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SERVICES IN DISGUISE: APPLYING EC-BANANAS' GATS/GATT FRAMEWORK TO DIGITAL TRADE MEASURES

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Abstract:
The digital economy poses serious challenges to a traditional system for the WTO-one in which rules for goods and services are separate. When it comes to digital transactions, including cloud services, it is frequently unclear if the rules of GATT or GATS or both should apply.
This article argues that the EC-Bananas III case, which allowed both agreements to apply at the same time, provides a useful way of dealing with this problem, if properly developed through later case-law. By analyzing examples like that of Canada Autos and China Publications, the article points out 5 key principles to understand when both agreements can be used simultaneously.
Using these principles, the article examines four modern issues of digital trade; regulations on online content streaming, regulations on cloud computing, regulations on digital platforms and data localization requirements. It concludes with proposing a clear analytical approach to future WTO cases and discussing what this means for the future regulation of digital trade.

I. Introduction

Digital Trade's Hybrid Goods/Services Nature

The digital economy poses a simple classification issue in the World Trade Organization's classification system, which includes different sets of rules for goods and services. When someone streams a movie, downloads software or signs up for cloud storage, it is not clear whether this is a trade in goods under GATS, a trade in services under GATS, or is both. This is not only a theoretical problem. How a digital transaction is categorized determines which rules apply, which exceptions a country can invoke, and in the end whether i.e. a country's government measure infringes WTO law.

The EC Bananas III case proved that GATT and GATS are not mutually exclusive. A single measure of government policy may be subject to both agreements simultaneously.[1] However, the Appellate Body dealt with this matter very cursorily using only two short paragraphs and left a number of important questions for clarification. It did not provide a mechanism on how judges are to decide when both agreements apply simultaneously, what is to be done in cases when rules under GAT/C and GATS are in conflict or how it is to function in case of digital trade where the distinction between good and services often vanishes.

These questions are now very important. Digital trade comprises around 25% of global goods trade and more than half of global services trade, and so the way these rules are applied has real and wide-ranging consequences.[2] However, there remains weak and incomplete WTO case law on how GAT and GATS work together. At the same time, nations are more and more developing

[1] Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III) (9 September 1997) WT/DS27/AB/R [221].

[2] UNCTAD, Digital Economy Report 2024 (United Nations 2024) 3; see also Mira Burri, 'The Regulation of Data Flows through Trade Agreements' (2017) 48 Georgetown Journal of International Law 407, 410.

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

legislation governing digital transactions through means that blur the traditional line between goods and services. Recent disputes and policy debates involving questions such as data localization laws, online streaming rules, and digital platform, have indicated that the current legal tools are not good enough to deal with these issues.[3]

This article proposes that the EC-Bananas III decision on the dual applicability, if clearly understood and applied in an organized manner, provides a good foundation to examine the laws governing digital trade. However, this approach requires further development to treat properly the special features of digital transactions. By relying on later WTO cases that explained and built on the Bananas decision such as Canada Autos, China Publications and Argentina Financial Services the article provides a clear and practical framework for determining whether digital trade measures are covered by GATT, GATS, or both.

The article is divided into four major parts. Part II examines the EC Bananas III decision and elaborates on what the Appellate Body plainly ruled and what it had deliberately ruled on. Part III examines subsequent WTO rulings in which the courts slowly clarified the operation of dual applicability and draws from this case law five key principles. Part IV applies this improved framework to analyzing 4 modern day digital trade situations. Finally, Part V outlines a clear way of dealing with future cases and touches on what this implies for the regulation of digital trade.

II. EC-Bananas III's Foundational Holding on Simultaneous Applicability

A. The Factual and Legal Context

The EC-Bananas III dispute arose from the European Communities' complex regime for importing, selling, and distributing bananas. The regime allocated import licenses based on past import volumes and operator categories, distinguishing between entities that marketed EC and traditional ACP bananas and those that marketed other bananas (the 'activity function rules').[4] The complainants challenged various aspects of this regime under both GATT and GATS.

The European Communities mounted a novel defense: it argued for 'a priori exclusion' of the licensing measures from GATS scrutiny.[5] According to the EC, allowing simultaneous application of GATT and GATS would create 'total overlap' between the agreements, potentially subjecting any measure to obligations under both frameworks.[6] This would upset the negotiated balance of the Uruguay Round, particularly where Members had made different commitments under goods and services schedules. The European Communities had the argument that measures affecting trade in goods should be reviewed only in GATT, and not in GATS.[7]

The Appellate Body rejected such a hard division. In two important paragraphs, it said that the ambit of GATT and GATS can overlap according to the measure:

> "Because GATT and GATS address different areas, sometimes the two may overlap, and sometimes they may not." It is all based on what the measure actually does. Some uses are as goods and therefore GATT is the only one that

[3] See Neha Mishra, 'What Are Digital Trade and Digital Trade Law?' (2023) 117 American Journal of International Law 1, 3-8.

