

# TIISA 2020

## Annual Conference

### Trade & Investment in Services

Friday 12 November

*“Servicification: Implications for International Trade Governance”*

**Shin-Yi Peng**, Distinguished Professor of Law, National Tsing Hua University

*“A New Trade Regime for the Servitization of Manufacturing: Rethinking the Goods-Services Dichotomy”*

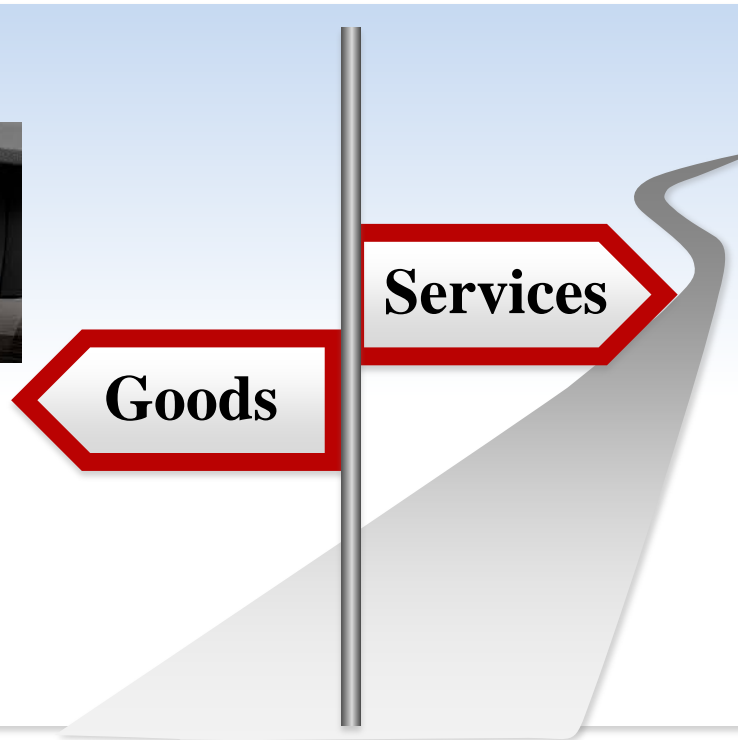


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# The Goods-Services Dichotomy

