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Classification Challenges and Regulatory Gaps in WTO Digital Trade Law: Implications for Nigeria

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ABSTRACT

When the Uruguay Round closed in 1994, the commercial internet barely existed. The agreements that emerged, the GATT, the GATS and TRIPS, were drafted for a world of shipping containers, bank branches and patent offices. Three decades later they are asked to govern streaming platforms, cloud services, cross-border data flows and artificial intelligence. This article argues that the strain shows up in two connected ways. The first is classification uncertainty: the same digital transaction can be treated as a good, a service or an intellectual property matter, with different obligations attaching to each. The second is a regulatory vacuum: the WTO has no binding multilateral instrument written for digital trade, the long-standing moratorium on customs duties on electronic transmissions has lapsed, and the main alternative, a plurilateral E-Commerce Agreement, is built by willing members rather than by consensus. The article then asks what this means for developing economies, using Nigeria as its case study. It contends that Nigeria's difficulty lies less in the absence of legal obligations than in the dualist structure of section 12(1) of the 1999 Constitution, thin technical capacity and a fragmented national policy. It closes with legislative, institutional and multilateral proposals.

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INTRODUCTION

Ask a trade lawyer to classify a film streamed from a server in Dublin to a laptop in Lagos, and a short, uncomfortable silence usually follows. Is it a good? Nobody ships anything. Is it a service? Perhaps, but then which of the four GATS modes applies, and has Nigeria scheduled any commitment for it? Is it a copyright matter under TRIPS? Quite possibly, but TRIPS says nothing of market access. The question is not an academic parlour game. The answer decides which non-discrimination rules apply, whether a tariff may be levied, and whether a regulatory measure can be challenged at all.

This article examines that problem. It does so from the standpoint of a developing country, and in particular Nigeria, which is Africa's largest economy and yet, as the literature repeatedly notes, a quiet presence in the WTO's negotiating rooms and its dispute settlement system (Olatoye, 2015; Chianu, 2010). The argument proceeds in three steps. Part II clarifies terms. Part III dissects the classification problem across the three covered agreements. Part IV turns to the regulatory vacuum, including developments at the Fourteenth Ministerial Conference (MC14) in Yaoundé in March 2026, which overtook much of the earlier scholarship. Part V considers Nigeria's position. Part VI proposes reforms, and Part VII concludes.

RESEARCH METHODS

The methodology is doctrinal. The article reads treaty texts, case law and institutional documents closely, and draws on secondary scholarship to test the interpretations offered.

RESULTS AND DISCUSSION

What Are We Regulating? "E-Commerce" and "Digital Trade"

The WTO has never defined its own vocabulary with much care. The 1998 Work Programme on Electronic Commerce described e-commerce as the production, distribution, marketing, sale or delivery of goods and services by electronic means. That formulation concerns how a transaction is carried out. "Digital trade" is a wider and looser idea. As Gao observes, it reaches information exchange, data flows and the digital economy generally, well beyond the sale of goods and services online (Gao, 2024).

The distinction matters for lawyers because it marks the edge of what existing rules can reach. An online purchase of a pair of shoes is, in substance, a goods transaction with an electronic ordering process; GATT can handle it comfortably. A cross-border data transfer that powers a cloud analytics service is something else. No one bought or sold a "good" in any ordinary sense, and whether it is a "service" depends on a classification exercise that the GATS invites but does not settle. Definitional haze at the front end therefore becomes legal indeterminacy at the back end.

The Classification Problem

GATT 1994: the awkward home for digital content

GATT 1994 governs trade in goods through tariff bindings, most-favoured-nation treatment (Article I) and national treatment (Article III) (General Agreement on Tariffs and Trade [GATT], 1994). Its logic presupposes something that crosses a border and can be stopped at a customs post. Software on a disc fits. Software downloaded from a server does not, at least not obviously. Music, films, e-books and apps, which once travelled in physical form, now travel as data streams, and it is far from settled that GATT disciplines follow them.

