated at all. The fact of the matter is that, when commitments under the GATS were negotiated in 1995, delivery of 'cross-border' services through the use of computer and digital platforms was fairly limited. Technological evolution over the years has enhanced this cross-border delivery of services. Certain services sectors, in which supply may traditionally have been possible only through Mode 3 commercial presence, are today amenable to cross-border supply through technological means.

Road transport and construction services: Illustrative examples

The evolution of technology to enable, for example, road transport, through ride-sharing apps, would not have been contemplated in 1995. Let us assume, for example, that a country's GATS schedule specifies that full commitments are taken on for Mode 1 under road transport. Ideally, under the Scheduling Guidelines, a country ought to have specified 'Unbound*', to indicate the unavailability of Mode 1 owing to technological feasibility issues. At the time of taking on Mode 1 commitments, however, a country may merely have wanted to schedule advice or consultancies related to road transport through cross-border means, and may not have envisaged that at some point in the future it would be possible to use a digital platform to connect drivers and customers. Would taking on commitments in Mode 1 potentially limit the country's ability to regulate app-based services, if it had chosen to mandate that 'commercial

1 Article XX, GATS.
2 Group of Negotiations on Services, Explanatory Note: Scheduling of Initial Commitments, MTN.GNS/W/164, 3 September 1993. Para. 47 of the Guidelines of 2001 (S/L/92) reflects this principle.

presence' and licensing was mandatory for such services? Could it limit the country's ability to impose discriminatory requirements to encourage domestic service suppliers over foreign service suppliers?

Countries that have taken on full commitments under Mode 1 in the road transport sector include Kenya, Jamaica, Ghana, Guyana and The Gambia. Of these, Kenya has not taken on any commitments under Mode 3 – which means it intends to preserve policy space to place restrictions on road transport service suppliers seeking to supply services through commercial presence in Kenya. Any expansive interpretation of its commitments on delivery of road transport services through Mode 1 could potentially put this regulatory space at risk.

Similarly, let us take the example of construction and related engineering services. In this area, the concept of 3D printing – a technological innovation that relies on additive manufacturing to construct objects directly from computer-aided design (CAD) data, adding different materials, layer by layer, with the help of a 3D printer[3] – has revolutionised traditional notions of 'construction' activity. Construction services are typically regulated in each country through various requirements such as performance standards, time period for completion, building codes, capitalisation norms, etc. The extent to which such requirements can be made applicable for 3D printing, and whether construction through 3D printing requires a different set of regulatory controls, is an issue that no country has yet addressed comprehensively.

A country stating 'None' (i.e. full commitments and no restrictions) in construction and related engineering services under Mode 1 in its GATS schedule of commitments in 1995 could only have intended that no restrictions would apply to advisory services relating to construction, or providing design elements – which was clearly the only possible way in which to render cross-border services in construction and related engineering services at that time. Can a 'None' entry in today's context potentially affect a country's ability to regulate 3D printing? With regard to construction and related engineering services, countries that have taken on full commitments in Mode 1 include Argentina, Canada, Seychelles and The Gambia.

Is the WTO itself '3D printing ready'? This is a question raised in an opinion piece in the WTO's World Trade Report 2018.[4] This is because 3D printing basically transmits data across the border, thereby eliminating the need for trade in intermediate goods. 3D printing may therefore require a fundamental rethinking of the traditional WTO rules governing trade in goods and trade in services. The piece discusses another article which suggests that 3D printing may wipe out as much as 40 percent of world trade by 2040.[5] Clearly, the relevance of technology in this regard has implications not only for trade in services but also for the notion of trade in goods, investments, services and data flows.

