THE WTO, THE INTERNET AND TRADE IN DIGITAL PRODUCTS

The rapid development of the Internet has led to a growing potential for electronic trade in digital content such as movies, music and software. As a result, there is a need for a global trade framework applicable to such digitally-delivered content products. Yet, digital trade is currently not explicitly recognised by the trade rules and obligations of the World Trade Organization (WTO).

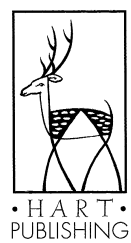
This study provides a complete analysis of the related challenges in the ongoing WTO Doha Negotiations to remedy this state of affairs. It elaborates on the required measures in the multilateral negotiations to achieve market access for digital content and examines the obstacles that lie on the path to reaching consensus between the United States and the European Communities. Negotiation parameters analysed include the current US and EC regulatory approach to audiovisual and information society services and the evolution of their applicable trade policy jurisdiction. Finally, this examination takes stock of how the Doha Negotiations and parallel US-driven preferential trade agreements to have so far contributed to securing free trade in digital content.

As new technologies are an increasingly prominent source of trade dispute, this book is an assessment of how WTO Members can maintain the relevance of the multilateral trade framework in a changing technological and economic environment.

The WTO, the Internet and Trade in Digital Products:

EC-US Perspectives

Sacha Wunsch-Vincent



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To my Parents

Contents

Table of Figures xi
Acknowledgements xiii
Disclaimer xv
List of Acronyms xvii
Table of Cases xxi
Table of Legislation xxiii

Introduction 1
I. The Starting Point: Growing Trade in Digitally-Delivered Content Products 2
II. The Research Question 7
III. Research Approach and Structure of the Study 8
IV. Contribution of this Research 11
V. Research Context 12

Part One: The WTO Negotiation Context 13

1 The WTO's Work Relating to Digitally-Delivered Content Products 15
1.1 WTO Work Programme on Electronic Commerce 16
1.1.1 Phase One: Geneva Ministerial Conference—Seattle Ministerial Conference 16
1.1.2 Phase Two: Seattle Ministerial Conference—Doha Ministerial Conference 19
1.1.3 Phase Three: Doha Ministerial Conference—Preparations for Cancún Ministerial Conference 22
1.1.4 Phase Four: Preparations for the Cancún Ministerial Conference and the General Council Decision of July 2004 23
1.2 Doha Development Agenda 24
1.2.1 Non-Agricultural Market Access Negotiations (NAMA) 26
1.2.2 Trade in Service Negotiations 27
1.3 Conclusion 31

Part Two: Requirements for Free Trade in Digitally-Delivered Content Products 33

2 Unresolved Horizontal WTO E-Commerce Questions 35
2.1 The WTO Duty-free Moratorium on Electronic Transmissions 37
2.2 The Customs Valuation of Digital Content 43
2.3 Unresolved Questions of Classification 48
2.3.1 Digitally-Delivered Content Products: Goods (GATT), Services (GATS) or Intellectual Property (TRIPS)? 51
2.3.2 If under GATS: Which Service Trade Commitments Apply? 62

3 Essential Improvements of WTO Trade Commitments 81
3.1 Goods: NAMA Negotiations and the Information Technology Agreement 81
3.2 Services: The GATS Negotiations 84
3.2.1 Stock-Taking of GATS Commitments for the Cross-Border Delivery of Services 84
3.2.2 Computer and Related Services 90
3.2.3 Value-Added Telecommunication Services 91
3.2.4 Audiovisual Services 92
3.2.5 Entertainment Services 98

Conclusion to Part Two 98

Part Three: Internal US and EC Negotiation Parameters 101

4 US Negotiation Parameters: Internal Measures and Trade Jurisdiction 103
4.1 Internal Dimension: US Freedom of Speech and Laissez-Faire Approach 104
4.1.1 Quasi-Inexistence of US Audiovisual Policy and an Export-Oriented US Content Industry 104
4.1.2 New US Policies for the Digital Age 107
4.2 External Dimension: The US Trade Policy Jurisdiction Relating to Digital Content 112
4.2.1 Fundamentals of the US Trade Policy Jurisdiction 113
4.2.2 From Stalemate Concerning Renewed Fast-Track Legislation to the 'Trade Act of 2002' 115
4.2.3 The Trade Act of 2002: A Mandate for Free Trade in Digital content 117
4.2.4 'Competitive Liberalisation' of Trade in Digital Content 126
4.3 Conclusion 128

5 EC Negotiation Parameters: Internal Measures and Trade Jurisdiction 129
5.1 Internal Dimension: Expanding Audiovisual and Information Society Policies 130
5.1.1 Evolving Mandate of the EC as Regards Culture and Content 131
5.1.2 Evolving Scope of EC Content Policies: Update of Traditional and Creation of New Content Measures 133
5.1.3 Link Between the Evolving Content and Information Society Policies and the EC's Negotiation Flexibility in the WTO 143

5.2 External Dimension: The EC's Common Commercial Policy Powers Relating to Digital Content 145
5.2.1 The Cultural and Audiovisual Service Carve-Out in the EC's Negotiation Mandate for the Doha Round: The First 'Safety Lock' 146
5.2.2 The Cultural and Audiovisual Service Carve-Out from the EC's Common Commercial Policy: Further 'Safety Locks' 147
5.3 Conclusion 163

Part Four: Outcomes of the Doha Round and US-driven Preferential Trade Negotiations 165

6 Digital Trade Achievements of the Doha Development Agenda: Slow or Absent Progress 167
6.1 Unresolved Horizontal E-Commerce Questions: No Solutions Forthcoming in the Doha Negotiations 168
6.1.1 Assessment of Work Leading to the Cancún Ministerial: Adoption of a Minimalist Stance 169
6.1.2 Assessment of the Situation after the Cancún Ministerial and the Council Decision of July 2004: Lack of Progress on All Fronts 170
6.1.3 Implications of the WTO Rulings Concerning the GATS US Internet Gambling Case 174
6.2 Essential Market Access: Slow Progress of the WTO's Doha Negotiations 176
6.2.1 NAMA and the Information Technology Agreement: Still Working on Negotiation Modalities 177
6.2.2 Service Negotiations: Ambitious Negotiation Proposals but Modest GATS Offers and Resistance to Liberalise Content Services 180
6.3 Parallel Negotiations on a UNESCO Convention on the Diversity of Cultural Expressions 195
6.3.1 Scope and Objective of the UNESCO Convention on Cultural Diversity 195
6.3.2 Possible Implications of the UNESCO Convention on the Specified WTO Negotiation Requirements for Digital Trade 197
6.4 Conclusion 199

7 Digital Trade Achievements of Parallel US Bilateral and Regional Trade Negotiations: Mixed Results 201
7.1 Towards Liberal Digital Trade Laws: US-Chile and US-Singapore FTAs Break New Ground 202

7.1.1 Successful Conclusion of E-Commerce Chapters with a Focus on Digital Content Products 204
7.1.2 Cross-Border Trade in Services Chapters: Liberalisation due to Negative List Approach but Remaining Audiovisual Limitations 213
7.2 Assessment of the Bilateral US Trade Agreements: Half-Way House or Remarkable Step Forward? 219
7.2.1 Does the US Digital Trade Template Constitute a Stumbling Block for the WTO? 221
7.2.2 Regional or Global Consensus via US-Driven Preferential Trade Agreements? 224
7.3 Conclusion 227

8 Conclusion 229

Annex 233

A.1.1 HS Codes for Physical Carrier Media 233
A.1.2 GATS Market Access and National Treatment Commitments 234
A.1.3 Correspondence between GATS Services Classification List and the Provisional CPC 235
A.1.4 Central Product Classification 1.1, Version 2002 237
A.2.1 Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment 240

Relevant Provisions of the Trade Act of 2002 240

A.4.1 Congressional Oversight Committee and Consultation Requirements 240
A.4.2 Comparison of the Negotiation Objectives of the Trade Act of 1974, the OCTA of 1988 and the Trade Act of 2002 243
A.4.3 Comparison of the Procedural Requirements of the Trade Act of 1974, the OCTA of 1988 and the Trade Act of 2002 245

Relevant Provisions of the Treaties of the European Communities 249

A.5.1 The Evolution of the EC's Common Commercial Policy Competence in the Treaties 249
A.5.2 Culture in the Treaties of the European Communities 252
A.5.3 Acronyms used for Treaties of the EC/EU 253
A.6.1 GATS Negotiations Proposals 254
A.7.1 US Free Trade Agreements on Digitally-Delivered Content Products 257

Bibliography 265
Index 289

Table Of Figures

Table 1: Digitally-delivered content products defined 3
Table 1.1: Council responsibilities in the WTO Work Programme on E-Commerce 17
Table 1.2: Agreements found in the WTO Work Programme on E-Commerce 21
Table 1.3: The Doha Declaration and its relevance to digitally-delivered content products 25
Table 1.4: GATS Mode 1 vs. GATS Mode 2 28
Table 1.5: Services relevant to digitally-delivered content products 30
Table 2.1: US vs. EC views on WTO issues relevant to digitally-delivered content products 36
Table 2.2: The relevance of the WTO Duty-Free Moratorium and the Valuation Decision 47
Table 2.3: Comparison between GATT and GATS 53–4
Table 3.1: ITA participants 82
Table 3.2: GATS Mode 1 commitments of selected WTO Members, 2004 86
Table 3.3: Inventory of the GATS commitment levels under Mode 1 / 2 for 146 WTO Members and pertinent service sectors, 2003 88
Table 3.4: Summary of requirements for free trade in digitally-delivered content products 99–100
Table 4.1: Campaign donations of US content industries, 2002 midterm and 2004 election cycle 107
Table 4.2: US digital trade policy objectives anchored in the TPA 119
Table 4.3: Status of US preferential trade agreements 127
Table 5.1: Varying distribution of EC trade policy powers depending on product type, delivery mode, service sector and nature of targeted liberalisation 152–3
Table 7.1: Assessment of the US bilateral trade agreements with Chile, Singapore and Australia 205

Figure 2.1: Classification possibilities for digitally-delivered content products 71
Figure 5.1: The evolution of the EC's trade policy jurisdiction 148

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Disclaimer

The responsibility for any incorrect statements vis-à-vis the negotiation positions of WTO Members or their trade jurisdiction rests entirely with the author. Only the submissions and offers of Members to the World Trade Organisation have a legally binding status.

Moreover, the views expressed in this paper are those of the author, and shall not be attributed to the Organisation for Economic Co-Operation and Development (OECD). This research has been conducted under own responsibility and is not based on work at the OECD.

List of Acronyms

ACTPN	Advisory Committee for Trade Policy and Negotiations (USTR)
AFJV	Agence Française pour le Jeu Vidéo
APEC	Asia-Pacific Economic Cooperation
BSA	Business Software Alliance
CPC	Central Product Classification of the United Nations (UN)
CAFTA	Central American Free Trade Area
COG	Congressional Oversight Group
COMTD	Committee for Trade and Development (WTO)
CRS	Congressional Research Service
CSI	Coalition of Service Industries (US)
CTG	Council for Trade in Goods (WTO)
CTFS	Committee on Trade in Financial Services (WTO)
CTS	Council for Trade in Services (WTO)
DDA	Doha Development Agenda (WTO)
DG	Directorate General of the European Commission (EC)
DG Trade	Trade Directorate General of the European Commission (EC)
EC	here: European Communities and their Member States
ECJ	European Court of Justice
E-Commerce	Electronic Commerce
ESF	European Services Forum
EIC	Entertainment Industry Coalition for Free Trade
EU	European Union
FAZ	Frankfurter Allgemeine Zeitung
FCC	Federal Communications Commission
FTA(s)	Free Trade Agreement(s)
FT	Financial Times
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade (WTO)
GC	General Council (WTO)
GDP	Gross Domestic Product
GNS	Group of Negotiations on Services (Uruguay Round)
IBM	International Business Machine Corporation
ICRT	International Communications Round Table
IFAC	Industry Functional Advisory Committee (USTR)
IFPI	International Federation of The Phonographic Industry
IGPAC	Intergovernmental Policy Advisory Committee (USTR)
IHT	International Herald Tribune

IIE	Institute for International Economics
IMF	International Monetary Fund
IPR(s)	Intellectual Property Right(s)
IT	Information Technology
ITA	Information Technology Agreement (WTO)
ITAC	Industry Trade Advisory Committees (USTR)
ITC	International Trade Center (UNCTAD/WTO)
ITI	Information Technology Industry Council
MFN	Most-Favoured Nation
MIN	Ministerial Conference
MPAA	Motion Picture Association of America
MTN	Multilateral Trade Negotiations
NAFTA	North American Free Trade Agreement
NAMA	Non-agricultural Market Access Negotiations (WTO)
NGMA	Negotiating Group on Market Access (WTO)
NTB	Non-Tariff Barrier
NTM	Non-Tariff Measure
NZZ	Neue Züricher Zeitung
OCTA	Omnibus Trade and Competitiveness Act of 1988
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Communities (EC)
RIAA	Recording Industry Association of America
SACU	Southern African Customs Union
SAFTA	Singapore-Australia Free Trade Agreement
TABD	Trans-Atlantic Business Dialogue
Telecom	Telecommunication
TNC	Trade Negotiations Committee (Uruguay and Doha Round)
TPA	Trade Promotion Authority
TPR	Trade Policy Review Body (WTO)
TRIPS	(Agreement on) Trade Related Aspects of Intellectual Property Rights, TRIPS Council refers to the Council for Trade in Intellectual Property Rights (WTO)
TVWF	Television Without Frontiers Directive
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US/USA	United States of America
USTR	United States Trade Representative
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
WITSA	World Information Technology and Services Alliance
WTO	World Trade Organisation

TECHNICAL ACRONYMS

Art(s)	Article(s)
Bn	Billion
Cf	Compare to
Cl	Column
Eg	For example
F	Following
For ex	For example
N	Footnote
Ibid	Ibidem (same as above)
Ie	Id est (thus, for ex)
Incl	Including
Mn	Million
No	Number
P	Page (pp for pages)
Para(s)	Paragraph(s)
Sec(s)	Section(s)
Subpara(s)	Subparagraph(s)
Vol	Volume
Vs	Versus

Table of Cases

WTO Decisions

US-Measures affecting the Cross-border Supply of Gambling and Betting Services, Report of Panel, WT/DS285/R (10 November 2004) 12, 174, 175
US-Measures affecting the Cross-border Supply of Gambling and Betting Services, Report of Appellate Body, AB-2005-1, WT/DS285/AB/R (7 April 2005).....12, 174, 175, 184

European Court of Justice

Opinion 1/94 (Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, Re; sub nom Uruguay Round Treaties, Re; [1994] ECR I-5267; [1995] 1 CMLR 205 .....148, 150, 151, 152, 156, 157

Table of Legislation

International Treaties and Conventions

Amsterdam Treaty 1997 (Treaty amending the Treaty on the European Union) 147, 151
Antidumping Agreement (WTO) 17, 24
Association of South East Asian Nations and People's Republic of China Free Trade Agreement 2004 225
Canada-Chile Free Trade Agreement 225
Canada-Israel Free Trade Agreement 225
Charter of Fundamental Rights of the European Union 2000
Art 22 132
Constitution for Europe Treaty 2004 (CE) 130, 148, 151, 158, 159, 160, 161, 162
Art I-16 161
Art III-56 .....161, **252**
Art III-181 .....161, 252
Art III-211 .....147, 148, 159, 160
Art III-211, para 1 .....161, 162
Art III-211, para 4 162
Art III-211, para 4, subpara 2 160
Art III-211, para 5 .....160, 161
Art III-217 .....**251**
Art III-227 .....161, 163, 251
Art III-227, para 1 .....159, 160
Art III-227, para 7, subpara 2 161
Art III-227, para 7, subpara 11 161
EC Treaty, see Treaty of the Economic Community
EC-Chile Association Agreement 2002 (Association Agreement between the European Community and its Member States and the Republic of Chile) 193, 211, 214, 215
Part IV, Title III 211
Art 95(2)(b) 215
Art 95(4) 214
Art 97 213
Art 98 213
Art 99 213

Art 100 214
Art 104 211
European Economic Area Agreement 1992 142
Financial Services Agreement 1997 (WTO) 66
General Agreement on Trade in Services 1995 (GATS) (WTO) 8, 9, 11, 17, 21, 25, 27, 28, 29, 32, 33, 35, 36, 37, 40, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53-54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 84, 85, 86, 87, 88-89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 108, 109, 118, 121, 122, 130, 132, 133, 136, 137, 140, 141, 143, 144, 145, 146, 147, 151, 152, 154, 155, 156, 157, 163, 168, 171, 173, 174, 175, 176, 177, 180, 181, 182, 183, 184, 185, 186, 187, 189, 191, 192, 193, 194, 198, 199, 200, 213, 214, 215, 226, 227, 230, 231
Art I 234
Art I, para 2 ..... 28, 65
Art I, para 3(a) 95
Art II 96, 97
Art II, para 1 64
Art II, para 2 95
Arts II-XV 95
Art VI 53
Art VI, para 1 85
Art VI, para 3 85
Art VI, para 4 28
Art VI, para 5 85
Art VIII, para 2 85
Art X, para 1 28
Art XIII, para 2 28
Art XIV 95
Art XV 214
Art XV, para 1 ..... 28, 98, 155
Art XVI 90, 209, **234**
Art XVII 90, **234**
Art XVII, para 1 64
Art XVII, paras 1-3 84
Art XVIII 190
Art XIX 198
Art XIX, para 1. ..... 28, 97
Arts XIX-XXI 95
Annex on Art II Exemptions 95
Annex on Art II Exemptions, para 3 97
Annex on Art II Exemptions, para 6 97
Annex for Telecommunications 90
Annex for Telecommunications, para 2(b) 72

General Agreement on Tariffs and Trade 1948, 1995 (GATT) (WTO) 17, 21, 25, 26, 27, 32, 33, 35, 36, 37, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53-54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 74, 81, 83, 98, 99, 108, 115, 121, 150, 152, 173, 176, 179, 180, 198, 226, 231
Art IV 55, 58, 94
Art VII 240
Information Technology Agreement (ITA) (WTO).....9, 21, 27, 32, 36, 44, 46, 47, 50, 52, 53, 54, 55, 57, 58, 81, 82, 83, 99, 100, 120, 177, 178, 179
para 2 27
Annex, para 2.....27
Annex, para 3.....83
Maastricht Treaty 1992 (Treaty on the European Union, TEU).....132
Art 92, para 3 132
Nice Treaty 2001 (amending the Treaty on the European Union, Treaty establishing the European Communities) 130, 145, 147, 149, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 163, 250
North American Free Trade Agreement (NAFTA).....115
Rome Treaty, see Treaty of the European Economic Community (TEEC)
Rules of Origin Agreement (WTO) 17
Sanitary and Phytosanitary Measures Agreement (SPS) (WTO) 54
Singapore-Australia Free Trade Agreement 2004 225
Subsidies and Countervailing Measures Agreement (SCM) (WTO).....55
Art 3, para 1(a).....55
Technical Barriers to Trade Agreement (TBT) (WTO) 17, 53, 54
Art 2, paras 2-3 54
Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) (WTO).....51, 61, 78, 118, 151, 231
Art 4 260
Treaty of the Economic Community (TEC, version after Amsterdam Treaty).....147
Art 133.....147, 148, **249**
Art 133, para 1 153
Art 133, para 4 154
Art 133, para 5 151
Art 228.....149
Treaty of the Economic Community (EC, version after Nice Treaty).....130
Art 49.....151
Art 87 .....134, 161. 252
Art 87 para 3.....132, 155, **252**
Art 133 .....133, 147, 148, 149, 151, 153, 156, 157, 158, 159, **250**
Art 133, para 1 .....148, 154
Art 133, para 2 .....149, 154
Art 133, para 3 .....149, 154

Art 133, para 4 .....154, 160
Art 133, para 5 157
Art 133, para 5, subpara 1.....154
Art 133, para 5, subpara 2.....154, 155
Art 133, para 5, subparas 2-3 155
Art 133, para 5, subpara 3.....156, 157
Art 133, para 5, subpara 4.....155
Art 133, para 6 154
Art 133, para 6, subpara 1.....154
Art 133, para 6, subpara 2 .....154, 156, 160
Arts 149–152 157
Art 151.....132, 134, 153, 155, 156, 157, 161, **252**
Art 151, para 1 132
Art 151, para 2 132
Art 151, para 3 132
Art 151, para 4 .....132, 155
Art 157.....131
Art 157, para 1 131
Art 251.....253
Art 300.....249, 250, 251
Art 300, para 1 149
Art 300, para 2 149
Art 300, para 3 149
Treaty of the European Economic Community (TEEC, Treaty of Rome).....148
Art 113.....147, 148, **249**
Art 133, para 1 .....148, 149, 150
Art 133, para 2 149
Art 133, para 3, subpara 2.....149
Art 133, para 4 149
Art 228.....249
UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression (Draft) 11, 133, 194, 195, 196, 197, 198, 199, 200, 227
Preamble.....195
Art 1(e),(g),(h),(i).....196
Art 4(2)–(6) 196
Art 5(1) 196
Art 6 198
Art 6(1),(2) 196
Art 6(2)(c) 196
Art 6(2)(d) 196
Art 7 196
Art 8 196

Art 12....196
Art 13....199
Art 14....196
Art 16....196
Art 19....199
Art 20....196, 199
Art 26....196
Art 26(1)(a)–(b)....196
Art 26(2)....196
Art 29....196
Annex on Conciliation Procedure....196
Annex I....197
Annex II....198
UNESCO Universal Declaration on Cultural Diversity 2001....195
US-Australia Free Trade Agreement 2004 (FTA)....11, 126, 201, 204, 205, 206, 207, 212, 213, 214, 216, 217, 218, 219, 221, 224, 227, 257–263
Art 10.1(4)....217
Art 10.1(4)(d)....214
Art 10.2....217
Art 10.4....217
Art 10.6....217, 258, 261
Art 11.13....258, 261
Art 13.9....258, 261
Art 14.12....57, 262
Art 14.1(3)....212
Art 16.5....204
Art 16.1....207, 257
Art 16.2....207, 258
Art 16.3....208, 257
Art 16.4....259
Art 16.4(1)....209
Art 16.4(2)....210
Art 16.4(3)(c)....212
Art 16.4(4)....212
Art 16.6....204
Art 16.8....262
Art 16.8(2)....206
Service Annex I....218
Service Annex II....218
US-Bahrain Free Trade Agreement 2004....126, 204, 207, 214, 219
US-Central American Free Trade Agreement 2004 (CAFTA)....126, 204, 207, 214, 219, 224, 225
Art 14.3....207
Art 14.3(2)....208

US-Chile Free Trade Agreement 2003 (FTA).....11, 63, 126, 201, 202, 203, 205, 206, 207, 210, 211, 212, 213, 214, 215, 216, 217, 218, 223, 227, 257–263
Art 3.5 .....208, 258
Art 11.4.....209
Art 15.1.....257, 262
Art 15.1(1).....204
Art 15.1(2).....208
Art 15.1(3).....212
Art 15.2.....207, 258
Art 15.3.....207, 257
Art 15.4.....209, 259
Art 15.5.....204
Art 15.6.....206, 262
Service Annex I 216
Service Annex II 216
US-Costa Rica Free Trade Agreement 2004 .....126, 219
US-Dominican Republic Free Trade Agreement 2004.....126, 219
US-El Salvador Free Trade Agreement 2004.....126
US-Guatemala Free Trade Agreement 2004.....126
US-Honduras Free Trade Agreement 2004.....126
US-Jordan Free Trade Agreement 2001 (FTA)
Art 7 202
US-Morocco Free Trade Agreement 2004.....126, 204, 207, 214, 219
US-Nicaragua Free Trade Agreement 2004 126
US-Singapore Free Trade Agreement 2003 (FTA) 11, 63, 126, 201, 202, 203, 205, 206, 212, 214, 215, 216, 217, 218, 220, 227, 257–263
Art 8.2(3)(d) 214
Art 8.3.....213
Art 8.4.....213
Art 8.5.....213
Art 8.7 .....213, 258, 261
Art 9.1(2) 216
Art 10.9.....258, 261
Art 14.1.....207, 257
Art 14.1(1).....204
Art 14.2.....207, 258
Art 14.3.....207, 257, 259
Art 14.3(1) 39
Art 14.3(2).....208
Art 14.3(3).....209
Art 14.3(4).....210
Art 14.3(5).....212
Art 14.3(6).....212

Art 14.4 ....2, 262
Art 14.4(2) 206
Art 15.12 ....258, 261
Annex Understanding on E-Commerce 204
Service Annex I 216

National Legislation

United States

Constitution 1776
Art I, s 8 113
Art II, s 2, cl 1 113
First Amendment 105
Children's On-line Privacy Protection Act 1998 105
Digital Millennium Copyright Act 1988 (PL 105-304)
s 102(a)(4) 109
Durbin Act 2002
s 2(b)(2) 122
Internet Tax Freedom Act 1988 (IFTA) (PL 105-277)110, 111
s 1101(a) 110
Internet Tax Non-Discrimination Act 2004.111
Omnibus Trade and Competitiveness Act 1988 (OCTA)
(PL 100-418) 117, 243–248
s 1101(b)(15) 107
s 1102(d) 124
s 1103(c)(B)(I) 124
Tariff and Trade Act 1984
s 306(a)(5) 113
Telecommunications Trade Act 1988 243
Trade Act 1974 (19 USC 2211; PL 93-618) 117, 243–248
s 102(c) 124
s 135(e) 125
s 161 123
Trade Act 1988 ....124, 246, 247
Trade Act 2002 (TPA) (PL 107-210) 10, 83, 104, 112, 115, 117, 118, 119, 120, 123, 125, 127, 202, 203, 240, 242, 243–248
s 103(b) 241, 242
s 103(b)(3) 242
s 104 242
s 107 241
s 107(b) 242
s 107(c) 242

s 2102(b)(2) 83, 118, 120
s 2102(b)(4) 123
s 2102(b)(7) 83, 118, 120
s 2102(b)(9) 118, 119
s 2102(b)(9)(A) 119
s 2102(b)(9)(B) 119
s 2102(b)(9)(C) 120
s 2102(b)(9)(D) 120
s 2102(b)(9)(E) 119
s 2102(c) 246
s 2102(d)(1) **240**
s 2102(d)(2) 124, **240**
s 2103(b) 241
s 2103(c) 124
s 2103(d) 118, 120
s 2104 ..... 124, **241**
s 2104(e) 125
s 2104(a) 124
s 2105 ..... **241**, 242
s 2105(b) 124
s 2105(b)(1)(B)(ii)(IV) 124
s 2107 ..... 123, 240
s 2107(b) 115, 123

WTO General Council Decision

Decision of 31 July 2004, WT/GC/W/535 ..... 8, 167, 168, 170, 172, 178, 179, 180
para e 183
para 7 180
Annex B 180
Annex C 183

EU Secondary Legislation

Directives

Council Directive 77/388/EEC 139
Council Directive 89/552/EEC (Television without Frontiers Directive) (TVWF) 133, 134, 135, 136, 137, 139, 140
Art 4 ..... 134, 137

Art 4(1) 134
Art 5 .....134, 137
Art 26.....136
Council Directive 97/36/EEC (Directive amending TVWF).....134
European Parliament and Council Directive 2000/31/EC (E-Commerce Directive) 138
Council Directive 2002/38 (amending Directive 77/388).....139
European Parliament and Council Directive 2002/21 (Telecom Framework Directive) 139
para 5.....139, 140
paras 5-7 140
para 6.....139
para 10 139
European Parliament and Council Directive 2002/58/EC (Privacy and Electronic Communications Directive).....138
Broadcasting Directive 136, 139

Regulations

Council Regulation 218/92 (Indirect Taxation – VAT Regulation).....41, 139
Council Regulation 792/2002 (amending Regulation 218/92).....41, 139

Decisions

Council Decision 2000/821/EC (Audiovisual Works Decision).....134, 141
Council Decision of 22 December 2000 (Digital Content Decision).....142
European Parliament and Council Decision 163/2001/EC (Media Training Decision).....134

Introduction

IN RECENT YEARS, the importance of the electronic trade in digital content has become evident. The rapid development of broadband Internet, a global medium that does not halt at national borders, has led to a growing potential for electronically-imported and -exported digital content like software, music, films and cinema movies. Nevertheless, from the governance perspective, e-commerce and the trade of digital content are still relatively new phenomena, particularly when viewed through the lens of international trade. Indeed there is a need to foster a global trade framework applicable to digitally-delivered content products that is predictable and adaptable to future technological developments and changes in the marketplace.

Although work in this regard has started in the World Trade Organisation (WTO), it is still in its early stages. In fact, digital trade is not yet explicitly treated by international trade law. Due to the novel character of these digital trade flows, no academic contribution exists that comprehensively lays out the necessary steps that WTO Members must take to remedy this situation.

This research is supposed to fill this gap by providing a careful analysis of the requirements that must be addressed in the relevant ongoing multilateral trade talks to build a predictable and liberal trade regime for digitally-delivered content products. The study also examines the obstacles that lie on the path to achieving consensus between the United States (US) and the European Communities (EC) on this important topic. Finally, the related progress made during the Doha Development Agenda and the progress made in parallel—mainly US-driven—preferential trade negotiations are assessed against the above-mentioned requirements.

As such, this study provides a comprehensive assessment of challenges, solutions and the most important negotiation positions with regard to the emerging trade flows in digital content and related actions to be taken at the WTO level. It is intended to act as a reference for negotiators engaged in the Doha Development Agenda and ongoing preferential trade talks, and for academics who engage in future research on this novel aspect of international trade.

I. THE STARTING POINT: GROWING TRADE IN DIGITALLY-DELIVERED CONTENT PRODUCTS

The starting point of this study is the growing international trade of digitally-delivered content products and the resulting challenges posed to the multilateral trade framework formulated.

A first step is to properly define the focus of the study.

A. Definition: What are Digitally-Delivered Content Products in International Trade?

The term 'e-commerce' is used within the WTO as the 'production, distribution, marketing, sale, or delivery of goods and services by electronic means'.[1] With the term digitally-delivered content products the author refers to products[2] created by traditional content or core copyright industries[3] (for example, the motion picture industry) that are digitally-encoded and transmitted electronically over the Internet and thus independently from physical carrier media[4] (eg, VHS tapes). Four digital content product categories are treated here: 1. Movies, Film and Images; 2. Sound and Music; 3. Software; and 4. Video, Computer and Entertainment Games.[5]

For this research, the definition comprises only content delivered 'on demand' (point-to-point) over the Internet. It does not include the delivery of content on physical carrier media, the delivery of content via traditional broadcasting, satellite, cable or any 'on supply' (point-to-multipoint) content delivery technology. Finally, it refers only to commercial downloads[6] and excludes printed matter/text (ie, electronic newspapers).

[1] General Council, Work Programme on Electronic Commerce: Adopted by General Council on 25 September 1998, WT/L/274 (30 September 1998) [General Council Work Programme on Electronic Commerce], para 1.3. All WTO documents can be found by searching for the document number in the WTO Documents Search Facility at Internet: www.wto.org/english/info_e/search_e.htm (if not indicated otherwise, all Internet links are last updated in June 2005). WTO Jobs are submissions by WTO Members which are not declassified. Some WTO or other documents that are used more than once, receive a special reference in []–brackets which is used subsequently.

[2] Throughout the study, with the term 'product' the author refers to both goods and services.

[3] As defined here, traditional content industries include the motion picture, the recording, the music publishing, the computer software, including both business and entertainment software, theatre, advertising and the radio, television and cable broadcasting industries. The book, journal and newspaper publishing industries are excluded from the scope of this research. See Siwek (2002) for a definition of core copyright industries.

[4] In this study, carrier medium means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape. *Cf* US-Singapore Free Trade Agreement Art 14.4.

[5] See Teltscher (2000) pp 4 f and 40; and Mattoo and Schuknecht (2001) for a similar categorisation.

[6] Meaning that non-commercial 'file-sharing' of music and videos where users 'share' copyright-protected files over peer-to-peer networks—a practice which is under examination in courts of many WTO Members for violation of copyrights and related rights—is not addressed here.

By providing some examples, Table 1 illustrates what is included and excluded from this definition (digitally-delivered content products—as defined here—are framed with bold lines).

Table 1: Digitally-delivered content products defined

Delivery Mode	*Distribution Mode*		
	On Demand (point-to-point)		*On Supply (point-to-multipoint)*
	Sale	*Rent*	*Scheduled Exhibition*
Via physical carrier medium	Purchase in store	Video cassette renting	Cinema
Via electronic delivery	Permanent download via the Internet	Temporary download via the Internet	TV & radio broadcasting (including new digital satellite, cable, and digital terrestrial over-the-air networks)

Source: Adapted from Nivlet (2001), page 13. The two cells that display digitally-delivered content products are framed with bold lines.

B. Obstacles and Drivers to Digital Trade in Content

Digitally-delivered content products are understood among the business community as well as among policy-makers to be a new growth industry.[7]

The rising importance of digitally-delivered content products can largely be attributed to two factors:

— the rapid digitisation of traditional and new content; and
— the emergence of the Internet as a global distribution platform for digital content products that seamlessly bridges national borders.[8]

The economics behind digitally-delivered content products, namely the high fixed costs of initial production but negligible marginal costs of duplicating and distributing digital copies on a global basis, make them ideal 'tradables'.[9]

Nevertheless, until now the commercial trade of on-line content has been held back by various factors. To begin with, bandwidth restraints that make the downloading of large files difficult and the lack of trustworthy electronic

[7] OECD (1998b).
[8] OECD (2003b, 2004a, b).
[9] On the economics of digital content products see Shapiro and Varian (1998); Smith, *et al*, (1999); Varian (2003); Quah (2002); Brynjolfsson, *et al*, (2003). Once the initial investment on the production of content has been undertaken, the high initial production costs are best recouped by global market penetration.

payment systems have complicated the on-line sale of content.[10] Second, file-sharing activities deemed illicit by the content-producing industries have slowed the commercial trade of digital content over the Internet.[11] Since the closure of Napster—the first popular peer-to-peer file-sharing service—an even broader range of file-sharing communities (eg, KazAa) has grown that makes movies or music available for free. The fact that the digital content industries are hesitant to make their content available on-line for fear of piracy, but also the lack of new business models for the on-line environment, have up to now caused a deficiency of viable commercial efforts to exploit the digital trade potential.

Today, however, increased access to improved on-line delivery technologies and adapted business models provide new impetus to digital trade flows.

— First, both the connectivity and the hardware to facilitate digital trade of content are increasingly available. Falling prices of personal computers, the increasing Internet penetration, the greater availability of broadband services that facilitate the downloading ('streaming') of content and the rise of mobile Internet services contribute considerably to the growing trade of digitally-delivered content products.[12]

  In 2003, for example, nearly 700 million users worldwide had access to the Internet, and this figure is growing rapidly with more and more developing countries with presence on the Internet.[13] In OECD countries, diffusion is at a very advanced stage, with, for example, Denmark, The Netherlands and South Korea with more than 60% of households connected to the Internet and with roughly 100 million broadband subscribers in OECD countries in 2004.[14] Developing countries like India and China are quick to catch up.

  The 'always-on' broadband phenomenon—where Internet users pay a lump-sum for accessing broadband irrespective of duration and size of downloads—has significantly increased the household demand for digitally-delivered content products.[15] On top of the growing Internet penetration, the convergence between television and the Internet, the development of new streaming and copy-protection technologies and more portable

[10] For more information on the development of digital content and sector studies on online computer and video games, scientific publishing, music and mobile content visit the OECD Working Party on the Information Economy, Project on Digital Broadband Content under Internet: www.oecd.org/sti/digitalcontent.

[11] See OECD (2004a), ch 5 on file-sharing developments in OECD countries.

[12] OECD (2003a) pp 123 f on Internet and broadband and pp 89 f on mobile access. See also UNCTAD (2003) p 11 on the increasing world-wide access to broadband.

[13] UNCTAD (2004) pp 2 f and UNCTAD (2003). From 2001 to 2002 the figure is reported to have grown by 20%. ITU (2004) is the data source.

[14] See the OECD ICT indicators under www.oecd.org/sti/telecom, chs three and four in OECD (2004a) and the OECD Communications Outlook 2005. Korea has roughly 25 out of 100 inhabitants with a broadband subscription.

[15] See IDATE (2003) p 126; IDATE (2004) and OECD (2004a) on the increasing importance of on-line content.

hardware to access and download digital content are transforming the content industries and their distribution systems.[16]

— Second, one also observes progress in terms of functioning business models that embrace the new technologies' potential.[17] A significant amount of business-to-business trade in software is already conducted over electronic networks. And this area of digital delivery is reported to be growing fast.[18]

In addition, there is remarkable new business activity as regards the on-line distribution of music, movies and on-line computer games (leisure software). Indeed, the recent debut of the Apple's iTunes Music Store has been portrayed as a new era for conducting music business over the global medium (music streaming or downloading services with pay-per-track or subscription options).[19] The success of this on-line music store has spurred other companies such as the music labels, Microsoft and Wal-Mart to also offer digitally-delivered content products on-line.[20] Most recently, this phenomenon of increased business activity in digitally-delivered content products has also been spreading to on-line movies, games and other digitally-delivered content products.[21]

The underlying assumption of this paper therefore is that digitally-delivered content products will make up a large share of upcoming business-to-business and business-to-consumer e-commerce transactions. As such, these digital transactions are also expected to be one of the fastest-growing global trade flows whose potential is still hardly tapped.[22]

However, due to their novel character, digital trade flows are one of the most noteworthy challenges to the current WTO trade framework. It is within the above-mentioned environment of fast-paced technological change that WTO Members must make decisions regarding the application of the rules-based trading system to digital content products.

[16] See OECD (2003b, 2004b, 2005a, b, c, d).

[17] See MCM (2004) for specific examples of successful on-line content ventures and OECD (2004a) chs 4 and 5 for the importance of entertainment content in Internet usage.

[18] OECD (1998a) pp 5 and 15 f, OECD (2002) ch 3. According to a statement of the Business Software Alliance (BSA) in House of Representatives (2003) p 49 soon on-line distribution will be the predominant way software is acquired and used. In 2005, 66% of all software is being distributed on-line. The Information Technology Industry Council (ITI) projected that between 1999 and 2003 the market for electronically distributed software alone has grown from $0.5 billion to $15 billion, see House of Representatives (2003) p 2. See also BSA (2003).

[19] See for a full account on digital music OECD (2005c).

[20] IFPI (2005) and 'Power Players: Big Names Are Jumping Into The Crowded On-line Music Field', in: *New York Times* (12 January 2004).

[21] Movielink (the first Hollywood on-line movie service) partnered with both RealNetworks and Microsoft Windows Media to use their digital rights management technology and media player technologies. See 'Movielink Ready To Roll'; in: *CNET News.com* (10 November 2002). See also 'Microsoft, Disney Forge Digital Content Deal', in: *Ecommerce Times* (9 February 2004). See on online games Screen Digest (2002) and OECD (2005b).

[22] See Hauser and Wunsch-Vincent (2001b) pp 2–4 on the untapped potential for digitally-delivered content products, Mattoo and Schuknecht (2001) for an estimation of the trade potential and Hauser and Wunsch-Vincent (2002) pp 29 f for trade figures concerning digitiseable content and related measurement problems.

C. Role of the WTO in Digital Trade

The WTO is the exclusive forum for negotiating and enforcing global rules governing cross-border trade in goods and services. But digitally-delivered content products are still relatively new to the multilateral trade framework. This situation requires improvement.

As has been demonstrated above, the electronic trade of digitally-delivered content products must overcome many obstacles relating to technological improvements, intellectual property rights (IPRs) and adequate business models in order to flourish.

But as opposed to many other tradable goods and services, the trade of digitally-delivered content products does not yet face trade barriers erected by governments that discriminate between content suppliers of different national origin. For instance, hitherto no country has been known to apply tariffs on digitally-delivered content products. And although local content quotas (ie, broadcasting ceilings for foreign content) or other discriminatory audiovisual support measures are widespread in the off-line world, no government is known to have enacted such trade barriers when it comes to digitally-transmitted content products.

However, this free trade situation applicable to digitally-delivered content products may change at any time. WTO Members have not yet found agreement on how to lock in this open trade environment. This is one of the rare moments in which global trade negotiations can—in a pre-emptive fashion—focus on avoiding the creation of new trade barriers rather than concentrating on the removal of existing impediments.

Initiatives to secure unfettered digital trade have already started in the WTO. But the complexity of securing free digital trade for content complicates the matter. As technologies converge and content becomes increasingly portable throughout different technologies (eg, TV, Internet), the boundaries between 'goods' and 'services' as well as the boundaries between software, telecommunication, and audiovisual services blur increasingly, making the applicability of current trade rules fraught with uncertainty.

In addition to these difficulties, the slow progress of WTO Members in locking in free digital trade in content is principally caused by disagreements between the US and the EC.[23] This inability of the US and the EC to concur has a pronounced impact on the likelihood of the WTO Membership to bring forward solutions.

Ideally, WTO Members would seize the opportunity of the ongoing WTO negotiations of the Doha Development Agenda to ensure that the predictable,

[23] International law does not accord the EU the status of an international legal entity, *cf* Craig and Búrca (1998) p 116. Thus in the context of the WTO, there is a need to refer to the EC rather than the EU. In the remainder of the text, the European Communities (EC) and the European Union (EU) are both referred to as the EC for simplicity.

rules-based WTO trade framework and a high degree of free trade commitments unambiguously apply to digitally-delivered content products. This research is meant to sustain this solution-seeking and to keep track of this important topic which tends to slip off the negotiation table easily due to its complexity and resistance from some WTO Members against preserving free digital trade.

II. THE RESEARCH QUESTION

Taking the above points into consideration, three related objectives are pursued.

— First, this study establishes and discusses the steps to be taken in the WTO to achieve a free trade framework for digitally-delivered content products (ie, non-discriminatory market access). It does so whilst explaining the negotiation context of the relevant digital trade issue.
— Second, it examines the negotiation parameters, like internal regulations towards digitally-delivered content products and applicable trade jurisdiction of the US and the EC, that determine the room for agreement during the Doha Negotiations. The goal is to increase the understanding of how the negotiators' hands of these two WTO Members are tied in matters relating to trade in digital content.
— Finally, this study takes stock of how the Doha Negotiations and parallel US-driven preferential trade negotiations have contributed to securing free trade in content.

As will be seen from *Chapter One* onwards, the difficulty of this trade topic is in fact its cross-cutting nature as regards international trade law which complicates the analysis and the achievement of unfettered market access. This study is meant to present these different and usually separate areas of trade negotiations in a clear and coherent fashion.

There are two aspects which this study explicitly does *not* undertake:

— First, this research is concerned only with the achievement of non-discriminatory market access for digitally-delivered content products. Although crucial to the further development of trade in digital content, the creation and the enforcement of a balanced international copyright framework is *not* the theme of this examination.
— Second, it is expressly *not* the goal of this study to focus on providing a purely normative treatment of *how* the e-commerce or digitally-delivered content products should be treated in the WTO. Without a doubt, it establishes a novel list of requirements for securing free trade in digitally-delivered content products. But with respect to some crucial decisions, the work is meant to discuss the various solutions at hand whilst explaining the pertinent legal and political negotiation context.