[4] Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas (22 May 1997) WT/DS27/R/USA [7.285]-[7.290].

[5] EC-Bananas III (n 1) [218].

[6] ibid [219].

[7] ibid [220].

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

> measures have. Other measures have an impact on services as services, so they fall only under GATS. There is a third type of measure that comes under both the agreements simultaneously. These are measures "that deal with services linked to a certain good or services that are supplied together with a certain good".[8]

This approach put out a few important ideas. First, the scope of different agreements need not be quite separate they can overlap. Second, what really matters is the actual nature of the measure being examined, and not what the regulating country meant to do. Third, although it is possible to have measures under only one of the agreements, there is also a third circumstance, where both agreements may be applicable simultaneously.[9]

B. What the Appellate Body Decided

The Appellate Body has answered an important basic question: under WTO law, the same measure could legally fall under GATT and GATs at the same time. It reached this conclusion by carefully reading the structure of the WTO Agreement. Both GATT and GATS are incorporated in Annex 1, covering distinct areas, but no mention has been made in the text that only one can apply concurrently with the other agreement.[10] Since there is no specific rule specifying priority for one agreement over the other, it is possible that both agreements can apply where their conditions are met.

Body held that the rules were covered by both agreements. The rules affected the import of bananas (which are goods) as well as wholesale distribution services with respect to bananas (which are services).[11] Since the licensing system was the one who had decided who was to be permitted to engage in wholesale distribution a service it triggered GATS obligations, even though it was a part of a system for regulating imports of goods.

This decision had definite practical effects. The Appellate Body upheld findings that the EC measures violated both Articles I: 1 of GATT (most-favored-nation treatment for goods) and Article II of GATS (most-favored-nation treatment for services).[12] The violations arose from the same measures but were analyzed under different legal standards appropriate to each agreement.

C. What the Appellate Body Left Unresolved

Despite its significance, the Bananas holding left numerous questions unanswered. The Appellate Body provided little guidance on how to identify when a measure 'involves a service relating to a particular good' or is 'supplied in conjunction with a particular good.[13] These phrases became the subject of extensive debate in subsequent cases.

First, the decision did not address how to resolve conflicts when obligations under the two agreements point in different directions. For instance, what if a measure is justified under GATT

[8] ibid [221] (emphasis added).

[9] See Joel Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 European Journal of International Law 655, 672-673.

[10] EC-Bananas III (n 1) [220].

[11] ibid [222].

[12] ibid [206], [233]-[234].

[13] ibid [221].

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
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Vol.04 No.01 (2026)

Article XX but not under GATS Article XIV? Should panels apply both exceptions analyses independently, or should one prevail?[14]

Second, the Appellate Body did not elaborate on the precise relationship between the goods and services aspects. Must the service be 'ancillary' to the good, or can it be of equal importance? Can measures affecting purely digital transmissions—where no physical good crosses borders—trigger GATT disciplines?[15]

Third, the decision provided no framework for addressing the 'scheduling asymmetry' problem identified by the EC. If a Member made limited commitments in its services schedule but bound tariffs broadly in its goods schedule, dual applicability could expand its obligations beyond what it intended to accept.[16] The Appellate Body acknowledged but did not resolve this concern.

These unresolved questions would shape the next two decades of WTO jurisprudence on the GATT-GATS relationship, with particular salience for digital trade measures.

III. Refinement of the Framework through Subsequent Jurisprudence

Since EC-Bananas III, several WTO disputes have addressed the GATT-GATS interface, progressively clarifying the dual applicability framework. From these cases, five key principles have emerged.

A. Principle One: Focus on Measure's Effects, Not Intent

Canada-Autos reinforced that classification turns on the measure's effects rather than its stated purpose. Canada argued that its import duty exemption, though formally applying to goods, should be analyzed solely under GATS because it aimed to regulate wholesale services.[17] The Appellate Body rejected this argument, emphasizing that 'the subjective intent of Members is not relevant' to determining whether a measure affects trade in services.[18]

The proper inquiry examines whether the measure 'affects' trade in goods or services, using the ordinary meaning of that term: to 'have an effect on' or 'make a difference to.'[19] This effects-based test has become fundamental to dual applicability analysis. It prevents Members from insulating measures from GATS scrutiny merely by characterizing them as goods regulations, and vice versa.

