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Perspectives

**Position of “Customs Duties on Electronic Transmission”
within the World Trade Organization Architecture**

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ABSTRACT

This article provides a doctrinal critique of how the World Trade Organization (WTO) moratorium on customs duties for electronic transmissions has endured for over a quarter century. The issues revolving around Customs Duties on Electronic Transmission remain unresolved despite a series of negotiations among the member countries of WTO. The article analyzes ambiguities and disagreements, legal positionality of electronically transmitted digital products, and evolution and structural lessons from the moratorium in free trade agreements. The article also provides a comprehensive view on the possible solution for understanding the positionality of electronic transmissions. The article is a useful reading for the academics, researchers, public policy experts, consultants, and lawyers working on issues related to international trade and investment laws.

KEYWORDS: Customs Duties, Electronic Transmission, Digital Products, World Trade Organization

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INTRODUCTION

The WTO moratorium on customs duties for electronic transmissions has endured for over a quarter century, renewed repeatedly since the 1998 Geneva Ministerial Declaration, yet never definitively resolved. Moratorium is a simple agreement between WTO Members that they will 'continue their current practice of not placing any tariffs on *electronically transmitted products*'.¹ The Agreement was meant to last a few years as a stabilisation measure while the Internet prospered. It now is one of the biggest points of contention in international trade as the Internet Economy has grown at a rate that was unimaginable in 1998.²

The development of digital products and e-commerce post moratorium has led to condominium with regard to *what is constituted in the moratorium*.³ Using the definitions of those terms found in the GATT and GATS would be the simplest method to ascertain whether a digital product qualifies as an item or service. The GATT provides no specific definition of “goods” and the GATS circularly defines services as “any service in any sector except services supplied in the exercise of governmental authority.”⁴ Unfortunately, no useful definitions are included in the language of these WTO accords. At the moment of writing this paper, negotiations are still ongoing regarding creating a Committee on Digital Trade (Switzerland) or establishing a limited-time (ACP Group) moratorium with developing countries; while the United States is pushing for permanent moratoriums- Unfortunately, Cameroon's Minister of Trade Luc Magloire Mbarga Atangana, the Chair of MC14 "we ran out of time" with regards to several outstanding issues such as the WTO's work programme on electronic commerce and the continuation of the existing moratoriums on customs duties for electronic transmissions.⁵ The

¹ Despite US efforts to continue forth with a permanent moratorium, the possibility of cessation of the same should not be traduced. The hypothetical situation in which the cessation might materialize, will lead to disorientation with regard to the positionality of the electronic transmissions.

² World Trade Organization, 'Work Programme on Electronic Commerce' (WTO, updated 2026) <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm> accessed 15 March 2026

³ The Indian and Indonesian position with regard to applicability of moratorium# is an additional point of contention.

⁴ GATS, *supra* note 5, art. I ¶ 3(b).

⁵ World Trade Organization, 'WTO Members Review Work Programme on Electronic Commerce' (News item, 3 March 2026) <https://www.wto.org/english/news_e/news26_e/ecwp_03mar26_304_e.htm> accessed 15 March 2026.

paper looks at political history for negotiations, and the ambivalent ideations of what is meant by “Electronic Transmission.”⁶

AMBIGUITIES AND DISAGREEMENTS

The definition provided by the WTO regarding the concept of Electronic Commerce (e-commerce) states that e-commerce will refer to " production, distribution, marketing, sale, or delivery of goods or services by electronic means".⁷

The WTO Secretariat issued a note to the Council for Trade in Services to confirm that *the GATS does not differentiate between services delivered via different delivery methods (i.e., delivery methods do not affect the legal status of the respective service)*. As such, differential treatment of a service based on its delivery method may constitute a violation of the MFN obligation.⁸ This serves as the basis for the “content” versus “carrier” debate.

Telecommunications Annex and Reference Paper on Basic Telecommunications provides for no-discrimination access to public telecommunications networks and services, which is a prerequisite of the market access that India's information technology services industry depends upon when providing cross-border electronic “services”.⁹ The classification of electronic products as a “good” or a “service” thus enabling further disorientation.