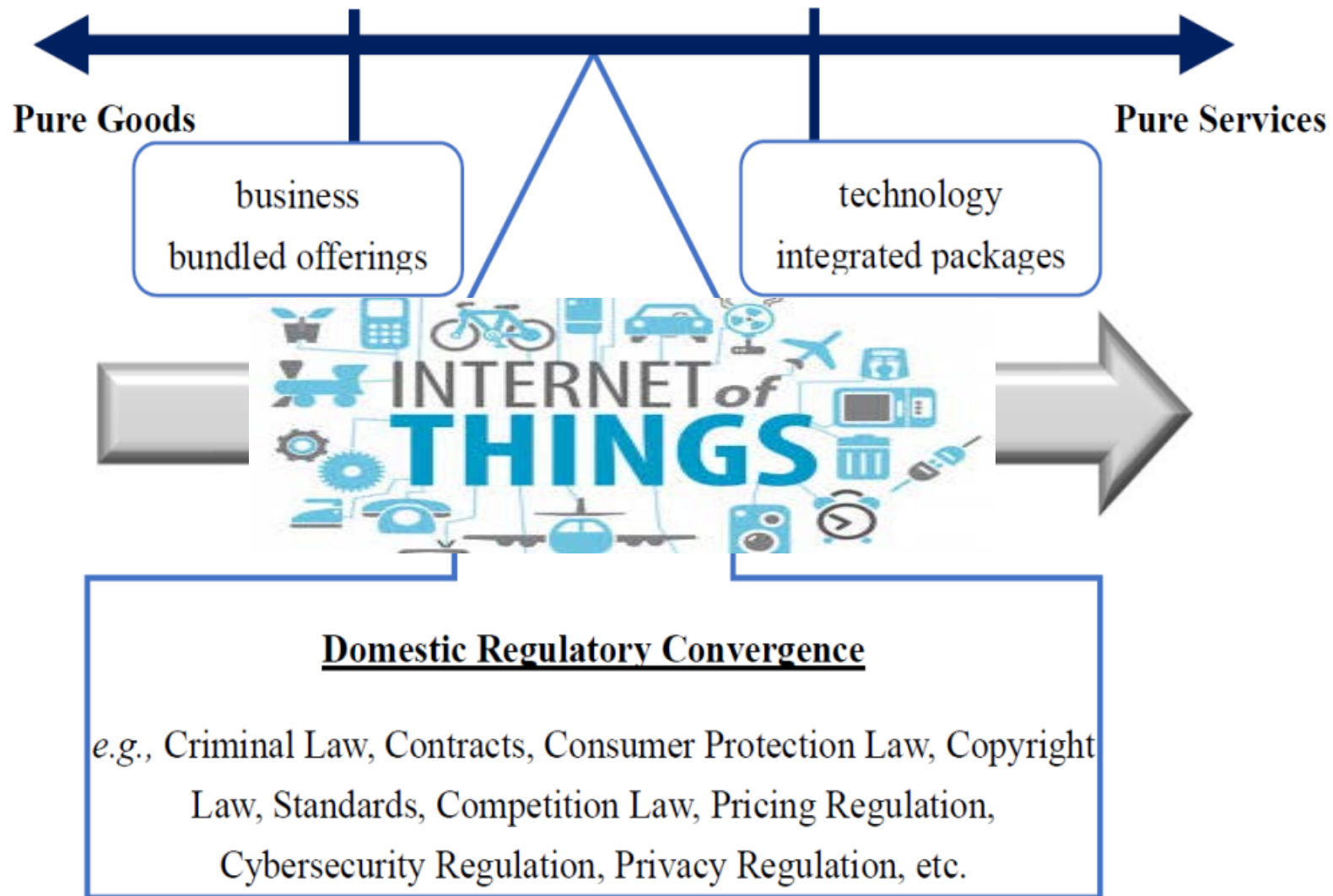


- Tangible (material things, physical dimensions)
- Homogenous
- Separable
- Non-perishable

- **Characteristics-based approach**
  - We can easily find exceptions

- Intangible (non-physical)
- Heterogeneous (non-standardized)
- Inseparable (produce/consume simultaneously)
- Perishable (non-storable)

