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Digital Trade Issues in WTO Jurisprudence and the USMCA

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ABSTRACT

The USMCA is a landmark trade agreement for the digital ecosystem that will create a strong foundation for the expansion of trade, investment, and innovation. The USMCA sets a new global high standard protecting the free flow of data beyond what is covered in the WTO. The USMCA along with WTO standards help in harnessing digital trade for prosperity by enabling free access, a secure market, and low barriers to growth. However, the USMCA is likely to become the model for future free trade agreements between the U.S. and other countries.

KEYWORDS

USMCA; digital trade; free trade agreement; WTO; international trade

I. Introduction

Digital trade offers economy-wide benefits. The advancement of technology has aided international business. World Trade Organization (WTO) members recognized the benefits digital trade offers and have developed a work program to facilitate the development of digital trade. However, WTO efforts to facilitate digital trade have stalled, leading to a slower than anticipated progress.

The question this note addresses is how the WTO supports and deals with digital trade. The note also addresses recent trade agreements, particularly the United States-Mexico-Canada Agreement (USMCA). It was chosen because it involves the largest economy in the world and the U.S. could use USMCA provisions as a template for future trade agreements (Bieron and Ahmed 2012; Ptashkina 2018).

II. WTO and digital trade

Digital trade developed after the creation of the WTO in 1994 (World Trade Organization 1998). Nevertheless, there are several WTO agreements related to digital trade. These WTO agreements include the General Agreement on Trade in Services (GATS) and the Information Technology Agreement (ITA).

GATS is of particular significance to digital trade for several reasons. First, communication services, which provide access to digital trade, fall under GATS (McLarty 1998). Second, GATS covers many sectors and modes of

delivery, whether the mode is traditional or electronic. Indeed, it was determined that GATS was technologically neutral (WTO Panel Report 2004). Third, the execution of an electronic transaction necessitates infrastructure services (distribution, payment, etc.) whose liberalization equally falls under GATS. In view of the acknowledged importance of telecommunication services, access to public telecommunication networks was incorporated in a separate telecommunication annex.

Each WTO member agreed to liberalize specific service sectors. These commitments are included in schedules or lists of service commitments (Zhang 2015). Many service sectors can be delivered physically and, more importantly, electronically. Whenever unlimited market access commitments are undertaken, every means of delivery including remote supply should be allowed (WTO Appellate Body Report 2005).

WTO members agreed to the so-called Reference Paper. The Reference Paper provides for rules that shall prevent anti-competitive behavior in the telecommunications sector. The Reference Paper includes competition policy principles to ensure access to public telecommunication networks. WTO members considered that the Reference Paper might be applicable to digital services where Internet access providers qualify as major suppliers of basic telecommunications (WTO Council for Trade in Services 1999). The European Union (EU) was of the opinion that the principles of the Reference Paper are applicable to internet access and internet network services (WTO Work Programme on Electronic Commerce 2000).

The Information Technology Agreement (ITA) is of particular significance to digital trade. WTO members committed themselves to reduce their tariffs on IT goods in four steps of 25% to reach a tariff-free policy by the year 2000 (Verrill, Jordan, and Brightbill 1998). This obligation pertains to a common list of IT products covering a wide range of some 180 information technology products in five major categories: computers and peripheral devices, semi-conductors, printed circuit boards, telecommunications equipment (except satellites), and software. By the year 2015, the ITA covered 95% of the existing world trade in IT goods (World Trade Organization 2017). Thus, the ITA brings advantages to a wide range of production activities.

Largely at the insistence of the U.S. at the WTO Ministerial Conference in 1998, WTO members decided to develop a work program covering digital trade (WTO Secretariat 1998). According to the WTO Work Program on Electronic Commerce, digital trade is understood to mean the production, distribution, marketing, sale, or delivery of goods and services by electronic means. The WTO divides digital trade transactions into three distinctive stages: the advertising and searching stage, the ordering and payment stage, and the delivery stage. Any or all of these stages may be carried out electronically and may, therefore, be covered by the concept of digital trade.