From a broad perspective, the moratorium applies to any *good or service* that has been digitized or that could be digitised, including not only the actual physical acts of transmitting the electronic product,¹⁰ but also any other possible future transaction that could be effected using

⁶ Pritam Banerjee, Arpita Mukherjee and Aahana Srishti, *E-Commerce in Trade Agreements: India's Strategies and Options* (Indian Council for Research on International Economic Relations Working Paper No 426, January 2025) <https://icrier.org/pdf/Working_Paper_426.pdf> accessed 15 March 2026

⁷ World Trade Organization, ‘Work Programme on Electronic Commerce’ (WTO) <https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm> accessed 14 March 2026.

⁸ World Trade Organization, ‘Communication from India: Work Programme on Electronic Commerce’ (S/C/W/68, 16 November 1998) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/C/W68.pdf> (docs.wto.org in Bing) accessed 15 March 2026.

⁹ World Trade Organization, ‘Telecommunications Services: Reference Paper’ (24 April 1996) https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm accessed 15 March 2026.

¹⁰ the bits and bytes

a digital means¹¹. This ambiguity *could* be resolved through a discussion on tangibility of products.¹² There are many types of *digitally transmitted products which are similar in their capabilities to tangible goods because they can be produced, stored, possessed, and sold*.¹³

If electronic transmissions are classified as goods, then GATT rules will apply, including the National Treatment rule, preventing Contracting Parties from applying differential rates of domestic taxes to foreign digital products. If electronic transmissions are classified as services, GATS will apply, allowing Contracting Parties to have a much greater degree of flexibility to impose domestic service taxes on imported e-services without being subject to the constraints imposed by the GATT National Treatment rule.¹⁴

LEGAL POSITIONALITY OF ELECTRONICALLY TRANSMITTED DIGITAL PRODUCTS

Nature of Electronic Transmissions

Dictionary definitions- A temporal line is etched by Merriam-Webster's: goods are manufactured then sold, while services exist only while performed. The intervention of Digital products further complicates this distinction. Numerous new products such as E-Books, 3D Printing, movie streaming, etc. blur whether subsequent versions are new goods or mere alterations, creating classification uncertainty.

Tangibility characteristics - The traditional way of separating goods (tangible) from services (intangible) is breaking down due to the emergence of digital products and technologies such as 3D printing. Although the WTO and U.S. courts have attempted to use a tangibility test to

¹¹ such as transferring money

¹² Richard Kozul-Wright and Rashmi Banga, Moratorium on Electronic Transmissions: Fiscal Implications and Way Forward (UNCTAD Research Paper No 47, June 2020) UNCTAD/SER.RP/2020/6.

¹³ for example, they cite Indonesian and Indian practice as well as EU law to show where certain "intangible" products are treated as tangible products for legal and tax purposes. They also cite case law regarding appellate bodies making presumptive findings with regard to "intangible goods" (for example "intangible goods" within the United States/China – Publications and Audiovisual Products) to help define the differences between tangible and intangible goods.

¹⁴ C Satapathy, WTO Work Programme on E-Commerce: Strategy for Further Negotiations (2001) 36 Economic and Political Weekly 3665–3668, stable URL <<https://www.jstor.org/stable/4411158>> (accessed 26 February 2026).

help determine the nature of a digital product, the tests have resulted in inconsistent outcomes, for example, a CD is classified as a good; a digital version is classified as a service. Peter Hill proposes a broader definition for these digital products: goods are things over which there is the potential for ownership rights to be established and provide an economic return; whereas services “expire” at the time they are provided. Digital products can be “controlled” through the use of digital rights management; therefore, while they are not exclusive, they are treated like goods under GATT. Current definitions based on form have created issues.

Likeness- The WTO’s “likeness principle” offers a solution for classifying digital products as goods or services. It rests on two ideations: trade neutrality and technological neutrality. Trade neutrality looks at “likeness” through a four-part test considering *physical properties, end-uses, consumer perception, and tariff classification*, with no single factor more decisive than other. Technological neutrality requires equal treatment regardless of delivery method looking at the content vs. carrier debate. Such is easy to classify for since it has tangible tethering grounds. The challenges emerge when digital products lack physical analogs or enable mass replication, as with 3D-printed houses. Likeness principle provides appealing consistency, it risks falling into inductive reasoning traps, proving inadequate for novel digital products.

