

# E-commerce Regulations in an Emerging Era: The Role of the WTO in Resolving the Complexities of Electronic Trade

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<https://doi.org/10.12982/CMUJASR.2021.008>

**Editor:**

Yos Santasombat,  
Chiang Mai University, Thailand

**Article history:**

Received: August 19, 2021;

Revised: January 5, 2022;

Accepted: January 10, 2022.

## ABSTRACT

*The World Trade Organization has responded slowly to issues pertaining to harmonizing the digital economy among its member states. Because of the complex, multidimensional electronic commerce environment, there are diverse interests and conflicts among states on internet regulation. However, agreements at World Trade Organization forums act as intermediary responsibilities in forming a safe, sure, and reliable guiding structure for electronic commerce. Thus, agreements are a significant way to facilitate the advancement of the digital economy. Currently, there is no all-inclusive program for change at the World Trade Organization. This paper focuses on overhauling the organization to be in line and able to handle challenging contemporary trade treaties and manage issues relating to the digital economy.*

**Keywords:** Digital economy, Dispute settlement, Electronic commerce, GATS, Liberalization, WTO law reform, Agreements

## INTRODUCTION

Electronic commerce is revolutionizing the international economy, creating new prospects and encounters. The global economy is governed by rules and World Trade Organization (WTO) agreements, written long before worldwide trade accepted digital trade as significant. There have been complaints from WTO members wanting updates to rules so they reflect the global economy's contemporary realities. WTO member states, whose representation in world trade is over 90 percent, have mutually agreed to launch negotiations on e-commerce to develop a new WTO agreement. However, the nation states not taking part deem the negotiations unnecessary and detrimental to the interests of developing countries (Khan et al., 2021b). Due to the ineffectiveness of the 1998 WTO work program and lack of clarity in the current WTO treaties concerning electronic products and

services, there is a need for new deliberation on the proper measures to strengthen and include emerging trends in online commerce.

Due to changes in online trade technologies and associated challenges them, current WTO treaties need to be updated to consider emerging technologies, resulting in a general call for the examination of “all trade-related issues relating to global electronic commerce” (WTO, 1998). Moreover, there is still a gap between the developments in e-commerce and the 1998 work program since the WTO members do not consider the work program to include a valid agreement on incorporating e-commerce issues into the WTO treaty. The work program’s principal outcome has been creating and maintaining a delay of the imposition of duties on foreign e-commerce transactions. This halt should not be considered a success as it is symbolic and temporal (Hammad et al., 2021).

The e-commerce chapters' Preferential Trade Agreement (PTA) negotiations were spearheaded by the USA in the year 2000. Other countries such as Australia, Japan, and Singapore, and to a lesser extent, the European Union and other Asian countries followed suit. Demands from the negotiations have become a necessity over time, including the Trade in Services Agreement, the Regional Comprehensive Economic Partnership, and, most recently, the renegotiation of the North American Free Trade Agreement (Villarreal & Fergusson, 2019). The demands will also influence the USA and Korea. The PTAs are ahead of the multilateral system of the WTO in terms of addressing issues in the digital economy. Several countries have recently shown interest in reviewing the work program and providing informal proposals (Hammad et al., 2021).

This article provides a detailed analysis of the multilateral framework governing digital trade, arguing it must be adapted to the new requirements of digital trade. This article provides an assessment of the significance and importance of WTO agreements, focusing on the General Agreement on Trade in Services (GATS). It examines the digital economy, discussing the GATS and its role in resolving current policy challenges in digital trade in order to explain why there is variation in the existing GATS rules on addressing existing digital trade policy challenges. The article further addresses the possible conflicts and gaps between GATS and PTA rules on the digital economy. It concludes by providing recommendations for reforming the WTO.

