Outstanding WTO Issues and Deliverables with Respect to the Electronic Cross-border Trade of Digital Products

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- Thesis: Draft of Chapter 2 -

The WTO and the Liberalization of Cross-border Electronic Services: a transatlantic perspective

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Chapter 2: Outstanding WTO Issues and Deliverables with respect to the electronic cross-border trade of digital products\(^1\)

Any serious debate about the future of audiovisual services in the WTO context has to take the new electronic delivery modes (Internet, video-on-demand via satellite, etc.) and ensuing new trade policy issues into consideration. Although the link between the WTO E-commerce Work Program established in 1998 and the audiovisual service negotiations has not been officially established, the two are very interrelated. In fact, even before the official GATS 2000 negotiations were launched both the US and the EC – the traditional adversaries when it comes to audiovisual trade liberalization – have already disagreed over issues that will be very relevant to the audiovisual debate. While the US is now ready to accept traditional European policy measures in the broadcasting and cinema sector (quotas and subsidies), it wants to make sure that the new delivery modes remain free from new trade restrictions\(^2\). To the contrary, the EC is very aware that the US desire to guard new content delivery modes would weaken their policy autonomy with respect to audiovisual services\(^3\). All in all, a discussion of audiovisual service negotiations must also advance solutions on the horizontal questions raised in the WTO E-Commerce Work Program and deal with necessary new mode commitments in the audiovisual sector.

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\(^1\) For the willingness to provide inputs during interviews or feedback loops thanks cause to various DG TRADE and DG EDUCATION AND CULTURE officials of the European Commission and to USTR officials, RUDOLF ADLUNG and LEE TUTHILL (Trade in Services Division, WTO), CATHERINE MANN (Institute for International Economics), HEINZ HAUSER (University of St. Gallen), LINDA SCHMID (Coalition of Services Industries) and BONNIE RICHARDSON (Motion Picture Association). The WTO conference "Telecommunications and Audiovisual Services in the Context of the WTO: Today and Tomorrow" (papers can be found on http://www.ulg.ac.be/ieje/nip/) held on November 21-22, 2001 provided valuable input. The responsibility for any incorrect statements rests with the author of this thesis. Statements concerning different country positions taken in the GATS negotiations or the WTO e-commerce work program cannot be attributed to the interviews with WTO negotiators. Only the written Communications of the WTO members to the various Councils are binding.

\(^2\) Personal interviews with industry representatives (software and motion picture associations) and S/C/W/78, December 8, 1998, Communication of the USA and S/CSS/W/21, December 18, 2000, Communication of the USA.

This chapter is divided into two parts and identifies two main threads of action in the WTO forum that are necessary for the efficient development of cross-border trade in electronic services. The first action to create a trade-barrier free environment for the cross-border trade in (electronic) services deals with the clarification of the open horizontal questions that are raised in the WTO E-commerce Program (Part 2.1). In solving these questions, it is desirable that a liberal trade framework be created for the hitherto untapped electronic trade potential. Particular attention is devoted to the different US and EU viewpoints taken with respect to the open horizontal questions. The second action addressed in this chapter refers to the necessity for further GATS liberalization measures for digital products (Part 2.2). Again, the analysis concentrates on the necessary liberalization steps that the USA and the EC need to take.

As will be seen the problems raised by the WTO E-Commerce Work Program have much more horizontal implications for the GATS than suggested by their isolated treatment in the E-commerce working groups. In fact, most questions raised (tariffs on electronic services, distinction problems between goods and services, boundaries between different service sectors, mode 1 vs mode 2 distinctions) do not only directly relate to the audiovisual service discussion. Rather they even address very generic uncertainties of the legal GATS framework. Thus it is argued that these unresolved issues are of overarching relevance to the whole legal framework for trade in services rather than being worth only a marginalized e-commerce discussion.

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2.1 Unresolved Horizontal Questions Relating to the Cross-border Electronic Delivery of Services

In May 1998 the WTO launched a work program to identify all trade-relevant questions raised by electronic commerce. All "Councils" (Council for Trade in Goods, Council for Trade in Services, Council for Trade Related Aspects of Intellectual Property\textsuperscript{5}) and the Committee on Trade and Development were instructed to complete reports before July 1999 analyzing the influence of electronic commerce on their field of operations. In the course of these reports the Councils considered how existing WTO agreements influenced e-commerce, what gaps in the existing trade agreements had to be rectified and whether there were any new questions that WTO member states needed to address by means of new agreements. The working group’s results act as a precursor in identifying generic horizontal GATS problems.

Each relevant Council addressed the following detailed questions:

<table>
<thead>
<tr>
<th>Relevant Council</th>
<th>Areas of responsibility of the WTO Work Program</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT Council</td>
<td>Applicability of the following GATT rules and past liberalization commitments to e-commerce: Market access, customs valuation questions, import license procedures, customs duties, technical standards, country of origin rules and questions on classification</td>
</tr>
<tr>
<td>GATS Council</td>
<td>Applicability of the GATS rules to e-commerce: with regard to the Most Favored Nation Clause, the transparency requirements, integration endeavors vis-à-vis the developing states, technical standards, mutual recognition of qualification requirements, elements of competition, issues relating to privacy and public morals, and the prevention of fraud Review of the GATS liberalization commitments: Granting of market access and national treatment to the electronic delivery of services</td>
</tr>
<tr>
<td>TRIPS Council</td>
<td>Review of the protection of intellectual property rights in the context of the new technological environment</td>
</tr>
<tr>
<td>Committee for Trade and Development</td>
<td>The influence of electronic networks on trade and the opportunities for development.</td>
</tr>
</tbody>
</table>


\textsuperscript{5} Hereafter described as the GATT, GATS und TRIPS Councils respectively.
The General Council was accorded a central role in this process. In particular it has to be vigilant regarding themes that go wider than the responsibility of individual Councils. Decisions that affected any imposition of customs duties on e-commerce are the General Council’s direct responsibility.

In July 1999 the interim reports of the work sessions were presented. The most important results were the following: The generic principles of the WTO – such as free market access, non-discrimination, transparency and technological neutrality – seem extremely well suited to e-commerce. Consequently, the WTO rules and all existing liberalization commitments made under the WTO Treaties should be applicable to e-commerce transactions. This can be ascribed to the fact that the level of existing concessions and the treaty obligations differentiate between types of traded products but not between the forms of their delivery. Regarding electronically delivered services this means that all general GATS obligations (Most Favored Nation clause, transparency, etc.) and all specific commitments on the relevant services (market access and national treatment) are applicable.

Despite these general conclusions the work program also brought to the fore a whole range of open horizontal questions. A solution to these questions is not simple, because fundamental concepts of the WTO agreements need to be revisited. It is true that interesting proposals were made during the work program. But all in all the majority of horizontal questions have not yet been solved. When the General Council requested the relevant Councils in July 2000 to continue with their work as it stood in July 1999, and to make recommendations as to how the General Council should best consider matters relating to e-commerce, no progress was made. In December 2000 the work groups had to report to the General Council on their results. Even this occasion in reality boiled down to a repeat of the work progress made in

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6 WTO Document WT/L/274, October 30, 1998. It also has to pay attention to questions that may fall under the mandate of other international organizations.
7 WTO Document S/C/W/183, November 30, 2000, Communication from the EC
9 See S/C/8, March 31, 1999 for an interim report of the Council for Trade in Services to the General Council where common understandings and issues that require further examination are discussed. G/C/W/158, July 26, 1999 provides the same information with respect to the results of the Council for Trade in Goods.
10 DRAKE & NICOLAIDIS (2000), p. 7 comment that states are now confronted with equally difficult and new conceptual questions than during the time when the agreements on trade in goods had to be complemented by an agreement on trade in services. (GATS).
Since then – four years after the launch of the WTO e-commerce work program – agreements on the open issues are pending. The recent fourth Doha WTO Ministerial Conference again put the ball in the General Council’s court by only mandating procedural issues while instructing the General Council to consider the most appropriate institutional arrangements for handling the work program and to report on further progress to the Fifth Session of the Ministerial Conference (September 2003, Mexico)\(^1\)2.

The most pressing questions of the work program seem to revolve around the duty-free moratorium on electronic transactions, the dilemma of the classification of digital trade products and regulatory trade barriers\(^1\)3. So far no consensus could be reached between the USA and the EU on the following questions:

(i) Should the temporary 1998 duty-free moratorium on electronic transactions be made permanent?

(ii) Should digital products (online films and software) be classified as goods (GATT) or as services (GATS)\(^1\)4?

(iii) If classified under GATS, in what service category do digital products fit (telecommunication, audiovisual, computer or entertainment services)?

\(^{11}\)"Members reaffirmed the continuing relevance of the earlier contribution of the Council for Trade in Goods to the General Council which was submitted by the Chairman of the CTG in July 1999 (G/C/W/158). According to the mandate contained in Document WT/L/274 (Work Program on Electronic Commerce), that contribution provides an overview on the discussion of the following issues..." cited from WTO Document: "Chairman's factual progress report to the General Council on the Work Programme on Electronic Commerce", G/L/421, November 24, 2000.

Or "The Council's discussion on the 6\(^{th}\) October took as its starting-point the progress report which it had made to the General Council on 27 July 1999 (S/L/74). It was the general view that this report was still an accurate reflection of the thinking of Members on the subject, and that there was no need to re-open or repeat what was said in it." WTO Document: "WTO Programme on Electronic Commerce: Oral Report by the Chairman of the Council for Trade in Services to the General Council on Electronic Commerce", S/C/13, December 6, 2000.

\(^{12}\)That is six months later than the tabling of the initial offers in March 2002. The mandate can be found in WT/MIN(01)/DEC/W/1, November 14, 2001, p. 7.

\(^{13}\)The other questions that need to be addressed at a later stage include development-related issues (participation of developing countries in e-commerce, technology transfer, movement of natural persons, etc.), fiscal implications of e-commerce, competition elements, jurisdiction and applicable law. It is most likely that these issues – except maybe the development-related ones - will not be dealt with during the Doha Round.

\(^{14}\)This question needs to be understood against the background of the politically very sensitive area of audiovisual or cultural products that would now be subject to either the wide-ranging free trade rules of the GATT or to the less limiting and incomplete trade rules of the GATS.
(iv) Should electronically delivered service transactions be classified as cross-border transactions (GATS Mode 1) or as consumption abroad (GATS Mode 2)?

(v) What WTO instruments should be implemented with respect to domestic regulations that constitute barriers to trade in services (regulatory discipline, data protection clauses, etc.)?

Throughout the work it needs to be kept in mind that both trade partners share the basic drive to liberalise e-commerce. However, it is evident that both approach the solutions to the open questions with their individual trade policy interests that often diverge. The USA and the major IT industry coalitions want to impose the most liberal interpretation (“the most trade-liberalizing approach”), whereas other WTO members states, above all the EC, want to ensure that they can preserve their space for audiovisual policy intervention. In that process, the US has been accused of trying to classify against legal principles and in favor of their industry interests. Moreover, the developing countries have not yet been convinced that a sound WTO e-commerce framework is important to them.

In the next section these unresolved questions and the potential solutions are discussed.

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15 This point has been reiterated by both the officials of the DG Trade and the USTR. Despite many problems to find common positions on the pending open questions, the negotiators were assertive of the fact that, in principle, they shared a strong interest in designing a trade policy beneficial to the e-commerce environment.


17 See WT/TPR/M/88/Add.1, communication from the United States and GLOBAL BUSINESS DIALOGUE ON E-COMMERCE GBDe(2001) for an Industry position on all following points. These views reflect the views of most other major IT industry councils, such as the ITIC and the ITAA. Interestingly, the GBDe also represents the European IT industry.

18 Personal interviews and Tietje (XXX), para. 69.
2.1.1 The Duty-free Moratorium on Electronic Transmissions

In May 1998 the Ministers of the WTO member states agreed on a temporary duty-free moratorium on all electronic transactions that would be valid until the next Ministerial Conference in Seattle (1999)\textsuperscript{19}. Although the declaration was not very explicit, they hereby opened the way to customs freedom on electronically delivered products. The moratorium only applies to trade transactions that are entirely electronic. If a good is ordered electronically, but physically delivered, then this general duty-free status does not come into play, but the existing GATT commitments. The majority of the developing states were not sure whether this temporary moratorium would be in their favor, but nevertheless agreed to it.

The argument can be put forward that the extension of the moratorium is not really an overarching practical important matter or that it even contradicts WTO principles.

(i) Only a very small percentage of tradable products can be digitized. The income from customs duties that may be derived from electronically transmitted goods is thus very small in volume, namely less than one percent of the worldwide income from customs duties\textsuperscript{20}.

(ii) In the future most of the electronic transactions will relate to services. Traditionally, service transactions are not hampered by customs duties, but are subject to market access restrictions, discriminatory tax levies, etc. Besides, taxes are not synonymous with customs duties. Despite the moratorium, WTO Member States remain free to decide what taxes they impose on electronic transactions\textsuperscript{21}. Hence, the moratorium only has very limited applicability\textsuperscript{22}.

\textsuperscript{19} "We also declare that Members will continue their current practice of not imposing customs duties on electronic transmissions. When reporting to our third session, the General Council will review this declaration, the extension of which will be decided by consensus, taking account the progress of the work program.", from WTO (1998).

\textsuperscript{20} \textsc{Mattoo, Pérez-Esteve, et al.} (2001), pp. 10-11: "According to our estimates, tariff revenue currently collected from these products represents on average less than 1 per cent of total tariff revenue and a meager 0.03 per cent of total fiscal revenue. Even if such trade were to grow strongly and all such trade moved online, the revenue loss would be small. It would also have to be counted against revenue gains from any positive (and revenue generating) productivity effects." Also see the original study in \textsc{Schuknecht & Pérez-Esteve} (1999).

\textsuperscript{21} \textsc{Drake & Nicolaidis} (2000), p. 45.

\textsuperscript{22} \textsc{Panagariya} (2000), p. 10.
(iii) The moratorium only offers a stopgap measure to governments that cannot levy tariffs on e-commerce anyway. Even if there were some willingness to impose customs duties on electronic transmissions, technically speaking this is not feasible today\textsuperscript{23}. Customs authorities would need to be able to trace and establish the value of commercial electronic transactions. Even if this is possible, it is highly doubtful whether the levies would outweigh the costs of this process\textsuperscript{24}.

(iv) The principle of technological neutrality is endangered by the duty-free moratorium. Whereas products that are physically delivered, continue to be subject to customs duties the same products that can now be delivered completely by electronic means (music, etc.) do not face customs duties\textsuperscript{25}.

Although these four points put the necessity of the moratorium into question, it should be borne in mind that this agreement was a strong political signal in favor of barrier-free electronic trade. The fact that the moratorium in its present form can be improved does not justify its abolition. Tariffs on electronic transmissions may well be applied to the delivery of digital products and maybe even service transactions and thus be very damaging to the growing trade field of electronic trade. Therefore a permanent moratorium on electronic transmissions should be part of a liberal WTO e-commerce framework.

As technology grows to become more sophisticated any service transaction that is conducted electronically may – as opposed to traditional service delivery forms – be subject to tariffs or differential taxation. Thus, the issue of a moratorium that looks quite innocent and unimportant to begin with has more systemic consequences. On a more generic level, the question is raised whether tariffs, unheard of in the GATS world, can and should find their way into the treatment of trade in services and in what way the legal framework is to be updated to avoid tarification of this new type of electronic service delivery.

\textsuperscript{23} Also, the moratorium is really only binding because of the practical difficulties in actually trying to assess duties on electronic transactions. See “U.S. looks for WTO Guidelines on E-Commerce by Cancun Ministerial”, Inside U.S. Trade, Vol. 20, No. 38, September 20, 2002.

\textsuperscript{24} See also WT/GC/25, July 5, 1999, Communication by Australia.