Despite the fact that the WTO Work Program on Electronic Commerce was set up in 1998, very little progress has been achieved. The most important issue blocking progress on digital trade in the WTO agenda is the question of categorization. WTO members differ on whether products which were usually sold as goods due to their link to a physical carrier and which can now be delivered online over the net (e.g., music or movies) shall be treated as goods under the General Agreement on Tariffs and Trade (GATT) or as services under GATS (Bergemann 2002). If goods delivered online were considered goods, they would be subject to few trade restrictions under GATT such as tariffs (Baker et al. 2001). On the other hand, if goods delivered online were considered services, they would be subject to more trade restrictions under GATS, such as market access barriers and discriminatory domestic regulations. Until the classification debate is resolved, WTO members decided not to impose tariffs on imported electronic transmissions.

There were numerous WTO meetings producing views and proposals which are reflected in the country statements or final reports (WTO Committee on Trade and Development 1999). These meetings included an informal exchange of viewpoints rather than the achievement of agreements. Therefore, the classification debate issue continues to be unresolved (Ismail 2020). There have been no new digital trade-relevant actions at the WTO until now.

WTO case law and digital trade

The first time the WTO addressed digital trade was its ruling on U.S. restrictions on cross-border Internet gambling services. Antigua and Barbuda initiated a dispute case against the U.S. claiming that U.S. Internet gambling restrictions, restrictions by U.S. credit card companies on payments to offshore gambling outlets, at both the federal and state levels violated the U.S. commitments under GATS.

A WTO panel ruled that online gambling restrictions imposed by the U.S. at the federal and state levels violated its market access commitments under sub-sector 10.D (other recreational services) of its GATS schedule (WTO Appellate Body Report 2005). Specifically, the WTO panel agreed with Antigua that U.S. market access commitments under Section 10.D of its GATS schedule covering “other recreational services” do include gambling services. The panel rejected the U.S. claim that it never intended to allow the cross-border supply of such services. The panel also maintained that the U.S. commitment to allow unrestricted market access on recreational services applies to all means of delivery, including the Internet. While the WTO panel agreed with the U.S. that the U.S. ban on cross-border gambling services may be justified under WTO rules to protect “public morals,” it found that the ban was applied

in a discriminatory manner since the U.S. permits remote gambling wagers through off-track betting under the 1978 Interstate Horseracing Act.

In China – Publications and Audiovisual Products, the WTO panel found that the scope of China’s commitment in its GATS schedule on “Sound recording distribution services” extends to sound recordings distributed in non-physical form through technologies such as the Internet (WTO Panel Report 2009). In deciding the case, the WTO panel relied on the principle of progressive liberalization which contemplates that WTO Members undertake specific commitments through successive rounds of multilateral negotiations with a view to liberalizing their services markets incrementally (WTO Appellate Body Report 2009). Thus, distribution covers both tangible and intangible products.

Prior to the WTO panel’s findings in those disputes, neither the WTO panel nor the Appellate Body had ever decided a digital trade case. The WTO’s ruling would have important implications, notably in the relationship between the WTO and digital trade. Now, under the WTO jurisprudence, digital trade is covered under GATS.

III. The digital trade provisions in the USMCA

The USMCA free trade agreement (FTA) explicitly includes provisions concerning digital trade (USMCA 2020, Chapter 19 Digital Trade). The digital trade provisions in Article 19.4.2 of the USMCA – which resemble the language in the Trans-Pacific Partnership (TPP) – apply to goods and services traded over the medium of the Internet. The USMCA provides illustrative examples of digitized products such as electronically traded software, books, and music.

The entire purpose of the USMCA is to lower barriers to trade in all sectors, including digital trade; therefore, the U.S., Mexico, and Canada were in the position with digital trade to never even establish a tariff which would later need to be lowered and eliminated (USMCA 2020, Article 19.3). The FTA creates a duty-free cyberspace. The USMCA requires parties not to impose customs duties on electronic transmissions. This language is based on the U.S. Internet Tax Freedom Act of 1998. The customs duties standstill in the USMCA is not indefinite or permanent. The parties to the agreement are merely obliged to continue the customs duties standstill until further notice.