## THE CURRENT FRAMEWORK OF WTO

WTO's current multifaceted framework, which includes the GATS and the General Agreement on Tariffs and Trade (GATT), was developed two decades ago and did not consider the rise of e-commerce. The GATT, created in 1947, was meant to serve as an interim pact for controlling world trade, but the International Trade Organization expected to replace the GATT was never approved. The GATT applied for 46 years, from January 1, 1948, until December 31, 1994, when the WTO replaced it on January 1, 1995 (Baachus, 2021). The GATT was explicitly meant to abolish the damaging impacts of trade protectionism, which had greatly affected international trade during the Great Depression. After the depression and World War II, the GATT reestablished financial well-being to the globe. The GATT contained three provisions, with the major one requiring each member to give preferred status to

every other member. It mandated equal treatment of its members regarding tariffs and the exclusion of special tariffs amongst British Commonwealth member states and custom unions (Ratnasingham, 1998). It also allowed tariffs to be removed if they had adverse effects on domestic production. Subsequently, the GATT removed restrictions on quotas of imports and exports, with exceptions such as when:

- A member state has surplus agricultural products.
- A member state needs to safeguard its balance of payment due to a low foreign exchange reserve.
- A developing country member wants to protect its nascent industries.
- Trade causes the national security of a member state to be compromised, including the protection of patents, public morals, and copyrights.

In 1965, as a result of more developing countries joining the GATT, there arose a need to create a provision to cater for the new members' needs. By agreeing to remove tariffs on imports from developing countries, developed states were able to revitalize the economies of those countries, thereby benefiting and promoting the long-term interests of the developed nations. The effects of this provision were to increase the number of middle-class consumers globally (Petersmann, 1997).

The creation of the GATS was a groundbreaking accomplishment of the Uruguay Round, with its results being enforced in 1995. The GATT influenced the creation of the GATS, and both had similar objectives, including creating a credible and reliable system of global trade regulations, the guarantee of policy bindings, a principle of non-discrimination, and the gradual liberalization of trade through trade promotion and development (Fleuter, 2016).

In as much as services account for over 60 percent of products and employment globally, their contribution to the total trade has a coverage of 20 percent. However, this share should not be underestimated. There is an increasing expansion of domestic services across borders due to mobility (Mitchell & Voon, 2009), a trend believed to be fueled by the emergence of new transmission technologies such as e-banking, telehealth and eLearning. Such technologies were initially monopolized, such as voice telephony and postal services to other countries. Regulatory improvements to previously strictly regulated sectors, such as transport, and the general combination of changing consumer preference, technical, and regulatory innovations have now improved the 'tradability' of services. However, as a consequence, the GATS framework has been rendered insufficient to deal with the digital economy.

## WHY THE WTO IS INEFFICIENT AT DEALING WITH THE DIGITAL ECONOMY

The GATS is the leading international trade agreement ruling on international trade across all sectors and supply modes across the territories of its member states. Aspects of the GATS include:

- Consumption abroad is also known as “where service consumer moves into another member's territory to have a service” (Rana, A., & Meena, R. 2021).
- Commercial service refers to a service provider from one member state establishing a presence in another member state’s region to offer services.
- The presence of natural persons: This occurs when one of the members enters the territory of another member to provide services.

The GATS framework is insufficient for promoting a progressive realization of the digital economy. In particular, GATS members must adhere to legal requirements and duties under the GATS, such as the right to a domestic market and domestic treatment. These have been there for almost three decades and do not adequately address business sectors in the digital economy. Converging business models combines telecommunications services with other services such as audio-visual, computer, financials, advertising, and financial services. These offered services are multifunctional, differentiate services and provide quality digital platforms (Trematerra, 2021).

A perfect example is Google and WeChat, which combine different services such as payments, communications, social networking, web mapping, and cloud computing. They depend on countries’ schedules and commitments on service and subsector services. For example, digital services such as the Google search engine cannot be instantaneously classified under computer and related services, advertising, and telecommunications services. Therefore, the case of Google search engine services will heavily depend on a member's commitment, and they will be specific to one subsector only. In other words, search engines can fit into different descriptions of various sub-sectors. When GATS was conceived, comprehensive digital platforms like Google and WeChat were unimaginable, resulting in legal uncertainties for products that fit into specified sectors in W/120. Some developing countries argue that Facebook and Google services are new services and are not captured in the W/120, but developed countries argue to the contrary (Kahn & Wu, 2020). The Appellate Body favors technologically augmented member states in the interpretation of their commitments in the GATs Schedules. The result is that few digital services can successfully qualify as “new services”, and the effects of this interpretation can affect other countries (Khan et al., 2021a).

