
WTO News

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Comment

Parallel Tracks of the U.S. Digital Trade Agenda

A central negotiation objective of the newly-granted U.S. fast-track negotiation authority is its instruction to the United States Trade Representative (USTR) to conclude trade agreements that prevent the creation of digital trade barriers. Whereas U.S. efforts to achieve its wide spectrum of digital trade objectives in the WTO have not yet been successful, the US negotiators are now moving fast to impose their digital trade agenda in bilateral and regional preferential trade deals. This process prepares the ground for a faster multilateral agreement.

Ambitious U.S. Digital Trade Objectives

The U.S. digital trade agenda calls for a set of rules and obligations that ensure favourable trade treatment of digital transactions. Particular emphasis is laid on the free trade of electronically delivered services (especially telecommunications, IT and audiovisual services). To this effect, services and digital products (software, movies, etc.) shall be classified and scheduled in a way that guarantees the freest possible trade. Discrimination against electronic delivery, trade barriers vis-à-vis new

services and any form of discrimination between digital products along the lines of national origin shall be avoided. Furthermore, online digital products shall receive treatment not less favourable than like products on physical carrier media (CDs, etc.).

In addition, the U.S. seeks a horizontal e-commerce chapter that – in addition to above principles – guarantees a duty-free moratorium on electronic transactions, and an agreement that existing trade obligations apply to digital trade. Also, an agreement that e-commerce regulations should be designed in the least trade-restrictive manner is called for. Finally, the U.S. wants to strengthen the protection of intellectual property rights (IPRs) – especially copyrights and trademarks – in an online environment by calling upon its trade partners to adhere to the two so-called “Internet Treaties” of the World Intellectual Property Organisation (WIPO).

Obstacles to the U.S. Digital Trade Agenda on the Multilateral Level

Despite U.S. efforts that led to the WTO E-commerce Work Program in 1998, none of the above-mentioned U.S. digital trade objectives has been achieved on the multilateral level. Currently, not even a formal agreement exists that the WTO rules and obligations apply to e-commerce. The WTO duty-free moratorium on e-commerce agreed on in 1998 expires if no action is taken during the Cancun Ministerial. Furthermore, there are still unanswered questions essential to legal certainty and digital market access concerning the classification of

electronic services and digital products. Clearly, the GATS commitments on cross-border service trade will not be updated to secure free digital trade before the (uncertain) conclusion of the current global trade talks in 2005 or 2007. With regard to IPRs, the current TRIPS debate is more concerned about limiting the scope of IPR protection than expanding it, making new WTO obligations for copyrights and trademarks unlikely.

The reasons for this lack of action in the WTO are mostly institutional. As digital trade spans such a wide spectrum of trade topics that each has its own timetable in the WTO, it is difficult to approach the U.S. digital trade objectives multilaterally in a swift and comprehensive way. Moreover, the classification of digital products is a political issue: Whereas the EU and other countries do not want to submit their cultural sectors to trade disciplines and therefore maintain that digital products are services, the U.S. wants to avoid the spread of cultural exemptions to the online trade of content. Finally, the numerous developing countries had – until now – only a modest interest in digital trade issues.

While the initial GATS offers that are due in March 2003 will certainly achieve progress in the liberalization of cross-border service trade (even in audiovisual services), a coherent multilateral approach to all digital trade issues is currently not in sight. The Doha mandate for e-commerce is limited to organisational issue.

First Successes on the Bilateral Front and More to Come...

Unimpressed by the slow progress on digital trade matters in the WTO, the U.S. has recorded considerable progress on the bilateral and regional level: Recently the U.S. has concluded bilateral Free Trade Agreements (FTAs) with Chile and Singapore, and many bilateral FTAs are pending (Australia, the South African Customs Union, the U.S.-Central America Free Trade Agreement, etc.). On the regional front the negotiations to conclude the Free Trade Agreement of the Americas (FTAA) in 2005 are also progressing. This flurry of bilateral and regional trade agreements will – if completed – spread the U.S. “liberalisation blueprint” for digital trade throughout many world regions.