The continuing of the no-duty policy under the USMCA may result in a negative economic impact because Mexico, for example, would not collect from digital transactions as it does from other transactions that actually result in the payment of tariffs. The other economic implication for a no-duty policy under the trade agreement is that it could lead to trade-diversion because of the preferential treatment of a particular mode of delivery over other modes.

The USMCA language is limited to tariffs but not domestic taxes, whether direct or indirect.

The USMCA also requires that the parties do not establish unnecessary barriers on electronic transmissions (USMCA 2020, Articles 19.2, 19.5). The term “unnecessary” is not clearly understandable. In addition, the standard “unnecessary barriers” is subjective since each party will determine what a necessary or unnecessary barrier is. An example of an unnecessary barrier could be applying trade restrictive technology mandates and not using open and market-driven standards. Applying trade restrictive technology mandates could inhibit the growth of digital trade.

The USMCA is concerned with the delivery of services electronically. As such, the USMCA not only covers trade in goods electronically but also trade in services. For instance, a supplier in the U.S. could deliver financial services, engineering plans, or legal services to a client in Mexico through the Internet. However, in this instance, it is unclear how the mode of the delivery could be classified, whether it is virtual cross-border supply or consumption abroad.

The USMCA does not require harmonization of digital trade laws and regulations of the U.S., Mexico, and Canada. The absence of such harmonization could pose problems for trading in products electronically when countries have different levels of laws and regulations. However, since the nature of the Internet and digital trade is global, then an international approach is needed for regulating digital trade.

The USMCA contains several principles that deal with technological neutrality, i.e., ensuring that basic trade concepts of nondiscrimination, national treatment, and most-favored-nation status apply to digital trade, and regulatory forbearance, i.e., avoiding government action that would restrict trade. The USMCA also covers the validity of electronic signatures (USMCA 2020, Article 19.6).

The USMCA provides that no country is allowed to give less favorable treatment to digital products “created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another party, or to digital products of which the author, performer, producer, developer or owner is a person of another party” (USMCA 2020, Article 9.4.1). Also, the USMCA allows the parties to provide subsidies or grants to its own residents and businesses, including “government-supported loans, guarantees and insurance” (USMCA 2020, Article 19.4.2). These USMCA provisions give the parties some policy space whereby they can favor their domestic cultural industries. Indeed, this is the intent of these articles.

The USMCA, in Article 19.7, has a requirement to maintain anti-spam rules and online consumer protection laws. Although these requirements seem to lack any specificity, when read in conjunction with Article 21.4 (Consumer Protection), which applies to digital trade and referred to in Article 19.7, they provide comprehensive protection. Article 21.4 of the USMCA imposes

several obligations on the parties including: adopting national consumer protection laws, whether civil or criminal, that determine fraudulent and deceptive commercial activities, requiring enforcement of these laws, coordination between the concerned countries, exchange of consumer complaints, and other enforcement information.

The USMCA covers personal information protection requirements (USMCA 2020, Article 19.8). The USMCA calls for a legal framework to protect the personal information of users of digital trade, but buried in a footnote is an acknowledgment that merely enforcing voluntary undertakings of enterprises related to privacy is sufficient to meet the obligation. The USMCA information protection requirements do not establish a mandatory minimum of protection.

Paperless trade did not escape the attention of USMCA negotiators as it helps in facilitating trade (USMCA 2020, Article 19.9). Each party endeavors to accept a trade administration document submitted electronically as the legal equivalent of the paper version of that document. Although the language used is not strong as it refers to “endeavors,” it is still important to include it to ensure faster movements of goods and services across borders.

The USMCA includes targeted provisions on computer facilities (USMCA 2020, Article 19.12). The purpose of such a provision is to prevent maintaining control over information processing and storage in a country. Thus, parties to the USMCA would not make it a condition for conducting business that a company from a trading partner must use or locate a computing facility in their country. The USMCA does not provide for public policy objectives which may lead a party to require the physical presence of computing facilities in certain circumstances.