The WTO's response was practical rather than doctrinal. In 1998, members agreed a suspension on customs duties on electronic transmissions, renewed at successive ministerial conferences, most recently at MC13 in Abu Dhabi in February 2024 (World Trade Organization [WTO], 2024). A moratorium is not a legal classification. It is a political promise not to resolve the question by taxing the thing in dispute.

GATS: the natural candidate, with a catch

Most commentators regard the GATS as the better fit for digital services. Cross-border supply by electronic means falls under Mode 1, and the core disciplines of most-favoured-nation treatment (Article II), market access (Article XVI) and national treatment (Article XVII) can in principle reach it (General Agreement on Trade in Services [GATS], 1994).

The catch is architectural. Apart from Article II, the GATS is a positive-list agreement: market access and national treatment apply only to the extent a member has scheduled them. Most members drew up their schedules in the early 1990s using the then-current Services Sectoral Classification List. An "online streaming service", a "cloud storage" offering or a "ride-hailing platform" appears nowhere in those documents. Whether such services sit under an old heading (audiovisual, telecommunications, computer and related services) or fall outside the schedule entirely is the sort of question that the Appellate Body's technological-neutrality reasoning in US – Gambling and China – Publications and Audiovisual Products tried to answer, in favour of reading schedule entries dynamically (WTO, n.d.-a, n.d.-b). Those rulings help, but they are case-specific, they pre-date the current generation of platforms, and they provide little comfort to a developing member that has made limited commitments and cannot be sure what it has promised.

TRIPS: protecting the content, not trading it

TRIPS sets minimum standards for copyright, including protection of computer programs as literary works, and for enforcement (Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], 1994). It remains the primary multilateral instrument for intellectual property online. But its subject is the protection of rights, not the conditions of trade. Burri has argued that the emerging idea of "data as a trade object", covering datasets, algorithms and AI models that sit uneasily within traditional IP categories, is exposing the limits of the TRIPS framework (Burri, 2023).

The cumulative effect

Taken together, the three agreements produce what the Secretariat and scholars have described as a three-way ambiguity (WTO Secretariat, 2023). A single online transaction may be framed as a good, a service or an IP matter, and the framing carries the outcome. The consequences are practical rather than theoretical:

Predictability suffers because businesses and regulators cannot tell in advance which obligations apply. Strategic framing becomes possible because well-resourced members can argue for whichever classification gives them the most favourable result, while regulatory space remains uncertain for governments adopting local-content or data-localisation requirements.

Put plainly, the existing regime was never designed for electronic commerce. It reaches online trade by analogy, and analogy is a thin foundation on which to hang binding legal obligations.

The Regulatory Vacuum

The Joint Statement Initiative and the E-Commerce Agreement

The WTO did not ignore the problem. Its 1998 Declaration on Global Electronic Commerce launched a work programme, but years of discussion produced no binding rules (WTO, 1998). In December 2017, at MC11 in Buenos Aires, a group of members started the Joint Statement Initiative (JSI) on E-commerce. By 2023 it counted more than ninety participants accounting for the large majority of world trade, and its agenda included electronic authentication, consumer protection, spam, cybersecurity, cross-border data flows and a permanent ban on duties on electronic transmissions (WTO Secretariat, 2023).

The JSI, however, exposed fault lines. Gao identifies two that matter here (Gao, 2024). The first is a divide between free-flow-of-data advocates, notably the United States and other developed economies, and members who prioritise data localisation and digital sovereignty. The second concerns process: some members, India and South Africa among them, objected on principle to rule-making outside the consensus-driven WTO framework, fearing that a plurilateral text would later be presented to the wider membership as a fait accompli.

Events since the dissertation on which this article builds was completed have sharpened the picture. At MC14 in Yaoundé (26 to 30 March 2026), ministers could not agree a package. The multilateral e-commerce moratorium, which MC13 had extended only until MC14, lapsed on the close of the conference, for the first time in about twenty-eight years (European Commission, 2026; UK Parliament, 2026). In its place, 66 members, said to represent roughly seventy per cent of world trade, endorsed a path to implement an E-Commerce Agreement on an interim basis, with the intention of eventually incorporating it as a plurilateral agreement in Annex 4 of the WTO Agreement (European Commission, 2026; UK Parliament, 2026). Several members, including the United Kingdom, also undertook to continue observing the moratorium among themselves as a stopgap while discussions in Geneva continued (UK Parliament, 2026).

