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A Goods and Services Conundrum in Electronic Commerce: Digital Tussle before WTO

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ABSTRACT

E-commerce or Digital Commerce has become a part our day-to-day life with the emergence of new technologies slowing changing the way transact things. Though an aspect of this change, which we neglect to look into at the Domestic, National and International Level and which will play a major role in shaping the fiscal resource of any country. The issue as to whether e-commerce transaction order online and delivered in digital format incur any tariff or tax liability when they cross the virtual border from one country to the other. The issue was identified for the first time by WTO in May 1998, whereby it established a working committee on e-commerce with 4 Sub-committees to suggest possible construction of laws, which will deal with imposition of custom duties and correlated aspects of e-commerce. While recognizing the need for levying custom duties on a major area of commerce still untouched by the clutches on any rules, WTO still came to a harsh reality that such levying cannot be imposed without first creating the laws itself to deal with it. So WTO members decided to impose a temporary moratorium of zero custom duties (so-called WTO Duty-free Moratorium on Electronic Transmissions) till the time legislation or rules enacting the same are enforced. It has been more than 2 decades since then, but WTO has failed to produce a single rule, law or agreement clarifying the stand and clearing the cloud on this temporary moratorium. They on the other hand with dominant position by developed countries keeps on extending this temporary moratorium after every 2 years using the same excuse of absence of any law, which they themselves have failed to reproduce. The author in this research paper dwell into the resolution of this long pending issue by analyzing the rules applicable and modification required to bring at par the principles and commitment of GATT and GATS on such Digital Products.

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I. Introduction

The traditional concept of goods and services was a simplified one. Where goods were based on tangibility, services covered the intangible area. Goods were those tangible movable products with physical attributes which can be bought and sold, exported and imported, consumed by the consumers and most importantly physically delivered in its entirety. Services were more of an offer of performance of certain acts/duties based on agreements which can be pre-sale, post-sale or entirely services in itself. In such cases also presence of a physical person to perform such services was essential. Like in cases of a technology transfer agreement or a warranty agreement a person will visit customers place to perform the service or the product will be sent to that person for performance of services. For pure services like banking, insurance, etc persons used to deal with the customers face to face in performance of their services.

With the advancement of technology certain aspects of these core understanding of differentiation between goods and services changed dramatically. On one hand tangibility of goods vanished for some areas, services are no longer a thing of personal face to face performance. Digitalisation has not just impacted the medium of delivery rather the very nature and attributes of some of the good and service have changed and more changes are on its way. Taking from a simple example of a hard printed book which can now be converted into an E-Book (collection of digital data in its soft form) to movies and songs which used to be delivered via cassettes, VCR's, CD's and DVD's, the form of these products changes though the content remains the same. Banking Services, Insurance Services, Advertisement services etc have also taken a leap into the new digital era by converting there medium which is also a collection of digital data in its soft form transmitted through internet. Due to this common characteristic feature of collection of digital data the ambiguity between goods and services arise.

II. A Definitional Challenge

The best course of action in cases of ambiguities and doubts is to go to the original source or definitions and try to interpret its scope and implication. Goods have been defined under Ad Article XVII[2] GATT, 1994 as "The term 'goods' is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services". The emphasis here is on understanding of commercial practice, which is again a subjective

[2] Ad Article XVII Paragraph 2 ANNEX I, NOTES AND SUPPLEMENTARY PROVISIONS, General Agreement on Trade in Goods, 1994.

concept and varies spatio-temporal (according to time and place). A new commercial practice may be goods in the eyes of someone but not for the other. Thus trying to find a place for digital products in the current definition of goods becomes equally complex. A mere exclusion of services from the definition of goods would be of no help unless services itself have been denied properly. Services under Article I clause 3 sub-clause (b) GATS[3] provides an inclusive definition as "'services' includes any service in any sector except services supplied in the exercise of governmental authority".