Clearly, the digital trade provisions of the two already existing bilateral agreements (U.S.-Singapore / U.S.-Chile) establish high benchmarks for further preferential and global trade talks. Through the use of the negative list approach and the entry of few limitations to the cross-border supply of services, significant market access was accorded to all sectors. On top of far-reaching commitments in fields like telecom and IT, all parties agreed to grant full market access and national treatment with respect to audiovisual services that are delivered through new media.

Most importantly, the inclusion of e-commerce chapters and precedent-setting provisions on the protection of IPRs in both agreements was achieved. The horizontal e-commerce chapters affirm that the wide-ranging service commitments apply to the electronic supply of services. The parties signed a permanent duty-free moratorium on e-commerce and they made a commitment to accord national treatment to all digital products. Moreover, online digital products must receive the same trade treatment as digital products delivered on physical carrier media. The parties also joined forces in an extensive, non-binding statement to reinforce the cooperation on various outstanding e-commerce matters (i.e. WTO issues). Finally, both parties followed U.S. requests and agreed to adopt sophisticated copyright and trademark protection principles that partly go beyond the WIPO Internet treaties.

Looking forward, the USTR has already announced that similarly high standards will now be pursued in the great number of pending bilateral and regional trade agreements.

Global Consensus via Preferential Trade Agreements?

Undoubtedly, the pursuit of the U.S. digital trade agenda in preferential trade deals is part of a concurrent strategy that has as its final goal to establish free digital trade on the global level. The U.S. knows that a scattered set of bilateral agreements with fairly small trade partners like Chile and Singapore is not satisfactory to do justice to trade conducted over global electronic media.

But seen in the light of a certain interdependence between bilateral, regional and multilateral negotiations, the bilateral FTAs may help the U.S. to build coalitions of like-minded trade partners that will facilitate a consensus on the regional or even the multilateral level that resembles the U.S. approach. The bilateral field may also serve as a “laboratory” for new disciplines such as IPR protection, further service liberalisation, etc.

However, it remains questionable if this U.S. strategy will work “all the way up”. When the U.S. starts approaching partners for preferential trade agreements that are economically more important and that are also very inclined to rank “cultural diversity” high on their agenda (e.g. Australia or Canada in the FTAA), the U.S. negotiators will face similar problems with respect to digital product classification as in the WTO. Accordingly, the U.S. efforts towards coalition-building for solutions in the WTO may, in some areas, not carry as far as intended. *Sacha Wunsch-Vincent*

This is a shorter version of a comment that is forthcoming in the March edition of the Swiss Review of International Economics Relations (“Aussenwirtschaft”). The long version can be downloaded from <http://www.journal-aussenwirtschaft.ch>



Dispute Settlement

The Sardines Case and the Potential of the TBT Agreement

This is the story: The European Commission had prohibited the marketing of pre-packaged sardines from Peru under the term “Peruvian Sardines” (English) or “Südamerikanische Sardinen” (German) under EC Council Regulation No. 2136/89. According to this Regulation, only fish of the species “*Sardina pilchardus*” may be marketed under the term “sardines”. This species is commonly found in the waters of the European Atlantic coast, the Mediterranean and the Black Sea. By contrast, the use of the term “sardines” was prohibited for the marketing of the fish species “*Sardinops sagax*” which displays similar organoleptic properties and which is found along the South-American Pacific coast. The EU argued that the objectives of the Regulation are consumer protection against deceptive practices, market transparency and fair competition. Peru had therefore requested consultations with the EU on 20 March 2001. On 24 July 2001, a Panel was established which circulated its report on 29 May 2002. The EU appealed against the Panel report. In its report dated 26 September 2002, the Appellate Body basically sided with Peru, as did the Panel.

TBT Agreement Applied for the First Time

The subject matter of the litigation as such would hardly justify a comment on the case – although the issue is of considerable economic importance for certain Latin American countries. The decision, however, is of systemic interest as this was the first time the Panel and Appellate Body had expressed their views on the substance of the Agreement on Technical Barriers to Trade (TBT Agreement).