\textsuperscript{25} See WT/COMTD/17, February 12, 1999, Communication by the United States, that argues that a bias towards e-commerce transactions has to be considered a positive development.
Since the moratorium was not extended three years ago at the Seattle Ministerial Conference (1999), the question arose before the Doha round whether the temporary moratorium had lost its validity and whether it should be made permanent. WTO members, such as the EU, were of the opinion that the moratorium became null and void because it was not extended. The American and the Japanese delegation acted in solidarity in favor of electronic trade and insisted on a permanent e-commerce moratorium. The United States were consequently irritated that, until shortly before the Fourth WTO Ministerial Conference in Doha, the EC member states were not willing to agree on either an extension or on a permanent status for the moratorium. Although the submissions of the EC and DG Trade representatives endorse the principle of a duty-free e-commerce trade framework, they have been unwilling to agree on a permanent moratorium. The EC argues that the US focuses too much on the moratorium while neglecting the other outstanding and more substantial e-commerce issues in relation with trade in services. It will only agree to a moratorium if an overall e-commerce package is adopted.

Clearly, there is a link between the pending classification of digital products and the moratorium. As opposed to the above arguments on the limited importance of the moratorium, the WTO Secretariat has noted that there is no reason in principle why customs duties should not be applied to services. Also if digital products are considered goods they are subject to customs duties. It can be assumed that some WTO member states are only willing to decide on the continued validity of the moratorium after the classification questions have been resolved.

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26 See “EC Discussion Paper on Electronic Commerce and the WTO”, available on the website of DG Trade, p. 11. There are nevertheless no indications that some WTO members now impose custom duties on electronic transmissions.

27 And of course in favor of the local e-commerce and IT industry.

28 Source is missing.


30 “EC Discussion Paper on Electronic Commerce and the WTO”, available on the website of DG Trade, pp. 3-4 and 11. Before the Doha Round, the EC said that it would only accept a reactivitation of the moratorium if further progress was made in the work program.

31 International Trade Reporter, “EU says it will not support WTO e-commerce Moratorium”, Vol. 16, No. 28, July 14, 1999.


33 S/C/W/68, November 16, 1998, Note of the WTO Secretariat to the GATS Council.
have been answered conclusively\textsuperscript{34}. As will be seen later, this attitude has its roots in the desire of the EC and other WTO member states to preserve its policy autonomy in the field of digital product trade (music, movies, etc.). Instead of agreeing on a generic moratorium to promote e-commerce, the EC argues that “it may be more practicable to address the issue in the market access negotiations by preventing the appearance of customs duties as a scheduled market access barrier”\textsuperscript{35}.

Another reason for the lack of consensus on the moratorium is the fear of developing countries concerning a potential permanent loss of their tariff revenue\textsuperscript{36}. Even if the US and the EU were to agree on the classification issues the developing countries may not accept a permanent duty-free moratorium.

At the Fourth Ministerial Conference in Doha (2001) it was agreed that the moratorium should again be extended temporarily until the Fifth Ministerial Meeting in 2003\textsuperscript{37}. This renewed temporary extension should not avert one's attention from the fact that no consensus could be found for a permanent duty-free moratorium. On the contrary: the Europeans and other delegations already agreed in Seattle and in Doha that in no way the temporary moratorium shall prejudge the results of the work program\textsuperscript{38}.

\begin{flushright}
\textsuperscript{34} WTO Document S/L/74, July 27, 1999. \\
\textsuperscript{35} “EC Discussion Paper on Electronic Commerce and the WTO”, available on the website of DG Trade, pp. 10. This remark must be seen in light of the fact that the EC wants to keep the whole audiovisual sector unbound; meaning that all market access limitations are permitted without scheduling them. \\
\textsuperscript{36} Quote UNCTAD estimations here. \\
\textsuperscript{37} WTO Document WT/MIN(01)/DEC/W/1, November 14, 2001, p. 7: "We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.” \\
\textsuperscript{38} WTO Document G/C/W/158, July 26, 1999, “It was stated that the standstill agreement could in no way prejudice the outcome of the work program”. This type of clause is a popular negotiating tactic that leaves the door open for subsequent deviations from agreements. The European delegation formulated an identical formula in the Doha Ministerial Declaration concerning the agricultural negotiations: “Building on the work carried out to date \textit{and without prejudging the outcome of the negotiations} we commit ourselves to comprehensive negotiations aimed at: substantial improvements in market access…”, italics by the authors of the thesis. See NZZ, November 16, 2001.
\end{flushright}
2.1.2 Open Classification Questions concerning the Electronic Trade of Services

The classification questions raised by e-commerce are certainly one of the key elements of the work program\(^{39}\). Answers to these questions are needed fast as the meaningfulness of the specific commitments made during the new services negotiations may otherwise not be guaranteed. Throughout the different questions the issue of “likeness” in terms of the Most-Favored Nation and National Treatment principles and the clarification of existing and future commitments to electronic services is of crucial importance (see also Part 2.2). This is definitely a question that of horizontal relevance to the whole GATS.

Again, the whole discussion is influenced by differing EC and USA viewpoints. Whereas the USA wants to ensure that electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form (the “most liberal treatment possible”\(^{40}\)) the EC has a more nuanced approach. This EC approach is often influenced by the desire to maintain regulatory autonomy in the field of audiovisual policies and an absence of trade concessions.

2.1.2.1 Digital Products: Are they Goods (GATT), Services (GATS) or Intellectual Property (TRIPS)?

WTO Members agree that the majority of services that are delivered electronically (such as financial or professional services) fall under the GATS. As most of these services are listed in the GATS country schedules their classification is not disputed. The fundamental question asked in the WTO’s e-commerce work program was, however, the following: Should products that were usually sold on a carrier medium (CD, etc.) but that can now simply be downloaded from the Internet, be classified under GATS or GATT? In other words: are online movies “like products” to conventionally delivered goods like video tapes or does this transaction fall under a new service category to be created for this purpose? The answer has a strong practical relevance due to the widely diverging liberalization commitments under GATT and GATS\(^{41}\). Certainly the issue is of particular importance to “cultural, entertainment and software


\(^{40}\) Source is missing.

\(^{41}\) See PANAGARIYA (2000), p. 4. Assuming that the duty-free moratorium does not apply to electronically delivered services, it can be argued that the duty-free moratorium increases the difference of commitment levels between goods and services.
products". Statisticians and the WCO have hesitated to proceed with a classification due to these sensitivities in the ‘goods or services’ debate about digitized products in trade negotiations in the World Trade Organization. But also the output of professional services, such as architectural or engineering designs that traditionally had a physical equivalent with a Harmonized System tariff line can now be delivered online.

It is very difficult to delineate the exact borders between the GATS and the GATT, because the Treaties do not contain any comprehensive definitions of or distinctions between the concepts of "goods" and "services". It is also quite probable that as the goods and service transactions continually become more intertwined, one will not be able to achieve any satisfactory distinction between the two. Although, for the time being, the discussion on a watertight distinction between GATT and GATS applicability has been confined to the e-commerce work program it is a question that will soon have to be dealt with on a more generic level also. For instance, the problem of distinguishing goods and services for the audiovisual sector has always been and is still a problem. Moreover, as the service content embedded in goods is on the increase the boundaries between goods and services increasingly blur. At one point one must ask whether we deal with a “service embedded in a good” or a “good embedded in a service”.

In the case of audiovisual services again, it has always been unclear how to treat production and distribution services that really constituted the core value-added that finally led to a standard good (a movie canister). A very similar question arises with respect to goods that actually derive their core value of previous R&D services. Furthermore, it is now standard knowledge that traditional goods industries (automobile, etc.) derive their profits from attached service transactions (finance, repair, etc.). Under the heading of “splintered services” this discussion on the value of services within goods has already been triggered nearly twenty

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42 See SAUVÉ & STEINFATT, 2001, p. 324.
43 Personal discussion with official of the WORLD CUSTOMS UNION (Brussels) and TASK FORCE ON SOFTWARE MEASUREMENT IN THE NATIONAL ACCOUNTS(2002), p. 4 f.
45 WTO Document S/C/W/68, November 16, 1998. For a legal treatment of the absence of a proper distinction between goods and services in the WTO context, see TIETJE (xxx), p. 67 and for an interpretation in the context of audiovisual service negotiations, see BAUMANN (XXX), p. 62 ff.
years ago\textsuperscript{48}. But with the two separated GATT and GATS Treaties within the WTO it did not yet have tangible repercussions.

The next three sections present the arguments used to defend one of the three classification possibilities (GATT, GATS and TRIPS). Most of the arguments in favor of the application of GATT principles to digital products emanate from the USA, whereas most of the arguments for a GATS classification come from the EC. Whereas the EC argues for a strict categorization of all intangible products under GATS, the USA wants to achieve that GATT and not GATS principles apply to digital products\textsuperscript{49}. Consequently, downloaded products should not be subject to less liberal treatment than their "like product" counterparts imported on a physical media carrier. There have also been interesting arguments in favor of a TRIPS classification.

\textit{GATT: Arguments in favor of categorizing digital products as goods}

\begin{enumerate}
\item \textbf{Trade is more liberal under GATT}
\end{enumerate}

The US argues that a classification in terms of the GATT regime, rather than GATS, would be more trade friendly because of the greater liberalization degree of GATT\textsuperscript{50}. Moreover, the best of all worlds – in other words free trade – would prevail when all electronic transmissions are classified as goods and the moratorium on customs duties is extended indefinitely\textsuperscript{51}. Table 1 on the differences between the two WTO Treaties reinforces the fact that the degree of liberalization under GATT is much more encompassing than under GATS. This is not surprising, since the WTO member states have had more than 45 years to improve the architecture and the commitment level under GATT. The following extracts of the table demonstrate that GATT is more trade friendly than GATS.

\begin{flushleft}
\textsuperscript{47} Like the pharmaceutical companies. \\
\textsuperscript{48} BHAGWATI (1984), p. 134. \\
\textsuperscript{49} See WT/COMTD/17, February 12, 1999, Communication by the United States, p. 5. Although one can read in many US industry position papers (quote) that digital products should be classified under the GATT, the DG Trade and the USTR official assert that the US has never called for an outright GATT classification of digital products. \\
\textsuperscript{50} WTO Document WT/GC/16, February 12, 1999, p. 5, contribution by the USA. \\
\textsuperscript{51} PANAGARIYA (2000), pp. 3-5, who comments though that the already existing classifications of most internet transactions as services, would render such a scenario impossible.
\end{flushleft}
(i) The application of the National Treatment Principle is obligatory for goods covered by GATT, whereas national treatment under GATS can be refused via a simple entry in the individual country schedules.

(ii) GATT does not tolerate any quotas, but they are allowed in terms of GATS if full market access has not been granted by an individual WTO member.

(iii) With a view to technical standards and health measures, GATT offers a variety of regulatory disciplines that do not yet exist under GATS. Regulatory disciplines under GATT ensure that national regulations do not unnecessarily hamper trade and insist that international standards be used. In the context of electronic trade there is a danger that heterogeneous and deliberately protectionist regulations may imperil free trade. Regulatory disciplines, as applied in terms of GATT, are thus urgently required.

(iv) For software on carrier media covered under the Information Technology Agreement the industrialized country signatories (56 participants that cover approximately 95% of world trade in IT) have agreed to a zero tariff line by the year 2000. The GATT Agreement, together with the duty-free moratorium, guarantees low customs duties. Only if the moratorium should be lifted, will some WTO member states be in a position to lift customs duties on digital products that do not enjoy the advantages of a nil tariff under GATT. Under GATS however, the quasi-absence of customs duties on electronic services is not guaranteed. Until now tariffs on services have been largely unknown. But if digital products are qualified as services, then customs duties on services would also be theoretically possible. Under GATS discriminatory tax regulations or customs duties could be implemented by countries that have not made national treatment commitments. All together GATT is thus the better guarantee for a duty-free e-commerce environment.

52 The GATT Treaty on Technical Barriers to Trade (TBT) or the GATT Treaty on Sanitary and Phytosanitary Measures (SPS) go much further than the existing GATS rules on domestic regulation. The latter consists mainly of a mandate to develop regulatory disciplines for the GATS. See TRACHTMANN (2002) or WUNSCH-VINCENT (2001) for a comparison.


55 The recording and imposition of customs duties on electronic transactions nevertheless remain a problem.
(v) GATT goes considerably further than the GATS in mandating development-related objectives vis-à-vis the developing countries\textsuperscript{56}.

(vi) In contrast with GATS, GATT offers an agreement on subsidies that forbids certain types of state financial assistance completely, and others partially. No similar GATS agreement on subsidies has been developed yet. The present state of negotiations does not indicate that the conclusion of such an agreement is in the offing\textsuperscript{57}. Equally, GATS has no agreement on anti-dumping, on safeguard measures, on trade related investments or on rules of origin. Clearly, GATS mandated further work on four topics: emergency safeguard measures, procurement, subsidies and a regulatory discipline. The meager results of the currently ongoing negotiations on the above-mentioned GATS rules indicate that it will be a lengthy undertaking to negotiate rules under GATS that are similarly effective as the existing GATT rules\textsuperscript{58}.

(vii) It should finally be pointed out that the degree of liberalization of GATS depends to a large extent on the individual concessions of the WTO member states. These concessions can of course not assume the same function as a GATS subsidy agreement or a GATS regulatory discipline. But it should be noted that wide-ranging GATS obligations regarding market access and national treatment could mean that GATS could become almost as trade-liberal as GATT.

\textsuperscript{56} SENTI (2000), para. 645.

\textsuperscript{57} See WUNSCH-VINCENT (2001a) for a stocktaking of the lengthy negotiations on the GATS rules.

\textsuperscript{58} See SAUVÉ (2002).
Table 1: Comparison between GATT and GATS Agreements

<table>
<thead>
<tr>
<th></th>
<th>GATT, 1948 and 1995</th>
<th>GATS, 1995</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Age of the Agreement in 2003</strong></td>
<td>55 Years</td>
<td>8 Years, GATS rules are incomplete</td>
</tr>
<tr>
<td><strong>National Treatment Principle</strong></td>
<td>General obligation that does not permit any exceptions(^{59}), but is limited only to domestic measures.</td>
<td>Obligation relates only to list of specific commitments that varies between countries</td>
</tr>
<tr>
<td><strong>Most favored nation status</strong></td>
<td>Exemptions from this obligation only granted under special circumstances (preferential trade agreements, developing countries, etc.)</td>
<td>Timebound country-specific exemptions from the most favored nation obligation are possible</td>
</tr>
<tr>
<td><strong>Customs duties</strong></td>
<td>Allowed where members have not set their customs duties on nil. The latter is applicable for most states that have signed the ITA, including software.</td>
<td>GATS does not deal with tariffs. When a country grants unlimited national treatment, then discriminatory limitations are not allowed.</td>
</tr>
<tr>
<td><strong>Quotas</strong></td>
<td>Only allowed in certain emergency situations</td>
<td>Permitted when no unlimited market access has been granted</td>
</tr>
<tr>
<td><strong>Transparency</strong></td>
<td>Obligation under GATT which is reinforced by GATT agreements, such as the TBT</td>
<td>Obligation under GATS, but less strict than under GATT (no consultation requirements, etc.)</td>
</tr>
<tr>
<td><strong>Regulatory discipline</strong></td>
<td>Exists in the area of technical standards and sanitary and phytosanitary measures, to impede unnecessary trade-restricting regulations and to encourage the use of international standards</td>
<td>Only an incomplete regulatory discipline and a mandate to develop such a discipline exists (GATS Art. VI)</td>
</tr>
<tr>
<td>** Preferential treatment for developing countries**</td>
<td>Special conditions for developing countries exist</td>
<td>Special GATS conditions are less far-reaching than under GATT(^{60})</td>
</tr>
<tr>
<td><strong>Agreement on subsidies</strong></td>
<td>Yes</td>
<td>None</td>
</tr>
<tr>
<td><strong>Anti-dumping rules</strong></td>
<td>Yes</td>
<td>None</td>
</tr>
<tr>
<td><strong>Emergency safeguard rules</strong></td>
<td>Yes</td>
<td>None</td>
</tr>
<tr>
<td><strong>Agreement on trade-related investments</strong></td>
<td>Yes</td>
<td>No, but investments may be covered under GATS mode 3</td>
</tr>
<tr>
<td><strong>Rules of origin</strong></td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^{59}\) The procurement division of the public sector is excluded.