[14] This issue arose later in China-Publications; see Part III.E below.

[15] These questions became central in China-Publications; see Part III.C below.

[16] See Markus Krajewski, 'Playing by the Rules of the Game? Specific Commitments after US-Gambling and Betting and the Current GATS Negotiations' (2005) 32 Legal Issues of Economic Integration 417, 425-426.

[17] Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry (31 May 2000) WT/DS139/AB/R, WT/DS142/AB/R [155].

[18] ibid [165].

[19] ibid [166]; see also Panel Report, Argentina – Measures Relating to Trade in Goods and Services (30 September 2015) WT/DS453/R [7.112]-[7.115].

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

B. Principle Two: Independent Obligations Analysis

The second principle, established in China-Publications, holds that when a measure falls under both agreements, panels must conduct independent analyses under each framework. China argued that measures regulating audiovisual products should be assessed exclusively under GATS because they involved content services.[20] The Panel and Appellate Body disagreed, finding that measures affecting distribution of physical audiovisual products (DVDs, books) implicated both goods and services obligations.

Critically, the Appellate Body emphasized that 'a measure could be simultaneously subject to obligations relating to trade in goods under the GATT 1994 and to obligations relating to trade in services under the GATS.'[21] The Panel must therefore examine the measure against the relevant provisions of both agreements, applying each agreement's substantive standards and interpretive approaches.

It also has important implications for the way in which cases should be analyzed. WTO panels cannot take as self-evident the conclusion in one agreement that may answer the question under another. For instance, the finding that imported and domestic products are "like" under GATS Article III does not necessarily mean that services are "like" under GATS Article XVII.[22] Each agreement must then be considered individually and on its own rules.

C. Principle Three: Digital Delivery Does Not Exclude Goods Classification

In China-Publications, the WTO also addressed an important issue relevant to trade of electronic products: Whether products delivered electronically can be considered goods for purposes of GAT. The Panel considered China's commitments with respect to sound recording distribution services and whether or not such serviced would be applicable in the case of distribution by electronic means.[23] The Appellate Body agreed that the distribution of sound recordings by electronic means would fall under the category of services commitments, even if the same recordings would have been treated as goods if the sale had taken place in physical form.

However, the Appellate Body did not intend to say that all digital content is always a service. Instead, it proposed a flexible approach, whereby the same product could be good when delivered in a physical format, and a service when delivered in an electronic format. In mixed or transitional delivery models either or both of these agreements may still apply.[24] This cautious approach typifies the reality of modern digital trade while leaving legal analysis flexible.

D. Principle Four: Scheduling Commitments Don't Determine But Merchant, Scope

The fourth principle addresses the relationship between a country's GATS schedule and the scope of an agreement as a whole. In Canada-Autos, the Appellate Body explained that because

[20] Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (21 December 2009) WT/DS363/AB/R [193].

[21] ibid [195] (emphasis added).

[22] See Canada-Autos (n 17) [178]-[184].

[23] Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (12 August 2009) WT/DS363/R [7.1245]-[7.1275].

[24] China-Publications (AB) (n 20) [412]-[413].

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

a country has not scheduled a particular service, it does not imply that measures that affect the service fall outside GATS altogether. GATS Article I:1 is applicable to all, scheduled or unscheduled, services.[25]

This point is particularly significant where digital trade is concerned. Most of the GATS schedules have been negotiated before digital services became highly industrialized. If countries were allowed to waive GATS obligations for those services that didn't exist, because they had not listed them, the agreement would lose much of its value. That being said, scheduling is important. Only scheduled services are covered by certain obligations such as market access and national treatment. General obligations such as most-favored-nation treatment require no scheduling.[26]

E. Principle Five: Exceptions Analyzed Separately Under Each Agreement

The last principle concerns the operation of exceptions in situations when both GATT and GATS apply. In the case of China-Publications, China relied on the public morals exception in GATT article XX(a) for the justification of restrictions on audiovisual products.[27] The Panel along with the Appellate Body persevered to examine the justification separately under GATS article XIV(a) (for services-related obligations) and GATS article XX (for goods related obligations).[28]

This separate analysis is feasible because GAT and GATS have different exception provisions, which in turn have their own legal requirements. Even where the wording is similar the context can result in varying results. For instance, the test of whether or not a measure is "necessary" might be applied differently for goods than for services.[29]

Taken together, these five principles provide a clear, workable method of analyzing measures that lie under both GATT and GATS. They focus on the real effects of measures; they require separate analysis under each agreement and mean that WTO law will be able to respond to changing trade realities without disrupting the balance between rights and options negotiated by Members.