## CROSS-BORDER ISSUES

Cross-border flows of data occur through the internet, which is often the primary method for many trade transactions. Internet-based services are not subject to customs tariffs but rather to regulations, affecting data flows into and out of a country, including privacy considerations. The WTO legal structure recognizes the critical nature of imposing controls on cross-border data flows (Meltzer, 2015). For instance, the GATS annex on telecommunications notes it is essential to regulate and maintain free cross-border data flows while considering privacy and data protection concerns. Meltzer observes, however, that under their financial service obligations, members are not permitted to prohibit the electronic transfer or processing of financial information (Meltzer, 2015). These regulations only apply to services within

the scope of the telecommunications and economic sectors such as audio-visual, digital services, computers, other related services, and cross-border data flows. Lastly, WTO members renewed agreements on electronic transmissions' custom duties under the 1998 work program.

There are also interim limitations, such as a WTO moratorium on customs taxes on electronic transmissions, which may prove insufficient in the current era of breakthrough technology and geolocation applications. The WTO moratorium was established to limit customs taxes on data transmission but not on data content (Meltzer, 2015). However, digital code material is transmitted via the internet. Suppose a digital tax is levied on Google's search engine. In that case, it is unclear whether taxes apply to data flows, which is prohibited under the moratorium, or if there should be a tax on Google's services, which are subject to taxation depending on the jurisdiction under the GATS agreement. Moreover, the widespread use of geolocation software can provide evidence that states can track data movement efficiently and impose a "byte tax" on international firms when their data crosses borders (Crosby, 2016). Such a fee would have numerous consequences, including jeopardizing individual users' privacy and interfering with the free movement of information and data across the internet.

## INSUFFICIENT DISPUTE SETTLEMENT MECHANISMS FOR THE DIGITAL ECONOMY

The WTO's dispute settlement system has been used to challenge increasing regulatory barriers to digital trade. Some countries have been reluctant to use the system because it has deficiencies. These countries are often not deeply involved in the complicated political economy of the digital economy. As noted, e-commerce is a transnational enterprise that significantly impacts international trade and sensitive political matters like internet regulation, economic growth, and human rights. WTO members are hesitant to bring digital disputes to a WTO tribunal court due to uncertainty regarding how its rules apply to digital trade. Conflicts of this type may impact domestic data protection laws, online data censorship, and, more importantly, internet governance. Members who take a cautious or interventionist approach to electronic commerce regulation, in particular, are more aware of the GATS framework's limitations in addressing domestic policy problems. Other options for dealing with these impacts include negotiating bilateral solutions like the privacy shield between the USA and the European Union or applicable norms in PTAs with groups of countries sharing similar goals (Palmer et al., 2022).

## INEFFECTIVENESS OF THE GATS

The GATS was formed in 1995 to gradually remove barriers in international trade and improve trade internationally. It contains rules governing and controlling trade across all trade sectors worldwide (Mishra, 2020). A close examination of the GATS clearly points out that it lacks the discipline to deal with the digital economy. Despite being in action since 1995, the composition of the GATS renders it incompetent at promoting the possibilities of the digital economy. There are several weaknesses in the body's framework. One of these weaknesses is that applying any

legal trade obligations under the body depends on the commitments inscribed by a given country, and each country can include any exceptions it likes in its GATS agreement. Therefore, WTO subscribers are free to determine how and to which sector they will open for a foreign company. They are also free to put limitations when opening a sector for a foreign company. For instance, they decide the level of technical qualification and can limit foreign equity extensions. Another weakness of GATS is the unclear boundaries between market accessibility and a member's local regulations (Wunsch-Vincent, 2006). An example of this surfaced after the Appellate report, which focused on gambling in the USA digital service restrictions: online gambling (characterized as "zero quotas" by WTO) was found to cause a prima facie breach in the member country's legal commitments to GATS (Hammad, 2022).