This thorough analysis of the questions involved and of the negotiation parameters of both the US and the EC shall help WTO Members to work out bargaining positions more effectively and to assess the basis for compromise.

III. RESEARCH APPROACH AND STRUCTURE OF THE STUDY

The time-frame of the analysis is from 1998—the beginning of the WTO's Work Programme on E-Commerce—over the launch of the Doha Negotiations in 2001 to the conclusion of the General Council Decision of 31 July 2004 and first corresponding efforts of the Decision's implementation up until June 2005.[24]

The research approach and the structure of this study in four parts have been chosen in the light of the research question.

Part One: The WTO Negotiation Context

Part One provides an introduction to the WTO negotiation context in which the unresolved WTO questions on e-commerce and further measures to liberalise digitally-delivered content products have been or may be addressed.

Chapter One reviews the history of the WTO's work on e-commerce. It sheds light on the WTO Work Programme on E-Commerce and its main issues by examining five years of declarations, progress reports and the significant number of pertinent submissions of WTO Members. *Chapter One* also assesses how negotiations relating to digitally-delivered content products are, can or should be taken up during the ongoing Doha Development Agenda.

This is done through:

— an analysis of the negotiation mandate of the Doha Development Agenda;
— a concise review of the product classifications possibly applying to digital content products; and
— a description of the pertinent negotiation activities that are being undertaken in the Non-agricultural Market Access Negotiations (NAMA) and the negotiations relating to the General Agreement on Trade in Services (GATS).

Part Two: Requirements in the WTO for Free Trade in Digitally-Delivered Content Products

Part Two discusses the requirements that WTO Members must fulfil to create unfettered market access for digitally-delivered content products.

[24] GC, Decision of 31 July 2004, WT/GC/W/535 (31 July 2004). The goal of the Council Decision was to reinvigorate the Doha Negotiations which had not made progress since the failure of the Cancún Ministerial.

Chapter Two analyses the unresolved horizontal e-commerce questions that are raised in the WTO through the advent of e-commerce. It does so by taking stock of and analysing more than five years of consultations of the WTO Work Programme on E-Commerce.

Chapter Three provides an assessment of the essential improvements in the WTO's free trade commitments necessary for non-discriminatory market access for digitally-delivered content products. It proposes a study of:

— the relevant commitments undertaken through the WTO's Information Technology Agreement (ITA); and
— commitments undertaken through the GATS in the field of computer, value-added telecommunication, audiovisual and entertainment services.

With respect to the essential new GATS commitments, *Chapter Three* principally relies on:

— a customised and new analysis of GATS commitments (146 WTO Members, taking into account recent accessions like China) which updates the latest available study on the scope and depth of GATS commitments from 1999; and
— the assessment of a significant number of GATS schedules of individual WTO Members to assess the potential for further GATS commitments.

Part Three: Internal US and EC Negotiation Parameters

Part Three assesses the internal negotiation parameters that influence the US and the EC WTO negotiators' readiness and ability to take the necessary steps outlined in *Part Two* during the ongoing WTO's Doha Development Agenda. Specifically, *Chapter Four* sheds light on the internal negotiation parameters of the US, whereas *Chapter Five* conducts a similar analysis for the EC. The author's central hypothesis is that the US and the EC negotiation flexibility on the issue in the WTO can be investigated only after an examination of two types of internal negotiation parameters, namely the:

— trade policy constraints resulting from existing domestic regulations; and
— trade policy constraints arising from the allocation of trade policy powers and the respective negotiation mandates for the Doha Development Agenda.

As regards the former, the desire to ensure coherence between internal policies/regulations and the WTO framework (necessity for regulatory parallelism) constrains the actions of US and EC negotiators. Regarding the latter, it is shown that the distribution of trade policy powers and the trade policy formulation process itself have a substantial influence on the possible outcome of international trade negotiations. It is argued in the literature that a mutual

understanding of these respective internal negotiation constraints may increase the probability of reaching an agreement.[25]

For the examination of US domestic regulations and industry interests *Chapter Four* relies on an assessment of:

— the US regulatory approach to the Internet conducted through a review of pertinent US bills and administrative documents; and
— US industry interests through an analysis of related industry position papers and an examination of the size and direction of relevant campaign contributions.

For the examination of US trade legislation and the pertinent US trade policy interests *Chapter Four* is based on an analysis of the:

— political context leading to the new US fast-track legislation (US Trade Act of 2002); and of the
— legal provisions of the US Trade Act of 2002 that sets out the new US Digital Trade Agenda.

For the study of the EC's domestic regulations *Chapter Five* builds on:

— an assessment of the EC's regulatory approach to audiovisual and information society services through the study of EC laws and policies.

For the analysis of the EC's common commercial policy framework and the pertinent EC trade policy interests *Chapter Five* relies on an examination:

— of the changing distribution of trade policy powers between the EC and its Member States from 1957 to today in the field of audiovisual and cultural services and interrelated EC competences; and
— of the EC's Doha negotiation mandate.

Part Four: Digital Trade Achievements of the Doha Round and Parallel Preferential Trade Negotiations

With its *Chapters Six* and *Seven*, *Part Four* assesses the digital trade achievements of the Doha Round and parallel preferential trade negotiations.

The objective of *Chapter Six* is to take stock of the progress made in the Doha Development Agenda so far and to anticipate probable upcoming multilateral developments as regards the deliverables formulated in *Part Two*. Beyond the end of the period initially allotted to the Doha Negotiations (ie the start of

[25] Meunier (1998) p 282 notes that '[. . .] comparing and contrasting the EC and US trade policy-making process could prove particularly interesting since they share many similarities and, given the place of the EC and the US as the world's two foremost trading entities, have the potential to learn from each other. Respecting the negotiation commitments makes it very much more probable that outcome is reached'.

2005), this final Chapter functions as a timely review that allows WTO Members to re-consider their negotiation positions accordingly.

In *Chapter Six* examinations of the NAMA Negotiations, on the one side, and sector-specific studies of the GATS negotiations on the other, are undertaken. The former is mainly carried out through an analysis of the negotiations, whereas the assessment of the latter builds on the investigation of around 50 sector-specific proposals and the initial and revised GATS offers handed in before June 2005. Moreover, *Chapter Six* evokes the negotiations to create a 'UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' and how such a Convention could relate to digitally-delivered content products.

Until this study was concluded, the WTO negotiations did not achieve the desired negotiation outcome as set out in *Part Two*. However, US-driven preferential trade negotiations have aimed at solutions to secure non-discriminatory market access for digitally-delivered content products.

The concluding *Chapter Seven* thus examines these relevant parts of the US preferential trade agreements signed between August 2002 and March 2005. A comparative analysis and evaluation of the services and e-commerce Chapters is conducted—in detail—for the following free trade agreements: US-Chile, US-Singapore, and US-Australia. Lastly, *Chapter Seven* addresses the interrelationship between these preferential trade agreements on digitally-delivered content products and the WTO negotiations. The question is posed whether the bilateral trade agreements are a building or a stumbling block to achieving progress in the WTO.

IV. CONTRIBUTION OF THIS RESEARCH

With the aforementioned research objective and the research approach, this study addresses several gaps in the literature.

To begin with, this research treats a new type of trade flow and demonstrates how the trade of digitally-delivered content products fits into the multilateral trade framework. Subsequently, it systematically develops a set of actions to be taken to secure non-discriminatory market access for these novel export items. Indirectly, this study is therefore also an assessment of how WTO Members can deal with upcoming new types of trade flows, thus maintaining the relevance of the multilateral trade framework in an evolving economic environment.

Furthermore, it can be argued that this novel strand of WTO research into digital trade issues merits both academic and policy-makers' attention. First, the Internet—having contributed significantly to the tradability of services—offers unseen possibilities for global digital trade. Second, despite the embryonic stage of digital trade flows, their political weight should not be underestimated. Recently, both the US Congressional Research Service and trade policy experts have noted that new technologies and e-commerce are an increasingly

prominent source of transatlantic trade and ideological dispute because these trade issues affect domestic regulatory regimes.[26]

V. RESEARCH CONTEXT

The research was carried out over a period of four years of which:

— two years at the University of St Gallen (Switzerland) during which the author consulted the European Commission[27]; selected WTO negotiators; the WTO Trade in Services Division; and representatives of the European service and content industry; and
— one year at the Institute for International Economics (Washington DC) and the Berkeley Center for Law and Technology (Berkeley CA)[28] during which the author consulted with the trade committees of the US Congress (House Ways and Means Committee/Senate Finance Committee); the Congressional Oversight Group; the United States Trade Representative (USTR); the Motion Picture Association of America (MPAA); the Information Technology Industry Council (ITI); the Business Software Alliance (BSA); the Coalition of Service Industries (CSI); and the US technology and content industries; and
— one year as Economist at the Organisation for Economic Co-operation and Development (OECD) under the Working Party on the Information Economy (WPIE).[29]

[26] Congressional Research Service (2003) pp 10–12; Hufbauer and Neumann (2002) p 5; and Mann (2000). This potential for disputes is exemplified by the recent Internet gambling case opposing the US and Antigua and Barbuda: see US—Measures Affecting the Cross-border Supply of Gambling and Betting Services—Report of the Panel, WT/DS285/R (10 November 2004) and US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Report of the Appellate Body AB-2005-1, WT/DS285/AB/R (7 April 2005).

[27] Namely the Directorate General (DG) of the Information Society, DG Internal Market, DG Education and Culture and especially DG Trade. In this research, the Council of the European Union will in general terms be referred to as 'the Council' and the European Commission as 'the Commission'.

[28] During that time, the author was also GULC Fellow (Georgetown University Law Center) at the Institute for International Economic Law (Washington DC).

[29] See the disclaimer at the start of this work.

Part One

The WTO Negotiation Context

1

The WTO's Work Relating to Digitally-Delivered Content Products

The WTO is addressing market access issues for digitally-delivered content products in two ways:

— On the one hand, WTO Members launched the 'WTO Work Programme on Electronic Commerce' (later also referred to as the 'Work Programme') to identify all trade-relevant questions raised by electronic trade. The Work Programme is largely an exploratory process through which WTO Members examine questions on the application of the WTO Agreements to e-commerce. Although the Work Programme deals with a considerable set of issues—some of which are outside the scope of this research—its most important and difficult unresolved questions are directly related to market access afforded to digitally-delivered content products.

— On the other hand, WTO Members agreed at the Fourth Ministerial Conference in November 2001 to launch the Doha Development Agenda which sets out a new round of multilateral trade negotiations.[1] The latter Doha Negotiations provide a unique platform for making new commitments and drafting new trade rules to facilitate the trade of digitally-delivered content products. In that context, WTO Members can propose solutions to the unresolved questions and enter new free trade commitments. In contrast, the WTO Work Programme on E-Commerce is a non-negotiation forum. Depending on solutions to the outstanding e-commerce questions, a multi-track approach (ie, in the goods and in the services negotiations) within the global trade talks may be necessary to secure market access for digitally-delivered content products.

The next two sections explain the negotiation background to digitally-delivered content products while focusing on a set of issues relevant to their liberal cross-border exchange.

[1] See Doha Ministerial Declaration.

1.1 WTO WORK PROGRAMME ON ELECTRONIC COMMERCE

1.1.1 Phase One: Geneva Ministerial Conference—Seattle Ministerial Conference

At the Geneva Ministerial Conference in May 1998, the WTO Members issued a declaration on global e-commerce that established a comprehensive WTO Work Programme on E-Commerce to examine all trade-related issues connected with global e-commerce. It required a report on the progress of the work at the next Ministerial Conference in 1999.[2]

This WTO E-Commerce Declaration also included a political statement calling upon Members to '. . . continue their current practice of not imposing customs duties on electronic transmissions' (the 'WTO Duty-free Moratorium on Electronic Transmissions').[3] The declaration also stated that '. . . [w]hen reporting to [the] third session [the Seattle Ministerial Conference], the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.'[4]

The WTO Secretariat prepared a background note discussing how the WTO Agreements relate to e-commerce.[5] Then, the General Council established the framework for the Work Programme.[6]

As a first step, the General Council defined 'e-commerce' as 'the production, distribution, marketing, sale or delivery of goods and services by electronic means'.[7] Then the General Council instructed its four 'subsidiary bodies'[8]—the Council for Trade in Goods, the Council for Trade in Services, the Council for Trade-Related Aspects of Intellectual Property, and the Committee on Trade and Development—to explore the relationship between the existing WTO Agreements and e-commerce.

Specifically, it identified a list of issues that each body should examine (see Table 1.1).[9]

After the proclamation of this Work Programme, the WTO Secretariat prepared background papers on the issues to be considered for each of the four subsidiary bodies[10] while WTO Members submitted papers. The four

[2] WTO, The Geneva Ministerial Declaration on Global Electronic Commerce, WT/MIN (98)/DEC/2 (20 May 1998) [WTO E-Commerce Declaration].

[3] *Ibid*.

[4] *Ibid*.

[5] GC, WTO Agreements and Electronic Commerce, WT/GC/W/90 (14 July 1998).

[6] GC, Work Programme on Electronic Commerce, WT/L/274 (30 September 1998) para 1.2.

[7] *Ibid*, para 1.3.

[8] A 'subsidiary body' refers to any of the WTO Councils or committees that reports to the WTO's General Council.

[9] GC, Work Programme on Electronic Commerce, WT/L/274 (30 September 1998).

[10] Council for Trade in Goods (CTG), Work Programme on Electronic Commerce, G/C/W/128 (5 November 1998); Council for Trade in Services (CTS), Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998); Committee for Trade and Development (COMTD),

Table 1.1: Council responsibilities in the WTO Work Programme on E-Commerce

Relevant Council	*Areas of Responsibility for WTO E-Commerce Work Programme*
Council for Trade in Goods	Aspects of e-commerce relevant to the GATT and other WTO Agreements affecting trade in goods (eg, Agreement on Technical Barriers to Trade, Agreement on Antidumping, Agreement on Rules of Origin), incl: Market access, customs valuation, import licence procedures, customs duties, technical standards, rules of origin, and classification.
Council for Trade in Services	The treatment of e-commerce in the GATS legal framework, incl: Scope (incl modes of supply), MFN, transparency, increasing participation of developing countries, domestic regulation, competition, protection of privacy and public morals and prevention of fraud, market access and national treatment commitments on electronic supply of services, access to and use of public telecommunications transport networks and services, customs duties, and classification.
Council for Trade-Related Aspects of Intellectual Property Rights	Intellectual property issues arising in connection with e-commerce, incl: Protection and enforcement of copyright and trademarks, and access and use to/of new technologies.
Committee on Trade and Development	The development implications of e-commerce, incl: Effects of e-commerce on trade and economic prospects of developing countries; challenges/solutions to enhancing participation of developing countries as exporters of electronically-delivered products, incl the role of improved access to infrastructure, transfer of technology, and the movement of natural persons; use of IT to integrate developing countries into the multilateral trading system; impact of e-commerce on traditional means of distributing physical goods; and financial implications .

Source: GC, Work Programme on Electronic Commerce, WT/L/274 (30 September 1998) and Hauser & Wunsch-Vincent (2002), page 62.

Development Implications of Electronic Commerce, WT/COMTD/W/51 (23 November 1998) and Council for Trade in Intellectual Property Rights (TRIPS Council), The Work Programme on Electronic Commerce, IP/C/W/128 (10 February 1999). All communications of Members to the WTO Work Programme on E-Commerce can be downloaded from www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

subsidiary bodies reported to the General Council on the progress of their work in July 1999.[11] The General Council forwarded the progress reports to the Seattle Ministerial Conference in 2001.[12] The General Council was, however, unable to make its own recommendations to the Seattle Ministerial Conference because the Members could not agree on two sets of questions directly linked to digitally-delivered content products:

— Should the temporary 1998 WTO Duty-free Moratorium on Electronic Transmissions be made legally binding and permanent?
— What trade rules and obligations should apply to digitally-delivered content products?

Moreover, Members could not concur on the 'institutional arrangements' for continuing the Work Programme.[13] Some Members favoured institutional arrangements that would place the Work Programme exclusively under the General Council to facilitate the consideration of 'cross-sectoral' issues.[14]

In preparation for the Ministerial Conference in November 1999, a number of delegations submitted recommendations for a reference on e-commerce to be included in the Seattle Ministerial Declaration.[15] The overall failure of the Seattle Ministerial Conference precluded any specific action on e-commerce and called into question the status of the Work Programme, as well as the moratorium on imposing customs duties on electronic transmissions.[16] Thus, Phase One of the Work Programme ended with no concrete accomplishments and uncertainty about the next steps.

[11] CTS, Interim Report to the GC, Work Programme on Electronic Commerce, S/C/8 (31 March 1999); GC, Communication from the Chairman of the COMTD, Interim Review of the Work Programme on Electronic Commerce, WT/GC/23 (9 April 1999); GC, Communication from the CTG Chairman, Interim Review of the Work Programme on Electronic Commerce, WT/GC/24 (12 April 1999); COMTD, Contribution by the Committee on Trade and Development to the WTO Work Programme on Electronic Commerce, WT/COMTD/19 (15 July 1999) [COMTD E-Commerce Report]; CTG, Work Programme on Electronic Commerce, G/C/W/158 (26 July 1999) [CTG E-Commerce Report]; CTS, Progress Report to the GC, Work Programme on Electronic Commerce, S/L/74 (27 July 1999) [CTS E-Commerce Report]; and TRIPS Council, Progress Report to the GC, Work Programme on Electronic Commerce, IP/C/18 (30 July 1999) [TRIPS Council E-Commerce Report].

[12] GC, Minutes of Meeting: Held 3 and 8 May 2000, WT/GC/M/55 (16 June 2000).

[13] See, eg, GC, Minutes of Meeting: Held 15 June 1999, WT/GC/M/40/Add.3 (5 July 1999) para 3 and GC, Minutes of Meeting: Held 15 June 1999, WT/GC/M/45 (2 August 1999) para 5.

[14] 'Cross-sectoral' or 'horizontal' issues are those that cut across the authority of an individual WTO Council or a WTO Committee.

[15] See, eg, GC, Communication from Japan, Preparations for the 1999 Ministerial Conference: Electronic Commerce, WT/GC/W/253 (9 July 1999); GC, Communication from the EC and their Member States, Preparations for the 1999 Ministerial Conference: WTO Work Programme on Electronic Commerce, WT/GC/W/306 (9 August 1999) and GC, Communication from Canada, Preparations for the 1999 Ministerial Conference: Electronic Commerce, WT/GC/W/339 (23 September 1999).

[16] GC, Minutes of Meeting: Held on 3 and 8 May 2000, WT/GC/M/55 (16 June 2000) para 10.

1.1.2 Phase Two: Seattle Ministerial Conference—Doha Ministerial Conference

In July 2000, the General Council agreed to:

— reinvigorate the WTO's work on e-commerce;
— ask the GATT, GATS, and TRIPS Councils and the Committee on Trade and Development to resume their work, identify cross-cutting sectoral issues, and report back to the General Council in December 2000; and
— consider how best to organise the Council's work, including the creation of an '*ad hoc* task force' to assist in consideration of subsidiary body reports and cross-sectoral issues.[17]

Each of the bodies reported back to the General Council as invited, but only reaffirming their earlier points made in the reports of July 1999.[18]

At the December 2000 General Council meeting, Members only reached a limited number of tentative agreements:

While WTO Members pointed to the fact that further clarification is needed, there seemed to be a consensus among a majority that e-commerce and thus also the trade in digitally-delivered content products fall within the scope of existing WTO Agreements. According to many WTO Members, no new trade rules should be created for e-commerce when existing rules and obligations can address the issues at stake.[19]

But even this majority view was challenged as a number of developing country Members questioned the extent to which e-commerce came within the scope of the WTO rules.[20] In other contributions to the Work Programme, Members have wondered whether a new WTO framework of general principles, for example, a 'reference paper for e-commerce', needs to be created.[21] Such a reference paper could address cross-sectoral issues like the classification of

[17] GC, Minutes of Meeting: Held on 17 and 19 July 2000, WT/GC/M/57 (14 September 2000) para 11.

[18] COMTD, Work Programme on Electronic Commerce: Contribution by the COMTD, WT/COMTD/26 (13 November 2000); CTG, Chairman's Factual Progress Report to the GC on the Work Programme on Electronic Commerce, G/L/421 (24 November 2000); TRIPS Council, Work Programme on Electronic Commerce, IP/C/20 (4 December 2000) and CTS, WTO Programme on Electronic Commerce, S/C/13 (6 December 2000).

[19] *Ibid*. Some Members even concluded that e-commerce *per se* does not appear in need of new WTO rules. See GC, Minutes of Meeting: Held 7, 8, 11 and 15 December 2000, WT/GC/M/61 (7 February 2001) para 106.

[20] *Ibid*, Brazil (para 113); India (para 122) and Malaysia (para 127). However, other developing country Members concurred that e-commerce fell within WTO rules and/ or on the need to avoid restrictive measures on e-commerce: eg, Colombia (para 108); Cuba (para 114) and Costa Rica (para 116).

[21] See GC, Communications from the Chairman, Interim Review of Progress in the Implementation of the Work Programme on Electronic Commerce, WT/GC/24 (12 April 1999) para 10.2. See also Drake and Nicolaidis (2000) p 406.

digitally-delivered content products, include general objectives like non-discrimination, better market access and national treatment commitments for relevant goods and services, and provide a regulatory discipline for e-commerce that ensures transparency, non-discrimination, least-trade restrictiveness and other key objectives. But no agreement could be reached between WTO Members on whether such an agreement should be aimed at.

In any case, the unconditional applicability of WTO rules to e-commerce would not mean that market access for digitally-delivered content products is automatically secured. To the contrary, market access for digitally-delivered content products must be negotiated via concrete and explicit liberalisation measures.

Table 1.2 on the next page presents the other agreements found in the GATT and GATS Council during the Work Programme. These points will be taken up in *Chapters Two* and *Six* again.

Some areas had been identified that need additional clarification as to how current rules should be applied in particular circumstances. The treatment of digitally-delivered content products was the central theme of these unresolved questions. In practice, the Council for Trade in Services developed a list of issues to be examined.[22] Although these and other questions have been discussed, most have not yet been resolved.[23] In the Council for Trade in Goods, the lack of decisions on the classification issue prevented the Council to tackle further questions.

Hence, the Chairman of the General Council expressed his hope that a procedure for organising the General Council's work on e-commerce would be selected '. . . in order to prepare for the next Ministerial Conference [in Doha].'[24] In May 2001, the same Chairman announced a plan to revive the Work Programme by:

— asking the four subsidiary bodies to deepen their work and to report back to the General Council;
— holding dedicated discussions in the General Council on e-commerce to address cross-cutting issues[25]; and
— considering how the topic of e-commerce would be approached at the Fourth Doha Ministerial Conference.[26]

[22] See *S 2.3.2* and CTS E-Commerce Report.

[23] See CTS, Interim Report to the GC, S/C/8 (31 March 1999) and CTS E-Commerce Report. For a discussion of these GATS-related questions, see Berkey and Tinawi (1999); Panagariya (2000b); Drake and Nicolaidis (2000); Hauser and Wunsch-Vincent (2001a, b); and Wunsch-Vincent (2002a).

[24] *Ibid*. See also GC, Minutes of Meeting: Held 8 and 9 February 2001, WT/GC/M/63 (2 March 2001) para *5*.

[25] Inspired by a contribution from MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay) identifying sectoral versus horizontal issues: GC, Communication from MERCOSUR, Electronic Commerce: Horizontal and Sectoral Issues Which Require Further Analysis, WT/GC/W/434 (7 May 2001).

[26] GC, Minutes of Meeting: Held 8 and 9 May 2001, WT/GC/M/65 (18 June 2001) para 128.

Table 1.2: Agreements found in the WTO Work Programme on E-Commerce

Council	*Main Agreements*
Council for Trade in Goods	Delegations agreed that goods sold or marketed electronically but delivered physically across borders were subject to the GATT and could be subject to customs duties. Some Members thought the Information Technology Agreement (ITA) was an important contribution for promoting e-commerce by providing less expensive access to e-commerce related products. The majority of Members agreed that most issues delegated to the Council for Trade in Goods for discussion could be meaningfully addressed only after a determination had been made regarding the classification of electronic transmissions as goods, services, or otherwise.
Council for Trade in Services	It was the *general view** that: — the electronic delivery of services falls within the scope of the GATS since the agreement applies to all services regardless of the means by which they are delivered; all general GATS provisions, incl the MFN obligation, are applicable to the supply of services through electronic means; electronic delivery had given rise to very few new services; the participation of developing countries should be enhanced through liberalisation of market access in areas of export interest to them and through better access to technology, incl encryption technology; and the Annex on Telecommunications guarantees access to and use of public telecommunications networks for Internet access providers.

Source: CTG E-Commerce Report and CTS E-Commerce Report.

Subsequently, the Doha Ministerial Declaration addressed e-commerce as follows:

> We . . . agree to continue the Work Programme on E-Commerce. . . . [W]e recognize the importance of creating and maintaining an environment which is favourable to the future development of e-commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the work programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.[27]

* Meaning that a majority but not all WTO Members agreed to that finding.

[27] Doha Ministerial Declaration, para 34.

Thus, Phase Two of the Work Programme ended with a consensus to extend it as well as a temporary renewal of the WTO Duty-free Moratorium on Electronic Transmissions. However—apart from the extension of the moratorium and new institutional arrangements—no other concrete decisions were taken.

1.1.3 Phase Three: Doha Ministerial Conference—Preparations for Cancún Ministerial Conference

In December 2001, the Chairman of the General Council proposed a second dedicated discussion on cross-cutting issues.[28] The results of these consultations confirmed that until the Fifth Ministerial Conference, in Cancún September 2003, the institutional arrangements for the Work Programme would be as follows:

— the General Council would play a central role in the process, keeping the Work Programme under continuous review and considering issues of cross-cutting nature;
— further dedicated discussions on cross-cutting issues would be held in October 2002, December 2002, February 2003, and May–June 2003; and
— the four subsidiary bodies would examine and report to the General Council on aspects of e-commerce relevant to their respective areas of competence.[29]

Throughout 2001–03, the General Council maintained the Work Programme on E-Commerce as a standing item on its agenda. Discussions at these meetings focussed on further consideration of the institutional arrangements as well as on reviewing the work being done in the subsidiary bodies and in the dedicated discussions.[30]

In total, there have been five dedicated discussions on horizontal e-commerce matters until June 2005, with the last taking place in 2003. For the first discussion, the WTO Secretariat prepared a list of cross-sectoral issues that had been previously identified by the subsidiary bodies.[31] Members concluded that—

[28] GC, Minutes of Meeting: Held 19–20 December 2001, WT/GC/M/72 (6 February 2002) para 4.
[29] GC, Minutes of Meeting: Held 15 October 2002, WT/GC/M/76 (5 November 2002) para 6.
[30] GC, Minutes of Meeting: Held 18 and 19 July 2001, WT/GC/M/66 (10 August 2001); GC, Minutes of Meeting: Held 10 October 2001, WT/GC/M/69 (26 October 2001); GC, Minutes of Meeting: Held 19 and 20 December 2001, WT/GC/M/72 (6 February 2002); GC, Minutes of Meeting: Held 8 and 31 July 2002, WT/GC/M/75 (27 September 2002); GC, Minutes of Meeting: Held 15 October 2002, WT/GC/M/76 (5 November 2002); GC, Minutes of Meeting: Held 10–12 and 20 December 2002, WT/GC/M/77 (13 February 2003); GC, Minutes of Meeting: Held 10 February 2003, WT/GC/M/78 (7 March 2003).
[31] GC, Dedicated Discussion on Electronic Commerce Under the Auspices of the GC on 15 June 2001, WT/GC/W/436 (6 July 2001) [First Dedicated Discussion on E-Commerce].

next to development aspects—the classification of digitally-delivered content products and the imposition of customs duties were the two most important cross-cutting issues.[32] Thus, the Second, Third and Fourth Dedicated Discussions on E-Commerce in 2003 focussed mainly on these matters.[33]

The last and Fifth Dedicated Discussion so far, held on 16 May and 11 July 2003, addressed three issues: classification of the context of certain electronic transmissions; general objectives to be applied to the consideration of e-commerce; and the report to be submitted to the next meeting of the General Council.[34] The discussion on general objectives was prompted by a submission filed by the US proposing that the Members agree to e-commerce objectives being tabled at the Doha Ministerial.[35]

The most recent important landmarks for the treatment of digitally-delivered content products were the Fifth Ministerial Conference in Cancún and the General Council Decision of July 2004.

1.1.4 Phase Four: Preparations for the Cancún Ministerial Conference and the General Council Decision of July 2004

In preparation for the Cancún Ministerial, the Council for Trade in Goods advised the General Council that it had not undertaken any discussion on the Work Programme because it had gone as far as it could go on technical goods matters given the 'unresolved horizontal issues' that remained under discussion in the General Council, including, most importantly the classification issue.[36]

The Council for Trade in Services also informed the General Council that there were no requests to include e-commerce on its agenda and that open classification questions prevented further progress.[37] The TRIPS Council and the Committee on Trade and Development reported on their work on e-commerce undertaken since the Doha Ministerial.[38]

[32] GC, Minutes of the 18 and 19 July 2001 GC Meeting, WT/GC/M/66 (10 August 2001) para 10.

[33] GC, Second Dedicated Discussion of Electronic Commerce Under the Auspices of the GC on 6 May 2002, WT/GC/W/486 (4 December 2002) [Second Dedicated Discussion on E-Commerce]; GC, Third Dedicated Discussion of Electronic Commerce Under the Auspices of the GC on 25 October 2002, WT/GC/W/486 (4 December 2002) [Third Dedicated Discussion on E-Commerce]; GC, Fourth Dedicated Discussion on E-Commerce Under the Auspices of the GC on 27 February 2003, WT/GC/W/492 (8 April 2003) [Fourth Dedicated Discussion on E-Commerce].

[34] GC, Fifth Dedicated Discussion on E-Commerce Under the Auspices of the GC on 16 May and 11 July 2003, WT/GC/W/509 (31 July 2003) [Fifth Dedicated Discussion on E-Commerce].

[35] GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493 (16 April 2003) and WT/GC/W/493/Rev.1 (8 July 2003).

[36] CTG, Report to the GC on the Work Programme on Electronic Commerce, G/L/635 (9 July 2003).

[37] CTS, Note by the Chairman, Work Programme on Electronic Commerce, S/C/18 (9 July 2003).

[38] TRIPS Council, Report to the GC, Work Programme on Electronic Commerce, IP/C/29 (2 July 2003) and COMTD, Work on Electronic Commerce in the COMTD since the Doha Ministerial Conference, WT/COMTD/47 (21 July 2003).

In the same vein—with the Work Programme on E-Commerce stalled and in the absence of further Dedicated Discussions on E-commerce—no input from the Work Programme has been submitted during the process leading to the General Council Decision of July 2004 or thereafter.

All in all, not many steps forward were registered in these final active phases of the WTO Work Programme on E-Commerce, leading this research to the second strand in which the WTO approaches issues related to e-commerce and digitally-delivered content products, namely the market access negotiations under the *chapeau* of the Doha Development Agenda.

1.2 DOHA DEVELOPMENT AGENDA

In November 2001, WTO Members agreed at the Fourth Ministerial Conference in Doha to launch the Doha Development Agenda and thus a new round of global trade negotiations. Initially, these negotiations were to be concluded no later than 1 January 2005 now continued at least to the Sixth Session of the Ministerial Conference in December 2005 but probably at least until 2007. The Fifth Session of the Ministerial Conference in Cancún (September 2003) was poised to take stock of the negotiations, and move the process forward by taking necessary decisions.[39]

At first glance, it appears that e-commerce and the trade of digitally-delivered content products in particular are not subject to the Doha Negotiations. Throughout the Doha Declaration, the Ministers 'agree[d] to negotiate' on specific topics.[40] In contrast, on the topic of e-commerce, the Ministers:

> . . . instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference . . .'; and
>
> . . . declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session.[41]

The absence of a negotiation mandate on e-commerce means that there will not be a specific negotiating group on this issue[42] and that WTO Members are not binding themselves to negotiate an 'E-Commerce Agreement' or initiating a

[39] Doha Ministerial Declaration, para 45.

[40] Some examples: Doha Ministerial Declaration, para 16 ('We agree to negotiations which shall aim [. . .] to reduce or as appropriate eliminate tariffs [. . .]') and para 28 ('We agree to negotiations aimed at clarifying and improving disciplines under the Antidumping Agreement [. . .]').

[41] Doha Ministerial Declaration, para 34.

[42] The Doha Negotiations are supervised by the Trade Negotiations Committee (TNC) that is under the authority of the GC, see Doha Ministerial Declaration, para 46. The TNC in turn established separate negotiating groups for market access for non-agricultural products, WTO rules, agriculture, services, geographical indications, dispute settlement, and implementation issues.

'WTO E-Commerce Initiative'[43] of relevance to digitally-delivered content products. It does not mean, however, that issues relevant to digitally-delivered content products cannot be addressed in the Doha Negotiations.

To the contrary, pending the decision whether digitally-delivered content products are goods or services, their market access can be negotiated in the GATT or GATS negotiations or in both (ie, a multi-track approach). As opposed to the WTO Work Programme on E-Commerce, the Doha trade negotiations can bring about binding commitments on the open e-commerce questions as well as on market access relevant to digitally-delivered content products. Specifically, both the market access negotiations for non-agricultural products and for services are of relevance for digital content. Table 1.3 establishes the correspondence between market access for digitally-delivered content products and the Doha Negotiation mandate.

Table 1.3: The Doha Declaration and its relevance to digitally-delivered content products

	Corresponding Mandate for Negotiations in the Doha Declaration
Digitally-delivered content products seen as (IT) goods	Para 16 Market Access for Non-agricultural Products: Ministers agreed to "negotiations which shall [. . .] reduce, or as appropriate eliminate tariffs [. . .] as well as non-tariff barriers" on all non-agricultural products (eg, IT goods).
Digitally-delivered content products seen as services	Para 15 Services: Ministers agreed to "continuing the negotiations" on trade in services which were initiated in Jan 2000. The Ministers reaffirmed the "Guidelines and Procedures for the Negotiations" previously adopted by the CTS and instructed participants to "submit their initial requests for specific commitments by June 30, 2002 and initial offers by March 31, 2003." Ministers also called for the development of a GATS regulatory discipline.

Source: Doha Ministerial Declaration, paragraphs 15 and 16.

Pending the decision on classification issues, the Market Access Negotiations for Non-agricultural Products have the potential to reduce tariffs on digitally-delivered content products (ie, through the reduction of tariffs on physical media carrier or through specific agreements related to digital content) whereas the service negotiations have as their objective the increase of specific GATS commitments in applicable sectors.

[43] *Cf* Hauser and Wunsch-Vincent (2001a, b).

Both negotiations are part of the Single Undertaking procedure of the Doha Negotiations, meaning that the 'conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking'.[44] Hence, '[v]irtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately'.[45]

1.2.1 Non-Agricultural Market Access Negotiations (NAMA)

The Doha Negotiations on goods are taking place under the auspices of the Negotiating Group on Market Access for Non-Agricultural Goods (NGMA). The scope of the market access negotiations is defined in the Doha Ministerial Declaration as follows: 'We agree to negotiations which shall aim, by the modalities agreed, to reduce or as appropriate disregard tariffs . . . as well as non-tariff barriers . . . . Product coverage shall be comprehensive and without *a priori* exclusions.'[46]

In the GATT framework, the liberalisation of trade in digitally-delivered content products can—if Members agree that digitally-delivered content products are covered by trade rules and obligations that relate to goods—be pursued by reducing tariff and non-tariff barriers on recorded physical carrier media.

The tariff schedules of the GATT[47] follow the format called the Harmonised Commodity Description and Coding System ('Harmonised System', HS), established by the World Customs Organisation (WCO).[48] Members can use these GATT schedules to agree on further liberalisation of the trade in physical carrier media. *Annex Table A.1.1* presents the list of physical carrier media that are subject to GATT negotiations. Chapter 37 of the HS classification on 'Photographic or cinematographic goods' and Chapter 85 on 'Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles' contain special sections for physical carrier media for which tariffs can be lowered or bound to zero. Chapter 95 for toys addresses particular types of video game used over television receivers.[49]

[44] Doha Ministerial Declaration, para 47.

[45] See 'Doha Declaration Explained', Internet: www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm.

[46] Doha Ministerial Declaration, para 16.

[47] The schedules list the tariff item number, a description of the product, the rate of duty/other charges, the present concession established and other elements of importance to market access.

[48] This system for classifying international goods trade entered into force in 1988 for those countries which were Members of WCO. It contains more than 5000 six-digit subheadings, which may be subdivided further to reflect national administrative and statistical requirements. See the WTO webpage on Goods Schedules under www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm or alternatively the Harmonised System Explanatory Notes on WCO webpage under: www.wcoomd.org/ie/En/en.html for more information.

[49] HS code: 9504.

Moreover, Members also have at their disposal the GATT Information Technology Agreement (ITA) to achieve duty-free status for physical carrier media and thus—depending on the interpretation of WTO Members—also for digitally-delivered content products.

During the WTO's December 1996 Singapore Ministerial Conference, fourteen signatories signed the 'Ministerial Declaration on Trade in Information Technology' to expand world trade in IT products.[50] The ITA is a plurilateral agreement that is undertaken on an MFN basis. It provides a mechanism for WTO Members to amend their existing tariff schedules under the GATT by 'binding'[51] customs duties on selected IT products. It does so by allowing Members to eliminate related duties and 'all other charges' in equal staged reductions over a period of four years, beginning in July 1997, and ending in January 2000.[52] Except for cinematographic films, the ITA product list on which tariffs are reduced to zero includes a list of physical carrier media depicted in *Annex Table A.1.1* on which content can be recorded.[53]

Taking account of the possibilities mentioned to reduce tariffs on physical carrier media, the NAMA negotiations can potentially reduce or eliminate tariff and non-tariff barriers to the trade in physical carrier media.

But before the NAMA negotiations can begin in earnest, the Doha Mandate specifies that Members must agree on 'negotiation modalities' (ie, the parameters for binding, lowering, and eliminating tariffs). Originally, the schedule for the market access negotiations called for the participants to submit modalities proposals no later than 31 December 2002 and to reach agreement on them by 31 May 2003.[54] The current state of these negotiations is picked up again in *Chapter Six*.

1.2.2 Trade in Service Negotiations

In the current GATS framework, the liberalisation of trade in digitally-delivered content products can be pursued by making full GATS Mode 1 and 2 commitments that are related to digitally-delivered content products (ie,

[50] WTO, Singapore Ministerial Conference, Ministerial Declaration on Trade in Information Technology Products, WT/MIN (96)/16 (12 December 1996) [ITA]. See Wasescha and Schlagenhof (1998) on the ITA.

[51] A 'bound' tariff is one that cannot be increased without notification and compensation to trading partners.

[52] ITA, para 2 and Annex para 2.

[53] 'Launching Of Free Trade In Computer Products To Benefit Everyday Life Of Consumers And Companies, Says Ruggiero', in: WTO News: 1997 Press Releases (Press/70, 27 March 1997) and 'Ruggiero Cites Progress In The ITA', in: WTO News: 1997 Press Releases (Press/69, 3 March 1997). See ITA Attachments A and B for complete product lists. The list is static, meaning that new physical media carrier are automatically excluded from the scope of the agreement if they do not fall within one or more of the listed categories.

[54] TNC-NGMA, Adopted by the Negotiating Group on 19 July 2002, Programme of Meetings for the Negotiations on Market Access for Non-Agricultural Products, TN/MA/3 (22 July 2002) para 2.

computer, value-added telecommunication, audiovisual and entertainment services).[55] These two modes of GATS transactions are explained in Table 1.4.
Source: Based on GATS Article I, paragraph 2.

Table 1.4: GATS Mode 1 vs GATS Mode 2

Mode	*Supplier Presence*	*Consumer Presence*	*Example*
Mode 1 Cross-border supply	Service supplier not present within the territory of the Member making the commitment to liberalise trade in a specific service.	Service delivered to the consumer within the territory of the Member making the commitment, from the territory of another Member.	Consumer is making a cross-border telephone call, ie, use of an international telecommunication service.
Mode 2 Consumption abroad	Same as Mode 1.	Service delivered to the consumer outside the territory of the Member making the commitment, in the territory of another Member.	Consumer goes to the movies in a foreign country.

Early on the services negotiations were—when compared to other negotiation dossiers—procedurally at a relatively advanced stage.[56] Whereas in June 2005 WTO Members were still trying to agree on negotiating modalities for non-agricultural goods, they have started to submit initial GATS offers to further liberalise trade in services in 2003.

Already in 2000 the Council for Trade in Services began a new round of market access negotiations in accordance with GATS Article XIX, paragraph 1, which calls for 'successive rounds of negotiations'. In addition to conducting negotiations on specific commitments, namely GATS market access and national treatment commitments (*cf Annex A.1.2*), Members shall engage in negotiations to reduce the listed MFN exemptions. The GATS also specifies that Members must complete unfinished GATS rules on domestic regulations, emergency safeguards, government procurement and subsidies.[57]

[55] See *S 2.3.2.4* for a more detailed discussion of the different service (sub)-sectors involved.
[56] See CTS, Report by the Chairman to the TNC, TN/S/10 (11 July 2003).
[57] GATS Art VI, para 4 directs the CTS to develop disciplines to ensure that domestic regulations 'relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade'; GATS Art X, para 1 calls for 'negotiations on the question of emergency safeguard measures based on the principal of non-discrimination'; GATS Art XIII, para 2 calls for 'multilateral negotiations on government procurement' by 1997; and GATS Art XV, para 1 directs Members to 'enter into negotiations with a view to developing the necessary multilateral disciplines to avoid . . . [the] trade distortive effects' of subsidies on trade in services.

Members reached agreement on guidelines and procedures for the negotiations in March 2001, thus well before the start of the Doha Negotiations.[58] It is specified in the Services Negotiation Guidelines that there shall be no *a priori* exclusion of any service sector or mode of supply and that the negotiations shall '. . . take place within . . . the existing structure and principles of the GATS'.[59] The starting point for the negotiation of specific commitments shall be the current GATS schedules and the request-offer approach.[60]

Like with other parts of the Doha Development Agenda, 1 January 2005 was the initially planned deadline for completion of the negotiations.[61] In addition to conducting negotiations on specific commitments, Members shall engage in negotiations on removing MFN exemptions. Prior to the conclusion of the Doha Development Agenda, they shall also complete negotiations regarding emergency safeguard measures, domestic regulation, government procurement, and subsidies.[62] Confirming the Services Negotiation Guidelines, during the Doha Ministerial Conference WTO Members agreed on the following scope for the multilateral negotiations: 'We reaffirm the Guidelines and Procedures for the Negotiations . . . as the basis for continuing the negotiations. . . . Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.'[63]

Most GATS Members made prior sectoral commitments on the basis of the GATS Services Sectoral Classification List (so-called W120).[64] This list of twelve broad service sector activities has independent sub-sectors that in most cases make numerical reference to the 1991 Provisional Central Product Classification (prov CPC) of the United Nations (UN).[65] Since GATS commitments are undertaken according to a 'positive list' approach, WTO Members can chose to include only certain sectors of the less detailed W120 in their schedules of specific commitments. They also have the choice of committing sub-activities of a certain sector and omitting others.[66]

[58] CTS, Guidelines and Procedures for the Negotiations on Trade in Services: Adopted by the Special Session of the CTS on 28 March 2001, S/L/93 (29 March 2001) [Services Negotiation Guidelines].