IV. Application to Contemporary Digital Trade Scenarios

The refined dual applicability framework has direct relevance for analyzing contemporary digital trade measures. This Part applies the framework to four scenarios that exemplify the challenges digital trade poses to the GATT-GATS distinction.

[25] Canada-Autos (n 17) [167].

[26] ibid [168]; see also Rudolf Adlung and Hamid Mamdouh, 'How to Design Trade Agreements in Services: Top Down or Bottom Up?' (2013) WTO Staff Working Paper ERSD-2013-08, 12-15.

[27] China-Publications (Panel) (n 23) [7.745]-[7.913].

[28] China-Publications (AB) (n 20) [223]-[309].

[29] See Panagiotis Delimatsis, 'Comment on the Appellate Body Ruling in China-Publications and Audiovisual Products' (2010) 9 World Trade Review 137, 148-152.

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

A. Scenario One: Content Streaming Regulations

Consider a Member that requires all audio-visual content streaming services to obtain local licenses, maintain servers within its territory, and reserve 30% of their catalog for locally-produced content. Such measures are increasingly common globally.[30]

Under the dual applicability framework, these measures likely fall under both GATT and GATS. The GATS coverage is straightforward: the measures directly regulate the supply of audiovisual services through mode 1 (cross-border supply). They affect service suppliers' ability to supply services and impose conditions on service supply.[31]

The GATT applicability is more complex but still present. The measures affect the 'importation' of audiovisual content to the extent that content crosses borders, even digitally. While the WTO moratorium on customs duties for electronic transmissions suggests digital content is treated as services for tariff purposes, this does not preclude GATT Article III (national treatment) or Article XI (quantitative restrictions) from applying to requirements that discriminate against foreign content or restrict its availability.[32]

The local content quota exemplifies dual applicability. Under GATT, it operates as a de facto quantitative restriction on foreign audiovisual content, analogous to the restrictions found inconsistent with Article XI in past cases.[33] Under GATS, it violates market access commitments (Article XVI) by limiting the types of services that may be supplied, and potentially national treatment (Article XVII) if it has discriminatory effects.[34]

B. Scenario Two: Cloud Computing Data Localization

A Member requires that all personal data of its nationals be stored on servers physically located within its territory, and prohibits cloud service providers from transferring such data abroad without explicit individual consent. This is a paradigmatic data localization measure.[35]

The GATS implications are clear. Data storage and processing are computer and related services under most Members' schedules.[36] Localization requirements restrict the supply of these services through mode 1, requiring commercial presence (mode 3) instead. This likely violates Article XVI (market access) if the Member scheduled these services without limitations, and Article XVII (national treatment) if foreign suppliers face burdens domestic suppliers do not.[37]

The GATT applicability depends on whether data constitutes 'goods.' If the Member requires foreign manufacturers to store product-related data locally (warranty records, usage data from

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[30] See eg EU Audiovisual Media Services Directive 2010/13/EU (as amended); Australian Broadcasting Services Act 1992 (Cth) s 102B.

[31] See GATS art I:2 (defining modes of supply).

[32] WTO, Work Programme on Electronic Commerce (adopted 25 September 1998) WT/L/274 [1.3]; see also Mishra (n 3) 15-18.

[33] cf Panel Report, India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (6 April 1999) WT/DS90/R [5.128]-[5.143].

[34] See China-Publications (Panel) (n 23) [7.1359]-[7.1428] (analyzing similar measures affecting audiovisual distribution).

[35] For examples of such measures, see Nigel Cory, 'Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?' (Information Technology and Innovation Foundation, May 2017) 5-12.

[36] See Services Sectoral Classification List (MTN.GNS/W/120, 10 July 1991) 6 (listing computer and related services including data processing).

[37] See Svetlana Yakovleva and Kristina Irion, 'Applying WTO and FTA Disciplines to Data Localization Measures' (2018) 17 World Trade Review 459, 465-472.