To find this distinction in the definition of E-commerce leads to multiple ends as it has been defined in numerous ways. These definitions often differ conceptually but at times overlapping as well. The range of definitions is the outcome of the multitude of stakeholders involved in e-commerce trade, rule-making, data collection and regulation. Policy-makers, statisticians, business and industry as well as consumers have different projections and interests guiding the way in which they interpret and define e-commerce. Table 1 groups the definitional ambit into four broad streams of classification, which highlight different aspects of e-commerce. E-commerce is treated in three main dimensions according to its unique features of physical traits (goods, services), methods of delivery[4] and spatial location.[5] Often a mix of these definitions are applied by countries while domestically regulating e-commerce and collecting statistics. OECD's defines e-commerce as " commercial transactions occurring over open networks, such as the Internet. Both business-to-business and business-to-consumer transactions are included".[6] This classification treats e-commerce as more of an infrastructure or an electronic platform for commercial transactions, rather than a unique type of an economic operation. Table 1 elaborates some such category of definitions based on various classification criteria.

Table 1: Classification and Scope of E-commerce Definition[7]

Classification	Scope of definitions	Examples
Location	Focus on open networks (e.g. Internet) as the location or infrastructure where	Internet purchase from Amazon but excludes sales

[3] Article I clause 3 sub-clause (b), GENERAL AGREEMENT ON TRADE IN SERVICES
[4] Wunsch-Vincent (2006) provides a comprehensive discussion of the definition of e-commerce from a delivery mode perspective. Accordingly, e-commerce is delivered either via physical carrier medium (e.g. CD) or through electronic delivery. E-commerce is then distributed either on demand (point to point) (e.g. physical purchase or downloading) or on supply (e.g. cinema or radio broadcasting).
[5] OECD. 1999; Perez-Esteve and Schuknecht 1999; Wunsch-Vincent 2004; Wunsch-Vincent 2006.
[6] Id.
[7] Id.

	retail transactions take place with consumers	over the phone
Channel	Broad definition that views e-commerce as a mode of trade which includes all electronically transferred commercial and financial transactions	money transfers, data transfers
Market entity	E-commerce is regarded as a type of service and/ or a tangible or intangible good	Digital products (software), telecommunication services
Transaction	These definitions view the elements of the e-commerce transaction, including information-seeking and advertisement, purchase and paying, as well as the final delivery	A bundle or combination of an electronic transaction that includes advertisement of online gaming, payment and delivery (playing)

Even though e-commerce rapidly captured a prominent role within domestic and international trade, its rule-making and regulations have been progressing at a much sluggish pace. International Trade in e-commerce is adversely affected by this lack of regulations and governance. This impact can largely be attributed to the absence of an agreement at the World Trade Organisation (WTO) level on what constitutes as e-commerce even though its members have been discussing e-commerce since 1998. A trace can be found in the form of a working definition which is guiding the deliberations of WTO Work Programme on Electronic Commerce defining e-commerce as “the production, distribution, marketing, sale or delivery of goods and services by electronic means”.[8] The wide coverage of E-commerce work programme under WTO creates the focal points of electronic commerce within the ambit of domain covered by WTO.[9] Thus in can be seen from the definition of e-commerce under WTO that it is wider compared to the definition under OECD. The constituents from all four classifications like production, marketing and distribution, elaborated under Table 1 encircles this broadened coverage.

[8] WT/L/274, 30 September 1998.

[9] According to the work programme, e-commerce is discussed under the direction of the General Council in the Council for Trade in Goods (GATT Council), the Council for Trade in Services (GATS Council), the Council for Trade-Related aspects of Intellectual Property (TRIPS Council) and the Committee on Trade and Development (CTD).

III. Physical attributes or content based approach: a practical controversy

Regardless of unclear and ambiguous definitions of goods and services under GATT and GATS there was no complication until before last 2 decades regarding the identification between the two. Though based on commercial perception goods were identified on the basis of their physical attributes i.e a movable property which can be bought and sold or transfer physical hands between persons. A book, a car, a table etc. were identified based on their physical appearance and their physical use. Its defining features were attributed to both how it looks and what it contains. These features changed for some goods with the emergence of new technology providing an alternative look and medium. Table 2 provides a brief look at the conceptualization of goods and services under domestic and international trade from the traditional commerce point of view and the new perspective brought in by e-commerce.