[59] *Ibid*, para 5.

[60] *Ibid*, paras 4, 10–11. These points signify that the 'positive list' approach will be maintained in the current GATS negotiations and that 'cluster' or 'formula-based' approaches will not be a primary method of negotiation.

[61] Doha Ministerial Declaration, para 5.

[62] *Ibid*, paras 6–7 and n 86.

[63] *Ibid*, para 15.

[64] Named after the WTO document: Uruguay Round Multilateral Trade Negotiations, Group of Negotiations on Services, Services Sectoral Classification List, MTNGNS/W/120 (10 July 1991) [Services Sectoral Classification List or W120] that contained this service classification.

[65] The provisional CPC can be found in UN (1991).

[66] To give an example for a possible case, it can be that in 'Computer and related services' that 'Data base services CPC 844' are covered by specific commitments but that 'Data processing services CPC 843' are not.

As is described later, the classification of digital content is not straightforward in the W120. The service activities that may be applicable to digitally-delivered content products are depicted in Table 1.5.[67]

Table 1.5: Services relevant to digitally-delivered content products

W120 Group	*Service Sector and Corresponding Provisional CPC Number*
1.	**BUSINESS SERVICES**
B.	**Computer and related services**
b.	842 Software implementation services
d.	844 Database services
e.	849 Other computer services
2.	**COMMUNICATION SERVICES**
C.	**Telecommunication services**
j.	7233** On-line information and data base retrieval
n.	843** On-line information and / or data processing
D.	**Audiovisual services**
a.	9611 Motion picture and video tape production and distribution services
b.	9612 Motion picture projection service
c.	9613 Radio and television services
d.	7524 Radio and television transmission services
e.	(no CPC number provided) Sound recording
f	Other
10.	**RECREATIONAL, CULTURAL AND SPORTING SERVICES**
A.	**9619 Entertainment services**

The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (eg, On-line information and/or data processing is only a component of CPC item 843).

Source: Group of Negotiations on Services, Note by the Secretariat, Services Sectoral Classification List, MTNGNS/W/120 (10 July 1991).

[67] See *Annex A.1.3* for a more detailed breakdown of these relevant service activities.

They reach from computer and related services in the 'Business services'-category, over telecommunication or audiovisual services in the 'Communication services-category to entertainment services.[68] Both the creation (eg, motion picture production) and the distribution services relating to content (ie, transmission, retrieval) are of relevance.

Until the beginning of 2005, the Chairman of the Special Sessions of the Council for Trade in Services had submitted thirteen reports to the Trade Negotiations Committee.[69] Around fifty WTO Members have submitted 110, mostly sector-specific, proposals for the service negotiations.[70]

Moreover, Members have started to file initial requests and offers.[71] In bilateral negotiations certain substantive issues might arise and require further multilateral discussion, including issues relating to the scope of commitments (ie, classification issues or certain regulatory issues raised in requests).[72] This is where the unresolved horizontal e-commerce question could be addressed.

The current state of the trade in service negotiations is picked up again in *Chapter Six*.

1.3 CONCLUSION

The WTO's work relating to digitally-delivered content products is dispersed across various WTO discussion and negotiation platforms. As a non-negotiation forum, the WTO Work Programme on E-Commerce could only start raising a number of horizontal questions.

Moreover, although the Doha Development Agenda does not mandate negotiations on e-commerce *per se*, most of the requirements of relevance to digitally-delivered content products can be addressed in the context of the Doha market access negotiations. This Chapter has established the correspondence between the mandate established via the Doha Ministerial Declaration and issues to be resolved for digitally-delivered content products.

[68] 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.

[69] CTS, Reports by the Chairman to the TNC, from TN/S/1 (11 April 2002) to TN/S/18 (9 December 2004).

[70] See WTO, Services Proposals: Proposals for the New Negotiations, Internet: www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm.

[71] In an initial request, Members can seek from another Member specific GATS commitments for sectors not included in a schedule, a removal or reduction of existing limitations or replacement of an 'unbound' entry with a binding; additional regulatory commitments, and/ or a removal of MFN exemptions. The word 'initial' is indicative of the negotiating process being a succession of requests and offers. Neither initial requests nor the offers have any final binding meaning at this stage. WTO Seminar on the GATS on 20 February 2002, Summary of presentation by the Secretariat, Technical Aspects of Requests and Offers, Internet: www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc.

[72] *Ibid*.

— On the goods side, a specific list of physical carrier media has been established for which tariff reductions achieved through the GATT or ITA negotiations would be helpful.
— On the services side, four specific service (sub)-sectors have been specified on which market access and national treatment commitments are potentially relevant to digitally-delivered content products.

However, without a negotiating group focussed on e-commerce and without clear decisions what trade commitments (GATT or GATS) apply, negotiations affecting digitally-delivered content products are dispersed.

Part Two

Requirements for Free Trade in Digitally-Delivered Content Products

Part Two sets out the prerequisites for free trade in digitally-delivered content products.

Chapter Two identifies and discusses the unresolved horizontal e-commerce questions affecting digitally-delivered content products. It is argued that solutions to these questions must be found in order to secure a liberal trade framework for digitally-delivered content products.

Chapter Three discusses the essential GATT and GATS market access commitments to secure free trade for digitally-delivered content products.

Throughout both Chapters particular attention is devoted to the different US and EC viewpoints taken with respect to the unresolved horizontal questions and the necessary liberalisation measures.

2

Unresolved Horizontal WTO E-Commerce Questions

DESPITE OF THE launch of the WTO Work Programme on E-Commerce in 1998, in 2005 the failure to agree on two main issues still stands in the way of establishing a free trade environment for digitally-delivered content products:

— the lack of a permanent WTO Duty-free Moratorium on Electronic Transmissions and uncertainty as to the proper customs valuation of digital content products (*Sections 2.1* and *2.2*); and
— the lack of agreement as to what trade rules and obligations should apply to digitally-delivered content products (*Section 2.3*).

With respect to the latter problem, the question essentially remains whether GATT or GATS rules and commitments are applicable. If GATS commitments are pertinent, it also remains to be decided which specific GATS commitments apply.

Especially with regard to the latter point, this Chapter also shows that disagreement between the US and the EC is contributing significantly to hampering steps forward regarding digitally-delivered content products.

At the outset, it can be recalled that both the US and the EC have in common the basic drive to liberalise global e-commerce.[1] They also share the conviction that the WTO Agreements apply to e-commerce. It was, for instance, in 1997 that the US and the EC agreed on a non-binding 'Joint Statement on E-Commerce'[2] which requests that unnecessary e-commerce trade barriers should be eliminated and prevented.[3] It was also a joint US-EC decision to establish a WTO Work Programme on E-Commerce in 1998.[4]

[1] This point has been reiterated by both the officials of the European Commission and the USTR. Despite many problems to find common positions on the pending unresolved questions, the negotiators stressed that, in principle, they shared a strong interest in designing a trade policy beneficial to the e-commerce environment.

[2] 'Joint EU-US Statement on E-Commerce', 5 December 1997, Internet: www.qlinks.net/comdocs/eu-us.htm.

[3] *Ibid*, paras 3 (iv) and 4 (i).

[4] 'US, EU Outline Plans For WTO Program On E-Commerce', in: *Inside US Trade* (17 July 1998); CTS, Work Programme on Electronic Commerce, Communication from the EC, WT/GC/W/85 (23 April 1998) p 4; 'Quad Members Pledge To Work For Standstill Pact On E-Commerce', in: *Inside US Trade* (1 May 1998); and 'EU To Push WTO E-Commerce Work With Principles List', in: *Inside US Trade* (28 May 1999).

Furthermore, it would be wrong to assert that differences concerning digital trade and the WTO arose exclusively between the US and the EC. On the contrary, many disagreements that block progress in the WTO—especially involving the applicability of existing commitments—frequently occur between industrialised and developing countries.[5]

Nevertheless, when it comes to the treatment of digitally-delivered content products, it is mainly the US-EC disagreement that is blocking progress on the multilateral front. For reasons explained in *Chapters Four* and *Five* both trading partners approach the solutions to the open questions with their relevant individual trade policy interests that clearly diverge. Table 2.1 summarises the different views of the US and the EC that are described in the later sections.

Table 2.1: US vs EC views on WTO issues relevant to digitally-delivered content products

	US	*EC*
Moratorium	Make it permanent and have all digitally-delivered content products fall under this duty-free rule.	Make it permanent only if all digitally-delivered content products are considered services.
Valuation decision	Levy tariffs on the the value of the carrier media and not on the value of the content.	No definite statement but the EC would only agree if all digitally-delivered content products are considered services and thus outside of the ITA and the GATT.
Classification issue	Achieve GATT-like treatment for digitally-delivered content products.	Achieve classification of digitally-delivered content products under the GATS.
In GATS	Classification of digitally-delivered content products under value-added telecom-services but not exclusively under audiovisual services. Digitally-delivered software of any kind must be considered either under the ITA or—at the minimum—under computer services.	All content must be considered outside of telecommunication and computer services. The EC invokes the audiovisual services-category for the classification of any content (except for business software).

[5] See, for instance, European Commission (2000c) p 3 noting that '[d]eveloping countries did not view e-commerce as a matter for them and some of them played with the idea of using it as a bargaining chip on the eve of new negotiations.' See also for a detailed account of the main disagreements on e-commerce between industrialised and developing countries UN ICT TF (2004).

As will be seen in detail later, the US attitude toward digitally-delivered content products is part of a broader digital trade agenda. In plain terms, the US strives to obtain 'the most trade-liberalising approach' in the WTO. Thus the US is in favour for the application of GATT principles to digitally-delivered content products.[6] Japan shares similar views.[7]

The EC has also stated its desire to create a liberal trade environment for e-commerce. However, the EC considers all digitally-delivered products to be services.[8] This endeavour of the EC to afford the less liberal GATS treatment to digitally-delivered content products[9] is meant to ensure that the EC can preserve its leeway for audiovisual policy intervention.[10] The determined stance of the US concerning digital trade issues is perceived in the EC as an attempt to circumvent the EC's instruments to promote its content industries in a digital era.[11]

In sum, both the US and the EC pursue their respective national interests in the relevant international trade negotiations. However, it can be said that—due to their strong comparative advantage in this field—the US strategies favouring non-discriminatory market access and free trade for the digital trade in content happen to be more closely aligned with free trade principles.

The next sections analyse the unresolved horizontal e-commerce questions that relate to digitally-delivered content products and offer solutions.

2.1 THE WTO DUTY-FREE MORATORIUM ON ELECTRONIC TRANSMISSIONS

In May 1998, the WTO Members issued a declaration in which they agreed on the continuation of the current practice of not imposing customs duties on electronic transmissions (so-called WTO Duty-free Moratorium on Electronic

[6] First, Third and Fifth Dedicated Discussion on E-Commerce. 'Administration Plan Seeks To Eliminate Barriers To Trade On Internet', in: *Inside US Trade (*13 December 1996) and 'The International Struggle Over E-Commerce', in: National Journal's Technology Daily (8 September 1999).

[7] See 'Electronic Commerce on WTO', Statement by the Japan Ministry of International Trade and Industry (11 May 1999), Internet: www.meti.go.jp/english/information/data/cEC9906e.html.

[8] CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) and CTS E-Commerce Report, para 6. See also CTS, Work Programme on Electronic Commerce, Communication from the EC, S/C/W/87 (9 December 1998); GC, Submission from the EC, Classification Issues and the Work Programme on Electronic Commerce, WT/GC/W/497 (9 May 2003) and European Commission (2000c) p 10.

[9] 'US, EU Outline Plans for WTO Program On E-Commerce', in: *Inside US Trade* (17 July 1998).

[10] The EC did not make market access commitments for audiovisual products under the GATS. This allows the EC to impose quotas or even prohibit forms of foreign entertainment. See Drake and Nicolaidis (2000) p 408; European Commission (1999a) and EBU (1999a, b, 2001, 2003a, b).

[11] '[. . .] the US would seem certain to challenge our desire to be free to regulate emerging services based on new technologies. likely to arise not only within the next Round negotiations, but also in other exercises such as the WTO E-Commerce Work Programme, notably through the angle of the scope and classification of electronic commerce-related services.' (Quoted from European Commission (1999c)). See also EBU (2001).

Transmissions).[12] This first temporary moratorium was valid until the Third Ministerial Conference in Seattle (1999).

The US was at the origin of the idea to codify the current practice of not levying customs duties on electronic transmissions in the WTO (*cf Section 4.1.2.1*).[13] But the EC and other industrialised countries quickly agreed as well that the growing number of commercial transactions conducted over international electronic networks should—in principle—not be subject to new tariffs.[14] The majority of the developing country Members of the WTO was not sure whether this temporary moratorium would be in their favour, but nevertheless agreed to it.[15]

The moratorium was an important first step but it came with a number of imperfections.

— First, the moratorium is a political commitment by Members that cannot be enforced through the WTO dispute settlement system.[16] The moratorium offers only a stopgap measure to governments that cannot charge duties on e-commerce anyway because the levying of tariffs on electronic transmissions is, at this stage, technically impossible.[17] Hence, observers have argued that the moratorium is effective only because of the practical difficulties in actually trying to levy duties on electronic transactions.[18]
— Second, there is no clear understanding of what the moratorium covers when it refers to 'electronic transmissions'. It is clear that the moratorium applies only to trade transactions that are entirely electronic, and thus not to goods that are ordered electronically but subsequently delivered physically (for example, via the postal service). But it can have several meanings when referring to on-line transactions.

[12] '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 GC will review this declaration, the extension of which will be decided by consensus, taking account the progress of the work programme.' (From the WTO E-Commerce Declaration, p 1).

[13] 'Global E-Commerce', Proposal by the US (19 February 1998), Internet: www.ustr.gov/sectors/e-commerce.shtml (10 October 2003).

[14] 'US, EU Agree To Seek Global Commitment On Tariff-Free Internet Trade', in: *Inside US Trade* (12 December 1997).

[15] Given that some developing countries rely more heavily on customs duties for revenue than developed countries which tend to rely on taxes, developing countries are hesitant to unilaterally tie their hands by extending the moratorium permanently. But it has been demonstrated elsewhere that the income from customs duties that may be derived from electronically-transmitted products is very small in volume, namely less than one percent of the worldwide income from customs duties. See Mattoo, *et al*, (2001) pp 10–11.

[16] 'WTO Members Reach Standstill Pact On Duty-Free Electronic Commerce', in: *Inside US Trade* (22 May 1998).

[17] Even if there were some willingness to impose customs duties on electronic transmissions, customs authorities would need to be able to trace and establish the value of commercial electronic transactions. Then, it is still highly doubtful whether the levies would outweigh the costs of this process.

[18] 'US Looks For WTO Guidelines On E-Commerce By Cancun Ministerial', in: *Inside US Trade* (20 September 2002).

One meaning is that duties cannot be imposed on the electronic transmissions (the *delivery service*) that support e-commerce, meaning that products that are duty-free off-line remain so in on-line transactions. Thus no special e-commerce charge is levied. At the minimum, a temporary duty-free zone for digital delivery has been instated through the moratorium.

It is less clear though whether the moratorium bans the imposition of customs duties on the content of the transmission, namely digitally-delivered content products or electronically-delivered services.

At the start, the US was interested in obtaining a permanent international moratorium on e-commerce tariffs which would have implied the absence of tariffs, duties, or fees on or in relation to the importation or exportation of digitally-delivered content products.[19] However, the text of the agreement that specifies a continuation of the 'current practice of not imposing customs duties on electronic transmissions' seems to stop short of this far-reaching duty-free moratorium on digitally-delivered content products. It is thus currently unclear if the moratorium applies to transmission services only or also to the content being transmitted digitally.

As the moratorium starts from the assumption that Members are continuing a 'current practice', it is also vague how the political declaration coincides with scheduled limitations. The EC, for instance, has noted that the moratorium does not apply to trade limitations which are already listed in the schedules of commitments of WTO Members (ie, mainly for audiovisual services) and which are applied in a manner consistent with the WTO provisions.[20]

Unfortunately, Members have failed to use the WTO Work Programme on E-Commerce to clarify the actual meaning of the moratorium.

— Third, the moratorium is inconsistent with the principle of technological neutrality because digital content products delivered physically could be subject to customs duties whereas—depending on the interpretation of the duty-free moratorium—digitally-delivered content products would not be. This discriminates against the physical mode of delivery. In response to this criticism, the US has suggested that '. . . if equalizing the treatment between physically-delivered and electronically-delivered products is the goal, instead of trying to impose a duty on the electronically-delivered product, a more liberalizing course of action would be to lower [duties] applied on the physically-delivered product.'[21]

[19] *Ch 7* shows that the US has actually pursued this type of duty-free moratorium on digital products in more recent bilateral free trade agreements. See for instance, US-Singapore FTA Art 14.3, para 1.

[20] CTS, Work Programme on Electronic Commerce, Communication from the EC, WT/GC/W/85 (23 April 1998) p 4.

[21] COMTD, Work Programme on Electronic Commerce, Communication from the US, WT/COMTD/17 (12 February 1999) also argues that a bias towards e-commerce transactions (ie the superior delivery form) has to be considered a positive development. See also GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493/Rev.1 (8 July 2003).

— Fourth, even if the moratorium also applies to the content of electronic transmissions (ie, digitally-delivered content products), it may not touch at the heart of possible digital trade barriers, namely discriminatory regulations affecting trade in services.

  In the future, most digital Internet transactions are likely to relate to service transactions. The Work Programme has maintained that customs duties could—in principle—be applied to services.[22] Clearly, through the WTO duty-free moratorium the imposition of duties on services (either on their transmission or the content itself) can be prevented.

  However, the EC and others have argued that it is not duties but other regulatory measures obstructing free market access and national treatment to service providers that act as digital trade barriers.[23] In spite of the moratorium and without full GATS market access and national treatment commitments, WTO Members remain free to impose discriminatory measures other than tariffs on service transactions. Consequently, to secure meaningful market access, the WTO Duty-free Moratorium on Electronic Transmissions would have to be accompanied by broad and deep GATS commitments in sectors relevant to digitally-delivered content products.[24]

  Interestingly, specific GATS commitments alone would also guarantee the absence of certain quantitative limitations or any discriminatory duties, rendering the WTO moratorium obsolete if electronically-traded products are considered services. Instead of creating a self-standing discipline of electronic transmissions or electronically-delivered services, WTO Members could thus rely on specific GATS commitments to liberalise e-commerce.[25] The EC has therefore argued 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'.[26]

— Fifth, notwithstanding the moratorium WTO Members remain free to tax electronic transactions.[27] The EC, for instance, has stressed that the moratorium does not affect indirect taxes applied to electronic transactions on a national treatment basis.[28] But unmistakably a great potential for burdensome design and implementation of Internet taxation exists. In fact, first disagreements on the taxation of electronic transactions (ie, value-added

[22] CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) para 34 and CTS E-Commerce Report, para 22.

[23] *Ibid*.

[24] Mattoo and Wunsch-Vincent (2004).

[25] Mattoo and Schuknecht (2001) pp 16 f.

[26] European Commission (2000c) p 10. This remark must be viewed in light of the EC's goal of leaving the entire audiovisual sector unscheduled.

[27] 'Global Electronic Commerce: Duty Free Treatment For Electronic Transmissions', Presentation by US Ambassador Rita Hayes, Internet: www.technology.gov/digeconomy/ambassad.htm; Panagariya (2000b) p 10; and Drake and Nicolaidis (2000) p 431.

[28] CTS, Work Programme on Electronic Commerce, Communication from the EC, WT/GC/W/85 (23 April 1998) p 4.

taxes on digitally-delivered content products) have already arisen.[29] For example, EC legislation[30] that—after July 2003—subjects non-EC suppliers of digitally-delivered content products to the same VAT as EC suppliers when they are providing electronic services to EC customers has provoked negative reactions from the US.[31] Visibly, the moratorium does not solve this problem.

— Finally, WTO Members could—in more than six years of Work Programme—not yet agree on an unambiguous and permanent duty-free moratorium on electronic content and its transmission. Since the time of its inception, the US has lobbied intensively to make the moratorium permanent whereas the EC has been less determined with respect to this negotiation objective.

Regrettably, since 1998 the moratorium has been on and off, creating significant legal uncertainty. Because the moratorium was not explicitly extended at the Ministerial Conference in Seattle (1999), its status was uncertain for two years until the Ministers expressly renewed it at the 2001 Ministerial Conference in Doha until the Fifth Cancún Ministerial Meeting in September 2003.[32]

In these two years, before the Doha Round the question arose as to whether the temporary moratorium had lost its validity. WTO Members, such as the EC and many developing countries, were of the opinion that the moratorium became null and void because it was not extended whereas the US insisted on its continued validity.[33]

It was also asked whether the moratorium should be made permanent. Before the Doha Ministerial, the US and the Japanese delegations had insisted on a permanent e-commerce moratorium.[34] But no consensus

[29] See the Fourth Dedicated Discussion on E-Commerce, paras 4–6 and the seminar organised by the COMTD in May 2002: COMTD, Note on the Meeting of 25 April 2002, WT/COMTD/M/40 (26 June 2002).

[30] Council Regulation (EC) No 792/2002 of 7 May 2002 amending temporarily Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) as regards additional measures regarding electronic commerce, OJ L 128/1 (15 May 2002). The proposed directive requires that non-EC suppliers register with a VAT authority in an EC Member State.

[31] Congressional Research Service (2003) pp 11–12 and 'European Union E-Commerce Proposal', Statement by Deputy Treasury Secretary Kenneth W Dam, Office of Public Affairs of the US Treasury, PO–1001 (8 February 2002), Internet: www.ustreas.gov/press/releases/po1001.htm.

[32] Doha Ministerial Declaration, para 34. See also 'Members Near Deal On 18–Months Extension Of E-Commerce Moratorium', in: *Inside US Trade* (12 November 1999).

[33] See, for example, European Commission (2000c) p 13 that reads 'As regards the moratorium on customs duties, it has never been more than a stopgap, which has prevented some WTO Members to focus on the substantial issues. After Seattle, the moratorium has disappeared, as a positive decision was necessary to maintain it.' Pakistan and other Members have also followed that interpretation. On the US position see 'Aaron Says E-Commerce Moratorium Stays Despite Seattle Failure', in: *Inside US Trade* (10 December 1999) and 'WTO Council Reveals Split Over E-Commerce Classification', in: *Inside US Trade* (22 June 2001).

[34] COMTD, Submission from the US, Work Programme on Electronic Commerce, WT/COMTD/17 (12 February 1999) and GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493/Rev.1 (8 July 2003).

among WTO Members could be reached. Although many WTO Members endorse the moratorium in principle (including the EC[35]), they have been unwilling to make it permanent.[36] The EC and other delegations also emphasised that the temporary moratorium should in no way prejudge the results of the Work Programme.[37]

— On the one hand, the lack of consensus on the moratorium is driven by the fear of developing countries of permanently losing tariff revenues associated with digital trade[38] and by their desire to secure technical assistance or market access commitments in areas of interest to them (ie, agriculture) in return for such a moratorium.[39]
— On the other hand, the EC has argued that it will agree to a moratorium only if an overall e-commerce package, including a decision on classification, is adopted.[40] The EC has reservations towards the US approach because it judges that the US focuses too much on the moratorium while neglecting other outstanding digital trade issues (*cf* next sections and *Chapter Three*).

There is a vital link between the pending classification of digitally-delivered content products and the moratorium (*cf Section 2.3*). It is reasonable to assume that some WTO Members, and especially the EC, are willing to decide on the continued validity of the moratorium only after the classification questions have been conclusively answered.[41] Should Members in the future be compelled to afford GATT treatment to digitally-delivered content products, tariffs may in fact be the last resort of WTO Members to protect their domestic digital content market.

Despite these six limitations, it should be borne in mind that the WTO Duty-free Moratorium on Electronic Transmissions is first and foremost a strong

[35] CTS, Communication from the EC and their Member States—Electronic Commerce Work Programme, S/C/W/183 (30 November 2000) para 6 and, eg, GC, Communication from Australia, Objectives for Treatment of Electronic Commerce, Work Programme on Electronic Commerce, WT/GC/25 (5 July 1999) principle 2.

[36] See European Commission (2000e) pp 3–4 and 10–11. See also 'EU Says It Will Not Support WTO E-Commerce Moratorium', in: *BNA International Trade Reporter* (14 July 1999).

[37] CTG E-Commerce Report, p 4.1: The finding states that the 'standstill agreement could in no way prejudge the outcome of the Work Programme'. This type of clause is a popular negotiating tactic that leaves the door open for subsequent deviations from agreements that are of a temporary nature.

[38] COMTD, Seminar on 'Government Facilitation Of E-Commerce For Development', Note of the Meeting of 8 October 2001, WT/COMTD/M/35 (31 October 2001); COMTD, Seminar on 'Revenue Implications of E-Commerce', Annex II, WT/COMTD/M/40 (26 June 2002) and COMTD, Work on Electronic Commerce in the COMTD, WT/COMTD/W/100 (5 March 2003).

[39] Fifth Dedicated Discussion on E-Commerce, p 10.

[40] CTS E-Commerce Report, para 23; 'EU Says It Will Not Support WTO E-Commerce Moratorium', in: *BNA International Trade Reporter* (14 June 1999) and 'WTO Members Lean To Extending E-Commerce Moratorium For Two Years', in: *Inside US Trade* (3 December 1999).

[41] CTS E-Commerce Report, para 23 and CTS, Interim Report to the GC, Work Programme on Electronic Commerce, S/C/8 (31 March 1999) p 10.

political signal in favour of free digital trade. A permanent and unmistakable duty-free moratorium is an essential building-block of a predictable liberal trade framework for digitally-delivered content products. It, however, needs to be accompanied by a clarification of the scope of the moratorium that ideally also encapsulates the absence of tariffs on the content of transmissions.

Before the Cancún Ministerial, WTO Members again stood before the decision of whether they wanted to extend the WTO Duty-free Moratorium on Electronic Transmissions or even make it permanent. Alternatively, WTO Members could—in the course of the Doha Negotiations—agree not to impose customs duties on digitally-delivered content products or—to prevent the levying of customs duties on electronically-traded services—seek GATS national treatment commitments in the pertinent sectors. This latter solution confined to the GATS would also make it obsolete to create new WTO disciplines that stand between the GATT and the GATS (*cf* to the approach taken in US preferential trade agreements in *Chapter Seven*).

2.2 THE CUSTOMS VALUATION OF DIGITAL CONTENT[42]

Given that the duty-free moratorium is thus far neither permanent nor binding and that it applies only to 'electronic transmissions', it is important to consider whether there are other limitations on the WTO Members' ability to impose duties on digital content products. One option discussed here refers to the trade-friendly customs valuation of digital content.

Under the GATT, many WTO Members determined customs duties on imported physical content products by the value of the carrier medium and not by the often much higher value of the content. However—except for software delivered off-line—nothing formally prevents Members from imposing customs duties on the actual content.

In the case of software, the Committee on Customs Valuation adopted a decision in 1984 permitting Members to levy duties on physically-imported software based on either the cost or value of the carrier medium (eg, a diskette) itself, which is often negligible, or the transaction value for the software, which is higher.[43]

In 1995, the WTO Committee on Customs Valuation adopted this Valuation Decision.[44] WTO Members that decided to use either way of valuation notified

[42] This section has benefited from discussions with Joanna McIntosh (at the time: Markle Foundation).

[43] See *Annex A.2.1* for the decision. CTG, Committee on Customs Valuation, Decisions Adopted by the Tokyo Round Committee on Customs Valuation, G/VAL/W/1 (28 April 1995) para A4 reprinting the 'Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment', VAL/8, as adopted by the GATT 1947, Committee on Customs Valuation, Minutes, VAL/M/10 (24 September 1984) para 7.

[44] CTG, Committee on Customs Valuation, Decisions Concerning the Interpretation and Administration of the Agreement on Implementation of Art VII of the GATT 1994 (Customs Valuation), G/VAL/5 (13 October 1995) para A4.

the Committee and had to apply the decision on an MFN basis.[45] Many WTO Members formally agreed to determine customs duties by the value of the carrier medium.[46] But other Members that are not committed to zero duties on physical carrier media (either via their own tariff bindings or participation in the ITA) can continue to impose customs duties on the actual content value. Moreover, this decision is only applicable to software delivered off-line and excludes the electronic transmission of sound, cinematic or video recordings.[47]

As a result, a formalisation and extension of the above Decision on Valuation to all WTO Members and to all digital content—whether delivered online or offline—could further limit the possibility of levying of customs duties on digital content products.

During the WTO Work Programme on E-Commerce, the Council for Trade in Goods considered the Valuation Decision and its special link to e-commerce.[48] Initially, it was considered in the Council for Trade in Goods whether all Members should agree to base tariffs for all types of physically-delivered content products, including, for example, movies, on the value of the carrier medium rather than on the content itself.[49] In particular, the US industry has been very vocal in calling for this approach[50] because otherwise customs valuation of content results in highly subjective assessments of projected revenues.[51]

Under the GATT, Members would need to agree on:

— extending the Valuation Decision to all digital content products (including sound, cinematic or video recordings); and
— notifying their more trade-friendly treatment of digital content products to the WTO Committee on Customs Valuation.

Such a consensus on levying duties on the basis of the physical carrier media would directly contribute to locking in freer trade for physically-delivered digital content.

[45] Meaning that for purposes of customs valuation digital content products from country A must be treated in the same manner as digital content products from country B.

[46] CTG, Work Programme on Electronic Commerce, G/C/W/128 (5 November 1998) para 5.1. For a current list of WTO Members applying the Decision, see CTG, Committee on Customs Valuation, Information on the Application of the Decisions on Interest Charges in the Customs Valuation of Imported Goods and on the Valuation of Carrier Media Bearing Software for Data Processing Equipment, G/VAL/W/5/Rev.14 (16 February 2004).

[47] Para 2 of the Decision on Valuation (Annex A.2.1) and CTG E-Commerce Report, para 6.2.

[48] CTG, Communication from the Chairman of the Council for Trade in Goods, Interim Review of Progress in the Implementation of the Work Programme on Electronic Commerce, WT/GC/24 (12 April 1999) paras 6.1–6.7.

[49] CTG, Chairman's Factual Progress Report to the GC on the Work Programme on Electronic Commerce, G/L/421 (24 November 2000) and CTG E-Commerce Report, paras 6 f.

[50] 'US Looks For WTO Guidelines On E-Commerce By Cancun Ministerial', in: *Inside US Trade* (20 September 2002) and 'Global Electronic Commerce', USTR discussion paper of 19 February 1998.

[51] House of Representatives (2003) p 49.

More importantly, during the Work Programme it was also considered to what extent the current GATT Valuation Decision or an extension thereof (applicable to all digital content) could be applicable for electronic content transactions. The Valuation Decision is seen by the US as a potential springboard to reach agreement on treating all physically- and digitally-delivered content products in an identical manner, thus one favourable to trade.

More precisely, the Valuation Decision can have a *direct* or an *indirect* effect on the market access of digitally-delivered content products.

— For a *direct* effect to result, one must establish the express applicability of this decision to digitally-delivered content products. In this regard, some WTO Members concluded that the decision was of very limited relevance because it did not extend to electronic transmissions.[52] Furthermore, to WTO Members like the EC digitally-delivered content products are services to which the GATT Valuation Decision does not apply.[53] These Members have not shown significant interest in extending the Valuation Decision (neither to on-line nor to off-line delivered content products).

  But the point that only the Council for Trade in Services is responsible for customs valuation on digitally-delivered content products was challenged by the US.[54] To date, WTO Members have not found agreement on the issue primarily because of the debate on whether off-line-delivered content must be treated 'like' digitally-delivered content.

— But independently from the debate on whether digitally-delivered content products are goods or services, there may be an *indirect* but vital link between the GATT Valuation Decision and digitally-delivered content products. In fact, the effect of establishing more liberal trade treatment for physically-delivered content products may—independently from the classification decisions—'spill over' to digital transactions.

  Obviously, WTO Members that apply the Valuation Decision cannot levy tariffs on the basis of an absent physical carrier media during an electronic transaction.[55] But given the WTO's goal of reducing tariffs and other barriers to trade, the question really is if WTO Members should be allowed to levy higher tariffs on 'like' digital content when it is delivered electronically rather than physically? Even more challenging is the question whether Members could—under the GATS—impose limitations to market access and national treatment when they are formally committed to duty-free or low tariffs for the same digital content under the GATT?

[52] CTG E-Commerce Report, para 6.2.

[53] *Ibid*. The EC also argued that the non-physical information contained on physical carrier media had only been treated as a good in the past, because no WTO agreement on services existed in 1984.

[54] *Ibid*.

[55] The absence of a physical carrier media during digital transactions is in fact also the main reason why Members are still at disagreement whether digitally-delivered content products are a good or a service (see *S 2.3*).

Prior to the attainment of a consensus between WTO Members on the fundamental point of whether they can impose greater trade barriers on-line, no straightforward answers to these dilemmas will exist. But if certain WTO Members decide to erect trade barriers against digitally-delivered content products (in the form of tariffs or other trade barriers), others are likely to call on the WTO dispute settlement system to bring clarity on the goods vs service issue. To assess whether 'like products' are not afforded the same treatment, a panel may actually be led to contrast the trade treatment of off-line and on-line trade of digitally-delivered content products.[56]

For instance, a panel deciding whether and how much duty WTO Member A may levy against electronically-traded software from Member B, may assess whether electronically-traded software is a good or service. If digitally-delivered content products are considered a good, the panel is likely to consider:

1) whether Member A has notified the Committee on Customs Valuation of its decision to use the value of the physical carrier medium to levy duties on software;
   a) if so, whether software traded electronically is 'like' software traded on a physical carrier medium;
   b) if so, whether Country A should value electronically-traded software no more than it values 'like' physically traded software;
2) whether Member A is a Member of the ITA and has bound duties on computer software at zero;
   a) if so, whether software traded electronically is 'like' software traded on a physical carrier medium;
   b) if so, whether Country A should apply the ITA tariff binding to electronically-traded software.

If digitally-delivered content products are considered a service, the panel is likely to assess:

3) whether Country A has made a GATS national treatment commitment on the relevant service that would preclude it from imposing customs duties on the particular software in question;
   a) if so, whether electronically-traded software from Country B is 'like' electronically-traded software from Country A; and
   b) if so, whether Country A is treating Country B's electronically-traded software no less favourably than Country A's electronically-traded software by imposing the duty.

An important question is also whether Country A is—despite the absence of GATS national treatment commitments—bound to treating digitally-delivered software 'like' physically-delivered software. To assess the similarity of trade

[56] *Cf* Wunsch-Vincent (2003b) n 34 and UN ICT TF (2004).

treatment in the latter and in case 1) b), a panel may compare the low tariffs on physically traded carrier media to greater tariffs on on-line sales—no matter whether goods or services—or to potentially even more inhibiting GATS market access or national treatment limitations that Members have opted to maintain (eg, in the audiovisual sector). This sets an interesting precedent in the comparison of GATT and GATS commitments.

Seen from that angle, the decision to establish lower or zero tariffs on recorded physical carrier media may also have substantial repercussions on digitally-delivered content products. This would also be the case if WTO Members agree—without invoking the dispute settlement system—that physically-delivered digital content products should not receive less favourable trade treatment than 'like' digitally-delivered content products.

To conclude, it is worthwhile to recapitulate that both the moratorium and a possible new and extended Valuation Decision apply differently to each WTO Member. Table 2.2 sheds light on when a clear moratorium (ie, one applicable to content and transmission) and a Valuation Decision provide additional value. According to this Table four cases arise:

Table 2.2: The relevance of the WTO Duty-Free Moratorium and the Valuation Decision

	Moratorium and Valuation Decision Add Value	*Moratorium and Valuation Decision Do Not Add Value*
GATT is applicable to digitally-delivered content products	I) Member is not participant to the ITA and has not bound its duties on physical carrier media to zero. Both the moratorium and the Valuation Decision are relevant. Without the moratorium or Valuation Decision, the WTO Member could start levying tariffs on the basis of the content on physically- and electronically-delivered content.	II) Member has committed to zero tariffs on carrier media via the ITA. As no tariffs on physical carrier media are allowed, neither the moratorium nor the Valuation Decision provide value-added.
GATS is applicable to digitally-delivered content products	III) No GATS national treatment commitments exist on the relevant service sectors. Both the moratorium and the Valuation Decision are relevant. The moratorium prevents the Member from imposing customs duties.	IV) GATS national treatment commitments exist on the relevant service sectors. As no tariffs are allowed, neither the moratorium nor the Valuation Decision are relevant.

— When the GATT is applicable, a meaningful WTO duty-free moratorium on digitally-delivered content products and an extended Valuation Decision are relevant, when a WTO Member is not committed to zero tariffs on physical carrier media (case I).[57] Neither the moratorium nor the extended Valuation Decision is a binding constraint, if a WTO Member is ITA participant (case II).
— When the GATS is applicable, a meaningful WTO duty-free moratorium on digitally-delivered content products and a low-tariff Valuation Decision are only relevant when a WTO Member has not made a GATS national treatment commitment for the respective service sector (case III and thus not in case IV). Moreover, in this case the Valuation Decision may have an impact on customs duties imposed on digitally-delivered content products. This holds true as WTO Members may be constrained not to treat digitally-delivered content in a less trade-friendly way than content delivered on physical carrier media.

2.3 UNRESOLVED QUESTIONS OF CLASSIFICATION

For the most part, WTO Members agree that the majority of services that are delivered electronically (such as financial services) fall under the GATS (see Table 1.2). As most of these services are listed in the country-specific GATS schedules, their classification and the applicability of GATS rules and obligations to them are not disputed.[58]

However, the fundamental question of the WTO Work Programme on E-Commerce is whether content that was previously traded on a carrier medium but that can now simply be downloaded from the Internet should be classified under the GATT or the GATS. Even if considered under the GATS, WTO Members would still have to agree under which GATS commitments (ie, 'Computer and related services', 'Value-added telecommunication services', 'Audiovisual services' or 'Entertainment services') the four types of digitally-delivered content products would fall.[59]

Due to these unresolved questions, currently a disturbing state of affairs prevails. Specifically, it is not certain if and how digitally-delivered content products are covered by the multilateral trade framework. This uncertainty complicates the market access negotiations for digitally-delivered content products, as market access must be pursued in various negotiation fora.

[57] See *S 2.1* for a discussion on the meaningfulness of the current duty-free moratorium on electronic transmissions.
[58] CTS E-Commerce Report, para 24.
[59] Wunsch-Vincent (2002a) p 30.

Unfortunately, this classification deadlock—well-reflected in the E-Commerce reports from the Council for Trade in Services[60]—also prevented WTO Members from doing anything more than scratching the surface of many other important and difficult e-commerce-related questions. The reason why WTO Members are struggling to come up with a definite agreement on the classification of digitally-delivered content products is three-fold:

— First, the global trade framework does not provide clear definitions on what is a 'good' or a 'service',[61] meaning that the boundaries between the GATT and the GATS are not clearly formulated.[62] The problem of distinguishing between goods and services does not only exist in trade matters. It is also an unsettled issue in internationally-agreed statistical classifications. In the most recent revision of the Central Product Classification (CPC), for example, it was concluded that of the variety of criteria generally used for distinguishing between goods and services,[63] none provides a valid, practical and unambiguous distinction in all cases.[64] Consequently, little guidance is forthcoming as to the correct classification of digitally-delivered content products.
— Second, it is a fact that the existing internationally-agreed industrial classification structures—and thus the categorisations on which GATT and GATS commitments are made—do not offer an unambiguous way to categorise content.[65] Industry classifications like the International Standard Industrial Classification (ISIC) or product classifications like the Central Product Classification (CPC) and the Harmonised System (HS) do not define the 'content-producing industries' or 'content' itself.[66] These classification systems were established long before the Internet came into existence.[67] Thus, digitally-delivered content products are new to these nomenclatures. Furthermore, even at the level of the OECD and despite of significant work on harmonising definitions related to ICT goods and services by the OECD Working Party on Indicators for the Information Society, no agreed classifications for digital content or the content industries exists.

[60] CTS, Interim Report to the GC, Work Programme on Electronic Commerce, S/C/8 (31 March 1999) and CTS, Oral Report by the Chairman of the CTS to the GC, WTO Programme on Electronic Commerce, S/C/13 (6 December 2000).

[61] CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) para 37. For a legal treatment concerning the absence of a proper distinction between goods and services in the WTO context see Tietje (1999a) paras 66–72. Baumann (1998) pp 62 f sheds light on this absence of goods vs service distinction in the context of the GATS audiovisual service negotiations.

[62] Feketekuty (2000) pp 108–10.

[63] Tangible versus intangible, storable versus non-storable or transportable versus non-transportable.

[64] UN (2002) p 10.

[65] Gault, *et al*, (2001); Nivlet (2001); Aufrant and Nivlet (2002); Hansen-Møllerud (2003); and Johanis (2003).

[66] For information on the existing classification systems see the Statistics Division of the United Nations, Internet: unstats.un.org/unsd/cr/registry/regct.asp?Lg=1.

[67] Technopolis (2003) pp 4 f.

In other words: Although both the EC and the US strongly make their case for the classification of digitally-delivered content products under the GATT or the GATS, it is a fact that the current nomenclatures (*cf* Annex Table A.1.1 and Table 1.5) that are used to make trade commitments do not unambiguously cover digital content *per se*.[68]

On the one hand, the GATT or the ITA that are based on the HS system expressly cover only physical carrier media.[69] For example, the ITA applies only indirectly to software as it essentially sets tariffs to zero only for diskettes and the like.[70]

On the other hand, it can be argued that the GATS which is based on an older version of the CPC, merely covers services that ultimately 'produce or record' content (eg, sound recording) or that serve to 'deliver' content (eg, radio and television transmission services) but not necessarily the content itself

The debate that neither the GATT nor the GATS commitments apply to content has been clearly illustrated for software on numerous occasions.[71] Both pre-packaged and electronically-delivered software lack an appropriate classification in the HS.[72] Equally, software is not directly mentioned in the existing service classification schemes.[73] Making it difficult to draw a line between a software product and a computer service, the W120 subsector on computer services (CPC 84, *cf* Annex Table A.1.3) refers only to

[68] As Japan notes,

> The GATT disciplines concern governmental actions related to the treatment of goods. In other words, the rules are defined in rem ('against the thing'). In contrast, the GATS rules are about governmental actions regulating supply of services. The rules are thus defined in personam ('against the person'). There is no question that GATT principles, such as the general elimination of quantitative restrictions, are applicable to physical media in which the digital content is recorded. Now, we need to examine whether these principles can equally be applied to the content per se that is supplied through electronic means.

And: 'We do not question that "the act of providing" is provision of services [. . .]. However, this does not mean that we have a clear set of in rem rules regarding digital content within the current WTO framework.' Statement by the Japan Ministry of International Trade and Industry in n 7 above.

[69] CTG, Work Programme on Electronic Commerce, G/C/W/128 (5 November 1998) para 2.2.