# The Evolving Integration of Goods and Services

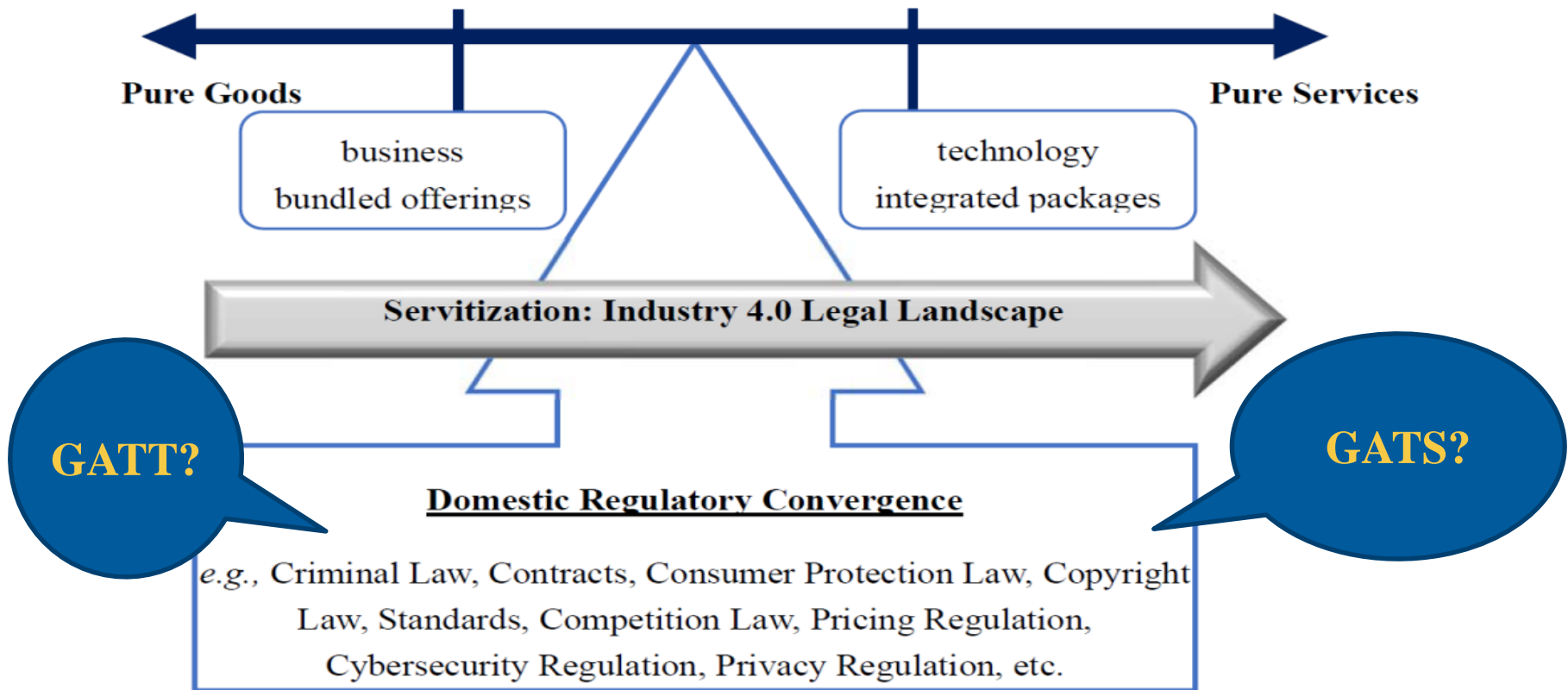


# Servitization of Manufacturing

- adding services components to tangible products
- bundling services with the goods they produce and sell
- **Moving toward a new age: the industry 4.0 landscape**
  - Nike+: incorporates shoes and customer data, as well as automation across the shoe lifecycle
  - IoT: enables the integration of goods and services by allowing firms to trigger different bundles of good-service offerings.



# The Increasingly Dual Nature of Domestic Regulations



- WTO Jurisprudence
- goods and services should be treated differently given their “inherent characteristics
- support the existence of a boundary between trade in goods and services.
- “the same measure could be reviewed under both agreements”
- Whether a specific measure should be reviewed under the GATT, or the GATS, or both is a matter that can only be determined on a “case-by-case basis.”

<i>case-by-case basis</i>	Obligations under GATT 1994	
Obligations under GATS	<p><b>Both GATT/GATS Concurrent Application</b>  <i>coexist; one does not override the other falling simultaneously within the scope of both Agreements</i></p> <ul style="list-style-type: none"> <li>▪ Measures which directly “govern” or “regulate” trade in goods but also “affect” trade in services.</li> <li>▪ Measures involving a service relating to a particular good or a service supplied in conjunction with a particular good.</li> </ul>	<p><b>GATT</b>  Measures which regulate trade in goods only.</p>
	<p><b>GATS</b>  Measures which affect trade in services only.</p>	<p><b>Neither</b>  Measures outside the scope of IEL.</p>

# One Measure Two Regimes

<b>Type I</b> Measures Effecting “Pure” Services	Trade Remedies	Trade Disciplines on Domestic Regulation
	GATS Articles X, XV. Subject to further negotiations	GATS Article VI:4/5 Subject to further negotiations
<b>Servitization</b>	<b>Type III Measures Regulating Services-Oriented Activities</b> GATS is more relevant; goods-related Agreements may also apply.	
	<b>Type V Hybrid Measures Governing Manu-services</b> Both Agreements are equally relevant.	
	<b>Type IV Measures Regulating Goods-Oriented Activities</b> Goods-related Agreements are more relevant; GATS may also applies.	
<b>Type II</b> Measures Governing “Pure” Goods	Trade Remedies	Trade Disciplines on Domestic Regulation
	<i>i.e.</i> , Safeguard (SG), Antidumping (ADA), Subsidies (ASCM)	<i>e.g.</i> , TBT, SPS

- **Types III and IV:**
  - How can we effectively employ the characteristics-based approach?
- **Type V:**
  - How can we address the overlapping rules which may result in conflicting legal effects?



