

January 2020

Industry Consultation Paper

Customs Moratorium on Electronic Transmissions

NASSCOM[®]

Contents

Issues at a Glance 3

Introduction 5

 Background to the Moratorium on Customs Duties on Electronic
 Transmissions..... 5

 Recent Developments preceding the 12th Ministerial Conference 6

 Issues for Consultation..... 6

Part 1: Overview of the Debate 7

 Literature Assessing Impact of the Moratorium..... 7

 Position taken by WTO Members on the Moratorium 8

Part 2: Defining “Electronic Transmissions” 9

 The Need for Defining “Electronic Transmissions” 9

 Approaches to Defining “Electronic Transmissions” 10

 E-Products - “Goods” vs. “Services” 12

 Dutiable Object: “Content” vs. “Carrier Medium” 16

Part 3: Questions for Consultation 19

Annex - I 22

Annex - II 32

Endnotes 38

Issues at a Glance

NASSCOM Approach to Consultation

The World Trade Organisation (WTO)'s Customs Moratorium on Electronic Transmissions (**Moratorium**) is due for re-assessment at the 12th Ministerial Conference of the WTO being held at Nur-Sultan, Kazakhstan from 8 to 11 June 2020.

Currently, digitised products are not subjected to customs as historically this presented a technical challenge and thereafter the Moratorium gave it a legal cover. Overtime, the technical feasibility has improved and therefore the case for an automatic rollover of the 'temporary' moratorium without assessing the economic implications has weakened.

Both the economic impact and technical feasibility are directly related to what is considered under the scope of electronic transmission. A wide definition could present many challenges and make it impractical to lift the moratorium. Given this, we believe that a wider definition is a nonstarter.

Conversely, a narrow definition could be a basis for a realistic evaluation of the merits and demerits of the Moratorium.

In framing a narrow definition, concerns such as classification of digitized products (as goods or services), and the scope and valuation of the dutiable object (whether the value should be limited to the carrier medium carrying content or subsume the content as well) need to be settled.

This paper seeks to (i) inform framing of an appropriate scope of electronic transmissions; and (ii) identify concerns that may remain should the Moratorium be lifted based on a narrowly defined scope.

Accordingly, this paper seeks industry feedback to:

- (i) Formulate a narrow definition which would ensure that there is least uncertainty on services being clubbed under the scope of electronic transmissions, with a view that this narrow definition could be proposed by India to the WTO to drive a global consensus.
- (ii) Evaluate the *pros* and *cons* for India and more specifically, the Indian IT industry including e-commerce considering both imports and exports, if a global consensus on the definition is achieved.
- (iii) Understand whether lifting of the moratorium, in the absence of a global consensus, could lead to certain IT products and/ or services to be covered under the scope of electronic transmissions. This concern arises as nations may take unilateral positions with respect to the scope of electronic transmissions. However, the concern needs to be tempered with the view that a nation's position would apply uniformly to both exports and imports of that country. Given that services are a major export for the developed countries which are India's export markets, it may be argued that it would not be beneficial for the developed countries to cover IT services under the scope of electronic transmissions.
- (iv) Determine whether the strategy for the Indian Government should be:
 - a. to propose a narrow definition that meets the test in (i) above; and
 - b. evangelise this globally and based on this take a position in June 2020.
- (v) Understand the concerns of the Software Products industry given that India's Software Products annual revenue is USD 7.1 billion out of which USD 2.3 billion are exports. Given that we are a net importer with Software Products import at nearly USD 10 billion, what could be the impact on the Software Products industry, should the moratorium be lifted? ⁱ

- (vi) Understand, if it is in India's interest to consider a rollover of Moratorium for a further period of two years, in either of the two scenarios:
 - a. There is a consensus on the scope of the narrow definition; or
 - b. There is no consensus

- (vii) Understand, the implications of a continued Moratorium keeping in mind trends such as substitution of trade in goods in favour of trade in services, on account of technologies such as additive manufacturing.

Introduction

Background to the Moratorium on Customs Duties on Electronic Transmissions

1. Recognizing the importance of global electronic commerce, and the opportunities it creates for trade, the WTO at the Second Session of the Ministerial Conference held in Geneva in May 1998, adopted the Declaration on Global E-Commerce (**E-Commerce Declaration**).ⁱⁱ

Objective

2. The primary intent of the E-Commerce Declaration was the creation of a comprehensive work program to study and develop frameworks around various issues relating to global e-commerce. However, given that the discussions were still at an incipient stage with no consensus on whether electronic transmissions should be taxable, WTO Members agreed to a temporary moratorium.

A "Temporary Moratorium"

3. Effective May 1998, the WTO Members agreed not to levy customs duties on electronic transmissions and incorporated this understanding in the fourth sentence of the E-Commerce Declaration (i.e. the Moratorium).ⁱⁱⁱ

E-Commerce Declaration

(WT/MIN(98)/DEC/2 Adopted on 25 May 1998)

Recognizing that **global electronic commerce** is growing and creating new opportunities for trade,

Declare that:

The General Council shall, by its next meeting in special session, establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by Members. The work programme will involve the relevant World Trade Organization ("WTO") bodies, take into account the economic, financial, and development needs of developing countries, and recognize that work is also being undertaken in other international fora. The General Council should produce a report on the progress of the work programme and any recommendations for action to be submitted at our third session. **Without prejudice to the outcome of the work programme or the rights and obligations of Members under the WTO Agreements, we also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions.** When reporting to our third session, the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.

4. The Moratorium has since been rolled out every two years (except for 2003 to 2005, owing to a lack of consensus at the Cancun Ministerial Conference) at successive WTO Ministerial Conferences.^{iv} However, the intervening duration since 1998 has witnessed an explosive growth in global e-commerce volumes, with increase in trade volumes of both digitized goods and services.^v
5. It is important to note that the observance of the Moratorium is a political commitment, and there is no mechanism for redressal under the WTO Dispute Settlement Mechanism. However, NASSCOM understands that WTO Members have observed the Moratorium continuously since its adoption in 1998, including, in the aftermath of the 2003 Cancun Ministerial Conference where the moratorium was not rolled over for a period of two years.^{vi}

Recent Developments preceding the 12th Ministerial Conference

6. The US and EU have been the primary drivers of the WTO's work on E-Commerce, evidenced particularly by the fact that the E-Commerce Resolution and the accompanying Work Program on E-Commerce were adopted because of a joint proposal by the US and the EU.^{vii} In fact, in the 2003 Cancun Ministerial Conference, the US delegation was strongly in favour of making the Moratorium permanent; whereas the European delegation supported the Moratorium, but stopped short of voting to make it permanent.^{viii}
7. Recently in 2019, some WTO Members, such as the European Union (**EU**) and the United States of America (**US**) have reiterated their desire to make the Moratorium permanent to enable continued growth of global e-commerce.^{ix} On the other hand, developing country Members - in particular India and South Africa, have voiced their concerns over actual and potential gains accrued to them by reason of the Moratorium.^x
8. On 10 December 2019, the Moratorium has been provisionally extended by way of a General Council decision.^{xi} Now, the decision on the continuation of the Moratorium is set to be taken at the 12th Ministerial Conference of the WTO being held at Nur-Sultan, Kazakhstan from 8 to 11 June 2020.

Issues for Consultation

9. Various studies conducted by the Organization for Economic Cooperation and Development (**OECD**),^{xii} the United Nations Conference on Trade and Development (**UNCTAD**),^{xiii} and the WTO,^{xiv} have all provided varying estimates of total trade volumes that are currently impacted by the of the Moratorium, and have resultantly provided varying estimates of the impact of a removal of the Moratorium.
10. The variance in approaches and estimates, is in part due to the lack of understanding among WTO Members as to what constitutes "electronic transmissions", and what goods and/or services can be made subject to customs duties.^{xv} The lack of a widely agreed definition compounds implementation and enforcement related problems, in a scenario where the Moratorium is not imposed.
11. Moreover, varying positions taken in domestic laws, both by India and other WTO Members, over the treatment of various information technology (**IT**) services and information technology enabled services (**ITeS**) (i.e. classification of such services as goods or services for the purposes of domestic taxes), has lent further uncertainty to the modalities of global e-commerce trade in the absence of the E-Commerce Moratorium.
12. Given this context, NASSCOM has put together this Consultation Paper to seek inputs from the industry on various issues related to the definitions and scope of the Moratorium, in order to ascertain the potential impact of the extension/ withdrawal of the Moratorium on the Industry.

Part 1: Overview of the Debate

Literature Assessing Impact of the Moratorium

UNCTAD Paper

13. The case for lifting the Moratorium has been illustrated in some detail in a paper released by the UNCTAD in February 2019.^{xvi} The paper makes a case for lifting the moratorium, in view of the fact that 86 out of 95 developing countries studied in the paper are net importers of physical digitizable products; and notes that India is the second largest net importer of such products. Notwithstanding the ability to impose domestic taxes, the paper argues that using estimations based on current levels of imports of physical digitizable products, the net potential revenue loss to these developing countries on account of the Moratorium could amount to USD 3.4 billion.

