

Digital Convergence and Electronic Commerce: Customs and Trade Implications

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This article covers emerging trade issues driven by the rapid expansion of goods incorporating digital products. Historically, trade bodies and agreements struggled to develop a uniform policy concerning software, the earliest digital product. In large part, the difficulty arose from differing rules for goods and services. As digital content expanded beyond software and became embedded in a wide array of products, the goods or services distinction grew in importance, while simultaneously becoming more difficult to administer. Recent free trade agreements (FTAs) have addressed this digital convergence through electronic commerce provisions that do not rely on traditional goods/service distinctions but seek instead to unify the treatment of digital goods across product lines and delivery means.

To appreciate the significance of the new digital commerce provisions, this article first presents the treatment of digital products in the absence of digital commerce provisions. Second, an analysis of the digital commerce provisions in recent trade agreements is presented. The expansion of digital commerce provisions and its implication on other taxes is then presented. This article concludes with a discussion of the possible relationship between most favoured nation (MFN) provisions of service agreement and digital commerce provisions and a case study concerning a recent digital convergence product – e-books.

I. INTRODUCTION

The last multilateral trade agreement was completed in 1992 – thirteen years before the iPod was introduced. At the time, goods were traded and services were exported and ‘digital convergence’ was not yet mainstream lexicon. In the intervening years, the line between ‘goods’ and ‘services’ has blurred, especially in the electronics industry, where digital content – be it camera software embedded into a mobile phone or video on an MP3 player – defines the value of the physical good. This convergence of goods and services has vexed trade policymakers who prior to digital convergence neatly packaged trade into goods issues and service issues. Indeed, fundamental questions, such as when – and if – to collect tariffs and taxes on digital products embedded into hardware, remain unanswered.

From a customs perspective, digital convergence has significant implications. For example, if an MP3 player has material costs of USD 90 and a retail price in excess of USD 400, with a significant portion of the difference attributable to embedded software, a

number of questions arise. Should the embedded software be considered a service or a good? If the embedded software is a service, should customs duties and import taxes be assessed on the hardware portion or on the full value of the product, inclusive of the embedded software?

Historically, the World Trade Organization (WTO) Committee on Customs Valuation sanctioned the practice of valuing carrier media bearing data or instructions (software) for use in data processing equipment either inclusive or exclusive of the value of the software recorded on carrier media.¹ Not only did this decision leave the ‘dutiability’ of digital products unanswered, it relied on terms that were superseded by technological advances.

Later, the Information Technology Agreement (ITA) attempted to address digital convergence, at least in the software context. However, in application, the ITA suffered from significant scope limitations. Many countries – including the United States – limited the scope of the ITA to products classified as traditional ‘carrier media’ and a small number of specifically

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1 Committee on Customs Valuation of the General Agreement on Tariffs and Trade (GATT) adopted on 24 Sep. 1984 a decision regarding the customs valuation of carrier media bearing data or instructions for use in data processing equipment. The decision indicates that the merchandise may be valued either inclusive or exclusive of a value element for the data or instructions.

identified products. As a result, only software on traditional carrier media (e.g., diskettes, CDs) is within the scope of the ITA. Imports of other products incorporating software (e.g., software pre-loaded on the hard drive of a computer) are outside the scope of the ITA because computers are not a 'carrier medium' and, therefore, outside the scope of the ITA.²

The next policy initiative concerning the convergence of goods and services was the import duty moratorium on electronic commerce. The moratorium originated in 1998 when the WTO Member States agreed to a two-year customs duty exemptions on 'electronic transmissions'.³ While effective in eliminating import duties on digital products transmitted electronically, its narrow application did not address convergent electronics.

Recent free trade agreements (FTAs) have adopted a more useful framework and, finally, have begun to directly address digital convergence in a meaningful way. Namely, a series of recent FTAs – including those to which the United States is a member – contain 'electronic commerce' provisions. For example, FTAs between the United States and Central America (Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and the Dominican Republic), Singapore, Chile, Australia, Peru, Morocco, and Bahrain all provide that customs duties will not be assessed on the value of an embedded digital product, irrespective of its classification.