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

smart devices), this could affect trade in those goods. A requirement that effectively prevents cross-border data flows necessary for product operation might constitute a technical barrier under the TBT Agreement or a quantitative restriction under Article XI.[38]

However, pure data localization affecting only services may fall exclusively under GATS. The crucial issue here is whether or not the rule actually impacts on goods as goods. If data flows form only a supporting part of the provision to a service and are not related to the trade in physical goods then GATT may not apply. This indicates that when both the goods and services may be involved, every case has to be considered carefully on the basis of its facts.[39]

C. Scenario Three: Digital Platform Licensing Requirements

A Member requires all digital platforms facilitating cross-border e-commerce to register locally, appoint a local representative, and comply with domestic consumer protection and content moderation rules. Failure to comply results in blocking access to the platform within the Member's territory.[40]

These measures present a clear case of dual applicability. The platforms provide services (marketplace facilitation, payment processing, logistics coordination), bringing them under GATS. Registration and representative requirements may violate Article XVII if they impose burdens not imposed on domestic platforms. Blocking access likely violates Article XVI commitments on market access for computer and related services.[41]

Simultaneously, because these platforms facilitate goods trade, measures affecting them impact goods importation. Blocking a platform prevents sellers from importing goods through that channel. Under Canada-Autos' effects-based test, measures that affect how goods are imported and distributed implicate GATT even if structured as services regulations.[42] The platform requirements might violate Article XI as quantitative restrictions or Article III:4 as regulations affecting distribution of imported goods.

D. Scenario Four: Algorithmic Content Curation Requirements

Finally, consider a Member that requires all recommendation algorithms used by search engines and social media platforms to prioritize domestic content over foreign content when serving results to local users. This measure aims to promote domestic culture and information diversity.[43]

This scenario tests the boundaries of dual applicability. The measure clearly affects services—search and information services fall under GATS computer and related services commitments. Algorithmic discrimination against foreign content likely violates Article XVII national

[38] cf Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (18 September 2000) WT/DS135/R [8.97]-[8.108].

[39] See Yakovleva and Irion (n 37) 472-475.

[40] Such measures exist in several jurisdictions; see eg Australia's Online Safety Act 2021 (Cth); Germany's Network Enforcement Act (NetzDG) 2017.

[41] cf China-Publications (Panel) (n 23) [7.1359]-[7.1434] (analyzing restrictions on foreign-invested enterprises).

[42] Canada-Autos (n 17) [165]-[166].

[43] No WTO Member currently implements exactly this measure, but similar concerns animate debates about algorithm transparency and fairness.

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

treatment obligations, as it accords less favorable treatment to foreign service suppliers' content.[44]

If an algorithm has the effect of discriminating against the facilitating of foreign news, film or music content which may also exist in material form then GATT may be applicable because these may be considered goods. However, if the rule only applies to purely digital material with no physical analogue, such as social media content, or original content that is only available online, then GAT's national treatment rule may not be applicable. This is because there are no similar domestic "products" that can serve as a benchmark.[45]

This is a similar example of how digital trade is generating transactions that are primarily services-based and deviate from where GATT is focused on issues concerning physical goods, though there are similar competition concerns in these transactions. The dual applicability approach enables the law to accommodate these changes, yet not abandon careful analysis of the law.

V. Proposed Analytical Framework and Policy Implications

A. A Structured Analytical Framework

Based on the principles discussed above, it is possible to apply the following step-by-step approach to enable decision-makers to evaluate digital trade measures:

Step One: Focus on the actual effects of a rule, and see how the rule actually works in the real world. Does it affect the import, sale, distribution or use of goods? Is it affecting the supply of services - by way of any mode of delivery? The point should be about what the effects of things actually are, not what the government said it was going to do.

Step Two: Determine if GATT Applies If the rule affects goods as goods such as their physical nature, import conditions, taxes or distribution, then GAT applies. The fact that the delivery is digital does not necessarily precludes GATT in cases where the content has obvious physical equivalents and the rule impacts on their competitive position.

Step Three: Determine whether GATS applies If the rule impacts on the supply of services, including digital or platform-based services, GATS applies, under Article I:1, even if the service does not appear on the schedules of the countries. Whether any specific obligations such as market access or national treatment exist depends on what has been scheduled to take place in the country respective.

Step Four: Consider each agreement individually, if both GATT and GATS apply, the measure will need to be considered independently under both agreements. A finding made less than one agreement should not be taken to determine the outcome of the other.

Step Five: Examine exceptions separately, if a country is relying on exceptions, the rules on exception in each agreement must be applied on their own terms. A measure may be justifiable under one agreement but not under the other and these outcomes will have to be contemplated carefully.

[44] See GATS art XVII:1-2 (national treatment obligation).

[45] cf GATT art III:4 (requiring comparison to 'like domestic products').