ECIPE Paper

14. The paper released by the European Centre for International Political Economy (**ECIPE**) in August 2019, indicates that lifting the Moratorium could lead to negative economic consequences. Using the same underlying data as the UNCTAD paper, the ECIPE paper suggests that, assuming that the imposition of tariffs on physical digitizable products will attract equal and reciprocal tariffs, India could stand to lose 49 times more in GDP than it would generate in duty revenues, and likewise loss in tax revenues could be 51 times more than duty revenues.^{xvii}

OECD Paper

15. A paper on this subject released by the OECD in November 2019, suggests that the highest estimated share of opportunity cost in terms of foregone revenue under the current Moratorium is in digitizable goods, which is low, at 1.2% of total trade, and that this will likely remain low even with the advent of technologies such as 3D printing, which are unlikely to have far-reaching implications on trade in the near term.^{xviii}

Box. 1

Tax: Source of Revenue and Means for Protecting Domestic Industry

One of the developments consistently highlighted by commentators responding to the concerns highlighted in the UNCTAD paper, is that of the work being undertaken by the OECD regarding taxation in the digital economy.¹ As a part of developing an Inclusive Framework for tackling Base Erosion and Profit Shifting (**BEPS**), the OECD has been focussing on issues relating to taxation in the digital economy under the Program of Work (**PoW**) on the BEPS Framework.

Under the current proposals being considered by the OECD and the G20 member countries, the key focus remains on addressing the imbalances in government revenues derived from the sale and provision of digital products and services in large consumer economies. Resultantly, the PoW is looking at two key proposals:

- (a) **Pillar One** - which would allocate additional taxing rights to market jurisdictions, and
- (b) **Pillar Two** - which would introduce global minimum tax to prevent shifting of profits to low-tax jurisdictions.

Accordingly, from a revenue neutrality perspective, the notional revenue losses on account of the Moratorium, could potentially be offset by a fundamental re-positioning of global tax rules surrounding domestic taxation of digital products and services.

¹ See, Organisation of Economic Cooperation and Development (OECD), "Secretariat Proposal for a "Unified Approach" under Pillar One", Public Consultation Document, 9 October 2019; Available at URL: <http://oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf>

However, customs duties serve an additional purpose -- of being a protectionist tool and to that extent, it may be argued that the lifting of the Moratorium is an important consideration, irrespective of the global developments in direct taxation of digital economy.

Position taken by WTO Members on the Moratorium

16. In 2019, India and South Africa (supported by Sri Lanka^{xxix}), expressing concerns over the effect of the Moratorium on developing countries, circulated a communication urging a review of the moratorium, especially in view of the issues raised in the UNCTAD paper.^{xx} This follows a 2017 communication from Australia, Canada, Chile, Colombia, EU, Korea, Mexico, Montenegro, Norway, Paraguay and Ukraine, circulated a communication urging the continuance of the Moratorium.^{xxi}
17. WTO Members such as US and EU, have consistently supported the extension of the moratorium, and have urged other members to be prepared to agree to a permanent moratorium on customs duties on digital transmissions;^{xxii} maintaining that the imposition of customs duties will have distortive effects on growth of the digital economy, be cost-prohibitive and technologically unfeasible.
18. However, each of the above positions is premised upon different estimates of the volume of trade that is subject to the applicability of the Moratorium. In the absence of an agreed definition for "electronic transmissions"; questions such as what products could potentially be "electronic transmissions"; and consequently, what is the impacted trade volume of "electronic transmissions" and potential impact on government revenues; continue to be inconclusive.

Takeaways

- Arguments both for and against lifting the moratorium, are ostensibly related to the respective WTO Member's position as a **net-importer/ net-exporter** of "electronic transmissions".
- South Africa and India (supported by Sri Lanka) are **in favour of lifting of the Moratorium**.
- Countries including US, the EU, Japan, China, Canada, Chile, Colombia, South Korea and Australia are **in favour of making the Moratorium permanent**.

Part 2: Defining “Electronic Transmissions”

The Need for Defining “Electronic Transmissions”

Lack of Definition under the E-Commerce Declaration and WTO Agreements

19. Implementation of the Moratorium is uncertain primarily because of the lack of an agreed definition for the term, “electronic transmissions”. The E-Commerce Declaration does not itself provide any definition of the term.
20. Likewise, the term is not defined in the WTO Agreements, and other WTO documents. Further, there is no consensus among WTO members, on the precise scope of the term, “electronic transmissions”. The definitions relied upon in existing literature have no legal standing and may at best be considered as a reference for developing a definition. Therefore, there is no agreement as to what goods and/or services would be subject to customs duties in the absence of the Moratorium.

Lack of Consensus among WTO Members

Goods v. Services

21. Disciplines relating to the levy of customs duties are limited to the General Agreement on Trade and Tariffs (**GATT**). There is no concept of customs duties recognized under the General Agreement on Trade in Services (**GATS**). Resultantly, only goods are typically subject to customs duties.^{xxiii}
22. It should be noted however, that the Work Program on E-Commerce has generally not ruled out the possibility of customs duties on services as well.^{xxiv}
23. Therefore, and in order to ensure that services are not subject to customs duties, the scope of the term, “electronic transmissions”, has been generally been interpreted to mean “digitizable goods”.^{xxv} This should mean goods (traditionally traded in physical form) that are transmitted in the form of electronic transmissions, for instance, e-books.
24. Software products are increasingly sold as a service, aka, Software as a service (**SaaS**). Increasingly, separating “software services” from “software products” (which could ostensibly be treated as digitizable goods) poses a serious challenge. This is further illustrated in subsequent sections of the paper. (See, discussion under “*Alternative Classifications*” at p. 15). The IT and ITeS industry would face concerns in case the definition of electronic transmissions is subjective and open to multiple interpretations.

Content v. Carrier Medium

25. Admittedly, WTO members have typically adopted an approach of segregating the “content” (i.e. the electronic transmission itself) from the “carrier medium” (i.e. the physical medium, such as a Compact Disk, over which the content is exported) and imposing customs duties only over the carrier medium.^{xxvi} However, this treatment is increasingly irrelevant in today’s scenario, where most software products and services are delivered over the cloud, without any carrier medium being physically exported. Moreover, there is no consensus among WTO Members on whether “electronic transmissions” should be limited to “content” or to “carrier medium.”^{xxvii}
26. If the Moratorium is lifted in a situation where there is no consensus around the scope of the Moratorium, this can result in various nations taking unilateral positions which could become a source of trade barriers. For example, cross-border transfers of data may be made subject to customs tariff.

Government of India Position

27. NASSCOM understands that the Government of India interprets the Moratorium as extending exclusively to digitized goods. However, there is a risk that the countries to which the Indian IT-BPM industry exports, may interpret the scope of the moratorium differently. Therefore, it is important that WTO Members agree on a definition of electronic transmissions, and accordingly, the taxability of such transmissions may be determined.

Takeaways

- Customs duties are typically **applicable to goods, and not services**. Even though the Work Program on E-Commerce has maintained that customs duties could be applicable to services.
- With the advent of cloud computing, it is **no longer practicable to separate** the **"content"** from the **"carrier medium"**.
- Without a definition of "electronic transmissions", **software products and services delivered electronically could be** considered to be "goods" and made **subject to customs duties**.
- There is **no consensus among WTO Members** as to the scope and definition of "electronic transmissions", and whether "electronic transmissions" would be treated as **goods or services**.
- The **IT and ITeS industry** would face concerns **in case the definition of electronic transmissions is subjective** and open to **multiple interpretations**.

Approaches to Defining "Electronic Transmissions"

28. In the absence of a definition available under the WTO documents, reliance may be placed on various Free Trade Agreements (**FTAs**), Regional Trade Agreements (**RTAs**) and Bilateral Trade Agreements (**BTAs**) (collectively, **Trade Arrangements**) which incorporate language reflecting the understanding on the Moratorium.

29. Currently, around a total of 70 FTAs already incorporate provisions relating to E-Commerce.^{xxviii} Upon a review of these and other Trade Arrangements (refer to list of Trade Arrangements incorporating the Moratorium at **Annex - I**), the approach adopted under various Trade Arrangements exhibited some variance. Broadly, these can be categorized into four approaches:

- (1) **Not Incorporated:** Some Trade Arrangements do not incorporate the understanding on the Moratorium. This could be on account of the generality of scope and the default applicability of the Moratorium to all WTO Members. Accordingly, no definitions are available under these Trade Arrangements to provide guidance on the scope of the term, "electronic transmissions."
- (2) **Incorporated but not defined:** Some Trade Arrangements do not include definitions for "electronic transmissions" but retain an implicit reference to the Moratorium. Illustratively, the EU-Japan Economic Partnership Agreement and the EU-Singapore FTA, incorporate the following language: *"The Parties shall not impose customs duties on electronic transmissions."*

- (3) **Incorporated and defines terms other than “electronic transmissions”:** Some Trade Arrangements, incorporate the understanding under the Moratorium, but do not define the term, “electronic transmissions”, as such.

Instead, these Trade Arrangements use terms other than “electronic transmissions” to operationalize the understanding under the Moratorium.

For instance, the US-Korea FTA (signed in June 2007) defines the term “digital products” as *“computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically.”*

Accordingly, the US-Korea FTA prohibits imposition of customs duties on digital products. Here, it may appear that “digital products” serve as a proxy to “electronic transmission”.

However, like other Trade Arrangements that incorporate similar definitions, the US-Korea FTA adds clarificatory statements to explicitly limit the scope of the definition used.