Another issue with the GATS is the lack of revisions to its nearly three-decade-old Services Sectoral Classification List, which is a reference point for members committing themselves to the GATS. As it is unrevised, this list still does not represent trade sectors relevant to the digital economy.

Because digital platforms did not exist during the formation of GATS, there are legal uncertainties about whether digital products fit under GATS specified sectors in W/120. Many GATS members have complained that digital services like Google are not captured in W/120 (Zhang, 2015). Developed countries, however, argue the contrary, and are major beneficiaries of "new services" like Google. Because the Appellate Body allowed neutral interpretation of member commitments inscribed in GATS, which were not explicitly written, we can say that some digital services should be enlisted as "new services". Still, this would be unfair, especially to countries such as Russia that are very concerned about regulating digital services or the internet within their borders (Zhang, 2015).

GATS has also failed to address issues related to cross-border data flows. All trading activities now rely on cross-border data flows through the internet. Restrictions on internet-based services are related to the flow of data in and out of countries' boundaries. Through GATS, the WTO has a limited framework in acknowledging the importance of cross-border data flows (Trematerra, 2021). The only provision for the control of cross-border data flows in GATS is the commitment by member states to allow information transfers on financial information. This applies to services related to financial information. There is, therefore, an existing legal gap in the GATS regarding the control of cross-border data flows, compared to other sectors of the digital economy like advertising services, audio-visual services, and computer services. These services are unprotected under the WTO.

Temporal measures by the WTO, like the moratorium on customs duties on services related to electronic transmissions, are arguably insufficient in this era of advanced technologies like geolocation software. The moratorium was put in place because the WTO wanted to prohibit customs duties on data transmission. The data contents were therefore left out of the clause. The distinction between taxing content and communication is thus ambiguous because a digital product's contents exist in the digital codes transferred through the internet (Willemys, 2021). Suppose a digital service is subjected to tax. In that case, it is unclear if the tax is for data flow, which the moratorium prohibits, or the service, for instance, by Facebook or Google, which is subject to the GATS through the commitments made by a country to it. With the adoption of geolocation software increasing, more states will soon track

data flows. It will thus be possible to impose taxes on foreign companies based on location (Greengard, 2021). This may compromise individuals' privacy and interfere with how information flows through the internet across borders. The weaknesses and legal gaps in the WTO and GATS need to be filled and existing rules need to be updated in order to regulate the current and future digital economy.

## HOW APPLYING GATS EXCEPTIONS TO THE MEASURES AFFECTING DIGITAL TRADE CURRENTLY FAILS

The regulation of sociocultural and economic activities on the internet needs a consistent and trustworthy framework. Countries have been asked not to restrict cross-border data transfers because this will interfere with the digital economy. Again, it is essential to consider other policies like data privacy, user protection, cybercrime, and public morality. These policies are equally important and must be safeguarded (Trematerra, 2021). According to Tuthill, GATS exceptions can carve limitations related to data flow and security or privacy rationales (Tuthill, 2016) and Crosby similarly observes that there is evidence in GATS Article XIV supporting data flow restrictions to protect privacy and data content (Crosby, 2016; Huang, 2021).

The application of these exceptions is, however, problematic. According to Neven & Mavroidis applying these exceptions to address the issue of restricting data flows satisfactorily requires a very close and in-depth, sophisticated study and analysis (Neven et al., 2006). This would likely require WTO tribunals to look deeply into factors like the measures of operation, feasibility, and availability of alternatives that could achieve equivalent levels of privacy or security, and resources available to member states domestically. Because of how complex the analysis is, it exposes members to more uncertainty regarding measures to control e-commerce and the use of the internet within their borders. Other researchers argue that these exceptions are only viable in tolerating derogations from GATS obligations on the grounds of privacy, protection of consumers, and data (Gunasekaran et al., 2008). These are necessary conditions for digital trade, but what about domestic laws?

Any application of exceptions for consumer protection, fraud, and privacy must be designed from an international trade law perspective. This would ensure WTO members retain control and autonomy pertaining to issues related to enforcing domestic laws. These restrictions may, however, help restrict data flow. According to GATS Article XIV, an arbitrary or discriminatory measure may be helpful if it essentially preserves the internet's integrity (Voon, 2009).