# The Problems of Concurrent Application: Potential Legal Conflicts

## Privacy standards for a smart house:

- Is the TBT applicable, or is Article VI of the GATS more relevant?

## Legal certainty and predictability:

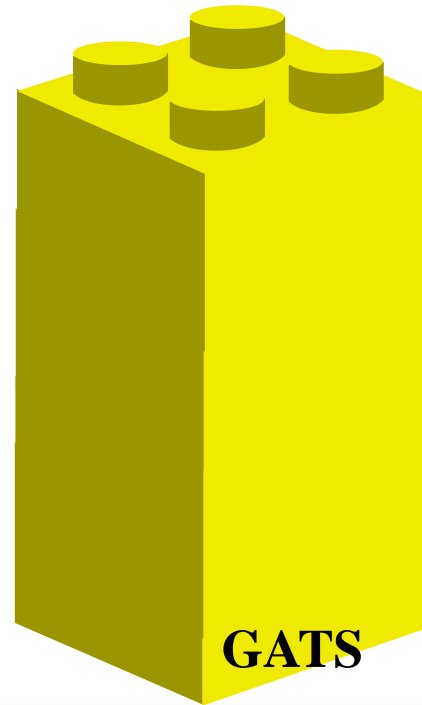
- Case-by-case basis
- The gap in the obligatory degree between TBT and GATS is substantial.
- The responding party: GATS
- The complaining party: TBT



Source: The Economic Times



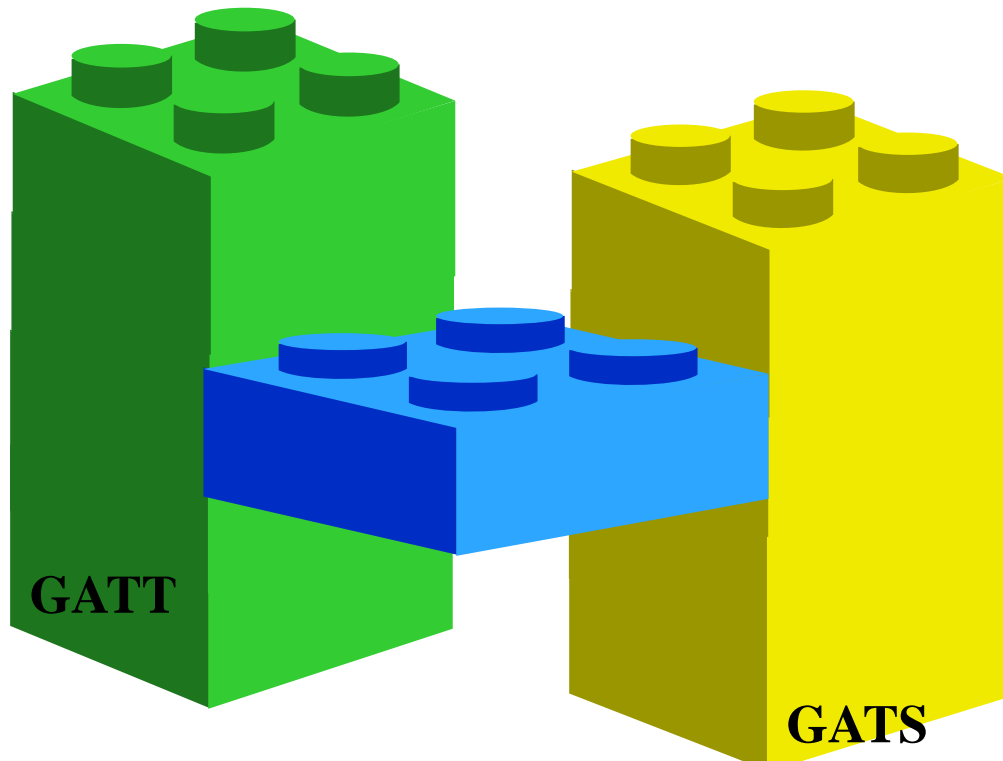
# Migration to a New Trade Regime



**Status quo:**

If we maintain the two silos without merging, how can we tackle the problems of concurrent application? How do we choose between two silos?