For instance, the definition of “digital products” under the US-Korea FTA is qualified by the footnote, *“The definition of digital products should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods”*. Therefore, if the above definition of “digital products” is to be agreed as the definition of “electronic transmission”, it would need separate discussions.

Trade Arrangements, at times, also provide clarifications on what is not intended to be covered under “digital products”. For example,, the US-Mexico-Canada Agreement (**USMCA**) (signed in November 2018) incorporates the term, “digital products”, and defines it in a manner similar to the US-Korea FTA, but adds that *“for greater certainty, digital product does not include a digitized representation of a financial instrument, including money.”*

Therefore, “financial instrument or money”, could take the form of electronic transmission but they would need to be explicitly kept out of scope for the purpose of Trade Arrangements.

- (4) **Incorporated and defines “electronic transmissions”:** Some Trade Arrangements, such as the Comprehensive Progressive Agreement for Trans-Pacific Partnership (**CPA-TPP**) and the Sri-Lanka-Singapore FTA, define the term, “electronic transmissions”. The CPA-TPP, uses the following definition: *“electronic transmission or transmitted electronically, means transmissions made using any electromagnetic means, including by photonic means.”*

Additionally, these Trade Arrangements also incorporate the understanding under the Moratorium by using language such as, *“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.”* ; or by including an explicit reference to the E-Commerce Declaration, e.g. the Sri-Lanka Singapore FTA employs the following language: *“Each Party shall maintain its practice of not imposing customs duties on electronic transmissions between the Parties, consistent with paragraph 3 of the WTO Ministerial Decision of 13 December 2017 in relation to the Work Programme on Electronic Commerce (WT/MIN(17)/W/6) as well as future WTO Ministerial Decisions which continue the non-imposition of custom duties on electronic transmissions.”*

Takeaways

- Most Trade Arrangements incorporate the understanding under the Moratorium in some form. However, **none of these agreements explicitly define the scope of electronic transmission.**
- There is **no uniform approach** to defining “electronic transmissions” under Trade Arrangements.
- Some Trade Arrangements incorporate **a narrow definition** of “electronic transmission” by circumscribing it with a definition of “digital products”.
- Other Trade Arrangements adopt **a wider definition** of “electronic transmission” without a reference to any other term and opening the way for interpretation.
- Trade Arrangements which limit the scope of the term “electronic transmissions” by introducing other terms such as “digital products” retain the parties’ flexibility to treat **certain “electronic transmissions” as goods, and others as services.**

E-Products - “Goods” vs. “Services”

The Case of Digital Products

30. On page 9, this paper has highlighted the lack of consensus on the scope of electronic transmissions with respect to Goods and Services and the challenges in classifying all Software Products as either Goods or Service.
31. Digital Products denote a broader connotation as against Software Products. The uncertainty surrounding the classification of “digital products” as goods or services is also long standing. Limited clarity exists under the context of a WTO Appellate Body ruling, in the case of United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services.
32. Here, the WTO Appellate Body defined “e-products” to mean, *“content-based products that formerly were delivered in tangible form but now can be delivered in electronic form via Internet download.”^{xxix}*
33. Digital Products are also defined in many trade agreements. However, most Trade Arrangements that include a definition for “digital products” as a substitute for the term “electronic transmissions”, caveat the same with the inclusion of the phrase, *“The definition of digital products should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.”*

The Need to Classify Digital Products: The Case of 3D Printing

34. While the Work Program under the E-Commerce Declaration, has broadly agreed that such “e-products” or “digital products” should be classified amongst either of the existing categories, i.e. goods or services, instead of creating a third category,^{xxx} there is no consensus amongst WTO Members as to the classification of these products, or for that matter the basis on which such classification can be determined.
35. These issues get further amplified with the advent of additive manufacturing technology (3D Printing). As technologies such as 3D printing gain wider commercial adoption, there could be a significant substitution of traditional manufacturing and trade, in favour of additive

manufacturing and 3D printing. While, the scale of this substitution is a matter of varying projections,^{xxx} significant levels of substitution, could lead to a rise in trade in services, as opposed to trade in goods.

36. These concerns, have in part prompted India, South Africa and other developing country and Least Developed Country (**LDC**) members of the WTO to be apprehensive of the impact that such a substitution could have upon tariff revenues from trade in goods, especially if “digital products” (such as a blue print for additive manufacturing) is considered to be a “service.”

Positions Taken by WTO Members

37. The US, which has incorporated the standard relating to valuation of “carrier medium” in several of its Trade Arrangements, has maintained that it could be more viable to treat “digital products” as goods, to benefit from protections under the GATT, which are horizontal and wide-ranging, as compared to the GATS.^{xxxii}
38. The EU on the other hand has maintained that “digital products” should be classified as services.^{xxxiii}
39. The EU has contended in various forums that cross-border E-Commerce could be bifurcated into two sorts of deliveries, i.e.
- (i) goods delivered physically, while ordered electronically - these will fall within the scope of the GATT; and
 - (ii) electronic deliveries, which consist of services - and these would therefore fall within the scope of the GATS.^{xxxiv}
40. In fact, certain Trade Arrangements entered by the EU, for instance the EU-Colombia-Peru FTA, expressly state that, *“The Parties agree that a delivery by electronic means shall be considered as a provision of services, within the meaning of Chapter 3 (Cross-border Supply of Services) and shall not be subject to customs duties.”*
41. The EU’s position can be partly explained by its position that digital trade barriers in e-commerce are not so much on account of duties, but rather domestic regulations. In any event, the EU has maintained that an easier way of dealing with the issue of customs duties on electronic transmissions, could be to treat all “digital products” as services, and incorporating appropriate market access commitments under the WTO Members’ GATS Schedules, relating to levy of customs duties.^{xxxv} This position, if widely adopted would make the Moratorium irrelevant.

Basis for Classification

42. Part of the reason why the classification problem remains, is the lack of an appropriate basis for classification. Literature surrounding this issue, however, provides certain bases for classifying “digital products.”

Tangible v. Intangible

43. One of the bases for classification of “digital products” could be defined along the lines of whether the product is tangible (in the sense of a physical product) or intangible (thereby being either intellectual property or a service).
44. This basis for classification finds support in the WTO Appellate Body’s ruling in *Canada - Certain Measures Concerning Periodicals* involving questions of taxation of periodicals containing

advertisements. The WTO Appellate Body, found that while advertising and editorial content had "service attributes," they formed a "physical product" in the periodical itself.^{xxxvi}

45. However, applying such a classification could lead to certain problems. To illustrate, an e-book being downloaded over the internet (accompanied by Digital Rights Management measures, that restrict tradability) could be a "like product" that directly competes with a physical copy of the same book. Further, given the principle of technology neutrality widely entrenched in WTO jurisprudence, treating a downloaded e-book as service, and the physical copy of the same book as a good, would be inconsistent with WTO principles.

Like Products

46. Given existing WTO jurisprudence surrounding the "likeness principle" (based on a test of substitutability), an alternative basis for classifying digital products could be guided by likeness to an existing good or service being traded. The WTO Appellate Body has set out the test for likeness as being dependent upon^{xxxvii}:
 - (i) physical properties of the products;
 - (ii) the extent to which the products can serve the same or similar end-uses;
 - (iii) the extent to which consumers perceive and treat the products as alternative means of performing functions in order to satisfy a want or demand;
 - (iv) international classification of products for tariff purposes.
47. However, in the absence of any agreed system of classifying digital products, adopting such a basis for classification, would call for a case-by-case evaluation of classification decisions taken by jurisdictions, leading to greater uncertainty for global E-Commerce trade.

The UN Central Product Classification Approach

48. The United Nations Statistical Commission (**UNSD**) in the preparation of the Central Product Classification (**CPC**), following the System of National Accounts (**SNA**) adopts the classification criteria set forth in **Box. 2** for classifying products as either a good or a service.^{xxxviii}

Box. 2
CPC/SNA Basis for Classification

The essential characteristic relied upon in the SNA/CPC system of classification is whether the product can be traded separately from production. If not, it would be categorized as a service.

A. Goods:

- Goods are physical objects for which a demand exists, over which ownership rights can be established and whose ownership can be transferred from one institutional unit to another by engaging in transactions on markets.
- They are in demand because they may be used to satisfy the needs or wants of households or the community or used to produce other goods or services.
- The production and exchange of goods are quite separate activities. Some goods may never be exchanged while others may be bought and sold numerous times. The production of a good can always be separated from its subsequent sale or resale.