The GATS and technology

Central to the delivery of any services through digital technology are data flows. The GATS does not guarantee the free flow of data. However, the scope of the GATS extends to any 'measure affecting trade in services'. This term has been interpreted in an expansive manner to mean 'any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services'.[6] While the GATS does recognise countries' ability to enact laws relating to privacy, and to ensure the protection of confidential data, this provision is inscribed as an exception to GATS obligations (under GATS Article XIV), which mandates that the actions of each country be tested against the principle of necessity for such a measure, and whether the measure is applied in a non-arbitrary, and non-discriminatory manner. In other words, use of an exception places the burden on the country invoking the exception to establish why the measure is the least trade-restrictive option it has, and that there is no other reasonably available alternative to it. Relying on this provision alone to ensure regulatory policy space in dealing with evolving technologies, therefore, may not be the right approach. In any event, the scope of the exception is limited to privacy-related concerns. It will not have any value in evolving other aspects of regulation, such as in localisation or mandating commercial presence for the delivery of certain types of services, such as construction or app-based transport services.

3 National Board of Trade (2016) *Trade Regulation in a 3D Printed World – A Primer*. Stockholm: National Board of Trade.
4 Patrik Tingvall and Magnus Rentzhog (2018) "Is the WTO 3D printing ready?", *World Trade Report 2018*. Geneva: WTO, at p. 158.
5 ING (2017), *3D Printing: A Threat to Global Trade*, Amsterdam: ING.
6 Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/R), para. 7.285.

To address this issue, commitments under the GATS need to be examined in the context of prevailing means for the supply of services at the time commitments were taken on, and whether countries could have anticipated that the evolution of technology would make possible the delivery of services through new technological means.

Discussions at the WTO have so far not addressed this issue. Instead, early discussions on relevance of technology in interpreting services commitments focused predominantly on the very simplistic question of whether the GATS itself was technologically neutral or not, and the debate surrounding this has been unnecessarily contentious. Several countries (including Australia, Canada, the EU and the USA) appear to support an expansive notion of technological neutrality. On the other hand, several developing countries have generally taken the view that the concept of technological neutrality cannot automatically be read into GATS commitments, as this would result in constraining the regulatory freedom of members in a way that was not envisaged at the time of undertaking commitments. In the context of the e-commerce discussions, a background document prepared by the WTO Secretariat notes that the means of delivery does not alter specific commitments under the GATS, and that the GATS is technologically neutral as it does not contain any provisions that distinguish between the different technological means through which a service may be supplied.[7] The document does not, however, address itself to the implications of evolving technology for interpreting commitments when such technology did not exist at the time of taking on the commitments.

WTO jurisprudence

There has so far been no WTO dispute in which any definitive consideration of this matter has occurred. However, the relevance of "intention" of parties at the time of scheduling has been considered in several GATS related disputes, including in *US – Gambling*,[8] where the facts involved an assessment of US commitments on cross-border supply of gambling and betting services in its GATS Schedule. The Appellate Body held that "the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members".[9] In the *David v. Goliath* story that unfolded, Antigua and Barbuda succeeded in their legal reasoning that US restrictions on cross-border supply of gambling and betting services is contrary to its GATS commitments.

The WTO panel and Appellate Body's ruling in *China-Publications and Audiovisual Products*,[10] also briefly discussed the relevance of a country's intention in interpreting commitments inscribed in the GATS schedule. China argued in this case that 'the electronic distribution of sound recordings as an established business and the legal framework for such business emerged only after the negotiation of its GATS Schedule and its accession to the WTO'.

The WTO panel examined the evidence presented by the parties on the technical feasibility and commercial practice with respect to the electronic distribution of sound recordings before and at the time of China's Protocol of Accession, and noted that the prevalence of electronic distribution of sound recordings existed at this time. Based on this finding, it concluded that the electronic distribution of music, although limited, had become a technical possibility and commercial reality by 1998, and in any case before the entry into force of China's GATS Schedule following its accession to the WTO in December 2001.

The panel noted that 'in seeking to confirm the "common intention of Members" with respect to a commitment in a GATS Schedule, evidence on the technical feasibility or commercial reality of a service at the time of the service commitment may constitute circumstances relevant to the interpretation of its scope under Article 32 of the Vienna Convention (on Law of Treaties)'.[11] Based on the evidence before it, it rejected China's submission that the electronic distribution of sound recordings had emerged only after its accession.