This is progress of a sort, but it does not close the vacuum. It relocates it. For non-participants, the rules that actually apply remain the old classification puzzle, and the lapse of the moratorium has reopened a question many assumed settled: whether a member may impose customs duties on electronic transmissions. A multilateral gap has been replaced by a two-tier system, in which those inside the plurilateral arrangement enjoy certainty and those outside it do not.

A weakened referee

A regulatory framework is only as credible as the means of enforcing it. Here, too, there is trouble. The Appellate Body has been unable to function since December 2019 because of the blocking of appointments, driven largely by objections to perceived judicial overreach, delay beyond the DSU's ninety-day period for appeals, and the treatment of trade-remedy measures (Shaffer et al., 2023). Foster reads the crisis as a collision between the Appellate Body's legalism and the dominant trading powers' attachment to policy independence (Foster, 2023).

The significance for digital trade is direct. Technological-neutrality reasoning was developed through Appellate Body reports. Without appellate review, a panel report may be appealed "into the void", and the interpretive work that might gradually settle classification questions stalls. Alternatives exist, notably Article 25 DSU arbitration and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), but they depend on consent and, as the DSU's own history shows, Article 25 has been used rarely (Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU], 1994). A member that cannot rely on appellate review, and cannot easily retaliate against a larger economy, has a weaker hand than the DSU promised on paper (Charnovitz, n.d.).

Implications for Developing Economies: Nigeria as a Case Study

Why the vacuum bites harder at the periphery

The classification problem is not neutral. Developed economies with large digital firms benefit from open data flows, duty-free transmissions and light-touch rules. Developing economies often want

policy space: room to tax digital services, to build domestic platforms, to require data to be stored locally. Rodrik's argued that the multilateral trading system can squeeze the policy tools that earlier industrialisers relied on has particular force here (Rodrik, 2011). A permanent moratorium on duties is not costless for a country whose customs revenue is substantial and whose digital imports are rising. Equally, the lapse of the moratorium is not an unqualified opportunity for developing members; tariffs on digital imports may raise domestic costs for businesses and consumers.

Nigeria's legal position

Nigeria is a dualist state in the formal sense. Section 12(1) of the 1999 Constitution provides that no treaty between the Federation and another country has the force of law unless enacted by the National Assembly. (Constitution of the Federal Republic of Nigeria, 1999, s. 12(1)) The Supreme Court confirmed the point in Abacha v Fawehinmi, while also recognising that unincorporated treaties are not irrelevant: they can shape interpretation and create legitimate expectations (Abacha v. Fawehinmi, 2000). Section 254C(2), which gives the National Industrial Court jurisdiction over matters arising from treaties in the field of labour and employment, is an exception of limited reach and of no real assistance to trade law.

The practical consequence is a gap between what Nigeria has promised internationally and what a Nigerian court or regulator may apply. WTO obligations bind Nigeria on the international plane. At home, they operate through domesticating legislation, and where that is missing or patchy, domestic measures on digital services, data and taxation can drift away from WTO commitments without anyone noticing, until a trading partner does. That drift is exactly what Elias identifies when he describes a structural gap between Nigeria's international obligations and its domestic implementation (Elias, 1972; Olatoye, 2015).

Capacity, coordination and participation

The empirical literature, thin as it is, points in a consistent direction. Chianu attributes Nigeria's low involvement in the DSU to limited expertise in international trade law, weak performance within the relevant ministry and a reactive approach to disputes (Chianu, 2010). Olatoye adds the lack of technical depth, uncoordinated trade policy and poor inter-agency collaboration (Olatoye, 2015, 2019). Charnovitz's observed that retaliation under the DSU favours economically stronger members completes the picture: even if Nigeria wins, it may be unable to enforce its win (Charnovitz, n.d.).