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

B. Policy Implications for Digital Trade Governance

This side of the coin is approach has major policy consequences. First of all, the current ban on customs duties for electronic transmissions within the WTO does not resolve the question of whether digital content is treated as goods or services. Even where there are no tariffs, the non-discrimination rules of GATT might apply to regulations that affected digital content.[46]
Second, the framework identifies challenges in ongoing negotiations on e-commerce in the WTO. Countries are negotiating rules on data flows, source code and digital products but these new rules must fit within existing GATS and GATS obligations. Since both agreements could apply, digital trade rules cannot be developed in isolation.[47]
Third is that the framework has an impact on how much freedom countries have to regulate digital markets. On the one hand, by applying both GATT and GATS the number of potentially WTO rules that may restrict digital regulations, such as, privacy or cyber security, is increased. On the other hand, both agreements provide exceptions to protecting legitimate policy goals if properly applied.[48]
The primary obstacle is how these exemptions should work within the world of digital technologies. Past cases are somewhat instructive, although many questions abound. For example, can the data localization be justified as being compliance to law or security requirements? How should the "necessity" test be applied to cyber security measures when it is difficult to measure risks?[49]
Fourth, the framework highlights the importance of scheduling decisions. Members negotiated their GATS schedules decades ago, back when there were no digital services. Technological neutrality in schedule interpretation, i.e. extending commitments to cover new means of providing scheduled services, is the key to keeping GATS relevant. However, this has to be balanced with the legitimate expectations of the Members on the extent of their commitments.[50]

C. Areas Requiring Further Clarification

Despite the appreciable development of jurisprudence, there are a number of issues that still need further clarification by either adjudication or negotiation:
First, what should be done if GATT and GATS provide conflicting obligations? If a rule is necessary under one agreement, but it is forbidden under the other, it is not clear which one should take priority.[51]

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[46] See Sacha Wunsch-Vincent and Arjun Vihannala, 'WTO E-Commerce Moratorium: Analysis of Digital Trade-Related Provisions' (2022) E15 Initiative Policy Brief.

[47] See WTO, Joint Statement on Electronic Commerce (adopted 25 January 2019) WT/MIN(17)/60; Mira Burri, 'Current and Emerging Trends in Disruptive Technologies: Implications for the Present and Future of EU's Trade Policy' (2020) European Parliament Study PE 653.618.

[48] See Anupam Chander and Uyên P Lê, 'Data Nationalism' (2015) 64 Emory Law Journal 677, 688-712.

[49] See Shin-yi Peng, 'Cybersecurity Threats and the WTO National Security Exceptions' (2015) 18 Journal of International Economic Law 449, 453-467.

[50] See Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (10 November 2004) WT/DS285/R [6.285]-[6.287] (applying technological neutrality).

[51] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 30-31.

ISSN E: 3006-1466
ISSN P: 3006-1458
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
CJSSR
CONTEMPORARY JOURNAL OF SOCIAL SCIENCE REVIEW
Vol.04 No.01 (2026)

Second, are products that have never existed in physical form to be treated a goods at all? As only digital products become more prevalent, it's possible that the way products are delivered may have to change.
Third, how to classify new technologies such as artificial intelligence, block chain and virtual reality? These technologies blur the lines between goods, services and information in ways which challenge existing legal categories.[52]

VI. Conclusion

The acknowledgment in EC Bananas III that both GATT and GATS can be used simultaneously is a good foundation for addressing the digital trade issues. Its attention to real world effects and its rejection of rigid categories have been of utility in the face of major technological change.
Later cases have reinforced this approach by reinforcing that each agreement must be analyzed separately, that digital delivery is not a rule out of goods treatment, and that exceptions need to be analyzed on their own. Decision-makers can use these combined rules as helpful guides in the handling of complicated arguments in digital trade.
The above four scenarios represent both the strength and limitations of this framework. While digital regulations raise difficult questions, the approach of dual applicability provides a consistent way of analyzing these rules without undermining the balance of WTO obligations. Still, all matters cannot be resolved by legal decisions only. Questions regarding purely digital products and balancing of open trade and regulatory freedom appear likely to require negotiation. Ongoing talks on e-commerce provide an opportunity to clarify and strengthen the rules.
As digital trade continues to grow, the success of this framework will depend on applying this framework's core ideas carefully: focusing on what is real, to analyse each agreement on its own terms, and being flexible enough to respond to technological change. If used thoughtfully, it can keep providing guidance on WTO digital trade governance well into the future.

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