[70] A look at the ITA commitment list of the US or the EC reveals that the word 'software' does not appear on its own but always via HS codes for carrier media (see ITA US Rev 3, 26 March 1997 and ITA EC Rev 2, 26 March 1997). The fact that software itself is not expressly covered in the ITA is buttressed by the official list of ITA products, see Internet: www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm; 'Information Technology Agreement', in: WTO Press Brief (27 March 1997) and 'Ruggiero Cites Progress In The ITA', in: WTO News: 1997 Press Releases (3 March 1997).

[71] See, for example, 'The Classification of Software Delivered Electronically', WTO non-paper submitted by Canada in April 2001, WTO JOB (01)/55.

[72] For an explanation how software fits into the HS system, see the Task Force on Software Measurement in the National Accounts (2002) pp 4 f. Carriers of software have, for example, the HS heading 85.24 ('packaged sets containing CD-ROMs with stored computer software and/ or data developed for general or commercial use'). See also CTG, Work Programme on Electronic Commerce, G/C/W/128 (5 November 1998) p 2.2.

[73] CTS, Computer and Related Services, S/C/W/45 (14 July 1998) [WTO Background Note on Computer Services], pp 3–4; and Chadha (2000) n 15.

'Consultancy services' related to the development and implementation of software. It also explicitly excludes the 'retail sale of packaged software', leading some WTO Members to affirm that CPC 84 does not cover software delivered in either physical or electronic format and others to contest that view.[74] The same argument can be constructed for movies with, for example, 'Motion picture and video tape production and distribution services'—or 'Radio and television services'-categories as part of the GATS but none that explicitly cover the actual film as content product (*cf Section 2.3.2.4*).

It is also a fact that the Services Sectoral Classification List is a static inventory that has not caught up with more contemporary entertainment products (eg, multiplayer on-line games) and their modern forms of delivery.

— Third, the debates pertaining to the boundaries between goods and services cannot conceal the fact that through these classification decisions, WTO Members are *de facto* influencing the politically-contentious market access situation for digitally-delivered content products, meaning that the scheduling methodology itself is an outcome of interest-based negotiations. As will be uncovered, these classification issues and the decision on the moratorium on electronic transactions have rather tangible effects on the applicable degree of trade liberalisation.[75]

Most importantly, it is this classification debate that introduces the link between a rather technical categorisation question and the outright refusal of many WTO Members to liberalise audiovisual services (the so-called desire for the 'exception culturelle'[76]). This link may appear innocent at first sight. But its dimension becomes clear when considering that this ambition of many WTO Members was almost a stumbling block to the entire Uruguay Round. That is also the reason why reaching agreement on how to classify content and content industries has posed substantial problems at the World Customs Organisation (WCO) and at the OECD.[77]

2.3.1 Digitally-Delivered Content Products: Goods (GATT), Services (GATS) or Intellectual Property (TRIPS)?

The next three sections present and discuss the arguments used to defend four classification possibilities, namely under the GATT, the GATS, the TRIPS or a hybrid approach.

[74] In the second view, CPC 84 covers the whole activity of designing, producing and implementing software, and it is not acceptable that the delivery aspect of these products would not be covered as well. The GATS states clearly that the supply of a service includes the production, marketing, sale and delivery of the service. See Third Dedicated Discussion on E-Commerce, p 5.

[75] See Panagariya (2000b) p 4.

[76] A term taken up later again that designates the desire of some WTO Members to exclude cultural and audiovisual services from the WTO rules and obligations.

[77] According to an official of the World Customs Union (Brussels) and Task Force on Software Measurement in the National Accounts (2002) pp 4 f.

All in all, a multitude of well-founded arguments has been presented for both a GATT and a GATS classification of digital products.[78] These arguments refer, for example, to the degree of market openness, the physical nature of digitally-delivered content products (tangible or intangible), technological neutrality arguments (consistent treatment of like products across GATT and GATS) or market access arguments in order to demonstrate the case for one of the several classification options.

But all these arguments have not enabled WTO Members to take a decision so far. This holds true because the decision-making process has largely been political in nature.

2.3.1.1 Arguments in Favour of GATT-Like Treatment

(i) Trade is More Liberal Under GATT The US argues that a classification in terms of the GATT regime, rather than the GATS, would be more favourable to trade because of the greater trade liberalisation engendered by the GATT.[79] Moreover, the best outcome—ie, a situation of free trade—would prevail if all electronic transmissions are classified as goods, if the moratorium on customs duties is extended indefinitely, and if it is applicable also to the content of the transmission.[80]

Whereas in the multilateral trading system physical carrier media under the GATT are subject to only few or—if the WTO Member is a signatory to the ITA—no customs duties or import quotas, the same content can face severe market access barriers or even absent trade commitments altogether when classified under certain GATS classifications such as audiovisual services.[81]

Table 2.3 demonstrates that the degree of liberalisation under the GATT is more encompassing than under the GATS.

Some examples of the Table illustrate:

— The application of the national treatment obligations to goods is mandated by the GATT, whereas national treatment under GATS must be explicitly scheduled via a sector-specific entry in the individual country schedule.
— The GATT prohibits Members from making quantitative restrictions on imports and it includes a broad prohibition against discrimination. Under the GATS, however, Members can decide in which sectors they make market access and national treatment commitments. Member can therefore limit market access for foreign service providers with a range of different

[78] For some of the arguments presented see Wunsch-Vincent (2002a) pp 13 f.

[79] GC, Work Programme on Electronic Commerce, Submission from the US, WT/GC/16 (12 February 1999) p 5.

[80] Panagariya (2000b) pp 3–5 who, however, comments that the already existing classifications of most Internet transactions as services render such a scenario impossible.

[81] For more details see Mattoo and Schuknecht (2001) pp 12–13; Panagariya (2000b); Feketekuty (2000) pp 92–99; Hauser and Wunsch-Vincent (2002) pp 76–78; and GC, Work Programme on Electronic Commerce, Submission from the US, WT/GC/16 (12 February 1999) p 5.

Table 2.3: Comparison between GATT and GATS

	GATT, 1948 and 1995	*GATS, 1995*
Age of the Agreement in 2004	56 Years	9 Years, GATS rules incomplete
National treatment Principle	General obligation that does not permit any exceptions*, but is limited only to domestic measures.	Obligation relates only to a list of specific commitments that varies between countries.
Most-favoured nation status	Exemptions from this obligation granted only under special circumstances (eg, preferential trade agreements).	Time-bound country-specific exemptions from the MFN obligation are possible.
Customs duties	Allowed where Members have not set their customs duties on nil. The latter is applicable for most WTO Members that have signed the ITA, incl on software.	GATS does not deal with tariffs. When a country grants unlimited national treatment, then discriminatory limitations are not allowed.
Quotas	General elimination of quantitative restrictions that are only allowed in certain emergency situations.	Permitted when no unlimited market access has been granted.
Transparency	Obligation which is reinforced by GATT Agreements, such as the WTO Agreement on Technical Barriers to Trade.	Obligation under GATS, but less strict than under GATT (eg, no consultation requirements).
Regulatory discipline	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.	Only an incomplete regulatory discipline, but a mandate to develop such a discipline exists (GATS Art VI).
Preferential treatment for developing countries	Special conditions for developing countries exist.	Special GATS conditions are less far-reaching than under GATT†.

* The procurement division of the public sector is excluded.
† Senti (2000), para 645.

Table 2.3: (*cont.*)

	GATT, 1948 and 1995	*GATS, 1995*
Agreement on subsidies	Yes	None
Anti-dumping rules	Yes	None
Emergency safeguard rules	Yes	None
Agreement on trade-related investments	Yes	No, but investments may be covered under GATS Mode 3.

measures, for example with quantitative restrictions that would be forbidden under the GATT.[82]

— While the GATT goes a long way in eliminating quantitative restrictions and introducing obligatory national treatment, it does not prevent Members from applying tariffs that are in line with the obligations formulated in their GATT tariff schedules. However, the GATT's ITA increases the trade-liberalising aspects of the GATT because participating WTO Members pledge to eliminate tariffs on physical carrier media. This signifies for ITA participants that if electronic content is to be afforded GATT-like treatment, digital content products that can potentially be exported on physical carrier media fall under the obligation of duty-free treatment.

— With a view to technical standards and other regulatory measures, the GATT offers a variety of regulatory disciplines that do not yet exist under the GATS.[83] Regulatory disciplines under the GATT (ie, Agreement on Technical Barriers to Trade[84] and Treaty on Sanitary and Phytosanitary Measures) ensure that national regulations do not unnecessarily hamper trade and advocate the use of international standards. This may be an important factor for electronic trade where heterogeneous and deliberately protectionist regulations may imperil free trade.

[82] *Cf Annex A1.2.*

[83] See Trachtmann (2002) who shows that the WTO Agreement on Technical Barriers to Trade (TBT) and the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) go much further than the existing GATS rules on domestic regulation. The latter consist mainly of a mandate to develop regulatory disciplines.

[84] The TBT seeks to ensure that technical regulations do not pose unnecessary obstacles to trade, ie that they are not more trade-restrictive than necessary to fulfil the legitimate objective (TBT Art 2, paras 2–3). It further promotes harmonisation of technical regulations, transparency in rules and administrative practices, and underlines the concepts of equivalence and mutual recognition.

— The GATT offers an agreement on subsidies that forbids certain types of financial assistance by governments completely, and others partially.[85] No similar GATS discipline on subsidies has been developed and the conclusion of such a GATS agreement is not imminent.[86]
— Equally, the GATS has no agreement on anti-dumping, safeguard measures, trade-related investments or rules of origin. It is true that the GATS mandates further work on four topics: emergency safeguard measures, procurement, subsidies and regulatory discipline. But the meagre results of the current negotiations indicate that it will be a lengthy and difficult task to negotiate rules that are similarly as effective as those existing under the GATT.

(ii) Safeguarding the Technological Neutrality of WTO Agreements The US and the leading software manufacturers fear that those products that had hitherto been included under the trade-friendly GATT could now fall under the still somewhat underdeveloped GATS.[87]

According to this view, the existing tariff lines in the GATT schedules, the presence of GATT Article IV on screening quotas for films and the indirect treatment of software via the ITA seem to indicate that until today content has been treated under GATT. In fact, it is not stated anywhere that the GATT applies only to physical products.[88] It thus seems inconceivable that, because of a new method of distribution, software or other content products should now be 're-classified' from GATT to GATS. Going against the principle of technological neutrality, this could mean that identical content transmitted on-line—usually the more efficient, cheaper, faster and ecological delivery-type—would indeed be subject to trade restrictions.

Moreover, it has been normal practice to abstain from classifying an electronic service that may be necessary to manufacture a physical good—for instance the cross-border transmission of music in order to produce a CD—as a separate service transaction.[89] Also, the physical outputs of certain service transactions, such as architectural designs, have so far been considered under GATT.

Understandably, the software industry is very concerned about the prospect of having to go through years of trade negotiations just to obtain the liberal

[85] The WTO Agreement on Subsidies and Countervailing Measures (SCM) prohibits two categories of subsidies, export subsidies and subsidies contingent on the use of domestic over imported goods (see SCM Art 3, para 1 (a) on prohibited export subsidies). Most specific subsidies may be challenged by the WTO dispute settlement system if they cause adverse effects to the interests of another Member. In addition, a Member may impose countervailing measures on imports benefiting from prohibited or actionable subsidies.

[86] See Sauvé (2002); and Wunsch-Vincent (2001a) for a stocktaking of the negotiations on the GATS rules.

[87] BSA (2001a, b).

[88] Fifth Dedicated Discussion on E-Commerce, para 6.

[89] Drake and Nicolaidis (2000) p 409 and CTS, Interim Report to the GC, Work Programme on Electronic Commerce, S/C/8 (31 March 1999).

trade situation under GATS that it had already gained earlier under the GATT.[90] Accordingly, the US has repeatedly pointed out that a WTO dispute settlement case would certainly regard downloaded software/music on the one hand, and CDs from a store on the other hand, as 'like products'.

(iii) Physical and Consumption Patterns Point to a GATT Classification The US argues that there are indeed a number of content products, such as music, 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 or a network, and send it to the consumer over the Internet, who then burns the game on a CD. But the US contends that in nearly all such situations 'content' is bound to a physical object.

According to the US, digitally-delivered content products do not share the key characteristics of services. They are not consumed after being viewed and unlike in the case of services, the production and consumption of content does not have to coincide in time.[91] Both this 'durability' and the inseparability from a physical medium point to digitally-delivered content products being goods rather than services.[92] Furthermore, the US argues that since the GATT came into being, the EC treats electricity—which in terms of form and shape comes very close to digitally-delivered content products—as a good.[93]

2.3.1.2 Arguments in Favour of Treatment under GATS

In contrast to the US, the EC argues that any electronic delivery consists of services which fall within the scope of the GATS.[94] According to the EC, 'the GATT schedules have never covered any information digitised into bits and sent across a border through a telecommunications network'.[95] Content like a movie or software and their transmission have always been considered as computer or audiovisual services and are therefore subject to GATS commitments.[96]

[90] Panagariya (2000b) pp 5–7 illustrates the negative consequences of the absence of technological neutrality.

[91] Fifth Dedicated Discussion on E-Commerce, para 6.

[92] COMTD, Communication from the US, Work Programme on Electronic Commerce, WT/COMTD/17 (12 February 1999) S 7.

[93] For a background to this approach in EC law see Randelzhofer and Forsthoff (2001) para 26; and Voß (1999) para 12.

[94] CTS, Work Programme on Electronic Commerce, Communication from the EC, S/C/W/87 (9 December 1998); CTS, Work Programme on Electronic Commerce, Preparations for the 1999 Ministerial Conference, Communication from the EC, WT/GC/W/306 (9 August 1999); European Commission (2000c) and European Commission (1999b). Other Members arguing that digitally-delivered content products are service are: Brazil, Hong-Kong, Norway, Singapore, Switzerland and Thailand.

[95] GC, Submission from the EC, Classification Issues and the Work Programme on E-Commerce, WT/GC/W/497 (9 May 2003) para 7.

[96] *Ibid,* and European Commission (1999b).

The EC's stance is also motivated by economic and cultural interests further analysed in *Chapter Five* (ie, the desire to safeguard its ability to extend audio-visual policies to digitally-delivered content products[97]).

Interestingly, the WTO Secretariat is—for other, non-partisan reasons—also leaning towards a GATS classification of all digitally-delivered content products.[98]

(i) Neither GATT nor ITA Liberalise Trade in Digitally-Delivered Content Products First, the EC and other delegations argue that the liberalising effect of the GATT does not apply to digitally-delivered content products. According to this view, the GATT only addresses physical products.[99] Digitally-delivered content products have no such physical attributes and therefore the HS system and thus the GATT do not offer any corresponding classifications and thus trade liberalisation.[100]

Second, according to the EC even the trade-liberalising effect of the GATT's ITA with respect to content may be overstated.

The US IT industry associations claim that '. . . all software types are covered under the agreement because the broad definition of software products extends to multimedia, interactive and other software.'[101] It was clearly the intention of the US to cover all kinds of software regardless of their means of delivery or the particular software type.[102] The MPAA even went a step further calling for the ITA to guarantee duty-free trade for all copyrighted material (including, for example, movies).[103] This aspiration actually coincides with the first calls from the MPAA for a tariff moratorium on e-commerce which would—according to its interpretation—give all digitally-delivered content products duty-free treatment.[104]

[97] This point comes from interviews with DG Trade officials, 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', in: *BNA WTO Reporter* (13 June 2001). This issue will be taken up in more detail in *chs 3* and *5* of this work.

[98] *Cf* Tuthill (2002) and conversations with CTS delegates to the WTO Work Programme on E-Commerce.

[99] GC, Submission from the EC, Classification Issues and the Work Programme on Electronic Commerce, WT/GC/W/497 (9 May 2003) paras 5 f and CTG E-Commerce Report.

[100] CTG, Work Programme on Electronic Commerce, G/C/W/128 (5 November 1998) paras 2.2–2.3.

[101] See for example 'ITAA Applauds WTO Information Technology Agreement', Press Release of the Information Technology Association of America, 26 March 1997.

[102] Committee on Market Access, Information Technology Agreement, Communication from the US, G/MA/W/8 (4 October 1996). 'High-Tech Industry Seeks More Products, Countries In New ITA Initiative', in: *Inside US Trade* (17 October 1997), stating that MPAA asked USTR to seek international consensus to define software, irrespective of the media on which it may reside, as 'instructions and data, whether or not incorporating sounds or images, recorded in binary form, and capable of being manipulated or providing interactivity to a user'.

[103] *Ibid*.

[104] *Ibid*. The MPAA wrote: 'To avoid distortions in the market, the customs treatment of copyrighted content should be the same regardless of [. . .] whether the content is electronically transmitted.'

Nevertheless, it must be recalled that not even software is specifically identified in the ITA (see *Annex A.1.1* and introduction to *Chapter Two*). It was only in 1999 that a WTO Member had made a proposal to separately identify 'software without carrying media' in the HS.[105] This separate identification was left optional however.

Furthermore, it can be argued that only certain types of software are covered by the ITA. This holds true as the EC—mainly driven by France but supported by Italy, Spain, Greece, Belgium and Portugal—has sought to protect cultural considerations in the field of software as well.[106] Therefore, WTO Members found it hard to agree on a definition of software during the ITA negotiations.[107] Any definition acceptable to the EC had to cover products involved in automatic data processing but could not be extended to music or video products (including software mainly or exclusively containing games and other elements like video, sound or music). In retrospect, experts conclude that the EC prevailed in keeping entertainment software carrying sound and/or visual recordings off the table.[108] Although this interpretation is certainly not shared by the US, it buttresses the argument that the ITA does not necessarily guarantee the duty-free treatment of all software types.

Finally, it can also be argued that—far from liberalising the content sectors more than the GATS—the GATT itself contains special provisions to exclude content from its obligations. Indeed, GATT Article IV on Special Provisions relating to Cinematograph Films, grants the right to maintain—in the form of screen quotas—internal quantitative limitations relating to exposed cinematograph films.[109]

(ii) No Rule Guaranteeing Technological Neutrality Exists between GATT and GATS As opposed to the US, the EC has pointed out that no such provision as a technological neutrality-principle exists in the WTO Agreements that would demand identical treatment for goods and services.[110] According to this view, under international trade law, the likeness of products between content being exported on physical carrier media and content delivered electronically does not imply an obligation to afford identical trade treatment.

[105] CTG E-Commerce Report, para 5.4.

[106] Sauvé and Fliess (1998) pp 29–30; 'EU Wants To Exclude Some Software From ITA, Posing Significant Problems For Talks, USTR Says', in: *BNA International Trade Reporter* (4 December 1996); 'EU Proposal Envisions Broad ITA Coverage', in: *Inside US Trade* (18 October 1996) and 'ITA Talks Break Down After EU Member States Reject Deal', in: *Inside US Trade* (12 December 1996).

[107] *Ibid.*

[108] Sauvé and Fliess (1998) pp 29–30.

[109] See Tietje (1999a) paras 55–56; and Jackson (1969) p 293 (n 2).

[110] Personal interview with an official from DG Trade and position taken by Viviane Reding (Commissioner for Education and Culture) in 'Cultural Policy and the WTO', address to the Mostra Internazionale d'Arte Cinematographica, Venice, DG EAC C1/XTD2001 (7 September 2001), Internet: europa.eu.int/comm/avpolicy/legis/venise_en.pdf.

(iii) In the Long-Run the GATS is More Liberal than the GATT The EC has emphasised that the goal of the Work Programme was to understand how WTO rules apply to e-commerce. Its objective was not to negotiate market access.[111] According to the EC, the process of discussing classification issues shall not be used by Members to '. . . pick and choose the rules that please them most . . .',[112] even if they are the most trade-liberalising ones.

But—on top of earlier arguments—the EC has produced additional arguments refuting the idea that the GATT is necessarily the most liberal trade-framework with respect to content. Certainly, at the moment the GATT generally provides a more trade-liberal framework (*cf Section 2.3.1.1*). But this may be true only at present.

The reason is that the GATS covers four modes of delivery while the GATT applies only to cross-border supply. Assuming that one day full, specific GATS commitments are offered, a far greater liberalising-effect may be achieved than under GATT (including foreign direct investments, ie, Mode 3, and the temporary migration of natural persons, ie, Mode 4).[113] In addition, the GATT does not address other regulatory dimensions of market entry that can be very important for certain service industries. Finally, the GATS rules on transparency, domestic regulation and on subsidies are also likely to evolve further through time. In sum, the GATT may not indefinitely be more trade-liberal than the GATS.

Following that notion, the fact that, for instance, the US software or the US film industry is so strongly in favour of a GATT classification, can only be explained by two reasons. The first reason is that the more far-reaching dimension of GATS has not been sufficiently taken into account. The second, more probable, reason is that the supporters of a GATT classification prefer to rely on existing free trade commitments under GATT, rather than on uncertain future GATS commitments that may not be readily forthcoming.

(iv) Legal Certainty is Increased via an Across-the-Board GATS classification Furthermore, the EC reminds other WTO Members that if they started to classify electronic deliveries with a physical equivalent under the GATT, many physical outcomes (eg, blueprints) that result from services (eg, architectural, consulting services) hitherto clearly targeted by the GATS would have to be considered under the GATT.[114] For obvious reasons, this broad re-classification is not deemed desirable.

[111] Fifth Dedicated Discussion on E-Commerce, para 8.

[112] GC, Submission from the EC, Classification Issues and the Work Programme on Electronic Commerce, WT/GC/W/497 (9 May 2003) para 20.

[113] The author thanks Lee Tuthill (WTO Trade in Services Division) for this point.

[114] GC, Submission from the EC, Classification Issues and the Work Programme on Electronic Commerce, WT/GC/W/497 (9 May 2003) paras 11 f. The WTO Secretariat explained this in CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) para 38 and recalled this in its WTO JOB (02)/37 (12 May 2002).

One of the main rationales behind the desire to treat all digitally-delivered content products under GATS ('across-the-board definition') is the legal certainty that this approach brings about as it uniformly applies across all digital products and services.[115] Taking this approach, thorny negotiations resulting from product-by-product classification debates could be avoided.[116]

(v) Physical conditions of digitally-delivered content products point to the GATS The distinction between goods or services is often made on the basis of the physical form of the product; in other words: whether the product is tangible or intangible. Accordingly, the EC considers digital content to qualify as a service.[117] This judgment does not change if—after an electronic transaction—a consumer, for example, burns electronic content on to a physical carrier medium like a CD. This subsequent transformation process is in no way connected to the initial cross-border import and does thus not suffice to argue in favour of a GATT classification.[118]

On top of a GATT or GATS classification, other categorisation possibilities have been raised.

2.3.1.3 Arguments in Favour of Classification as Trade in Intellectual Property Rights

As argued by Indonesia, Singapore and Australia there is an increasing set of cross-border transactions concerning intellectual property that are not necessarily captured by either goods- or service-categories, thus especially financial transfers for licence fees or royalties paid for the use of intellectual property. These WTO Members note that:

> . . . [e]ven when a consumer 'purchases' a product, such as a music CD or a software application on CD-ROM, the true legal nature of the transaction is somewhat different from a simple purchase of a physical product. What is really happening is that the consumer is taking out a limited licence to use a sound recording [. . .] in a limited range of circumstances.[119]

[115] First Dedicated Discussion on E-Commerce, p 2.

[116] 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.

[117] This corresponds to EC law as described in Geiger (2000) p 322; and Randelzhofer and Forsthoff (2001) paras 25 and 27.

[118] '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 manufactured goods involve services inputs of various kinds', cited from p 10 of the CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) para 38 and non-paper of Singapore to the regular meeting of the GC on 8 May, WTO JOB (01)55, 26 April 2001.

[119] Cited from para 13 in TRIPS Council, Electronic Work Programme, Submission from Australia, IP/C/W/233 (7 December 2000). See also GC, Preparation for the 1999 Ministerial Conference, Work Programme on E-Commerce Communication from Indonesia and Singapore, WT/GC/W/247 (9 July 1999) p 12.

In the IMF and other Balance of Payments-statistics these transactions are mostly reflected in trade in service-statistics, under the heading 'Royalties and licence fees'.[120] However, in the audiovisual service nomenclature of the GATS, this classification does not exist. Furthermore, when a cross-border software purchase takes place, not the programme as such, but the licence to use the programme in specified ways is being purchased.[121] The programme itself remains in the possession of the intellectual property right-holder.[122] Thus, some WTO Members have argued that the trade of digital content could be considered as trade in intellectual property rights. Therefore the relevant multilateral trade framework would be the TRIPS.[123]

Given that the importance of intellectual property-related assets that do not fall clearly within the GATT or the GATS is constantly increasing, this topic merits further consideration. Incorporating market access rules or specific commitments into the TRIPS or devising separate market access-disciplines on intangible assets could be an interesting venue for the future. In any case, the multilateral trade framework cannot permanently ignore ambiguities of its rules with respect to intangible assets.

Nonetheless, a classification of digitally-delivered content products under the TRIPS is not currently a solution. The reason is that whereas the TRIPS offers far-reaching standards to protect intellectual property, it currently does not guarantee market access nor any other form of trade liberalisation. Until the TRIPS does not provide for a market access-dimension, it cannot constitute the trade-framework for digitally-delivered content products.

2.3.1.4 A Hybrid Solution: GATS Classification with GATT Treatment?

Finally, the latest proposals tabled at the WTO Work Programme on E-Commerce advocate a hybrid solution to the categorisation problem; namely a treatment under the GATS while ensuring that GATT-level market access applies.[124] In fact, Singapore and Japan argued that if full specific GATS commitments are offered and if MFN exemptions are eliminated, the

[120] See OECD (2000c) and UN, *et al*, (2002).

[121] *Ibid*.

[122] GC, Interim Review of Progress in the Implementation of the Work Programme on Electronic Commerce, Communication from the Chairman of the Council for Trade in Goods, WT/GC/24 (12 April 1999) para 6.6.

[123] '[. . .] music and software are not in themselves new commercial products. [. . .] all these three examples, without a carrier medium are intangible goods considered under the ambit of intellectual property rights. Could such products than be simply considered as trade in intellectual property rights and not be classified as a good or a service?', quoted from GC, Preparation for the 1999 Ministerial Conference, Work Programme on E-Commerce Communication from Indonesia and Singapore, WT/GC/W/247 (9 July 1999) para 12.

[124] First Dedicated Discussion on E-Commerce, p 2. See also 'WTO Members Fail To Agree On Rules For E-Commerce Deals; New Meeting Called', in: *BNA WTO Reporter* (10 May 2001).

'goods or services'—argument relating to digital content could be rendered meaningless.[125]

At first sight this solution looks quite acceptable. Pragmatically speaking, these digitally-delivered content products would then appear in one or several service classification groups. Then, the GATT principles (unconditional MFN, national treatment, the prohibition of quantitative restrictions and often free market access) would have to be mirrored by country-specific GATS market access and national treatment commitments.

Yet, this solution may not work in practise. This holds true as it is not realistic to assume that most countries would accommodate, for instance, the prerequisite of full specific GATS commitments for audiovisual services and the like. Otherwise, it would not have been all that difficult to reconcile the differences of opinion regarding the classification issues in the first place. But a hybrid approach which is not complemented by the corresponding necessary GATS commitments does not constitute a suitable solution.[126]

The problem of categorising digitally-delivered content products does not stop here. In fact, even if a GATS classification is agreed on, problems remain.

2.3.2 If under GATS: Which Service Trade Commitments Apply?

Even if a GATS classification is agreed on, it is quite uncertain under what service trade commitments electronically-delivered content would fall. This unclear classification and overlap of listed sectors within the GATS is highly problematic. This holds true as it cannot be said with certainty whether individual GATS Members have committed themselves to free trade for this particular service.[127] Four essential questions need to be addressed[128]:

— Do existing GATS commitments apply to digitally-delivered content products (*Section 2.3.2.1*)?
— How will the 'likeness' of such services be assessed; especially between electronic and non-electronic services (*Section 2.3.2.2*)?
— Are digitally-traded services covered by GATS Mode 1 or 2 commitments (*Section 2.3.2.3*)[129]?

[125] 'Proposal on WTO's Approach to E-Commerce Towards eQuality', Communication of Japan to the WTO Work Programme on E-Commerce (15 June 2001), Internet: www.meti.go.jp/english/information/downloadfiles/cw010706e.pdf and non-paper of Singapore to the regular meeting of the GC on 8 May, WTO JOB (01)55, 26 April 2001. Para 16 of the latter paper argues that by this agreement on-line delivered products, such as software, would not be treated worse than traditional off-line sales. See also 'WTO Members Fail To Agree On Rules For E-Commerce Deals; New Meeting Called', in: *BNA WTO Reporter* (10 May 2001).

[126] This is also not acceptable to the US, *cf* First Dedicated Discussion on E-Commerce, p 2. For the same reasons Japan was also not inclined to support the informal proposal by Singapore.

[127] Barth (2000) p 287; and Shrybman (2001) pp 31 f.

[128] See CTS E-Commerce Report for the outstanding issues in the CTS.

[129] The GATS Modes are explained in Table 1.4.

— Which sector-specific commitments of the GATS apply to digital content (*Section 2.3.2.4*)?

2.3.2.1 If under GATS: Do Existing Commitments Apply to Digitally-Delivered Content Products?

The WTO Work Programme on E-Commerce asked whether electronic cross-border transactions are covered by the GATS commitments made during the Uruguay Round. It also questioned the extent to which electronically-traded services may be 'like' services delivered by other methods. Although the EC and the US agree that the current GATS commitments also apply to new types of cross-border delivery, other WTO Members are not convinced.

The Council for Trade in Services reported to the General Council that:

> . . . [i]t was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered [. . .]. Measures affecting the electronic delivery of services are [. . .] covered by GATS obligations. [. . .] Some delegations expressed a view that these issues were complex and needed further examination.[130]

Those Members seeking further examination question whether the GATS obligations and commitments undertaken in 1994 apply to services transmitted by a technology (ie, the Internet) that was not yet envisioned at the time of the negotiations. Some Members go as far as stating that new specific commitments may be needed for cross-border Internet service transactions.[131] Consequently, the US has asked for a positive reaffirmation that electronic transactions are covered by existing GATS commitments.[132]

In order to provide legal certainty, WTO Members should affirm that measures related to the supply of a service using electronic means fall within the scope of the GATS obligations.[133]

[130] CTS E-Commerce Report, para 4.

[131] See eg, CTS-Committee on Trade in Financial Services, Report of the Meeting Held on 9 May 2001, S/FIN/M/31 (1 June 2001) for a statement by the Representative of India that the positive list approach to scheduling specific commitments under the GATS requires new commitments for services delivered through new technologies. *Cf* to GC, Preparation for the 1999 Ministerial Conference, Work Programme on E-Commerce Communication from Indonesia and Singapore, WT/GC/W/247 (9 July 1999), Indonesia and Singapore argue in para 17 that '[. . .] most countries would not have factored [e-commerce] in when they scheduled their GATS commitments during the Uruguay Round'.

[132] CTS, Communication from the US, Clarification of the Relationship between Existing Services Commitments and the Internet, S/C/W/130 (14 October 1999) and 'US Looks For WTO Guidelines On E-Commerce By Cancun Ministerial', in: *Inside US Trade* (20 September 2002).

[133] Similar language was used later by the US in, eg, the US-Chile and the US-Singapore Free Trade Agreements signed by the US Congress in 2003. *Cf Ch 7*.

2.3.2.2 If under GATS: Are Electronic Services 'Like' Non-Electronic Ones?

An additional matter relating to the applicability of GATS commitments to be addressed in the Doha Development Agenda is the uncertainty around the topic of 'likeness'. The general MFN obligations and specific national treatment commitments of the GATS apply only to the extent that a foreign service or service supplier is 'like' a domestic service or 'like' a domestic service supplier.[134]

Importantly in this context, under the Work Programme the Council for Trade in Services also posed the question to which extent electronically-traded services must be considered 'like' services delivered off-line. According to the Council for Trade in Services report to the General Council, only '. . . [s]ome Members' agreed that 'likeness would not depend on whether a service was delivered electronically or otherwise.'[135]

But questions regarding the general meaning of 'likeness' under the GATS exist independently from the question of electronic vs non-electronic supply of a service. As a general matter, the GATS does not provide guidance on when services must be considered 'like' other services. The question is what criteria shall be used to determine whether a computer consultancy service or an engineering service supplied by a professional from WTO Member A is 'like' a service of this respective type supplied by a national professional. The meaning of 'likeness' of services also remains untested in dispute settlement.[136] But the increase in the tradability of services, stimulated by the increased use of IT and e-commerce, adds urgency to the need to develop a test for likeness, including the circumstances under which electronically-supplied services are like services supplied otherwise.

Looking forward, it can be said that the task of bringing more legal certainty to the concept of likeness under the GATS is not part of the Doha Mandate. To bring clarification to the issue of 'likeness of services' is too complex a task to be tackled during the Doha Development Agenda. This is best dealt with through the Council for Trade in Services for Specific Commitments or—like in the case of the GATT—dispute settlement.[137]

Nevertheless, it is important that during the Doha Development Agenda GATS negotiators seek some understanding of likeness in the context of elec-

[134] GATS Art II, para 1: '[. . .] each Member shall accord [. . .] to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country' and GATS Art XVII, para 1: '[. . .] each Member shall accord to services and service suppliers of any other Member [. . .] treatment no less favourable than that it accords to its own like services and service suppliers'.

[135] CTS E-Commerce Report, para 8.

[136] See Arkell (2002) p 5 explaining 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.

[137] The Committee on Specific Commitments is a 'subsidiary body' to the GATS Council and is responsible for addressing questions relating to the scheduling of specific commitments and classification of services.

tronic delivery. As a first step, a positive reaffirmation that the electronic delivery does not change the nature of a particular service or service provider is warranted. Ideally, this would be part of the statement asserting the applicability of GATS commitments to electronic delivery (*cf* previous *Section*). Finally, in some limited and well-contained sector-specific cases (eg, on-line and off-line delivery of software), the likeness of services can be discussed and agreed upon—for example in a Chairman's note or with an entry in the schedules—during the sector-specific GATS request-offer negotiations.

2.3.2.3 If under GATS: Is the Electronic Cross-Border Delivery Covered by GATS Mode 1 or 2?

Under the Work Programme, the Council for Trade in Services concluded that services could be supplied electronically under any of the four modes of supply. But in the case of electronic cross-border delivery, WTO Members have difficulties distinguishing between a service supplied over GATS Mode 1 and a service supplied over GATS Mode 2 (see Table 1.4). In the case of an electronically-supplied service, the problem is to determine whether a service supplier was providing a service on a cross-border basis to:

— a consumer located within the country making the specific commitment (Mode 1); or
— on a consumption-abroad basis to a consumer located outside of the country making the specific commitment (Mode 2).[138]

If one applies GATS Article I, paragraph 2 the distinction depends on whether the service is produced abroad and sent across borders to a foreign consumer or whether it is the consumer who 'travels' abroad to consume a service. In the case of digital content, for example, a consumer may download a film from a locally available website or play an on-line entertainment game. Then the question is in fact if it is the service provider who exports internationally when a consumer downloads his/her content (Mode 1) or if it is the consumer who is consuming a content service while 'abroad' (Mode 2).

In fact, the Committee on Trade in Financial Services (CTFS) has been struggling with the question of distinguishing GATS Mode 1 from Mode 2 for years.[139] In the CTFS, WTO Members feel that the distinction between the two

[138] CTS E-Commerce Report, para 5 and CTS, Work Programme on Electronic Commerce, S/C/W/68 (16 November 1998) pp 2 f.

[139] CTFS, Technical Issues Concerning Financial Services Schedules, S/FIN/W/9 (29 July 1996) and CTFS, Report of Informal Consultations held on 27 June 1997 on the Distinction Between Modes 1 and 2 in Financial Services, S/FIN/W/14 (17 May 1999). See also S/FIN/1 (28 April 1995) to S/FIN/6 (4 October 2001) of the CTFS. See CTFS, Report of the Meeting held on 13 July 2000, S/FIN/M/27 (23 August 2000) para 15–17; CTFS, Report of the Meeting held on 13 April 2000, S/FIN/M/25 (8 May 2000) and CTFS, Report of the Meeting held on 9 May 2001, S/FIN/M/31 (1 June 2001) that buttress the fact that progress on the issue of deciding on the difference between GATS Modes 1 and 2 is stalling.

modes is unclear even when no electronic delivery is involved.[140] However, the problem is getting even more pressing through the increasing possibilities for electronic service delivery.[141]

The CTFS has been seeking solutions for this problem. One idea was that a difference could be introduced between the two modes through questioning as to whether the service provider actively approaches ('solicits') consumers abroad. In that case a Mode 1 categorisation would apply. If it is the consumer who approaches the service provider through a visit on his website, a Mode 2 transaction would apply.[142]

Despite long discussions, a solution as concerns the distinction between GATS Modes 1 and 2 or a definition of 'solicitation' has not yet been agreed upon in the CTFS.[143] For pragmatic reasons and lack of time, the responsibility for clarifying the modal nature of GATS financial service commitments lay with the individual Members at the end of the negotiations leading to the 1997 WTO Financial Service Agreement.[144] A small number of WTO Members subsequently introduced individual headnotes concerning the distinction between Modes 1 and 2. Although these headnotes[145] provide some clarification, they are problematic in the sense that they:

— do not adequately define the respective modes; and that
— due to the scattered country-specific headnotes only applying to financial services, the heterogeneity of the GATS commitment schedules and the modal interpretations has been noticeably increased.[146]

It was stated that the main reasons for this imperfectly concerted method was the need to avoid any delay in the progress of the negotiations and recognition of the fact that this issue was not exclusive to financial services, and thus, had horizontal implications that warranted a careful approach and treatment by the GATS Committee on Specific Commitments.

[140] See S/FIN/W/9 (29 July 1996) paras 5 and 18.

[141] See S/FIN/W/9 (29 July 1996) paras 5 and 18; CTFS, Report of Informal Consultations held on 27 June 1997 on the Distinction between Modes 1 and 2 in Financial Services, WTO JOB (37)/06 (3 July 1997), Annex II, paras 1–2; S/FIN/M/31 (1 June 2001) paras 9 f and CTS, GATS 2000: Financial services, Communication from the EC and their Member States, S/CSS/W/39 (22 December 2000).

[142] *Ibid.*

[143] WTO JOB (37)/06 (3 July 1997), Annex II and CTFS, Report of the Meeting held on 13 July 2000, S/FIN/M/27 (23 August 2000). Also, the meaning of national treatment with respect to the two modes has not been decided upon, see S/FIN/W/9 (29 July 1996).

[144] CTFS, Report of the meeting held on 13 April 2000, S/FIN/M/25 (8 May 2000) para 12.

[145] See for an example of such a headnote, eg, Switzerland—Schedule of Specific Commitments—Supplement 4, GATS/SC/83/Suppl.4 (26 February 1998): 'Commitments on banking, securities and insurance services are in accordance with the "Understanding on Commitments in Financial Services" [. . .]. It is understood that "paragraph B4 of the Understanding does not impose any obligation to allow non-resident financial services suppliers to solicit business"'.

[146] See CTFS, Annotated provisional agenda for the eleventh meeting, S/FIN/W/5 (13 February 1996) and S/FIN/W/9 (29 July 1996) on the headnotes. See also S/FIN/M/25 (8 May 2000).

In the WTO Work Programme on E-Commerce, this modal classification debate has been continued. WTO Members have put forward arguments supporting both classifications.

Japan, for example, submitted that telephone and fax transactions have always been classified under Mode 1 and that other forms of electronic trade should also be.[147] The US sought the most liberal classification and thus questioned whether a Mode 2 classification would be preferable, given that there are more Mode 2 specific commitments with fewer limitations than Mode 1.[148] To support this position, the US argued that the consumer actually 'visits' the website of an Internet service provider in another country.[149] Countries, such as Switzerland, that are interested in cross-border financial services were supportive of this kind of argument and proposed greater harmonisation or a merging of the commitments under the two modes.[150]

As treated by the next two sections, the modal classification has implications on the degree of liberalisation and potentially on other legal aspects.

(i) Modal classification and its implications on the degree of liberalisation
The answer to this classification issue is important because the 'quality' of existing specific GATS commitments—and thus also the level of liberalisation—differ widely depending on which mode applies.

In general, concessions under Mode 2 and Mode 3[151] are more liberal than the specific commitments under Mode 1.[152] In many sectors a large number of WTO Members—in particular industrialised countries—are fully committed to market access and national treatment under Mode 2 (see Table 3.3). WTO Members accepted that their citizens could not be prevented from consuming while abroad.[153] Concessions under GATS Mode 3 where the local physical presence and thus regulatory control of the service provider is guaranteed, are also broader than for GATS Mode 1[154] (*cf Section 3.2.2.1*).

In contrast, the specific GATS Mode 1 commitments to give up present or future market access or national treatment limitations are much more limited, often permitting WTO Members to erect discriminatory service trade barriers.[155]

[147] CTS, Communication from Japan, Work Programme on Electronic Commerce, S/C/W/104 (25 March 1999) para 14.

[148] COMTD, Communication from the US, Work Programme on Electronic Commerce, WT/COMTD/17 (12 February 1999) para 4.

[149] *Ibid*.

[150] CTS, Communication from Switzerland, GATS 2000: Financial Services, S/CSS/W/71 (4 May 2001) and see also CTFS, Communication from Switzerland, E-Banking in Switzerland, S/FIN/W/26 (30 April 2003) para 1.

[151] The GATS Mode 3 applies to the commercial presence of the foreign service supplier in the territory of any other Member.

[152] Bacchetta, *et al*, (1998) pp 52–55; and Berkey and Tinawi (1999) pp 7–8.

[153] WTO (2001b) pp 4–5 and 104–5.

[154] *Ibid*.

[155] Berkey and Tinawi (1999) pp 5, 7–8. In their country schedules WTO Members have mostly entered 'unbound' in the Mode 1 column and 'none' for limitations under the Mode 2 column. Also see Panagariya (2000b) p 12; and Altinger and Enders (1996) p 320.

Especially newly-created content services could thus be burdened with new regulations that are in conflict with the market access and national treatment principle.

(ii) Modal classification and its other legal implications The modal classification debate may also have other important legal consequences that reach beyond the previously addressed question of market access. Frequently, the question is asked which national legal system is applicable to a cross-border electronic service transaction: the country where the supplier is located (country of origin-principle) or the country where the consumer is located (country of destination-principle).[156] If, for example, a US entertainment service provider makes films available for download to French consumers, does the service provider have to comply with French, US or other (content) regulations? Complicating the matter further, the location from which the content is sent may—from a technical point of view—be hard or impossible to determine (eg, when the server used to send the content product is at a different location from the content provider and the consumer).

This adds a particularly thorny dimension to the Mode 1 vs Mode 2 classification debate which has produced two conflicting views:

— Some experts assert that the modal classification can have an impact on which legal regime is applicable. Under Mode 1, the legal system of the consumer's locality would prevail because the supplier is engaging in business in that locality. Under Mode 2, however, the legal system of the supplier's locality would prevail.[157]
— Others state that the GATS does not address matters of jurisdiction.[158]

Regardless which point of view prevails, applicable jurisdiction is one of the cross-cutting issues under consideration in the WTO Work Programme on E-Commerce. But so far no substantive discussions to sort out the issue have taken place.[159]

Here it is argued that the latter argument—ie, GATS does not address matters of jurisdiction—makes more sense. The reason is that the GATS Modes have certainly not been devised to speak to complex matters of applicable jurisdiction in the on-line context. As a result, it is argued here that this topic should be completely separated from market access negotiations and the GATS Modes.