\(^{60}\) SENTI (2000), para. 645.
2. Safeguarding the technological neutrality of the WTO Agreements

The USA and the leading software manufacturers fear that those products that had hitherto been included under the trade-friendly GATT Agreement, could now fall under the still somewhat underdeveloped GATS Agreements\(^{61}\).

Following this logic, it seems as if the existing tariff lines in the GATT schedules, the presence of GATT Art. IV on screening quotas for films and the software treatment via the Information Technology Agreement (ITA) show that hitherto content was treated under the GATT. Then, it seems incomprehensible that whereas software and movies have so far been classified as goods, these should now be reclassified from goods to services merely because of a new distribution technology. It could well happen that due to the Information Technology Agreement software delivered physically would reach the consumer free of customs duties and without any trade restrictions, but that the same kind of software, transmitted online, is indeed subject to trade restrictions tolerated by GATS.

The fact that there are no clearly defined GATS commitments for electronically delivered software creates tremendous uncertainty for software suppliers that influence the US position. Suppliers of digitized content are concerned about the prospect of years of trade negotiations just to obtain the market access and national treatment assurances under GATS that they already enjoy under GATT. Thus, the USA has repeatedly pointed out that a WTO dispute settlement case would certainly regard downloaded music on the one hand, and CDs from a store on the other hand, as "like products" – hence the GATT rules should apply. The resulting legal uncertainty of a differential treatment would otherwise put the more efficient form of transactions, namely the online distribution, at disadvantage\(^{62}\).

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\(^{61}\) "To date some countries have argued, for example, an anti-virus software program that is downloaded is to be treated as a service, while the same product, if imported on disk, is to be treated as a good. Adoption of this rule in the WTO would result in substantial uncertainty and harm our industry", cited from BSA (2001a), Business Software Association.

\(^{62}\) PANAGARIYA (2000), pp. 5-7 illustrates the negative consequences of the absence of technological neutrality.
Moreover the classification of similar items under GATT has not been problematic so far. It has so far been normal practice to abstain from classifying an electronic service that may be necessary to manufacture a product – for instance the cross-border transmission of text data in order to print a book – as a separate service transaction\(^63\). It has also become normal practice that most goods incorporate a number of services, data or software and that these would still be seen as a part of the goods transaction\(^64\). In that sense all manufactured products are regarded as carrier media for digitized information\(^65\). Finally, as mentioned before, the physical outputs of certain service transactions, such as architectural designs, have always been considered under GATT.

3. Physical condition of the product points to a GATT classification

The United States argues that there are indeed a number of products, such as entertainment games, that may change their physical carrier medium various times during a trade transaction. A game manufacturer may copy the content of a Game-CD onto a hard drive, send it to the consumer over the Internet who then burns the game on a CD. In nearly all such situations the “content” is intricately linked to a physical object. Digital products are not consumed during consumption. Both this “durability” and the inseparability from a physical medium mean that digital products are rather a good than a service\(^66\). Finally, the USA contends that since the GATT came into being the EC has insisted that electricity – which in terms of comparability (form, shape, etc.) comes closest to digital products – should be regarded as a good and not a service\(^67\).

\(^{63}\) **DRAKE & NICOLAIDES (2000)**, p. 16.

\(^{64}\) WTO Document S/C/8, March 31, 1999.


\(^{66}\) See WTO Document WT/COMMD/17, February 12, 1999, Communication by the USA.
GATS: Arguments for a categorization as services:

In contrast with the USA, the EC argues that digital products should be classified as services. Moreover, as opposed to the US, the EC has pointed out that no such thing as a technological neutrality principle exists across WTO agreements that would demand identical treatment for goods and services. The EC holds the view that a service should not receive a different treatment under GATS when it is delivered through another technology. But the EC is clear that the principle of technological neutrality cannot be applied to compare a goods transaction (software on a carrier medium) to a services transaction (software delivered online). Likeness of products and consequently the same market access and national treatment should not be accorded.

On the whole the EC’s interpretation should be seen from the perspective of various internal negotiation parameters that will be analyzed in chapter 3. Certainly, the desire of the EC to protect its ability to extend its audiovisual policies to digital products plays a major role. If these electronic deliveries are in fact a service, the EC can continue to apply its restrictive rules on the distribution and broadcast of audiovisual works to films and TV programs transmitted over the Internet. Part 2.2 will return to the low level of audiovisual liberalization by the EC.

But the EC is not alone in taking on this interpretation. All other WTO members that are interested in maintaining a wide margin for audiovisual policy intervention follow the same logic. But also the background studies of the WTO’s Trade in Services Division and

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67 It should be pointed out that the HS System gives WTO member countries the possibility to classify electricity as an “intangible good”. The HS System does not allow any other good to be classified under this category.


69 Personal Interview with DG Trade Official.

70 This point comes from private interviews with DG Trade, the WTO Secretariat and German and French delegates to the WTO (133 Committee). See also in this respect “US holds e-commerce talks with WTO partners, covering nature of digital products”, BNA WTO Reporter, June 13, 2001. This point will be taken up in more detail in chapter 3 and 4.
interviews with the responsible WTO officers indicate that it is leaning towards a GATS classification of all digital products.\footnote{The presentation of LEE TUTHILL (Trade in Services Division of the WTO and GATS Council delegate for the WTO E-commerce work program) during the WTO audiovisual conference in November 2001 (see footnote 1) reinforces this impression. But although the viewpoint of the WTO Secretariat may certainly influence some WTO Member States it has no formal consequences, because the Secretariat lacks the authority to make decisions.}

1. **In the long-term GATS allows more liberal trade than GATT**

Certainly GATT presently provides the most trade-liberal framework for cross-border trade of digital products. But this may be a static analysis. Contrary to GATT, the GATS framework allows liberalization along four different distribution modes. Assuming that full commitments are taken under GATS, a far greater liberalizing effect may be achieved than under GATT.\footnote{The author thanks LEE TUTHILL for this point.}

This is true because the WTO member states would then also have commitments in their schedule that guarantee foreign direct investments (mode 3) and the temporary migration of natural persons (mode 4). GATT does not address these dimensions of market entry that can be very important for the audvisual industry, for instance (i.e. ownership of a local TV license, operation of a local cable network, etc.).

Considering this fact, the GATT classification may only be the most liberal for e-commerce seen from a short-term perspective. In the long run, however, it may be an empty gesture. The fact that for instance the software or the film industry is so strongly in favor of a GATT classification, can only be explained by two reasons. Either the more far-reaching dimension of GATS has not been sufficiently taken into account or the supporters of a GATT classification would rather prefer an existing free trade commitment under GATT they can build on rather than an uncertain future GATS commitment.\footnote{Whether GATS liberalizes more than GATT depends crucially on the willingness of the WTO member countries to make wide-ranging liberalization concessions in all four modes and for all service classifications that potentially affect digital trade. Those that favor the GATT classification are certainly not wrong when believing that full commitments in fields like audiovisual services are not realistic in the near future.}
In response to the US argument of technological neutrality the EC position is that this concept only exists within a trade agreement (like the GATS), but that legally speaking, technological neutrality cannot be build between trade agreements.\(^74\)

2. GATT has never been a good framework for trade in content

The international standard for recording merchandise trade is set out in the “International Merchandise Trade Statistics: Concepts and Definitions”\(^75\) (IMTS) and the GATT classification follows the "Harmonized Commodity Description and Coding System (HS)“, created by the World Customs Organization (WCO). This register bases the classification of goods in terms of their physical characteristics, and not in accordance with their eventual use. Because digital products, such as movies, have no real physical attributes, the HS system does not offer any fitting classification to such "content".\(^76\) And so software has so far been classified according to the kind of carrier on which it is recorded (laser disc, magnetic tapes, etc.)\(^77\). These are goods that are carriers of software within HS heading 85.24. (“packaged sets containing CD-ROMs with stored computer software and/or data developed for general or commercial use ”). But diskettes or CD-ROMs with stored computer software and/or data developed to order are to be scheduled under trade in services.

This classification of digital products, according to the type of carrier on which they are, is nowadays problematic. Earlier one could distinguish much more clearly between carrier mediums, such as books, LPs or videocassettes. But today some of these carrier systems, such as laser discs, could be used on various platforms, which means that the strict separation between types of carriers and thus also the straightforward HS classification, have all become redundant.

Another proof that GATT may not be present the most appropriate classification for digital products is the fact that due tariffs are mostly determined by the value of the carrier medium


\(^75\) UNITED NATIONS (1998).


\(^77\) For an explanation how software fits into the HS system, see the TASK FORCE ON SOFTWARE MEASUREMENT IN THE NATIONAL ACCOUNTS (2002), p. 4 f.
and not by the often much higher value of the underlying content\textsuperscript{78}. "In determining the customs value of imported carrier media bearing data or instructions, only the cost of value of the carrier medium itself shall be taken into account. The customs value shall not, therefore include the cost or value of the data or instructions, provided that this is distinguished from the cost or the value of the carrier medium"\textsuperscript{79}. The latter decision that does strictly not apply to electronic transactions, to cinema, to movie or to video recordings leaves it to the WTO members to choose whether they would like to impose tariffs on the basis of the value of the transaction of the carrier contents or on the basis of the value of the carrier medium. It can, however, be empirically verified that the majority of WTO members impose customs duties on the value of the carrier medium\textsuperscript{80}. This could be attributed to the fact that it is difficult at border posts to ascertain and to classify the contents. Undoubtedly, it is in the US interest that this procedure also applies to any digital product\textsuperscript{81}.

Under the current GATT framework, an electronic transmission that takes place without a carrier medium physically crossing a border has so far not been registered as an actual import/export. In connection with electronic networks the fundamental question arises as to where exactly the boundaries of an actual import actually lie. Thus questions were asked in the e-commerce program whether downloaded data were in reality covered by the definition of an import\textsuperscript{82}: "With electronic commerce [...] it was unclear whether there was a 'thing' that actually moved across a border, which would lead to the conclusion that an importation in the sense of Art. II of the GATT had taken place."\textsuperscript{83}. In the WTO Forum an electronic transmission without a carrier physically crossing any border, has so far not deemed as an import/export in the true sense of the word. In the 1984 the Chairperson of the Committee on Customs Valuation stated that when the importation of software is so closely connected with

\textsuperscript{78} On this discussion, see WTO Document WT/GC/24, April 12, 1999: "Valuation Issues arising from the application of the agreement on the implementation of Art. VII of the GATT 1994", G/VAL/1-8 and G/VAL/W1-5.

\textsuperscript{79} World Customs Organization (WCO) Technical Committee Commentary, printed in WTO Document G/C/W/128, November 5, 1998. The basis for this kind of classification of contents was the the Agreement on "Valuation Issues arising from the application of the agreement on the implementation of art. VII of the GATT 1994" or the "Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment". See also WTO Document G/VAL/8, October 21, 1996.

\textsuperscript{80} Personal conversation with the Brazilian delegate to the WTO, SERGIO DOS SANTOS, on November 22, 2001.


\textsuperscript{82} WTO Document G/C/W/158, July 26, 1999.

\textsuperscript{83} Cited from WTO Document WT/GC/24, April 12, 1999.
the importation of goods (for instance from an assembly plant), then the data transmission should be classified as part of the imported goods and not as a new importation action\textsuperscript{84}. Quite interestingly this could mean that if one deals with an electronic content transmission alone then it may well be the case that no WTO Agreement obligations or liberalization concessions apply. Of course, it should be kept in mind that the decision was made roughly 20 years ago, when there was no agreement yet on trade in services.

This and the fact that customs values have so far been established on the basis of the type of carrier and not the content itself – are witness of the rather incomplete appreciation of the emerging content industries and of digital trade. Indeed, GATT has difficulties in dealing with any trade on which customs duties cannot be imposed at physical border posts. This is an indication that the GATT categorization of digital products is not adequate.

3. Physical condition of the product points to a GATS classification

The distinction between goods or services is often made on the basis of the physical form of the product; in other words whether it is tangible or intangible. Accordingly products without any physical form – such as a financial consultation or an online software program– are regarded as services. Following that logic, all products delivered electronically should be considered services. But the question remains how close the relationship should be between such a product and a so-called carrier technology in order to qualify as a good rather than a service. If a consumer would watch a video stream online, transmitted via the Internet, then this would be described as an audiovisual service. What then happens if this same consumer burns this film to a CD and thereby attaches the "content" to a carrier medium that falls under GATT? In the opinion of the WTO Secretariat this subsequent transformation process was not connected to the initial cross-border import\textsuperscript{85}. Thus, the mere fact that in the end the consumer puts the data on a carrier medium does not suffice to make it a GATT transaction.

\textsuperscript{84} WTO Document G/VAL/W/14/Rev. 2, July 25, 1984. Also: "The point that had been made was that the delivery of information or software via satellite did not conform to the traditional definition of importation of goods upon which customs duty might be payable. The WCO Secretariat had suggested that there could be circumstances where the delivery of information was closely associated to the importations of goods and, in this case, the software could be taken into account in the determination of the value of the imported goods." Fifth Meeting on the interpretation of the WTO Agreement on Customs Valuation, contained in WTO Document G/C/W/128, November 5, 1998. See also in this connection G/VAL/W/14/Rev. 2, July 25, 1984 or G/VAL/W/12, October 8, 1996.

\textsuperscript{85} "If hard copies are produced, whether legally or not, this is a manufacturing process resulting in the production of goods, into which the electronic transmission could be seen as a service input: [...] virtually all
4. **GATS classification offers new and more adequate classification possibilities**

The argument offered by the USA that certain digitizeable products have always been classified under GATT and that therefore digital products should consequently be regarded "like products" is not convincing. After all, at the time of classifying these products – such as in the case of electricity – the GATS treaty did not exist. For the lack of something better, at the time the integration of these products into GATT via their carrier medium was the most desirable solution. But because the WTO Agreements have now matured, there is some justification to change the classification of products that hitherto have been attributed to the GATT. After all, audiovisual or computer services that determine the value of most digital products are themselves classified under GATS.

From a legal point of view it is in fact incorrect to determine the GATT or GATS positioning of digital contents according to whether they can be interpreted as falling into any particular category within the HP or CPC codes. One should rather determine where the real value of the product lies and then see whether that fits to a service or a goods transaction. Moreover, the advantage to group all digital transactions under GATS ("across-the-board definition") lies in the fact that trade frictions resulting from the various classification possibilities of individual products are avoided. Finally, since the initial classification of movies under GATT, more than 50 years have gone by. During that time the understanding of the service sector in general and the trade of content has greatly evolved. It may now be time that this change is reflected by a new classification.

5. **The underlying business models point to a service categorization**

In this section it will be argued that digital products, such as online software cannot be considered “like products” to the original offline products. The change towards a network-based services economy means that business models for products like software (hitherto classified under the GATT) increasingly rely on complementary electronic service transactions. Nowadays the purchase of software for example is no longer a one-stop action. Online software support, updates and steps to customize the software increase service manufactured goods involve services inputs of various kinds", cited from WTO Document S/C/W/68, November 16, 1998.

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86 Please note that an across-the-board classification of all electronic products under GATT is impossible because many relevant areas have already been registered as services by the GATS classification system.

87 See RÜCK (2000) for the changing economic understanding with respect to services.
interaction between producers and consumers. Besides, the degree of personalization that the product then receives makes it very different from a standardized software package. The value of the software really lies in these later online interactions. Because of the increased functionality and service component the software may in the final analysis not be a “like product” of the traditional software anymore.