The central provision of the TBT Agreement is Article 2. Article 2.1 TBT obliges countries to accord treatment no less favourable than that accorded to like products of national origin (national treatment) and to like products originating in any other country (most-favoured nation treatment; MFN) in respect of technical regulations. Article 2.2 TBT calls upon members to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. They shall not be more trade-restrictive than necessary to fulfil a legitimate objective. In analogy, Article 2.3 TBT postulates that technical regulations shall not be maintained if the circumstances or objectives leading to their adoption no longer exist, or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. Finally, Article 2.4 TBT calls upon countries to use relevant international standards where they exist or where their completion is imminent.

With these clauses, the TBT Agreement goes much further than the analogue provision on national treatment contained in Art. III.4 of the General Agreement on Tariffs and Trade (GATT). The GATT calls only for non-discrimination whereas the TBT establishes a right to market access. According to Article 2.2 TBT, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. In the GATT, a similar test is required only if a

regulation that is inconsistent with basic GATT principles is to be justified under the general exceptions of Article XX GATT. In addition, the TBT obliges countries to base their technical regulations on existing international standards – a requirement that is not contained in the GATT. Against this background, it was particularly interesting to see how the dispute settlement organs would interpret the provisions of Article 2 TBT.

Regrettably, the Panel and the Appellate Body had to pronounce on only one of the provisions that were raised. In its submission, Peru had asked that its claims be considered in the following sequence:

- a.) Peru requested the Panel to find that the EC Regulation was inconsistent with Article 2.4 TBT because the Regulation was not based on an international standard.
- b.) If the Panel were to find that the Regulation was consistent with Article 2.4 TBT, Peru requested the Panel to find that the Regulation was inconsistent with Article 2.2 TBT because it was more trade-restrictive than necessary.
- c.) If the Panel were to find that the EC Regulation was consistent with Articles 2.2 and 2.4 TBT, Peru requested the Panel to find that the measure was inconsistent with Article 2.1 TBT because it accorded Peruvian products prepared from “*Sardinops sagax*” treatment less favourable than that accorded to like European products made from “*Sardina pilchardus*”.
- d.) If the Panel were to find that the measure was consistent with the TBT Agreement, Peru requested the Panel to find that it was inconsistent with Article III:4 GATT.

An examination of each of these claims would have been significant for the future interpretation of the Agreement on Technical Barriers to Trade. However, since both the Panel and the Appellate Body had already found the EC Regulation to be inconsistent with the TBT when examining Peru's first claim, they abstained from making findings with regard to the other claims. Therefore, future disputes will have to clarify the extent to which the necessity test called for in Article 2.2 TBT limits regulatory sovereignty of members. Further case-law will also be required to clarify the relationship between Article 2.1 and Article 2.2 TBT.

Application of International Standards

In their reports the Panel and the Appellate Body focus on the interpretation of Article 2.4 TBT which requires members to use relevant international standards as a basis for their technical regulations. As mentioned above, the EC Regulation contained a provision which prohibited the use of the trade description “sardines” – even if combined with further qualifications – for fish species other than “*Sardina pilchardus*”. However, pre-packaged sardines are also subject to an international standard (Codex Stan 94) elaborated by the Codex Alimentarius Commission of the Food and Agriculture Organisation (FAO) and the World Health Organisation (WHO). Numerous provisions of the EC Regulation are in line with the Codex Stan 94. With regard to naming, however, there is a difference which led to Peru's complaint: According to Codex Stan 94, the term sardines without any additional qualification may be used only for “*Sardina pilchardus*”, as is the case in the EU. However, the term may be used for a larger group of related fish species provided that it includes a further qualification which indicates the country or region of origin, or the name of the

fish species. This, by the way, is in line with naming practices used on a worldwide scale, except by the EU. In the light of Codex Stan 94 and contrary to the EU prohibition, Peru claims that it should have the right to market its products under names such as “Peruvian sardines” or “Südamerikanische Sardinen” (German).