[156] See FTC (2000) for a good overview of the debate regarding country of origin regulation versus country of destination regulation. Establishing the locus of a transaction for legal purposes may be important for reasons which go beyond GATS disciplines (ie consumer protection, policing of illegal activities, and, perhaps most importantly, determining the jurisdiction of of commercial contracts).

[157] Drake and Nicolaidis (2000); and Panagariya (2000b) p 12.

[158] Hoekman and Kostecki (2001) p 265.

[159] Second Dedicated Discussion on E-Commerce, para 5.

(iii) Unsatisfactory solutions to the modal classification debate in the WTO Work Programme on E-Commerce Coming back to the distinction between Modes 1 and 2, so far only unsatisfactory solutions to the categorisation problem have been offered in the WTO Work Programme on E-Commerce.[160]

— Australia, for instance, is in favour of classification according to the country where the final consumption of the service took place.[161] It has been shown elsewhere that the application of this delineation method does, however, not always lead to clear-cut answers.[162]
— Moreover, proposals to create a new GATS Mode 5 to deal specifically with services delivered by electronic means (notably the Internet) existed.[163] Apart from avoiding the modal classification dilemma, this solution had fundamental flaws. To start with, the division between Modes 1, 2 and 5 would not necessarily have become any clearer.[164] More decisively, all commitments would have to be renegotiated for that mode, imposing significant potential for retrograde steps and burdensome negotiations for WTO Members. This solution should therefore been discarded.
— Furthermore, a straightforward classification of all electronically-delivered services under GATS Mode 2 (the 'most trade-liberalising approach') is not politically feasible.

None of these suggestions have been taken on yet.

But turning to the Doha Negotiations and assuming that Members do not want to leave this matter to the dispute settlement process, the decision to classify the electronic delivery of services in Mode 1 or 2 may be addressed in the service negotiations in two ways:

— First, Members may use the bilateral request-offer process to obtain equivalent commitments under GATS Modes 1 and 2, so it does not matter how electronically-traded services are classified.[165] With many existing full GATS commitments by many WTO Members concerning Mode 2, this presupposes the somewhat improbable scenario that all WTO Members are willing to have uniform full specific GATS commitments in Modes 1 and 2 in all sectors.
— Second, Members may explore this question using the concrete examples provided in the bilateral request-offer negotiations and use the information provided to develop a consensus within the Council for Trade in Services on

[160] Drake and Nicolaidis (2000) pp 413–14.

[161] CTS, Work Programme on Electronic Commerce—Communication from Australia, S/C/W/108 (18 May 1999) para 3.

[162] See Hauser and Wunsch-Vincent (2002) pp 91 f.

[163] Berkey and Tinawi (1999) p 10.

[164] *Ibid*, p 10. The authors state that is not clear when an electronically-delivered service should be classified under GATS Modes 1, 2 or 5. They also demonstrate that a new GATS Mode 5 category does not bring about more clarity.

[165] This presupposes the somewhat unlikely scenario that all WTO Members are willing to have uniform Mode 1 and 2 commitments in all sectors.

how electronically-traded services are classified. This consensus could then be reflected in the Chairman's note that also addresses the applicability issues raised in *Section 2.3.2.2.*

It is the first option which proposes levelling-off the GATS commitments between Modes 1 and 2 that—at least in the non-binding discussion of the Work Programme—most WTO delegations (including the US and the EC) and the WTO Secretariat seem to favour.[166]

However, this declaration of intent has its shortcomings. Manifestly, WTO Members would again postpone finding a meaningful distinction between GATS Modes 1 and 2. Also, this approach would not address the jurisdictional issues mentioned. More importantly, the likelihood that the Mode 1 commitments would be increased to the Mode 2 level in relevant sectors through the market access negotiations is slim.

As a result, the second option of a Chairman's note combined with positive statements relating to the other issues of applicability (*cf Section 2.3.2.1*) is to be preferred. This note could also be a welcome opportunity to make explicit that the modal type of GATS commitments does not in any way make judgements about the matter of applicable jurisdiction during an electronic transaction.

2.3.2.4 If under GATS: Which Specific Commitments Apply?

Even if a classification of digitally-transmitted content under a specific GATS mode is agreed on, it is quite uncertain under what specific GATS commitments digitally-delivered content products fall.

(i) Existing GATS Services Sectoral Classification List and its Inadequacies
Specific GATS commitments are undertaken according to a positive list approach, meaning that WTO Members are free to include only certain (sub)-sectors of the GATS Services Sectoral Classification List (ie, the W120[167]) in their schedules of specific commitments. By definition, services are only covered unambiguously when they can be clearly identified under an existing sectoral classification for which commitments have been entered. As a result, it is necessary to ensure a tight match between classification systems, the commitments undertaken by trading partners and existing digital trade flows.

But unfortunately this straightforward match between digitally-delivered content products and the W120 does not exist. The W120 has several weaknesses that cause uncertainty as to what elements and products of the entertainment industry's value-chain (production, delivery and the content itself) are covered by which GATS commitments.[168]

As discussed before, the main reason for this unfortunate state of affairs is that 'content' itself or its digital delivery are hard to locate in the GATS Services

[166] European Commission (2000c) p 9.
[167] Services Sectoral Classification List, MTNGNS/W/120 (10 July 1991).
[168] These points have strongly benefited from a discussion with Carol Balassa (USTR).

Sectoral Classification List or in any internationally-agreed industrial classification structure on which current trade commitments are based (*cf* beginning of *Chapter Two*). Consequently, the provisional CPC on which current GATS commitments have been made and potential future GATS commitments do not reflect current service activities in the fields most relevant to content production (ie, computer, value-added telecom, audiovisual and entertainment services).

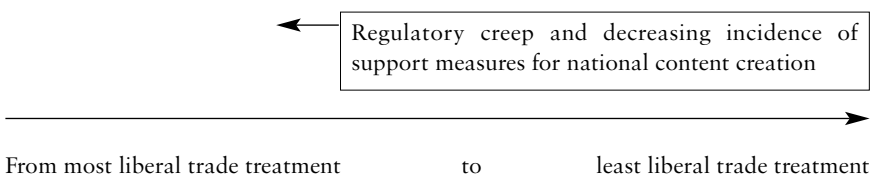
Figure 2.1 takes the applicable categories laid out in Table 1.5 and reflects the different classification possibilities in the W120 and associated problems for the four digitally-delivered content products discussed here. None of these products fits neatly into one available category. The classification possibilities for software and Video, Computer and Entertainment Games, for instance, range from no fitting classification entry over computer and related services, over value-added telecom to entertainment or audiovisual services. Whereas business software seems to be less of a classification problem (direct classification under computer services), the case of on-line entertainment games is particularly thorny. Depending on the form of Internet-delivery, films and music can be considered as value-added telecom, an entertainment or an audiovisual service.

In sum, most of the digital content delivery services, like video-on-demand over the Internet, are inseparable combinations of telecommunications, software and audiovisual services that rely on commitments on these content services themselves and their digital transmission. Problematically, very different levels of GATS commitments apply to the different classification possibilities (from liberal on the left-hand side to very limited market access and national treatment commitments on the right-hand side, see Figure 2.1 and *cf Section 3.2*).

Some classification issues merit to be discussed in more detail.

Figure 2.1 Classification possibilities for digitally-delivered content products

1. Business services	2. Communication services	10. Recreational, cultural and sporting services	2. Communication services
B. Computer and related services	C. Value-added telecomminication services.	A. Entertainment services	D. Audiovisual services



a. Problems with the W120: Content vs Conduit? The distinction between the content itself and the actual delivery or conduit (eg, telecommunication service) is a crucial but difficult one that the GATS negotiators have been trying to resolve since the telecommunications negotiations started.[169] For instance, cable and broadcast distribution of radio and television programming is carved out of the Annex for Telecommunications, producing a vacuum in terms of trade disciplines governing the regulation of on-line audio and video content.[170] Interestingly, so-called 'Programme transmission services' (ie, broadcast transmission services) are categorised under audiovisual services in the W120 whereas the underlying provisional CPC clearly classifies these transmission services as telecommunication services (CPC 7524 Programme transmission services).[171] Moreover, the W120 excludes programme distribution services by cable and satellite that are covered as telecommunication services in the underlying CPC.[172]

— One the one hand, the EC insists on the fact that content and transmission must be separated. Like, for example, Australia and Canada, the EC spells out in its schedule that 'Broadcasting services' or 'the provision of content' are not covered by commitments made under telecommunication services.[173] However, the EC is not specific as to where content is to be scheduled.
— On the other hand, the US does not agree with this demarcation between content and transmission.[174] When the WTO Secretariat noted that: '. . . 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 . . .',[175] the

[169] The WTO Secretariat notes: '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.' (Cited from CTS, Background Note on Audiovisual Services, S/C/W/40 (15 June 1998) [WTO Background Note on Audiovisual Services]). See Bronckers and Larouche (1997) for the difficulty of distinguishing between basic and value-added telecommunication services.

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

[171] Equally, broadcasting services are also not part of the telecommunications agreement. See Roberts (1999).

[172] 'Prov CPC 753 Radio and television cable program distribution services'.

[173] The EC's schedule of specific commitments for telecommunication services, GATS/SC/31/Suppl.3 (11 April 1997) states:

> Telecommunications services are the transport of electro-magnetic signals [. . .] 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 [. . .]. Therefore, [telecommunication commitments do not] cover the economic activity consisting of content provision [. . .]. The provision of that content [. . .] is subject to the specific commitments [. . .] in other relevant sectors.

[174] See Nihoul (2001) for details about the US-EC disagreements concerning the differences between audiovisual and telecommunication services.

[175] WTO Background Note on Audiovisual Services, para 5.

US contended that the distinction between these two sectors that exist in an analogue setting is not as easy to make in a digital one.[176]

b. Problems with the W120: Value-Added Telecommunication vs Computer Services? It is not clear how much content provision is contained in value-added telecom and computer services (eg, on-line information provision services; provision of information on Web-sites; entertainment games).

Complicating the matter further, the distinction between computer and telecommunication services in the W120 also becomes increasingly blurred. The classification for telecommunications, for instance, includes services such as 'On-line information and data base retrieval (CPC 7233)' which are difficult to differentiate from 'Computer database services (CPC 844)'.[177] It is not clear how new data 'push' and other Internet content services fall under existing commitments.[178]

On the side of the computer service-category, a lack of a classification for 'Video/entertainment games/leisure software' or more generally 'Publishing leisure software' or 'interactive content' poses problems. To cover all types of software unambiguously, detailed software classifications may be warranted that introduce the difference between business and leisure software intended for private consumption (eg, games).

c. Problems with the W120: Inadequacy of Audiovisual Service Classifications Most importantly, the GATS audiovisual service sector classification is inadequate and—often—out of date.[179] To start with, this classification is not clearly defined and lumps together services related to music/sound and those related to visual content like films.[180] Thus, according to the W120, on-line music or other content provision falls under the less liberal audiovisual classification.[181] Calls from the music industry for the reclassification of sound recording services outside the broad audiovisual services classification into a separate services category to avoid that the dissemination of music over the Internet might not be

[176] Based on a personal interview with a USTR official in Geneva and CTS, Communication from the US, Audiovisual Services, S/C/W/78 (8 December 1998).

[177] WTO Background Note on Computer Services, pp 3–4. There are also overlaps between advertising and audiovisual services. Within the sectoral classification list of audiovisual services there is an entry for promotion or advertising (CPC 9611) that creates an element of uncertainty towards the applicable advertising commitments. See WTO Background Note on Audiovisual Services, p 3 on the difficult distinction between advertising and audiovisual services.

[178] See, eg, CTS, Communication from US, Work Programme on Electronic Commerce, S/C/7 (12 February 1999) s 3.

[179] CTS, Communication from the US, Audiovisual and Related Services, S/CSS/W/21 (18 December 2000) [Second US Audiovisual Service Proposal] and CTS, Communication from the US, Audiovisual Services, S/C/W/78 (8 December 1998) [First US Audiovisual Service Proposal] that discuss the need of a major overhaul of the current audiovisual classification scheme. See also Krancke (2003) pp 192 f; Aufrant and Nivlet (2002) and Nivlet (2001).

[180] In the W120, the production service 'Sound recording' is separately identified (without CPC number as shown in Table 1.5). However, there is no specific transmission or distribution service for acoustic content.

[181] See European Commission (2000e).

clearly distinguished from broadcasting services,[182] have hitherto been ignored (*cf Chapter Five* for an EC rationale for this stance). This is making targeted commitments on the digitally-delivered content product (for example on music without touching upon films) impossible.

In addition, the ageing audiovisual classification is problematic as it focuses on broadcasting and the creation of film and cinema movies and thus ignores new content formats (eg, cartoons, interactive Internet content services) or new types of transmission (eg, the Internet).[183] More specifically, new content and multimedia services like the distribution of home video entertainment directly to home consumers, the distribution of recorded music directly to home consumers, and other forms of access to audiovisual content over the Internet are not included.[184]

The absence of Internet delivery classification has led to suggestions to create a special 'Internet service category' or an entry for 'On-line distribution, sale, and delivery of specific audiovisual works to the general public' in the audiovisual service classification.[185] This would allow WTO Members to make specific GATS commitments for Internet-delivery whereas abstaining from commitments on broadcasting.

Overall, there is no category either for 'new' entertainment products that combine software, audiovisual and telecommunication services; namely (on-line) video and entertainment games, education or recreational/leisure software or more generally 'leisure software'.[186]

— WTO Members like the EC argue that these software/gaming types are—due to their audiovisual content and cultural impact—covered by GATS audiovisual service commitments.[187]
— However, this classification of leisure software under audiovisual services (rather than the GATT or the relatively liberal GATS computer and related service category) draws considerable negative reactions from the US and other content industries.[188]

[182] 'IFPI Response to the EC Consultation Document on the GATS 2000/WTO Negotiations concerning Audiovisual Services and Cultural Services', Answer to the EC Questionnaire on Services in the Music Sector (31 May 2001), Internet: www.ifpi.org/site-content/library/gats-questionaire.pdf.

[183] Nivlet (2001) p 9 and n 9.

[184] Second US Audiovisual Service Proposal, Annex A.

[185] Krancke (2003) p 194.

[186] See Nivlet (2001) for this point.

[187] '[. . .] services in the recreational software sector do not have a specific classification or definition within the GATS [. . .] Because of the nature of the multimedia material in question [. . .] services involving the publication, production and transmission of recreational software to the public can be considered to be included in audiovisual services.' and 'In light of the convergence of various technologies [. . .] it is felt that services in the recreational software sector are covered by the Community exemptions.' (Quoted from European Commission (2000e)). See ELSPA (2003) p 8 on the cultural impacts of games and the increasing similarity of movies and games.

[188] See 'WTO Council Reveals Members Split Of E-Commerce Classification', in: *Inside US Trade* (22 June 2001); ITI (2001); BSA (2001a, b) and the Letter from the ICRT of 13 March 2001 to the Head of Unit Audiovisual Policy (DG Education and Culture), Internet: www.icrt.org/pos_papers/2001/010313_BOpdf for negative reactions to this EC classification proposal.

Finally, the question has not been completely discarded by WTO Members if it is not GATS commitments on a totally separate category, namely distribution services (W120, Section 4), which could be invoked for digitally-delivered content products. In the distribution-category that applies strictly to off-line transactions, retail sales of content products figure prominently (*cf* 'CPC 63234 Retail sales of records, music and tapes', 'CPC 63252 Retail sales of non-customised software', 'CPC 63294 Retail sales of games', etc).

d. Problems with the W120: Incidence of 'Regulatory Creep' A problem referred to as 'regulatory creep' increases the relevance to these classification problems.[189] Traditionally, the less liberalised audiovisual and entertainment sectors on the right of the grid in Figure 2.1 were the most regulated sectors, whereas the sectors on the left (computer and telecom services) benefited from low regulatory intensity.

But today, the convergence of services related to digitally-delivered content products poses problems because of the different national regulatory approaches (regulations and subsidies) applied to the diverse sectors. In the process of convergence, regulations applying to the audiovisual sector increasingly influence (or 'creep on') the hitherto unregulated sectors (depicted in Figure 2.1 as movement from right to left).[190] A standard example in this respect are the constraints faced by the heavily-regulated broadcasting sectors (rules on advertising, local content quotas, etc) that may start applying in the field of computer or telecommunication services.[191]

To conclude the assessment of the current situation, the uncertainty of commitments is complicated by another type of 'regulatory creep'. Indeed, cultural or industrial policies that have as objective the promotion of domestic content industries and/or cultural diversity may also appear in the context of value-added telecommunication or computer services, if it is judged that they constitute more than just voice, data and business software.

In sum, it can be said that due to these four sets of problems the current classification system for service trade commitments is inadequate to unambiguously capture digitally-delivered content products. Problematically, the next section demonstrates that no significant improvement is forthcoming from newer internationally-agreed classification nomenclatures that would remedy this problem.

[189] This term has been coined by the US-based Business Software Alliance (BSA) that sees the software sector being negatively affected by regulations from other sectors. Based on interviews with the USTR.

[190] See CTS, Communication from the US, Computer and Related Services, S/C/W/81 (9 December 1998) that describes this phenomenon for computer services.

[191] WTO Background Note on Computer Services, pp 2 and 13 f.

(ii) No improvement forthcoming from newer nomenclatures: the case of the CPC 1.1 and other international classifications Clearly, trade commitments that follow the positive list approach can at best be as good as the underlying international product and activity classifications.

Looking forward, WTO Members may thus want to seek guidance from more up-to-date classifications to enter their commitments during the Doha Negotiations.[192] The provisional CPC, for example, has been updated twice to cover advancements since the end of the Uruguay Round whereas the GATS commitments are entered on a static list of services.[193] Ideally, the evolution of the statistical nomenclatures in the field of content would enable the GATS negotiators to make more fitting commitments.

Unfortunately, this search for improved internationally-agreed classification categories for content-related activities does not bear much fruit. The correct categorisation of 'electronic content' or the distinction between a 'non-electronic'- and an 'electronic content'-sector is still an unresolved issue which draws considerable attention in the leading statistical fora.[194] Currently, no unambiguous ways to classify 'digital content' are proposed and, for instance, work on content classifications in the OECD or in the Voorburg Group on Services is unlikely to bring forward an agreement in the near future (even after the 2007 revision of the International Standard Industrial Classification).

A look at the CPC 1.1 (*cf Annex A1.4*)—the most likely classification structure to be used to update the commitments based on the provisional CPC—and the following discussion illustrates the unfortunate circumstance of lacking classifications for digitally-delivered content products. In sum, the new nomenclatures for computer, telecom and audiovisual services do not offer greatly improved entries for digital content.

a. Problems with the CPC 1.1: Computer and Related Services In the updated CPC 1.1, 'Division 84' which in the provisional CPC bundled all computer and related services has completely disappeared. Its content is now redistributed into several new divisions: 'Other professional, scientific and technical services'; 'Telecommunications services and Information retrieval and supply services'; 'Support services' and 'Production services, on a fee or contract basis' (see *Annex A1.4*).[195]

[192] Members have been discussing whether and how to improve the classification of services almost since the entry into force of their Uruguay Round commitments. In 1996, the GATS Council Committee on Specific Commitments asked the Secretariat to analyse changes in the CPC See CTS—Committee on Specific Commitments, S/CSC/W/6/Add.9 (27 March 1998).

[193] The CPC has been updated two times, CPC 1.0 in UN (1998) and CPC 1.1 in UN (2002) since the Uruguay Round ended. A further update is planned for 2007. See Cassamajor (2002); Cave (2002) and Becker (2001).

[194] See the work on Information Society Statistics and electronic content of the leading statistical forum on service statistics, the Voorburg Group on Service Statistics, under Internet: www4.statcan.ca/english/voorburg/. Since its 16th meeting, the Voorburg Group struggles with the correct classification of existing and newly arising digital content products. See Technopolis (2003) pp 4 f; Nivlet (2001); Hansen-Møllerud (2003); Johanis (2003); and Aufrant and Nivlet (2002).

[195] UN (2002).

Still, digitally-delivered business and leisure software is not unmistakably covered. Like in the provisional CPC, the 'Computer consultancy service'-category (CPC 1.1 8314) still includes software consultancy services. However, even in the revised form it continues to exclude the 'retail sale of packaged software'. Moreover, the electronic sale or the digital delivery of any kind of software is not explicitly mentioned. Consequently, no guidance is forthcoming from the CPC 1.1 on the issue of whether leisure software (ie on-line entertainment games) should be grouped in the computer service-category. In sum, WTO Members cannot easily cross-refer to the CPC 1.1 to make specific GATS commitments on digitally-delivered business or leisure software.

b. Problems with the CPC 1.1: Telecommunication Services When it comes to telecommunication services, a significant restructuring and further elaboration have been undertaken (see *Annex A.1.4*).

Specifically, the new category 'Telecommunication services, information retrieval and supply services, CPC 1.1 84' addresses the increased convergence between computer and value-added telecommunication services.[196] As regards digitally-delivered content products, one of the interesting entries is the new 'Program distribution services, CPC 1.1 8417'. Making significant progress, it groups different content transmissions, including, for example, the delivery of audio and video programming in digital mode by using satellite together. Nevertheless, two problems arise with this entry that make it inadequate to capture digitally-delivered content products in the GATS negotiations:

— First, it is—like in the case of other value-added telecommunication services—unclear whether the 'Program distribution services'-entry covers only the transmission or also the content itself. The conduit vs content debate (*cf Section 2.3.2.4*) is thus not addressed.
— Second, the closed list of transmission technologies of the 'Program distribution services'-entry (ie, cable, satellite or wireless terrestrial network) stops short of including the transmission of content via the Internet. In the new nomenclature for telecommunication services there actually exists a stand-alone entry for Internet telecommunication services (CPC 1.1 842). However, the latter refers only to the carriage of traffic (eg, Internet access services) and not to the content itself.

The most promising venue in the telecom section is the one on 'On-line information provision services' (CPC 1.1 843). This new grouping overcomes the convergence of computer and value-added telecom services outlined earlier by grouping database, web information and data retrieval together, and by proposing the new category 'Provision of on-line information by content providers'. Nonetheless, again two problems arise with this group:

[196] *Ibid*, p 25.

— First, it is not fully clear whether the term 'information' can be taken to also refer to films and other digital content products.
— Second, it explicitly formulates an outright exclusion of Internet sales from its scope of application, significantly reducing the pertinence of this categorisation to the Internet sales of digitally-delivered content products.

c. Problems with the CPC 1.1: Intangible Assets Finally, a new category 'CPC 1.1 733 Licensing the right to use intangible assets' which includes the licensing services for the right to use computer software and digital entertainment products, has been added.[197] This category fits closely with arguments made in *Section 2.3.1.3* that described that the trade in digitally-delivered content products often consists of the exchange of licence agreements and thus a specified right to use a protected work. Furthermore, this category adequately reflects the significant economic importance and the specific nature of these new economic transactions.

Once more, however, this grouping does not qualify for a majority of digitally-delivered content products because it excludes limited end user licences on consumer goods which are sold as part of a digital content product (eg, off the shelf packaged software, records). Furthermore, despite of the fact that a similar category already existed in the provisional CPC (Division 89, CPC 73 Intangible assets), an entry on the use of copyrights was—probably due to overlaps with the TRIPS—not included in the GATS Services Sectoral Classification List, making it unlikely that this could be agreed on in the ongoing GATS negotiations.

(iii) Suggested solutions for the Doha negotiations Given that current international classifications like the above CPC 1.1 only imperfectly cover the content industries, it is to be hoped that future classification work may bring about better results. At the soonest, the 2007 ISIC and CPC revisions offer potential for consensus on an internationally-agreed statistical framework for content.[198] This may be too late to provide guidance relevant to the Doha Development Agenda.

As a result, negotiators of the Doha Round must operate under the assumption of absent existing classification schemes that would capture digitally-delivered content products unambiguously. This means that even full GATS commitments in pertinent sectors of the existing classifications will not provide guaranteed market access.

Clearly, without internationally-agreed nomenclatures or a concerted approach, the risk exists that individual Members resort to their own definitions of service activities (ie, outside the CPC). This would increase the heterogeneity

[198] Details about these revisions can be gleaned from Internet: unstats.un.org/unsd/cr/registry/regct.asp and www4.statcan.ca/english/voorburg/2004–index.htm. This possible integration of the information sector in international classification systems is likely to be modelled after the North American Industrial Classification System (NAICS), see US Bureau of the Census (1997).

[197] UN (2002), p 24.

of commitments and GATS schedules and complicate the interpretation of existing and future commitments even more.[199]

To circumvent the absence of proper classifications and to avoid heterogeneous approaches only few alternatives exist:

— Given the above difficulties of converging and newly generated services, the single best and most forward-looking method is undoubtedly the adoption of a negative list approach coupled with very limited derogations in the relevant areas (*cf Section 4.2.3.1*). Under this approach all service sectors and delivery modes (including new services and delivery modes) are liberalised as long as Member States do no list limitations to market access and national treatment in their GATS schedules. On top of avoiding that classification problems and convergence block trade liberalisation in fast-moving areas, the negative list approach and absent limitations in relevant fields also make decisions superfluous on how best to distinguish GATS Mode 1 vs 2 and electronically- vs non-electronically-delivered services.
— As the negative list approach will not be acceptable to most WTO Members for all specific GATS commitments (eg, financial or public services), a more custom-made approach could be to apply the negative list approach selectively to the set of four identified service sectors (targeted negative list approach[200]).
— Alternatively, if this negative list approach is too far-reaching for selected service areas, GATS commitments could also be entered at the two-digit CPC level in the four designated sectors (eg, CPC 84 for Computer and related services). As the service categories are then specified in their most aggregate form, they include all possible sub-activities and potentially a great number of future services.
— Finally, Members could also depart from existing classification schemes and define four entries for the here-discussed digitally-delivered content products in service sub-sectors of their own choice and make full specific GATS commitments hereunder. This would certainly be the most straightforward solution which creates greatest legal certainty and which enables WTO Members to liberalise the trade in digitally-delivered content products without touching upon the more sensitive broadcasting services.

No matter which approach is chosen, it must always be ensured that the creation, its delivery and the content itself are fully covered by the chosen trade commitments.

The next Chapter addresses the potential for further market access commitments in greater detail.

[199] In fact the 'Guidelines and Procedures for the Negotiations on Trade in Services' impose nearly no limits on the heterogeneity of classifications that could be introduced.

[200] See for such a targeted negative list approach Mattoo and Wunsch-Vincent (2004).

3

Essential Improvements of WTO Trade Commitments

THE CLARIFICATION OF the unresolved questions described in *Chapter Two* alone is not sufficient to guarantee market access for digitally-delivered content products. To secure free digital trade in content, a deepening and broadening of commitments by all WTO Members during the Doha Development Agenda is indispensable.

Chapter Two shows that, to date, no decision has been taken on whether and which GATT or GATS rules apply to digitally-delivered content products. Without these decisions, WTO Members interested in achieving the liberalisation of digitally-delivered content products can best pursue parallel market access negotiations in the Non-Agricultural Market Access Negotiations (NAMA) and the Services Negotiations (*cf Section 1.2*). *Chapter Three* lays out the specifics of these negotiations and the scope for improved liberalisation.

The dissimilarities of the diverse negotiation issues—as regards related scope and timelines—also shed light on the complexities involved in achieving free digital trade in content.

3.1 GOODS: NAMA NEGOTIATIONS AND THE INFORMATION TECHNOLOGY AGREEMENT

In this section, it is assumed that WTO Members agree that the GATT rules and obligations apply to digitally-delivered content products or—given the pending classification debates—that they desire to exploit all means to pre-empt trade barriers to digital content. Given these premises, free digital trade can—next to a clear and permanent WTO Duty-free Moratorium—best be bolstered either via a reduction of tariffs on physical carrier media, an improvement of the ITA product coverage and/or increased participation in the ITA.

Accession to the ITA is the most straightforward way to secure zero duties on physical carrier media that lend themselves to carry digital content. The zero-tariff approach of the ITA is binding on digitally-delivered content products, if it is agreed that digitally-delivered content products are goods, or if it is agreed that digitally-delivered content products should receive the same trade treatment as physically-delivered content products.

The scope for further ITA participation is substantial: Today, there are sixty-three participants to the ITA (see Table 3.1). The EC and the US—as well as all other OECD Members—are ITA participants and thus bound to zero duties on the physical carrier media listed in the ITA product list (*cf Annex 1.1* for relevant products).

Table 3.1: ITA participants

ITA Participants (63)			
Albania	Estonia	Kyrgyz Republic	Panama
Australia	EC*	Latvia	Philippines
Bahrain	Georgia	Lithuania	Poland
Bulgaria	Hong Kong, China	Macao, China	Romania
Canada	Hungary	Malaysia	Singapore
China	Iceland	Malta	Slovak Republic
Costa Rica	India	Mauritius	Slovenia
Croatia	Indonesia	Moldova	Switzerland†
Cyprus	Israel	Morocco	Chinese Taipei
Czech Republic	Japan	New Zealand	Thailand
Egypt	Jordan	Norway	Turkey
El Salvador	Korea	Oman	US

Source: WTO List of ITA Participants, Internet: www.wto.org/english/tratop_e/inftec_e/itapart_e.htm (15 February 2005).* Since May 2004 many ITA participants listed in the table are EC Member States.

ITA participation is continually expanding through the WTO accession process. Since the entry into force of the ITA in 1997, nearly all countries acceding to the WTO are participants in the ITA, with the exception of, eg, Armenia and FYR Macedonia, which acceded in 2003.[1] Twenty-six accessions are pending at this time—including two vital candidates, namely the Russian Federation and Viet Nam.[2]

Notwithstanding the high percentage of trade in IT products already covered

† On behalf of the customs union of Switzerland and Liechtenstein.

[1] WTO, Accessions Gateway, List of completed accessions, Internet: www.wto.org/english/thewto_e/acc_e/acc_e.htm (information on accession last updated in March 2005).

[2] *Ibid.*

by the ITA and the number of newly acceding countries joining the agreement, ITA participants such as the US and the EC are eager to see non-participating WTO Members join.[3] More than half of the WTO Membership—virtually all of which are developing countries—are not ITA participants,[4] including Mexico, Brazil, South Africa and Argentina that have a relevant share of world IT trade but that—at times—apply significant tariff rates to IT products (including physical carrier media).[5] Average tariffs of non-ITA Members can, for example, be as high as 15% for physical media carriers that contain software.[6]

This situation can be addressed through the NAMA negotiations. The latter can be used in three distinct ways to cut tariffs on physical carrier media during the Doha Development Round:

— horizontal tariff-cutting formulae that apply to all goods including recorded physical carrier media with HS categorisation and tariff line[7];
— supplementary approaches that aim at reducing or eliminating tariffs ('zero-for-zero approaches') for particular sectors or a set of products (in this case a list of IT products including recorded physical carrier media); and
— use of the NAMA negotiations to increase participation in the ITA or to transform the currently plurilateral agreement into a multilateral one.

To ensure that these three options also secure free trade in digitally-delivered content, Members could formally agree on the fact that these GATT rules and obligations equally apply to software and other electronically-delivered content products.

As the products covered by the ITA are scheduled at the very specific six-digit level of the Harmonised System, new physical carrier media are not automatically covered. During the NAMA negotiations, Members could therefore expand the list of physical carrier media to comprise newly arising storage media as well or schedule products at the more aggregate four-digit level.[8]

[3] See 'US E-Commerce Industry Plots Strategy For WTO Talks', in: *Inside US Trade* (24 May 2002). The US Trade Act of 2002 asks US negotiators to seek to expand ITA participation and its product coverage. See Trade Act of 2002, s 2101 (b)(2) TPA and s 2102 (b)(7)(B) TPA.

[4] For example, only three Latin American countries are ITA participants: Costa Rica, El Salvador, and Panama.

[5] 'High Tech CEOs Promote Trade Issues To White House and Capitol Hill', in: *Inside US Trade* (9 February 2001). See also the presentation of Bijit Bora during the last WTO ITA Symposium, 18 October 2004, Internet: www.wto.org/english/thewto_e/acc_e/acc_e.htm.

[6] See the presentations made at the WTO ITA Symposium mentioned in the previous note.

[7] These can be formulae that (i) are not dependent, in any way, on the initial tariff rate formulae, (ii) that are a function of the initial tariff, (iii) tariff-dependent formulae that can be linear or non-linear (ie Swiss formula), and/or (iv) formulae with different reduction coefficients for developed and developing Members. See Negotiating Group on Market Access, Formula Approaches to Tariff Negotiations, TN/MA/S/3/Rev.2 (11 April 2003) for more details on tariff-reduction formulae.

[8] The ITA Annex, para 3 directs participants to meet periodically to review the attachments listing the covered products with an eye towards expanding ITA product coverage.

3.2 SERVICES: THE GATS NEGOTIATIONS

In this section, it is assumed that WTO Members agree that the GATS rules and commitments apply to digitally-delivered content products or that, pending the classification issues, WTO Members desire to exploit all means to pre-empt trade barriers to digital content.

In that case, free digital trade in content can best be locked in by additional market access and national treatment commitments under the GATS. Through full GATS market access commitments, WTO Members are essentially bound to refrain from imposing limitations of a quantitative nature on digital content transactions or suppliers.[9] Through full national treatment commitments, WTO Members are bound to abstain from measures that modify the conditions of competition in favour of local digital content providers compared to like services or like service suppliers of other WTO Members.[10] As stated earlier, full specific GATS commitments that are applicable to digitally-delivered content products also render a WTO Duty-free Moratorium on Electronic Transmissions obsolete.

Here, an analysis of GATS Mode 1 and 2 commitments shows that substantial potential exists for additional specific commitments. This is mainly due to:

— a *modal imbalance* of commitments that puts cross-border GATS Mode 1 transactions at a disadvantage; and
— a *sectoral imbalance* of commitments in the different service sectors that are potentially relevant for digitally-delivered content products.

In addition to matters relating to an expansion of specific GATS commitments, *Chapter Two* demonstrates that additional work in the WTO is necessary to guarantee the inclusion of digitally-delivered content products through the GATS classifications. Expanded commitments alone may not unambiguously guarantee market access.

As it is currently unclear which GATS commitments apply, the analysis proceeds along the four different service sectors identified earlier in a step-by-step fashion. This is preceded by a general examination of GATS Mode 1 and 2 commitments.

3.2.1 Stock-Taking of GATS Commitments for the Cross-Border Delivery of Services

The modal distribution of specific GATS commitments shows that few WTO Members anticipated the rapid rise of digital trade during the Uruguay

[9] Limitations not compatible with full GATS market access commitments are reprinted in *Annex A.1.2.*

[10] GATS Art XVII, paras 1–3.

Negotiations.[11] The most liberal GATS commitments were taken under Mode 2, leading to the imbalance between GATS Mode 1 and 2 commitments (*cf Section 2.3.2.2*). In addition, the commitments under Mode 3 are significantly broader and deeper than the commitments under Mode 1.[12] Some WTO Members have left the Mode 1 unbound due to presumed lack of technical feasibility to supply across borders.[13] But most Members simply followed the logic of 'regulatory precaution'[14] when abstaining from these commitments.

This problem of limited cross-border liberalisation weighs heavily with respect to service sectors that are prone to complete electronic delivery.[15] In that context it must be noted that several of the general GATS obligations apply only to services sectors for which WTO Members have made specific commitments. For instance, the requirement for reasonable, objective and impartial administration of domestic regulations (GATS Article VI, paragraphs 1, 3, and 5) or constraints for monopolistic suppliers (GATS Article VIII, paragraph 2) apply only when specific commitments have been made in the respective sector.

On top of the generally low commitment level for Mode 1 and the resulting imbalance of commitments between GATS Modes 1 and 2, the picture for digitally-delivered content products is further complicated. The problem is that levels of commitment diverge widely for the different service sectors that are potentially relevant for digitally-delivered content products (*cf Section 2.3.2.4*). This divergence of commitment levels is caused by different sector-specific negotiation contexts during the Uruguay Round and priorities of WTO Members taken up in *Sections 3.2.2—3.2.5*. To look more closely at this problem, an in-depth analysis of GATS schedules is conducted through the Tables 3.2 and 3.3 and the sector-specific analyses.

To begin with, Table 3.2 analyses 27 GATS schedules of selected WTO Members indicating the frequency and type of GATS Mode 1 market access and national treatment commitments.

Confirming earlier points (*cf Section 2.3.2.4* and Figure 2.1), Table 3.2 documents that far fewer commitments have been undertaken for audiovisual than

[11] See GC, Work Programme on E-Commerce, Communication from Indonesia and Singapore, WT/GC/W/247 (9 July 1999) para 17; CTS, Structure of Commitments for Modes 1, 2 and 3, S/C/W/99 (3 March 1999); Karsenty (2000); Kono, *et al*, (1998) pp 44 f; and Hauser and Wunsch-Vincent (2002) pp 111 f for earlier qualitative and quantitative analyses of GATS commitment schedules yielding this result. See Adlung and Roy (2005) for a recent analysis of the depth of commitments.

[12] WTO (2001b) 4–5 and 104 f.

[13] See OECD (2000a) p 6 and OECD (2000b). It is noted in the latter publication that the assumptions reached in the early 1990s about the 'lack of technical feasibility' to supply cross-border may no longer be accurate due to technological change.

[14] See Sauvé (2000) p 92; WTO (2001b) p 105, and Adlung and Roy (2005) p 12. Regulatory precaution leads to a more restrictive policy stance vis-à-vis GATS Mode 1 because governments may not wish to guarantee access for services over which they can hardly exercise regulatory control as the service provider is not in their jurisdiction.

[15] See OECD (2000a, b); and Mattoo and Schuknecht (2001) p 17. In 2000, only three electronically-deliverable service sectors (professional, other business and financial services) had commitments by more than half of the WTO Membership.

Table 3.2: GATS Mode 1 commitments of selected WTO Members, 2005

WTO Member	*Computer services*	*Value-added telecom*	*Entertainment*	*Audiovisual*
Argentina				
Australia				
Brazil				
Canada				
Chile				
Czech Republic				
Egypt				
EC				
Hong Kong				
Hungary				
India				
Indonesia				
Japan				
Korea				
Malaysia				
Mexico				
Morocco				
New Zealand				
Philippines				
Poland				
Singapore				
Slovak Rep.				
South Africa				
Switzerland				
Thailand				
Turkey				
USA				

Table Legend:

	Full national treatment and market access commitment GATS Mode 1
	Partial commitment
	No commitment (either unbound or not included in the schedule)

Explanation: Trade obligations are only counted as *full commitments* if Members have fully committed to both GATS market access and national treatment obligations.

Source: Author's own examination based on the legally binding WTO Members' GATS schedules; OECD (2000a) and WITSA (2003). Initial or revised GATS offers as part of the Doha Negotiations are not taken into account because they are not yet legally binding.

for any other service sector under consideration.[16] No WTO Member in this list has made full market access and national treatment commitments for audiovisual services. For the given WTO Members, cross-border computer and value-added telecommunication services are by far more liberalised than entertainment and audiovisual services.

Table 3.3 presents novel data on the level of Members' commitments on the selected sectors produced with the help of the WTO Secretariat. The data covers 146 WTO Members, which includes all recent accessions (including, for example, China but not Nepal) and thus constitutes an update of the GATS schedule information last published in 1999.[17]

To start with, the second column provides the total number of Members—out of 146 WTO Members—with commitments in the specified sector for Mode 1 and 2 commitments.[18] The other columns present the number and the percentages of WTO Members with full, partial or unbound commitments for market access and national treatment with regard to Modes 1 and 2 and according to service sub-sectors. Due to the methodology outlined below Table 3.3, the percentages provide only an indication of WTO Members that have entered commitments in that sector (as opposed to information on *all* WTO Members). To illustrate, in the case of, for example, 'Radio and television services', only nine commitments have been entered. WTO Members who have not entered any commitment in the sector—ie, the great majority—are not counted as 'unbound'.

Table 3.3 corroborates the thesis of the more far-reaching Mode 2 commitments put forward earlier. This imbalance between Modes 1 and 2 that is particularly striking in areas like financial or legal services, also applies to many here-listed service sub-sectors and especially to value-added telecommunication and entertainment services.[19] Most importantly, Table 3.3 also strongly

[16] All studies that try to quantify the GATS liberalisation commitments to make predictions on the degree of free trade in services must be seen in the following light: From a legal perspective, the commitments that are inscribed in the GATS schedules represent a compulsory minimum requirement with respect to sector-specific liberalisation. A country thereby commits to maintaining and not undergoing a self-chosen degree of free trade. However, positive deviations from the commitments—meaning a movement to freer trade despite of weaker GATS bindings—are still possible. Thus, lacking or partial GATS commitments must not mean that the actual market access or national treatment level cannot be higher than indicated in the country schedule. In fact, WTO Members often treat service trade in a more-liberal fashion than they committed to in the Uruguay Negotiations. Still, the legal and economic literature uses the quantitative analysis of GATS engagements as a reliable indicator for the degree of free service trade. This is justified by the fact that only the entries in the GATS schedules constitute a legally binding obligation whose irreversible nature creates welcome legal and investment security. See Adlung (2001) p 143; or Kono, *et al*, (1998) pp 41–43 for more details.

[17] *Cf* CTS, Structure of Commitments for Modes 1, 2 and 3, S/C/W/99 (3 March 1999). Results date from April 2004. The data are also innovatory as they present the sector-specific number of liberalisation commitments on a mode-by-mode basis.

[18] Table 3.2 only provides an analysis of Mode 1. In the WTO, Members are still debating whether Mode 1 or 2 commitments apply to certain cross-border transactions (*cf S 2.3.2.3*).

[19] In the figures for audiovisual services, eg, the imbalance between GATS Mode 1 vs Mode 2 is existent but almost negligible. However, as the percentages only reflect the nature of the very low number of submitted commitments (*cf* to methodology under Table 3.3), this does in no way mean that the issue of modal imbalance can be discarded for audiovisual services.