Are there any approaches we can borrow from in other areas of law?



**Forward-looking:**

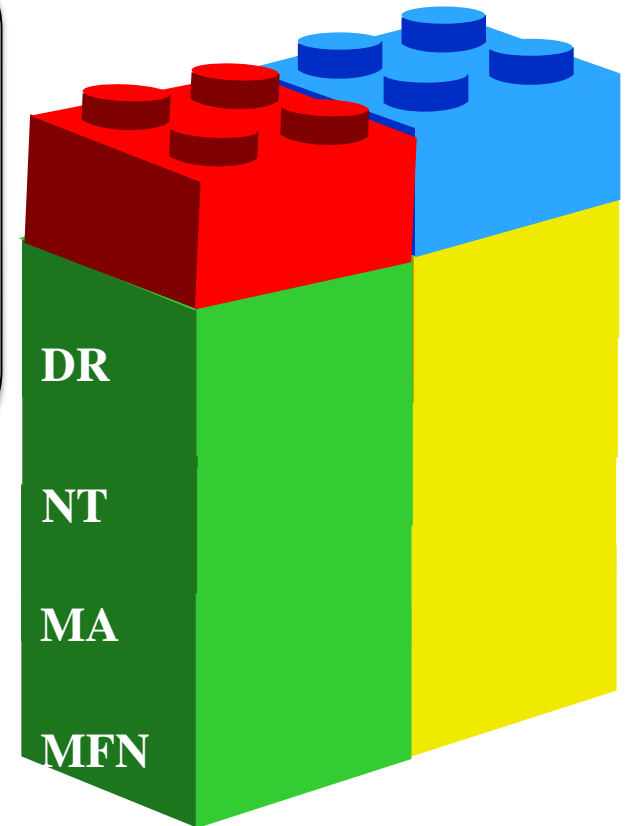
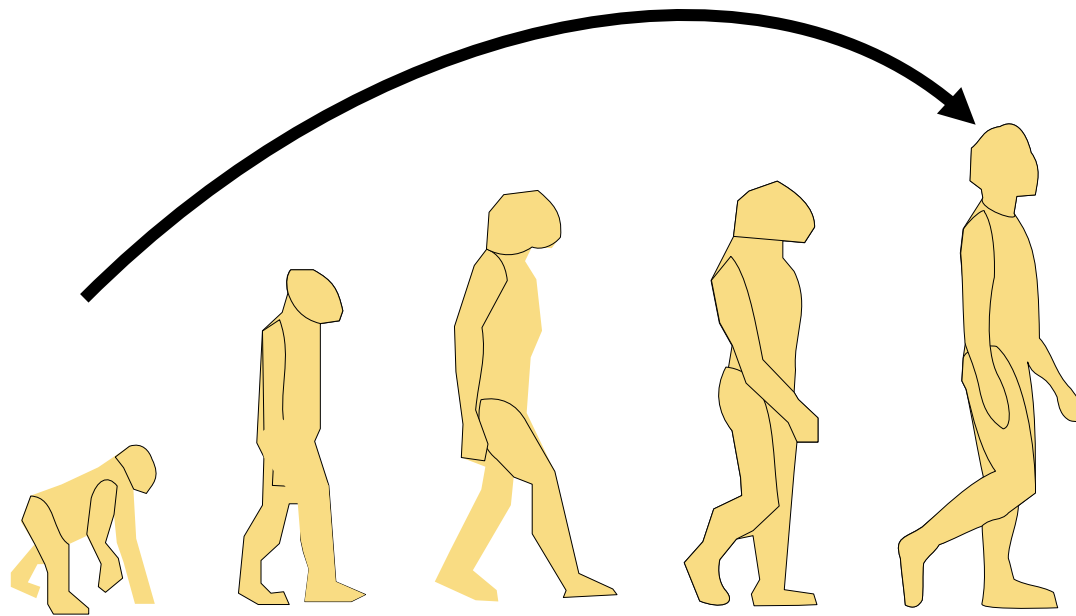
If we (temporarily) maintain the two silos, is there a pragmatic approach that helps bridge the differences between the two systems?