What is an 'Electronic Transmission'? The Content versus Carrier Divide

Although the concept of 'electronic transmission' is central to the WTO's prohibition on introducing customs duties on electronic transmissions, it does not currently have an agreed definition under the rules of the WTO. Since the declaration made during the 1998 Geneva Ministerial Conference, all Members have agreed not to impose customs duties on electronic transmissions at every Ministerial Conference that has occurred since, but no amendments have clarified the meaning of "transmission”.

According to the WTO's e-commerce Work Programme, e-commerce is defined as "production, distribution, marketing, selling and delivery of goods and services by electronic means"; however, this does not answer the fundamental question regarding whether the moratorium applies to the content of a transmission, such as a movie, software or e-book. On the contrary, there's currently a debate as to how far the moratorium applies to a transmission if it does not apply to anything that exists in or on the telecommunications network. This

distinction between content and carrier is not an insignificant question of interpretation; it delineates the full and comprehensive descriptive reach of the moratorium.^{15, 16}

Generally speaking, when merchandise gets imported into a country through international boundaries, a duty (tax) is imposed on it by Customs at the time of importing. An implication with this traditional understanding of customs (to have a duty imposed at the border when the item actually physically arrives at the border) is that with e-transfer there isn't any physical border crossed, and therefore, the e-transfer of goods will likely not have an associated duty as was suggested in prior articles on this issue.¹⁷ This is less of a viable option now than it was previously because of growing numbers of digital customs and track-and-trace technologies that are helping countries identify and value products that were received digitally.

Therefore, the question of whether a country can place a customs duty on a product that was received digitally is now moving from concept to more practical application. In doing this the legal role of the moratorium must be defined as being a prohibition rather than being simply a reiteration of an obsolete idea, and this can only be done if the question of what is being transferred over the internet is resolved. The question of distinction between “content” and “carrier” emerges- how far can either be divorced from the other? If they are separated, which ambit will be covered by GATT (goods) and GATS (services). Interestingly, CPTPP adds “content” in the scope of application for digital trade. “Article 14.3: Customs Duties 1. No Party shall impose customs duties on electronic transmissions, including *content* transmitted electronically, between a person of one Party and a person of another Party.” The moratorium does not indicate content or carrier for the “digital product”.

Goods or Services: Separate and Consequential Categories

One aspect of the content-carrier dilemma flows into if the products delivered digitally (that is, electronically transmitted products) should be treated as goods (under the GATT) or services (under the GATS). Simply put, this classification will not only affect how each agreement regulates digitally delivered products but also affect how each agreement creates binding

¹⁵ WTO, WT/L/274, 1998

¹⁶ Kaukab, R.S. (2024) WTO Moratorium on Customs Duties on Electronic Transmissions. Winnipeg: IISD.

¹⁷ Hanappi, T., Jakubik, A. and Ruta, M. (2023) 'Fiscal Revenue Mobilization and Digitally Traded Products', IMF Notes No. 2023/005.

obligations for parties and their governments related to the liberalisation of trade in such products. Though there are significant similarities between the two agreements, there are also significant differences, all of which would be of great consequence in determining which framework will apply to digitally delivered products. These digital products have both traditional characteristics of goods and those of services which has made the choice of framework (GATT or GATS) one of the most significant unresolved issues before the WTO.¹⁸

If classified under the GATT, the digital delivery is treated as a product that crosses a border, which is subject to Members' tariff schedules (bound by the Members) and would also require other Members to afford the same treatment to both domestically produced and foreign-sourced digital goods under Article III of the GATT (national treatment). From a trade liberalisation perspective, this approach disproportionately favours developed country exporters of digital goods, given that most developed countries have very low or zero bound tariff rates on digital goods, and yet non-discrimination obligations under the GATT would prevent developing countries from imposing selective taxes on digitally delivered products imported from developed countries. Historically, the United States has also supported the GATT approach, as it maximises liberalisation of trade by anchoring digital goods within the GATT, which provides for more binding regulatory obligations compared to the GATS.¹⁹

On the other hand, GATS categorizes the digital delivery of services as a service provided and establishes a positive list approach under GATS –member countries make binding commitments only in those sectors within which they choose to make a commitment and can attach conditions or limitations to such commitments. The European Union argued that "WTO Members have never intended for the transmission of digitized data to be covered under the GATT", strictly bifurcating the digital products as intangible and thus unable to fit in the GATT classification. Furthermore, the European Union claims that the electronic provision of services fits within GATS given that it is based on consensus, (EC, S/C/7 , 1999) and this has since been confirmed by the WTO Council on Trade in Services. (WTO, S/C/8 , 1999). The GATS process gives developing nations the option of adjusting their level of control over their service sectors as they make progress and provides them the option of determining whether or not they

¹⁸ Fleuter, S. (2016) 'The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification', *Chicago Journal of International Law*, 17(1).

