

Regulating for Globalization

Trade, Labor and EU Law Perspectives

The TikTok Controversy: Can WTO Prevent Bans?

Sunanda Tewari (Centre for Trade and Investment Law, New Delhi) · Tuesday, September 1st, 2020

The popular video-sharing mobile app TikTok has been in the news of late. President Trump signed an executive order on August 6, banning TikTok unless it is acquired by a U.S. company by September 15th.^[1] This order comes on the heels of similar action taken by India, which banned 59 applications owned by companies in China, including TikTok, WeChat, UC Browser, CamScanner, and others.^[2] The Indian ban stems from the apprehension that these applications might facilitate activities that are prejudicial to sovereignty and integrity of their governments, including the security of the state and public order.^[3] Setting aside the political controversy surrounding the ban, some wonder whether restrictions on a mobile app like TikTok are covered by international trade agreement commitments, especially WTO commitments.

TikTok – A classification Conundrum?

Mobile applications are generally understood to be “new services or digital services” and hence are not explicitly included within the Services Sectoral Classification (W/120) list. The Scheduling guideline does not prescribe a clear classification methodology. The question of how to classify these new digital services is currently before the Committee on Specific Commitments at the WTO. The Committee is wrestling with how to distinguish between services delivered by a new means on the one hand, and a genuinely new service on the other.^[4] Even though uncertainty exists around the classification of such new services, the question is, does GATS apply?

In the absence of consensus about classification, it is up to a WTO panel to interpret the Schedule of Commitments of the Members, and to assess whether such ‘new services’ are part of a Member’s commitments. The GATS schedules of India and United States include commitments undertaken for services like computer related services, audio-visual, distribution, voice mail, online information, and database retrieval and data processing services.^[5] There is a strong argument that an app like TikTok may fit one of these categories.

The GATS the agreement is technologically neutral,^[6] which means that it does not distinguish between the digital or physical means through which a service is supplied. Ultimately, the focus is on what the service *actually does* or *its end-use* rather than the means of its supply. In the past, the WTO panels and the Appellate Body have interpreted the sectoral coverage of a Member’s commitments to include the digitized version of a service^[7] that could have been provided physically.^[8]

A social-media app like TikTok (a video sharing application) allows users to interact through

electronic transmission of data (text, image, video, or audio) through an information database stored in an online server. A WTO panel, when interpreting the GATS Schedule of India or United States to ascertain the commitment for ‘social media services,’ would recognize that it has components of computer-related-services, online information and data processing service, online information and data base retrieval services, even if it does not fall squarely within any traditional definition of service under Services Sectoral Classification (W/120) for the purpose of its end-use. In short, classification challenges exist even upon applying the functional approach of interpretation as previously adopted by one WTO Panel.[9] Furthermore given the technological advancements, it may be argued that W/120 list of GATS could not have envisaged the services like social-media services that are provided digitally through a mobile application.[10] Hence, its inclusion would be contrary to the positive listing approach under GATS, where a Member has taken commitments based on its choice.

All this is to say that a definitive answer may not be found in the GATS, but if the matter goes for panel adjudication, China would face a major challenge in asserting coverage, when China itself has erected the controversial “great firewall” to keep the internet giants from other Member countries from accessing its markets, citing national security and internet regulation.[11]

In any event, apps like TikTok provide services mainly in digital format. The Work Programme on E-commerce at the WTO was formed to deal with trade related issues arising from global e-commerce. It defines electronic commerce as the “production, distribution, marketing, sale or delivery of goods and services by electronic means.” Perhaps apps like TikTok fall within the ambit of e-commerce?

If not GATS, does TRIPS apply?

Apart from GATS, the government bans on apps may run afoul of obligations under the Trade Related Aspects of Intellectual Property Rights (‘TRIPS’). The affected Member could argue that the ban on TikTok is not only ban on the service provided by the app, but also affecting the source-code of the app by leaving it unprotected. IPR related issues arising from computer programs, and the intrinsic relationship between market access in services and IPR, is uncharted territory for WTO dispute settlement.

Under TRIPS, source code for software is treated as a literary work under the Berne Convention.[12] And a complete ban on apps would directly affect the use of such IPR, such as enjoyment of IPR, which may include deriving commercial benefits from it. However, any harm on the IPR is arguable an ancillary result of the ban. At best, it can be argued that this might result in nullification of rights under the TRIPS. For now, this is academic, because there is an ongoing moratorium on non-violation complaints under the TRIPS.

International trade law provides no current, obvious, and effective limit on governments banning mobile apps like TikTok or others. Investment claims may be pursued, but GATS or TRIPS are shown to be inadequate to deal with the challenges presented by the new digital economy. Whether the existing tools can be shaped to address the issue depends on the specific challenge and the creativity and imagination of advocates. That may require the exercise of political will, rather than traditional dispute settlement.

[1] Executive Orders, ‘Executive Order on Addressing the Threat posed by TikTok’ (dated August

6, 2020) <<https://www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-posed-tiktok/>> Accessed August 6, 2020; *Also See*, Agence France-Press, ‘TikTok “Out of Business” in US If Not Sold By Mid-September: Donald Trump’ *NDTV* (Washington, August 4, 2020) <<https://www.ndtv.com/world-news/us-president-donald-trump-tiktok-out-of-business-in-america-if-not-sold-by-mid-september-2273619>> Accessed August 1, 2020.

[2] Yuthika Bhargava, ‘Government bans 59 apps including China-based TikTok, We Chat’ *The Hindu* (New Delhi, June 29, 2020) <<https://www.thehindu.com/news/national/govt-bans-59-apps-including-tiktok-wechat/article31947445.ece>> Accessed July 29, 2020.

[3] *Ibid.*

[4] Note by Secretariat, ‘Report on Meeting held on 18 September, 2014’ (October 15, 2014) S/CSC/M/71, paras 1.2.

[5] United States’ GATS Schedule of Specific Commitments <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC90.pdf&Open=True>> Accessed July 29, 2020.

[6] The principle of Technological neutrality is applicable to GATS was first realized in the case of *US – Gambling*. In the same case all means of services delivery, including the internet was recognized. *See*, Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (November 10, 2004) WT/DS285/R, para.6.285 [Hereinafter ‘*US – Gambling*’]; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products* (December 21, 2009) WT/DS363/AB/R, paras 396-397, 408 [Hereinafter ‘*China – Audiovisual Products*’].

[7] Appellate Body Report, *US – Gambling*, para. 164.

[8] Ines Willemys, ‘GATS Classification of Digital Services – Does ‘The Cloud’ Have a Silver Lining?’ (2019) 53 (1) *Journal of World Trade* at 8 <<https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/53.1/TRAD2019003>> Accessed July 29, 2020. *Also See*, Appellate Body Report, *China – Audio-visual Products*, paras. 407- 410.

[9] *Ibid* at 14.

[10] Rhousi Zhang, ‘Covered or Not Covered: That is the Question’ (2015) World Trade Organisation ERSD Working Paper 11/2015, 15 <https://www.wto.org/english/res_e/reser_e/ersd201511_e.pdf> Accessed July 29, 2020.

[11] Kristina Zucchi, ‘why Facebook is banned in China & How to Access it’ *Investopedia* (October 22, 2019) <<https://www.investopedia.com/articles/investing/042915/why-facebook-banned-china.asp>> Accessed August 2, 2020.

[12] Trade Related Aspects of Intellectual Property, Article 10. “*Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).*”

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