**TRIPS: Arguments for a classification as trade in intellectual property rights**

The above examples about the trade in online movies or customizable software may also create the impression that neither a trade in goods nor a trade in services transaction takes place. It would rather appear as if these transactions derive their value from commercial transactions with “ideas and content” that are protected by intellectual property rights. The only service involved may well be the distribution service that delivers content from country A to country B. In trade statistics these transactions are mostly reflected in the trade in services tables, under the heading, “Royalties and License Fees”. However, in the audiovisual service nomenclature of the GATS that is used to make market access or national treatment commitments this classification does not exist. Furthermore, when a cross-border software purchase takes place not the program as such, but actually the license to use the program to a certain extent (in other words the usufructs), that is being purchased. The program itself remains the possession of the intellectual proprietor. Thus, some have argued that the issue of content classification deserves to be treated under TRIPS.

Although the idea that commercial transaction in knowledge-based economies have less to do with traditional goods or service transactions than with the actual licensing of content,
information and knowledge, a classification of digital products under the TRIPS Agreement is not a solution. The reason is that whereas the TRIPS Agreement offers far-reaching standards to protect intellectual property it guarantees neither market access nor any other form of trade liberalization. Consequently, TRIPS cannot constitute the trade framework for digital products. In this connection it should however be noted that in the IMF and OECD manuals on trade statistics the “Cross-border payments for royalty and license fees” figure prominently under trade for services\(^\text{94}\).

**A hybrid solution: GATS classification but with GATT treatment?**

The latest proposals tabled at the WTO e-commerce work program rather propose a kind of hybrid solution to the categorization problem; namely a categorization under GATS while ensuring that GATT-level market access applies. The Singaporean and Japanese representatives stated that if market access in the form of unconditional MFN, national treatment and the prohibition of quantitative restrictions is to be recognized, even under GATS, the “goods or services” argument over digital contents could be rendered meaningless\(^\text{95}\).

At first sight this solution is quite popular among the WTO delegations. But pragmatically speaking, these digital products would then appear in one or several service classification groups. In this context the GATT principles (unconditional MFN, national treatment, the prohibition of quantitative restrictions and often free market access) would have to be mirrored by the individual countries’ GATS commitments that would translate into significant cross-border market access and national treatment commitments. Clearly it is not realistic to assume that most countries would accommodate that prerequisite for audiovisual services and the like. Otherwise it would not have been all that difficult to reconcile the differences of opinion regarding GATT or GATS classification. A second look thus reveals that this hybrid approach


\(^{95}\) METI (2001): Proposal on WTO’s approach to E-commerce Towards eQuality: Global E-Commerce presents a Digital Opportunity to Close the Divide Between Developed and Developing Countries, Non-published communication of Japan to the WTO work program on e-commerce of June 15th, 2001 non-paper of Singapore to the regular meeting of the General Council on 8 May (JOB(01)55, 26 April 2001). Para. 16 of the latter paper argues that by this agreement online delivered products, such as software, would not be treated worse than traditional offline sales. See also “WTO Members Fail to Agree on Rules For E-commerce Deals; New Meeting Called”, BNA WTO Reporter, May 10, 2001.
does not constitute an acceptable solution to the US if this is not followed up by the subsequent necessary GATS commitments.

To conclude, the correct classification of digital services remains a hotly contested issue. The WTO members have not yet accepted any of the above classifications and an agreement is not in sight. But clearly the questions at hand may be more important than one would first think. It is now realized that trade in content (not only music, but also designs and other blueprints or ideas) may not fit well within the classic GATS or GATT-frameworks. Furthermore, many observers regard this discussion as a symptom for the prospect that - in the long term - the division of the WTO into GATT, GATS and TRIPS will be difficult to maintain\footnote{See for instance FEKETEKUTY (2000), pp. 108-110 who was one of the first to raise the issue of the increasing complexity to distinguish between goods and services and the ensuing potential need for a fusion of both the GATS and the GATT agreement.}. 

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\footnote{See for instance FEKETEKUTY (2000), pp. 108-110 who was one of the first to raise the issue of the increasing complexity to distinguish between goods and services and the ensuing potential need for a fusion of both the GATS and the GATT agreement.}
2.1.2.2 If in GATS: Where to Classify Digital Product Services?

The problem of categorizing digital products does not stop here. In fact, even if a GATS classification is agreed to, it is quite uncertain under what commitments many electronic services fall. This problem results of the generic fact that the 1991 classification scheme chosen for the positive list approach taken is outdated. Although here the problem of digital product services is dealt with only, the problem of correct classification is a horizontal one that also pertains to financial services, for instance.

This unclear classification “within” the GATS is highly problematic, as no one knows whether individual GATS signatories have committed themselves to free trade for this particular service; overlap and duplication of listed sectors exist\(^\text{97}\). Two essential questions need to be addressed:

(i) Where to classify digital services such as online movies, entertainment games, interactive information services, etc.?

(ii) Once the classification for all services is clear, how will the “likeness” of such services be assessed?

Again seen from a very broad perspective the issue of determining the likeness between services will be one of the most difficult issues the WTO members and international law experts will have to deal with in the future\(^\text{98}\). On a narrow front, the next paragraphs will show that this issue is of particular relevance to digital products. It is unclear under what entry in the sectoral classification list certain digital products will be treated. To complicate the matter even more, there is a marked imbalance of commitments between the different possibilities. Thus, to determine what service receives the same treatment as another, it is essential to be in a position to pronounce on their likeness.

But on a broader front, the greater feasibility of cross-border trade in services brings to the fore larger questions that are not limited to the issue of digital products. For instance: when is a service from abroad “like” a service provided domestically? Is it the service itself or the service providers themselves that have to be alike in order to be guaranteed equal trade


\(^{98}\) See ARKELL (2002), p. 5 who points out that the GATS concept of likeness has not been subject to significant panel interpretations and that the advent of the Internet will constitute a severe test of the bounds of likeness.
treatment? Previously, when nearly all of the service trade was conducted via some establishment (GATS mode 2) this question did not often arise. Most foreign service providers were incorporated under domestic law and their product was submitted to the same regulations as any other domestically produced service. However, the issue currently becomes much more complex when one starts dealing with foreign service providers that are actually established in a different country with different practises and different regulatory requirements. From an American perspective, one needs to determine whether a banking service from a provider in the Phillipines is “like” a financial service from an American or Swiss provider. While the question of likeness has – despite of considerable efforts - not been dealt with satisfactorily in the domain of the GATT it is not exaggerated to say that the work in the field of “likeness” for services has hardly begun.

Whereas this work cannot deal with the broader question of “likeness”, it concentrates on the classification of electronic content services. To this day, it is questionable which GATS commitments apply to electronic services. Although the WTO Secretariat has proposed a homogeneous classification model for services not all countries schedule in accordance with this model. Those who do so certainly have a different interpretation concerning the different service categories.

Several principles for the classification of electronic content services may be followed. One may opt for a sector-specific treatment (an electronic content service from a bank is scheduled under financial services) or for a content-related treatment (an electronic content service, such as a multimedia product is scheduled under audiovisual, software or similar service categories). Questions arise as to whether financial information services over an interactive web platform should be classified under financial, consulting or even news press agency service. Moreover, the question where to classify trade in digital products in the existing nomenclature is a central issue.

99 The author thanks RUDOLF ADLUNG (Trade in Service Division, WTO) and ALEXANDER ZIEGLER (EFTA Secretariat) for interesting discussion on this point.

100 Known as the W/120 among the WTO delegates. See WTO Document MTN.GNS/W/120, 10.7.1991 for the full classification schedule these paragraphs are based upon.

101 Certainly the service providers may see themselves differently than the service negotiators do. Financial information providers (Dow Jones, Reuters, etc.), for instance, see themselves more as business information service providers. See OECD (2001), p. 10.
Table 2 reflects the most relevant classification possibilities concerning electronic content services. They range from classification as a regular business service over communication to recreational services. As discussed previously the coverage of the content itself is actually uncertain. Although there is an entry for computer services or motion picture distribution services, the software or the movie itself may not be covered. As the table indicates is important to look at the whole range of classification possibilities because very different commitment levels apply for the different sectors. They range from liberal on the left hand side to very limited market access and national treatment commitments on the right hand side.

Table 2 Classification Possibilities for Electronic Content Services

<table>
<thead>
<tr>
<th>1. Business services</th>
<th>2. Communication services</th>
<th>10. Recreational, cultural and sporting services</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Computer and related services</td>
<td>C. Telecommunication services</td>
<td>D. Audiovisual services</td>
</tr>
<tr>
<td>a. Consultancy services related to the installation of computer hardware</td>
<td>h. Electronic mail</td>
<td>a. Motion picture and video tape production and distribution services</td>
</tr>
<tr>
<td>b. Software implementation services</td>
<td>j. On-line information and data base retrieval</td>
<td>b. Motion picture projection service</td>
</tr>
<tr>
<td>c. Data processing services</td>
<td>k. Electronic data interchange</td>
<td>c. Radio and television services</td>
</tr>
<tr>
<td>d. Data base services</td>
<td>n. On-line information and/or data processing</td>
<td>d. Radio and television transmission services</td>
</tr>
<tr>
<td>A. Advertising Services</td>
<td></td>
<td>e. Sound recording</td>
</tr>
<tr>
<td></td>
<td></td>
<td>f. other</td>
</tr>
<tr>
<td></td>
<td></td>
<td>B. News agency services</td>
</tr>
<tr>
<td></td>
<td></td>
<td>C. other</td>
</tr>
</tbody>
</table>

Full GATS commitments, “none” to No or few GATS commitment, “unbound”

Most liberal to less liberal

Source and explanation: The darker area to the right indicates less commitments than the lighter area to the left. Own display of information contained in the services sectoral classification list in WTO-Document MTN/GNS/W/120, 10.7.1991.

\[102\] Other than audiovisual.

\[103\] Theatrical producer, singer group, band and orchestra entertainment services; services provided by authors, composers, sculptors, entertainers and other individual artists; circus, amusement park and similar attraction services; ballroom, discotheque and dance instructor services; other.
In any case, the distinction between the content itself and the actual delivery (e.g. telecommunication service) is a crucial but difficult one that the GATS negotiations have been struggling with since the telecommunications negotiations started. Again, the EC position is very different from the American one. Whereas according to the EC “content” is to be scheduled under audiovisual and not the telecommunication services, the US does not agree to this straightforward delineation. When for instance the Secretariat wrote that, “as a general rule of thumb, however, it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications,” the US was strictly opposed to this interpretation. It contended that the distinction between these two sectors that exist in the analogue world is not as easy to identify in the digital world.

In sum, no consensus could be achieved on the differences between basic or value-added telecommunications or which services would actually fall under audiovisual or telecommunication services. A look at the GATS Annex for Telecommunications also

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104 The WTO Secretariat notes in a background note on audiovisual services: “Especially for the sub-category of Radio and television transmission services (CPC 7524), it sometimes becomes difficult to determine exactly the boundary between services classified under telecommunications and those classified under audiovisual services.” WTO-Document S/C/W/40, Audiovisual Services, Background Note by the Secretariat, 15.6.1998.

105 The EC’s schedule of specific commitments for telecommunication services (see WTO document GATS/SC/31/Suppl.3, April 11, 1997) features the following description: “Telecommunications services are the transport of electro-magnetic signals - sound, data image and any combinations thereof, excluding broadcasting. Broadcasting is defined as the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators. Therefore, commitments in this schedule do not cover the economic activity consisting of content provision which require telecommunications services for its transport. The provision of that content, transported via a telecommunications service, is subject to the specific commitments undertaken by the European Communities and their Member States in other relevant sectors.”, underlining by the author. In the EC schedule broadcasting is defined as the uninterrupted chain of transmission required for the distribution of TV and radio program signals to the general public, but does not cover contribution links between operators.

106 See NIHOUL (2001) for details about the US-EC disagreements concerning the differences between audiovisual and telecommunication services.

107 WTO-Document S/C/W/40, Audiovisual Services, Background Note by the Secretariat, 15.6.1998, para. 5.

108 Based on a personal interview with a USTR representative in Geneva. A closer look though at the American specific telecommunication commitments reveals that they exclude one-way satellite transmissions of digital television services and of digital audio services. This seems somewhat inconsistent with the above proposition. It is not clear though if the US sees these as telecommunication services, but it simply does not make any commitments, or whether the US considers these outside the scope of the telecommunication services list. See GATS/SC/90/Suppl.2., date is missing.

109 See BRONCKERS & LAROCHE (1997), p. XX for the difficulty of distinguishing between basic and value-added telecommunication services. Concerning the differences between audiovisual and telecommunication services.
reveals that cable and broadcast distribution of radio and television programming is carved out of the Annex. Thus, this created a vacuum in terms of trade disciplines governing the regulation of on-line audio and video content. Moreover, it is not clear whether the GATS Telecommunications Agreements apply to applies to cable companies and other non-traditional telecom service suppliers over whose networks scheduled services (e.g. on-line stock quotes) may be delivered. On the whole, uncertainty remains as to what parts of the total value-chain of getting content out to viewers is covered by what commitments. Whereas countries may have listed no limitations to audiovisual service production and even audiovisual projection they may have retained limitations on the transmission of particular content.

Equally, the distinction between advertising and audiovisual services is not clear-cut. Within the sectoral classification list of audiovisual services there is also an entry for promotion or advertising (CPC 9611) that creates an element of uncertainty towards the applicable advertising commitments. Finally, the distinction between computer and telecommunication services becomes increasingly blurred because the telecommunications schedules include services difficult to differentiate from computer services, such as electronic mail, voice mail, on-line information and data base retrieval, electronic data interchange, etc. If a country does not have a commitment on library or audiovisual services, for instance, it

services a conference was recently (November 2001) held at the WTO (see www.ulg.ac.be/ieje/nip/ for the conference papers).

Para. 2(b) of the GATS Annex for Telecommunications. Also, broadcasting is not mentioned as a sectoral activity in the audiovisual classification. See also ROBERTS (1999).


It may also be the case that the transmission itself, the bottleneck in getting content to viewers, is not covered by full market access and national treatment commitments. These points have strongly benefited from a discussion with CAROL BALASSA (USTR).

See WTO Document S/C/W/47, Advertising Services, Background Note by the Secretariat 9.7.1998, p. 3 on the difficult distinction between advertising and audiovisual services.

In that respect the WTO Secretariat notes the following: “Given the lack of further clarification, at least three diverging interpretations are possible: CPC 96111 is intended to cover activities related to (i) production and circulation of advertisements for audiovisual services; (ii) broadcast of advertisements through audiovisual media; and/or (iii) production of audiovisual advertisements, e.g. for TV commercials. The potential for interpretation problems is compounded by the fact that, while 51 Members have undertaken commitments on “other business services/advertising services”, no more than 8 Members have committed on “promotion or advertising services” (CPC 96111).” Same source as previous footnote.

WTO document S/C/W/45, Computer and related Services, Background Note by the Secretariat, July 14, 1998, p. 3-4.
may still be bound by content-related commitments made in sectors like computer services that expose the content sector to the full array of GATS obligations\textsuperscript{116}.

At times, members have been explicit on the distinction between these services – as the EC on the difference between telecommunication and content services\textsuperscript{117} – but most of the times the meaning of the commitments is uncertain. Even in the case of the EC that explicitly excludes content from its telecommunication schedule, the EC schedule leaves the reader in doubt under what “other relevant sectors” content provision may fall. This latter problem of lacking certainty towards applicable commitments is aggravated in cases of “new” services, such as online trading platforms for banks\textsuperscript{118} or entertainment products that combine software, audiovisual and telecommunication services\textsuperscript{119}.

To conclude, there is also an issue that has been termed “regulatory creep” that adds relevance to these classification problems\textsuperscript{120}. Traditionally, these less liberalized sectors on the right of the grid in table 2 were also the most regulated sectors whereas the sectors on the left profited from low regulatory intensity. But today the increasing convergence of service products - or at least the consensus that is still outstanding for a straightforward classification - poses problems related to the different degree of state regulation that the range of the sectors in table 2 are faced with. In other words, in the process of convergence regulations from the one sector increasingly influences (or “creeps”) the hitherto unregulated sectors\textsuperscript{121}. A standard example in this respect are the constraints faced by the heavily regulated telecommunications and broadcast sectors that may suddenly apply to the trade in software (or software services)\textsuperscript{122}.

