



**Discussions on
Electronic Transmissions
at the Council for Trade in Goods
and its subsidiary bodies**

Roy Santana
Market Access Division
World Trade Organization

In this presentation:

1. CTG mandate on e-commerce
2. CTG work and discussions on electronic transmissions
3. CV - Decision on Carrier Media Bearing Software

1. CTG mandate on e-commerce

1. CTG Mandate [\(WT/L/274\)](#)

- Following the 1998 Declaration on Global Electronic Commerce ([WT/MIN\(98\)/DEC/2](#)) and the adoption of the Work Programme ([WT/L/274](#)), the CTG was instructed to:
 1. Examine and report on aspects of electronic commerce relevant to the GATT 1994, the multilateral trade agreements covered under Annex 1A of the WTO Agreement, and the approved Work Programme
 2. Report to the General Council
- Subsequent Ministerial Conferences have continued instructing the GC to hold periodic reviews of the Work Programme based on reports submitted by the relevant WTO bodies, including the CTG





1. CTG mandate [\(WT/L/274\)](#)

The issues to be examined shall include:

- market access for and access to products related to electronic commerce;
- valuation issues arising from the application of the Agreement [on Customs Valuation];
- issues arising from the application of the Agreement on Import Licensing Procedures;
- customs duties and other duties and charges as defined under Article II of the GATT 1994;
- standards in relation to electronic commerce;
- rules of origin issues;
- classification issues.



2. CTG work and discussions on electronic transmissions



2.1 Informal dedicated meetings: 1998-2001

- Informal CTG meetings dedicated to E-Commerce were conducted from end-1998 to mid-2001 on the basis of Secretariat background notes
- **1998 Background Note by the Secretariat** ([G/C/W/128](#)):

“1.2 An important question which touches on all subjects discussed in the subsequent paragraphs relates to **the characterization of electronic transmissions**. As the terms “goods” and “services” are not explicitly defined under the GATT and the GATS, **the question arises under what circumstances, if any, can digitized products be characterized as goods?** It appears that an answer to this question lies at the core of the work programme on electronic commerce, and will require further debate among Members. The subsequent discussion will attempt to raise some considerations for the case that certain digitized products would be characterized as goods.”



2.2 CTG - Informal dedicated meetings: 1998-2001

1998 Background Note by the Secretariat ([G/C/W/128](#)):

- **The HS classification and classification of tradeable non-physical data over the Internet**
(The HS does not have a classification for the content itself; software classified under the type of carrier media it is contained on.)
- **Market access for IT products, such as hardware and software, which are essential infrastructure for data flows** (E-commerce cannot be conducted without access to the essential infrastructure components; ITA seeks to eliminate tariffs on products essential to the infrastructure for electronic commerce.)
- **Application of Article II of the GATT to electronic transmissions** (If decided that customs duties apply to certain electronic transmissions, then the duties and ODCs should not exceed those outlined in the schedule of the WTO Member.)
- **Customs valuation issues, e.g. software imported without carrier media**
(Reference to the Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment)
- **Rules of origin issues** (Questions could arise where data is sent electronically between two countries and is subsequently stored in a physical carrier medium or used for the production of a physical good)
- **Import licensing issues** (If data transmitted is a good *and* license requirement, prior approval in the form of a license would be required)
- **Standards in relation to e-commerce** (1. the extent to which TBT can be enforced on electronic transmissions considered to be goods; and 2. the extent to which standards will themselves be traded electronically).

More on
this later



2.3 CTG - Informal dedicated meetings: 1998-2001

Chairman's summary of the discussions held in the CTG was submitted to the General Council in 1999 ([G/C/W/158](#) and [WT/GC/24](#))

- Discussions concerning the characterisation of electronic transmissions:
 - Is it necessary to define the concept “electronic transmissions”?
 - Do WTO provisions in the goods area apply if electronic transmissions are considered “goods”?
 - Is the electronic transmission of data itself is a delivery of service covered by the GATS?
 - Can the disciplines of the GATT 1994 be applied to digitalized content delivered through electronic means in so far as they could be characterized as goods); For example:
 - Can downloaded software and software recorded in a physical media be considered to be “like products”?
 - Is downloaded data an “import” in the sense of Article II of the GATT?
 - Is it appropriate to use the distinction of “goods” and “services” given that many digitalized products traded over the Internet do not need to be stored in a carrier media?

“2.11 The discussions showed that there was a wide range of opinions and questions regarding the characterization of the content of electronically transmitted digitalized data, including the question whether such a characterization was actually bringing discussions on the work programme forward.”