The first critical element in these 'second generation' FTAs is the movement away from 'software' and to 'digital content' as the focal point. Digital content is much more than software. The second critical element is expansion of the term 'carrier media'. By defining carrier media as 'any physical product capable of carrying digital product', the artificial limitations imposed by the ITA are eliminated. By any measure, these provisions represent groundbreaking changes in trade law by unifying and addressing products that embed a 'good' and a 'service'.

However, because digital commerce provisions are exclusive to bilateral FTAs a wide variety of

implementation and application issues have arisen. For example, since the genesis of the electronic provisions is within a bilateral framework, does the origin of the digital product become an important consideration? If so, what should be the applicable origin rules since digital origin may be more indeterminable than goods origin? Finally, what are the implications of most favoured nation (MFN) provisions if one FTA has an electronic commerce provision, while another does not? As this area is in its infancy, many of these questions remain unanswered. Provided below is an outline of the emerging issues and potential outcomes, presented from the perspective of two recent FTA partners; the United States and Peru.

2. THE DIGITAL COMMERCE PROVISIONS IN PERSPECTIVE

Central among the benefits of the electronic commerce provision is the exclusion of digital products from the assessment of customs duties. This exclusion is accomplished by allowing the customs value of an imported product to be based on the *net* of the value of a digital product. If a product is imported with both hardware and software, the applicable customs duty is applied only against the value of the imported hardware.

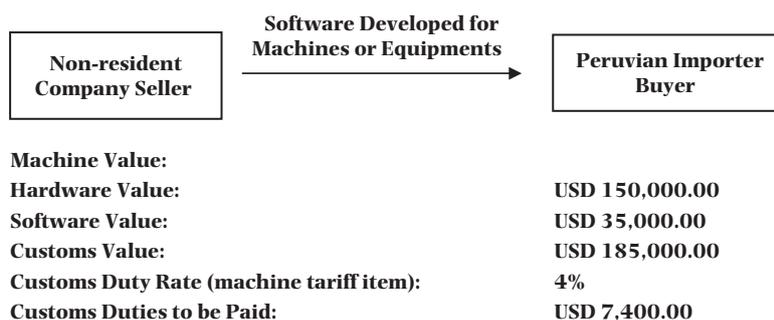
To appreciate the significance permitting this digital content exclusion irrespective of classification, consider the recent history of digital commerce in Peru, which is similar to models adopted in other countries. In 1997, the Peruvian Customs Authority published its Software Customs Valuation Procedure ('Software Procedure'), establishing criteria for determining the customs value of software recorded on a carrier medium.⁴ Software importations into Peru⁵ were assessed customs duties in accordance with the following schedule:⁶

- *Software for common use*: Considered a good and its customs value composed the value of the carrier medium and the value of the software. Therefore,

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- 2 The applicability of the software exclusion was further limited by the exclusion of data or instructions recorded or encoded by means of integrated circuits, semiconductors and similar devices, or articles incorporating such circuits or devices. Moreover, the term 'data or instructions' was not to be interpreted as including sound, cinematic, or video recordings. These limitations eliminated the digital product duty exclusions on most products in-bound into the United States. *US Valuation of Imported Carrier Media Bearing Data or Instructions for Use in Data Processing Equipment*, 50 Fed. Reg. 144 (6 Jul. 1985).
- 3 WTO Members adopted a Declaration on global electronic commerce on 20 May 1998 at the Second Ministerial Conference in Geneva.. The Declaration directed the WTO General Council to establish a work program to examine all trade-related issues arising from electronic commerce. The 1998 Declaration also included a moratorium stating that 'Members will continue their current practice of not imposing customs duties on electronic transmission'.
- 4 Official Gazette El Peruano, Resolution No. 001551, 11 Jun. 1997.
- 5 For customs purposes and according to the Software Procedure, the international transfer of software recorded on a carrier medium was considered as merchandise. The transfer of software was usually supported by granting a software license to the importer for a specific time period.
- 6 *Ibid.*, Ch. 5.