B. Services:

B.1 Change Affecting Services

- Services are the **result of a production activity that changes the conditions of the consuming units or facilitate the exchange of products or financial assets.**
- These types of service may be described as **change effecting services** and margin services respectively. Change-effecting services are outputs produced to order and typically consist of changes in the conditions of the consuming units realized by the activities of producers at the demand of the consumers.
- Change effecting services **are not separate entities over which ownership rights can be established.** They cannot be traded separately from their production. **By the time their production is completed, they must have been provided to the consumers.**

B.2 Margin Services

- Margin services result **when one institutional unit facilitates the change of ownership of goods, knowledge-capturing products, some services or financial assets between two other institutional units.**
- Margin services are provided by wholesalers and retailers and by many types of financial institutions.
- Margin services resemble change-effecting services in that **they are not separate entities over which ownership rights can be established.** They cannot be traded separately from their production. **By the time their production is completed they must have been provided to the consumers.**

Alternative Classifications

Need for Alternative Classification: Existing Issues

49. Under the existing systems of classification, such as those maintained by the WCO (i.e. the Harmonized System (**HS**)), and the UNSD (i.e. the CPC, which is referenced in India's GATS schedule of commitments), certain digital products, such as software products, could be classified both as a service (for instance, Computer and Related Services CPC 841 to 844) and a good (for instance, HS 8523 80 20).
50. In fact, up till the introduction of the new Goods and Service Tax (**GST**) legislation in India, there were instances in which software products were subject to both service tax as well as Value Added Tax (**VAT**) applicable to goods.^{xxxix}
51. Under the new GST regime, development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software and temporary transfer or permitting the use or enjoyment of any intellectual property right are treated as services. However, if a pre-developed or pre-designed software is supplied in any medium/storage (commonly bought off-the-shelf) or made available using encryption keys, the same is treated as a supply of goods classifiable under the HS heading 8523.^{xl} Accordingly, unless software products are packaged, they are now treated as services under the GST regime. Typically, the determinant of a "temporary transfer" is the End-User License Agreement (**EULA**).^{xli} This understanding, is in line with the long-standing decision of the Supreme Court of India (in the *Tata Consultancy Services* case) which noted that the same product could not be made subject to dual levy as a good, as well as a service.^{xlii}

Possible Alternate Classifications

52. Given the drawbacks in the classification approaches described above, there could be some merit in exploring an alternative *sui generis* bases for classifications for digital products.
53. In this regard, the CPC 2.1 (the last released version of the CPC) notes that there could be a need for data and classifications relating to the digital economy. Accordingly, the CPC 2.1

adopts the work done by the OECD's Working Party on Indicators for the Information Society (**WPIIS**) and recommends it as an alternative classification for digital economy products.^{xliii}

54. In determining what constitutes an "ICT Product", the following identifying principle has been applied, *"ICT products must primarily be intended to fulfil or enable the function of information processing and communication by electronic means, including transmission and display."*
55. Likewise, in identifying what constitutes a "Content and(or) Media Product", the following principle has been adopted, *"Content corresponds to an organized message intended for human beings published in mass communication media and related media activities. The value of such a product to the consumer does not lie in its tangible qualities but in its information, educational, cultural or entertainment content."*
56. The alternative classifications provided under the CPC 2.1 for digital economy products, i.e. ICT Products and Content and Media Products, have been captured in **Annex - II**.

Takeaways

- Technologies such as 3D Printing (Additive Manufacturing) are **causing a substitution** of trade in goods **in favour of trade in services**.
- Available definitions for "e-products" or "digital products" **provide no clarity** on whether these products **would be treated as goods or services**.
- Digital products such as **software products and software services** can be subject to **levies both as goods and services** and have been made subject to such levies in the past in India.
- Some WTO Members such as the **US consider "digital products" to be goods**, WTO Members such as the **EU consider all "digital products" to be services**.
- In the absence of an agreed position, there needs to be a **basis for classifying "digital products"** as either goods or services; or alternatively as **a separate sui generis category**.
- The primary basis for classification adopted by the WTO Appellate Body has been one of **tangible v. intangible**, however this basis **cannot account for the classification of digital products**.
- Another potential basis for classification is provided by the UN CPC which considers if the product can be **traded separately from production**. If not, it would be categorized as a service
- In the absence of an alternative basis for classification **a separate sui generis classification** category for "digital products" could be explored. This could be along the lines of the classification for **ICT Products** and **Content and Media Products** recommended by the UN CPC.

Dutiable Object: "Content" vs. "Carrier Medium"

57. If a narrow definition for "electronic transmissions" or "digital product" is adopted, the question of whether the Moratorium applies to the "content" of an "electronic transmission", or to the "carrier medium" over which such content is transferred, would be irrelevant. However, if the definition is not narrow enough to categorically limit the scope of the moratorium, existing questions around the dutiable object would continue to exist.

Challenges in arriving at a Valuation

58. During the subsistence of the Moratorium, there are no immediate implications of defining “electronic transmissions” based on either “content” of electronic transmissions, or the “carrier medium” of electronic transmissions. However, the question would quickly become important, should a decision be reached to lift the Moratorium.
59. There are a few important considerations that come to fore, while considering the question of whether “content” or the “carrier medium” needs to be the dutiable subject. For instance, there are likely to be significant variances in the valuation of the “content” of “electronic transmissions” as opposed to the “carrier medium” over which such content is transmitted.

Position under Trade Arrangements

60. At present, several trade agreements which incorporate the understanding under the Moratorium, explicitly define “carrier medium.” For instance, the US-Korea FTA defines the term “carrier medium” as *“any physical object designed principally for use in storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape.”*
61. Similar definitions have been incorporated in other Trade Arrangements, including the Colombia-Northern Triangle FTA, the Costa Rica-Singapore FTA, the GCC-Singapore FTA, the Korea-Singapore FTA, the US-Bahrain FTA, and US-Morocco FTA.

Background to Debate

62. Moreover, some Trade Arrangements such as the Korea-Singapore FTA, also refer to the position under the Customs Valuation Agreement, to explicitly limit the applicability of customs duties to the “carrier medium” bearing electronic transmissions. The Korea-Singapore FTA is one of the few Trade Arrangements that do so.
63. This is ostensibly on account of varying positions held by WTO and World Customs Organization (**WCO**) members having differing views on the subject.
64. At the time of adoption of the E-Commerce Declaration, there was significant discussion around the question of customs valuation.^{xiv} The operative position customs valuation of electronic transmissions at the time, was based on a decision of the WTO Customs Valuation Committee (**WTO CVC**) in 1995, which stated that only the cost or value of the carrier medium bearing data or instructions shall be taken into account for the purposes of valuation.^{xiv}
65. This position, however, was called to further assessment by the US, which raised the instance of data or information (software) downloaded by satellite. The US, citing the example of robotic machinery, stated that the price of the carrier medium (machinery) might include the value of such software that may be downloaded at a point of time subsequent to the import of the carrier medium, i.e. after the machinery is installed. The WTO CVC, noted that while such a situation was indeed possible, it was a very narrow set of circumstances, where such issues would arise. Accordingly, the WTO CVC, noted that, *“countries which choose to apply that decision should interpret this paragraph in the widest possible terms so as not to negate the intention of the decision. Therefore, the expression “distinguish” should be interpreted in such a manner that if only the cost or value of the carrier medium is known the cost or value of the data or instructions should be considered as distinguished.”*

66. Therefore, the obligation to distinguish the value of the “content” from the “career medium” arises when it is possible to do so. In other cases, the composite value would by default be pegged to the carrier medium.

India and South Africa Position

67. As noted above, the issue of valuation was left for individual interpretation by WTO Members. This has led some WTO Members to highlight practical difficulties with valuation of the “content” of “electronic transmissions” (irrespective of how they are defined), as one of the primary reasons for extending the Moratorium.

68. India and South Africa have rebutted this by highlighting examples from Australia (citing new laws to tax the imports of digital products and services), India (citing the inclusion of Online Information Database Access and Retrieval (**OIDAR**) services under the GST regime), amongst others, as evidence of technical feasibility. ^{xlvi}

Takeaways

- Currently, some Trade Arrangements **explicitly define “career medium”** and limit the application of customs duty to the value of the “career medium.”
- The WTO Customs Valuation Committee and the WCO have taken **no determinative position in borderline cases**, where distinguishing the value of the “career medium” and “content” is not possible.
- WTO Members in support of extending the Moratorium, cite the **practical limitations in undertaking valuations** of “content” and “carrier medium” as one of the reasons for extending the Moratorium.
- India and South Africa, have highlighted examples such as the **inclusion of OIDAR services** under the GST list as evidence of **technical feasibility of valuating “content.”**

Part 3: Questions for Consultation

Considering the foregoing discussion, NASSCOM seeks inputs from the industry on the issues listed below, in order to inform the Government of India's position in a manner that safeguards the interest of the domestic industry.

Consultation Process

- We request the inputs been sent to the NASSCOM Public Policy team, latest by **31st January 2020**
- Please send in all inputs to policy@nasscom.in
- Inputs received will be collated, and the results of the consultation process will be discussed in New Delhi soon thereafter.
- The Final Report on the Industry Consultation will be shared with the Ministry of Commerce and Industry, and shared on the [NASSCOM Community Page](#)

1. In the context of your current business operations:

- a. **What are the top 10 jurisdictions where you currently export software services or software products (in terms of Net Value)?**
- b. **What is the current treatment of these exports in these jurisdictions in terms of tariffs levied?**
- c. **What is the current treatment of these exports under domestic tax legislation?**
- d. **What are the top 10 jurisdictions where you currently import software services or software products (in terms of Net Value)?**
- e. **What is the current treatment of these imports in India in terms of tariffs levied, and under domestic tax legislation?**

2. Formulate a narrow definition which would ensure that there is least uncertainty on services being clubbed under the scope of electronic transmissions, with a view that this narrow definition could be proposed by India to the WTO to drive a global consensus.