Table 3.3: Inventory of the GATS commitment levels under Mode 1 / 2 for 146 WTO Members and pertinent service sectors, 2004

	Total[a]	*Market Access*						*National Treatment*					
		Mode 1			*Mode 2*			*Mode 1*			*Mode 2*		
		Full	*Par.*[b]	*No*	*Full*	*Par.*[b]	*No*	*Full*	*Par.*[b]	*No*	*Full*	*Par.*[b]	*No*
Computer and Related Services													
Consultancy services related to the installation of software	66	64%	18%	18%	71%	17%	12%	68%	11%	21%	76%	9%	15%
		42	12	12	47	11	8	45	7	14	50	6	10
Software implementation services	71	61%	24%	15%	69%	23%	8%	65%	17%	18%	73%	15%	11%
		43	17	11	49	16	6	46	12	13	52	11	8
On-line information and / or data processing services	69	59%	25%	16%	68%	23%	9%	62%	20%	17%	72%	17%	10%
		41	17	11	47	16	6	43	14	12	50	12	7
On-line information and / or data base services	62	61%	21%	18%	71%	21%	8%	66%	15%	19%	77%	13%	10%
		38	13	11	44	13	5	41	9	12	48	8	6
Other	44	52%	43%	5%	55%	41%	5%	57%	39%	5%	61%	34%	5%
		23	19	2	24	18	2	25	17	2	27	15	2
		19	31	6	28	22	6	33	18	5	32	16	8
Value-Added Telecom Services													
On-line information and data-base retrieval	70	31%	61%	7%	43%	47%	10%	56%	39%	6%	53%	34%	13%
		22	43	5	30	33	7	39	27	4	37	24	9
On-line information and / or data processing	56	34%	55%	11%	50%	39%	11%	59%	32%	9%	57%	29%	14%

	Total[a]	*Market Access*						*National Treatment*					
		Mode 1			*Mode 2*			*Mode 1*			*Mode 2*		
		Full	*Par.[b]*	*No*	*Full*	*Par[b]*	*No*	*Full*	*Par.[b]*	*No*	*Full*	*Par.[b]*	*No*
Audio visual Services													
Motion picture and video tape production and distibution	24	42%	42%	17%	42%	50%	8%	42%	33%	25%	42%	42%	17%
		10	10	4	10	12	2	10	8	6	10	10	4
Motion picture projection services	17	53%	29%	18%	65%	29%	6%	59%	24%	18%	65%	24%	12%
		9	5	3	11	5	1	10	4	3	11	4	2
Radio and television services	12	50%	33%	17%	50%	42%	8%	67%	25%	8%	58%	33%	8%
		6	4	2	6	5	1	8	3	1	7	4	1
Radio and television transmission services	9	33%	44%	22%	44%	44%	11%	56%	33%	11%	56%	33%	11%
		3	4	2	4	4	1	5	3	1	5	3	1
Other	6	0%	67%	33%	17%	83%	0%	33%	33%	33%	33%	50%	17%
Recreation, Cultural and Sporting Services													
Entertainment	39	51%	10%	38%	67%	28%	5%	54%	10%	36%	64%	15%	21%
		20	4	15	26	11	2	21	4	14	25	6	8

[a] Total number of Members with commitments in the sector concerned for any of the two modes.

[b] Stands for partial commitments and includes horizontal limitations.

Notes: Some totals exceed or fall short of 100 % because they were rounded off Total 146 WTO Members. The data includes all recent accessions (eg, China, Armenia, Macedonia). Nepal and Bahrain are not yet included.

If a Member does not wish to bind itself in any modes of supply for a given sector (ie, no commitments for all modes), the member does not need to include this sector/sub-sector in its schedule of commitments. This absent entry does not enter into the percentage value. The commitment level "partial" is attributed to any sector-specific entry in a Member' schedule if the Member deviates from full market access or national treatment by indicating the specific limitations it wishes to maintain. A market access or national treatment limitation maintained even by just one EC Member State or one US state (for a given sector and mode of supply) is counted as a "partial" commitment for the whole EC and the US.

Source: Updating the data from CTS, Telecommunications Services - Background Note by the Secretariat, S/C/W/74 (8 Dec 1998), p 18 and CTS, Background Note by the Secretariat, Structure of Commitments for Modes 1, 2 and 3, S/C/W/99 (3 Mar 1999). Thanks go to the WTO Secretariat and Aaditya Mattoo (World Bank) for their assistance.

confirms the previous results of low audiovisual and entertainment and more wide-spread computer and telecom service commitments. It is also shown that in audiovisual services, for example, commitments can also vary widely between sub-sectors.

It is therefore important during the Doha Development Agenda to ensure a reduction of this modal and sectoral imbalance, either by clarifying whether GATS Mode 1 or 2 apply to digitally-delivered content products or—even better—to ensure that both receive an equally high level of GATS commitments, and by entering new specific commitments in sectors which are not fully committed.

3.2.2 Computer and Related Services

As *Chapter Two* identified, some digitally-delivered content products (software and entertainment games) may fall under the 'Computer and related services'-category.

Computer and related services are a sub-sector of the, in general, greatly liberalised service sectors represented in the 'Business services'-category of the W120 (*cf* Table 1.5). This relatively high commitment level reflected in Tables 3.2 and 3.3 can be traced back to the originally low level of regulations in these sectors.[20] Moreover, at the time no link was established between this category and content products like entertainment games.

As a result, a relatively high number of commitments in the field of computer services (from 62 for 'On-line information and database services' to 71 GATS Mode 1 and 2 commitments for 'Software implementation services') can be found in Table 3.3.[21]

The EC, the US and most other industrialised countries have committed fully in Modes 1 and 2 without listing limitations on market access or national treatment. In general, the entry of sector-specific limitations is rare[22] and thus full market access and national treatment commitments outnumber partial commitments.[23] The percentage of full Mode 2 commitments does not significantly outweigh the percentage of full Mode 1 commitments,[24] showing that—despite an above-average amount of commitments—the classification issue Mode 1 vs 2 is less relevant here. Finally, no sector-specific MFN exemptions have been listed for computer services.

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

[21] Here the results of Tables 3.2 and 3.3 are complemented by insights from the WTO Background Note on Computer Services, pp 12–14 and CTS, Communication from MERCOSUR, Computer and Related Services, S/CSC/W/95 (9 July 2001).

[22] *Ibid*.

[23] *Ibid*.

[24] WTO Background Note on Computer Services, Table 5.

Despite this high commitment level, it is essential that the Doha Negotiations are used to achieve substantial improvements in terms of market access and national treatment commitments.[25] Whereas developed and some other WTO Members have—by and large—committed the sector to its full extent (around 40 out of 147 WTO Members),[26] non-OECD countries have often only entered partial commitments or have left certain or all computer services unscheduled or unbound. For example, Brazil, Chile, India, Thailand, Morocco have not included the sector in their GATS schedule (*cf* Table 3.2).[27]

Further to these necessary steps for increased cross-border trade in service liberalisation, the GATS negotiations can also be used to clarify the following points necessary to secure unambiguous non-discriminatory market access for digitally-delivered content products:

— the uncertainty relating to the coverage of electronically-delivered business and leisure software by GATS commitments for Computer and related services (*cf* introduction to *Chapter Two* and *Section 2.3.2.4*); and
— the growing overlap of computer, telecommunication and audiovisual, the generation of new services and the 'regulatory creep'-effect described earlier which reduces the clarity of commitments (*cf Section 2.3.2.4*).[28]

3.2.3 Value-Added Telecommunication Services

The GATS commitments for the two relevant value-added telecommunication services depicted in Tables 3.2 and 3.3 are—as with computer services—quite far-reaching (56 for 'On-line information and/or data processing' to 70 GATS Mode 1 and 2 commitments for 'On-line information and database retrieval').[29] Again the industrialised countries generally have full commitments for value-added telecommunication services. Whereas, for instance, the US has full commitments in both areas, the EC has full commitments in 'On-line information and data base retrieval' but not for 'On-line information and data processing'.

Comparing this to the entire WTO Membership, there is still substantial scope for further commitments. Despite the relatively high level of engagement (as compared to other service sectors), commitments by around 60 WTO Members only amount to less than one half of all 146 WTO Members.

[25] *Ibid*, Table 5.
[26] With the exception of the category 'Other computer and related services'.
[27] Corroborated by OECD (2000a).
[28] See for some classification problems CTS, Committee on Specific Commitments—Communication from the Separate Customs Territory of Taiwan, Penghu, K [. . .], Computer and Related Services, S/CSC/W/37 (8 January 2003). See WTO Background Note on Computer Services, p 2 and CTS, Communication from Canada, Initial Negotiating Proposal on Computer and Related Services, S/CSC/W/56 (14 March 2001) for more background information.
[29] While only a few WTO Members made commitments in the basic telecommunications services, a number of Members undertook commitments for value-added services at the close of the Uruguay Round.

Moreover, on average these two types of value-added telecommunication services depict a lower level of commitments than for computer services.[30] Within the value-added telecom category, 'On-line information and/or data processing' received the lowest number of commitments.[31] For the two sub-sectors, partial commitments outweigh full commitments with, for example, only 31% of all Mode 1 market access commitments on 'On-line information and data-base retrieval' being full commitments. Overall, three types of market access reservations are listed most (eg, limitations on the number of suppliers, restrictions on type of legal entity and, a related measure, limits on the participation of foreign capital). In addition, full Mode 2 commitments outweigh full Mode 1 commitments in the case of market access.[32]

Clearly, the vague difference between audiovisual, telecommunication and computer services, the blurring delimitations between telecom sub-sectors and the fact that the CPC does not reflect the current state of technology also matter at this point.[33]

As regards digitally-delivered content products, it is of interest that the EC has always ruled out that any kind of content could be covered by commitments in its GATS telecom schedule (*cf Section 2.3.2.4*).[34]

3.2.4 Audiovisual Services

The audiovisual sector clearly is a special case among the four pertinent service sectors. It plays a central role for the whole discussion of digitally-delivered content products.

3.2.4.1 Opposed Views on Audiovisual Service Liberalisation

Two very opposed views exist amongst WTO Members on the trade treatment of audiovisual services. These diverging positions are central to the unresolved digital trade questions in *Chapter Two* and to the internal negotiation parameters of the US and EC discussed in *Chapters Four* and *Five*. Thus, background information on the negotiation context is essential.

[30] In addition to Tables 3.2 and 3.3, see CTS, Telecommunication services, S/C/W/74 (8 December 1998) [WTO Background Note Telecommunication Services], pp 6 f for a comprehensive analysis of the commitment level in value-added telecommunication services.

[31] *Ibid*, p 6.

[32] *Ibid*, p 6 and Table 14.

[33] *Ibid*.

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

— On one side, the US and some other WTO Members have always emphasised the commercial nature of the content industry's products. Films, music or other audiovisual products are not seen as any different from other trade commodities. In the view of the US, they deserve the same open and non-discriminatory GATS treatment like any other services.[35]
— On the other side, many WTO Members (especially the EC—notably France—Australia and Canada) attribute a critical cultural and social dimension to audiovisual products. These WTO Members refuse to treat audiovisual services as mere trade commodities to be fully submitted to the rules of free trade.

  The EC has taken a special role in this debate, arguing that the advantages of the international division of labour do not apply to cultural products.[36] In particular, the EC asserts that content products are part of the EC's 'cultural heritage' and that they are tightly linked to concepts like national identity, pluralistic democracy, freedom of speech and cultural diversity.[37] Furthermore, the EC is particularly weary of a possible dominance of the US content industries. Putting forward a market failure argument, the EC asserts that US content producers can better recoup large fixed costs on their larger home market.[38] It is feared that free trade in content would lead to the control of audiovisual content by a small number of US groups.

Even before the existence of the GATS, this special role of cultural products led most WTO Members to introduce policies for audiovisual services that are based on two pillars:

— a regulatory framework for audiovisual services (including content quotas that discriminate against foreign service providers); and
— financial or non-pecuniary support measures for local content production and distribution.[39]

The former content quotas and subsidy schemes for national or affiliated content producers—explained in greater detail for the EC in *Chapter Five*—are usually not compatible with specific GATS commitments.[40] As national subsidy

[35] Balassa (1995) p 6.

[36] See a recent speech of Pascal Lamy on that point: 'Les Négociations Sur Les Services Culturels À l'OMC', address of Pascal Lamy to the Cultural Commission of the European Parliament (19 May 2003), Internet: trade-info.cec.eu.int/doclib/html/116396.htm.

[37] See Jarothe (1998) p 348; and Sauvé and Steinfatt (2000) p 327.

[38] The EC also contends that in the US anti-competitive agreements between producers and distributors restrain market access for outsiders, and that US content producers undertake 'cultural dumping' abroad. See Iapadre (2000) p 4; Footer and Graber (2000); and Bernier (1998) on this accusation of cultural dumping.

[39] OECD (1999) pp 5 and 16 f survey the national audiovisual policies of the OECD Member Countries. See also Working Party on GATS Rules, Subsidies for services sectors, S/WPGR/W/25/Add.3 (19 September 2002) for a compilation of the numerous audiovisual subsidy schemes (mostly direct grants and tax incentives) of WTO Members. WTO Members with subsidy schemes in place for audiovisual services include: Argentina, Canada, the EC, Jamaica, Korea, Mexico, Tanzania, etc. See also McKinsey (2002).

[40] Germann (2003) pp 6 and 22 f.

schemes for audiovisual services are often open to a selected list of third countries, they also violate the MFN principle.[41]

As a consequence of this special character of audiovisual products, these have always been a special case in the WTO framework (*cf* to GATT Article IV discussed in *cf Section 2.3.1.2* which allows the establishment and maintenance of national screen quotas).[42]

3.2.4.2 Effect on the Uruguay Round Negotiations and Outcomes

During the GATS negotiations, the different views concerning the audiovisual sector were so radically opposed that this conflict almost led to a breakdown of the Uruguay Round.[43] Notably the EC, but also countries like Canada and Australia, wanted to preserve their room for manoeuvre with respect to current and/or future audiovisual policies.[44]

Particularly, the EC pressed for an exclusion of the audiovisual sector from the GATS negotiations; the so-called 'exception culturelle'.[45] The latter had as its goal to avoid subjecting any cultural or content support measure to trade rules.[46] It was really the determination of France[47] and the introversion of the European film industry that swayed the EC into this position.

However, especially the US and Japan were not ready to grant this special status to audiovisual services.[48] Although the US was aware of the fact that the EC's financial support measures for the local content industries were not exceedingly damaging to its exports, it disapproved the EC's absent national treatment commitments. Most importantly, the US was determined to seek an abolition of the European television and screen quotas.[49]

[41] In the case of the EC, eg, the audiovisual support measures are open to non-EC European countries (notably the accession countries). The EC also has numerous bilateral cooperation agreements with non-EC countries. Further specific measures that can hamper trade in content are, for example, tax incentives or government subsidies to promote the production and exhibition of domestically-produced films and television programmes.

[42] See GNS, Uruguay Round Working Group on Audiovisual Services, Matters relating to trade in audiovisual services, MTNGNS/AUD/W/1 (4 October 1990) for an elaboration on GATT Art IV.

[43] Tietje (1999a) para 61. For a detailed elaboration on the WTO treatment of audiovisual products and the Uruguay Round see Baumann (1998); Jarothe (1998) pp 347 f; and Acheseon and Maule (1999).

[44] See Messerlin (2000) p 306. Morgan de Rivery (1995) elaborates on the position of the EC.

[45] Falkenberg (1995) pp 429 f; and Hahn (1996). This suggestion entailed an exclusion of the cinema and broadcasting sectors from the GATS.

[46] See Saint-Pulgent, *et al*, (2003) p 66: 'L'exception culturelle ne définissait pas une politique culturelle mais une légitimation de toute politique culturelle—puisqu'elle traduisait l'idée que la question culturelle ne pouvait pas rentrer dans le champ des négociations commerciales.'

[47] Woolcock and Hodges (1996) p 322. The concept of an 'exception culturelle' has long-standing historical roots in France and its political leadership is determined to preserve it. See Gournay (2002); Regourd (2002); Saint Pulgent, *et al*, (2003); and Balle (1995).

[48] Eeckhout (1994) p 135.

[49] These points result from an interview with the MPAA representative to the European Commission in October 2001.

Finally, extensive negotiations led to a tailored integration of the audiovisual sector into the GATS; the so-called 'spécificité culturelle'.[50] The peculiarity of the 'spécificité culturelle' is that—on the one hand—the audiovisual sector is fully submitted not only to the GATS general obligations (GATS Article II to XV) but also to the obligations on progressive liberalisation (GATS Article XIX to XXI). The final provisions do not contain language referring to a 'cultural exception' and, as opposed to a widespread misconception, Article XIV (GATS exemptions) does not contain an exemption relating to the protection of cultural values.[51]

On the other hand, WTO Members were not pressured into any specific audiovisual service commitments.[52] The service area that the EC wanted to protect most (ie, broadcasting) does not appear as a sub-sector of the audiovisual service category.[53] Furthermore, in the absence of national treatment commitments for audiovisual services or a stricter general discipline on subsidies, governments can continue to fund the production of national audiovisual services—while discriminating against foreign service suppliers—and when complemented by an MFN exemption for audiovisual services governments can selectively extend these subsidy schemes to certain trade partners.[54]

In terms of how the *general GATS obligations* apply to audiovisual services, the following more specific outcomes have emerged:

— The general obligations fully apply to audiovisual services, no matter if specific commitments have been entered. But the absence of specific GATS commitments was not sufficient to ensure the compatibility of the GATS MFN obligations with the preferential treatment of third countries with regard to audiovisual policies. Hence, the EC and other countries successfully exercised pressure in order to be able to derogate from the MFN obligations.[55]

[50] See Dujat (2000) pp 9–11 for a background to the evolution behind the terms 'exception culturelle', 'spécificité culturelle' and 'exemption culturelle'.

[51] See Yüksel (2001) p 72 for such an interpretation. See Baumann (1998); Iapadre (2000); and Hauser and Wunsch-Vincent (2002) pp 129 f for the applicable GATS rules in the case of the audiovisual sector.

[52] Balassa (1995) p 2 refers to this situation of full integration of audiovisual services under the general GATS obligations but absent specific GATS obligations as a 'draw' between the EC and the US at the end of the Uruguay Negotiations. See also Paemen and Bensch (1995) pp 233–34.

[53] Tietje (1999a) paras 70 and 72.

[54] In this context, it is important to realise that—as opposed to popular views—the GATS permits subsidies as such. However, insofar as subsidies are trade-related, they are measures (as defined in GATS Art I para 3 a) covered by the general obligations and national treatment commitments made under the GATS. Via the general MFN obligations of the GATS, WTO Members would—in the absence of MFN exemptions—not be able to extend their subsidy schemes selectively to certain trading partners. Moreover, national treatment commitments that do not exclude subsidies would constrain a WTO Member to administer its subsidy scheme in a manner which accords services and service suppliers from other WTO Members a treatment not less favorable than accorded to national service suppliers.

[55] GATS Art II, para 2 and GATS Annex on Art II Exemptions.

WTO Members (including in one case the US[56]), but especially the EC,[57] made active use of the possibility of listing temporary MFN exemptions in the audiovisual field.[58] The exemptions most commonly cover co-production arrangements for film and television productions, typically granting, for example, national treatment status in respect of eligibility for financial assistance (ie, subsidies) and tax benefits. Most MFN limitations are directly applicable to digitally-delivered content products because the exemptions are often aimed at audiovisual policies with wide applicability or at general conditions affecting the distribution of audiovisual works, rather than at certain delivery technologies (eg, TV) or particular content.

In terms of *specific GATS commitments,* the following results emerged (*cf* Table 3.3)[59]:

— The audiovisual service sector is the one with the lowest number of specific GATS commitments and the lowest number of WTO Members entering commitments.[60] Most WTO Members followed the approach of the EC thus entering no specific GATS commitments[61] and continuing to maintain discriminatory subsidy schemes for audiovisual services.[62] The low level of audiovisual service commitments that varies widely across the different sub-sectors (from 9 commitments for 'Radio and television services' to 24 commitments for 'Motion picture and video tape production and distribution') is illustrated in Table 3.3.[63] Moreover, a significant share of Mode 1 and 2 commitments are subject to limitations. It also remains unclear which audiovisual service commitments apply to digitally-delivered content products.

[56] The US took one MFN exemption allowing differential treatment due to application of reciprocity measures or through international agreements as regards one-way satellite transmission of DTH and DBS television services and of digital audio services. See GATS List of Art II (MFN) Exemptions of the US, Supplement 2, GATS/EL/90/Suppl.2 (11 April 1997).

[57] GATS List of Art II (MFN) Exemptions of the EC, GATS/EL/31 (15 April 1994). Examples of the EC's MFN limitations are, eg, measures granting the benefit of any support programmes to audiovisual works, and suppliers of such works, meeting certain European origin criteria.

[58] Counting the EC as a single entity, a total of 33 countries listed MFN exemptions for audiovisual services. This represents 29% of all MFN exemptions. See WTO Background Note on Audiovisual Services, pp 7 f; OECD (2001) p 11; and CTS, MFN Exemptions, Communication from Japan, S/CSS/W/42/Suppl.1 (14 May 2001).

[59] See Falkenberg (1995); and Morgan de Rivery (1995).

[60] Just after the Uruguay Round 13 WTO Members had made audiovisual service commitments. In 1999, this figure rose to 19. See WTO Background Note on Audiovisual Services, Table 9; and Krancke (2003) p 151.

[61] Some have scheduled the audiovisual sector as 'unbound' but most WTO Member fully excluded the audiovisual sector from their GATS country schedule. See Tietje (1999a) paras 70–72, 137–41 and 202 for the EC commitment level on audiovisual services. See also Kruse (1993) p 291; and Jarothe (1998) p 352.

[62] Working Party on GATS Rules, Subsidies for services sectors, S/WPGR/W/25/Add.3 (19 September 2002).

[63] *Cf* WTO Background Note on Audiovisual Services, pp 7 f, based on the commitment level of 1998.

In contrast to almost all WTO Members, the US made full cross-border market access commitments in all its audiovisual sub-sectors. But even the US upholds limitations that are partly the result of the GATS framework itself. The US maintains modest national treatment limitations to GATS Mode 1.[64] More importantly, the US schedule—which does not build on the GATS Services Sectoral Classification List—is no more up-to-date than other schedules in terms of making explicit commitments for content *per se* or digitally-delivered content products. It also does not enter commitments for new content transmission technologies/services (cable and satellite television,[65] one-way satellite transmissions of direct-to-home (DTH) and direct broadcast satellite (DBS) television services,[66] etc).

In sum, both the number of MFN exemptions and the specific GATS commitments in audiovisual services leave much to be desired.

3.2.4.3 Requirements for Audiovisual Service Liberalisation in the Doha Round

In order to achieve favourable trade treatment of digitally-delivered content products during the Doha Development Agenda, two main measures are to be taken in the realm of audiovisual service negotiations.

— First, the way forward is for WTO Members to agree on whether and under which audiovisual sub-sectors digitally-delivered content products fall. To be meaningful for digitally-delivered content products, any liberalisation of the audiovisual services must address the classification issues outlined in *Section 2.3.2.4*.
— Second, WTO Members need to make appropriate full specific GATS commitments in the chosen or created category. In fact, the elimination of MFN exemptions,[67] increased specific commitments for audiovisual services and their full submission to GATS rules are—following the progressive liberalisation mandate of the GATS[68]—on the agenda of the Doha Negotiations. In principle, the exemption of the audiovisual sector from

[64] In the case of 'Motion picture and videotape production and distribution', 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.' However, in comparison to the EC's cultural subsidies the volume of grants from which foreigners are excluded is negligible (*cf S 4.1.1*).

[65] Personal interview with USTR officials.

[66] USA, Schedule of Specific Commitments Supplement 2, GATS/SC/90/Suppl.2 (11 April 1990).

[67] 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.

[68] GATS, Art XIX, para 1.

specific commitments is—as opposed to various assertions of French and/or EC officials[69]—only provisional.[70]

Finally, the general obligations of the GATS do not formulate a discipline to curtail trade-distortive subsidies. GATS Article XV, paragraph 1 only constrains the WTO Members to '[. . .] enter into negotiations with a view to developing the necessary multilateral disciplines to avoid [. . .] trade-distortive effects'. WTO Members are scheduled to negotiate a GATS Discipline on Subsidies that is likely to affect audiovisual policies.[71]

3.2.5 Entertainment Services

The exceptionally low number of GATS commitments in the area of entertainment services from all WTO Members makes this narrow sub-sector of the category 'Recreational, cultural and sporting'-services very similar to the audiovisual service sector.

With a total of 39 commitments (*cf* Table 3.3), the majority of Members has not undertaken GATS commitments. Whereas the US has full commitments for market access and national treatment, the EC (except for some of its Member States[72]) and most other WTO Members have abstained from making commitments for entertainment services. Mode 2 commitments in entertainment services are significantly less liberal than under Mode 1.

Next to improving the generally low level of specific commitments on entertainment services, WTO Members need to clarify their scope and thus their relationship to digitally-delivered content products.

CONCLUSION TO PART TWO

Part Two demonstrates that WTO Members have extensive room for interpretation when it comes to the applicability of their trade obligations to digitally-delivered content products. This state of affairs which decreases the legal certainty of the GATT and GATS obligations results from an uncertain coverage of digitally-delivered content products, from the convergence of

[69] For some misleading statements of EC officials see address of Viviane Reding above at chapter 2 n 110 and Communication from the Commission to the European Parliament and the Council of Ministers on 'Audiovisual Policy: Next Steps', COM (1998) 446 final (14 July 1998) that stresses that audiovisual support measures are an irrevocable '*acquis*'.

[70] See Graber (2002) p 1; Sauvé and Steinfatt (2000) p 2; and Iapadre (2000) that buttress the argument that the *status quo* in audiovisual services will be challenged during a new round of GATS Negotiations.

[71] Groupe de Travail Franco-Québécois Sur la Diversité Culturelle (2002) pp 42 f; Sauvé (2002); and Hauser and Wunsch-Vincent (2002) pp 134 f.

[72] Only countries like Austria and Sweden that acceded to the EC in 1995 and Iceland have committed to full market access.

certain applicable service (sub)-sectors and from an imbalance of commitments between service (sub)-sectors that could potentially apply to digitally-delivered content products.

As derived in the previous Chapters, two interrelated types of requirements are crucial to the creation of a liberal, clear and predictable trade framework for digitally-delivered content products:

— solutions to the outstanding horizontal e-commerce questions outlined in *Chapter Two* (especially clarifying the commitments applicable to digital trade) which will be hard or impossible to find outside of the Doha market access negotiations; and
— measures outlined in *Chapter Three* that bring about further specific GATT and GATS commitments.

Table 3.4 summarises the full set of requirements in detail.

Table 3.4: Summary of requirements for free trade in digitally-delivered content products

Solutions to Horizontal Questions	
Applicability of WTO rules to e-commerce	Affirm that WTO Rules apply—without reservation—to e-commerce.
Moratorium	Establish a clear-cut WTO duty-free moratorium on digital transactions, applicable to transmission and content.
Valuation	Take decisions on the valuation questions and its applicability to digitally-delivered content products.
Classification decisions	Decide what GATT and/or GATS commitments bind the four categories of digitally-delivered content products (1. Movies / Film / Images, 2. Sound & Music, 3. Software, and 4. Video, Computer & Entertainment Games). **GATT:** • Decide on the applicability of the ITA and of the GATT Valuation Decision to digitally-delivered content products. **GATS:** • Confirm that GATS commitments apply to digitally-delivered services. • Establish some guidelines on assessing the "likeness" of services that—at the minimum—recognise that electronically-delivered services are "like" physically-delivered ones. • Decide whether GATS Mode 1 or 2 commitments apply to digitally-delivered content products. • Decide which specific GATS commitments (service sector and sub-sector) apply to digitally-delivered content products.

Table 3.4 (*cont.*)

Market Access Issues (depending on answers to open horizontal questions)	
NAMA negotiations	**Market Access** Reduce tariffs on physical carrier media via • an increase of the number of ITA participants, a multilateralisation of the ITA and/or possibly an update of the product list. • horizontal or sector-specific tariff reductions affecting physical carrier media. Decide that all digital products should - for customs purposes— be valued on the basis of the cost of the media carrier they are embedded on.
Service negotiations	**Market Access** Achieve full market access and national treatment for digital content via full commitments under the GATS for computer and related services, value-added telecom, audiovisual and entertainment services for both the creation and the distribution of digital content. This can be done via full market access and national treatment commitments in all relevant (sub)-sectors implemented through — the use of a negative list approach that binds digitally-delivered content products. — a targeted, and complete set of GATS commitments in agreed sub-sectors (eg digital delivery of movies over the Internet). — full GATS commitments on the two-digit level for sectors that are found to be applicable (eg CPC 84 Computer services). **GATS Rules** Establish a GATS discipline on subsidies and on domestic regulation.

Part Three:

Internal US and EC Negotiation Parameters

Part Three assesses the internal negotiation parameters that influence the US and the EC WTO negotiators' readiness and ability to take the necessary steps outlined in *Part Two* during the ongoing Doha Development Agenda.

Chapter Four sheds light on the internal negotiation parameters of the US whereas in *Chapter Five* the analysis is conducted for the EC.* As the factors determining the respective US and EC negotiation parameters do not follow the same rationales, the set of factors analysed for the US and the EC is not entirely symmetric.

As will be seen, the internal trade policy processes and responsibilities have significant influence on the potential outcome of the negotiations.

* For the rationale behind this approach *cf* the *Research Approach*.

4

*US Negotiation Parameters: Internal Measures and Trade Jurisdiction**

THE POSITIONS TAKEN by the US on the trade treatment of digitally-delivered content products follow a clear rationale: the desire to preserve a free global trade environment for e-commerce and digitally-delivered content products. In particular, the US is striving to avoid that new media like the Internet are confronted with the same trade barriers that have been instated for traditional content delivery technologies, like broadcasting or the cinema. All in all, this trade policy objective is bolstered by a very explicit mandate concerning digital trade issues and tight procedural requirements that leave the USTR with little leeway.

Section 4.1 on the internal dimension of the negotiation position shows that the US practises a hands-off approach to the regulation of content and to the regulation of the emerging Internet services. The internal regulatory framework and the strengths of the US entertainment and computer industry do not warrant governmental support for digital content. Rather a new and influential coalition of the American entertainment and software industries is calling on the US government to establish a global free trade framework for digitally-delivered content products. Being very receptive to the industry's agenda, the US administration and US Congress reflect their prerogatives in domestic laws that also pronounce trade policy objectives.

Section 4.2 reveals that these objectives have translated into an ambitious US trade negotiation strategy for digitally-delivered content products which ties the hands of USTR negotiators on the offensive side and which receives exceptional bipartisan support. Following the new 'principle of competitive liberalisation', US negotiators have been instructed to use a concurrent bilateral, regional and multilateral approach to pursue US digital trade objectives.

This digital trade mandate is backed by increased congressional oversight rights, significant congressional power to enforce US trade negotiation objectives and a strong role for the industry in the trade policy formulation process. At a time when general congressional support for fast-track authority is at an historic low, USTR negotiators will be pressed to achieve the congressional digital trade mandate set out by the US Congress before the fast-track negotiation authority of the US President expires (initially 2005, renewable to 2007).

Throughout the two sections, it is shown that the classification of digitally-delivered content products outside of the narrow category of audiovisual services is necessary to achieve significant market access for digitally-delivered content products and thus to do justice to the congressional mandate.

The laws based on the US Framework for Global Electronic Commerce and the 'Bipartisan Trade Promotion Authority Act of 2002'[1]—the formal delegation of trade negotiation authority from the US Congress to the USTR signed into law on 6 August 2002—constitute the applicable US law for this Chapter.

4.1 INTERNAL DIMENSION: US FREEDOM OF SPEECH AND LAISSEZ-FAIRE APPROACH

4.1.1 Quasi-Inexistence of US Audiovisual Policy and an Export-Oriented US Content Industry

As set out in *Section 3.2.4.1*, the US emphasises the commercial nature of content products and the importance of a liberal digital trade regime.

4.1.1.1 In-Existence of US Audiovisual Policy: Freedom of Speech and a Non-Interventionist Approach with Respect to Content Industries

In the US, hardly any regulatory or financial measure exists to support the creation of (digitally-delivered) content. In practice, the US does not have a Ministry of Culture that oversees a centralised cultural policy and its direct cultural support measures are relatively minor.[2]

Furthermore, the US does not implement any audiovisual regulation in the form of local content quotas. No official audiovisual policy or federal regulation exists that fosters the production or distribution of cinematic motion pictures, music or other (digital) content.[3] Even the programme of the National Endowment for the Arts that provided small production subsidies for non-profit film and video production is reported to have been discontinued.[4]

Some US States and American municipalities implement some financing and tax initiatives (eg, sales tax incentives), host film commissions and simplify

[1] Public Law 107–210 under Internet: www.tpa.gov/pl107_210.pdf (20 June 2004); House of Representatives (2001d); and Senate Committee on Finance (2002b).

[2] Saint-Pulgent, *et al*, (2003) p 17. The direct US financial support for culture (including, eg, museums) is—in absolute terms—roughly ten times smaller than in France and three times smaller than in the UK.

[3] Balassa (1995) p 1; and Germann (2003) pp 3 f. The US trade barriers reports from the EC (European Commission 2000a, 2002b) do not mention any US audiovisual market access barrier. See Rodriguez (2000) on the US hands-off approach to content regulation.

[4] CTS, Communication from the US, Audiovisual Services, S/C/W/78 (8 December 1998). For example, the endowment provided the relatively little sum of $900000 for the two-year fiscal period 1995/1996.

administrative procedures to attract entertainment industries.[5] Infrastructure investments are also partly financed by state governments.[6] But as opposed to other WTO Members' actions, these measures—targeting both domestic and foreign producers—are mostly non-discriminatory and still small in scope and scale.[7] No special incentive programme of the government (neither on the federal nor on the state-level) exists to foster the creation, the distribution or the commercialisation of digital content.

This attitude in support of the broadest possible free flow of content within and across international borders and the absence of an audiovisual policy are rooted in the First Amendment to the US Constitution on free speech that has a long history in preventing US governments from legislating on content (except for matters relating to child pornography and obscenity).[8] The non-interventionist approach that the US government affirms to take in the market economy, a key characteristic of the US economic system, also plays a large part in determining the hands-off approach of the US government vis-à-vis the content industries.[9]

4.1.1.2 Export-Oriented US Content Industry with Significant Political Clout

As opposed to the EC, US trade policies with respect to the content industries are offensive in nature. In fact, the contribution of the service industries in general and the content industries in particular to US growth and employment are increasingly recognised.[10]

The USTR's and the US Congress' stance is driven by the fact that the US is the world's leading exporter of services. Its exports account for roughly a fifth of world services trade in 2002, with service exports more than doubling between 1990 and 2002 and continuing to grow fast.[11] The US comparative advantage in the service sector industries is reflected in the increasing net export balance in services which improves the US balance of payments.[12] The

[5] Jones (2002) pp 41–43 (especially Table 17).

[6] *Ibid*.

[7] *Ibid*.

[8] First Amendment to the US Constitution on Religion, Speech, Press, Assembly, Petition of 1791 which specifies that, 'Congress shall make no law [. . .] abridging the freedom of speech [. . .]'. See Balassa (1995) p 1; and Rodriguez (2000) pp 34 f. On content regulation relating to child pornography or obscenity on the Internet see, for example, the Children's On-line Privacy Protection Act of 1998 which regulates the collection, use, and distribution of information obtained on-line from children under the age of thirteen.

[9] Rodriguez (2000) pp 28 f; and Bach and Erber (2001) pp 126–28.

[10] USTR (2002) pp 14 and 18 f.

[11] For the figures on the US export strength see WTO (2001a) p 161; USTR (2004) p 5 and the BEA data on US service trade (release from 14 September 2004) showing that in the first half of 2004 US services exports increased by $3.5 billion to $85 billion, exceeding imports by $13.7 billion. See also US Department of Commerce (2005).

[12] Mann (1999) pp 35 f and 37; BEA (2003); and Senate Committee on Finance (2002a).

significant export-driven job creation through US services industries receives important political consideration.[13]

Even more importantly, the US has a comparative advantage in the production and export of content products (increasingly called *core copyright industries* in Washington DC[14])[15]. In 2002—the latest figures available—the US content industries accounted for six percent of the US GDP and between 1997 and 2001 the copyright industries' share of Gross Domestic Product (GDP) grew more than twice as fast as the remainder of the economy.[16] Foreign sales and exports of the combined copyright industries surpassed those of all other major respective industry sectors in 2001.[17] Due to its significant trade surplus, the audiovisual sector is often characterised as 'jewel in America's trade crown'.[18] On top of their past strong performance, US software publishers are projected to experience above-average export and employment growth, dominating both the pre-packaged and custom software markets with a trade surplus of $24.3 billion in 2002.[19]

Consequently, not only the traditional content industries but also the computer software and service providers enjoy increasing and bipartisan congressional support which is also driven by their important financial political support to the political parties. Indeed, as shown in Table 4.1, they are among the top ten or top 15 industries with considerable campaign donations, a reasonably good proxy for their congressional influence, to both Democrats and Republicans.[20]

The traditional content industries (ie, TV/Movies/Music) represented by the MPAA and corporations like Time-Warner, have a long-standing influence on the US Congress.[21] On average, the traditional content industry ranked 8th in terms of campaign contributions between 1990 and 2004 and it ranked 11th in the 2004 election cycle.[22] In the 2004 election cycle, the Democrats actually received a greater but decreasing share of funds coming from the content industries, making the contributions to Congress slightly more bipartisan.

[13] Bureau of Labor Statistics (BEA), Release of 8 October 2004 and 'Employment Data Show Good-Paying Services Jobs Increase Again: 1.2 million US Services Jobs Added in 2004 Overall', CSI Press Release, 8 October 2004.

[14] See Siwek (2000, 2002, 2004).

[15] USTR (2002) p 2.

[16] Siwek (2002, 2004).

[17] *Ibid*.

[18] House of Representatives (2001a) p 17.

[19] See CSI (2003) p 11; BSA (2003); and House of Representatives (2003) on the export strength of the US software industry and BLS (2004) on employment growth in the IT sector.

[20] Center for Responsive Politics (1996); and Center for Responsive Politics (2002) both based on data from the Federal Election Commission.

[21] *Ibid*. A 2001 Fortune ranking of the top lobbying groups in Washington DC (The Power 25) also displays that the MPAA ranks 16th, the National Association of Broadcasters 17th and the Recording Industry Association of America 22nd, Internet: www.fortune.com/fortune/washingtonpower25.

[22] Center for Responsive Politics (1996); and Center for Responsive Politics (2002).

Table 4.1: Campaign donations of US content industries, 2002 midterm and 2004 election cycle

Year	*Rank*[a]	*Industry*	*Amount*	*Democrats*	*Republicans*	*Balance*
2002	7	TV / Movies / Music	USD 39.927.758	78%	22%	Strongly Democratic
	12	Computers / Internet	USD 26.586.687	48%	51%	On the Fence
2004	11	TV / Movies / Music	USD 20.859.235	68%	32%	Leans Democratic
	13	Computers / Internet	USD 18.178.684	51%	48%	On the Fence

[a] Ranking of the industry as compared to more than 80 other industries.

Source: Center for Responsive Politics, based on data from the Federal Election Commission (FEC) that discloses campaign finance information, Internet: www.opensecrets.org (24 March 2004). Numbers are based on contributions from political action committees (PACs), soft money donors, and individuals giving $200 or more. The 2004 election cycle runs from 1 January 2003 to 31 December 2004. Data for the current election cycle were released by the Federal Election Commission on 25 October 2004.

The software and Internet industries stayed relatively aloof from US politics for many years. But as can be seen from the latest available figures on campaign contributions, in a few years the computer and the software industry have translated their economic strength into major political influence (from rank 53 in 1990 to rank 13 in 2004).[23] Especially the computer software industry (eg, Microsoft, IBM) has gained in importance.[24] Furthermore, the support of the software and Internet industries is—if judged by campaign contributions—exceptionally bipartisan. At least since 1998, the US software and IT industries' interests are also reflected in US trade jurisdiction.[25]

4.1.2 New US Policies for the Digital Age

As stated before, the US government has—apart from some active broadband diffusion policies[26]—no special incentive programmes for the creation or distribution of digital content.

[23] For the figures see sources under Table 4.1. Lawrence (1984); Destler (1995) pp 46, 183 and 192; and Shoch (2001) p 65 shed light on the growing political clout of the IT and software industry on US Congress.

[24] As can be seen from Center for Responsive Politics (2002) p 8 software firms like Microsoft have gone from negligible donations to becoming the top 50 donors between 1989 and 2002. The same publication shows on pp 8–9 that the entertainment sector figures prominently in the Top 50 and Top 100 donation rankings.

[25] S 1101 (b) (15), Omnibus Trade and Competitiveness Act of 1988 (OCTA).

[26] See the US Federal Communications Commission (FCC) for strategic goals relating to broadband deployment, Internet: www.fcc.gov/broadband/ (20 March 2004).

However, it is acknowledged that the rise of digital-delivery technologies has increased the potential positive economic impact of US digital content producers. Since 1996, the US Congress and the US Administration have been operating under the assumption that the Internet can lead to a major increase in US economic growth and the productivity of US content industries[27] and that the US is an uncontested leader in e-commerce.[28] Moreover, the possibility of digital delivery is seen as a catalyst to global market reach for the already very competitive US content industries.[29]

Both the traditional and the new content industries use their growing political influence amongst the two parties to call for a hands-off approach of the US government vis-à-vis the regulation of content and new technologies, a strong intellectual property regime and the pursuit of an offensive US trade policy for digital content.

4.1.2.1 Responses to the Digital Age: New Influential US Industry Coalition

The rise of e-commerce has also led to influential industry coalitions that exert added political pressure on US Congress.

Due to increased digital delivery possibilities for content products, the different associations representing the US content producers (ie, MPAA for films, the Recording Industry Association of America, RIAA, for music and the BSA for software) are more and more seen as a single entity with analogous trade policy interests.[30] Moreover, US business associations that represent high-tech manufacturing (eg, Information Technology Industry Council) and services firms on the one hand, and associations that represent classical content industries on the other (eg, MPAA), are increasingly having similar interests in fostering a non-interventionist and liberal approach to digital trade.

Especially, the US IT and the software industry have increasingly attached more importance to non-GATT issues due to their current evolution from goods- to service-producing firms. The US software industry, in particular, is taking more interest in the unresolved WTO classification questions around digital content. It is not ready to face a 'reclassification' of its products sold on-line from GATT to GATS and/or from 'computer and related service' with many specific GATS commitments to 'audiovisual service' with few commitments. Therefore the stake of the US software industry is actually higher than that of

[27] 'Approaching the New Round: American Goals in Services Trade', address of Susan Essermann (Assistant USTR) to the Senate Finance Subcommittee on Trade (21 October 1999); Advisory Commission on E-Commerce (2000); US Treasury (2000); White House (1997a, b) and, eg, 'Outlining a vision to shape congressional information technology policy into the next century to promote and preserve the successes, leadership, and uniqueness of the United States information technology sector', H Con Resolution 182, 1st Session, 106th Congress, referred to House Committee on Commerce; Washington DC: House of Representatives.

[28] 'High-Tech Groups Focus On Trade Vote', in: *Washington Post* (14 May 2002).

[29] WITSA (2000) p 16.

[30] Siwek (2002) p 9.

the audiovisual content producers who—over a period of almost ten years—have adjusted to a low level of audiovisual GATS commitments.

For its part, the MPAA welcomes this new important ally in the quest for free trade afforded to digitally-delivered content products.[31] As during the Uruguay Round the MPAA triggered a lot of bitterness from WTO Members (especially in the EC), even today its trade-related requests provoke suspicion, if not resentment, with trade partners. Hence, at the global level, the US IT and software industry may actually have more political clout.