Figure 1: Example of Software Importation Related to a Machine



customs duties were imposed on the full value of the imparted product.

- *Software developed for machines and equipment:* Considered as a part of the machine or equipment, therefore the value of the software was also charged with import duties at the tariff rate applicable to the imported machine or equipment, even if the software entered into Peru separately from the goods.
- *Customized software not related to imported goods:* Considered a service and not a transfer of goods, thus the customs value included only the carrier medium value.
- *Software upgrades:* If the original imported software was charged with customs duties and the upgrades were covered under the license contract period, the customs value only included the value of the carrier medium.
- *Software with undefined value at the time of customs clearance:* This classification included commercial software whose license was activated after the importer evaluated the software programs and determined which items to purchase. After customs clearance and before software license activation, the customs value included only the value of the carrier medium. After the license activation, the importer must pay the customs duties based on the value of the activated software.
- *Additional software license users:* The customs value for additional software license users was considered as copyright, therefore the customs value was based on the value of the paper on which the contract was printed.

- *Patch technical fixes software:* The customs value was based on the value of the carrier medium.

Consistent with the ITA, Peru modified and simplified the former Software Procedure by introducing two types of software for customs valuation purposes: the taxable and non-taxable software.^{7,8} Much like the rest of the world, the distinction was classification based.

Software was considered dutiable if a hardware, equipment, or machine required software in order to function. The software was dutiable at the rate associated with the hardware, equipment, or machine requiring the software. For example, operating software such as Windows and Mac Operating software were dutiable with the computers on which the software was loaded.⁹

Non-dutiable software was data processing software, that was not related to any hardware, equipment, or machine function. This software was exempt from import duties because it was considered a service. Examples of non-taxable software include application software programs, such as Microsoft Office, antivirus software, and software developed by request or customization.

The United States took a similar approach. In 2002, the United States noted that Decision 4.1 adopted in 1984 by the Committee on Customs Valuation of the GATT (now the WTO Committee on Customs Valuation) sanctioned the practice under the WTO Valuation Agreement of valuing carrier media bearing data or instructions (software) for use in data processing equipment either inclusive or exclusive of the value of the software recorded on carrier media.

However, US Customs applies the software exemption only to imported carrier media bearing software.

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⁷ The Software Customs Valuation Procedure published in 1997 was modified by Resolution No. 000628 dated on 5 Aug. 1999. Few years later, this Resolution was modified by Resolution No. 000546 dated on 10 Dec. 2003, which was in force until 28 Jan. 2009. Resolution No. 000546, 10 Dec. 2003.

⁸ Peru is not yet a signature country of the ITA; however, the ITA Committee has agreed on its meeting held on October 2008 that the ITA schedule of Peru is pending of approval. It is anticipated that Peru will become soon the 72nd participant to the ITA.

⁹ *Ibid.*, Ch. 10.

For example, recorded data installed on the hard disk of a data processing machine (ADP) is deemed outside the scope of the ITA because the hard drive/software is classified as an ADP machine and not as 'carrier media'. Because, the imported product is an ADP machine, not a carrier medium bearing software, US Customs considers the importation outside the scope of the software exclusion of the ITA.¹⁰

In the limited cases where the ITA is applicable (e.g., software on a CD-ROM), customs value and duty is assessed on the value of the carrier medium only and exclusive of the value of the digital product. Moreover, US importers are not relieved of obligations under Article 19 CFR, section 141.86(a) to set forth the purchase price of each item imported on the invoice, which includes the digital product and the carrier media.

In most jurisdictions, the classification of the underlying product and the means by which the digital product is transmitted remain central to the applicability of customs duties on the cross-border transfer of digital content. This long-standing classification-based framework has been significantly altered by inclusion of digital commerce provisions in second generation FTAs.

3. DIGITAL PRODUCT AND CARRIER MEDIA IN SECOND GENERATION TRADE AGREEMENTS

The objective of the electronic commerce provisions in second generation FTAs is to eliminate tariffs on information technology products (hardware and digital content) and components, infrastructure equipment, medical equipment, and scientific instruments. This is accomplished by expansively defining 'digital product' so that it is not inherently tied to either a goods or services trade law framework and is independent of classification.