Table 2: Tabulation of Goods and Services from Traditional and Electronic Commerce[10]

	Domestic		International/Cross-border	
	Goods	Services	Goods	Services
Traditional commerce	A consumer buys a product from a domestic retail store	A consumer receives a service offline from a domestic supplier, e.g. a haircut in a local salon	Bulk import and export of goods by international trading companies	Four modes of supply defined by GATS,[7] not involving online transactions, e.g. international shipping, international tourists, companies that have foreign investments, supplying a service to local customers, and temporary movement of a service supplier to another country to supply a service
E-commerce	A consumer buys a product from a domestic online store	A service is supplied from a domestic supplier via Internet, e.g. e-banking services provided by domestic banks	A consumer orders a product from an online store and the product is shipped from the producer/retailer in another country directly to the consumer	Mainly mode 1 and 2 of GATS, involving cross-border supply of services, which could include: - Digital products: music, video, apps and games downloaded and paid for online - Services transactions completed online between a consumer and a supplier located in different countries

Taking into view the old and the new with further growth in technology e-commerce goods can be classified into 3 categories[11]:

i. **Traditional goods in digital form:** These goods now due to the technological advancements have now been traded in their digital form as well e.g a book as an e-

[10] International Trade Centre (2016). Bringing SMEs onto the e - Commerce Highway. ITC, Geneva.
[11] Traditional Goods ordered online but delivered physically are not included here as there is no ambiguity in their regard. They are still governed by the existing trade rules.

book. Though its content remains the same but due to major changes in its form factor perception of it being a mere collection of digital data creates the complexity. As these goods are still traded in their traditional form a problem of principle of equality also comes into picture. In its traditional form they are subject to prescribed custom duties but just due to a change in its form factor should they be treated differently from its counterparts?

ii. **New Digital Goods:** These good are a gift of technology with no traditional counterparts. Goods like a software, an app or a sound recording, which has their origin in digital form only, is being accessed and traded without any international boundaries. Overpassing all physical limitations its trade

iii. **3D Printing Technology:** Though only in its infancy at this stage 3D printing technology will likely to cause more challenges to the International Trade Rules. Any goods can now be converted into a digital 3D model and transferred cross-border, all the receiving party need is a 3D printer and some basic printing material to convert it back into goods in its traditional form. A good is valued for its physical attributes, aesthetic appearance and physical function. So even in its digital 3D format it retains the same value except for its physical conversion, which is more or less a mere mechanical process of printing. In the near future all types of traditional goods from a car to a table can be bought and sold via Internet in its digital form without actual physical movement.

The nature and spirit of good or service, whether it is in conventional form or contemporary digital form, are to be analyzed basing its internal content and purpose as the root. Instead of the exterior form the product or its mode of transfer, content based theory base its significance on the inside content. Like a book and an e-book basically have same internal content, the difference lies in the outer formation of the two. Before the negotiation of GATS this issue has been dealt by again and again specially since telecommunication negotiation initiated, but they have still not been clarify the basis of products being internal content or conduit.[12] To bring an example of the same, “cable and broadcast distribution of radio and television programming is carved out of the Annex for Telecommunications, producing a vacuum in terms of trade disciplines governing the regulation of on-line audio and video

[12] The WTO Secretariat notes: ‘Especially for the sub-category of Radio and television transmission services (CPC 7524), it sometimes becomes difficult to determine exactly the boundary between services classified under telecommunications and those classified under audiovisual services.’ (Cited from CTS, Background Note on Audiovisual Services, S/C/W/40 (15 June 1998) [WTO Background Note on Audiovisual Services]). See Bronckers and Larouche (1997) for the difficulty of distinguishing between basic and value-added telecommunication services.

content."[13]

There have been attempts by some countries to solve this issue by recognizing the chief characteristics of a digital product to categories them as goods, instead of a service.[14] Such attempts includes multifaceted interpretation where "One interpretation sees such products as goods if they 'resemble or were close substitutes' to the physical goods, or if they were delivered personally to the consumer, rather than being generally available on the Internet; and as services if they are immediately consumed by the purchaser and are not stored".[15] Although this doesn't provide a concrete solution as it nowhere tries to identify the innate nature of what makes it 'goods', rather relies upon the similar like product analogy. This conflict doesn't arise in digital products which are sui generis in nature and doesn't share the resemblance with any physical goods. Further by using such analogy sale of a bag of chips would be treated as services if immediately consumed, but as goods if bought over the internet after storage.[16]