What are the positive lessons in terms of the convergence of goods/services governance from the experiences of the RTAs?

## Evolution toward revolution:

What if we attempt to break down the two legal silos?

Is it really that unrealistic? At what point will the evolution turn into a revolution?



# Choosing Between the Two Silos



# Article 2 of the UCC

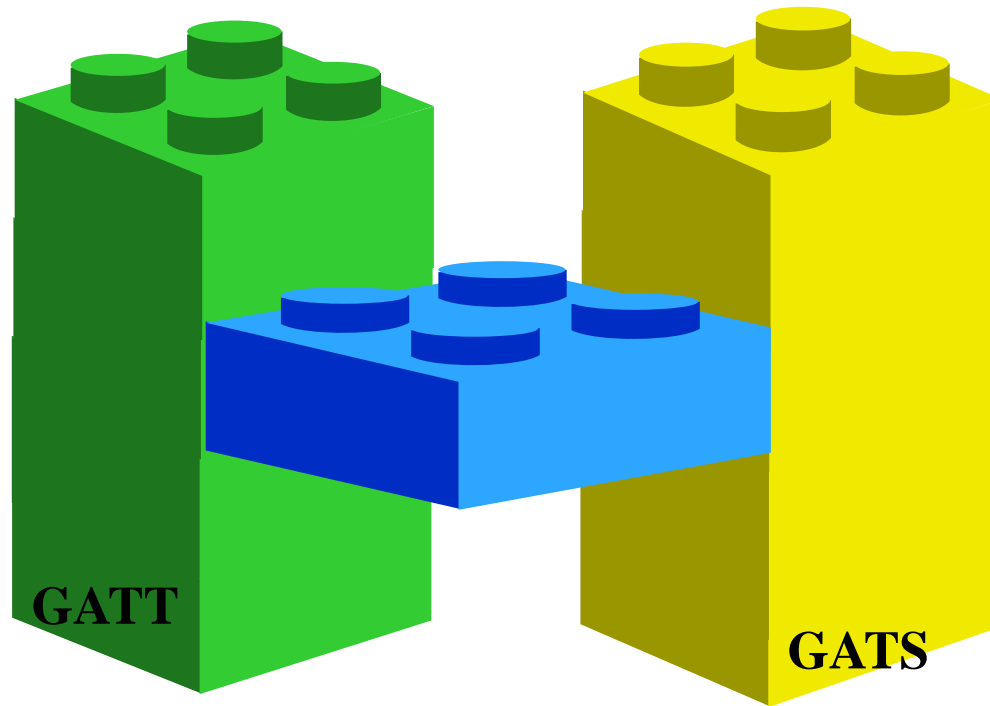
- A transitional approach
  - create guidance for the characteristics-based approach.
  - borrow experiences from other subfields of law on how to tackle the problems of concurrent application.
- “Sales” applies to transactions in “goods” only.
- the applicability of Article 2 to “hybrid transactions.”
  - the “predominant purpose” of transaction.
  - “all or nothing” for contracts with a dual nature.
    - hiring an artist for painting
    - the installation of a water heater

service K




goods K

# Bridging the Two Silos







Article 14.1 of the CPTPP:

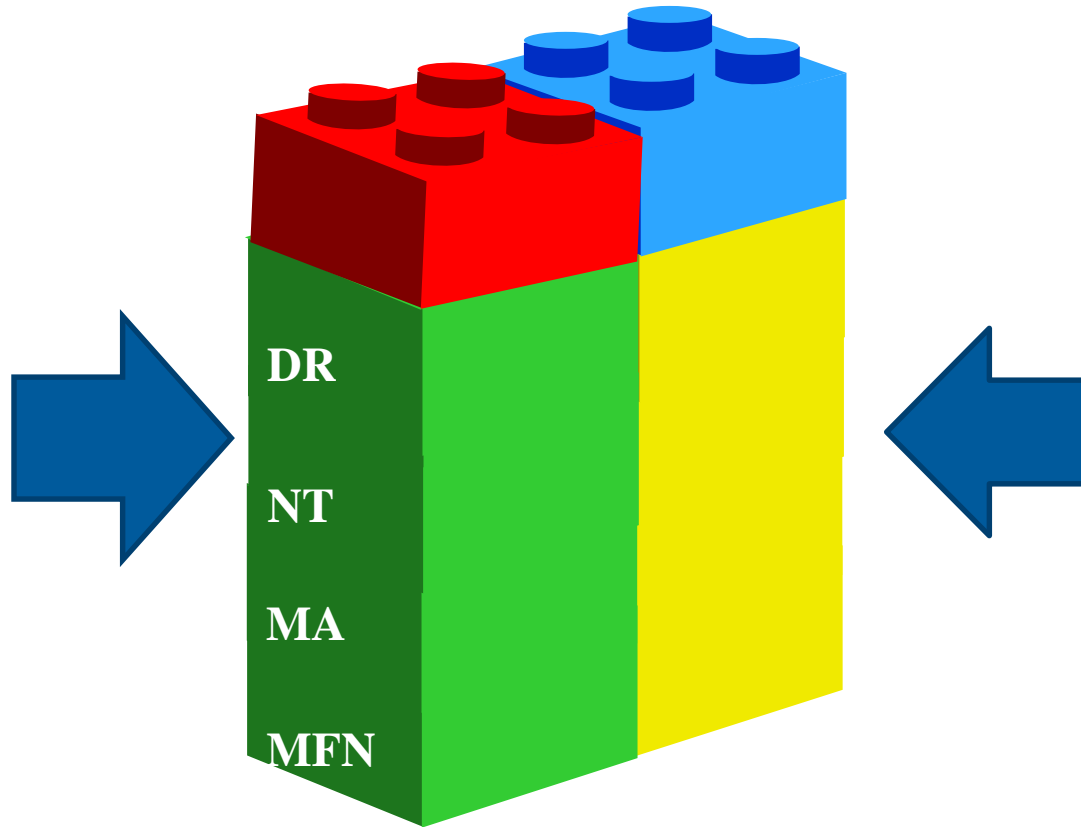
- digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically.

FN: “The definition of digital product should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.”