Effectively, the merging digital trade policy objectives of the US IT, software and the content industries came to a peak in the recent move of a group of leading entertainment industries (including hardware, video games and traditional content) to form the Entertainment Industry Coalition for Free Trade (EIC).[32] The service industry—represented by the Coalition of Service Industries (CSI)—also takes a strong stand on e-commerce issues[33] which is echoed in positions of the US administration.[34]

Without doubt, the influence of these industry coalitions was decisive for the enactment of the US Trade Promotion Authority in 2002 and its digital trade-related negotiation objectives. The support of these industries will also be crucial for the completion of the Doha Negotiations before the fast-track authority elapses before the end of 2007.

4.1.2.1 Corresponding Recent US Legislative Efforts: Free Global E-Commerce and Trade in Content

In its non-trade-related legislation, the US Congress has thus followed the industry's advice that e-commerce, and digital trade of content in particular, will thrive best with a strong intellectual property regime[35] but without any interference from government.[36]

To start with, the US government has continued to refrain from audiovisual policies or content regulation. Moreover, legislation of the US Congress recognises that the high-tech and content industry has been successful because it has been free from government interference.[37] The US hands-off policy with respect

[31] Based on personal interviews.

[32] 'Entertainment Companies and Trade Associations Announce Creation of Entertainment Industry Coalition for Free Trade', Press statement of the Entertainment Industry Coalition for Free Trade (EIC), Washington, DC (13 March 2003), Internet: www.mpaa.org/jack/2003/2003_03_13Cpdf (12 May 2004).

[33] See, for instance, CSI (1999) and most CSI contributions since then.

[34] See for example 'Introductory Remarks before the Services 2002 Conference', address of Dean R O'Hare (US Department of Commerce) to the CSI (5 February 2002), Washington, DC, Internet: www.uscsi.org/meetings/services2002/o'hare.pdf (12 June 2004). For the increasing influence of the US service industry on its American trade policy see Shoch (2001) p 114; Paemen and Bensch (1995) p 163; Heeter (1998); and Freeman (2000).

[35] See, for example, the Digital Millennium Copyright Act of 1998, Pub L No 105–304, § 102 (a)(4), 112 Stat 2861, the US legislation that implements the WIPO Internet treaties.

[36] Advisory Commission on E-Commerce (1997, 2000) and US Treasury (2000).

[37] Rodriguez (2000) pp 28 f.

to e-commerce in general and digitally-delivered content products in particular was formalised by the US 'Framework for Global Electronic Commerce' and the 'Presidential Directive on E-Commerce' decided upon in July 1997.[38]

The Framework establishes four principles for e-commerce:

— the private sector should lead;
— governments should avoid undue restrictions on e-commerce;
— where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for e-commerce; and
— e-commerce over the Internet should be facilitated on a global basis.[39]

With respect to free global e-commerce, the US legislative framework particularly emphasised issues relating to customs, taxation and other market access matters.[40] It notes that:

> [f]or over 50 years, nations have negotiated tariff reductions because they have recognized that the economies and citizens [. . .] benefit from freer trade. Given this recognition [. . .] it makes little sense to introduce tariffs on goods and services delivered over the Internet. [. . .] Therefore, the United States will advocate in the WTO [. . .] that the Internet be declared a tariff-free environment [. . .].

In addition, the US affirms that no new taxes should be imposed on Internet commerce.

Importantly, the US government also pledges to support 'the broadest possible free flow of information across international borders'.[41] Consequently, the regulation of content should—if any is needed at all—be carried out by industry self-regulation. Efforts to adopt laws to restrict access to certain types of content are perceived to impede global e-commerce and shall not serve as disguised trade barriers.[42]

The US Framework for Global Electronic Commerce of 1997 rapidly translated into US internal legislative and other measures. For instance, in 1998 the Internet Tax Freedom Act (ITFA) was passed, temporarily banning taxes on Internet access and multiple or discriminatory taxes on e-commerce.[43] This act

[38] See White House (1997a, b) and US Information Agency (1997). This movement was preceded by the creation of the so-called Global Information Infrastructure (GII) founded by Vice President Al Gore in March 1994; see US Department of Commerce (1995). See also Bach and Erber (2001) pp 126–28; and Braga (2004) p 14–16 for how the US approach to regulating e-commerce (principally to avoid that regulations cripple e-commerce in its infancy) differs from the European approach (principally an *ex ante* and more paternalistic approach).

[39] White House (1997a). White House (1997b) p 1 notes that '[. . .] governments must adopt a market-oriented approach to electronic commerce, one that facilitates the emergence of a global, transparent, and predictable environment to support business and commerce'.

[40] White House (1997a), in particular Recommendation 1.

[41] *Ibid*, Recommendation 8; US State Department (2003) and Ambassador Gross (2003).

[42] Ambassador Gross (2003).

[43] Internet Tax Freedom Act (ITFA) public Law No 105–277, October 1998. S 1101(a) ITFA reads: '(a) Moratorium: No State or political subdivision thereof shall impose any of the following taxes during the period beginning on October 1, 1998, and ending 3 years after the date of the

also instructed President Clinton to seek bilateral and multilateral agreements to remove barriers to global e-commerce through various international organisations.[44]

The ITFA also established the 'Advisory Commission on Electronic Commerce'.[45] This Commission stressed the need for international agreements[46] and non-discriminatory, simple and neutral taxation of e-commerce and called for a permanent ban on discriminatory e-commerce and Internet taxes.[47]

As explained in *Chapter Two*, the US Framework for Global Electronic Commerce and the work of the Advisory Commission on E-Commerce are the origin of the WTO Work Programme on E-Commerce and the WTO Duty-free Moratorium on Electronic Transmissions.

For its part, the US Congress has proposed numerous bills that urge President Bush to seek a domestic moratorium on tariffs and on special, multiple, and discriminatory taxation of e-commerce.[48] In December 2004, the Internet Tax Non-Discrimination Act was enacted that prolongs the US Internet tax moratorium for two years.[49] The FCC also issued rules exempting 'Internet' services from domestic telecommunication regulation and thus from common carrier obligations (also classification of cable modem services as information service).[50] Moreover, usually related Senate and House bills affirm that the regulation of the Internet is not in the public interest. From 2004 onwards, the Bush administration has made universal, affordable access to broadband, the

enactment of this Act—(1) taxes on Internet access [. . .]; and (2) multiple or discriminatory taxes on electronic commerce.' The moratorium was extended in 2001 and expired on 1 November 2003. It is important to note that the US moratorium does not prohibit the imposition of sales taxes on e-commerce transactions.

[44] White House (1997a) point 1 under Background Information. 'Administration Plan Seeks To Eliminate Barriers To Trade On Internet', in: *Inside US Trade* (13 December 1996) and 'Administration Pressing For Duty-Free Zone In Cyberspace', in: *Inside US Trade* (8 November 1996).

[45] Advisory Commission on E-Commerce (2000). See Internet: www.ecommercecommission.org/about.htm.

[46] *Ibid*, s 5 and 6. It also requires the Secretary of Commerce to take stock of the barriers imposed in foreign markets on US e-commerce sales.

[47] *Ibid*.

[48] 'US Congress Urges Bush To Spur Global E-Commerce', in: E-*Commerce Times* (11 May 2001) based on 'Joint resolution on free digital trade', 106th Congress, 1st Session, S CON RES 58 (30 September 1999). See also Senate Bill, 'Expressing the sense of Congress on the importance of promoting e-commerce, and for other purposes', 107th Congress, 1st Session, SCONRES37 (10 May 2001).

[49] Internet Tax Non-Discrimination Act (HR 49/S150), introduced 13 January 2003, enacted by the US Senate on 29 April 2004 and signed by President Bush in a modified version in December 2004. This law extends the ban that expired in November 2003. Original proposals would have permanently extended the ban.

[50] As recommended in Advisory Commission on E-Commerce (2000) and US Treasury (2000) para 3. 'FCC Classifies Cable Modem Service As Information Service; Initiates Proceeding to Promote Broadband Deployment and Examine Regulatory Implications of Classification', FCC Press Release, 14 March 2002.

reduction of regulations on broadband access and taxation issues related to it, one of eight top political US Technology Agenda priorities.[51]

With respect to trade, US Congress is also resolved to use international negotiations to reduce the impediments to digital trade and to call for an adjustment of trade policy to the emergence of this new trading technology.[52] As a result of this trade-orientation of domestic legislation, the US was at the origin of many political Joint Statements on E-Commerce that tried to establish non-binding principles on free digital trade as of 1997 (*cf Section 7.1*).

Going one step further, on 24 October 2000, USTR Barshefsky exposed an ambitious plan to remove e-commerce trade barriers and to create a set of international rules to foster e-commerce trade, starting a new US digital trade agenda (also called 'trade policy for the networked economy') which was reflected later in the US trade policy mandate for the Doha Negotiations discussed in the next section.[53] This is at least what has been affirmed by the US government and the USTR so far.

4.2 EXTERNAL DIMENSION: THE US TRADE POLICY JURISDICTION RELATING TO DIGITAL CONTENT

With the enactment of the 'Bipartisan Trade Promotion Authority Act of 2002',[54] the US Congress has re-established fast-track authority to conclude trade agreements with a simplified congressional ratification procedure.

The importance of a successful passage of new fast-track legislation for international trade negotiations can hardly be overstated. For nearly ten years the US has lacked fast-track authority necessary to conduct complex multilateral trade negotiations. Consequently, US trade policy experts,[55] policy-makers and trade partners around the world have welcomed the new Trade Promotion Authority (TPA).[56]

The Bush administration's intention is to use the new fast-track legislation to pursue a parallel track of preferential and multilateral trade negotiations.[57] This is a reaction to the fact that US policy-makers were increasingly worried that the

[51] President Bush has called for universal, affordable access for broadband technology by the year 2007. See White House (2004) p 11–12.

[52] House of Representatives (2001a).

[53] The former USTR Barshefsky calls the digital trade agenda the 'second generation of high-tech trade policy'. See Barshefsky (1998); Barshefsky (2000a); Barshefsky (2000b); and US Department of State (2001) p 5.

[54] See above 1.

[55] See Bergsten (2002) p 9 who in 2002 saw a 'renaissance of US trade policy'.

[56] 'Trade: Trade Bill's Passage Receives Warm Reaction Worldwide', in: National Journal's Technology Daily (3 August 2002). See also USTR (2004) pt 1, p 1.

[57] See the recent address of USTR Robert Zoellick to the Committee on Ways and Means of the House of Representatives, 26 February 2003 on the 2003 Trade Agenda of President Bush, Internet: www.ustr.gov/speech-test/zoellick/2003–02–26–waysandmeans.pdf; 'Bilateral Pacts Are Special Focus of Bush Administration', in: *Washington Post* (12 December 2002).

US had been losing the race for preferential trade agreements.[58] Parallel to the ongoing WTO's Doha Negotiations, the TPA that in 2005 was three years old, has already provided impetus to a flurry of concluded or pending bilateral and regional trade agreements.[59]

As will be seen, a central innovation of the new fast-track authority is its instruction to the USTR to conclude trade agreements that anticipate and prevent the creation of new digital trade barriers.[60]

4.2.1 Fundamentals of the US Trade Policy Jurisdiction

Unlike in the case of the EC (*cf Section 5.2.2.1*), the US trade policy jurisdiction does not differentiate between trade in services (or certain service sectors) and trade in goods.[61] The powers to negotiate and conclude international trade agreements are shared between the executive branch (the President and executive agencies like the USTR) and the legislative branch (the Congress).

The President has the right to conduct relations, to negotiate and to conclude treaties with other countries.[62] When it comes to foreign trade treaties, however, Congress—specifically the Subcommittees on Trade of the Finance Committee of the US Senate and the Committee on Ways and Means of the US House of Representatives[63]—and not the President—has the power to regulate commerce with foreign nations.[64] International agreements are thus under the exclusive power of the federal level.[65] Independently from the division of powers, the actual trade negotiations are always conducted by the USTR.[66]

The executive and legislative branch came up with a legal innovation that does justice to this constitutional division of power but at the same time facilitates the conclusion of trade agreements. This so-called fast-track negotiation authority is a grant of constitutional authority to regulate trade treaties with

[58] Before 2002, the US had only concluded preferential trade agreements with Israel, Mexico and Canada (NAFTA) and Jordan. See on the desire of Congress to 'catch up' with respect to FTAs House of Representatives (2001b); Hubbard (2002) p 2; and Fitzgerald (2001) p 2.

[59] USTR (2004) p 3. The declared objective is to 'span the globe with bilateral FTAs'.

[60] GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493 (16 April 2003); and Wunsch-Vincent (2003b).

[61] US trade law refers to services as economic activities whose outputs are other than tangible goods, see s 306 (a)(5) Tariff and Trade Act of 1984.

[62] See Cohen, *et al*, (1996); Burnham (1995) p 8; and Jäger and Welz (1995) pp 159 f. For a background to the distribution of jurisdiction with respect to trade treaties, the actors involved and the history of fast-track legislation see House Committee on Ways and Means (2001a) pp 238 f; and Destler (1995, 2005).

[63] See House Committee on Ways and Means (2001a, b), Internet: http://waysandmeans.house.gov/ and http://finance.senate.gov/.

[64] Art I, s 8 of the US Constitution and Trebesch (1973) pp 23 f.

[65] Art II, s 2, cl 1. of the US Constitution and Jäger and Welz (1995) p 94. States are precluded from any treaty making with a foreign state if they do not have the consent of Congress.

[66] See TPR, Trade Policy Review, US, WT/TPR/G/56 (1 June 1999) and House Committee on Ways and Means (2001a) pp 269–77 for details on the trade policy formulation process and the actors involved.

foreign countries from the Congress to the executive branch.[67] In this legislative procedure, Congress sets formal negotiating objectives for major trade agreements and agrees to vote:

— on the results of the negotiations and the proposed implementing legislation; and
— only on the agreement (including the implementing legislation) as a whole, without amendments and within a limited time period (up-or-down vote in up to 90 legislative days and with limited floor consideration).[68]

The two main reasons for this legislative innovation are the following: First, although the President has the legal power to negotiate and conclude treaties without fast-track legislation, there is a risk that afterwards Congress will not be willing to pass the necessary implementing legislation.[69] Second, the fast-track mechanism also reduces the vulnerability of Congress to political pressure from import-competing industries.[70]

Procedurally, the delegation of trade negotiation authority works as follows: In a first step Congress sets out a fast-track bill that is valid for subsequent or ongoing trade negotiations. Following these instructions, the USTR then takes over the negotiation and the conclusion of trade bills. Congress is again involved in the conclusion of trade agreements when USTR provides the trade bill for congressional consideration and a draft of the implementing legislation for ratification.

But the US Congress does not fully abdicate its trade policy powers.[71] Since 1974, fast-track bills have included the following components[72]:

— content-related requirements like the specification of trade negotiation objectives;
— procedural requirements for the executive branch (ie, the obligation to consult regularly with Congress and with a network of advisory committees);
— a congressional group to supervise the trade negotiations;
— mechanisms to discipline the executive branch for non-compliance; and
— a deadline for the conclusion of authorised agreements.

Independently from individual negotiation objectives, the USTR negotiators must try to obtain a final negotiation package that—in the up or down vote—Congress perceives to be overall beneficial to the US economy and that addresses

[67] Van Grasstek (1997).
[68] *Ibid*, pp 97 f.
[69] On the importance of fast-track negotiation authority for trade partners see Paemen and Bensch (1995) pp 192 f; Baldwin and Magee (2000) p 2; Fitzgerald (2001) p 2; and Gresser (2001a) p 1.
[70] Congressional Research Service (2002c) p 1; Shoch (2001) p 26; and Schott (2002). The President is said to be more accountable to a broader constituency and therefore more insulated from producer interests.
[71] Destler (1998) p 2; and Meunier (1998) ch 1.
[72] Congressional Research Service (2001c) p 20; and Destler (1998) pp 1–2 and 6–8.

the congressional negotiation mandate as formulated in the fast-track legislation.[73]

The legally-prescribed negotiation objectives and procedural requirements are not only a burden for the US negotiators.[74] To the contrary, the explicitly formulated negotiation objectives like, for example, on digitally-delivered content products also help US negotiators to successfully execute a negotiation strategy. USTR has, in fact, learned to use the pressure of Congress to inspire careful consideration of the US trade policy interests abroad.[75]

4.2.2 From Stalemate Concerning Renewed Fast-Track Legislation to the 'Trade Act of 2002'

Since 1974, Congress has renewed fast-track negotiation authority several times.[76] The last extension of the fast-track authority expired in 1994.[77] In the meantime, fast-track authority was instrumental to the completion of the Tokyo Round of the GATT in 1979, the conclusion of a North American Free Trade Agreement (NAFTA) in 1993 and the WTO Agreements in 1994.[78]

Since 1994, several attempts to reinvigorate the fast-track authority of President Clinton and the succeeding Republican majority in Congress have taken place.[79] All failed, and the second half of the 1990s was a display of the erosion of congressional support for continued trade liberalisation.[80] Doubts over extending fast-track legislation got even more serious in the 1980s and early 1990s due to the growing trade deficit and concerns with respect to the adverse effects of trade liberalisation.[81] Instead of denying the extension of fast-track legislation in 1988, 1991 and 1993,[82] Congress chose to constrain the flexibility of the executive branch through more detailed trade negotiation objectives and procedures.[83] The consensus in favour of fast-track legislation truly broke down later when the linkage between trade and other policy concerns, especially labour and the environmental standards, put a halt to the delegation of fast-track authority.[84] Since, attempts to restore it had failed.

[73] Stressed also in the 'Congressional Consultation Guidelines' established along s 2107(b) of the Trade Act of 2002, 4 December 2002. Document Source: USTR.

[74] Discussions with Craig van Grasstek were helpful for the development of this point.

[75] Paemen and Bensch (1995) p 192.

[76] See Low (1993) pp 58 f; and Destler (1998) pp 3–4 for an account of the changes.

[77] Baldwin and Magee (2000) p 1; and House Democratic Trade Counsel (2001).

[78] Jackson (1998) pp 296 f.

[79] See Barfield (1998); Congressional Research Service (2002c) pp 3–5; and Shoch (2001) pp 4 f and 59.

[80] Council on Foreign Relations (2001) pp 7–8.

[81] US Department of State (2001) pp 1–2; Destler (1995) p 66; and Baldwin and Magee (2000) pp 38–39.

[82] See Congressional Research Service (2001d).

[83] Destler (1995) p 66.

[84] The dispute boils down to a fundamental disagreement between Democrats who want provisions of labour and environment in trade agreements and Republicans who prefer to do without. See Congressional Research Service (2002c) pp 4, 5–10; and Wagner (2000) p 1047.

When President George W. Bush arrived into office in the year 2000, he made the renewal of fast-track authority a top priority[85] and called for Trade Promotion Authority, a new title for the conflict-ridden term 'fast-track negotiation authority'.[86] In view of various previously-cited domestic legislative actions, the maintenance of a trade-barrier-free e-commerce environment and further service trade liberalisation were considered a main concern in this new trade agenda.[87] As expected after the analysis of *Section 4.1*, the Bush administration's e-commerce-related negotiation objective was strongly supported by Democrats and Republicans in both the Senate and the House of Representatives.

Considering the political sensitivity of asking Congress to enact fast-track legislation, the Bush administration emphasised that the executive branch was not looking for a *carte blanche* for trade negotiations, but that a 'new trade partnership between Congress and the President' should emerge that would entail increased consultation and other congressional oversight procedures.[88] It also stressed the Bush's administration's intention to use the new TPA to pursue a parallel track of preferential and multilateral trade negotiations.[89]

As expected, the reluctance in both the Senate and the House of Representatives towards the enactment of fast-track legislation was considerable. After long debates[90] and relentless political pressure from the White House,[91] the two congressional houses agreed on a common version of the bill on 25 July 2002.[92] The very narrow majority in the House of Representatives and the partisan aspect of the vote[93] indicate that, for the first time in US history, no broad congressional consensus existed in favour of enacting fast-track legislation.[94]

The executive branch had to pay a price for congressional support. In this context, the most relevant is that the executive branch accepted tightened specific negotiation objectives and procedural requirements (*cf Sections 4.2.3.1* and *4.2.3.2*).[95]

[85] See Bergsten (2002) pp 3–4; and Shoch (2001) p 270.

[86] 'State of the Union Address of the President to the Joint Session of Congress', 27 February 2001, Internet: www.whitehouse.gov/news/releases/2001/02/20010228.html.

[87] *Ibid*. President Bush made the elimination of e-commerce trade barriers his top priority among 13 'Negotiating Objectives to Advance US Priorities' in 2001.

[88] *Ibid*.

[89] '2001 International Trade Legislative Agenda', USTR (10 May 2001), Internet: www.ustr.gov/agenda.pdf (11 March 2004).

[90] Congressional Research Service (2002c) pp 6–7.

[91] 'Bush Lobbies House To Pass Trade Bill Before Hill Recess', in: *Washington Post* (27 July 2002).

[92] For more on the mediation process and the results see the Conference Report for HR 3009 (House of Representatives 107–624), Internet: http://thomas.loc.gov.

[93] The House majority for the conference Report on the TPA bill on 27 July 2002 was very narrow (Yea: 215; Nay: 212) and it was cast along partisan lines. The House Democrats were mostly opposed to the TPA bill (Yea: 25; Nay:183) whereas the House Republicans were mostly in favour of it (Yea: 190; Nay: 27). See Roll No 370 (House) and Record Vote Number 207 (Senate), Internet: http://thomas.loc.gov.

[94] See Congressional Research Service (2001d).

[95] Brainard and Shapiro (2001) pp 5–6. See for other concessions instrumental in getting congressional consensus on the trade bill Bergsten (2002) pp 4–7; and Wunsch-Vincent (2003a) p 26.

But it can also be said that the goal of free trade in services and through e-commerce were an important motor for Congress to consider the extension of fast-track legislation.[96] Indeed, since early 2001, the US IT and content industries have contributed largely to the adoption of relevant offensive negotiation objectives mandated in the final TPA bill.[97]

4.2.3 The Trade Act of 2002: A Mandate for Free Trade in Digital Content

The Trade Act of 2002 entered into force on 6 August 2002. Its negotiation objectives and procedures apply to all trade agreements that the US negotiates.[98]

The two previous major fast-track bills (Trade Act of 1974 and the Omnibus Trade and Competitiveness Act of 1988–OTCA) serve as a benchmark to analyse the new US trade legislation (*Annex Tables A.4.2* and *A.4.3* actually compare the relevant provisions of the TPA to these earlier fast-track bills to identify the main changes).

On the whole, Congress enshrined in the law that:

— it is not ready to give the President a *carte blanche* for negotiations[99];
— it wants to play a more active role before, during and after the trade negotiations and that it wants specific concrete negotiation objectives to be achieved[100]; and that
— it is ready to withdraw fast-track legislation in case the above requirements are not met.[101]

Notably, US Congress spelled out very precise negotiation objectives with regard to digitally-delivered content products that are supported by both political parties. As a result, it can be assumed that—unlike other negotiation topics (eg, labour standards)—it will be unaffected by changes in political majorities or the forthcoming Presidential elections in 2004.[102] It is felt by Congress that

[96] Baucus (2002) p 18; Senate Committee on Finance (2002a) pp 26–27 and 'High-Tech Groups Focus On Trade Vote'; in: *Washington Post* (14 May 2002).

[97] See, eg, Letter of the Information Technology Industry Council to the Honorable J Dennis Hastert (US House of Representatives), 5 December 2001, Internet: www.itic.org (20 July 2003). The ITI evaluated the individual voting behaviour of each Congressmen in the TPA votes very closely. ITI establishes an influential High-Tech Voting Guide that creates pressured for Congressmen to vote favourably on IT-related issues (see for an example, Internet: www.itic.org/vote_guide/VotingGuide_107th.pdf.

[98] Congressional Research Service (2001c) p 7.

[99] 'Trade Bill', address of Chairman Max Baucus (at the time chairman of the Senate Committee on Finance) to the Senate Committee on Finance (1 August 2002), Internet: www.finance.senate.gov (2 February 2004).

[100] Address of Senator Max Baucus to the Committee on Finance, Senate, Mark-up of Fast Track Legislation (12 December 2001) and Senate Committee on Finance (2002a) pp 46 and 52 f.

[101] Senate Committee on Finance (2002a) pp 52 f.

[102] In fact the Democrats are seeking the support of the entertainment and high-tech industry in the run-up to the Presidential elections in 2004. 'Democrats Seek Silicon Valley Support in Presidential Race', in: *National Journal* (16 December 2002).

far-reaching service liberalisation and a multilateral trade framework applicable to digitally-delivered content products is necessary to avoid the WTO's global trade framework from progressively falling behind technological change. Success concerning these negotiation objectives is, from a congressional point of view, also the key for agreement on concessions in fields where more defensive interests prevail (ie, agriculture).

4.2.3.1 Content-Related Requirements: The Congressional Mandate for a Digital Trade Agenda

One of the distinguishing factors of the TPA is the fact that many procedural requirements (ie, disapproval resolutions) are tightly linked with the achievement of content-related objectives. The interrelationship between congressional sector-specific mandates and the congressional willingness to endorse an overall negotiation package is more significant than in previous trade bills. This manifests itself in an increased number of and more precise overall negotiation objectives (*cf Annex A.4.2*).[103] Trade partners rightly suspect that the content-related and procedural specificity of the TPA resembles a 'straightjacket' that will leave only little flexibility during trade negotiations.[104]

As demonstrated in *Chapters Two* and *Three*, the negotiation of free trade for digitally-delivered content products is very complicated, since the distinction between goods and services is blurred. This complexity is mirrored in the TPA, which posits an ambitious new US digital trade agenda depicted in Table 4.2. Under this multi-faceted negotiation agenda, a set of rules and trade concessions is called for that concerns the elimination of tariffs on physical carrier media, the liberalisation of trade in telecommunication, computer, audiovisual entertainment and other electronically-deliverable services, a Chapter liberalising e-commerce, and a strong protection of IPRs.[105] Most negotiation objectives go beyond the current state-of-the-art rules or commitment levels in the WTO ('GATS-plus', 'TRIPS-plus', etc).[106]

(i) Special Mandate on E-Commerce and Digitally-Delivered Content Products

The mandate on e-commerce[107] figures prominently in the principal negotiation objectives, namely more space is devoted to this issue than to trade in services. It directly addresses the questions raised by the WTO Work Programme on

[103] Overall negotiation objectives are more aspirational than the goals mentioned as principal negotiation objectives.

[104] See 'Trade: Trade Bill's Passage Receives Warm Reaction Worldwide', in: National Journal's Technology Daily (3 August 2002); and Kluttig and Nowrot (2002) pp 18 and 34. This view has also been corroborated by interviews conducted with the European Commission.

[105] See s 2102(b)(2) TPA on services, 2102(b)(7)(B) TPA and 2103(d) TPA on IT products and 2102(b)(9) TPA on e-commerce. See also US Department of Commerce (2005).

[106] Senate Committee on Finance (2002a) pp 11–12; and Wunsch-Vincent (2003b) pp 2 f.

[107] S 2102 (b) (9) TPA.

Table 4.2: US digital trade policy objectives anchored in the TPA

Trade Issue and TPA Mandate	*Specific US Digital Trade Policy Objectives*
Trade in IT products Sec 2102(b)(7)(B) and 2103(d)	— Ensure that trade partners accede to the WTO's ITA, that the ITA product coverage is extended and that non-tariff trade barriers to IT products are reduced or eliminated. — For digital products, trade partners shall agree to base customs duties on the value of the carrier media rather than the content itself
E-commerce / Digitally-delivered content products Sec 2102(b)(9) and 2102(b)(8) on regulatory practices	— Ensure that current obligations, rules, disciplines, and commitments under the WTO apply to e-commerce. — Guarantee that electronically-delivered goods and services receive no less favourable treatment under trade rules and commitments than like products delivered in physical form. Ensure that the classification of such goods and services secures the most liberal trade treatment possible. — Make certain that governments refrain from implementing trade-related measures that impede e-commerce. Where legitimate policy objectives require domestic regulations that affect e-commerce, obtain commitments that any such regulations are the least restrictive on trade, non-discriminatory, and transparent, and promote an open market environment. — Extend the WTO Duty-free Moratorium on Electronic Transmissions. — Explicitly acknowledge the importance of maintaining a free flow of information.
Digital trade in services Sec 2102(b)(2)	— Guarantee that, when possible, the most liberal form to schedule trade commitments (negative list approach) is used so that new services are automatically covered by standing commitments and ensure the absence of discrimination against electronic service delivery. ***Audiovisual services:*** — Trade partners are not asked to withdraw existing financial support schemes for culture and content-production. The US only requests the elimination of very trade-distorting subsidies and other financial support schemes. — Trade partners are not asked to eliminate existing regulations that discriminate against foreign content and that usually apply to traditional technologies like broadcasting or the cinema. But trade partners are asked to schedule their existing audiovisual regulations and thus freeze them at a particular level (50 percent local broadcasting content quota, for instance).

Table 4.2: ***cont.***

Trade Issue and TPA Mandate	*Specific US Digital Trade Policy Objectives*
	– The US is also requesting commitments on new audiovisual services like video-on-demand, new forms of content distribution, etc. ***Telecommunication services and Computer and related services:*** — Deepen and broaden the commitments for basic telecommunications, for value-added telecommunications (like on-line information services, database retrieval, etc) and for computer services. — Ensure that different software categories (incl entertainment games) are covered by these commitments. ***Other service sectors that can be electronically-delivered across borders*** — Deepen and broaden the commitments for the cross-border trade in financial, business, professional and other services.

Source: Based on the Bipartisan TPA Act of 2002; Senate Committee on Finance (2002a, b); complemented by interviews with the USTR, the pertinent US industry and US Department of Commerce (2005).

E-Commerce (*cf Chapter Two*).[108] Hence, the e-commerce mandate is particularly relevant to the issue of digitally-delivered content products. Its negotiation objectives that are—in comparison to others—defined in an exceptionally narrow way were lauded by the US content industries. Indeed, the latter had exerted considerable influence on the wording of the TPA provisions.[109]

Specifically, Section 2102(b)(9) TPA, paragraph (A) ensures that WTO disciplines apply to e-commerce, paragraph (B) provides US negotiators with guidance as to how the open classification with regard to digitally-delivered content products should be approached and paragraph (E) seeks the further extension of the WTO Duty-free Moratorium on Electronic Transmissions. Congress also instructs US negotiators to make certain that countries are not able to evade core trade disciplines, such as national treatment, or previous commitments on the grounds that trade in digitally-delivered content products does not neatly fall within the WTO Agreements.[110]

[108] The fact that the core of the e-commerce mandate has hardly changed throughout the different versions of the congressional TPA bills underlines the strong overarching and bipartisan interest in the field.

[109] 'Trade: Congress Sets Terms On E-Commerce, Intellectual Property', in: National Journal's Technology Daily (2 August 2002) and 'Senate Passes Trade Promotion Authority Conference Report; ITI Lauds Swift Action'; Press Release from the Information Technology Industry Council (1 August 2002), Internet: www.itic.org/2002prs/020801.htm (12 December 2002). According to an interview with ITI, the e-commerce mandate was actually co-drafted by this industry association and passed on to the House Committee on Ways and Means who then included the wording.

[110] Senate Committee on Finance (2002a) pp 26–27.

Moreover, the strategic use of the term 'digital products' outside of the goods or service negotiation mandate is supposed to be without prejudice to the ongoing WTO classification debate. Without making essential classification decisions, it tries to ensure free trade no matter how digitally-delivered content products may be classified.[111] This reflects the fact that it has been impossible for the US industry to unite around an 'all goods'- or an 'all services'-approach, a circumstance that will be assessed again when analysing the first US bilateral agreements. Importantly, via this approach the US also aims at avoiding a paralysing classification debate.

Section 2102(b)(9), paragraphs (C) and (D) go further in mandating a regulatory discipline for e-commerce.[112] In line with the US domestic 'hands-off approach' to the regulation of e-commerce, the American request for regulatory forbearance and transparency intends to limit the number of trade-related e-commerce measures of trade partners or at the international level.[113]

(ii) US Multi-Track Strategy as Regards the Goods and Services Market Access Negotiations Together with the WTO Duty-free Moratorium on Electronic Transmissions, the US Congress also mandates the USTR to use the pending market access negotiations to ensure that no tariffs are levied on digital content products.

To secure market access for products that are considered goods, the US Congress requires the expansion of ITA participation and the improvement of the ITA[114] through, for example, renewed negotiations on IT products.[115] Without explicitly formulating it in the TPA, it also requests trade partners to levy duties on the value of the carrier medium rather than the usually much higher value of content (*cf Section 2.2*).

The principal negotiation objective of US Congress on services is extremely short and broad but offensive in nature.[116] In the run-up for the enactment of the TPA, Congress asked for service negotiations to reduce barriers to all modes of supply, particularly those relevant to digitally-delivered content products.[117]

[111] House of Representatives (2003) p 65 stating that a mix of industry groups agreed with the USTR on this approach.

[112] Senate Committee on Finance (2002a) p 27. According to the US Senate, 'negotiators must guard against regulations and disciplines that would discriminate against e-commerce in favour of more traditional forms of commerce, or otherwise retard the growth of this technologically innovative way of doing business'.

[113] See House of Representatives (2001a); and Mann (2000) for transatlantic conflicts surrounding regulations applicable to digital trade.

[114] S 2102(b)(7)(B) TPA.

[115] S 2103(d) TPA See also 'US E-Commerce Industry Plots Strategy For WTO Talks', in: *Inside US Trade* (24 May 2002).

[116] S 2102(b)(2) TPA; and USTR (2004) p 5. Additional information on negotiation stances related to services in general or certain service sectors are gathered from deliberations of Congress, the USTR and the US content industries.

[117] Senate Committee on Finance (2002a) pp 11–12. The congressional trade in service considerations are very linked to the e-commerce considerations as they stress the need (i) for liberalisation of the cross-border supply of services, (ii) to create a free, open and technology-neutral commercial

Where possible, the US Congress advocated the use of the negative list approach in service trade agreements.[118] Moreover, in preferential trade negotiations US negotiators are actually instructed to seek commitments that go beyond the GATS rules and commitments.[119]

a. Computer and Telecommunication Services: US Calls For Full Liberalisation
Requests for commitments in the area of telecommunication and computer services are less politically-sensitive and more straightforward than requests in the audiovisual sector. The US thus calls for full specific GATS commitments in these areas.

With regard to software—together with the strategy adopted with respect to classification issues—the US aims at securing the most favourable treatment under both the GATT and the GATS. Stressing that 'all' software types should receive equal treatment, the US is making an appeal to resist any temptation to extend audiovisual exemptions to software that contains audio or video sequences.

b. Audiovisual Services: Tailored Approach to New Delivery Technologies
Regarding specific commitments for audiovisual service, the US continues to argue that trade rules are sufficiently flexible to address both the creative and the commercial aspects of the audiovisual sector.[120] In particular, technological evolutions have brought about new audiovisual services that should benefit from free trade.

But the US has learned its lesson from the Uruguay Round (*cf Section 3.2.4*). It declares to be ready to engage into dialogue to promote cultural diversity. However, it is not ready to accept discriminatory market access barriers to content that restrict the free flow of information.[121] Most importantly, foreign content quotas and other broadcasting regulations shall not be extended to 'new digital content services'.[122]

environment for the development of e-commerce and (iii) the need to explicitly acknowledge the importance of maintaining free flows of information.

[118] *Ibid*.

[119] Senate Committee on Finance (2002a) pp 11–12.

[120] This part on the US audiovisual requests is based on interviews with the MPAA (Brussels and Washington) and the USTR. See also Richardson (2002, 2003); CTS, Communication from the US, Audiovisual Services, S/C/W/78 (8 December 1998); CTS, Communication from the US, Audiovisual and Related Services, S/CSS/W/21 (18 December 2000); CTS, Report of the Meeting Held on 3–6 December 2001, S/CSS/M/13 (26 February 2002) para 213 and CTS, Report of the Meeting Held on 4 and 10 July and 3 September 2003, TN/S/M/8 (29 September 2003) para 193.

[121] *Ibid*, p 17, '[. . .] content restrictions must be avoided. Uncensored print and broadcast media provide independent and objective information and offer a vehicle for citizens to openly and freely express their opinions and ideas.' White House (1997a), Recommendation 8 and Ambassador Gross (2003) p 18: 'Artificial barriers that [. . .] restrict the free flow of information [. . .] are the enemies of innovation, retard the creation of knowledge, and inhibit the exchange of ideas that are necessary for people to improve their lives.'

[122] The MPAA has addressed this issue before Congresss when noting that, '[f]ortunately, to date, we haven't seen any country adopt this form of market-closing measure for digitally delivered content. We hope this market will remain unfettered—and hope we can count on your support as we work with our international trade partners to keep digital networks free of cultural protectionism'. See House of Representatives (2001a).

The USTR's new strategy has thus evolved from asking for an elimination of all discriminatory market access barriers, to requests that US trade partners should enter so-called 'standstill commitments'. These commitments 'freeze' their current level of discriminatory audiovisual regulations in their GATS schedule or other preferential service agreements.[123] As contemporary audiovisual regulatory frameworks do not usually contain measures directly affecting digitally-delivered content products, this approach has the effect of avoiding new trade barriers to digital content.[124]

A negative list approach in bilateral trade agreements would also mean that new services linked to digitally-delivered content products are automatically covered by GATS market access and national treatment commitments. In addition, the US Congress is requesting commitments on many new digitally-delivered audiovisual services (eg, Mode 1 and 2 for on-line sales of filmed entertainment—including streaming and downloading, Mode 1 and 2 for leasing of video tapes, pay television distribution on all platforms[125]). Zero duties and national treatment for trade in digital products are also called for.

In addition, the US will not be asking its trade partners to eliminate their financial support schemes, including subsidy programmes for domestic film production that rely solely on general tax revenues and are implemented in a non-discriminatory manner[126] (*cf Section 4.1.2.1*). But the US is not ready to accept discriminatory market access barriers to content or specific subsidies that have particularly trade-distortive effects on US audiovisual exports.[127] Moreover, certain MFN exemptions that accommodate legitimate cultural concerns (ie, co-production agreements) are acceptable to the US.[128] As most subsidy schemes may have trade-distorting effects and as the 'legitimacy of cultural concerns' is hard to measure precisely, these specifications of the US trade policy prerogatives are, however, somewhat vague.

The previously mentioned negotiation objectives with respect to e-commerce and services are rounded off with demanding negotiation objectives concerning

[123] Essentially Mode 1 and 2 comitments addressing quantitative and other restrictions based on foreign content on the supply of audiovisual services and services supplying audiovisual products.

[124] Richardson (2002, 2003). Previous drafts TPA bills went further and specified that culturally-minded discriminatory measures would not be tolerated. See Office of US Senator Dick Durbin (2001) and s 2(b)(2) of the Durbin Act s 2062 on services that calls on US negotiators to oppose cultural exceptions to GATS obligations.

[125] US Department of Commerce (2005) pp 30 f.

[126] An important US IT industry alliance noted that, '[g]overnments should give priority to promoting cultural identity, rather than regulating content by quotas and other protectionist measures', see WITSA (2003) p 6.

[127] CTS, Communication from the US, Audiovisual Services, S/C/W/78 (8 December 1998) and Richardson (2002, 2003). In fact the US has proposed a working group to identify acceptable subsidy schemes.

[128] CTS, Report of the Meeting Held on 3–6 December 2001, S/CSS/M/13 (26 February 2002) para 213.

the extension and enforcement of intellectual property rights in this new digital environment (Section 2102(b)(4) TPA).[129]

4.2.3.2 Specific Procedural Negotiation Requirements: Tight Reins for US Negotiators[130]

The content-related US negotiation objectives described under *Section 4.2.3.1* are backed by procedural negotiation requirements that give US Congress leverage to press the USTR for the attainment of its specified negotiation targets.

Specifically, the increased desire for congressional intervention in US trade policy manifests itself in the procedural negotiation requirements that are mandated by the TPA.[131] *Annex Table A.4.1* outlines the relevant provisions and *Annex Table A.4.3* summarises the main changes towards previous fast-track legislations. This analysis demonstrates that the procedural requirements compel the executive branch to consult more intensively with Congress at all phases of an agreement's negotiation and thus even before negotiations are initiated.[132]

Moreover, the institutional oversight provisions of Congress over the executive branch have been increased.[133] The mandate to set up a new Congressional Oversight Group[134] whose members will be accredited as official advisers to the US delegation in trade negotiations and that will co-exist next to the Group of Congressional Advisors for Trade Policy[135] is actually one of the most significant procedural innovations of the TPA. Following the TPA, Members of any congressional committee with jurisdiction can rather flexibly participate in the Congressional Oversight Group. Therefore, the new fast-track procedures open the door to a much wider and more active congressional participation, that is to say regular exchange of information, adjustment of the US negotiation objectives along congressional inputs, extensive briefings during different stages of negotiation rounds.[136]

[129] In this study the issue of IPRs is not taken up in any detail (*cf Research Approach*). For a more detailed discussion on the US mandate on IPRs see Wunsch-Vincent (2003b) pp 12 and 18–19.

[130] This section has strongly benefited from discussions with Richard B Self (at the time: Akin Gump).

[131] Congressional Research Service (2002c) pp 7–8.

[132] Senate Committee on Finance (2002a) p 3. On the whole the current consultation requirements are also stronger than any earlier proposals that had been tabled. See Destler (1998) pp 6 f for details on the weaker consultation requirements of previous proposals.

[133] An enhanced consultation process was actually recommended to solve the stalemate on the renewal of fast-track authority. See Brainard and Shapiro (2001) p 6; Destler (1995) pp 262–264; and Council on Foreign Relations (2001) p 13.

[134] S 2107 TPA.

[135] See s 161 Trade Act of 1974 as amended (19 USC 2211; PL 93–618, as amended by PL 96–39 and PL 100–418) and House Committee on Ways and Means (2001a) pp 1118 f for the origins of this group of congressional delegates and the Congressional Consultation Guidelines established along s 2107(b) of the Trade Act of 2002.

[136] Congressional Research Service (2001c) pp 5 and 15–16 and 'Senate Democrats Want Broad Role For Congressional Trade Group', in: *Inside US Trade* (13 September 2002).

Additionally, the notification and consultation requirements have been strengthened to some degree.[137] The question of how and to what extent the agreement will achieve the applicable purposes will now receive more consideration.[138] Furthermore, the consultation requirements are now effective at an earlier stage of the process—thus before the negotiations are started rather than before an agreement is entered into[139]—and consultations have to be conducted more intensively.[140]

Finally, the instruments that Congress has at hand to withdraw fast-track legislation have changed, as there is now a more direct link between the possibility to launch a procedural disapproval resolution—which repeals the fast-track legislation—and content-related requirements.[141] The introduction of a disapproval resolution can now be introduced by any member of the House of Representatives or the Senate, and it can now be justified by insufficient progress in the negotiations.[142]

As the consultation process with Congress is augmented by consultation with an Advisory Committee System, business interests that relate to digitally-delivered content products play a considerable role in the US trade policy formulation process.[143] Specifically, the USTR is mandated to rely on public hearings, an interagency coordination mechanism and a three-tiered system of advisory committees to receive guidance on its trade policy.[144] The importance devoted to e-commerce considerations is mirrored in a specially created Industry Functional Advisory Committee on E-Commerce (IFAC–4) that was host to an increasing number of high technology and content industries.[145]

[137] Point buttressed by Everett Eisenstat (Senate Committee) during the ABA Section of International Law and Practice Symposium, 'The US, the Doha Round and the WTO—Where Do We Go From Here?', Segment 9: 'TPA/Fast-Track', 12–13 September 2002, Georgetown University Law Center, Washington DC.