This system of 'subject matter only' approach has not been consented invariably by all the member countries because some still emphasize on innate nature of digital products. EU specially forwards an argument that as there is a need of suitable electronic network to take part in electronic commerce, all transacted products should be treated as services regardless of there delivery mode being physical or digital.[17] This stand unofficially got the support of WTO Secretariat, though being on the neutral seat, as can be seen in the background note of 1988 by WTO E-commerce work committee which is closely on the same line as that of EU approach.[18] This approach is spreading with approval and acceptance by many WTO member countries, though still on a dissent on the categorization of 'small number of products made available on the internet…such as books and software'.[19] Thus amongst this all for now there seems neither a determined solution on categorization of digital products nor the issue of innate nature of a product making it a good or service.

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[13] Para 2 (b) of the GATS Annex for Telecommunications. Also, broadcasting is not mentioned as a sectoral activity in the audiovisual classification. See Roberts (1999).
[14] WT/GC/W/436, para 1.6.
[15] Electronic Commerce and the Role of the WTO, p. 51.
[16] G/C/W/158, para 2.9.
[17] WTO, Communication from the United States—Work Programme on Electronic Commerce—Scope and Classification Issues, S/C/W/87, 9 December 1998, para 1; this view is also reflected in their paper on the categorisation of computer and related services: WTO, Coverage of CPC 84—Computer and Related Services, TN/S/W/6, 24 October 2002, para 8; it reiterates its view in WTO, Work Programme on Electronic Commerce: Classification Issue: Submission by the European Communities, WT/GC/W/497, 9 May 2003, para 16.
[18] WTO, Work Programme on Electronic Commerce: Note by the Secretariat, S/C/W/68, 16 November 1998, 10.
[19] Work Programme Reflects Growing Importance of Electronic Commerce 15 June 2001, available at <www.wto.org/english/tratop_e_ecom_e/ecom_briefnote_e.htm>. (last visited 9 October 2002) 2.

IV. The categorisation discourse before WTO

The Work Programme on E-commerce under WTO has taken the initiative of bringing the discourse upfront as to whether to consider digital products as goods or services or something completely new. In this direction there have been some notable concurrence before WTO. Firstly it has been decided before WTO that "[w]ithout prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, . ..Members will continue their current practice of not imposing customs duties on electronic transmissions."[20] Though in the midst of other issues legal enforceability of these rules are not very clear, but member countries for now continues to practice it.[21] Secondly, member are still trying to avoid bringing a new trade agreement on this matter and pushing forward the need of categorisation of digital products as goods or services only.[22]

WTO Council for Trade in goods and Trade in Services in 1999 have acknowledged that the categorisation discussion seems not close to any solution as of now lingering the question of whether digital products to be treated as goods or services.[23] Thus on these lines the analysis provided below focuses more on the negotiation and practical resolution part rather than legal analysis of the same.

Backdrop of Categorisation Discussion

The categorisation debate holds much significance in relation to digital products due the variance which lies between long-standing GATT rules and comparatively new GATS rules. The trade protections covered under both vastly differ from each other. GATT covers goods which enjoys the advantage of Most-Favored Nation (MFN) Principles i.e. "benefits offered to imports from one WTO member country must be applied to imports from every member"[24] and National Treatment Principle (NTP) i.e., "products of a WTO member country must receive treatment under national law no less favourable than that accorded to domestic

[20] Ministerial Declaration on Global Electronic Commerce, WTO Doc. WT/MIN(98)/DEC/2 (May 25,1998) [hereinafter Second Ministerial Declaration]; Work Progamme on Electronic Commerce, VW7TO Doc. WT/LI274 (Sept. 30, 1998).

[21] See Daniel Puzzin, WVTO Members Moving Toward Creation of Ad-Hoc Group on Electronic Commerce, 5ELECTRONIC COM. & L. REP. 1227 (2000).

[22] See, e.g., Work Programme on Electronic Commerce, Objectives for Treatment of Electronic Commerce, Communication from Australia, WTO Doc. WT/GC/25, at 2 (July 5, 1999) ("Principle 3: That existing WTO rules, which are consistently technology-neutral, be applied to electronic commerce as far as possible, thereby obviating the need to classify it as a distinct regulatory domain in international trade.").