2.4 CTG - Informal dedicated meetings: 1998-2001

Chairman's summary of the discussions held in the CTG was submitted to the General Council in 1999 ([G/C/W/158](#) and [WT/GC/24](#))

11. Concluding note by the Chairman

11.1 On the basis of discussions to date, it appears that a majority of delegations believe that most aspects of electronic commerce delegated to the CTG for discussion **can only be meaningfully addressed once a determination has been made if, and under what circumstances, electronic transmissions can be considered as services, goods, or something else.** This question of characterization of electronic transmissions, however, is one of the “trade-related issues of cross-cutting nature”, which, according to paragraph 1.2 of the work programme, the General Council shall take up for consideration. In light of these considerations, Members agreed to continue discussions on this matter, if required, in the context of the results of the interim review of progress in the implementation of the work programme, foreseen in the General Council.



2.5 CTG - Stall in the discussions: 2001-2011

- **March 2001 CTG meeting:** agreed that, pending the clarification of characterization of electronic transmissions, discussions on certain issues in the area of competence of the CTG, such as market access and trade facilitation, could proceed. ([G/C/M/46](#))
- Following the 2001 Doha Ministerial Declaration, the General Council determined that the most appropriate institutional arrangements for continuing the Work Programme would be for the subsidiary bodies, including the CTG, to continue their work while discussions on cross-cutting issues would be guided by a DDG. ([WT/GC/M/72](#))
- Members deemed that they had gone as far as they could with regard to technical goods matters, pending a clarification of the classification issue by the General Council.
- June 2003 CTG meeting was the last in which E-Commerce was included as a separate agenda item. There had been no substantial discussions on this matter in the CTG during 2002-2003 due to the fact that the horizontal issues remain under discussion in the General Council and the CTG had not been asked to address any matter in particular. ([G/C/M/70](#))

➔ **No substantive discussions took place in the CTG after the Doha Ministerial Conference**



2.6 CTG - Restarting the discussions: 2011 onwards

- **MC7 – Geneva 2009:** Ministers agreed to reinvigorate the Work Programme and instructed the General Council to hold periodic reviews ([WT/L/782](#))
 - Subsequent Ministerial Conferences stressed the importance of the Work Programme and instructed the GC to hold periodic reviews based on the reports submitted by the WTO bodies
- The Work Programme has been included in each meeting of the CTG ever since**
- **2011-2015:** Discussions in the CTG revolved around the Moratorium; the relationship between E-Commerce and development; and the effective participation of developing countries and LDCs in as a means to combat poverty.
 - Chairpersons frequently encouraged Members to hold discussions, but Members were not particularly active in expressing their opinions or making suggestions during this period.

For an overall summary, see [JOB/GC/73](#)



2.7 CTG restarts discussions: 2016-2018

2016-2018: New proposals were submitted to the CTG following the Nairobi Ministerial and the 2015 Ministerial Decision on the Work Programme ([WT/L/977](#)). For example:

- A communication exploring existing and potential E-Commerce related WTO commitments, mechanisms, and frameworks
- A non-paper outlining a number of trade-related policies that can contribute meaningfully to the flourishing of trade through electronic and digital means
- A communication proposing discussions on promotion and facilitation of cross-border trade in goods enabled by Internet, together with services directly supporting such trade
- Proposals on enabling developing Members and LDCs, and their SMEs and disadvantaged groups to better participate in and benefit from international trade and global value chains
- Proposals focused on cyberspace trade barriers and on how cyberspace "intrudes" on physical space

But there were only sporadic references to "electronic transmissions":

- e.g. South Africa noting that more clarity was needed with regard to the references in various non papers by Members to terms such as "digital trade", "digital economy" and "digital product": What did they mean, and how were they related to E-Commerce? What were the "digital/digitized/digitizable products"? Were "digital products" more akin to goods or services? What was an "electronic transmission"? Would goods ordered online but delivered offline fall under the Work Programme definition of "E-Commerce"?



2.8 Discussions leading to MC11 and beyond

- **MC11 – Buenos Aires 2017:** While some Members indicated their wish to identify the goods-related issues in E-Commerce as potential deliverables at MC11, other Members raised the development component and requested a further clarification of the definitions.
- A number of Members pointed out the benefits and opportunities that E-Commerce could provide to developing countries, LDCs, and SMEs. Others referred to the digital divide and the stark differences in capacities and supporting infrastructure among Members and sought an increased focus on bridging the digital gap.
- Ministers agreed to continue the Work Programme ([WT/L/1032](#))
- **After 2019:** relatively few interventions on electronic transmissions at the CTG:
 - South Africa and India referred to three submissions to the GC explaining their understanding of the scope of the Moratorium.
 - The African Group saw merit in the CTG engaging in a deeper conversation about *inter alia* the scope and definition of electronic transmissions, including whether all Members have a common understanding of what electronic transmissions entail.