Nearly all second generation FTAs define 'digital products' to include 'computer programs, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically'.¹¹

Early second generation FTAs such as United States-Chile and United States-Australia recognized the significant shift being undertaken and included clarifying language such as 'for greater clarity, digital products can be a component of a good, be used in the supply of a service, or exist separately...'.¹²

In the same FTAs, carrier media is defined as 'any physical object capable of storing the digital codes that form a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes an optical medium, a floppy disk, and a magnetic tape'.¹³ Perhaps recognizing that the definition above converted any physical product into 'carrier media', certain agreements have added 'designed principally for use in storing a digital product' to the definition of carrier media. However, this qualifier is the exception.¹⁴ Given the extraordinarily broad definition of carrier media, the electronic commerce provisions of FTAs are applicable to a wide array of industries as digital instructions are incorporated into an increasing number of products.

Not only is the definition of digital products expansive and the definition of carrier media without classification limitations, the vast majority of customs duty exemptions in electronic commerce provisions are not specific to the partner countries. Specifically, only the United States-Morocco FTA predicates valuing carrier medium exclusive of the digital product on the digital production being 'of the other party'.¹⁵ Most other FTAs provide that the exception, irrespective of origin:

A Party shall not accord less favourable treatment to some digital products than it accords to others like digital products [o]n the basis that (i) the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, outside its territory; or (ii) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a *non-Party*.¹⁶

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10 See, for example, US Customs and Border Protection, HQ 965271 (23 Jan. 2002; 'Customs applies the software decision only to imported carrier media bearing software. Currently, the decision applies to recorded data installed on the hard disk of an ADP machine because the hard drive/software (i.e. carrier media bearing software) is separately classified from the ADP machine. As such, recorded data installed on the hard disk falls within the scope of the software decision. However, under the proposed modifications/revocations, T.D. 85-124 would not apply because recorded data installed on the hard disk of an ADP machine would no longer be classified separately from the ADP machine. Therefore, the imported product is the ADP machine, not the carrier medium bearing software, and outside the scope of the software decision').

11 See, for example, US-Singapore Free Trade Agreement, Art. 14.4(2).

12 US-Australia Free Trade Agreement, Art. 16.8(4).

13 *Ibid.*, Art. 16.7(2) (emphasis added).

14 CAFTA, Singapore, Bahrain, Oman, Australia, and Morocco Agreements do not contain the phrase 'designed principally for use in storing a digital product' in the definition of carrier media. Peru and Korea do contain the phrase and Chile does not define carrier media.

15 US-Morocco Free Trade Agreement, Art. 14.3(2).

16 See, for example, US-Singapore Free Trade Agreement, Art. 14.3(3)(a)(2) (emphasis added).

4. THE RAPID EXPANSION OF ELECTRONIC COMMERCE PROVISIONS

Since the US FTA with Chile, every FTA negotiated by the United States has contained a digital commerce provision. The applicable provisions are summarized in Table 1.

Likewise, Peru has executed a number of FTAs incorporating digital commerce provisions. It signed its second FTA with Canada, which came into force on 1 August 2009. This FTA sets forth the digital exclusion provision, which provides in Article 1503 that neither Peru nor Canada may charge customs duties, fees, or charges on the importation or exportation of digital products through electronic means.

According to the Peru-Canada FTA, the term digital product includes any computer programs, text, video, images, sound recordings, and other products that are digitally encoded. The FTA does not define the term 'electronic means' but explains the action of delivering something electronically. It can be interrelated as being delivered through telecommunication,¹⁷ alone or in conjunction with other information and communication technologies. The Agreement does not expressly set forth the treatment of digital products recorded in a carrier medium, unlike the United States FTA.

Peru's FTA with Singapore came into force on 1 August 2009 and like the other FTAs, its Chapter 13 establishes the digital exclusion provision. According to this FTA, both countries shall not charge customs duties on electronic transmissions and unnecessary barriers on electronic transmission should be avoided.