[23] Work Programme on Electronic Commerce, Information Provided to the General Council, VTO Doc. G/C/W/158, T 2.11 (July 26, 1999) ("wide range of opinions and questions regarding the characterization of the content of electronically transmitted digitalized data"); Work Programme on Electronic Commerce, Progress Report to the General Council, VTO Doc. S/L/74, 6 (July 27, 1999).

[24] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194(amended by General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Annex IA, 33 I.L.M. 1154 (1994)), Art. 2

products".[25] GATT further adds various other protections to trade in goods, including but not exhaustive to, general prohibition on quantitative restrictions, valuation rules, rules of origin, and dumping and subsidies rules.[26]

The position of United States is majorly derived by its own interest of enhancing the applicability of GATT over its widespread dominating e-commerce business including leading cross-border trade market. This has received some backing from Japan as well[27], but it still remains a minority stand before WTO.

On the other hand of the arguments European Union promotes the categorisation of digital products as services. According to such argument e-commerce includes delivery under two different modes:

i. "goods delivered physically, while ordered electronically, which fall within the scope of the GATT;
ii. electronic deliveries, which consist of services and therefore fall within the scope of the GATS."[28]

The stand point of EU is corroborated by ample other WTO member countries with substantive reasons. Firstly, categorisation as services for digital products opens the option for member countries to extend content restrictions on the basis of national origin. The present restriction under this category includes "the EU Television without Frontiers Directive, which requires EU broad-casters to reserve a majority of their transmission time for European works,"[29] and "the Canadian requirement that 60 percent of television programming and 35 percent of day time radio musical programming be reserved for Canadian content".[30] There is no GATS commitment by member countries under WTO which imposes a barrier upon this kind of content based restriction on digital products. Secondly, categorisation of services as digital products fosters precedents over other related issues, like value-added tax (VAT) issues as deliberated in detail under Chapter V of the

[25] Id, Art. 3
[26] Id, Art. 4, 7, 9, 11
[27] Preparations for the 1999 Ministerial Conference, Electronic Commerce, Communication from Japan, WTO Doc. VTIGCW12 53, at 1 (July 14, 1999) ("With respect to the treatment of digital contents transmitted electronically, it is appropriate to examine the issue further so that the principles stipulated under GATT, namely the most-favoured-nation treatment, national treatment and the general elimination of quantitative restrictions, can be applied to such contents.")
[28] Preparations for the 1999 Ministerial Conference, Work Programme on Electronic Commerce, Communicationfrom the European Communities and their Member States, WTO Doc. WT/GC/T/3 06, T I (Aug. 9, 1999).
[29] Council Directive 89/552/EEC, art. 4, 1989 OJ. (L 298) 23, amended by Parliament and Council Di-rective 97/36/EC, 1997 O.J. (L 202) 60.
[30] Canadian Radio-television and Telecommunications Commission, Fact Sheet: Canadian Content onRadio and on TV(Aug. 11, 1999), available at http://www.crtc.gc.ca/ENG/ INFOSHT/GI le.htm.

Thesis. Thirdly, capabilities to impose trade restriction on digital products under GATS provides the member countries wide reach to foster control over the present global dominance of United States' e-commerce companies.

Apart from the above other members of WTO have started emphasising upon a more reasonable approach by keeping the rules of WTO neutral in treating digital products from their physical counterpart. As an instance Singapore and Indonesia have mentioned that "[t]he advent of digitized products however has blurred the boundary between goods and services.... Whatever the classification, the basic principles of MFN and national treatment have to apply in order to ensure fair, open and transparent market access for e-commerce."[31]

V. Legal rationale of goods or services categorisation

The examination of categorisation of digital products as goods or services on the legal basis can be anatomised under 2 mainstream concepts: (1) theoretical rules on fundamental characteristics of goods and services; (2) Cardinal WTO Trade Rules on principles of technology neutrality and progressive trade liberalization

1. Fundamental Characteristics of Goods and Services

It has been advocated by Mr. Peter Hill that the basis feature of goods are there value which can be possessed and they remain be independent of their owner and can be traded easily in this form.[32] Services, on the other hand, entails some suitable alterations in each service by the service provider which makes it different for each consumer in their physical and mental state. Such flexibility in the mode of service is based upon the association between service provider and consumer.[33] Based on this criteria digital products like e-books, audios, videos, operating systems and apps should be treated as goods, as it can be owned. Although with advancement of technology service providers have started offering digital products with more diverse portfolio like video-on-demand which looks more like a service.