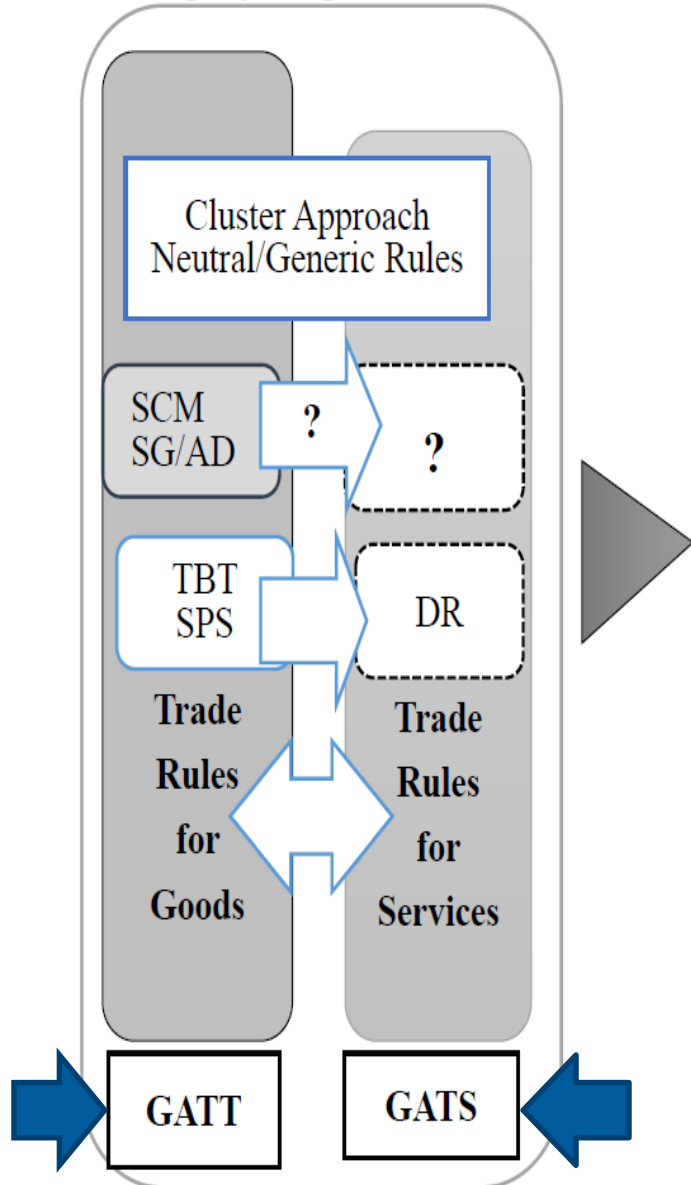
**CPTPP**

COMPREHENSIVE AND PROGRESSIVE  
AGREEMENT FOR TRANS-PACIFIC  
PARTNERSHIP

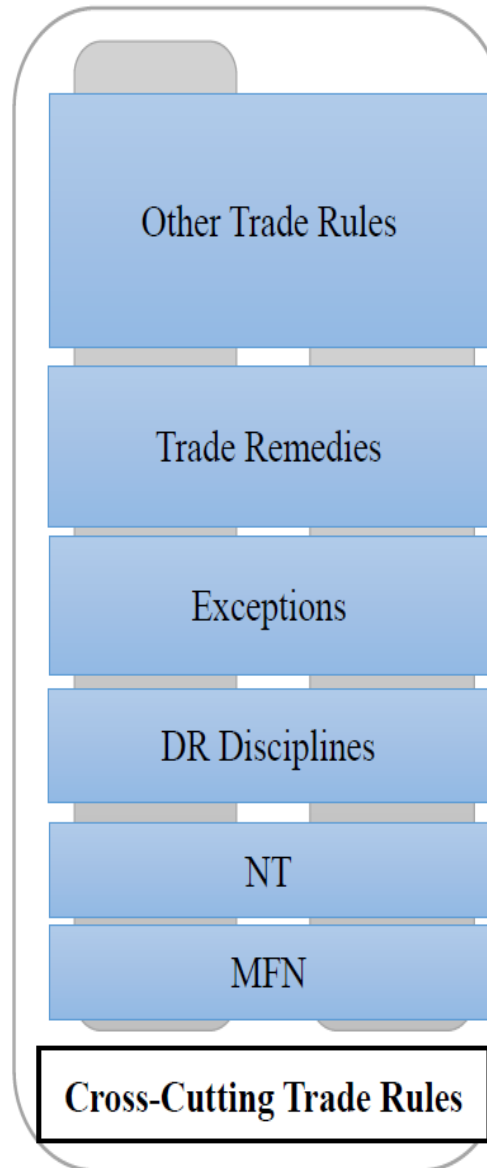
# Breaking down the Two Silos



## Legacy Regime - Silos



## New Generation Regime - Converged



To address issues arising from the goods/services convergence.

The evolution will turn into a revolution?

- from a segmented vertical to a centralized horizontal cross-cutting framework?
- “zoning” of the WTO agreements, which will lead to the merger of two parcels: goods and services?

# Conclusion

- When goods and services become increasingly linked to one another as “complete packages”
  - so, too, do the regulations that govern them.
- A new trade regime is needed
  - under which the legal framework will be reconceptualized and reconstructed from vertical to horizontal modes.



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