¹⁹ WTO, S/C/W/68, 1998)

want to liberalize and if so under what conditions; unlike the general rules of GATT which place obligations on a country.

Digital products are becoming more of a challenge to classify because many physical goods being traded (e.g. industrial parts, medical devices, architectural designs) can now be converted to digital files and sent to the destination country to be made using 3D printing or other manufacturing processes. This new classification also results in a significant loss of tariff revenue for developing countries if they apply the moratorium to digitised goods; this figure is also likely to grow dramatically as more products are digitally produced. Therefore, when considering the classification of goods, one needs to consider both the current state of trade and how this has changed over time because of changes in technology, regime, and the tax and regulatory structures that will add to each year. The inability to determine whether digitally delivered materials constitute a good or a service – especially before such a large quantity of each had been delivered – has created a basic institutional gap in the structure of the World Trade Organization that cannot be overlooked any longer due to the ongoing moratorium discussion.²⁰

Tangibility and Intangibility

Tangible goods can cross the border, albeit being facilitated by online marketplaces and listings²¹, and be covered under the GATT articles, however, the issue arises when intangible digital products come into the picture. While tangible goods exist as a singular product, same intangible goods can be sold to different people. UNCTAD proposed three criteria to be met for an electronic transmission to be classified as a good –homogenous, storable and transferrable, while the services may be classified by the features of heterogeneity, inseparability, perishability. Intangible goods are transferred via “Digital Deliveries”. The paper did not consider “services” as a part of the moratorium.²²

²⁰ Banga, R. (2019) Growing Trade in Electronic Transmissions: Implications for the South, UNCTAD Research Paper No. 29. Geneva: UNCTAD.

²¹ In my understanding, the online marketplace constitutes as a service for facilitation of goods

²² Richard Kozul-Wright and Rashmi Banga, *Moratorium on Electronic Transmissions: Fiscal Implications and Way Forward* (UNCTAD Research Paper No 47, UNCTAD June 2020) UNCTAD/SER.RP/2020/6, 1.

THE MORATORIUM IN FREE TRADE AGREEMENTS: EVOLUTION AND STRUCTURAL LESSONS

The WTO's temporary and debated moratorium continues to be disputed, however, the commitment to implement duty-free access to electronic transmissions and digital products has established itself into many international bilateral and regional FTAs (Free Trade Agreements) over time in various forms that tend to be permanent and more comprehensive.

An example of such early bundling of the duty-free commitment with non-discriminatory obligations was the US-Jordan FTA²³ which represented the first bilateral agreement to include explicit electronic commerce provisions. This agreement provides for the equivalence of downloaded and physical copies (the former referred to as a form of physical copy) and establishes an "internet" or "duty-free cyberspace" obligation; however, it does not provide for common definitions, it only maintains the status quo of existing practices and does not create a legally binding definition or framework as a universal definition for duty-free electronic transmissions. Because of this lack of legally binding definitions, domestic taxation of VAT and income taxes was not addressed in the agreement, resulting in definitional uncertainty and risk of diversion of trade.²⁴ Tangible services carriage, as is India's position, will thus be covered in this ambit. Thus, this early template created a pattern for future agreements that would repeatedly combine the duty-free obligation with obligations not to discriminate against digitally traded products.

The United States-Mexico-Canada²⁵ contains provisions that include no customs duties imposed on digitally transmitted digital goods; It has expanded the scope of non imposition of customs duties-Scope of measure has expanded. Electronic transmissions were replaced by digital products products-content vs carrier debate- products include content. (Art 19.3). Other

²³ *Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area* (signed 24 October 2000, entered into force 17 December 2001) <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text> accessed 15 March 2026.

²⁴ B H Malkawi, 'E-Commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement' (2006) 15 *International Journal of Law and Information Technology* 153.