7 Work Programme on Electronic Commerce, Background Information by the Secretariat, JOB/GC/73, 6 February 2015, paras 4.12 and 4.18.
8 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Appellate Body Report, WT/DS285/AB/R (Adopted 20 April, 2005).
9 Ibid at para. 159.
10 Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R and Corr.1, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261, (adopted 19 January 2010).
11 Ibid., para. 7.1237.

While upholding the panel's analysis, the Appellate Body noted that the panel had 'simply concluded that certain circumstances of the conclusion of the treaty did not exclude the possibility that China's GATS commitment also extends to the electronic distribution of sound recordings'. The Appellate Body clarified that 'the purpose of treaty interpretation' under Articles 31 and 32 of the Vienna Convention on Law of Treaties was 'to ascertain the "common intention" of the parties, not China's intention alone', and that 'the circumstances of the conclusion of the treaty may thus be relevant to this 'common intention'.[12]

The key principles that emerge from the findings in *China-Publications and Audiovisual Products* therefore are that:

- Factual evidence on the technical feasibility or commercial reality of a service at the time a service commitment was made may constitute circumstances relevant to the interpretation of its scope;
- In interpreting a country's schedule of commitments, it is not sufficient to examine that country's intention alone; the 'common intention' of all parties engaged in the negotiations needs to be ascertained through an examination of the circumstances of the conclusion of those commitments.

Conclusions and recommendations

The approach taken by the panel and Appellate Body in *China-Publications and Audiovisual Products* suggests that countries need not worry unduly about expansive interpretation of their GATS commitments in view of evolving technology, provided they are able to adduce adequate evidence regarding the common intention of WTO members at the time of negotiating commitments. However, what is also clear is that countries need to exercise greater prudence and caution when framing their commitments, to avoid such inquiries arising in the first place. This is relevant both under the WTO and under any commitments taken under bilateral or regional preferential trade agreements. This is because the emergence of a new technology is not only about a new means of delivery of services, but also throws up a host of new regulatory challenges for governments that could not have been envisaged at the time of undertaking commitments in trade agreements.

Issues relating to the relevance of technology could also have growing importance in the ongoing joint informal group discussions at the WTO on e-commerce. With support from over 71 WTO members, these discussions are considering various dimensions of trade-related issues. A key issue that would have to be resolved in these discussions relates to the relevance of technology in making e-commerce possible, and assessing the implications of this for commitments inscribed in GATS schedules of specific commitments over 24 years back. Clarity on the nature of legal principles to be applied in interpreting commitments, while ensuring that countries safeguard adequate regulatory policy space to deal with the new challenges that technology throws up, will be crucial. Other than road transport and construction and related engineering services, technological issues relating to e-commerce activities will have relevance for several other sectors, including:

- Distribution services involving e-commerce retail channels;
- Financial services involving payment through credit or charge cards on e-commerce platforms;
- Computer-related services that enable the use of information technology for delivering services.

Regulatory issues in each of these sectors include whether countries can and need to:

- Mandate local presence of a service supplier in the territory of a country to provide specific services, thereby limiting the scope of cross-border supply of the service;
- Ensure localisation of data, particularly personal and sensitive data, through mechanisms such as mandating local servers for processing such data;
- Place restrictions on the export of data;
- Apply principles of taxation in a manner that can ensure a level playing field for service suppliers having physical presence and those seeking cross-border supply of services;
- Apply principles of competition and consumer protection that can ensure fair competition that can maximise the benefits for both service suppliers and service consumers.

At the same time, countries need to be careful in adhering to new trade agreements and making commitments under these. In this regard, it is useful

12 Ibid., para. 405.

to examine language adopted by Japan in its trade agreements with Chile, Mexico and Switzerland and most recently in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CP-TPP). The text used in the CP-TPP by Japan reads as follows:[13]

> Japan reserves the right to adopt or maintain any measure relating to services other than those recognised or other than those that should have been recognised by the Government of Japan owing to the circumstances at the date of entry into force of this Agreement.
>
> Any services classified positively and explicitly in JSIC [Japanese Standard Industrial Classification] or CPC [Central Product Classification] at the date of entry into force of this Agreement should have been recognised by the Government of Japan at that time.
>
> Japan reserves the right to adopt or maintain any measure relating to the supply of services in any mode of supply in which those services were not technically feasible at the date of entry into force of this Agreement.

