

# IS TANGIBILITY A PREREQUISITE? DIGITAL PRODUCTS AS GOODS

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## ABSTRACT

*This research is intended to answer whether digital products can be considered as goods even though these products are intangible. Electronic commerce has permeated the lives of billions, and yet World Trade Organization (hereinafter "WTO") law is still facing headwinds in the effort to tackle the issue adequately. One of the major issues is that members are unable to agree on whether to apply the General Agreement on Tariffs and Trade (hereinafter "GATT") or the General Agreement on Trade in Services (hereinafter "GATS") for digital products. The distinction itself could have a radical impact on digital trade, since the GATT regime is known to be more liberal compared to that of GATS. This paper argues that the WTO jurisprudence does not provide a clear guideline on how to properly classify a product. Nevertheless, the application of the rules of interpretation under the Vienna Convention on the Law of Treaties indicates that tangibility is not a prerequisite.*

**KEYWORDS:** *digital products, electronic products, e-products, goods, GATT, digital content, electronic transmissions, electronic commerce, e-commerce, digital trade*

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## I. INTRODUCTION

Electronic commerce has been regarded as one of the most essential issues in the agenda of the World Trade Organization (hereinafter “WTO”), particularly in light of the fact that the world is experiencing digitalisation and technological advances at a breakneck speed. An essential step in the effort to capture e-commerce under international trade law was undertaken in the year 1998. During the WTO Ministerial Conference in Geneva in May 1998, the Declaration on Global Electronic Commerce was issued, and it called for the establishment of a Work Programme on Electronic Commerce (hereinafter “WPEC”).<sup>1</sup> The most important aspect of this declaration is the agreement among WTO Members to continue the pre-existing practice of not imposing customs duties on “electronic transmissions” (often dubbed “temporary moratorium on e-commerce”).<sup>2</sup> This commitment was then reaffirmed in the Ministerial Conferences that were held in Doha in 2001, Hong Kong in 2005, Geneva in 2009 and 2011, Bali in 2013, Nairobi in 2015 and Buenos Aires in 2017.<sup>3</sup> On December 10, 2019, members have also agreed to extend the moratorium until the 12th Ministerial Conference in Nur-Sultan on June 8-11, 2020.<sup>4</sup>

Furthermore, on January 25, 2019, seventy-six WTO Members issued a Joint Statement on Electronic Commerce which confirmed their intention to proceed with negotiations on trade-related aspects of e-commerce.<sup>5</sup> Discussions were subsequently held under this Joint Statement Initiative, including a text proposal by Canada that includes a prohibition on the levying of customs duties on “digital product[s] transmitted electronically”.<sup>6</sup>

However, since the collapse of the Doha Round, discussion over the nature of “digital products” is arduous at best. There are diverging views on whether digital products should be treated under the General Agreement on Tariffs and Trade (hereinafter “GATT”) or the General Agreement on

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<sup>1</sup> World Trade Organization [hereinafter WTO], The Geneva Ministerial Declaration on Global Electronic Commerce, WTO Doc. WT/MIN(98)/DEC/2 (May 25, 1998).

<sup>2</sup> *Id.* As a note, the exact meaning of “electronic transmissions” is not stipulated in the moratorium. Nevertheless, the term has been defined by the Council for Trade in Goods as “digitalized information transmitted by electronic means.” See Council for Trade in Goods [hereinafter CTG], *Work Programme on Electronic Commerce: Information Provided to the General Council*, ¶ 2.2(iv), WTO Doc. G/C/W/158 (July 26, 1999). This definition would encompass digital products that are transmitted electronically.

<sup>3</sup> WORLD TRADE ORGANIZATION: ELECTRONIC COMMERCE, [https://www.wto.org/english/tratop\\_e/ecom\\_e/ecom\\_e.htm](https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm) (last visited Feb. 27, 2020).

<sup>4</sup> *WTO Members Agree to Extend E-commerce, Non-violation Moratoriums*, WTO (Dec. 10, 2019), [http://www.wto.org/english/news\\_e/news19\\_e/gc\\_10dec19\\_e.htm](http://www.wto.org/english/news_e/news19_e/gc_10dec19_e.htm).

<sup>5</sup> WTO, *Joint Statement on Electronic Commerce*, WTO Doc. WT/L/1056 (Jan. 25, 2019).

<sup>6</sup> WTO, *Joint Statement on Electronic Commerce: Communication from Canada*, art. 5.1, WTO Doc. INF/ECOM/34 (June 11, 2019).