²⁵ United States, Mexico and Canada, *Agreement between the United States of America, the United Mexican States, and Canada* (signed 30 November 2018, entered into force 1 July 2020) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> accessed 15 March 2026.

trade agreements that are either currently in effect or have been signed,²⁶ have replicated the USMCA, with variations, in other jurisdictions by adopting the prohibition of customs duties on goods imported into their respective jurisdictions using digital formats, the liberalisation of data flows, source code protection, and the prohibition of localisation in one legally binding agreement.

The definitions are clearer in the Korea US free trade²⁷ Agreement digital goods that are delivered electronically and consumed on a physical product or carrier medium are included based on the specific Harmonization/HS subheadings listed in Annex 14A of the Korea US Free Trade Agreement. The EU Singapore digital trade agreement²⁸ contains definition for “online services: which means without the parties being simultaneously present. The Japan Switzerland free trade agreement²⁹ specifies “digital products” means such products as computer programmes, texts, plans, designs, video, images and sound recordings or any combinations thereof, that are digitally encoded and transmitted electronically; Note 1: For the purposes of this Chapter, digital products do not include those that are fixed on a carrier medium. Digital products that are fixed on carrier medium shall be subject to Chapter 2. Note 2: For the purposes of this Chapter, digital products are those produced for commercial sale or distribution.

The general template for many agreements today is similar to that for the CPTPP(sticks to electronic transmission- content is mentioned clearly, goods and services debate addressed in footnote 4, digital products does not classify itself as a good or service) agreement written back in 2018 (now 2023).³⁰ In addition, Digital Economy Agreements (DEAs) such as the Digital

²⁶ such as the Australia-UK FTA; UK-NZ FTA; the FTA between Hong Kong and Peru; and Ukraine-EFTA)

²⁷ *Free Trade Agreement between the Republic of Korea and the United States of America* (signed 30 June 2007, entered into force 15 March 2012, amended 2019) <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> (ustr.gov in Bing) accessed 15 March 2026.

²⁸ Agreement on digital trade between the European Union and the Republic of Singapore, OJ L 2026/126 (20 Jan 2026) art 1.

²⁹ *Free Trade Agreement between Japan and the Swiss Confederation* (signed 19 February 2009, entered into force 1 September 2009) https://www.wto.org/english/tratop_e/region_e/rta_jpn_switzerland_e.pdf (wto.org in Bing) accessed 15 March 2026.

³⁰ Nextrade Group and The Asia Foundation, *Digital Trade Agreements in Asia and the Pacific* (The Asia Foundation March 2024)

Economy Partnership Agreement (DEPA) that was signed in 2020 represent the movement of an agreement beyond the traditional text on digital services into areas of interoperability, FinTech, AI governance and digital integration within sectors.³¹ From this structural perspective, the strategic repositioning of the WTO moratorium on electronic commerce and the creation of a digital trade chapter in comprehensive FTAs are becoming two sides of the same coin. Uncertainty in digital products classification could trigger tariff reclassification, undermining frictionless trade opportunities for software and services startups. Thus, resulting in a mixed bag approach towards bilateral agreements despite opposing the moratorium via multiple statements.

PROPOSED SOLUTION FOR UNDERSTANDING THE POSITIONALITY OF ELECTRONIC TRANSMISSIONS

Table 1: Meta Levels of Electronic trade column (Source: Zwass, V. (1996)³²)

<i>Meta Levels of Electronic trade</i>	<i>Electronic Transmissions classification</i>
Infrastructure: the hardware, software, databases, and telecommunications that together deliver such functionality as the World Wide Web over the Internet, or support EDI and other forms of messaging over the Internet or over value-added networks;	Software Based Infrastructure
Services: messaging and a variety of services enabling the finding and delivery (on business terms, if desired) of information, as well as negotiation, transacting business, and settlement;	Intangible service products and carriage services for digital products
Products and structures: direct provision of commercial services to consumers and business partners, intraorganizational information sharing and collaboration, and organization of electronic markets and supply chains	Intangible digital products- including goods and services

³¹ *id*

³² Zwass, V. (1996). Electronic Commerce: Structures and Issues. *International Journal of Electronic Commerce*, 1(1), 3–23. <http://www.jstor.org/stable/27750797>