- a. **What should be the approach adopted towards defining the term "electronic transmissions"?**
 - i. A wide definition would increase the scope and increase the technical challenges in taxing the "electronic transmissions". Given this, is there any reason for any nation to recommend wider definition be adopted to encompass all forms of cross-border electronic transmissions? Kindly provide justifications.
 - ii. A narrow definition is likely to limit the scope and enable levy of customs from a technical perspective. Therefore, what should be the narrow definition which would squarely cover digital products and ensure that there is no scope for services to be covered under the ambit? If it helps, provide an exhaustive itemized list. Kindly provide justifications. Identify specific services, if any, which

India exports through electronic transmissions, but which could be treated as goods in certain circumstances in a narrow definition

- b. If the answer to (a.) above is to adopt a wide definition, should “electronic transmissions” be defined as being limited to the “carrier medium” or should it extend to the “content” being transmitted?**

 - i. Adopting a wide definition and limiting the same to the “carrier medium” is already in place under certain Trade Arrangements. If you recommend this approach, kindly provide justifications.
 - ii. Adopting a wide definition and extending it expressly to “content” would open the scope to possibly a range of services. If you recommend this approach, kindly provide justifications. Identify specific services sectors that can get covered within the scope of the moratorium, if it is extended to include services.
- 3. Evaluate the *pros* and *cons* for India and more specifically, the Indian IT industry including e-commerce in the context of implications on imports and exports, if a global consensus on the definition is achieved.**

 - a. In case the consensus is on a narrow definition
 - b. In case the consensus is on a wide definition
- 4. Understand whether lifting of the moratorium, in the absence of a global consensus, could lead to certain IT products and/ or services to be covered under the scope of electronic transmissions. This concern arises as nations may take unilateral positions with respect to the scope of electronic transmissions. However, the concern needs to be tempered with the view that a nation’s position would apply uniformly to both exports and imports of that country. Given that services are a major export for the developed countries which are India’s export markets,² it may be argued that it would not be beneficial for the developed countries to cover IT services under the scope of electronic transmissions.**

 - a. **Is this presumption realistic? Could any other measure by certain WTO members harm the Indian IT industry? Kindly justify your views and explain precisely what concerns India should keep in consideration.**
 - b. **Given this, and the inclusion of provisions under relevant FTAs entered into by the US, which limit the scope of the Moratorium to digitizable goods (See *Items 20, 21, 22 and 23 in Annex - I*); there is unlikely to be opposition to a narrow definition limited to digitizable goods. Is this presumption correct? Kindly justify your views and explain what concerns India could keep in consideration.**
- 5. Determine whether the strategy for the Indian Government should be.**

 - a. to propose a narrow definition that meets the test in (i) above; and
 - b. evangelise this globally and based on this take a position in June 2020.

Is this approach suitable? Share your feedback and suggest alternative approach, if any, with justification.

² See, Congressional Research Service, “Digital Trade and US Trade Policy” R44565 (May 21, 2019); Available at URL: <https://fas.org/sgp/crs/misc/R44565.pdf>; For instance, in 2017, U.S. (a major market for Indian service exports) exports of information and communications technology-enabled services (excluding digital goods) were an estimated \$439 billion.

- 6. What would be the concerns of the Software Products industry given that India's Software Products annual revenue is USD 7.1 billion out of which USD 2.3 billion are exports. Given that we are a net importer with Software Products import at nearly USD 10 billion, what could be the impact on the Software Products industry, should the moratorium be lifted?³**
- 7. Is it in India's interest to consider a rollover of Moratorium for a further period of two years, in either of the two scenarios:**
 - a. There is a consensus on the scope of the narrow definition; or**
 - b. There is no consensus**
- 8. What could be the implications of a continued Moratorium keeping in mind trends such as substitution of trade in goods in favour of trade in services, on account of technologies such as additive manufacturing, 3D printing?**
- 9. Any other information that you would like to provide in relation to the issues raised in the consultation paper.**

³ See, Ministry of Electronics and Information Technology (MeitY), National Policy on Software Products (2019), Available at URL: https://meity.gov.in/writereaddata/files/national_policy_on_software_products-2019.pdf

Annex - I

Illustrative List of Trade Arrangements incorporating the Moratorium

S. No.	Trade Arrangement	Relevant Excerpts
1.	Australia-China FTA	<ol style="list-style-type: none"> Each Party shall maintain its practice of not imposing customs duties on electronic transmissions between the Parties, consistent with paragraph 5 of the WTO Ministerial Decision of 7 December 2013 in relation to the Work Programme on Electronic Commerce (WT/MIN(13)/32-WT/L/907). Each Party reserves the right to adjust its practice referred to in paragraph 1 in accordance with any further WTO Ministerial Decisions in relation to the Work Programme on Electronic Commerce
2.	Australia-Hong Kong FTA	<ol style="list-style-type: none"> Neither Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of a Party and a person of the other Party. Neither Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of a Party and a person of the other Party.
3.	Canada-Honduras FTA	<ol style="list-style-type: none"> A Party may not impose a customs duty, fee, or charge, on or in connection with the importation or exportation of a digital product transmitted electronically. For greater certainty, paragraph 1 does not preclude a Party from imposing an internal tax or other internal charge on a digital product transmitted electronically, provided that the tax or charge is not prohibited by this Agreement. <p>digital product means a computer program, text, video, image, sound recording, or other product that is digitally encoded; but does not include a digitized representation of a financial instrument;</p> <p>transmitted electronically means to transfer a digital product by electromagnetic means, including by photonic means</p>
4.	Canada-Jordan FTA	<ol style="list-style-type: none"> A Party shall not apply customs duties on products delivered electronically. For greater certainty, this Article does not preclude a Party from imposing internal taxes or other internal charges on products delivered electronically, provided that such taxes or charges are imposed in a manner consistent with this Agreement. For purposes of this Article, delivered electronically means delivered through telecommunications, alone or in conjunction with other information and communications technologies.
5.	Chile-Colombia FTA	<ol style="list-style-type: none"> Ninguna Parte podrá aplicar aranceles aduaneros a productos digitales de la otra Parte. Para efectos de determinar los aranceles aduaneros aplicables, cada Parte determinará el valor aduanero del medio portador importado que contenga un producto digital basado únicamente en el valor aduanero del medio portador, independientemente del valor del producto digital almacenado en el medio portador.

productos digitales significa programas computacionales, texto, video, imágenes, grabaciones de sonido, y otros productos que sean codificados digitalmente y transmitidos electrónicamente, independientemente de si una Parte trata a dichos productos como una mercancía o como un servicio de conformidad con su legislación interna;^{FN}

transmisión electrónica o transmitido electrónicamente significa la transferencia de productos digitales utilizando cualquier medio electromagnético o fotónico

^{FN} Para mayor certeza, los productos digitales no incluyen las representaciones digitalizadas de instrumentos financieros, incluido el dinero. La definición de productos digitales es sin perjuicio de las discusiones en curso en la OMC acerca de si el comercio de productos digitales transmitidos electrónicamente constituye una mercancía o un servicio

(Original in Spanish; Translation below)

1. Neither Party may apply customs duties to digital products of the other Party.
2. For the purpose of determining applicable customs tariffs, each Party shall determine the customs value of the imported carrier medium containing a digital product based solely on the customs value of the carrier medium, regardless of the value of the digital product stored on the carrier medium.

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law;^{FN}

electronic transmission or electronically transmitted means the transfer of digital products using any electromagnetic or photonic means

^{FN} For greater certainty, digital products do not include digitized representations of financial instruments, including money. The definition of digital products is without prejudice to ongoing discussions in the WTO on whether trade in electronically transmitted digital products constitutes a good or a service

6. Colombia-Northern Triangle FTA

Artículo 14.3

Para mayor certeza, las Partes afirman que las medidas que afectan el suministro de un servicio mediante la utilización de un medio electrónico están dentro del alcance de las obligaciones contenidas en las disposiciones pertinentes de los Capítulos 12 (Inversión) y 13 (Comercio Transfronterizo de Servicios) y sujetas a cualquier excepción o medida disconforme establecidas en este Tratado, las cuales son aplicables a dichas obligaciones.

Artículo 14.4

1. Ninguna Parte podrá establecer aranceles aduaneros, tarifas u otras cargas en relación con la importación o exportación de productos digitales por medio de transmisión electrónica.
2. Para efectos de determinar los aranceles aduaneros aplicables, cada Parte determinará el valor aduanero del medio portador importado que incorpore un producto digital basado únicamente

en el costo o valor del medio portador, independientemente del costo o valor del producto digital almacenado en el medio portador.

medios electrónicos significa la utilización de procesamiento computarizado;

medio portador significa cualquier objeto físico diseñado principalmente para el uso de almacenar un producto digital por cualquier método conocido actualmente o desarrollado posteriormente y del cual un producto digital pueda ser percibido, reproducido o comunicado, directa o indirectamente e incluye, pero no está limitado a, un medio óptico, disquetes o una cinta magnética;

productos digitales significa programas de cómputo, texto, video, imágenes, grabaciones de sonido y otros productos que estén codificados digitalmente;^{FN}

transmisión electrónica o transmitido electrónicamente significa la transferencia de productos digitales utilizando cualquier medio electromagnético o fotónico.

^{FN} Para mayor claridad, los productos digitales no incluyen las representaciones digitales de instrumentos financieros, incluido el dinero.

(Original in Spanish; Translation below)

Article 14.3

For greater certainty, the Parties affirm that measures affecting the supply of a service through the use of an electronic medium are within the scope of the obligations contained in the relevant provisions of Chapters 12 (Investment) and 13 (Cross-Border Trade in Services) and subject to any exceptions or non-conforming measures set out in this Agreement, which are applicable to such obligations.