\textsuperscript{116} See SHRYBMAN (2001), p. 24 f. for how commitments under the subheadings “computer and related services”, or “research and development” may affect library services in which no GATS commitments have been undertaken.

\textsuperscript{117} See footnote XX above.

\textsuperscript{118} The author thanks Christophe Perritaz from SECO for this point on new services.

\textsuperscript{119} See also CHADHA (2000), p. XX for this point.

\textsuperscript{120} This term has been coined by the U.S.-based Business Software Alliance (BSA) that sees the software sector being negatively affected by regulations from other sectors.

\textsuperscript{121} See S/C/W/81, December 9, 1998, Communication from the US on Computer and Related Services that describes this phenomenon for computer services.

\textsuperscript{122} WTO-Document S/C/W/45, Computer and related Services, Background Note by the Secretariat, 14.7.1998, p. 2 and pp. 13 f.
To summarize: these paragraphs illustrate that the WTO member states have far-reaching interpretation margins for their commitments that may be used to the advantage of most liberal trade. In addition, some services may rely on both a telecommunication and for example an audiovisual service (inter linkage between service sectors) that may make it even more necessary to eliminate the imbalances of the concessions in between service sectors. This or more precise definitions of service sectors would also avoid uncertainties over commitments. An example relating to entertainment software in box 1 illustrates the classification debate and indicates how interrelated the issues presented here are in fact.

**Box 1: Case study for Multimedia Online Games or Entertainment software**

Most sources agree that the product ‘computer software’ is not well identified in current international trade codes (neither for GATT nor GATS) or balance of payments (BOP) items. One the one hand, an individual entry for software itself cannot be found in the GATT classifications. Only certain carrier media are subject to favorable GATT treatment. *Ad valorem* tariffs are thus mostly imposed on the value of the carrier media and not the value of the content itself. Moreover, the treatment of software through the Information Technology Agreement (ITA) seems even more favorable. It phases out all tariffs by 2000 of major IT exporting and importing countries. But this tariff free zone applies to software only indirectly via the transporting carrier media. Still, most experts - and certainly the IT industry - itself agree that for software the tariff line is set to zero. Some differences

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123 Considering that point the OECD (2001a) and the preparatory work for the GATS negotiation guidelines (WTO documents under S/CSS/W/* and especially the EC’s contribution S/CSS/W/3) have addressed the need to address certain “clusters” of services in the negotiations. This proposition however, was not taken on as a negotiation technique in the GATS negotiation guidelines because of serious disagreements of WTO members on that topic. The traditional sectoral request-offer negotiation remains the basis for this round.

124 See TASK FORCE ON SOFTWARE MEASUREMENT IN THE NATIONAL ACCOUNTS (2002), p. 4 f.

125 Legally speaking, the ITA is a special agreement under GATT. See FLIESS & SAUVÉ (1998) for an excellent discussion of the ITA and p. 3 for these points on software. WASESCHA & SCHLAGENHOF (1998) also provide valuable background information on the ITA.

126 By 2003 54 WTO members that represent roughly 95 percent of the world trade in IT have joined the ITA. All the industrialized countries have maintained a zero tariff line since the year 2000.

127 A look at the ITA commitment list of the USA or the EC reveals that the word “software” does not appear individually but always appears via the HS code for carrier media (ITA US Rev 3, March 26, 1997 and ITA EC Rev 2, March 26, 1997 ). The fact that software itself is not covered in the ITA is buttressed by the official list of ITA products (see the WTO page http://www.wto.org/english/tratop_e/inftec_e/itadec_e.htm or the WTO Press Brief, “Information Technology Agreement”, March 27, 1997). A press release from of the WTO makes clear that the WTO definition of IT excludes software (see the WTO News: 1997 Press Releases, “Ruggiero cites progress in the ITA”, , March 3, 1997 under http://www.wto.org/english/news_e/pres97_e/pr69_e.htm.

between the IT industry and experts persist with regard to the type of software covered. The BSA, the ITIC and the ITAA state that all software types are covered under the agreement because the broad definition of software products extends to multimedia, interactive and other software\textsuperscript{129}. But during the ITA negotiations the EC wanted entertainment software carrying sound and or visual recordings to be deleted from the ITA software definition and some observers are of the opinion that the EC got its way\textsuperscript{130}.

Considering that the commitments are made for carrier media and not for the content itself, one may wonder how particular content types could be excluded\textsuperscript{131}. Moreover, it is questionable how the distinction between software and multimedia products could be made in practice. Both points can be taken as a demonstration that the ITA covers either all or no software types. Clearly, no WTO member defends the latter stance.

This uncertainty may also go a long way in explaining why the US is pressing hard for the duty-free moratorium on e-commerce that – according to the American interpretation – would apply to all types of electronic transmissions (including entertainment software). If however, entertainment software was not covered by the ITA but by the far-reaching GATS mode 1 commitments for computer services, then the USA may be wrong in assuming that the GATT is more liberal after all.

**GATS classification:** On the other hand, the classification of software under the GATS is not any easier. Again, software and content are not directly mentioned in the existing classification scheme and it is questionable where to draw the line between the software product and an actual service\textsuperscript{132}. This is because the GATS sub-sector on computer services (known as UNCPC 842) refers only to the "consultancy" services related to "development and implementation" of software. And even if GATS were to be applied, parts 2.1.2.2 showed how difficult a classification of multimedia or entertainment products between sector-specific services (financial software = financial service), computer, telecommunication, audiovisual or entertainment services may be.


\textsuperscript{130} FLIESS & SAUVÉ (1998), p. 51 f.

\textsuperscript{131} As mentioned on page XX, the only carrier media formally excluded from ITA and submitted to the GATS domain is the one containing software to conduct orders.

2.1.2.3 When GATS: Should Electronic Content Services be Covered by Mode 1 or Mode 2?

Regarding open e-commerce questions, there is no unanimity on the important question whether electronically delivered trade in services falls under GATS Mode 1 (cross-border trade) or Mode 2 (consumption abroad). In the forum of the e-commerce work program different arguments were put forward in favor of both classifications. The Japanese delegation for example argued that until now telephone and fax transactions were always considered under GATS mode 1. It is thus only logical that electronic trade too, should be covered likewise. The Americans who argued for the most liberal classification form questioned whether a mode 2 classification would not be better. The US actually argued that the consumer actually "visits" the website of an Internet service provider in another country. Countries, such as Switzerland, that are interested in cross-border financial services followed this argument.

If one applies the GATS sectoral classification list, then this distinction depends on whether the service is produced in the recipient country (the foreign producer is locally established) or whether it is produced abroad and consumed by a national resident (the national consumer “travels” to the foreign producer). However, this criterion for distinction breaks down if neither a physical movement of the provider nor of the consumer takes place.

Apart from statistical considerations, an answer to this classification problem is important because the existing commitments differ widely depending on the selected GATS transaction mode. If in one of these modes a WTO member state has not reported any limitations to market access, national treatment or the Most Favored Nation principle, then any actions it may take to place in jeopardy these principles of opening up markets, may not be legitimate.

Firstly, Mode 3 concessions often contain more wide-ranging obligations towards the opening of service markets than GATS mode 1 and 2. Secondly, concessions under mode 2 are generally deeper than concessions under mode 1. The reason for the focus on mode 3 concessions is that under mode 3 the local physical presence of the service provider is

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guaranteed. This in turn means that regulators have better control over the service provider. In addition to this theory of regulatory capture, some authors argue that the focus on mode 3 concessions is a hidden trade-related measure to encourage investments in the local economy\(^\text{137}\).

Many states have undertaken obligations in Mode 2, accompanied by no limitations to non-discriminatory market entry ("none"). States simply accepted that their citizens couldn’t be prevented from consuming abroad\(^\text{138}\). In contrast, the concessions not to renounce on present or future market access or national treatment limitations against the mode 1 type of delivery, are much more modest (see table 3)\(^\text{139}\). So it may certainly be argued that in the context of cross-border services the lack of 'None' commitments in Mode 1 means that WTO members will have the ability to impose regulatory roadblocks to electronic services\(^\text{140}\).

**Table 3: Mode dependent GATS concessions**

<table>
<thead>
<tr>
<th>Mode 1</th>
<th>Mode 2</th>
<th>Mode 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>„all limitations possible (unbound)“</td>
<td>“no limitations possible (none)“</td>
<td>“no limitations possible (none)“</td>
</tr>
<tr>
<td><strong>Business Services</strong></td>
<td>25%</td>
<td>88%</td>
</tr>
<tr>
<td><strong>Finance</strong></td>
<td>30%</td>
<td>57%</td>
</tr>
<tr>
<td><strong>Entertainment</strong></td>
<td>31%</td>
<td>94%</td>
</tr>
<tr>
<td><strong>Health</strong></td>
<td>80%</td>
<td>89%</td>
</tr>
</tbody>
</table>

**Comments on Table 3:** This table provides a sector-specific analysis of the degree of liberalization concessions in the respective modes. To illustrate, under Mode 1 for health services, 80% of the GATS concessions by all member states permit all discriminatory market access limitations (unbound). The columns on Modes 2 and 3 in turn show the share of concessions that adhere to relinquishing discriminatory regulations (none). For example in the health sector under mode 2 only 11% (100% - 89%) of the concessions are of such a nature that further limitations may be continued.

Source: Own translation and compilation: Data from ALTINGER & ENDERS (1996), p. 320.

This picture of imbalanced GATS commitments between modes, could certainly lead to one questioning the eventual technological neutrality of GATS. In the end only a few technological variants – such as mail, telephone, electronic networks, etc. – come into play for

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\(^\text{137}\) See WTO Secretariat (2001a), p. XX.


\(^\text{139}\) TINAWI & BERKEY (1999), p. 5. In their country lists the authorities have mostly entered "unbound" in the mode 1 column and "none" for limitations under the mode 2 column. Also see PANAGARIYA (2000), p. 12.

\(^\text{140}\) TINAWI & BERKEY (1999), pp. 7-8. This imbalance is particularly strong for the USA and the EC.
cross-border service distributions. Thus the limited mode 1 concessions in themselves amount to a discrimination by WTO member states against certain technological delivery methods. It is likely that this was not done for the purpose of discriminating against certain technologies. The low GATS mode 1 commitment level rather meets the desire of WTO member states to subject service providers to the local regulatory regime. Still, the negative effect on the use of new technologies for trade is a reality. Box 2 provides two examples for the relevant problem.

**Box 2 Example of a case in favor of the questions on Mode dependent classification**

| Whereas until recently it was unthinkable that data processing services or other IT services could be outsourced abroad, there are a variety of these services operating today. If a country has not made any commitments under mode 1 (unbound), and it has not registered any limitations under mode 2 (none), then the question of classifications in terms of mode 1 or 2 has a marked effect.  

If in this scenario electronically delivered services are classified as mode 2 transactions, then the WTO members with no limitations on GATS mode 2 have no right to limit the market entry of foreign suppliers by means of discriminatory regulations. This obligation is effective for traditional services that are now delivered with the help of technology and for new services that fit into existing commitments. A classification under mode 2 thus translates to a preemptive ban on discriminatory regulations that some WTO members may now want to introduce.  

But on the other hand, if electronic services should be classified under Mode 1, then the majority of WTO members who have scheduled some limitations, are still able to erect discriminatory barriers concerning cross-border services. Most newly created services that fit under a service classification with limitations could thus be burdened with regulations that are in conflict with the market access and national treatment principle.  

This contrast is qualified by the fact that under any mode 1 or 2 commitment WTO member states may still adopt regulations for reasons that fall under GATS Art. XIV exemption clause. In other words: Despite of full mode 1 and mode 2 commitments (entry of “none”) a country may choose to enact regulations that go counter the market access and national treatment principle to prevent fraudulent practices or to protect the privacy of individuals. |

Source: Adapted from TINAWI & BERKEY (1999), pp. 7-8 and own contributions

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141 These relate to discriminatory regulations that fall under GATS Art. XVI and XVII.
142 The general exceptions found in GATS Art. XIV are public morals, public order, human/animal/plant life or health, etc. and the security exceptions are in GATS Art. XIV bis. However, the chapeau of this article makes quite clear that disguised restrictions on trade in services or discriminations between countries are not accommodated by this general exception.
The categorization either under Mode 1 or 2 also may have far-reaching legal consequences that are leading experts into unchartered waters\textsuperscript{143}. There is a frequent question as to what national legal system is applicable in a cross-border electronic delivery of services. Whereas some experts state that GATS does not pronounce itself on matters of jurisdiction\textsuperscript{144} others state that the GATS classification under either two modes indicates which country's regulations are applicable in the case of a cross-border transaction\textsuperscript{145}. Following this interpretation, under mode 1 the regulatory regime of the buyer's locality and under mode 2 the foreign regime of the service provider abroad would be applicable. If, for example, a financial transaction\textsuperscript{146} over the Internet (an American customer makes transactions over the website of a Swiss bank) is classified under mode 2 for example, then Swiss laws on financial services (including laws on disclosure and confidentiality\textsuperscript{147}, on investor protection, etc.) apply. Consequently, consumers who make electronic transactions are covered by foreign and not their own national law system. Depending on the degree of protection offered by national vs. foreign law this will not \textit{per se} result in a worse position for the consumer. But the fact that consumers would have to resort to foreign courts to settle a claim is not an acceptable scenario to many regulatory agencies responsible for consumer protection.

This example enables one to see that – seen from a national government perspective – this adds a particularly thorny dimension to the mode 1 vs. mode 2 classification. Obviously, a mode 2 classification would mean that all efforts of WTO members to submit service providers under their regulatory control - and therefore all efforts to avoid regulatory competition from abroad - have not been achieved through a reluctant stance on mode 1 liberalization. Nevertheless, WTO member countries have expressed some serious interest to tackle these jurisdictional questions from the GATS perspective\textsuperscript{148}.

\textsuperscript{143} See FTC (2000) for a good overview of the debate around country of origin regulation versus country of destination regulation.

\textsuperscript{144} HOEKMAN & KOSTECKI (2001), p. 265.


\textsuperscript{146} As will be seen in the parts on necessary liberalization the financial sector is very affected by this mode 1/2 differentiation because the imbalance between the two commitments modes is particularly conspicuous.

\textsuperscript{147} This is obviously a big issue for the Swiss financial landscape that derives some of its competitiveness from the very strict confidentiality requirements (Bankgeheimnis) to which banks are held by tax or other government authorities. This point was derived from a interview with a SECO official.

Until now only unsatisfactory solutions to the categorization problem have been offered. Concerning a straightforward classification of all electronically delivered services under mode 2, it should be noted that although it is the “most trade-liberalizing approach” it is not politically feasible. During the Uruguay Round and Post-Uruguay negotiations many states did not list any limitations to the market entry under Mode 2 because they did not foresee that Internet transactions could actually be classified under that entry. Now, if it is decided to apply mode 2 to electronically delivered services, many member states will be forced into GATS commitments that they initially did not intend. Despite the obligation by GATS towards progressive liberalization (Art. XIX), it is more than questionable whether this somewhat blunt *modus operandi* would create confidence among WTO members regarding future commitments.

Other suggestions have not performed better. Australia, for instance, was in favor of classification according to the country where the final consumption of the service took place. It has been shown elsewhere that the application of this delineation method however does not always lead to clear-cut answers. There are also proposals to create a new fifth delivery mode for Internet services. The advantages of such an action are not clear. All commitments would need to be renegotiated for that mode and the division between these would not become clearer merely because a new Mode has been created. In conclusion: suggestions that do not make the distinction clearer in practice were made during the financial services negotiations when certain WTO member states proposed that any service provider who actively approaches the consumer (promotion, direct solicitation, etc.) should fall under mode 2.

From a liberal trade perspective the most appealing solution would be that WTO members agree to identical liberalization levels between the two modes. This is also a proposition the EC and US delegation to the WTO find – at least in the non-binding discussion of the WTO e-commerce program – acceptable. Even the WTO Secretariat underlined that the distinction should be left to negotiations on market access. Three problems arise with this procedure.