The USMCA recognizes that there are different legal approaches to protecting personal information, including comprehensive privacy, personal information, or personal data protection laws; sector-specific laws covering privacy; or laws that provide for the enforcement of voluntary private sector undertakings. The U.S., Canada, and Mexico agreed to promote compatibility and exchange information on their respective mechanisms. The USMCA specifically identifies the APEC Cross-Border Privacy Rules System as a valid mechanism to facilitate cross-border information transfers while protecting personal information (USMCA 2020, Article 19.4).

The USMCA includes provisions to break down data localization laws, which require that certain kinds of data remain within a country's borders. The USMCA bans restrictions on data transfers across borders (USMCA 2020, Article 19.11). However, this ban is not a blanket ban as any USMCA party can adopt “a measure ... necessary to achieve a legitimate public policy objective.” In other words, a party could restrict a data transfer on public policy grounds. However, according to Article 19.11.2, there are strings attached whereby the measure in question should not be applied

in a manner which would constitute a means of arbitrary unjustifiable discrimination or a disguised restriction on trade and does not impose restrictions on transfers of information greater than are necessary to achieve the objective. The conditions of Article 19.11.2 of the USMCA resembles GATT Article XX. Thus, GATT jurisprudence in this area can serve as excellent guidance on the meaning of terms such as “arbitrary unjustifiable discrimination” or “disguised restriction on trade.” In contrast with Article 19.11 of the USMCA, the EU demands limits on data transfers (Bu-Pasha 2017). The European model of data protection uses data transfer restrictions as a way to ensure that the information enjoys adequate legal protections.

The USMCA prevents countries from requiring the disclosure of source code (USMCA 2020, Article 19.16). In addition, the USMCA goes further to bar governments from requiring the disclosure of “algorithms” expressed in that source code unless that disclosure was required by a regulatory body for a specific investigation, inspection, examination enforcement action, or proceeding.

The USMCA provides protection for Internet service providers modeled on the Digital Millennium Copyright Act (Asp 2018). The USMCA protects Internet service providers for copyright liability for the actions of their users. Internet platforms are not held civilly – nor criminally – liable for the actions of their users. However, there is no language in the USMCA that requires a balanced approach to copyright which might have further empowered user rights.

The USMCA protects open government data provided in machine readable format (USMCA 2020, Article 19.18). The language used regarding open government data is not mandatory but rather best endeavors.

IV. Conclusion

The Internet offers substantial opportunities to companies. The world has witnessed an explosion in digital trade in the past few years, with online shopping now doubling annually. Although the WTO did not contain explicit articles covering digital trade, it was seen that the WTO is well-fitted to advance digital trade because of the WTO principles of nondiscrimination, transparency, and market openness.

The USMCA was thought of as a breakthrough in the sense that it included an explicit chapter concerning digital trade. A closer examination of the USMCA on digital trade revealed that the parties invented some specific rules needed for digital trade. For most of the digital trade provisions in the USMCA, the approach of the parties was based on the simple premise that digital trade is trade, that it is only the form by which the commercial transaction is performed which may be new, and not its substance; thus, the

parties relied on existing treaties or domestic laws. Thus, the USMCA does not require many legal changes to domestic laws.

There is a host of digital trade issues that need to be addressed in future trade agreements. Among them are new technologies such as block chain and the classification of the content of certain electronic transmissions. Future trade agreements should cover the issue of “likeness” of e-goods, development-related issues, fiscal and revenue implications of digital trade, the relationship and possible substitution effects between digital trade and traditional forms of commerce, and whether the dispute settlement mechanism covers digital trade in a way similar to any other provision in free trade agreements. By expanding and developing rules for digital trade, parties to the USMCA can take maximum advantage of the vast opportunities that the technological revolution offers.

Disclosure statement

The views and opinions expressed in this article are those of the author and do not reflect the official policy or position of any agency of the government. The author made this article in his own personal capacity. All errors and omissions are his own.

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