Article 14.4

1. No Party may impose customs duties, tariffs or other charges in connection with the import or export of digital products by means of electronic transmission.
2. For purposes of determining applicable customs duties, each Party shall determine the customs value of the imported carrier medium incorporating a digital product based solely on the cost or value of the carrier medium, regardless of the cost or value of the digital product stored on the carrier medium.

electronic means means the use of computer processing;

carrier medium means any physical object designed primarily for the use of storing a digital product by any method now known or later developed and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, optical media, diskettes, or magnetic tape;

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded;^{FN}

electronic transmission or **electronically transmitted** means the transfer of digital products using any electromagnetic or photonic means.

^{FN} For clarity, digital products do not include digital representations of financial instruments, including money.

7. Comprehensive Progressive Agreement for Trans-Pacific Partnership (CPTPP)

Article 14.2

For greater certainty, measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services), including any exceptions or non-conforming measures set out in this Agreement that are applicable to those obligations.

Article 14.3

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.
2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;^{FN1 FN2}

electronic transmission or **transmitted electronically** means a transmission made using any electromagnetic means, including by photonic means;

^{FN1} For greater certainty, digital product does not include a digitised representation of a financial instrument, including money.

^{FN2} The definition of digital product should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.

8. Costa Rica-Singapore FTA

Article 12.3

For greater certainty, the Parties affirm that measures affecting the supply of a service using electronic means fall within the scope of the obligations contained in the relevant provisions of Chapter 10 (Trade in Services) and Chapter 11 (Investment), subject to any exceptions or non-conforming measures set out in this Agreement, which are applicable to such obligations.

Article 12.4

1. Neither Party shall impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products by electronic transmission.
2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.

carrier medium means any physical object capable of storing the digital codes that form a digital product by any method now known or later

developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes an optical medium, a floppy disk, and a magnetic tape;

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically;
FN

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means; and

using electronic means means employing computer processing

FN For greater certainty, digital products do not include digitized representations of financial instruments.

<p>9. EFTA-Central America FTA</p>	<p>The Parties confirm their current practice under the terms of the decision of 17 December 2011 of the WTO Ministerial Conference of not imposing customs duties on electronic transmissions.</p>
<p>10. EU-Central America Association Agreement</p>	<p>The Parties agree not to impose customs duties on deliveries by electronic means.</p>
<p>11. EU-Colombia-Peru TA</p>	<p>The Parties agree that a delivery by electronic means shall be considered as a provision of services, within the meaning of Chapter 3 (Cross-border Supply of Services) and shall not be subject to customs duties.</p>
<p>12. EU-Japan EPA</p>	<p>The Parties shall not impose customs duties on electronic transmissions.</p>
<p>13. EU-Singapore FTA</p>	<p>The Parties shall not impose customs duties on electronic transmissions.</p> <p>For greater certainty, the Parties affirm that measures related to the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of this Chapter, subject to any exceptions applicable to such obligations.</p> <p><i>(Reference made to Chapter on Services)</i></p>

14. Gulf Cooperation Council-Singapore FTA

Article 7.3

The Parties agree that delivery by electronic means is to be considered as the supply of services using electronic means, within the meaning of the Chapter 5 (Trade in Services).

Article 7.4

1. A Party shall not apply customs duties or other duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission. FN1
2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.
6. This Chapter does not apply to measures affecting the electronic transmission of a series of text, video, images, sound recordings, and other products scheduled by a content provider for aural and/or visual reception, and for which the content consumer has no choice over the scheduling of the series.

carrier medium means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated,

directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape;

digital products means computer programmes, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically;^{FN2}

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means; and

using electronic means, means employing computer processing

^{FN1} Paragraph 1 of this Article does not preclude a Party from imposing internal taxes or other internal charges provided that these are imposed in a manner consistent with this Agreement.

^{FN2} For greater clarity, digital products do not include digitized representations of financial instruments.

**15. India-Singapore
CEPA**

A Party shall not apply customs duties or other duties, fees or charges on or in connection with the importation or exportation of digital products by electronic transmission.

Note: The obligation in paragraph 1 does not preclude a Party from imposing internal taxes or other internal charges provided that these are imposed in a manner consistent with Article III of GATT 1994 and its interpretative notes as incorporated into this Agreement by Article 2.2

**16. Japan-Switzerland
FTA**

1. Recognising the importance of maintaining the current practice of not imposing customs duties on electronic transmissions, the Parties shall cooperate to make this practice binding within the framework of the World Trade Organization, with a view to considering its incorporation into this Agreement.

2. In the context of paragraph 1, the Parties confirm their current practice of not imposing customs duties on electronic transmissions under paragraph 46 of the Hong Kong Ministerial Declaration of December 2005.

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.

transmitted electronically means transferred by any electromagnetic means.

17. Korea-Singapore FTA Article 14.2

1. The Parties recognise the economic growth and opportunity provided by electronic commerce the importance of avoiding unnecessary barriers to electronic commerce and the applicability of WTO rules to electronic commerce.

2. This Chapter does not apply to measures affecting the electronic transmission of a series of text, video, images, sound recordings, and other products scheduled by a content provider for aural and/or visual reception, and for which the content consumer has no choice over the scheduling of the series.

Article 14.3

For greater certainty, the Parties affirm that measures related to the supply of a service using electronic means fall within the scope of the obligations contained in the relevant provisions of Chapters 9 (Cross-Border Trade in Services), 10 (Investment) and 12 (Financial Services), and, subject to any exceptions applicable to such obligations and except where an obligation does not apply to any such measure pursuant to Articles 9.6 and 10.9.

Article 14.4

1. Each Party shall not apply customs duties or other duties, fees, or charges on or in connection with the importation or exportation of a digital product of the other Party by electronic transmission.^{FN1}
2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product in accordance with the Customs Valuation Agreement.

digital products means computer programmes, text, video, images, sound recordings and other product that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically;^{FN2}

carrier medium means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape;

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means; and

using electronic means means employing computer and digital processing.

^{FN1} Paragraph 1 of this Article does not preclude a Party from imposing internal taxes or other internal charges provided that these are imposed in a manner consistent with this Agreement.

^{FN2} For greater clarity, digital products do not include digitized representations of financial instruments.

18. Singapore-Australia FTA

1. Neither Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of a Party and a person of the other Party.
2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

electronic transmission or **transmitted electronically** means a transmission made using any electromagnetic means, including by photonic means.

19. Sri-Lanka Singapore FTA

1. Each Party shall maintain its practice of not imposing customs duties on electronic transmissions between the Parties, consistent with paragraph 3 of the WTO Ministerial Decision of 13 December 2017 in relation to the Work Programme on Electronic Commerce (WT/MIN(17)/W/6) as well as future WTO Ministerial Decisions which continue the non-imposition of custom duties on electronic transmissions.
2. Each Party reserves the right to adjust its practice referred to in paragraph 1 of this Article in accordance with any future WTO Ministerial Decisions in relation to the Work Programme on Electronic Commerce.

electronic transmission or **transmitted electronically** means transmissions made using any electromagnetic means, including by photonic means;

20. US-Bahrain FTA

Article 13.2

For greater certainty, the Parties affirm that measures affecting the supply of a service using electronic means are subject to the obligations contained in the relevant provisions of Chapters Ten (Cross-Border Trade in Services) and Eleven (Financial Services), subject to any exceptions or non-conforming measures set out in the Agreement that are applicable to such obligations.

Article 13.3

1. Neither Party may impose customs duties, fees, or other charges^{FN} on or in connection with the importation or exportation of digital products by electronic transmission.
2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product of the other Party based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.

carrier medium means any physical object capable of storing a digital product, by any existing method or method later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes an optical medium, a floppy disk, and a magnetic tape;

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded,² regardless of whether they are fixed on a carrier medium or transmitted electronically;

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means; and

using electronic means means employing computer processing

^{FN} For greater certainty, Article 13.3 does not preclude a Party from imposing internal taxes or other internal charges on digital products, provided that these are imposed in a manner consistent with this Agreement.

21. US-Korea FTA

Article 15.2

The Parties affirm that measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapters Eleven through Thirteen

(Investment, Cross-Border Trade in Services, and Financial Services), which are subject to any exceptions or non-conforming measures set out in this Agreement that are applicable to such obligations

Article 15.3

1. Neither Party may impose customs duties, fees, or other charges on or in connection with the importation or exportation of:
 - (a) if it is an originating good, a digital product fixed on a carrier medium; or
 - (b) a digital product transmitted electronically.^{FN2}

carrier medium means any physical object designed principally for use in storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape;

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and produced for commercial sale or distribution, regardless of whether they are fixed on a carrier medium or transmitted electronically;^{FN3}

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means;

^{FN1} For greater certainty, paragraph 1 does not preclude a Party from imposing internal taxes or other internal charges on digital products, provided that the taxes or charges are imposed in a manner consistent with this Agreement.

^{FN2} Consistent with Article 2.14.4 (Committee on Trade in Goods), the Committee on Trade in Goods shall consult on and endeavor to resolve any difference that may arise between the Parties on classification matters related to the application of paragraph 1.

^{FN3} The definition of digital products should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.