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151 See *Hauser & Wunsch* (2002), p. XX.

152 Source is missing.

Firstly, it would not solve the jurisdictional questions. Secondly, the WTO member states would again postpone finding a meaningful distinction between mode 1 and mode 2. One has to keep in mind though that a clear distinction between mode 1 and mode 2 could easily be achieved by means of geographical references\textsuperscript{154} would almost certainly accord the lower level of liberalization, namely mode 1, to electronically delivered services. And finally, - as this thesis will gradually uncover – the chances that the mode 1 commitments would be increased to the mode 2 level in sectors, such as financial service, are extremely slim. Maybe it is exactly these criticisms - no need to define clear boundaries between mode 1 and 2 and no automatic but discretionary liberalization of e-commerce - that make this solution approach so popular among some WTO delegations.

\textsuperscript{154} Only if the consumer has actually physically traveled to consume abroad and a physical co-presence of the foreign service supplier and the consumer is present then mode 2 applies. This understanding would certainly come closest to the original intention of WTO members.
2.2 Sector-specific Analysis of Necessary Liberalization: The Case of Digital Products

When it comes to e-commerce prone sectors, the field of digital products is the most debated and the less liberalized service sector. It also plays a pivotal role for the clarification of the horizontal e-commerce questions and in the trade competence distribution of the EC.

One can identify two distinguishing factors to most other service sectors.

First, Part 2.1 showed that digital content is the only case where neither the GATS nor the GATT offer clear guidance as to where it should be classified. Even if the WTO negotiating parties agree on a GATS classification, it is still questionable what part of the GATS country schedules reflects the current and future liberalisation level for digital products. On the one hand, the most obvious classification group for content products, namely the “audiovisual services” category, displays an absence of liberalisation commitments for most WTO Member States. This state of play is unseen in other GATS service sectors\(^{155}\). A similarly low level applies to recreational and entertainment services. On the other hand, the other classification groups like computer or value-added telecom services are characterized by significant GATS commitments of most industrialized WTO Member States\(^{156}\).

Second, in contrast to the financial and other service sectos under negotiation the EC and the USA were not pulling on the same rope to advance the GATS liberalization of audiovisual services. In fact, the two WTO members each headed a coalition of WTO member states that held very opposing views on the desirability of audiovisual service liberalization. The open e-commerce questions that relate to the moratorium or the classification issues should actually be seen as a transposition of this dispute in the early 1990s to the negotiations on e-commerce that – ten years later – are ongoing.

\(^{155}\) Even the health and education service sectors that have only few countries committing are more liberalized under the GATS.

\(^{156}\) However, this trend of full commitments has not been followed by less developed WTO Member States.
The analysis of the liberalisation degree for digital trade products has to proceed along the various classification possibilities in a step-by-step fashion (audiovisual, computer, value-added telecommunication and entertainment services) because the GATS scheduling structure does not reflect the state of convergence in the field of digital products. For the value-added telecommunications sector only category C “Online Information and Data Base Retrieval” is considered relevant for this digital product analysis. It shall be reiterated here that neither of these sectoral classification groups specifically refers to digital products like movies, software, etc. (see Part). First, the next part goes into detail about the liberalisation process for audiovisual services. Due to the fact that there are a few mode commitments to analyse and that the difficult audiovisual negotiations are crucial for the understanding of the open horizontal questions, here more attention is given to the in-depth study of the opposing EC and US views in the audiovisual negotiations. Concerning the other classification possibilities for digital trade products the texts only briefly addresses their GATS commitment levels.
2.2.1 The GATS Liberalization Process for Audiovisual Services and the Resulting Commitment Structure

Technological advances, the convergence of media products and the increased household demand for entertainment products point to a rapid development of cross-border trade in digital content. The fact that a lot of cross-border trade in content is mirrored in the statistics on royalties and license fees or not taken up at all in statistics make it difficult to come with correct trade figures. But the economics behind these information goods, namely the high fixed initial production costs but negligible marginal variable costs of producing and distributing digital copies\textsuperscript{157}, make them ideal “tradable services”. The media industry is getting increasingly globalized and concentrated. Moreover, other sectors like the advertising industry increasingly rely on audiovisual products to distribute their services. Finally, as opposed to the financial service sector, the developing countries also heavily contribute to global content exports\textsuperscript{158}.

Seen from this angle, it is even more surprising that most WTO Member States have made no audiovisual GATS commitments. This unparalleled absence of trade concessions stands in contrast to the other sub-classifications of the communications sector.

In WTO framework audiovisual products are different from other trade items. Already during the GATT negotiations movies, then considered as goods, already received a special treatment that was first cemented via the more than fifty-year-old GATT Art. IV\textsuperscript{159}. This article allows the maintenance of film quotas in the cinema and legitimises discrimination\textsuperscript{160}. Thereby it

\textsuperscript{157} Once the initial investment on content production has been undertaken, the costs are best recouped by worldwide market penetration. See VARIAN & SHAPIRO (2001) for the economics of information goods and WOLF (2000) for a description of the entertainment economy.

\textsuperscript{158} India is the largest movie producing trade nation in the world and also exports. Countries like Jamaica are very involved in the production of music, interactive entertainment and educational products. See ITC (2000).


\textsuperscript{160} It must be noted that GATT Art. IV only applies to the cinema. Television, software or other potentially digitizeable content products are not covered. This truism explains why the US advances the argument that the GATT is more trade favorable than the GATS. See Tietje (XX), p. X.
runs counter to the unconditional national treatment obligation (GATT Art. III) and the quota ban that are both fundamental GATT principles\textsuperscript{161}.

But audiovisual services also got special treatment during the GATS negotiations. WTO Member States were allowed to maintain market access and national treatment limitations and to schedule exemptions from the MFN principle. This uncommon treatment of audiovisual products is rooted in the two very different perceptions that exist on audiovisual services.

On one side, the USA and a few other WTO Member States have always emphasized the commercial nature of the media industry’s entertainment products. With respect to trade, movies, music or other audiovisual products are not seen as any different from other trade commodities. Consequently, they deserve the same GATS treatment than other services and therefore an open and non-discriminatory treatment to all content providers should be fostered\textsuperscript{162}. This American position is certainly buttressed by the fact that the audiovisual sector is one of the few trade areas in which the US holds a significant trade surplus\textsuperscript{163}. Moreover, the EC is the biggest demandeur of US movies. Not without reason, the president of the Motion Picture Association (MPA) has repeatedly characterized American movies as “crown jewel of American exports”\textsuperscript{164}.

Moreover, it is important to note that the US does not have a national audiovisual policy comparable to the other WTO member states. The US has no Ministry of Culture that is responsible for a coherent audiovisual policy framework and – except for matters relating to obscenity - no US federal regulation exists that discriminates against foreign content per se or that influences the production or distribution of cinematic motion pictures\textsuperscript{165}. Increasingly the individual US states rely on financing, tax initiatives or simplified administrative procedures to attract entertainment industries. Infrastructure investments by the government are also increasingly considered a good way to attract industry. But as opposed to other WTO member states’ actions these measure are mostly non-discriminatory and still small in scope and scale.

\textsuperscript{161} See TIETJE (XX), para. and JACKSON (XX), p. 293. Jackson, 293/Fn. 2, world trade and the law of the GATT
\textsuperscript{163} The importance of certain service sectors to outweigh the negative US trade balance was addressed on p. XX.
\textsuperscript{164} Source is missing.
\textsuperscript{165} The US trade barriers reports from the EC (quote) do not mention any US audiovisual market access barrier. USTR negotiators trade this non-discrimination towards content back to the First Amendment of the US Constitution. See BALASSA (XXX), p. 1.
On the other side, a majority of WTO member states (especially France and Canada) attributes a decisive cultural and social dimension to audiovisual products. These countries refuse to treat audiovisual products as mere trade commodities that should be submitted to the dictate of free trade. Especially, the EC affirms that cultural products are part of their “cultural heritage” and are tightly linked to concepts like national identity, pluralistic democracy, freedom of speech, cultural diversity and human dignity. The EC fears that free trade in content would lead to a small number of American groups to control audiovisual content. They contend that in the US anti-competitive agreements between producers and distributors restrain market access for outsiders, that they can better recoup there large fixed costs on the larger home market and subsequently conduct “cultural dumping” abroad.

Even before the existence of the GATS treaty, this special role of cultural products led most WTO Member States to introduce policies for audiovisual services that are based on two pillars: a dense regulatory framework for audiovisual services (including content quotas that discriminate against foreign content) and financial or non-pecuniary support measures for local content production. Further specific measures that restrict trade are restrictions on the production and transmission of advertisements sourced from overseas restrictions on foreign ownership and control of broadcasting services and other tax incentives and government subsidies provided to promote the production and exhibition of domestically produced films and television programs. In box 3, some policy measures of the EC are illustrated.

The two pillars of the above-mentioned audiovisual policy have as express goal to favour national or European works via quantitative limitations and subsidies to local producers. Hence, they are not in conformity with the GATS principles of free market access and national treatment. Moreover, the selective extension of the EC policy measures on third countries runs counter to the MFN principle. Nevertheless, most WTO member states were not ready to give these up for the GATS agreement.

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168 OECD (1997), p. 5. This OECD report nicely surveys the national policies with respect to the content industries for OECD Countries.
169 This listing stems from ASIA-PACIFIC BROADCASTING UNION (1999).
170 This shall not divert the reader’s attention from the fact that most other WTO Member States maintain similar regulations and support schemes.
Box 3 Some Elements of the Audiovisual Policies of the EC

As the first policy pillar, the EC has imposed restrictions on the diffusion of non-European content on TV. Specifically, the EC’s “TV without Frontiers Directive” (TVWF) introduced TV screen quotas for European works\textsuperscript{172}. This directive that is to be implemented by all EC Member States specifies that a majority of television transmissions must be of European origin\textsuperscript{173}. The TVWF will be revised by the end of 2002. As the second pillar, this quota scheme is complemented by financial support schemes for European content production or content distribution. Also, educational and training support for people employed in the media industry is granted. These measures are run under the name of the European MEDIA I and II Program\textsuperscript{174}.

Both the quota regime and the financial support measures do not only apply to service providers of EC Member States. Via bilateral agreements with “culturally close” nations and above all with the EC accession countries, the EC selectively extends the benefits to third parties\textsuperscript{175}. In addition, it is important to understand that these EC-wide audiovisual policy measures only supplement the much more extensive national policy measures that have individually been initiated by the EC Member States. In some federal EC Member States like Germany, the responsibility of audiovisual regulation is held by the different “Länder” (federal states).

As a result and to the great surprise of many negotiators the different views concerning the audiovisual sector were so radically opposed that this conflict almost led to a breakdown of the conclusion of the whole WTO agreements\textsuperscript{176}.

The EC (mostly driven by France, Spain and Belgium) and countries like Canada formulated the desire to be able to maintain their room for manoeuvre with respect to any audiovisual policy measure at the start of the negotiations\textsuperscript{177}. Their objective was that the GATS negotiations should not lead to a situation in which the legitimacy of the past or future audiovisual policies of EC Member States would get under pressure through the GATS treaty.

\textsuperscript{171} Provide sources.
\textsuperscript{172} See the EC directive EEC/89/552, modified by EC/97/36 (OJ L 202/60, 30.7.1997).
\textsuperscript{173} Sources are missing.
\textsuperscript{174} See EUROPEAN COMMISSION (1999) or CINCERA (1999) for a comprehensive overview on the EC policies. The latter article also deals with the 1998 modernisation of these instruments that were made necessary by technological advances.
\textsuperscript{175} Here it may be interesting to note that GATT Art. IV does not allow for a differential treatment of different trade partners and therefore prohibited a violation of the MFN principle.
\textsuperscript{176} Sources are missing.
First a flooding of Europe with American content that would endanger the cultural European creations was feared and second these countries understood very well that it would be difficult to reconcile their existing policy measures with the standard GATS principles.

The seemingly impossible task of reconciling the GATS principles with the existing and future EC audiovisual policy put the EC delegation into a difficult negotiation position. Finally, the EC delegation with the support of others opted to pressure for an exclusion of the audiovisual sector from the GATS negotiations; the so-called “exception culturelle”\(^\text{178}\). This suggestion entailed an exclusion of the cinema and broadcasting sectors from the GATS\(^\text{179}\).

It was really the determination of France\(^\text{180}\) and an introverted European film industry that tilted the EC to this rather extreme position. The Commission and some EC Member States like Germany had a far more liberal view on the opening of the European audiovisual market\(^\text{181}\). In the end, the EC converged to the more defensive European position for two reason. Firstly, all EC Member States attached a great importance to the incontestability of their national public broadcast system. But most importantly, neither the Commission nor individual EC Member States wanted to run the political risk of upsetting the extremely determined French delegation\(^\text{182}\).

But the USA and Japan were not ready to grant this special status to the audiovisual services\(^\text{183}\). It claimed that the special treatment of a particular service sector would damage the whole regulatory coherence of the GATS treaty\(^\text{184}\). Consequently, the USA not only insisted on the inclusion of this service category into the GATS but it also requested far-reaching market access concession of the EC. The USA knew that the EC’s financial support measures for the local content industries were not very damaging to their exports but they


\(^{179}\) Same as in previous footnote.

\(^{180}\) In fact the French Assemble Nationale was the only national Parliament which was significantly involved in this position. See Woolcock & Hodges (1996), p. 322. See Balle (1995) for a good overview of the French audiovisual policies and position towards external trade liberalisation in the audiovisual sector.

\(^{181}\) See the document of the German Parliament with the title „Antwort auf die Kleine Anfrage, Bundestags-Drucksache 12/6339: Auswirkungen des GATS-Abkommens auf die deutsche Film- und Fernsehindustrie, Bonn, 1993“. 

\(^{182}\) Personal Interviews with officials of the European Commission and some EC Member States.

\(^{183}\) Eckhout (XX), p. 135

\(^{184}\) It was a widespread fear that the introduction of sector-specific exemptions could lead other WTO Member States to desire the introduction of other “special treatments” of other sectors.
criticized the EC’s violation of the national treatment principle anyway. Most importantly, the US trade were determined to reach the abolition of the European screen quotas that were considered very harmful to US movie exports.\textsuperscript{185}

Finally, with the pressure for success of the whole round extensive negotiations led to a tailored integration of the audiovisual sector into the GATS; the so-called “spécificité culturelle” or “exemption culturelle”.\textsuperscript{186}

Other than in the case of financial services here the commitment structure of the EC and USA is very different and representative of the main opposing groups around this model of “spécificité or exemption culturelle” for audiovisual services.\textsuperscript{187}

The peculiarity of the “spécificité culturelle” is that on the one hand the audiovisual sector is fully submitted to the GATS general obligations (GATS Art. II to XV) like MFN Treatment (Art. II), Transparency (Art. III), Domestic Regulation (Art VI)\textsuperscript{188} but also to the obligations on Progressive Liberalisation (Art. XIX to XXI). The final provisions do not contain language referring to “cultural exception” and as opposed to a widespread misconception Art. XIV (GATS exemptions) does not explicitly refer to the protection of cultural values.\textsuperscript{189} Temporary exemptions from the MFN clause can however be taken.

But on the other hand, countries were not pressured into any specific commitments on Art. XVI or XVII meaning that the EC could maintain its quota regime.\textsuperscript{190} Also, the service area that the EC wanted to protect most (broadcasting) does not appear as a subsector of the

\textsuperscript{185} This point results from an interview with Harvey Rouse, MPA representative to the European Commission, MPA Office in Brussels, October 2001.


\textsuperscript{187} See FALKENBERG (1995) and MORGAN DE Rivery (1995) for the outcome of the negotiations. See also S/C/W/40, June 15, 1998, Background Note by the WTO Secretariat on Audiovisual Services for a comprehensive analysis of the audiovisual commitment level.

\textsuperscript{188} However, Art. VI:1 holds only for these sectors where commitments have been entered.