For the purposes of this FTA, digital products are 'computer programs, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically'. Carrier media refers to the transfer of digital products using any 'electromagnetic or photonic device'.

5. THE IMPLICATION OF ELECTRONIC COMMERCE PROVISIONS ON INDIRECT TAXES

In general, the FTA electronic commerce provisions are aimed at eliminating customs duties on

the importation or exportation of digital products transmitted electronically or recorded in a carrier medium. This is in accordance with the WTO agreements and electronic commerce provisions. However, apart from the customs duties, there are other duties and taxes charged on importations, which could be eliminated by FTAs and their digital commerce provisions.

According to the United Nations Conference on Trade and Development (UNCTAD),¹⁸ there are two additional types of additional duties levied on importation: (1) customs surcharges that are levied only on imports; and (2) internal taxes that are levied on imports as well as on domestic goods. Both are usually assessed on the customs value of the imported product.

Customs surcharges are usually a mixture of duties, including customs fees and uplifts or taxes such as statistical taxes, stamp taxes, or port taxes. The internal taxes are usually value-added taxes, sales taxes, or other types of consumption taxes.¹⁹ By redefining customs value, the FTA electronic commerce provisions do not only reduce customs duties, they could also reduce customs surcharges, tariff duties, and internal taxes that are levied on imports.

Based on a literal interpretation of the electronic commerce provisions, these Agreements could eliminate import VAT on digital products recorded in carrier medium or transmitted electronically because this is a charge related to the importation of goods and not to domestic sales.²⁰ Nevertheless, in practice, the Peruvian Tax Authority is imposing VAT on the importation of goods, including the digital products recorded in a carrier medium, even if goods are dispatched from an FTA exporting country.

The current FTAs, especially those signed with Peru and the United States, Canada, and Singapore, set forth expressly that:

nothing in this Chapter [Electronic Commerce] shall be construed to prevent a Party from imposing internal taxes or other internal charges on the domestic sale of digital products, provided that such taxes or charges are imposed in a manner consistent with this Agreement.

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17 The term telecommunication is not defined in Ch. 15 of the FTA – Electronic Commerce but in Ch. 10 – Telecommunications. According to the list of term definitions of Ch. 10 of the FTA, telecommunications means the transmission and the reception of signals by any electromagnetic means, including photon means.

18 Susanne Teltscher, 'Tariffs, Taxes and Electronic Commerce: Revenue Implications for Developing Countries, Policy Issues', in *International Trade and Commodities Study Series No. 5* (New York and Geneva: United Nations, 2000).

19 *Ibid.*, 21.

20 According to the Peruvian VAT Law and in general, the Peruvian VAT levies six different taxable situations: the sales of goods in Peru, the importation of goods into Peru, the services rendered in Peru, the use of services rendered by non-residents, the building contracts, and the first sale of real estate by builders.

Table 1 : Electronic Commerce Provisions of Second Generation Free Trade Agreements

Basis for Customs Duty Exclusion	US-Australia Neither Party may impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products, regardless of whether they are fixed on a carrier medium or transmitted electronically.	US-Singapore Each Party shall determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	US-Bahrain Each Party shall determine the customs value of an imported carrier medium bearing a digital product of the other Party based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	US-Central America For purposes of determining applicable customs duties, each Party shall determine the customs value of an imported carrier medium bearing a digital product based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	US-Chile For purposes of determining applicable customs duties, each Party shall determine the customs value of an imported carrier medium bearing a digital product based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	US-Morocco Each Party shall determine the customs value of an imported carrier medium bearing a digital product of the other Party based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	US-Peru For purposes of determining applicable customs duties, each Party shall determine the customs value of an imported carrier medium bearing a digital product based on the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.
Definition of Carrier Medium	Carrier medium means any physical object capable of storing a digital product, by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, including an optical medium, floppy disk, and magnetic tape.	Carrier medium means any physical object capable of storing a digital product, by any existing method or method later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes an optical medium, a floppy disk, and a magnetic tape.	Carrier medium means any physical object capable of storing the digital codes that form a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes an optical medium, a floppy disk, and a magnetic tape.	Carrier medium not defined.	Carrier medium means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, including an optical medium, a floppy disk, and a magnetic tape.	Carrier medium means any physical object designed principally for use in storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape.	Carrier medium means any physical object designed principally for use in storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape.