22. US-Mexico-Canada Agreement

1. No Party shall impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically, between a person of one Party and a person of another Party.
2. For greater certainty, paragraph 1 does not preclude a Party from imposing internal taxes, fees, or other charges on a digital product transmitted electronically, provided that those taxes, fees, or charges are imposed in a manner consistent with this Agreement.

digital product means a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. For greater certainty, digital product does not include a digitized representation of a financial instrument, including money;^{FN}

^{FN} This definition should not be understood to reflect a Party's view that digital products are a good or are a service.

23. US-Morocco FTA

1. Neither Party may apply customs duties, fees, or other charges on or in connection with the importation or exportation of digital products by electronic transmission.^{FN1}
2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product of the other Party based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.

carrier medium means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, including an optical medium, a floppy disk, and a magnetic tape;

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically;
FN2

electronic means means employing computer processing;

electronic transmission or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means.

^{FN1} For greater certainty, paragraph 1 does not preclude a Party from imposing internal taxes or other internal charges on digital products, provided that these are imposed in a manner consistent with this Agreement.

^{FN2} For greater certainty, digital products do not include digitized representations of financial instruments.

Annex - II

Alternative Classification of “ICT Products” and “Content and Media Products”

ICT Products

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
Computers and Peripheral Equipment	
45142	Point-of-sale terminals, ATMs and similar machines
45220	Portable automatic data processing machines weighing not more than 10 kg, such as laptops, notebooks and sub-notebooks
45230	Automatic data processing machines, comprising in the same housing at least a central processing unit and an input and output unit, whether or not combined
45240	Automatic data processing machines presented in the form of systems
45250	Other automatic data processing machines whether or not containing in the same housing one or two of the following types of units: storage units, input units, output units
45261	Input peripherals (keyboard, joystick, mouse etc.)
45262	Scanners (except combination of printer, scanner, copier and/or fax)
45263	Inkjet printers used with data processing machines
45264	Laser printers used with data processing machines
45265	Other printers used with data processing machines
45266	Units performing two or more of the following functions: printing, scanning, copying,
45269	Other input or output peripheral devices
45271	Fixed media storage units
45272	Removable media storage units
45289	Other units of automatic data processing machines
45290	Parts and accessories of computing machines
47315	Monitors and projectors, principally used in an automatic data processing system
47550	Solid-state non-volatile storage devices
Communication Equipment	
46921	Burglar or fire alarms and similar apparatus
47211	Transmission apparatus incorporating reception apparatus
47212	Transmission apparatus not incorporating reception apparatus
47213	Television cameras
47221	Line telephone sets with cordless handsets
47222	Telephones for cellular networks or for other wireless networks
47223	Other telephone sets and apparatus for transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)
47401	Parts for the goods of subclasses 47221 to 47223
Consumer Electronic Equipment	
38581	Video game consoles

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
47214	Video camera recorders
47215	Digital cameras
47311	Radio broadcast receivers (except of a kind used in motor vehicles), whether or not combined with sound recording or reproducing apparatus or a clock
47312	Radio broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles
47313	Television receivers, whether or not combined with radio-broadcast receivers or sound or video recording or reproducing apparatus
47314	Monitors and projectors, not incorporating television reception apparatus and not principally used in an automatic data processing system
47321	Sound recording or reproducing apparatus
47323	Video recording or reproducing apparatus
47330	Microphones and stands therefor; loudspeakers; headphones, earphones and combined microphone/speaker sets; audio-frequency electric amplifiers; electric sound amplifier sets
47402	Parts for the goods of subclasses 47321, 47323 and 47330
Miscellaneous IT Components and Goods	
45281	Sound, video, network and similar cards for automatic data processing machines
47130	Printed circuits
47140	Thermionic, cold cathode or photo-cathode valves and tubes (including cathode ray
47150	Diodes, transistors and similar semi-conductor devices; photosensitive semi-conductor devices; light emitting diodes; mounted piezo-electric crystals
47160	Electronic integrated circuits
47173	Parts for the goods of subclasses 47140 to 47160
47403	Parts for the goods of subclasses 47211 to 47213, 47311 to 47315 and 48220
47530	Magnetic media, not recorded, except cards with a magnetic stripe
47540	Optical media, not recorded
47590	Other recording media, including matrices and masters for the production of disks
47910	Cards with a magnetic stripe
47920	"Smart cards"
48315	Liquid crystal devices n.e.c.; lasers, except laser diodes; other optical appliances and instruments n.e.c.
48354	Parts and accessories for the goods of subclass 48315
Manufacturing Services for ICT Equipment	
88741	Electronic component and board manufacturing services
88742	Computer and peripheral equipment manufacturing services
88743	Communication equipment manufacturing services
88744	Consumer electronics manufacturing services
88749	Magnetic and optical media manufacturing services

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
Business and Productivity Software and Licensing Services	
47811	Operating systems, packaged
47812	Network software, packaged
47813	Database management software, packaged
47814	Development tools and programming languages software, packaged
47821	General business productivity and home use applications, packaged
47829	Other application software, packaged
73311	Licensing services for the right to use computer software
83143	Software originals
84341	System software downloads
84342	Application software downloads
84392	On-line software
Information Technology Consultancy and Services	
83117	Business process management services
83131	IT consulting services
83132	IT support services
83141	IT design and development services for applications
83142	IT design and development services for networks and systems
83151	Website hosting services
83152	Application service provisioning
83159	Other hosting and IT infrastructure provisioning services
83161	Network management services
83162	Computer systems management services
Telecommunication Services	
84110	Carrier services
84120	Fixed telephony services
84131	Mobile voice services
84132	Mobile text services
84133	Mobile data services, except text services
84140	Private network services
84150	Data transmission services
84190	Other telecommunications services
84210	Internet backbone services
84221	Narrowband Internet access services
84222	Broadband Internet access services
84290	Other Internet telecommunications services
Leasing or Rental Services for ICT Equipment	
73124	Leasing or rental services concerning computers without operator
73125	Leasing or rental services concerning telecommunications equipment without operator

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
73210	Leasing or rental services concerning televisions, radios, video cassette recorders and related equipment and accessories
Other ICT Services	
83325	Engineering services for telecommunications and broadcasting projects
87130	Maintenance and repair services of computers and peripheral equipment
87153	Maintenance and repair services of telecommunication equipment and apparatus
87331	Installation services of mainframe computers
87332	Installation services of personal computers and peripheral equipment
87340	Installation services of radio, television and communications equipment and apparatus

Content and Media Products

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
Printed and other Text-based Content on Physical Media, and related services	
32210	Educational textbooks, in print
32220	General reference books, in print
32230	Directories, in print
32291	Professional, technical and scholarly books, in print
32292	Children's books, in print
32299	Other books n.e.c., in print
32300	Newspapers and periodicals, daily, in print
32410	General interest newspapers and periodicals, other than daily, in print
32420	Business, professional or academic newspapers and periodicals, other than daily, in
32490	Other newspapers and periodicals, other than daily, in print
32511	Maps and hydrographic or similar charts (including wall maps, topographical plans and maps for globes), printed, other than in book-form
32530	Printed or illustrated postcards; printed cards bearing personal greetings or messages, with or without envelopes or trimmings
32540	Printed pictures, designs and photographs
32620	Trade advertising material, commercial catalogues and the like
32630	Transfers (decalcomanias) and printed calendars
47691	Audio books on disk, tape or other physical media
47692	Text-based disks, tapes or other physical media
83631	Sale of advertising space in print media (except on commission)
Motion picture, video, television and radio content, and related services	
38950	Motion picture film, exposed and developed, whether or not incorporating soundtrack or consisting only of sound track
47620	Films and other video content on disks, tape or other physical media
83632	Sale of TV/radio advertising time (except on commission)

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
84611	Radio broadcast originals
84612	Television broadcast originals
84621	Radio channel programmes
84622	Television channel programmes
84631	Broadcasting services
84632	Home programme distribution services, basic programming package
84633	Home programme distribution services, discretionary programming package
84634	Home programme distribution services, pay-per-view
96121	Motion picture, videotape and television programme production services
96122	Radio programme production services
96123	Motion picture, videotape, television and radio programme originals
96131	Audio-visual editing services
96132	Transfers and duplication of masters services
96133	Colour correction and digital restoration services
96134	Visual effects services
96135	Animation services
96136	Captioning, titling and subtitling services
96137	Sound editing and design services
96139	Other post-production services
96140	Motion picture, videotape and television programme distribution services
96150	Motion picture projection services
Music content and related services	
32520	Music, printed or in manuscript
47610	Musical audio disks, tapes or other physical media
96111	Sound recording services, except live recording services
96112	Live recording services
96113	Sound recording originals
Games software	
38582	Software cartridges for video game consoles
47822	Computer game software, packaged
84391	On-line games
On-line content and related services	
73312	Licensing services for the right to use databases
83633	Sale of Internet advertising space (except on commission)
84311	On-line books
84312	On-line newspapers and periodicals
84313	On-line directories and mailing lists
84321	Musical audio downloads
84322	Streamed audio content
84331	Films and other video downloads
84332	Streamed video content

CPC Ver 2.1	Product Description (CPC Sub-Class Title)
84393	On-line adult content
84394	Web search portal content
84399	Other on-line content n.e.c.
Other content and related services	
47699	Other non-musical audio disks and tapes
73320	Licensing services for the right to use entertainment, literary or artistic originals
83611	Full-service advertising
83620	Purchase or sale of advertising space or time, on commission
83639	Sale of other advertising space or time (except on commission)
83812	Advertising and related photography services
83940	Original compilations of facts/information
84410	News agency services to newspapers and periodicals
84420	News agency services to audio-visual media
85991	Other information services
89110	Publishing, on a fee or contract basis
96330	Original works of authors, composers and other artists except performing artists, painters and sculptors