\textsuperscript{189} See YUKSEL (2001), p. 72 for such a misconception and HAUSER & WUNSCH (2002), p. XX, BAUMANN (1998), p. XX and IAPADRE (2000) for the applicable GATS rules in the case of the audiovisual sector. In this light of full submission of the audiovisual services to the GATS principles it is misleading to see statements by the EC that mention that thanks to the results of the Uruguay Round it has no policy guidelines whatsoever for the design of its audiovisual policies, see KOM (98) 446.

audiovisual service category\textsuperscript{191}. Furthermore, as the GATS does not yet have a discipline on subsidies governments can continue to fund audiovisual activities.

In terms of specific commitments following results emerged:

Audiovisual services is a sector with the lowest number of GATS commitments (19 commitments). The commitments were concentrated on very few countries. Most WTO Member States followed the approach of the EC and made no market access or national treatment offers whatsoever\textsuperscript{192}. The very few commitments that have been made however are full market access commitments (see table 4 below). This contrast between no and full commitments has later been termed the „all or nothing“-approach to audiovisual services\textsuperscript{193}.

As opposed to the other service sectors – no imbalance in commitments exists between mode 1 and 2 in audiovisual services\textsuperscript{194}. The few countries that made audiovisual GATS commitments often have their own country-specific definition of the audiovisual sub-sector activities. This makes the comparability of commitments more difficult and can reduce the meaningfulness of the commitments.

Table 4: Full and partial mode 1/2 commitments in the audiovisual sector

<table>
<thead>
<tr>
<th>Service sub-sector</th>
<th>Full and partial market access</th>
<th>Full and partial national treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motion picture and video tape production and distribution</td>
<td>Hong Kong, Japan, Korea, Mexico, New Zealand, Singapur, Switzerland, USA (none)</td>
<td>Japan, Korea, Mexico, Singapur, Switzerland</td>
</tr>
<tr>
<td>Motion picture projection services</td>
<td>New Zealand, Singapur, USA (none)</td>
<td>Singapur, USA (none)</td>
</tr>
<tr>
<td>Radio and television services</td>
<td>New Zealand, USA (none)</td>
<td>USA (none)</td>
</tr>
<tr>
<td>Radio and television transmission services</td>
<td>New Zealand, USA (none)</td>
<td>USA (none)</td>
</tr>
<tr>
<td>Sound recording services and other audiovisual services</td>
<td>Hong Kong, Japan, Korea, New Zealand, Singapur, USA (none)</td>
<td>Japan, Korea, Singapur, USA (none)</td>
</tr>
<tr>
<td>Other audiovisual services</td>
<td>USA (none)</td>
<td>USA (none)</td>
</tr>
</tbody>
</table>

Source: Analysis of the individual GATS country schedules and the OECD (2000), S. 41-45. In the case of the

\textsuperscript{191} TIEJJE (XX), p. 72. One can take this as a further example for the fact that the scheduling methodology is itself an outcome of interest-based negotiations.

\textsuperscript{192} Some have scheduled the audiovisual sector as “unbound” but most WTO Member Countries fully excluded the audiovisual sector from their GATS country schedule. This is only possible if no commitments on any audiovisual subsectors in any mode of delivery exist.

\textsuperscript{193} S/CSS/W/21, December 18, 2000, Communication by the US on Audiovisual Services.

\textsuperscript{194} Mostly, either the whole sector is left out of the schedule (unbound) or by these few countries full commitments are made in mode 1 and 2.
In stark contrast to the majority of the WTO member states, the USA made full cross-border market access commitments in all audiovisual subsectors specified in the GATS schedule. In mode 1 and 2 it maintains only one modest national treatment limitation in the case of motion picture and videotape production and distribution. USTR negotiators have argued that this rather unilateral opening of the audiovisual sector in terms of the GATS reflects the current open US regulatory environment that does not tolerate foreign content restrictions.

But contrary to the generally accepted view that the USA has full commitments for audiovisual services in all modes, noteworthy limitations remain that are partially the result of the GATS framework itself.

First, seen in the light of the contemporary technological innovations (pay-per-view, satellite television, etc.) the coverage of included audiovisual services is moderate in coverage. This has to do with the fact that the CPC classification of 1991 or the country-specific definitions employed for the commitments could not or did not want to reflect future innovations. Thus, in the case of the US and all other WTO member states commitments on pay-per-view TV or for video-on-demand for example do not exist.

Second, under mode 3 the US maintains significant establishment limitations on radio & television transmission services. For example, radio and television licences that enable control over transmission and content may not be held by firms chartered under foreign law or by firms where more than 20 percent of the capital stock is owned or voted by a non-US

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195 The following mode 1 national treatment limitation has been scheduled: “Grants from the National Endowment for the Arts are only available for: individuals with US citizenship or permanent resident alien status, and non-profit companies”. In comparison to the EC subsidy instruments for cultural support measures (Media I and II) and the instruments of the EC member states the volume of grants from which foreigners are excluded here is negligible. In 2002, the National Endowment for the Arts provided $ XX Million Dollars in subsidies to non-profit whereas only the subsidies on the EC level amounted to roughly $ XX Million Dollars.


197 Quote a source that tells us that USA is totally open.

198 See BALASSA (1995), p. 3, a USTR negotiator who notes that the coverage was moderate already by standards of 1995 and who notes that the commitments of the Uruguay Round provide a “starting point for future negotiations”.

199 The US like the other few WTO member states has used its own definitions to make audiovisual commitments.
Elsewhere, the US maintains other mode 3 national treatment limitations and has left the entirety of mode 4 unbound. Most importantly, as a consequence of the CPC classification used and probably also to maintain future bargaining leverage, even the US has no commitments for cable and satellite television services in its audiovisual GATS column. This limitation to the transmission of audiovisual services under mode 1 is also declared in the US telecommunications column that specifies that no commitments be taken on one-way satellite transmissions of DTH and DBS television services and of digital audio services.

On top, the US lists one MFN exemption for that particular service area that establishes reciprocity conditions. Assuming that an integrated value chain of content production and transmission relies on cross-border satellite transmission and some form of establishment, together these limitations may amount to a significant impairment of the liberal mode 1 commitments.

In terms of the general obligations following results emerge:

The absence of the specific GATS commitments in audiovisual services was not enough to ensure the WTO conformity of the audiovisual policy of the EC and its preferential treatment of EC accession and other selected countries. Thus the EC managed to negotiate an exemption possibility of the MFN clause and thus a differential treatment of its trade partners. As can be seen in the list of the EC’s MFN exemptions the EC made vivid use of

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200 Moreover, the licenses may not be held by foreign governments, a corporation chartered under the laws of the US that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non-US citizens or a foreign government or a corporation of which any officer or more than 25 per cent of the directors are non-US citizen. All these limitations reflect the regulations of the Telecommunications Agreement of 1934 that out of national security considerations made sure that local media (airwaves, etc.) was under US control. Thanks goes to JONATHAN LEVY (FCC) for explanations concerning this point.

201 See BALASSA (XXXX), p. 8 who links this absence of US commitments to the fact that the GATS schedule does not specify these categories.

202 In this case a limitation from the telecommunications schedule of the US negatively impacts on commitments made in the audiovisual schedule. See part XX for the different EC and US views on the boundaries between both of these service sectors.

203 Differential treatment of countries due to application of reciprocity measures or through international agreements guaranteeing market access or national treatment. See GATS/EL/90/Suppl.2, April 11, 1997, List of Article II (MFN) Exemptions of the USA, Supplement 2.

204 Especially the quotas but also the other measures of the European audiovisual policy programs do not only favor national service suppliers but also provide special treatment for service suppliers in other EC Member States. This constitutes a violation of the MFN principle.

205 GATS Art. II:2 and GATS Annex on Article II Exemptions.
this derogation. Again other countries followed suit and in total 33 MFN exemptions specifically mentioning the audiovisual sector were put in place. In addition to the above-mentioned sector-specific US MFN exemption, its numerous horizontal limitations relating to favourable tax treatment (see p. XX) also apply to the audiovisual sector. The sector-specific exemptions, however, commonly cover co-production arrangements for film and television productions, typically granting national treatment status in respect to eligibility for financial assistance, tax benefits and simplified entry procedures for natural persons.

It can be concluded that the EC managed to shape the GATS Rules and commitments in such a way that, temporarily, its audiovisual policy stood in no conflict with GATS rules. Clearly, this room for maneuver must be reassessed and confirmed when renegotiations of MFN exemptions or progressive liberalization in the next GATS rounds takes place. Observers of the final overall outcome of the GATS note that the EC’s determination had a significant political price attached to it in terms of the negotiation results in financial, maritime and aviation construction services.

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206 The exemptions are listed in MTN.GNS/W/228, 8.12.1993 (negotiation document), GATS/EL/31, 15.4.1994 (final document).

207 See S/C/W/40, June 15, 1998, Background Note by the Secretariat on Audiovisual Services.


209 KRUSE (1993), p. 291 and JAROTHE (1998), p. 352. According to the author of this work, it is questionable whether the weak results of the before-mentioned sectors can be fully attributed to the audiovisual considerations of the EC. During interviews, this direct link was also refuted by officials of the European Commission.
2.2.2 Analysis of the GATS Commitment Structure for the Other Service Sectors Relevant to Digital Products

For the other classification possibilities mode 1 commitments are more plentiful. Still, there is a great degree of variation in the commitment level between the three categories. In sum, the computer and related services field has most commitments whereas the commitment level of recreational services rather resembles the audiovisual level.

Computer and related services

Computer and related services are a subsector of the Business Services classification. In general business services constitute a very heterogeneous group of services that are much more liberalised than professional services (like legal services, accounting services, veterinary services). This is also due to their originally low level of sector-specific regulation.

One finds a high number of commitments for the field of computer and related services (66 commitments). Moreover, in percentage terms full commitments to market access and national treatment outweigh other types of more restricted commitments. No sector-specific MFN exemptions have been listed. Also, mode 2 commitments do not significantly outweigh mode 1 commitments. In sum, a look at the consultancy service columns of the GATS member states reveals that during the Uruguay Round the GATS negotiators achieved the greatest liberalisation in that field.

But considering that over 130 schedules existed at the time of analysis, one can again find a group of industrialized economies with full/partial commitments on the one hand and some less developed countries on the other hand. The EC, the US and most other industrialized countries have committed fully in mode 1 and mode 2 without listing limitations on market access or national treatment. Countries like Thailand and Morocco and some developing

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210 Here, as in other GATS sectors, a low level of internal regulation leads to few limitations to Art. XVI or XVII in the GATS schedules.


212 This assertion excludes the telecommunication and the financial service sector that were liberalised in the Post-Uruguay Round.
countries like Brazil, India, Egypt, Indonesia that are known for their notoriously low GATS commitment level have left the sector unbound\textsuperscript{213}. For completeness one must also note that many of the total number of commitments entered entail limitations\textsuperscript{214}.

Despite this relatively good-looking overall picture, it has been mentioned that the increasing convergence of the audiovisual and the telecommunication sector with the computer sector had a pronounced upward impact on regulations applicable in the computer service sector (the so-called “regulatory creep”, see page XX)\textsuperscript{215}. Accordingly, this sector that faced little or no sector-specific regulation to begin with, is increasingly confronted with new regulatory trade barriers. Moreover, the classification problem of “new services” also applies with respect to computer services. As pointed out before, it is questionable if the commitments in the computer service classification apply to online entertainment games or multimedia education.

**Value--added telecommunication services (online databases, etc.)**

The following three service subsectors within the value-added telecommunications schedules may be relevant for the classification of digital products: j. on-line information and data base retrieval, k. electronic data interchange (both 7323** in W/120 classification) and n. on-line information and/or data processing (843** in W/120 classification)\textsuperscript{216}.

Unfortunately, in this case the GATS member countries have not always used the CPC classification to its full extent or – as the USA - have it their own definition\textsuperscript{217}. The fact that different definitions have been used complicates the comparability of the commitments\textsuperscript{218}.

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\textsuperscript{213} Here the most surprising result is that India, one of the greatest exporters of software services, has left all sectoral groups for computer services unbound.

\textsuperscript{214} M\textsc{attoo} \& S\textsc{chuknecht} (2000), p. 14.

\textsuperscript{215} See S/C/W/45, July 14, 1998, Computer and Related Services, Background Note by the Secretariat, p. 2, para. 5.

\textsuperscript{216} In document W/ 120, the telecommunications services classified as “value-added”, following the CPC listings are: (h) electronic mail, (i) voice mail, (j) on-line information and data base retrieval, (k) electronic data interchange, (l) enhanced/ value-added facsimile services, including store and forward, store and retrieve, (m) code and protocol conversion, (n) on-line information and/ or data processing (inc. transaction processing).

\textsuperscript{217} Enhanced telecommunications services as defined by the US Federal Communications Commission - services offered over common carrier transmission facilities (i.e. public telecommunications transport services) which employ computer processing applications that: (i) act on the format, content code, protocol or similar aspects of the subscriber’s transmitted information; or (ii) provide the subscriber additional, different or restructured information; or, (iii) involve subscriber interaction with stored information.

\textsuperscript{218} S/CSS/W/35, December 11, 2000, Communication from the EC and their Member States, GATS 2000: Telecommunications, para. 6.
Moreover, again the CPC does not reflect the current state of technology and the delimitations between subsectors is increasingly blurred. Many statements made here pertain to the whole range of value-added telecommunication services rather than to individual subsectors.

The case of these three value-added telecom services depicts a lower level of commitments than for the computer services category (40-54 commitments). Actually, the WTO telecommunications agreement of the Post-Uruguay negotiations only furthered the commitments of basic telecommunication services. Like with computer services, it was mostly the industrialized countries that committed to value-added services. The EC has full commitments in on-line information and data base retrieval and electronic data interchange (EDI) but not for online information and data processing. Still, the exclusion with respect to content from the EC telecom schedule explained before applies. The commitment situation for the USA seems to be similar, although its own definition (footnote XX) leaves room for interpretation with respect to coverage of content.

In general, this subsector “online information and data processing” received the fewest overall commitments of all value-added subsectors. For all three subsectors by large partial commitments outweigh full commitments and that full mode 2 commitments outweigh the full mode 1 commitments in the case of market access. Yet the usual pattern is somewhat disturbed by the fact that full commitments outweigh partial commitments and that full mode 1 commitments outweigh full mode 2 commitments in the case of national treatment. In more general terms, the commitments of industrialized economies for value-added telecom services are more open than for mode 1 and 2 than for commercial presence. The opposite holds for emerging economies. Finally, the regulatory level for value-added telecommunications services is less burdensome than for basic telecommunications.

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219 S/C/W/74, December 8, 1998, Telecommunication services, Background Note by the Secretariat, p. 7, para. 19.

220 See S/C/W/74, December 8, 1998, Telecommunication services, Background Note by the Secretariat, p. 6 ff. for a comprehensive analysis of the commitment level in value-added telecommunication services. The number of commitments for value-added telecommunication services is slightly lower than the one for basic telecommunication services.

221 This distinction between transmission and the content itself has been reiterated in the most recent EC submission with respect to telecommunication services. See S/CSS/W/35, December 11, 2000, Communication from the EC and their Member States, GATS 2000: Telecommunications, para. 7.

222 Note, p. 7, para. 23.

223 S/C/W/74, December 8, 1998, Telecommunication services, Background Note by the Secretariat, p. 7, para. 9 and S/CSS/W/30, December 18, 2000, Communication from the US, Market Access in Telecommunications
Recreational, cultural and sporting services (entertainment and news agency press services other than audiovisual)

Generally speaking, the low number of commitments for all WTO Members makes this sector very similar to the audiovisual service sector’s „all or nothing“-approach. A majority of countries has not made any commitments in mode 1 and the EC abstained from making commitments in the entertainment services category whereas the USA has full commitments for market access and national treatment. Only countries like Austria and Sweden that acceded to the EC in 1995 and Iceland have committed to full market access like the USA.