<p>Definition of Digital Product</p>	<p>Digital products means the digitally encoded form of computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically. For greater clarity, digital products can be a component of a good, be used in the supply of a service, or exist separately. The definition of digital products should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.</p>	<p>Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically.</p>	<p>Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded.</p>	<p>Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law.</p>	<p>Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically.</p>	<p>Digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically.</p>
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Therefore, the digital products that are going to be sold domestically can be levied with internal taxes or charges by the Contracting Parties, such as VAT (indirect taxes) or Income Tax (direct taxes). The Contracting Parties are not restrained to charge internal taxes on domestic sale of digital products.

6. CASE STUDIES: E-BOOKS EXPORTED TO PERU

Digital products may be imported by way of attachment to a physical carrier or an electronic transmission. However, the case of e-book readers highlight that even this distinction is not easily applied in the context of trade and customs law. While the e-book readers may be exported with a digital content embedded within them, additional digital content is added to the e-book through electronic transmission. Outlined below are a number of issues, from the perspective of the e-book importer in Peru sourcing from the United States.

At the starting point, the e-book reader crosses the border embedded with digital content. At the time of importation, the custom value of the product should be exclusive of software embedded in e-book reader.

After the reader is imported, digital books are then transmitted electronically (i.e., downloaded off the Internet) and used in Peru. This digital product (the book downloaded onto the e-reader) is not a physical good, but rather a service rendered by a non-resident person, when the digital product is exploited economically in Peru, namely is distributed, traded, or reproduced for commercial purposes according to a License Agreement. The non-resident service may be levied with VAT according to the use of services rendered by non-resident rules and the Peruvian VAT Law. The current VAT rate in Peru is 19%.

In accordance with Peruvian Law No. 28086 (hereinafter the 'Book Act'), a book is defined as a non-periodical medium where an author communicates his work in hard copies or in digital format, in order to transmit knowledge, opinions, experiences, or scientific, artist, literature creations. Moreover, an electronic book is defined as an edited, reproduced text by electronic means for its transmission, use, and exploitation in total or partially through Internet or other networks.

The Book Act provides that the importation and/or the domestic sales of books in hard or digital copies are exempted of VAT until 12 October 2015. Consequently, the sale of e-books through Internet or through the importation of a medium carrier that records an e-book is not levied with VAT.

However, the Bylaw of the Book Act limits the application of the e-books VAT exemption.²¹ This Bylaw establishes that only those books classified in specific customs tariff items can be exempted of VAT.²² These customs tariff items refer only to books in hard copies and not in electronic format. Therefore, the Tax Authority might apply the provisions of the Bylaw and not the provision of the Book Act in order to determine the VAT treatment for e-books.

For income tax purposes, the importation of e-books through Internet or medium carrier recordings is not levied with income tax, since the sale transaction of the e-books have occurred abroad.²³ However, if the non-resident supplier grants a license to a Peruvian company for distributing, selling, and reproducing e-books domestically, the Peruvian Company (Licensee) should pay a royalty to the Licensor and consequently, withhold the Corporate Income Tax (30%) and pay the VAT (19%), because the non-resident renders a service in Peru, which is used economically in Peru by the Licensee.

This constant blending of services and goods present a number of unique challenges, some of which are resolved by the digital commerce provision of the US-Peru FTA, as highlighted in Table 2.

7. THE FUTURE OF TRADE IN DIGITAL PRODUCTS AND CROSS-FERTILIZATION BY MFN

If digital products are to be considered a service and exempt from import duties whether or not they are embedded in a physical good, then digital content providers may be entitled to benefits beyond those associated with individual bilateral FTAs. Namely, digital content providers may be entitled to the benefits of MFN clauses in most FTAs, thereby potentially expanding the most liberal digital commerce provisions to every country with a services MFN provision in an FTA.