Endnotes

- ⁱ See, Ministry of Electronics and Information Technology (MeitY), National Policy on Software Products (2019), Available at URL: https://meity.gov.in/writereaddata/files/national_policy_on_software_products-2019.pdf;
- ⁱⁱ See Ministerial Declaration on Global Electronic Commerce [hereinafter **E-Commerce Declaration**], WTO Doc. WT/MIN(98)/DEC/2 (May 25, 1998); See also, Work Programme on Electronic Commerce, VW7TO Doc. WT/LI 274 (Sept. 30, 1998); Available at URL: https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm;
- ⁱⁱⁱ *Ibid.* E-Commerce Declaration;
- ^{iv} See, Fifth Ministerial Conference, Cancun Ministerial Declaration, WTO Doc. WT/MIN(03)/20 (Sept. 20, 2003), Available at URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=14475&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True; While the draft ministerial declaration (Available at URL: https://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm) included a reference to the continuance of the Moratorium, the same was not adopted;
- ^v See, Congressional Research Service, "Digital Trade and US Trade Policy" R44565 (May 21, 2019); Available at URL: <https://fas.org/sqp/crs/misc/R44565.pdf>; The economic impact of the internet was estimated to be \$4.2 trillion in 2016; The United Nations estimates that world trade in ICT physical goods grew to \$2 trillion in 2017; The OECD estimates that ICT services trade increased 40% from 2010 to 2016;
- ^{vi} *Supra* Note. (iii); Even though no declaration was adopted, Members did continue to adhere to the practice of not imposing customs duties on "electronic transmissions"; owing primarily to enforcement problems. This understanding is reflected in the minutes of the next session of the General Council; See WTO General Council, Work Program on Electronic Commerce, "Dedicated Discussions under the auspices of the General Council on Cross-Cutting Issues related to E-Commerce", WTO Doc. WT/GC/W/555 (Nov. 21, 2005); Available at URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=64358,84557,57960,55619,72954,61689,51701,57050,75718,56745&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True;
- ^{vii} See, Wunsch-Vincent S., *The WTO, the Internet and Trade in Digital Products: EC-US Perspectives*, Bloomsbury Publishing, 2006 at pp. 35-36; See also, Joint EU-US Statement on E-Commerce; Available at URL: <http://www qlinks.net/comdocs/eu-us.htm>;
- ^{viii} *Ibid.* at pp. 38-44;
- ^{ix} See, European Union, "Joint Statement on Electronic Commerce: EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce", WTO Doc. INF/ECOM/22 (Apr. 26, 2019); Available at URL: https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf; See also, US Mission Geneva, Statement Delivered to the General Council by the US Permanent Representative to the World Trade Organization (Oct. 16, 2019), Available at URL: <https://geneva.usmission.gov/2019/10/16/statements-by-ambassador-dennis-shea-at-the-wto-general-council/>;
- ^x See, WTO General Council, Work Programme on E-Commerce, "Communication from India and South Africa: The E-Commerce Moratorium and Implications for Developing Countries", WTO Doc. WT/GC/W/774 (Jun. 4, 2019), Available at URL: https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/254708/q/WT/GC/W774.pdf;
- ^{xi} See, WTO General Council, Work Programme on E-Commerce, General Council Decision, WTO Doc. WT/L/1079 (Dec. 11, 2019), Available at URL: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=259651&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True;
- ^{xii} See, Andrenelli, A. and J. López González (Nov. 13, 2019), "Electronic transmissions and international trade - shedding new light on the moratorium debate", OECD Trade Policy Papers, No. 233, OECD Publishing, Paris, Available at URL: <https://doi.org/10.1787/57b50a4b-en>

- xiii See, Banga R. (Feb. 2019), "Growing Trade in Electronic Transmissions: Implications for the South", UNCTAD Research Paper No. 29, UNCTAD/SER.RP/2019/1/Rev.1, Available at URL: https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf;
- xiv See, WTO General Council, "Fiscal implications of The Customs Moratorium on Electronic Transmissions: The Case of Digitisable Goods", WTO Doc. Job/GC/114 (Dec. 12, 2016);
- xv See, WTO General Council, Secretariat Summary of Fourth Dedicated Discussion on Electronic Commerce under the auspices of the General Council on 27 February 2003, WTO Doc. WT/GC/W/492 (Apr. 8, 2003);
- xvi *Supra* Note (xii);
- xvii See, Lee-Makiyama H. (Aug. 2019), "The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions", ECIPE Policy Brief No. 3/2019, Available at URL: https://ecipe.org/wp-content/uploads/2019/08/ECI_19_PolicyBrief_3_2019_LY04.pdf;
- xviii *Supra* Note (xi);
- xix See, Ravi Kanth D., 'India, South Africa adopt tough stand on e-commerce moratorium', The Hindu Business Line, (Nov. 19, 2019); available at: <https://www.thehindubusinessline.com/economy/india-south-africa-adopt-tough-stand-on-e-commerce-moratorium/article30019521.ece>;
- xx *Supra* Note. (ix);
- xxi See, Communication from Australia, Canada, Chile, Colombia, the European Union, the Republic of Korea, Mexico, Montenegro, Norway, Paraguay and Ukraine, JOB/GC/140 Rev. 2, (Nov. 6, 2017);
- xxii *Supra* Note. (viii);
- xxiii See, WTO Secretariat Note, Work Program on Electronic Commerce, WTO Doc. S/C/W/68 (Nov. 16, 1998); Available at URL: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/C/W68.pdf>;
- xxiv *Ibid.* at para. 34; It is noted that while it is very uncommon for customs duties to be applied to services: there is no reason in principle why customs duties should not be applied to services, whether supplied electronically or in any other way;
- xxv *Supra* Note (xii);
- xxvi See, Cheng W. and Brandi C. (2019), "'Governing Digital Trade - A New Role for the WTO", German Development Institute, Briefing Paper 6/2019, Available at URL: <https://www.die-gdi.de/briefing-paper/article/governing-digital-trade-a-new-role-for-the-wto/>;
- xxvii *Ibid*;
- xxviii See, International Chamber of Commerce (ICC) Working Group on E-Commerce, "WTO Plurilateral Negotiations on Trade-related Aspects of Electronic Commerce: The Business Case for a Permanent Prohibition on Customs Duties on Electronic Transmissions", ICC Issues Brief No. 2, Available at URL: https://www.iccgermany.de/fileadmin/user_upload/Content/Handels- und Investitionspolitik/iccissuesbrief2-moratorium.pdf;
- xxix See, Appellate Body Report, United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (Apr. 7, 2005); In this case, the service at issue was online gambling provided to customers in the U.S. by companies in Antigua and Barbuda;
- xxx See, Baker S.A., et al., E-Products and the WTO, 35 INT'L LAW. 5, 6 (2001), Available at URL: <https://scholar.smu.edu/til/vol35/iss1/3/>;
- xxxi *Supra* Notes (xi), (xii), (xvi);
- xxxii *Supra* Note (xxix) at p. 7; The United States has maintained that e-products should be classified as goods and benefit from GATT protections, stating that, "While some have suggested that all commerce based on electronic transmission is a service, this conclusion needs further examination While the transmission of these products can certainly be characterized as a service, the products themselves are not consumed in their transmission, but

rather retain a permanence analogous to the goods world... The United States is not arguing that intangibles should be classified as "goods" in the traditional sense. Given the broader reach of WTO disciplines accorded by the GATT (i.e. market access and national treatment are not dependent on specific commitments) there may be an advantage to a GATT versus GATS approach to such products which could provide for a more trade liberalizing outcome for electronic commerce."

xxxiii *Ibid;*

xxxiv *Ibid;*

xxxv *Supra* Note. (vi) at pp. 56-57;

xxxvi See, Appellate Body Report, Canada-Certain Measures Concerning Periodicals, WTO Doc. WIT/DS3 1/AB/R (Jun. 30, 1997);

xxxvii See, Fleuter S. (2016) "The Role of Digital Products Under the WTO: A New Framework for GATT and GATS Classification," Chicago Journal of International Law: Vol. 17: No. 1, Article 5, Available at URL: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1704&context=cjil>;

xxxviii See, United Nations Statistical Commission (UNSD), Central Product Classification, Version 2.1, Available at URL: <https://unstats.un.org/unsd/classifications/Econ/CPC.cshtml>;

xxxix See, *Tata Consultancy Services v. State of Andhra Pradesh*, 2004 (178) E.L.T.22 (SC)

xl See, Central Board of Indirect Tax and Customs (CBIC), Sectoral FAQs on GST: IT/ITeS, Available at URL: <http://www.cbic.gov.in/resources//htdocs-cbec/gst/sectoral-faq-it-ites.pdf>;

xli *Ibid;*

xlii *Supra* Note (xxxviii);

xliii *Supra* Note. (xxxvii);

xliv See, WTO Secretariat, Background Note for Work Program on Electronic Commerce, WTO Doc. G/C/W/128 (Nov. 5, 1998)

xlv *Ibid;*

xlvi *Supra* Note. (ix).