With respect to press agency news services and sporting services both the EU and USA are part of the very few countries that have fully committed. Gambling services that are particularly suitable to e-commerce are excluded from the EC commitment. The EU and its Member States have not made any commitments for services relating to libraries, archives and museums.
2.2.3 Requirements for Further Cross-border Audiovisual Service Liberalization

The necessary steps for meaningful mode 1 liberalisation of digital trade services can be structured along two lines: a successful tackling of the open e-commerce questions that are noteworthy in the audiovisual and other service context (resulting from Part 2.1) and necessary agreements on regulatory issues involved in further liberalization (resulting from Part 2.2). Both points are intricately related.

2.2.3.1 Solutions to the Open E-commerce Questions

Almost all horizontal questions that were raised through the E-Commerce Work Program are extremely relevant to the digital trade sector.

In fact, especially the debates about the duty-free moratorium and the GATT or GATS classification of digital trade products are actually driven by audiovisual considerations.\textsuperscript{224} The difficult content classification within the GATS and the regulatory creep from very regulated sectors to more unregulated ones is also of particular relevance. Any further liberalization of the audiovisual sector is dependent on clear answers to these open horizontal questions raised in this chapter. It must be clear whether certain content transactions fall under the GATT or the GATS. Ideally the level of GATS liberalization should be equal to the previous GATT liberalization granted. Clearly, the boundary between different sector-dependent commitments (audiovisual vs. telecommunication) must be addressed. Only a predictable legal framework like this can re-introduce clarity about existing commitments and create trustworthy climate for new commitments. It is also of great importance to avoid too many electronically deliverable services being drawn into the low audiovisual commitment level.

Furthermore, a significant overhaul of the current classification schemes - be it for computer or audiovisual services - is necessary. Technology has changed and the commitments that correspond to certain service activities need to reflect these technological and business model innovations. Otherwise the current GATS commitments that are very limited in the first place...
run the risk to become obsolete. This change of classification structure should be informed by specific trade transactions that actually take place. Much trade in content, for example, takes place via the licensing of works rather than the transfer of rights. This is just one of the transactions that are not adequately reflected in the W/120\(^{225}\). Moreover, it is uncertain where all cross-border electronic content delivery transactions find their place within the GATS.

2.2.3.2 The link Between Further Trade Liberalisation for Digital Products and Regulatory Issues

In addition to the solution to the open horizontal GATS questions more commitments in mode 1 and mode 2 are necessary for the service sectors deemed relevant to digital trade (audiovisual, value-added telecommunications, computer services, etc.). Most importantly it will be important to find a solution to the liberalization of the audiovisal service sector for these cross-border delivery modes.

With respect to the GATS liberalisation of audiovisual services one thing is sure. The status quo of audiovisual service commitments is called into question by the necessity of progressive liberalization and the elimination of scheduled MFN exemptions\(^{226}\). As opposed to some misleading public statements of French or EC officials a cultural exception or indefinite policy flexibility with respect to the audiovisual sector does not exist\(^{227}\). Thus, in principle, the “freedom of action” with respect to national audiovisual policies is of a temporary nature.

\(^{225}\) See p. 27 on TRIPS: Arguments for a classification as trade in intellectual property rights. See also S/C/W/78, December 8, 1998, Communication of the USA that discusses the need of a major overhaul of the current audiovisual classification scheme.

\(^{226}\) See para. 3 of the GATS Annex to Art. II exemptions concerning the five-year review period of the exemptions and para. 6 that calls for a 10 year limitation on the MFN exemptions: “In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing round.”. This would mean elimination of the exemptions by 2004 or 2005. This date coincides with the scheduled end of the Doha negotiations. See GRABER (2002), p. 1, SAUVE & STEINFATT (2000), p. 2 and IAPADRE (2000) that buttress the argument that the status quo in audiovisual services will be re-opened for negotiations during the current GATS round.

\(^{227}\) Some EC officials from DG Education and Culture continue to portray the idea of cultural exception or indefinite policy autonomy in the GATS: “What the Community obtained as a result of the Uruguay Round is more than a vague exception subject to the restrictive interpretation of a WTO panel of experts. It obtained the freedom to act, which is essential in order to maintain and develop national and Community policies in the audiovisual sector.” position taken by VIVIANE REDING (Commissioner DG Education and Culture) on “Cultural Policy and WTO”, 58\(^{th}\) Mostra Internazionale d’Arte Cinematographica, Venice, September 7, 2001, DG EAC C.1/XT D (2001), p. 2. The director of the audiovisual department of the DG Education and Culture, JEAN-MICHEL BAER, made similar statements at the European Forum Luzern, “Kultur im Quotenstress” (Culture under the stress of quota systems), October 24-25, 2001.
The decisions taken towards the end of the Uruguay Round were rather a postponement of a debate concerning more audiovisual trade liberalization.

In addition to the progressive offering of more specific commitments one further element of change results from the fact that the GATS itself is not a static instrument. Even if members are not formally obliged to make audiovisual commitments the build-in agenda of the GATS asks them to further horizontal GATS rules on subsidies, emergency safeguard measures, domestic regulation and government procurement.

In the current Doha Development Agenda, the US and other WTO members have actually already requested market access commitments from countries like the EC. Clearly, the US now displays a greater awareness towards the cultural diversity sensitivities and affirms that subsidies that are not too trade-distortive may be tolerated. On the one hand, the US is not demanding an elimination of existing audiovisual policies. They simply ask their trading partners to freeze their current regulatory schemes by entering them as limitations in their GATS schedule. On the other hand, it seems that the US trade negotiators will insist very much on the fact that new electronic delivery means (like the Internet) remain free of new trade barriers. A new dynamic behind the negotiations will be the fact that developing country interests in this sector may prevent a polarization of the debate between the USA and the EC.

To be meaningful and to incite commitments, any liberalisation of the audiovisual and other digital trade sectors must involve special provisions. Due to the network-based characteristics of the media industry it will simply not be enough to negotiate simple partial or full GATS commitments under GATS Art. XVI and XVII. Similar to the negotiations on telecommunication services in the Post-Uruguay Round, the elaboration of a reference paper or an annex for the media industry is necessary.

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229 „Priorities for the US Audiovisual Sector“, speech delivered by BONNIE RICHARDSON (Motion Picture Association) on the following conference: Services 2002: Conference on WTO Negotiations on Services, US Department of Commerce, September 12, 2002 and personal interviews with USTR negotiators.

230 Brazil has expressed interest in liberalization with its communication to the Council for Trade in Services and UNCTAD is working on a mobilization of the developing countries for the audiovisual service negotiations (see UNCTAD, 2002).

231 As argued before the broadcasting sector, for instance, was not part of the telecommunications agreement. See ROBERTS (1999).
On one side, this reference paper could address the cultural diversity considerations that most WTO members have (special subsidy provision, cultural safeguard measures, vertical integration of the US media industry, antidumping provisions, etc.). On the other side, it will be important to address the regulatory issues pertaining to these industries. The regulatory density of the the content-producing and content-diffusing sectors (broadcasting, etc.) has already been extremely high before more recent regulatory challenges or cross-border tradability materialized\(^{232}\).

Latter challenges result of a more globalized, concentrated and vertically integrated media industry and the increasing convergence of different service fields (broadcasting, telecommunications, Internet, etc.) that put into question the current regulatory frameworks\(^{233}\). The fact that content distribution is always dependent on essential facilities like an Internet Service Provider (AOL, etc.), a cable operator (Murdoch Inc.) or a Pay-TV operator (Canal +) raises interesting competition policy issues that have not yet been addressed in the WTO context\(^{234}\). Moreover, many regulations that concern that sector are, de iure, of a non-discriminatory type (content regulation, etc.)\(^{235}\). Despite of their non-discriminatory nature these rules create significant trade barriers that must be addressed to allow for more integrated and contestable markets that leave enough room for cultural considerations of nation-states.

The communications from the United States, Brazil and Switzerland and at least two very significant conferences show that some thinking in these directions has been undertaken\(^{236}\). But it would be false to believe that the three existing GATS position papers or these conferences reflect a consensus to start discussing meaningful audiovisual service liberalization in the WTO. The European Communities (especially the French) and the

\(^{232}\) MCKINSEY (2002), OECD (1999b) and OECD (1997).


\(^{234}\) During the elaboration of the telecommunications annex that contains elements of competition policy the broadcasting sector was excluded.


Canadians do not seem to be moved by the imperatives of progressive GATS liberalization. Instead of showing willingness to discuss above-mentioned elements of “healthy” audiovisual service liberalization their primary goal is to drive the audiovisual debate outside of the WTO forum. To their mind the issue of audiovisual service liberalization should be dealt with by the UNESCO or a similar international organisation\textsuperscript{237}. As they correctly point out, that is there only chance to maintain maximum audiovisual policy flexibility\textsuperscript{238}. Consequently it is very likely that the EC will not address the audiovisual services within the WTO. Moreover, they will remain alert as to the audiovisual implications of the horizontal rule development of the GATS and the issues raised in the WTO E-Commerce Work Program\textsuperscript{239}. This will also affect the whole discussion of horizontal questions to be answered for the cross-border delivery of digital products. In the worst case scenario, this stance already has and will continue to negatively influence progress on the unfinished agenda for the development of missing GATS rules (subsidies, domestic regulation, etc.).

And a more liberal stance towards audiovisual service liberalization within the WTO should not be expected from the EC in the future. At the recent Conference on Cultural Diversity in Johannesburg, the French President himself (Jacques Chirac) has very reiterated the determination of France to block any treatment of the cultural products in the framework of the WTO\textsuperscript{240}. With respect to electronically tradable services, recent questionnaires and statements from the DG Education and Culture and French officials even seem to indicate that hybrid products like entertainment games are also covered by the exception of audiovisual commitments\textsuperscript{241}.


\textsuperscript{238} See EUROPEAN COMMISSION (1999) for the desire to maintain policy flexibility with respect to audiovisual services.

\textsuperscript{239} No EC or Canadian WTO position paper has been received so far. See the speech of CATHERINE TRAUTMANN, UNESCO Round Table Discussion «La diversité culturelle face à la mondialisation» (November 2, 1999) in which she indicates that the EC will try to block any decisions in the E-commerce Work Program that may endanger the cultural exception desired by the French government.


Most importantly, the EC position does not seem negotiable. Despite of the fact that a number of EC Member States (like the UK, the Netherlands and even Germany) want to negotiate some elements pertaining to audiovisual services France has the willingness and the ability to block such a move. Both the distribution of trade policy jurisdiction between the European Communities and the EC Member States and the extremely limited jurisdiction of the EC on cultural matters (Art. 151 of the Amsterdam Treaty) basically tie the hands of the EC negotiators on the defensive side. In other words, despite of a majority of EC Member States that may be in favor of audiovisual service liberalization, commitments on audiovisual services by the EC can be blocked by one single EC member state (see chapter 3 for the mechanics behind that French veto power over audiovisual services).

242 Discussions with representatives of these national governments have revealed that their national music and media industries actively ask for further liberalization. Bertelsmann, the German media giant, for example, realizes that a further development of its US presence requires US audiovisual offers that can only be requested if the EC gives something up in return. Although public broadcasting shall not be part of this EC offer, the European industries see room for consensus concerning an elimination of quotas in radio distribution of music.
2.3 Summary of Deliverables and State of Play

It is not clear whether the audiovisual conflict that is cooking up between the USA and the EC has – as in 1994 - the potential to block the Doha Development Agenda or at least the GATS negotiations. For the moment, a very similar conflict – the agricultural negotiations – seems to function as the stumbling block for the Doha negotiations.

But what is certain is that both the clarification of the horizontal questions relating to electronic content delivery and further cross-border commitments in audiovisual services are not likely to be decided upon before any substantial negotiations for specific commitments take place. In sum, a global WTO framework that offers a predictable, robust and applicable legal regime to current and future developments for cross-border content delivery has not yet been successfully established.

In sum, the horizontal questions raised by the WTO E-Commerce Work Program will not be answered any time soon. The questions raised are still in a working group not entitled to negotiations and the WTO E-Commerce Work Program that lost much time on procedural issues is currently stalled. Furthermore, the Doha Mandate has been very disappointing in this regard. Instead of proposing deadlines for solutions to the open questions, it only mandates the General Council to come up with procedural arrangements to deal with the questions by September 2003 – six months later than the initial offers to be tabled in March 2003. The decision-making situation and this instruction are similar to the situation in 1998 and it is questionable whether this new "old" point of departure would lead to any results. Fact of the matter is that a renewed delegation of the responsibility to the respective Councils will not produce any new basis for decisions.

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244 Interestingly, the French determination to maintain agricultural subsidies is the driving forces of that conflict.


246 The recent fourth WTO Ministerial Conference again put the ball in the General Council's court: "We instruct the General Council to consider the most appropriate institutional arrangements for handling the work program and to report on further progress to the Fifth Session of the Ministerial Conference.", WTO Document WT/MIN(01)/DEC/W/1, November 14, 2001, p. 7. This lack of attention devoted to e-commerce certainly also has to do with the fact that the hype surrounding this new trade technology has been dampened by more recent stock market developments. Thanks goes to KEN SCHAGRIN (USTR) for this point.
Clearly, this uncertainty regarding the classification of e-commerce products is exercising a counterproductive effect in the current request-offer process. As has been demonstrated in previous parts, the questions raised in the E-Commerce Work Program have overarching importance for the whole GATS framework. The issue of correct mode 1 vs. mode 2 classification and the treatment of new services, for instance, has already surfaced in recent meetings of the Committee on Trade in Financial Services.\(^{247}\) Only clarity on the question how electronic content services should be classified, will create the right environment for new liberalization entries in the country lists. In personal interviews, both the EC and the US reiterate that they do not want to treat e-commerce as some separate negotiation topic but that they would like to deal with the open e-commerce questions during the negotiations on specific commitments.\(^{248}\) Also, in order to have an additional bargaining chip, the developing countries seem to have an interest in postponing the e-commerce decisions until the negotiations on specific commitments. However, the current activities during the request stage - that admittedly are in their very early stage - do not show any efforts to deal with the open GATS questions in an horizontal manner. The chances of having any decision before the Ministerial Meeting in Cancun are therefore slim.\(^{249}\)

When it comes to further audiovisual service commitments progress will very much depend on the ability of the US and the EC to group other WTO trading partners on their side. Thus, it is very likely that the US-EC fight over further audiovisual liberalization will take place with respect to third country commitments. A prelude to this new sort of US-EC debate could already be observed in the accession negotiations concerning future EC Member States (Lithuania, Latvia, Croatia, etc.). Fights over their WTO commitments in audiovisual services between the US and the EC have considerably slowed their WTO accession.\(^{250}\) In sum, it is thus very likely that – instead of tackling the more complex regulatory challenges depicted in

\(^{247}\) S/FIN/M/25, May 8, 2000, Committee on Trade in Financial Services, Report of the Meeting held on April 13, 2000 and S/FIN/M/31, June 1, 2001 Committee on Trade in Financial Services Report of the Meeting held on May 9, 2001 Note by the Secretariat.

\(^{248}\) Also there seems to be a ten


Part 2.2.3.2 - much energy of the trade negotiators will be used up in battling the same “all or nothing”-issues as in 1994\textsuperscript{251}.

Unfortunately, this missed opportunity would render the GATS framework and its “status quo commitment level of 1994” even more obsolete than it already is today. This increased lagging of the GATS treaty and its commitments behind new technological possibilities and existing trade flows may well – peu à peu – lead to a gravitation towards bilateral and regional service trade agreements. The recent US-Jordan Free Trade Agreement with its sophisticated language on service and e-commerce liberalisation and the upcoming US agreements with Chile and Sinapur are only indicative of this move away from the GATS for meaningful service liberalisation\textsuperscript{252}. If this process of service liberalisation proves more successful to countries with ambitious agendas in terms of services trade, they may well turn their back on the GATS for other issues as well.

\textsuperscript{251} This term has been coined by S/CSS/W/21, December 18, 2000, Communication of the USA.

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