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21 Decree Supreme No. 008-2004-ED, published on 20 May 2004.

22 4901.10.00.00, 4901.91.00.00, 4901.99.00.00, 4902.10.00.00, 4902.90.00.00, 4904.00.00.00 of the Customs Tariff Act.

23 According to Corporate Income Tax Law approved by TUO Supreme Decree No. 179-2004-EF, resident corporations are income tax levied on a worldwide basis over their net taxable income with a general rate of 30%. Non-resident corporations are only income tax levied on a Peruvian source income basis. The income tax rates for non-resident corporations vary depending on the nature of the income obtained and they are collected through income tax withholding mechanisms.

Table 2: Case Study on Exportation of E-Books to Peru

	With FTA		Without FTA	
	E-book imported with embedded software.	Supplemental electronic purchases of material.	E-book imported with embedded software.	Supplemental electronic purchases of material.
Customs Duties	No, customs duties based on the carrier medium value alone.	No, if the e-book is imported via electronic transmission.	Yes, customs duties might apply on full value of imported product, inclusive of hardware, if the e-book is not considered as a carrier medium. ²⁴	No, if the e-book is imported via electronic transmission.
VAT	Reduced, import VAT should be assessed based on hardware value. Software VAT assessed based on the rate applicable to services provided by a non-resident, if the software will be used economically in Peru.	Yes, software VAT assessed based on the rate applicable to services provided by a non-resident, if the software will be used economically in Peru.	Yes, import VAT might apply on full value, if the e-book is not considered as a carrier medium.	Software VAT assessed based on the rate applicable to services provided by a non-resident, if the software will be used economically in Peru.

A typical MFN clause provides that 'each Party shall accord to service suppliers of the other Party treatment no less favourable than that it accords, in like circumstances, to service suppliers of a non-Party'.²⁵ In the digital product context, the most favourable treatment is exemption from customs duties. As such, all trade partners with an MFN clause are entitled to the most liberal treatment provided to an FTA partner, that is, exclusion of digital content from customs values.

For example, if the United States and Peru have a digital commerce provision providing duty-free treatment for digital content imbedded in carrier media, and Peru simultaneously has an FTA with Brazil providing Brazil with MFN status with respect to services, Brazil may be entitled to the digital commerce provisions of the Peru-US FTA in its trade with Peru. To do otherwise would place Brazilian digital content

(a service) at a disadvantage vis-à-vis US digital content providers in Peru. This outcome is specifically precluded by the MFN clause.

While these issues are at the forefront of bilateral agreements, progress is more measured at the WTO. To date, WTO General Council has only agreed to hold dedicated discussions on cross-cutting issues, that is, issues whose potential relevance may 'cut across' different agreements of the multilateral system.²⁶ So far, there have been five discussions dedicated to electronic commerce – all held under General Council's auspices. However, the parties have merely expressed the option that examination of these cross-cutting issues is 'unfinished' and 'further work to clarify these issues' is needed. Thus, for the foreseeable future, the electronic convergence will continue to be managed from a trade and customs perspective through bilateral agreement.

Notes

24 On 13 Jan. 2009, the Supreme Decree No. 004-2009-EF was published, which establishes domestically the new provisions for customs valuation of digital products and carrier mediums. According to its Art. 2, a carrier medium is any physical object designed principally for use in storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape. However, according to Art. 5, if a good, which contain a digital product for its function, is not considered as a carrier medium, then its customs value will include the value of the good and the cost of value of the digital product.

25 See, for example, US-Morocco FTA, Art. 11.3; US-Peru FTA, Art. 11.2(1).

26 The issues discussed included: classification of the content of certain electronic transmissions; development-related issues; fiscal implications of e-commerce; relationship (and possible substitution effects) between e-commerce and traditional forms of commerce; imposition of customs duties on electronic transmissions; competition; jurisdiction and applicable law/other legal issues. See Work Program on Electronic Commerce, adopted by the General Council, 25 Sep. 1998.