To profess the arguments further Mr. Peter Hill "rejects the alternative framework that a good is tangible while a service is an intangible.[34] Although the point of tangible nature fostered a major role in WTO Appellate Body decision in Canada-Certain Measures Concerning

[31] Preparations for the 1999 Ministerial Conference, Work Programme on Electronic Commerce, Communicationfrom Indonesia and Singapore, WTO Doc. VVT/GC/W/247, at 2-3 (July 9, 1999).
[32] Peter Hill, Tangibles, Intangibles and Services: A New Taxonomy for the Classification of Output, 32 CANADIANJ. ECON. 426, 437-41 (1999).
[33] Id. at 441-43.
[34] Id. at 443. Although the tangible/intangible approach is arguably inconsistent with the fact that intellectual property is an intangible that is not a service, intellectual property is already treated as a special case, governed by the TRIPS Agreement (rather than GATT or GATS).

Periodicals.[35] Canada in the abovementioned case deposed that taxation on periodicals are applicable on advertisements and are subject to GATS rules. The WTO Appellate Body analysed that "while advertising and editorial content had 'service attributes', they formed a 'physical product' in the periodical itself".[36] This approach above is not diametrically opposite to Mr. Peter Hill's approach as a magazine, its ads and all related content in it belongs to the buyer and this can be further forwarded to others by the buyer. In light this test becomes even more apparent and difficult to deny that any tangible product will not fulfil Peter Hill's test.

2. Cardinal WTO Trade Rules

Another legal take on categorisation approach is to extend the same trade rules of WTO which generally forms its basis. The principle of trade neutrality before WTO states that "like products are generally subject to like trade rules".[37] This approach examines the products as to whether they are "similar" or are "directly competitive or substitutable"[38]. The emphasis in such analysis is on the following characteristics i.e "(1) the product's end-uses in a given market; (2) consumers' tastes and habits; and (3) the product's properties, nature, and quality"[39]. As digital products are "demonstrably are substitutable with their physical analogues",[40] the principle of trade neutrality extends them no less favourable treatment then their physical counterpart. Thus application of GATT rules and commitments are the most appropriate option to evade a situation of dissimilar treatment.

Technological neutrality is a relatively new principle in this arena. Under GATS it extends to services "provided through any means of technology (e.g., cable, wireless, satellites)."[41] An application of this principle emphasis upon the fact that mere change in mode of delivery or medium of transfer does not change the trade rules pertinent to that product. Like a book, audio or video content should not receive a different treatment then its physical counterpart delivered through paper, CD's or DVD's.

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[35] Canada-Certain Measures Concerning Periodicals, WTO Doc. WIT/DS3 1/AB/R (June 30, 1997).
[36] Id. at 17
[37] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194(amended by General Agreement on Tariffs and Trade 1994, Apr. 15, 1994,, Art. 3
[38] Japan-Taxes on Alobolic Beverages (Japan-Alcohol AB Decision), VTO Doc. WVT/DS8/AB/R, WrlTDSI0/AB/R, WT/DSI I/AB/R, Oct. 4,1996, at 23, 24;see also Canada-Certain Measures Concerning Periodicals , at 24-25.
[39] Id at 19;
[40] A QUANTITATIVE ASSESSMENT OF ELECTRONIC COMMERCE 6 (WTO Economic Research and AnalysisDivision, Working Paper ERAD-99-01, Sept. 1999), at 5-6.
[41] Group on Basic Telecommunications, Notes for Scheduling Basic Telecom Services Commitment, WTO Doc.5/GBT/W/2/Rev.1, $ 1(c) (Jan. 16, 1997).