Japan's reservation as extracted above, is reflective of the reservations and concerns that a major developed country has with regard to evolving technologies and its implications for commitments on trade in services. It would be useful for other countries to further consider and refine Japan's approach, in order to be able to effectively secure the right to exercise regulatory supervision and place regulatory controls on any new service that emerges after the signing of an agreement.

Trade agreements are important because they signal and ensure certainty and predictability to business operators, investors and service suppliers. Equally, governments need to ensure that trade agreements do not inadvertently compromise their ability to regulate. The Preamble to the GATS recognises 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right'.

In a world where the rapid evolution of technology is transforming the way in which trade and business is conducted, it is even more important to ensure that the principle of regulatory sovereignty is emphasised, to achieve a fair balance for a predictable trade environment, with the ability to regulate new emerging technologies.

13 Schedule of Japan, Annex II, CP-TPP Agreement, p. 5.

International Trade Policy Section at the Commonwealth Secretariat

This Trade Hot Topic is brought out by the International Trade Policy (ITP) Section of the Trade Division of the Commonwealth Secretariat, which is the main intergovernmental agency of the Commonwealth – an association of 53 independent countries, comprising large and small, developed and developing, landlocked and island economies – facilitating consultation and co-operation among member governments and countries in the common interest of their peoples and in the promotion of international consensus-building.

ITP is entrusted with the responsibilities of undertaking policy-oriented research and advocacy on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITP approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on highly vulnerable Commonwealth constituencies – least developed countries (LDCs), small states and sub-Saharan Africa.

Scope of ITP Work

ITP undertakes activities principally in three broad areas:

- It supports Commonwealth developing members in their negotiation of multilateral and regional trade agreements that promote development friendly outcomes, notably their economic growth through expanded trade.
- It conducts policy research, consultations and advocacy to increase understanding of the changing international trading environment and of policy options for successful adaptation.
- It contributes to the processes involving the multilateral and bilateral trade regimes that advance more beneficial participation of Commonwealth developing country members, particularly, small states and LDCs and sub-Saharan Africa.

ITP Recent Activities

ITPs activities focus on assisting member countries in their negotiations under the WTO's Doha Round and various regional trading arrangements, undertaking analytical research on a range of trade policy, emerging trade-related development issues, and supporting workshops/ dialogues for facilitating exchange of ideas, disseminating informed inputs, and consensus-building on issues of interest to Commonwealth members.

Selected Recent Meetings/Workshops Supported by ITP

15–16 November 2018: Commonwealth Regional Consultation on Multilateral, Regional and Emerging Trade Issues for Africa held in Mahe, Seychelles.

14 November 2018: Commonwealth African Trade Negotiators Network Meeting held in Mahe, Seychelles.

30–31 October 2018: Commonwealth Consultation on Multilateral, Regional and Emerging Trade Issues for the Caribbean held in Georgetown, Guyana in collaboration with the CARICOM Secretariat.

4 October 2018: Sustainable Technology-enabled Trade and a More Inclusive Trading System – Small State, ACP States, LDC and SSA perspective (WTO Public Forum) held in Geneva, Switzerland, in collaboration with ACP Geneva office and DiploFoundation.

5–6 June 2018: Commonwealth-CII Regional Consultation on Multilateral, Regional and Emerging Trade Issues for Asia held in New Delhi, India.

24 May 2018: Presentation of the Commonwealth Trade Review held in Geneva, Switzerland.

11 April 2018: The Commonwealth Prosperity Agenda: Towards a Common Future held in London, United Kingdom.

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The Commonwealth

Trade Hot Topics

ISSN: 2071-8527 (print) ISSN: 2071-9914 (online)

Commonwealth Trade Hot Topics is a peer-reviewed publication which provides concise and informative analyses on trade and related issues, prepared both by Commonwealth Secretariat and international experts.

Series editor: Teddy Soobramanien

Produced by Trade, Oceans and Natural Resources Directorate of the Commonwealth Secretariat

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