3. Customs valuation: Decision on Carrier Media bearing software



3.1 Decision by the Committee on Customs Valuation

- The “**Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment**” was originally adopted by the Tokyo Round Committee on 24 September 1984 ([VAL/M/10](#), paragraph 7). GATT document [VAL/8](#) and Chair’s statement in [VAL/8/Add.1](#).
- Adopted by the WTO Committee on Customs Valuation at its first meeting on 12 May 1995 ([G/VAL/5](#))
- Recognizes there is a “**unique situation**” with regard to data or instructions (software) recorded on carrier media for data processing equipment.
- For those parties wishing to do so, the Decision allows for a different approach that would also be consistent with the Agreement on Customs Valuation.
- Those Members adopting the practice referred to in paragraph 2 of the Decision shall notify the Committee of the date of its application.



Software - Hardware



“Instructions or data for automatic data-processing machines”

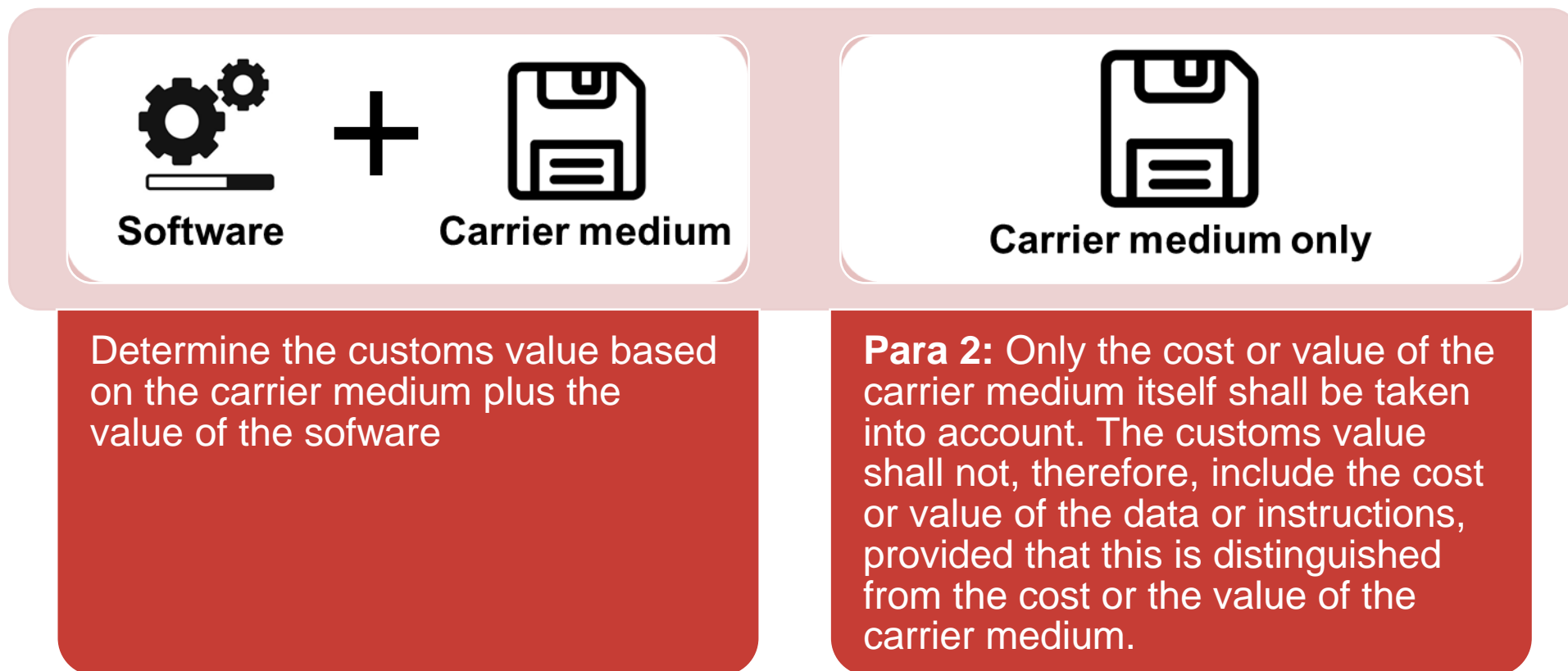
“Automatic data processing machines”

Language still used today in the HS to refer to computers (HS 84.71)