Principle of progressive trade liberalisation is another major backbone of WTO structure. It provides that “under GATT, commitments of tariff reductions may not be withdrawn”[42], and “withdrawal of GATS commitments requires payment of compensation to affected countries”.[43] This principle of "no steps backward" has proved to be victorious in reaching the desired targets of reduction in tariff under GATT, and is already started showing the promises of benefits under GATS.

Therefore we can culminate that digital products should gain complete protection of GATT just like their physical counterpart products.

VI. CONCLUSION: A HYBRID SOLUTION OR NEED FOR A NEW CATEGORY

A unique proposition propounded by Work Programme on E-commerce under WTO in 2001 was a fusion exposition for categorization issue i.e. “a treatment under the GATS while ensuring that GATT-level market access applies”.[44] Some of the member countries like Japan and Singapore advocated that on complete particular commitment under GATS and dispensation of MFN exemptions, the need for categorization debate of goods and services for e-products can become irrelevant.[45]

This proposition may seem reasonable on a prima facie outlook, although from a practical view point if these e-products are categorized under any of the service class enforcing member country specific commitment separately for all will be complicated. Extending GATT rules like unrestricted MFN, NTP, market access commitments and prohibiting quantitative restrictions by cloning the same based on member-vise GATS commitment will create future problems.

Therefore, this hybrid approach does seem like a workable exposition on the ground. It is quite pragmatic to presume on part of majority of WTO member countries that they will ever adjust and accept the requirements of particular GATS commitments for audio-visual and similar services. This holds true specifically in the circumstance where variance in perspective and contentions exist between the WTO member countries originally, otherwise

[42] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194(amended by General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Art. 2 :1(b); Understanding on the Interpretation of Article II:l(b) of the GATT1994, Apr. 15, 1994,

[43] General Agreement on Trade in Services, Apr. 15, 1994, Art. 20

[44] First Dedicated Discussion on E-Commerce, p 2. See also ‘WTO Members Fail To Agree On Rules For E-Commerce Deals; New Meeting Called’, in: BNA WTO Reporter (10 May 2001).

[45] ‘Proposal on WTO’s Approach to E-Commerce Towards eQuality’, Communication of Japan to the WTO Work Programme on E-Commerce (15 June 2001), Internet: www.meti.go.jp/english/information/download files/cw010706e.pdf and non-paper of Singapore to the regular meeting of the GC on 8 May, WTO JOB (01)55, 26 April 2001. Para 16 of the latter paper argues that by this agreement on-line delivered products, such as software, would not be treated worse than traditional off-line sales. See also ‘WTO Members Fail To Agree On Rules For E-Commerce Deals; New Meeting Called’, in: BNA WTO Reporter (10 May 2001).

was complex to resolve the categorization issue since its inception. Thus this hybrid solution, depended upon the correlated essential GATS commitment, doesn't provide befitting way out.[46]

Regardless of some minor issue with traditional products, notable dissent continues to exists between member countries on categorization of online trade. This conundrum has no solution provided under GATT or GATS regulation as these are only subject to commodities catalogued within member countries schedule attached with GATT or GATS. The polarity among WTO members' categorization opinion is in addition to their readiness to liberalize completely the service trade sector. Both GATT and GATS approve the detail scheduling nomenclature to aid the categorization and classification of commodities as specific goods and services, but the complication occurs where a said product can't not find its place in either of the established nomenclature in the schedule such as the case with e-products. Such minimal situation will rely upon the member countries discretion to decide the categorization which will always be influenced by domestic economies' necessities instead of the need of international cross-border trade. Therefore, it has created influence of domestic political considerations over international trade policies which is not the most suitable approach to resolve electronic commerce and trade issues.

To conclude the applicability of GATT or GATS over e-commerce and specifically e-products, the discourse continues at the center of e-commerce Work Programme before WTO, though member countries seems unwilling to vacate this pivotal issue on the future uncertainty of dispute settlement resolution rules under WTO. Thus this creates the need to create a new category with the nomenclature of 'E-Products" or 'Digital Products' with proper classification based on their individual defining features and a completely new multilateral trade agreement to deal with the same. This last approach may seems difficult but will be the most effective one to bring about permanent clarity and certainty on the debate.

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[46] This is also not acceptable to the US, cf First Dedicated Discussion on E-Commerce, p 2. For the same reasons Japan was also not inclined to support the informal proposal by Singapore.

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