It is also recommended that countries employ technical standards that protect consumers. However, these measures may mean importing services or products from certain countries and under international trade law the measures may cause unwelcome outcomes because articles XIV and XIV have limited scope. The articles additionally do not enable the holistic consideration of trust issues in the internet (Mitchell & Hepburn, 2017). Digital marketing is built on reliable and trustworthy internet, consumer protection issues, cybersecurity, and other online issues that must be addressed to enable a thriving global marketplace. Submissions and proposals should consider these factors and aim for achievable changes to GATS frameworks.

## HOW THE WTO IS INEFFICIENT AT SETTLING DIGITAL TRADE DISPUTES

Despite the recent increase in digital trade disputes, the WTO continues to be insufficient for settling them. This is not because of the GATS weaknesses discussed in previous sections. It is a result of the complexity of the digital economy. E-commerce cuts across many issues and touches on essential issues like human rights, economic development, and internet governance (Bown, 2017). Members are thus reluctant to bring digital economy disputes to the WTO. Members who adopt a guarded approach in the digital economy also worry about the GATS framework's impact on domestic policy.

There are also gaps between the GATS and PTAs which the WTO has been unable to bridge. Provisions related to the digital economy are rising in PTAs while progress at the WTO continues to be sluggish. In one example, the agreements between the USA and other countries like Singapore and Chile (European Commission, 2010) could not address matters related to free digital flows. The role of PTAs in modernizing the legal framework on digital trade can be said to be growing only slowly because of the complexity of digital trade rules across varying PTAs. These rules have also disrupted digital trade's global framework (Angelo & Xiong, 2007).

PTAs provide a better way of addressing digital trade issues because they are more liberal than the GATS. They have horizontal disciplines in the digital economy that can be applied in different sectors. However, liberalization through PTAs can be affected by nonconforming exemptions and measures in digital commerce. PTAs have limited disciplinary power for digital commerce (Angelo & Xiong, 2007) and conflicts exist, but are ignored, between electronic commerce chapters in the GATS and PTAs. This is because many PTAs do not have provisions binding their digital economy chapters and partly because the process of settling disputes does not apply to e-commerce chapters of PTAs (Broughan, 2009). Some scholars support the WTO over PTAs when settling trade disputes (Pauwelyn, 2019). However, this study views the synergy between WTO and PTA disciplines as necessary to enhance a predictable and safe framework for digital trade.

## REFORMING THE WORLD TRADE ORGANIZATION

### AVAILABLE SUGGESTIONS BY MEMBER COUNTRIES AND EXPERTS

Because the WTO is essential and its significance fundamental, member countries have had suggestions on changes that can be implemented to make the WTO efficient. The global trade regime can be seen as an excellent example of multilateral cooperation. This cooperation is, however, currently facing problems. The immediate increase in market shares and output by emerging economies has brought rise to perceptions that the growth is from the availability of commercial practices that allow unfair competition and distort the global market. The increasing competition by governments who want to stimulate their economies has also increased trade tensions. With these and many other challenges facing the world market, an expert board from Bertelsmann Stiftung suggested revitalizing the

WTO's multilateral governance in 2018. This suggestion was also put through in 2001, but it remains unconcluded to date. The committee found that emerging digital economies need a functioning multilateral trade system because there are no effective regional or bilateral trade agreements for them. Considerable OECD powers like Japan, China, and the USA also need changes to multilateral trade because their concerns regarding international digital trade cannot be solved under the current organization of the WTO (Ciuriak, 2019).

Another suggested recommendation is fostering substantive deliberation in WTO bodies. Countries like the USA and China have had concerns about control of competitiveness. The USA has called for policy dialogue on policies affecting competitiveness. This is after several bilateral conflicts between the USA and China over fair market competitions. The USA suggested that member countries have dialogue on perceived problems and propose solutions. It is also essential to reflect on the arrangement discourse of new issues and areas of opportunity and observe whether and how WTO bodies can be more helpful to the national government offices responsible for managing each of the issue areas they cover. One component of such a procedure is for WTO individuals to determine what data they have to connect beneficially in various WTO bodies. Resistance to a significant number of notice prerequisites remembered for WTO understandings has become a wellspring of dispute. As opposed to maintaining consistency with all current warning necessities, it would be progressively valuable for WTO Committees to ask themselves what data is expected to satisfy their orders. Furthermore, it most conveniently helps financial entertainers and residents explore and comprehend the exchanging framework (Hoekman & Wolfe, 2021).