The most important point in this debate was the question whether the EU had the right to invoke the exception contained in Article 2.4 TBT, which exempts countries from the obligation to use an international standard in cases where it would be an ineffective or inappropriate means to fulfil the legitimate objectives pursued. Peru acknowledged that the objectives of the EC Regulation – consumer protection, market transparency and fair competition – were legitimate. The question, however, was whether the provision in Codex Stan 94 that allows the use of the terms “sardines” with further qualifications for a larger family of fish species would be ineffective or inappropriate to reach the EC objectives. To answer this question, the Panel had to balance the arguments speaking for regulatory autonomy and market access opportunities respectively very carefully. As a result, the EU arguments were rejected and the applicability of the international standard was confirmed.

High Potential for Trade Liberalisation

The reports have clarified the provisions of Article 2.4 TBT which stipulates that members shall use relevant international standards “as a basis” for their technical regulations. This

does not mean that they would have to be adopted in an absolutely identical manner. The Panel explicitly holds that standardisation bodies are no “world legislators”. Further interpretation will be required to clarify the concrete meaning of the expression “use ... as a basis” in Article 2.4 TBT. It seems obvious that national technical regulations which directly contradict international standards (as in this case) will not be covered by this provision. It is also left to further clarification when an international standard is ineffective or inappropriate for the fulfilment of legitimate objectives. However, the reports suggest that Panels and the Appellate Body will not easily accept such claims but rather take a restrictive attitude.

Another relevant question is whether inferences can be made from this restrictive attitude with regard to Article 2.4 TBT to the future interpretation of the requirement contained in Article 2.2 TBT, according to which technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective. The answer to this question will largely determine the flexibility to formulate technical regulations according to national preferences. This, in turn, will determine the extent to which the right to market access that is contained in Article 2 TBT will materialise. For the time being, however, this question remains open as neither the Panel nor the Appellate Body have made any findings with regard to Article 2.2 TBT. If, however, a similarly restrictive position were adopted, the TBT would be a powerful tool for the removal of technical barriers to trade. *Heinz Hauser*



From the Book Shelf

KYLE BAGWELL and ROBERT W. STAIGER: The Economics of the World Trading System, Cambridge (MA): MIT Press, 2002; 224 Pages, Hardcover, USD 30.00

Until recently, research on the institutional design of the world trading system was still dominated by legal scholars. Only in the last couple of years has it become the focus of formal economic analysis. Kyle Bagwell and Robert W. Staiger have significantly contributed to this development.

Their latest book starts from the widespread assumption that multilateral trade agreements are concluded in order to offer a means of escape from inefficiencies in unilateral trade policy. Yet, the authors show that the inefficiencies eliminated by such agreements are exclusively driven by terms-of-trade movements. This conclusion can be drawn both in the case of governments maximising national welfare and in the case of governments seeking political contributions from special-interest groups. If one accepts the paramount importance of the terms of trade, it is easy to demonstrate the underlying economic logic of the two main pillars in the GATT/WTO system: reciprocity and non-discrimination. They are complementary principles assisting governments in their bilateral negotiations to achieve more efficient trade-policy outcomes. Furthermore, they ensure that bilateral negotiations are not detrimental to countries which are not involved.

Besides reciprocity and non-discrimination, the book also discusses the economic rationale behind other principles of

the world trading order, such as the limits on the enforcement of GATT/WTO law, the gradual manner in which tariffs have been liberalised, or the safeguard clause mechanism. At the same time, the authors criticise the GATT/WTO approach towards preferential trading agreements. Theoretical considerations show that these might pose a threat to the existing multilateral trading system.

In conclusion, Bagwell and Staiger succeed in establishing a systematic economic analysis of the institutional design of the world trading order. With some two hundred pages and a minimum of technical analysis, the book can be recommended not only to international economists, but also to political scientists and to scholars of international trade law. *Alexander Roitinger*

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