3.2 Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment

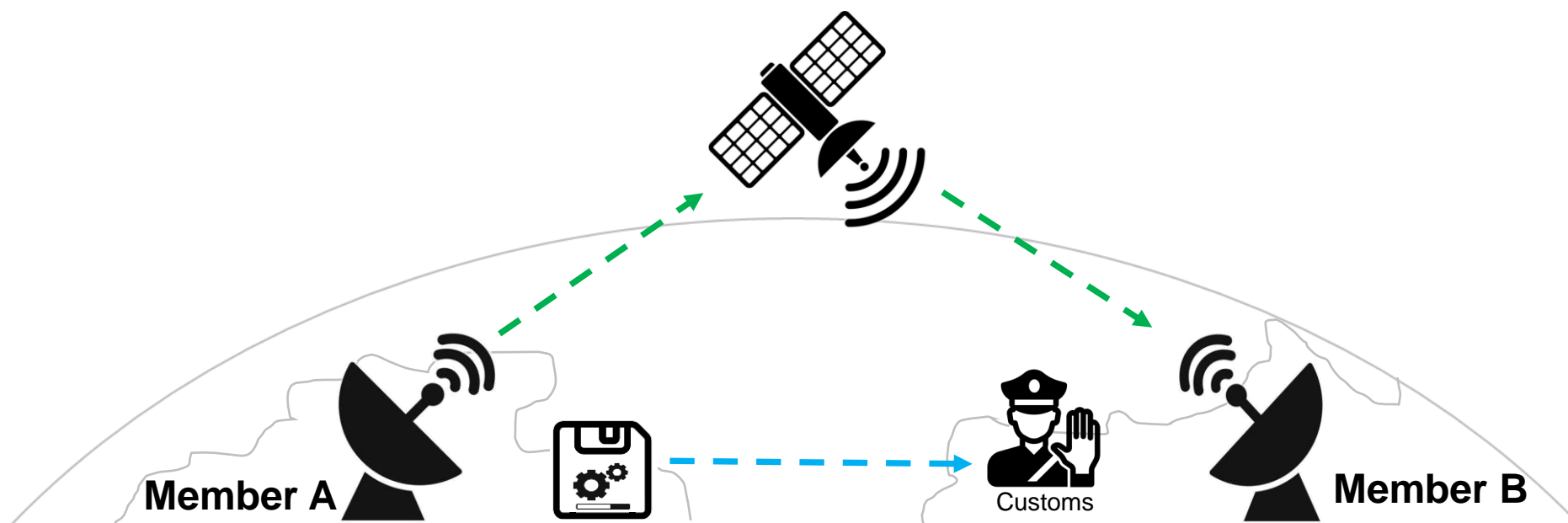
Allows for two possible ways of determining the customs value of carrier media bearing software for data processing equipment, but of which are consistent with the CVA.





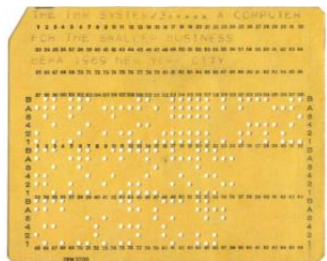
Unique situation? [VAL/M/10](#), para.5, which refers to Chair's statement reproduced in [VAL/8/Add.1](#)

“In the case of imported carrier media bearing data or instructions for use in data processing equipment (**software**), it is essentially the carrier media itself, e.g. the tape or the magnetic disc, which is liable to duty under the customs tariff. However, the importer is, in fact, interested in using the instructions or data; the carrier medium is incidental. Indeed, if the technical facilities are available to the parties to the transaction, **the software can be transmitted by wire or satellite**, in which case the question of customs duties does not arise. In addition, the carrier medium is usually a temporary means of storing the instructions or data; in order to use it, the buyer has to transfer or reproduce the data or instructions into the memory or data base of his own system.”



What is a “carrier medium”?

- Software used to require a “**carrier medium**” in order to move it from one country to another
- **Problem**: some of these carrier media could also contain other contents



For the purpose of this Decision, the expression "carrier medium" shall not be taken to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices; the expression "data or instructions" shall not be taken to include sound, cinematic or video recordings.



HS 8523.49



HS 95.04



Different HS classification can lead to a different tariff treatment



“In taking this decision on the valuation of carrier media bearing software for data processing equipment, it is understood that should any difficulties arise in the implementation and application of the decision, it would be useful for those difficulties to be considered by the Parties to the Agreement.”

Chair’s statement reproduced in [VAL/8/Add.1](#)

“The applicability of the WTO Agreement on Customs Valuation (CVA), particularly the Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment (VAL/8), was also a controversial issue. In the absence of a decision on the characterization of electronic transmission as goods, some Members considered that the scope of the CVA and the Decision on Carrier media could not be extended to trade in electronically transmitted data.”

E-commerce, Background Information by the Secretariat, [JOB/GC/73](#), para 4.43

2013 Proposal by Uruguay to update the carrier media decision to take account of USB flash drives. No consensus was reached at the Committee on Customs Valuation.

See [G/VAL/W/241/Rev.1](#)

Thank you!

Roy.Santana@wto.org