Table 2: Multi-Layered Positionality of electronic transmissions

	GOOD	SERVICES
CONTENT –Digital Products	1. Good as Content³³(Tangible/Intangible) 2. Software/Source Code-Digital Infrastructure	Services as Content (Intangible)
CARRIER	1. Goods <i>being</i> Carried via “Service Providers”³⁴ 2. Carriage Services- As tangible goods (CDs, USBs, etc.)	Carriage- transmitting services for digital products (Goods/Service) ³⁵

The inability to dissolve the uncertainty surrounding each of the two matter-types that make up electronic transmissions means no independent legal clarity on the implications of the moratorium. The inter-relationship between matter-type and the form of transmission of electronically transported products leads to a spectrum of four positions based on the available definitions and means of processing electronically transported products that involve various distinct legal implications dependent upon the definable (either or both) positions of matter-type and the transitory form of conveyance used for electronically transported products which have resulted in an indefinite suspension of the moratorium with respect to sounds, colours, physical materials, etc.

Peter Hill argues against separating goods from services based solely on tangibility and, instead, emphasizes ownership and durability to provide an alternative distinction. Goods

³³ The developed countries; exporters of technology would be motivated by such an outcome given that under current GATT schedules, they are not able to impose tariffs on their digital goods due to the low bound tariffs and that the moratorium will preclude future country-specific tariff; and therefore; will increase the globalisation of trade of those goods.

³⁴ Represents the developing members' preferred ways they would like to see processes in place. "WTO Members have never Intended on treating transmission of digitally transmitted information under the GATT."

³⁵ Due credit to my classmate Sanika Kapse for suggesting the idea for transmission as a service during class discussions

represent items or entities, regardless of their physicality, for which ownership rights may exist, and from which economic benefits can be derived. Services, on the other hand, are consumed or “used up” in the process of being provided (or used only once). Using this framework, digital products such as files do not get “consumed” when they are sent over the internet, but rather become a permanent entity after being sent, and thus more resemble goods than services. The United States has made this argument in WTO deliberations, asserting that they should classify digital items for purposes of the GATT under the definition of goods rather than services.³⁶ Classifying the digital product as a definite “good” or “service” binary will be a disservice to the nature of the same. The digital product can be seen as a multi-layer package of “goods” and “services” transactions. The customs may be applied while considering the nature of the product.

The quadrant which relates to how content is classified as a “good” may be regulated by GATT specifically whether such materials fall into the Product (Goods) category, an area generally favoured by the U.S., who believes that if they are able to classify digitally transmitted material (e.g. films, software, e-books) as “goods,” the use of tariffs will be limited and thus result in greater globalisation of trade in these items. In this regard, the moratorium has substantial importance, as it prevents Members from imposing tariffs on goods that would otherwise be subject to tariff imposition.

The quadrant where content is seen as a service under the GATS framework, the delivered content will be considered a cross-border provision of services. Another bifurcation exists when classifying E-Trade Service- if they would be an expression of Mode I or Mode II. “E-trade can be seen from the angle of the seller of goods and provider of services attempting to offer the products abroad or from the perspective of recipient consuming goods from a foreign country”³⁷ However, if one understands it purely from the letter of the law, since the service provider and service consumer both have not moved from their respective states, it will, most likely come in mode 1 classification.

³⁶Richard Kozul-Wright and Rashmi Banga, *Moratorium on Electronic Transmissions: Fiscal Implications and Way Forward* (UNCTAD Research Paper No 47, UNCTAD June 2020) UNCTAD/SER.RP/2020/6, 1

³⁷ Weber, R. H. (2007). International E-Trade. *The International Lawyer*, 41(3), 845–872. <http://www.jstor.org/stable/40708032>

Therefore, Contracting Parties' commitments will be determined by their positive listings rather than through GATT's global tariff bindings. From a developing country's perspective, this Classification would allow for regulatory flexibility so that they may gradually liberalise, pile up the limitations to liberalizing, and regulate market access; options not available as part of the GATT which has created stricter binding obligations. In essence, in practice, the asymmetric manufactured by GATS regarding Mode I commitments (more so from advance nations) which provide an advantage to advance nations in terms of Digital Exports has a lesser effect; although GATS has more flexibility in reality (particularly from developed nations), developed nations have made deeper commitments which GATS provides additional market access; therefore a GATS classification for Content will continue to provide developing nations with additional access.³⁸