Digital trade magnifies each weakness. Effective participation in the E-Commerce Agreement, or in shaping what comes after, demands technical fluency across data protection, cybersecurity, taxation, competition and telecoms. In Nigeria those responsibilities are spread across several agencies, including the Federal Ministry of Investment, Trade and Industry, the Federal Competition and Consumer Protection Commission, the Federal Inland Revenue Service and the sectoral regulators. When no single institution holds the whole picture, Nigeria's negotiating posture risks being a patchwork.

What Germany can and cannot teach

The dissertation that informs this article compared Nigeria with Germany. The comparison deserves care. Germany's strengths, namely a firm commitment to multilateralism, efficient customs administration under the EU Customs Code and sustained investment in research and innovation, rest on EU membership and an economy of a different scale (German Foreign Trade and Payments Act, 1961, as amended 2013; Union Customs Code, n.d.). Nigeria cannot copy them. It can, however, take three transferable lessons. First, that a state can combine openness with security screening: Germany's Foreign Trade and Payments Act pairs liberalisation with authorisation requirements where public security demands it. Second, that trade facilitation pays for itself in reduced border delay. Third, that capacity is built deliberately and over time. In the African context, Nigeria's participation in the African Continental Free Trade Area offers a regional counterpart to Germany's use of the EU, and a place to develop and test digital trade rules suited to African conditions.

Proposals for Reform

The following proposals are offered at the national and multilateral levels.

Multilaterally: a binding digital trade framework with development built in. The long-term goal should remain a multilateral, consensus-based agreement, or at the least a plurilateral agreement open to later accession on fair terms. Its text should address classification head-on, by stating that a digitally delivered product is to be treated according to its function, and should specify the legal status of customs duties on electronic transmissions rather than leaving the matter to successive political renewals. Special

and differential treatment should be real: longer implementation periods, technical assistance tied to concrete milestones and flexibility on data governance.

Resolve the enforcement gap. Without a functioning appellate stage, even sound rules lose force. Developing members have an interest in supporting reform of the appeal process, and in the interim should assess whether joining the MPIA or agreeing Article 25 arbitration in specific disputes serves them better than the current stalemate.

Nigeria: legislate. Parliament should consider a dedicated statute addressing Nigeria's position on digital trade and the domestication of relevant WTO commitments, so that the dualist gate in section 12(1) does not become a bottleneck. The statute should coordinate with existing instruments, notably the Nigeria Data Protection Act 2023 and the tax measures on digital activity introduced through the Finance Act 2023 and related orders, rather than operating in parallel.

Nigeria: institutionalise coordination. A standing inter-agency body, with a defined mandate and a technical secretariat, should hold Nigeria's digital trade position. Its job would be to brief Geneva delegates, to review proposed legislation for WTO consistency before enactment and to track developments such as the status of the moratorium.

Invest in the people. The capacity problem identified in the literature is, in the end, a human one. Sustained training for trade officials and practitioners in WTO law, with particular attention to dispute settlement and digital issues, would be among the cheapest and most durable reforms available. Partnerships with universities, the Nigerian Institute of Advanced Legal Studies and the Advisory Centre on WTO Law deserve exploration.

Use the regional platform. The AfCFTA's digital trade work offers a forum for African states to articulate shared positions before they arrive in Geneva. Speaking with one voice is a better strategy for smaller economies than speaking separately.

CONCLUSION

The WTO remains indispensable. Its rules brought predictability to trade in goods and services for a generation, and nothing yet matches its dispute settlement architecture in ambition. But its digital trade law is fragile: classification uncertainty makes the existing rules unpredictable, the moratorium that papered over the gaps has lapsed, the plurilateral alternative has opened a two-tier system, and the machinery for settling disputes is damaged.

For developing economies such as Nigeria, these are not abstract worries. They affect revenue, regulatory space and the ability to take part in the rules that will govern the next phase of the global economy. Nigeria cannot repair the multilateral system alone. It can, however, close the gap between its international commitments and domestic law, invest in the capacity to defend its interests, and join with other African states to ensure that when the rules for digital trade are finally written, they are written with developing countries in the room.

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