Experts have also recommended open plurilateral initiatives among WTO members. The absence of an agreement to talk about issues unsecured by surviving WTO understandings or remembered for the Doha Round plan has been a factor obstructing the utilization of the WTO as a discussion area for the arrangement discourse. A partial solution to this issue is for gatherings to coordinate on an open, plurilateral premise and, where plausible, dispatch activities for explicit parts or strategy regions. Open plurilateral activities can be a vehicle for member states to select traditional strategy standards such as sound administration and consent to new arrangement disciplines.

## RECOMMENDATIONS FOR CHANGES TO THE WTO

This article has made clear that current international frameworks related to digital trade are deficient and thus cannot be relied on to solve the modern digital economy's essential policy challenges. The digital economy requires meaningful, timely reforms to existing institutions. There are several significant policy avenues to reform international trade laws in place to govern digital trade. Among these is the work program. This can be reformed to facilitate considerations of the essential issues to digital trade and improve prospects necessary for developing new rules at the WTO. Policy actions are also needed in three areas at the multilateral level. These include improving access to markets, supporting developing countries to fit in the digital economy quickly, and reforming regulatory barriers. New agreements on the digital economy also need to be implemented in the WTO (De Caria, 2017). This

includes amending GATS to have disciplines relevant to the current digital economy.

## REFORMS TO THE GATS

The first reform required to the GATs is to improve and update the commitments of WTO members. The WTO can virtually adopt cluster tactics in classifying digital services and products or agree with its members on service scopes covered in W/20 chapters. The GATS can be reformed to expand commitments on matters related to technology sectors (Benz & Rozensteine, 2021). Obligations on transparency through GATS' Article III could also be reformed for WTO members to better understand the regulations they impose and the effects on digital trade.

New disciplines may need to be emplaced because GATS was created long before the internet's existence and thus lack disciplines to cover digital marketing. This will include new public policies that will address the needs of the digital economy. WTO members could, for instance, agree to have new disciplines guiding domestic regulations on cross-border data flows by reforming Article VI:4 or adding an annex on e-commerce to the GATS (Broughan, 2009).

## NEW AGREEMENTS UNDER THE WTO

A key reform for the WTO is new agreements by members. These should address the limitations of the GATS and form clear definitions of digital products that are neutral to all members, as well as creating a permanent moratorium on customs duties on transmissions. New cross-cutting agreements could also be made to capture all aspects of digital trade. This would reform the current divided structure of the WTO. Forming a new horizontal discipline for data transfers and international trade would be a wise reform. New agreements could be made such that e-commerce takes the form of a plurilateral agreement under the WTO agreement (Hoekman, B., & Mavroidis, P.C., 2021). This would address a wide range of development and regulatory concerns related to the digital trade economy. Modest reforms to the GATS could also incorporate comprehensive agreements on digital trade made under the WTO at a later date.

## CONCLUSION

The WTO must have an instrumental role in the control framework regulating digital trade. Although the current framework under the GATS has many deficiencies in addressing policy challenges associated with the digital economy, reforms could improve the WTO system. Despite WTO members being proactive in developing disciplines related to digital trade, there is still a lack of permanent solutions. PTAs can form the grounds for countries to test new rules while working on permanent solutions to international trade issues in the digital economy.

There is an urgent need for the WTO to develop creative solutions to digital economy issues through creative mechanisms. These mechanisms will address barriers to digital economy issues like data privacy, consumer and data protection, and cybercrime prevention. With these issues tackled, countries will be confident to

open their digital trade market without fear of uncontrolled competition or security and privacy threats. This will also achieve a balance in facilitating the digital economy but still preserving the trust and integrity of the internet.

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