The treatment of the *carrier*, the telecommunications infrastructure and data transmission services that convey content across networks as a *service* under the GATS is the closest the moratorium debate comes to settled ground. Existing GATS commitments on basic and value-added telecommunications services already govern this dimension, and the moratorium adds little to the legal landscape if its scope is limited to the carrier layer. The fourth quadrant carrier as goods under the GATT is near-hypothetical: data packets and electromagnetic signals lack the physical form that customs duties require, and no Member has seriously advanced this classification, most likely scenario is the bifurcation- using of carriage services for digital products which may be good or a service.

The binaries of goods and services versus content and carriers determine how severely restricted developing countries will be by the moratorium. The moratorium imposes no functional trade restrictions on developing countries when the moratorium is applied strictly to carriers and provides maximal restrictions on developing countries when applied to goods as content. As pointed out by India and South Africa in their 2021 submission, Members must have clarity regarding the moratorium's scope to make an informed decision as to whether to continue or discontinue the moratorium. The political dilemma is that WTO Members, most invested in each quadrant of the matrix, have conflicting interests and if an exact definition of the moratorium was provided, one or more of the dominant powers could not accept the results.

³⁸ WTO, S/C/8, 1999, EC, S/C/7, 1999

Thus, the duration of the moratorium has been paradoxically dependent upon its incomplete conceptualization.³⁹

CONCLUSION

The previous analysis indicates that digital goods fit poorly into the current binary construct used in WTO law. “Digital Goods” are extremely difficult to categorize as they meet many of the criteria of both “goods” and “services” as defined under the GATT and GATS frameworks. A detailed examination of the definitions of “goods” and “services” from both dictionary definitions and common usages, concluding that a purely formalistic reading of the GATT and GATS indicates that digital products should be classified as “goods.” However, examining practical distinctions using the likeness doctrine does not clarify which classification digital products should receive.(Fleuter,2016) There is more support for the classifications of digital goods as services based upon the goals of the WTO in treating digital products as services and therefore subjecting them to GATS limitations. Therefore, when weighing these three criteria together, it is the position of this Comment that the WTO should treat digital products as services and therefore (subject to GATS limitations).⁴⁰

Greater interpretive precision will not solve this problem. Neither does GATT define "goods", nor does the GATS define services except in an inherently circular manner. This structural lacuna has created a situation wherein WTO Member countries have approached the classification of software differently. This definitional vacuum exists by virtue of its own premises rather than accident.

The overlap between content-carrier and goods-services reveals that any effort to locate digital products within one of the two existing structural frameworks also implicates the opposite framework. An electronically transmitted film is at once a commercially viable product (which pulls toward GATT), a service Frontier Mode 1; a piece of content that is separate from the means of transmission of that content, and a carrier-dependent transmission that cannot be separated from the telecommunications network on which it was transmitted. Digital products possess characteristics of both "goods" and "services", and therefore special characteristics of

³⁹ WT/GC/W833, 2021

⁴⁰Sam Fleuter, *The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification* (2016) *17 Chicago J Int'l L* 155, 155

digital products, including their effects on Member States, should be given special treatment because forcing them into either category will not actually relieve the tension produced by this definitional vacuum; rather, it will simply hide it and thus will provide further evidence of phasing out the moratorium.⁴¹

A sui generis digital product category is needed for a law that will not impose a legal regime through analogy with physical goods, a law that recognizes both content and carrier coemergent, and a law that can adapt to the varying fiscal and developmental realities of digital commerce for all Members. The previous moratorium was established for the packaged software world (e.g., software on DVD or compact disc), which used to be sold on physical media (i.e., before google existed) and was intended to be used for software applications and licensed; now it applies to ai, cloud infrastructure, and digital fabrication. By the time a new regime is developed, it would already be irrelevant and outdated by even newer technologies. However, this risk requires careful and future-proof design, as opposed to remaining bound by existing laws that were never intended to accommodate this much weight.

⁴¹ Marsoof, A. (2012) 'A Case for Sui Generis Treatment of Software under the WTO Regime', *International Journal of Law and Information Technology*, 20(4), pp. 291–311.