[138] Similarly to the 1988 Trade Act.

[139] S 2102(d)(2) and s 2104(a) TPA Previous fast-track bills only required consultation with Congress before agreements are entered into; *cf* s 1102(d) of the OTCA; and s 102(c) of the Trade Act of 1974.

[140] S 2104 TPA.

[141] See Congressional Research Service (2001c) pp 21–22 and the language on the 'extension disapproval resolution' in s 2103(c) TPA and the language on the 'procedural disapproval resolution' in s 2105(b) TPA.

[142] See s 2105(b)(1)(B)(ii)(IV) on the link between content-related negotiation objectives and the introduction of a disapproval resolution. In previous fast-track bills only the chairmen of the two trade committees could introduce a procedural disapproval resolution (ie s 1103(c)(B)(I) of the OTCA).

[143] House Committee on Ways and Means (2001a) pp 282–93; GAO (2002) and USTR (2001) pp 224 f. For more information see www.ustr.gov/Who_We_Are/List_of_USTR_Advisory_Committees.html.

[144] For more information on the Advisory Committee for Trade Policy and Negotiations (ACTPN) and the Intergovernmental Policy Advisory Committee (IGPAC) see GOA (2002); Jäger and Welz (1995) p 94 and previous footnote.

[145] The committee has, for example, IBM, Microsoft, eBay, Time Warner and ITI as members. See 'White House Rewards Donors with Slots on Key Advisory Committee', in: *Inside US Trade* (13 December 2002) on the growing share of content industries (new appointees include, eg, eBay, IBM) and ACTPN (2004a) for a list of members updated on 12 March 2004.

Besides, the advisory committee on services (ISAC 13) also consisted of representatives from institutions like the BSA, the MPA and IBM.[146] Today, these two committees have been merged as Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce (ITAC 8).

Most importantly, when a trade agreement has been signed and before congressional assent is given, the trade advisory committees on e-commerce and services report to USTR and Congress with a formal finding on areas of interest, either supporting or criticising the legal language included (*cf Chapter Seven* on the US bilateral trade agreements).[147]

To conclude, it can be said that the deadline (1 June 2005, renewable to 1 June 2007) of the fast-track legislation itself is a noteworthy device to press negotiation partners to settle for compromises. This holds true as trade partners in bilateral, regional and multilateral trade negotiations are uncertain whether the deadline for fast-track authority will be extended and are thus more likely to make compromises as the deadline is starting to approach.

4.2.4 'Competitive Liberalisation' of Trade in Digital Content

As indicated in the beginning of this Chapter, USTR has swiftly capitalised on this new TPA. Pursuing its mandate set out by the US Congress, it has concluded more than six bilateral free-trade agreements with more than ten countries and initiated a significant number of regional and bilateral trade negotiations (see Table 4.3) since 2002.[148]

Under the heading of 'competitive liberalisation' the US is—refusing a veto on its trade policy goals—trying to create pressure for liberalisation by negotiating on the bilateral, the regional and the multilateral level in a parallel fashion.[149]

In this process of competitive liberalisation, trade rules on digitally-delivered content products, reflected in special Chapters on e-commerce, are high on the agenda. In fact, the USTR has already successfully pursued e-commerce provisions that are especially similar to the TPA objectives when negotiating the

[146] See ACTPN (2004b) for a list of Members updated on 12 March 2004.

[147] S 2104(e) TPA and s 135(e) of the Trade Act of 1974, as amended. Both call on the trade committees to submit their report no later than 30 days after the President notifies Congress of his intent to enter into an agreement. The report is to include an advisory opinion as to whether the agreement achieves the applicable overall and principal negotiating objectives set forth in the TPA.

[148] See USTR (2004) pt III; 'WTO Negotiations May Hold Key to Bush's Legacy On Free Trade', in: *Washington Post* (28 July 2002); 'Bilateral Pacts Are Special Focus Of Bush Administration', in: *Washington Post* (12 December 2002) and 'A Pragmatic Agenda', in *National Journal* (4 January 2003).

[149] On this concept see USTR (2004) pt I, p 1 and 'Unleashing The Trade Winds', comment by USTR Robert Zoellick, in: *The Economist* (7–13 December 2002): 'We will not passively accept a veto over America's drive to open markets. [. . .] If others do not want to move forward, the [US] will move ahead with those who do.'

Table 4.3: Status of US preferential trade agreements

State of Negotiations	*Country*
In force since 1 Jan 2004	Singapore
In force since 1 Jan 2004	Chile
In force since 1 Jan 2005	Australia
Signed in May 2004	US-Central American Free Trade Agreement (CAFTA): Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua
Signed in June 2004	Morocco
Signed in September 2004	Bahrain
Negotiations launched	Southern African Customs Union (SACU): Botswana, Lesotho, Namibia, South Africa, Swaziland
Negotiations launchd	Free Trade Negotiations of the Americas (FTAA): 34 Western Hemisphere countries
Negotiations launched	Panama
Negotiations launched	Andean countries: Columbia, Peru, Bolivia, and Ecuador
Intentions to negotiate	Thailand
Intentions to negotiate	Middle East
Intentions to negotiate	Arab Emirates (UAE) and Oman

Source: based on Economic Report of the President (2004), page 236 (Table 12–2); GAO (2004); USTR (2004) and Internet: www.ustr.gov (last updated in March 2005).

flurry of concluded (Australia, CAFTA, Chile, Morocco, Singapore) or pending bilateral/regional trade agreements (details of the provisions and their merits are discussed in *Chapter Seven*).[150]

In line with previous sections, US trade officials—under close scrutiny by US Congress when selecting new FTA partners—have made very clear that prospective bilateral trade partners must be willing to negotiate comprehensive trade agreements which include state-of-the-art e-commerce provisions.[151] The

[150] US negotiators can always exert pressure by referring their foreign counterparts to the demanding mandate and supervision set out by US Congress.

[151] *Ibid*; 'USTR Defends Choice of Free-Trade Agreement Partners Against Critics', in: *Inside US Trade* (10 January 2003); GAO (2004a) p 10 and 'Freeing the Intangible Economy: Services in International Trade', address of USTR Robert Zoellick to CSI (2 December 2003), Internet: www.uscsi.org/publications/papers/12–02–03.htm.

goal is to build alliances around the US 'regulatory model of e-commerce', to use bilateral and regional FTA's as laboratories for innovative new disciplines[152] and to break the impasse on digitally-delivered content products in the WTO negotiations,[153] thus following a bottom-up approach from bilateral over regional to possibly achieve the negotiation objectives on the multilateral level.

4.3 CONCLUSION

As the analysis of *Chapter Four* demonstrates, US Congress has spelt out a very explicit and demanding negotiation mandate with respect to digitally-delivered content products that USTR will have to follow in preferential and global trade talks. This mandate is backed by procedural requirements anchored in the TPA.

Both the content and procedural requirements that relate to digital trade issues must be seen in the light of the fact that—for the first time in US history—no broad congressional consensus existed in favour of enacting fast-track legislation.[154]

In fact, US trade policy experts have expressed particular criticism towards the way the TPA was enacted, ie, with a small majority and an alienation of many Democratic Congressmen.[155] Leading congressmen, like the Senate Finance Committee Chair of 2002 Max Baucus have already threatened that Congress would derail any trade agreement not in conformity with the TPA's content or procedural requirements.[156] This weak congressional support essentially increases the pressure on the USTR to achieve the negotiation objectives mandated by the US Congress.

Especially the digital trade objectives and certain aspects of service trade liberalisation are among the areas that Congressmen will—being lobbied by the US content industries—watch very closely when assessing trade agreements that await their approval. Finally, concessions from the US in more defensive fields (steel, sugar, etc) that are essential for the conclusion of comprehensive trade agreements can only be expected if these new trade areas are tackled in the respective trade agreements.

[152] See for this point the USTR description of the US-SACU FTA on Internet: www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Section_Index.html.

[153] See ACPTN (2003a) p 6; USTR Robert Zoellick's comments in 'USTR Defends Choice of Free-Trade Agreement Partners Against Critics', in: *Inside US Trade* (10 January 2003).

[154] See Congressional Research Service (2001d).

[155] Discussions with Meredith Broatband (House Ways and Means Committee), IM Destler and Gary van Grasstek were essential to developing this argument. See for similar concerns 'Trade Act of 2002', Keynote Speech by Senator Max Baucus at the conference on 'Trade Policy in 2002' (26 February 2002) at the Institute for International Economics, Internet: www.iie.com/publications/papers/baucus0202.htm; Destler (2002); Wolff (1995) p 4; Destler and Balint (1999) p 55; Congressional Research Service (2002c) p 9.

[156] 'Indeed, the congressional consensus in favour of new trade agreements is weak and uncertain. If this latest grant is misused by the Administration, agreements negotiated under fast-track are in jeopardy, and extension of this authority is unlikely', cited from Statement of Senator Max Baucus, delivered on the first Congressional Oversight Group Meeting (19 September 2002), document source: USTR.

5

EC Negotiation Parameters: Internal Measures and Trade Jurisdiction

THE POSITIONS TAKEN by the EC in the WTO on the trade treatment of digitally-delivered content products follow a clear rationale: the desire to preserve the maximum margin for manoeuvre to implement support measures for content industries and the requirement to ensure the coherence between EC regulations and WTO rules.[1] The desired policy flexibility is achieved through expanding the scope of the audiovisual carve-out achieved during the Uruguay Round,[2] ideally leading to a *carte blanche* for digitally-delivered content products. In sum, its objectives prevent the EC from taking a liberal stance with respect to the requirements to guarantee free digital trade.

Section 5.1 explains the internal dimension of the EC's negotiation position, namely its adjusting audiovisual and its latest information society policies that devote mounting attention to digital content. These content support policies of the EC have a dual objective: to preserve linguistic and cultural diversity, on the one side, and to boost the competitiveness of the EC's content industries on the other.

Section 5.2 demonstrates that this need for policy flexibility and the endeavour to protect the local content industries are mirrored in the EC trade jurisdiction. The latter ties the hands of the EC's trade negotiators on the defensive side with respect to the WTO's audiovisual service negotiations. A defensive EC negotiation mandate and a lacking jurisdiction of the EC to make binding audiovisual service commitments for its Member States are at the origin of this protective regime. It is also shown that the classification of digitally-delivered

[1] See European Commission (1999c); European Commission (2000e); Communication from the Commission to the European Parliament and the Council of Ministers of 14 July 1998 on 'Audiovisual Policy: Next Steps', COM(1998)446final and Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 14 December 1999 on 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age', COM(1999) 657 final [European Commission (1999a)].

[2] Communication from the Commission to the Council and the European Parliament, Commission of the European Communities of 27 August 2003 on 'Towards an international instrument on cultural diversity', COM(2003)520final, p 4 and Communication from the Commission in n 43, pp 11–12.

content products as (audiovisual) services is a necessary precondition for three objectives of the EC.

— First, in EC law digitally-delivered content products are considered to be services. To achieve consistency between EC law and international trade law, the classification of digitally-delivered content products under the GATS is essential.
— Second, all regulatory and financial support measures to further digitally-delivered content products can only benefit from the 'spécificité culturelle' and thus the absence of specific GATS commitments if digitally-delivered content products are classified as audiovisual services.
— Third and very related to the second point, the classification of digitally-delivered content products under (audiovisual) services, or uncertainty surrounding their correct classification, are essential to uphold this policy of lacking GATS commitments of the EC. This holds true as trade agreements that affect cultural and audiovisual services are excluded from the EC's exclusive common commercial policy powers. This has the effect that individual EC Member States can easily block pertinent service liberalisation (*cf Section 5.2*) and that national parliaments have a say in the conclusion of international trade agreements. EC Member States, like France, have worked intensively to maintain this veto right for audiovisual services.

The Treaties founding the EC/EU (as amended by the Treaty of Nice in force since 1 February 2003) constitute the applicable law as regards this Chapter (see *Annex A.5.3* for the treaty acronyms used).[3] The changes which may result from the ratification of the Constitution for Europe are also assessed.[4] Finally, account is also taken of the enlargement of the European Union from 15 to 25 Member States on 1 May 2004, which has provoked a greater geographical application of EC policies, the need for new EC Member States to adapt their WTO negotiation positions accordingly and—due to supplementary votes of EC Member States being cast *en bloc*—a greater influence of the EC in the WTO.

5.1 INTERNAL DIMENSION: EXPANDING AUDIOVISUAL AND INFORMATION SOCIETY POLICIES

The EC perceives the content industry as prime vector of social and cultural values. Thus the support to the content industry is deemed a legitimate means of

[3] Treaty of Nice amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Official Journal of the European Communities (OJ) 2001/C 80/01(10 March 2001). The citation of articles of the Treaties follows the approach outlined at the beginning of this study.

[4] Draft Treaty establishing a Constitution for Europe, submitted to the President of the European Council in Rome, OJ C 169/01 (18 July 2003). Signed in October 2004 to become the Treaty establishing the Constitution for Europe. Final version reprinted in OJ C C310 (16 December 2004).

preserving local content and languages. The *acquis communautaire*—the sum of the EC's internal regulatory framework—reflects this aspiration and circumscribes the margin of manoeuvre of trade negotiators in international settings; that is to say in the WTO.[5] An assessment of the EC's internal powers in the field of content services (*Section 5.1.1*) provides the necessary background to the analysis of the conventional and the new EC content policies outlined in *Sections 5.1.2* and *5.1.3*.

5.1.1 Evolving Mandate of the EC as Regards Culture and Content

Over time the EC has—due to modifications of the EC Treaties—obtained progressively more important powers to formulate policies that affect (digital) content industries. However, it started from a limited mandate in this field of competence.

5.1.1.1 Starting Point: Limited EC Mandate Concerning Culture and Content

At the start of the EC's audiovisual policies in the 1980s, the Treaties did not confer a mandate on culture to the EC. Cultural policies were kept in the exclusive competence of the EC Member States.[6] The audiovisual policies on the European level were legitimised as part of the Single Market Programme.[7] In addition, pursuing to Article 157 EC on industrial policies,[8] the EC worked to increase the competitiveness of its content industries.[9] Manifestly, it was first and foremost the increasing trade deficit for content industries with the US that acted as impulse for the establishment of the EC's audiovisual policies, like local content quotas.[10]

[5] See Young (2000) p 112 for an account of how the internal regulatory framework of the EC structures its external room for manoeuvre.

[6] Ress and Ukrow (2000) para 1.

[7] The foundations for a common market for audiovisual services are described in European Commission (1988) pp 93 f and European Commission (1996). According to these publications, the key weaknesses of the European programming industry are, for example, the fragmentation into national markets, a low rate of cross-border programming, distribution and circulation, and an inability to attract financial resources.

[8] Art 157, para 1 EC reads, '[t]he Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist'.

[9] Oppermann (1999) paras 1968 and 1990.

[10] Kessler (1976) pp 58 f. European films have a very small market share in the US whereas the US imports little audiovisual content from the EC, see Germann (2003) pp 3–4.

5.1.1.2 Growing EC Powers in Traditional and New Content Areas: Both a 'Cultural' and an 'Industrial Policy'-Affair

Progressively, however, the EC's mandate with respect to culture has been expanded[11] and the EC has taken on responsibilities which it shares with its Member States.[12]

Specifically, Article 151 EC (first inserted by Article 128 TEU[13] and renumbered to Article 151 by the Treaty of Amsterdam[14]) stipulates that the Community shall contribute to the 'flowering and the diversity of the cultures' of the EC Member States.[15] According to Article 151 EC (reprinted in *Annex A.5.2*), the EC shall do so by encouraging cooperation between Member States. If necessary, the EC shall support and supplement the Member States' actions in several cultural fields,[16] by cooperating with third countries in the sphere of culture[17] and by taking into account cultural diversity in its actions.[18] Importantly, the role of the EC must be seen as very limited and supplementary to the national policies. The latter retain full control of their cultural policies, and Council decisions in this respect are taken by unanimity.[19]

Besides the strengthening of the EC's role in cultural policies, the EC Treaties also progressively anchored the right of EC Member States to subsidise audiovisual and cultural services. Specifically, Article 87, paragraph 3 EC (reprinted in *Annex A.5.2*; first inserted by Article 92, paragraph 3 TEU) allows state aids to promote culture. And the Council has reiterated that WTO negotiations shall not interfere with this national prerogative.[20]

Today the EC therefore stresses that its audiovisual support policies and its actions to limit audiovisual and cultural service liberalisation in the GATS negotiations are legitimised by:

— its mandate to safeguard cultural diversity; and
— the right of EC Member States to maintain national state aids in the field of culture.[21]

[11] See Ress and Ukrow (2000); and Oppermann (1999) paras 1968 f for detailed accounts of the EC's growing role in the field of culture. See also speech of Lamy in chapter 3 n 36.

[12] Ress and Ukrow (2000) para 2; and Oppermann (1999) paras 1135 and 1968 f.

[13] Treaty of Maastricht establishing the European Union, OJ 1992/C191 (29 July 1992).

[14] See the Annex A.5.3 for the quotation of EC/EU treaties.

[15] Art 151, paras 1 and 3 EC.

[16] Art 151, para 2 EC.

[17] Art 151, para 3 EC.

[18] Art 151, para 4 EC See also Art 22 of the Charter of Fundamental Rights of the European Union.

[19] Oppermann (1999) paras 1968, 1970 and 1972.

[20] In Council Resolution of 12 February 2001 on national aid to the film and audiovisual industries, OJ C 73/02 (6 March 2001) para 5 the Council emphasised that the mandate given to the Commission [. . .] on 26 October 1999 for the Doha Negotiations states that the Union shall ensure that the Community and its Member States maintain the right to preserve and to develop their capacity to define and implement their cultural and audiovisual policies.

[21] See, eg, n 2.

By framing its internal and external policies as necessary ingredients to the completion of the common market and to the achievement of cultural and linguistic diversity,[22] the EC has thus managed to reconcile its dual—economic and cultural—objectives.[23] The latter enlarged competence is perfectly reflected in the fact that—despite its limited formal legal competences—as per the mandate given by the European Council in November 2004, the European Commission negotiated the UNESCO Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions (see *Section 6.3*) on behalf of the EC.

Furthermore the EC's scope of action with respect to supporting content industries was also expanded due to the advent of the information society and the Internet. Taking note of technological innovations, the EC and its Member States are questioning existing (cf *Section 5.1.3.1*) and inventing new support measures to stimulate the development of digital content on the Internet (*cf Section 5.1.3.2*). As will be seen, digitally-delivered content products are again viewed from a double—an economic and cultural—angle.

Finally, the EC not only widens and accelerates its content-supporting activities. Since its enlargement in May 2004, the number of Member States that are bound by the EC's content policies and thereby the weight of the EC in the WTO on this matter have also risen.

5.1.2 Evolving Scope of EC Content Policies: Update of Traditional and Creation of New Content Measures

The increasing scope of the EC's mandate and technological change are matched by evolving and new content policies.

5.1.2.1 Long-Established EC Audiovisual Support Measures

During the Uruguay Round, the EC did not make GATS commitments on audiovisual services because its audiovisual policy was not compatible with specific GATS commitments (*cf Section 3.2.2*). As in the case of other WTO Members, the EC's traditional audiovisual policy is centred on:

— a regulatory framework allowing the realisation of an effective single market for broadcasting, which also introduces TV content quotas for European works (ie, the Television Without Frontiers, TVWF-Directive); and

[22] Communication from the Commission in n 42, pp 11–12 and 2381st Council meeting of 5 November 2001 on 'The role of culture in the development of the European Union', Culture and Audiovisual Affairs, 13126/01 (Presse 377–G). Summaries of the Council Meetings are on Internet: ue.eu.int/newsroom.

[23] *Cf* Tietje (1999a) para 77.

— financial support measures for content industries at the European level (mainly the MEDIA Programmes) that complement the national support measures.[24]

Concerning the regulatory framework, the EC's TVWF adopted on 3 October 1989, has the objective to allow for the free movement of television broadcasts within the Community.[25] The directive also aims at promoting European works. It imposes restrictions on the diffusion of non-European content on TV. Accordingly, Member States shall, for example, 'ensure [. . .] that broadcasters reserve for European works [. . .] a majority proportion of their transmission time [. . .].'[26]

Concerning the financial support measures, the MEDIA Programmes that started in 1990 were designed as financial support schemes for European content production and/or distribution.[27]

In line with Article 151 EC and with Article 87 EC on state aids, these two strands of audiovisual policy measures only supplement the much more extensive national measures.[28] These national cultural and audiovisual measures do not only concern film quotas. In the case of France, they range from national content quotas for the radio to special tax measures in support of national movies.[29]

Consequently, the EC's stance of preventing audiovisual liberalisation in the WTO can also be explained by the fact that in trade negotiations it is the EC's duty to shield the cultural policies of its Member States. This is the reason why the EC and its Member States are quite satisfied that in WTO trade negotiations no differentiated treatment exists for the individual sub-services of the broad W120–audiovisual service classification (ie, films, broadcasting, radio,

[24] *Cf* EC (1996) and Cincera (1999). See also the webpage on the EC's audiovisual policies of the DG Education and Culture, Internet: europa.eu.int/comm/avpolicy/intro/intro_en.htm. In this list, the support measures for cinematographic and other audiovisual works are not discussed.

[25] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJC 1989/L298 (17 October 1989) pp 23–30 amended in 1997 by Council Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, OJC 1997/L202 (30 July 1997) pp 60–70. See also Krebber (2002) and Wu (2004) p 93 for details on the TVWF Directive.

[26] Art 4 TVWF on the 'Promotion of distribution and production of television programs', para 1 (based on the amended version after 1997). This excludes the time appointed to news, sports events, games, advertising, tele-text services and tele-shopping. See also Art 5 TVWF.

[27] Council Decision 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA plus—Development, Distribution and Promotion) (2001–05); Decision No 163/2001/EC of the European Parliament and of the Council of 19 January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry (Media Training), 2001–05.

[28] European Commission Green Paper of 3 December 1997 on the Convergence of the Telecommunications, Media and Information Technology Sectors, Towards and Information Society Approach, COM(97) 623 [EC Green Paper on Convergence], p 46 that notes that audiovisual regulation is largely national in scope.

[29] See Saint-Pulgent, *et al*, (2003) pp 26–44 for an overview of French cultural policies.

music).[30] An undifferentiated approach, and thus a broad exemption of all services related to content without selective content-related commitments, actually seems most appropriate to defend the diversity of underlying national measures.

Contrary to first impressions, a direct link exists between these traditional content measures and the support to digitally-delivered content products. On first sight, the TVWF Directive applies only to free-to-air broadcasting and not to the digital delivery over electronic networks. Likewise, the early financial support measures of the EC were also more focussed on dramas and, for example, creative documentaries intended for cinema or television distribution. Nevertheless, these national content quotas or financial support measures also further the availability and thus distribution of digitally-delivered content products.

The logic behind this argument is simple: once the process of content creation has been supported by audiovisual policies, the film or other content formats can be digitised and delivered over the Internet. Content support measures of any kind, including those aimed at traditional radio and TV broadcasting, can thus have a rather direct influence on digitally-delivered content products.

In addition, the following sections show that there also increasingly exist support measures targeted to the creation and distribution of digital content.

5.1.2.2 New Audiovisual and Information Society Policies for the Digital Age

The EC has been a precursor in identifying technological evolutions of the digital age and analysing resulting challenges posed for regulatory frameworks.[31] Addressing the increasing difficulty of differentiating between telecommunication and audiovisual services (*cf Section 2.3.2.4*), the EC's 'Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors' argued that technological convergence must lead to a reassessment of content policies.[32] This new policy guideline also elevated the promotion of new audiovisual services to an objective of major public interest.[33]

On the level of the EC, two parallel and related actions have since been initiated that are now of concern to 25 EC Member States:

— a modernisation of traditional audiovisual measures; and
— novel and independent information society policies to support digital content.

Both developments are ongoing and the EC-internal changes are far from being concluded. As the EC does not want to prematurely preclude using certain

[30] See for an industry critique of this approach: 'IFPI Response to the EC Consultation Document on the GATS 2000/WTO Negotiations Concerning Audiovisual Services (Music and Recreational Software) and Cultural Services', Brussels: International Federation of the Phonographic Industry (31 May 2001), Internet: www.ifpi.org/site-content/library/gats-questionaire.pdf.

[31] EC Green Paper on Convergence.

[32] *Ibid*, p 34.

[33] *Ibid* and 2381st Council meeting of 5 November 2001 on 'The Role of Culture in the Development of the European Union', Culture and Audiovisual Affairs, 13126/01 (Presse 377–G).

policies in either course, it strives to preserve an unqualified leeway with regard to these topics in the WTO.[34] This stance also explains why the EC is not ready to list specific reservations in its GATS audiovisual service schedules (especially not for new services) but prefers to leave the whole sector unscheduled.

(i) Renewal of the Traditional EC Audiovisual Policies: Securing and Adapting the 'Acquis' The broad outline of the EC's approach to audiovisual policy in the digital age was set out in a special communication in December 1999.[35]

Ever since the EC has been reviewing its audiovisual policies. The continued need for European and national policies to make the European audiovisual sector more competitive has been at the centre of existing developments.[36] Most importantly, the attention has shifted from supporting film and cinematographic works to the enhancement of the competitiveness of the European content industry at large.[37] It was felt that especially the distribution, exploitation and development of works in Europe relying on digital technologies were sub-optimal.[38]

Today both the TVWF-Directive and the MEDIA programmes are at crossroads, and since the beginning of 2004 the future of the European audiovisual policy is in the process of being re-shaped.

a. Audiovisual Regulations: The EC Broadcasting Directive at Crossroads and Regulatory Uncertainty as Regards Digital Content With regard to audiovisual regulations, a stocktaking of the EC's audiovisual policy was conducted in preparation of the scheduled review of the TVWF Directive.[39] In June 2003, the Commission proposed a work programme[40] that shall provide it with the necessary input to evaluate the need for updating the present regulations of the TVWF Directive. Moreover, the question is posed as to what regulatory framework to apply to digitally-delivered content products that, for the moment, fall outside of both the EC telecommunication and broadcasting laws.

[34] European Commission (2000e).

[35] European Commission (2002f). Support of the European Council found in: 2427th Council Meeting of 23 May 2002, Culture and Audiovisual Affairs, 8846/1/02 REV 1 (Presse 140) and the Council Resolution of 21 January 2002 on the development of the audiovisual sector (2002/C 32/04).

[36] See, eg, Conclusions of the European Audiovisual Conference 'Challenges and Opportunities of the Digital Age', Birmingham (6–8 April 1998), referred to in Council Resolution of 21 January 2002 on the development of the audiovisual sector, 2002/C 32/04, para 3.

[37] 2381st Council meeting of 5 November 2001, Culture and Audiovisual Affairs, 13126/01 (Presse 377–G) and Council conclusions of 26 June 2000 concerning the communication from the Commission on 'Principles and Guidelines for the Community's Audiovisual Policy in the Digital Age'.

[38] 2545th Council meeting of 24–25 November 2003, Education, Youth and Culture, 14575/03 (Presse 325).

[39] Art 26 TVWF provides that, not later than 31 December 2000, and every two years thereafter, the Commission must submit and, where appropriate, make further proposals to adapt the Directive.

[40] Fourth report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 6 January 2003 on the application of Directive 89/552/EEC 'Television without Frontiers', COM(2002) 778.

As a result of the review, the Commission may submit proposals on new European audiovisual policies to the Community legislator. The fact that the EC is in the process of deciding under what regulatory frameworks digitally-delivered content products should fall, also helps to explain the EC's aim to preserve policy flexibility at the international level.[41]

Results of the TVWF Review At the end of 2003, first results of the review process were published.[42]

During these reviews, the articles that foster the promotion of European content, and that are therefore in conflict with the GATS, received particular attention.[43] A majority of stakeholders were in favour of maintaining the principle of safeguarding cultural diversity as the underlying objective of the TVWF[44] and asserted that the current approach in Articles 4 and 5 of the Directive were sufficient to ensure the promotion of European works. This is also the result of the commissioned studies that were to assess the effects of both articles.

But—going beyond the *status quo*—some important stakeholders are of the opinion that the Directive needs to be updated to achieve its objectives in a changing technological environment. The European Broadcasting Union has pointed out that, without a modernisation, the TVWF will become progressively obsolete.[45] In addition, the European Parliament is also calling for a complete overhaul of the TVWF directive.[46]

To address the remaining open questions, it was decided that further work would be needed to prepare any legislative proposal updating the TVWF Directive to be put forward in 2005. The initial work of the tasked Focus Group 1 has produced a consensus for a new regulatory framework for the delivery of audiovisual content (incl. web casting, streaming, etc.).[47] In the first half of 2005, announcements by Commissioner Reding—now in charge of the reorganised DG Information Society and Media which is also responsible for audio-

[41] European Commission (2002f).

[42] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 15 December 2003 on the 'Future of the European Regulatory Audiovisual Policy', COM(2003) 784 final, pp 11–12.

[43] Art 4–6 TVWV. See Review of the TVWF Directive, Theme 2: Promotion of Cultural Diversity and Competitiveness of the European Programme Industry, 23–25 June 2003, Internet: europa.eu.int/comm/avpolicy/regul/review-twf2003/twf2003-theme2_en.pdf.

[44] See n 42. It notes on p 17 that '[s]ome requested the strengthening of the requirements, while others proposed replacing the existing requirements with other instruments such as investment obligations or specific support programmes for European production. A minority of stakeholders continues to question the need and/or the proportionality of such requirements'.

[45] EBU (2003b) pp 6–8; and *cf* EBU (1999a, b, 2003a).

[46] Resolution of the European Parliament of 4 September 2003 on Television without Frontiers, P5_TA(2003)0381.

[47] European Commission, DG Education and Culture (Audiovisual Policy), Focus Group 1, Regulation of Audiovisual Content, September 2004, Internet: europa.eu.int/comm/avpolicy/regul/focus_groups_en.htm.

visual policy—made clear that a new TVWF Directive will be submitted. According to Reding, this new directive will be 'technologically neutral vis-à-vis all models of delivery of audiovisual content' (platform neutrality)[48], raising questions as to the meaning of this feature in the context of measures to protect European works (ie, discriminatory quotas) and other promotion of local content). The current thinking, however, seems to be that only four areas of fundamental obligations (including for example the the rules on the protection of minors but excluding the rules on the promotion of European works) should apply equally to all platforms, including the Internet.[49]

Uncertain Regulatory Approach towards Digitally-Delivered Content Products
As mentioned above, during the regulatory review particular attention will be paid to the regulatory approach taken towards digitally-delivered content products.

Some of the regulatory uncertainty as regards digitally-delivered content products has already been settled. These internal decisions are putting certain limits on the EC's flexibility in classifying digitally-delivered content products on the international level.

— First, it was decided that under EC law digitally-delivered content products are considered services. Whereas EC law considers physical carrier media as goods,[50] all artistic creations that derive their value from the intellectual capital that is vested in them are considered services if they are not linked to a carrier medium.[51]
— Second, as regards the realisation of an effective Single Market, and thus for purposes of liberalising intra-EU trade, digitally-delivered content products are treated as so-called 'information society services'.[52] As such, digitally-delivered content products fall under a set of newly-adopted regulations. Notably, they are submitted to the EC's E-Commerce Directive, and thus the legal framework supporting on-line commerce across the EC,[53] and other corresponding regulations that relate to data protection,[54] value-added

[48] 'Challenges ahead for the European Commissioner for Convergence', address by Viviane Reding at the European Cable Communication Association Conference, Brussels (18 January 2005).

[49] 'La revision de la directive Television sans Frontieres', speech by Viviane Reding, Seminaire de la Presidence du Luxembourg: Allocution d'ouverture (30 May 2005).

[50] Hahn (2002) p 86. See Oppermann (1999) para 1268 for a definition of 'goods' in EC law.

[51] Lux (2003) pp 197–98; and Randelzhofer (1992) paras 6–13.

[52] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1 (17 July 2000) pp 1 f [EC Directive on Electronic Commerce], para 18.

[53] EC Directive on Electronic Commerce, pp 1 f, and para 18. On the contrary, television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request.

[54] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (EC Directive on privacy and electronic communications), OJ L 201/37 (31 July 2002).

taxation,[55] and other regulatory matters. Under EC law, classification of digitally-delivered content products as services is therefore critical if these regulations are to be applicable to them.[56]

Further limiting the EC's leeway in the WTO context, some regulatory uncertainty remains as to what regulations to apply to digitally-delivered content products.

Since in the digital world, the difference between content and transmission is increasingly difficult to uphold (*cf Section 2.3.2.4*), digitally-delivered content products fall strictly between the current regulatory frameworks for telecommunication services on the one side and broadcasting services on the other.[57]

Emphasising the difference between transmission and content services, the EC law follows a clear separation between telecommunication services (ie, data, voice) subject to the new package of EC telecom directives,[58] and television broadcasting services subject to the TVWF Directive.[59] The two regulatory contexts differ widely:

— On the one hand, in 2002 the EC adopted a new common regulatory framework for 'electronic communications networks and service electronic communications'[60] to be applied to telecommunication services as of July 2003. Its regulatory approach is very different from the Broadcasting Directive as its rules are basically aimed at progressive liberalisation, deregulation in a converged technological environment (eg, unbundling of the local loop) and thus competition.
— On the other hand, the TVWF Directive for broadcasting focuses on public interest objectives like freedom of expression, pluralism, cultural and linguistic diversity, as well as the protection of minors.[61]

[55] Council Regulation No 792/2002 of 7 May 2002 amending temporarily Regulation (EEC) No 218/92 on administrative cooperation in the field of indirect taxation (VAT) as regards additional measures regarding electronic commerce, OJL 128/1 (15 May 2002) and Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value-added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services, OJ L 128/41 (15 May 2002). See Internet: http://europa.eu.int/comm/taxation_customs/index_en.htm and chapter 2 n 30.

[56] Drake and Nicolaidis (2000) p 408. See also EC Green Paper on Convergence, pp 82–85; Lopez-Tarruella (2001); Voß (1999) paras 11–12; and Randelzhofer and Forsthoff (2001) paras 23–30 and compare this to the classification discussion in s *2.3.2.4*.

[57] *Cf* Wu (2004).

[58] Following Framework Directive unites the package of regulations: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJL108 (24 April 2002) pp 33 f [EC Telecom Framework Directive].

[59] EC Green Paper on Convergence, especially pp 7 and 9.

[60] See EC Telecom Framework Directive, paras 5 and 10, these are defined as services or networks that transmit communications electronically, whether it is wireless or fixed, carrying data or voice, Internet-based, etc.

[61] European Commission (2002f) and EC Telecom Framework Directive, para 6.

Digitally-delivered content products are not yet explicitly addressed in either regulatory regime. The former telecom-related legislation excludes the provision of content through communications networks.[62] The EC telecom laws are thus 'without prejudice to measures taken at Community or national level [. . .] in order to promote cultural and linguistic diversity [. . .]'.[63] It also specifies that instead it is the TVWF Directive and the new 'Principles and Guidelines for the Community's Audiovisual Policy' which are applicable to content.

But during the review of the EC's audiovisual policy, it has not yet been concluded by the EC if and how its evolving audiovisual policies (ie, content quotas and subsidies) should be relevant to digitally-delivered content products. As content delivered over the Internet is not identical with 'broadcasting', the traditional audiovisual policies of the EC are not automatically extended to this new area.[64]

In the medium-term, however, the Commission may—next to the financial support measures directly aimed at digital content described later—also consider regulations affecting new modes of delivery like the Internet (for example, as part of the revised TVWF Directive).[65] These regulations would probably not be compatible with specific GATS commitments applicable to digitally-delivered content products. This regulatory uncertainty also leads the EC to minimise international engagements in the field.

b. Financial Support Measures: Updates to Reflect the Digital Age The financial support measures implemented by the Commission are also continually being reviewed and adapted.[66] In July 2004, the Commission adopted a new programme (MEDIA 2007) for the years 2007–2013.[67] Significantly increasing the number of WTO Members benefiting from audiovisual support measures, the programmes that often do not seem to be compatible with specific GATS commitments is open to all 25 EC Member States, to remaining accession and to other countries.

As a general rule, the focus on digitisation is growing in the 'new generations' of the MEDIA Programmes.[68] Direct support to more interactive media (and video games in particular) has been given through the MEDIA Programme since 1998.[69] The newer generations of the MEDIA Programmes put increased emphasis on the creation and dissemination of new types of audiovisual

[62] EC Telecom Framework Directive, paras 5–7.

[63] *Ibid*, para 5.

[64] See Wu (2004) pp 93–94.

[65] *Cf* 'The Future of European Audiovisual Policy', address of Viviane Reding to the Westminster Media Forum, London (22 April 2004), Internet: www.ebu.ch/CMSimages/en/Reding_04_192_EN_tcm6–11665.pdf.

[66] See the MEDIA Programme under Internet: europa.eu.int/comm/avpolicy/media/index_en.html.

[67] See the consultation process under Internet: europa.eu.int/comm/avpolicy/media/med2eva_en.html.

[68] This was requested by EC Member States in 2545th Council meeting of 24–25 November 2003, Education, Youth and Culture, 14575/03 (Presse 325).

[69] Rapport Fries (2003) p 25.

content.[70] MEDIA 2007 will thus have objectives to preserve and enhance European cultural diversity through a strengthening of content distribution over the Internet.[71] Building on this, some Member States, such as Germany, have—in the public consultation process—argued that the future batch of the MEDIA Programme should entail measures aimed at supporting multimedia content.[72] The increased policy attention on digitally-delivered content products is also reflected in a growing overlap of adapting EC audiovisual policies and the new information society policies.

(ii) New EC Information Society Policies: E-Content as Major Policy Focus
The EC has also rapidly taken on so-called information society policies.[73] With the latter, the EC has become involved in the European digital content market with substantial funds to support the creation and distribution of European digital content.

These policies may be hard to reconcile with specific GATS commitments and its MFN obligations. Therefore, they imply further pressure on the EC to seek an audiovisual service classification for digital content products (including computer games, leisure software) and continued absence of GATS commitments there under.

a. The eEurope Initiative: Digital Content as Driver of Growth and Challenge to Cultural Diversity In 2000, the Lisbon European Council spelt out the objective to make the EU the most competitive knowledge-based economy in the world before 2010.[74] In particular, the Lisbon Council stressed the crucial role of digital content as 'creating added value by exploiting and networking European cultural diversity', and thus stimulating the development and use of European digital content on global networks.[75]

The *e*Europe initiative is also driven by the desire to preserve cultural diversity and the motivation to avoid hegemony of the US on the Internet through the development of a European approach to the information society.[76] This

[70] Council Decision of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audiovisual works (MEDIA Plus-Development, Distribution and Promotion, 2001–05, OJ C 2000/821/EC (17 January 2001) paras 15 and 20).

[71] See address of Viviane Reding above n 66.

[72] 'Nachfolgeprogramme Media Plus und Media Fortbildung', Stellungnahme der deutschen Delegation (11 August 2003). See also the previous note.

[73] EC Green Paper on Convergence; Commission Communication of 24 July 1996 on the implications of the Information Society for European Union policies preparing the next steps, COM(96)395 and Final report of the High Level Experts Group of April 1997 to the Commission on Building the European Information society for us all.

[74] Communication on a commission initiative for the special European Council of Lisbon from 23 and 24 March 2000 on 'An information society for all', DOC/00/8, Internet: www.e-europestandards.org/Docs/eeurope_initiative.pdf.

[75] n 43, paras 9 and 11; European Commission (2002g) and 'Press Release on the e-Content Programme', Commissioner Liikanen (22 December 2000), Internet: www.cordis.lu/econtent/release.htm.

[76] European Commission (2002g).

increased support for the development and use of European digital content has received strong backing by the Council.[77]

In view of the above considerations, the EC launched the *e*Europe Initiative in 2000, followed by *e*Europe 2002 and *e*Europe 2005.[78]

b. Supporting European Digital Content: The eContent Programme

Specifically, the *e*Europe Initiative started the *e*Content Programme aimed at supporting the production, use and distribution of European digital content and the promotion of linguistic and cultural diversity on global networks.[79] Some actions shall illustrate:

— The *e*Content Programme (2001–2004) favoured, for instance, the development and use of European digital content on the Internet. Moreover, in the beginning of 2004, the Commission issued a Communication[80] which recommends a follow-up *e*Content*plus* Programme open to EC Member States and selected third countries.[81] This initiative was adopted by the European Parliament in January 2005. With a planned financial envelope of €149 million for 2005 to 2008, its objective is to spur demand for broadband and mobile content.[82]

— In the context of the *e*-Content programmes, studies have been commissioned to identify the major steps that can be taken to foster the development of the mobile content market in Europe and to assess the export potential of European digital content products.[83] Moreover, the objectives of the *e*-Content programmes are fostered by parallel policies, like for example the TEN-Telecom Programme which promotes the marketing of European digital products.[84]

[77] 2427th Council Meeting of 23 May 2002, Culture and Audiovisual Affairs, 8846/1/02 REV 1 (Presse 140).

[78] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions of 25 May 2002 on eEurope 2005: An information society for all, Action plan to be presented in view of the Sevilla European Council, 21–22 June 2002, COM(2002) 263 final. See *e*Europe Programme under Internet: europa.eu.int/information_society/help/about/index_en.htm.

[79] Council Decision of 22 December 2000 adopting a multi-annual Community programme to stimulate the development and use of European digital content on the global networks and to promote linguistic diversity in the information society, OJ L14/32 (18 January 2001). *Cf* Valentini (2003) and Internet: www.cordis.lu/econtent.

[80] Proposal for a Decision of the European Parliament and of the Council of 13 February 2004 establishing a multi-annual Community programme to make digital content in Europe more accessible, usable and exploitable (presented by the Commission), EEA Agreement [*e*Content Plus Programme].

[81] *e*Content Plus Programme, Art 1, para 1 and p 8. Its Art 2 specifies that participation is open to legal entities established in European Fair Trade Associations, in states which are contracting parties to the European Economic Area Agreement, and legal entities established in third countries.

[82] 'New EU Programme to Promote European Digital Content Market: Commissioner Reding Welcomes Postive Vote in Parliament', EC Press Release, IP/05/98 (27 January 2005).

[83] See European Commission (2000b, d, 2002a).

[84] See Internet: europa.eu.int/information_society/programmes/eten/index_en.htm (11 January 2004).

— More recently, a new European initiative for the information society has been launched to spur the goals of the Lisbon strategy (i2010).

Additionally, the Commission and the EC Member States are taking growing interest in interactive media content and recreational software.[85] Since the Danish EU Presidency in 2002, these digital contents have been handled as the media form of the future with economic considerations outweighing that of the film and cinema market, and for which it is important to 'develop content based on European values'.[86] This new policy priority took its height in the 2002 Council Resolution on Interactive Media Content that declares the promotion of interactive media content as prime objective of the Council.[87]

Before assessing the linkages between the EC's policy developments and its WTO negotiation stance in more detail, attention shall be drawn to the fact that policies focussing on multimedia content that may not be compatible with the specific GATS obligations are not unique to the EC.

To the contrary—often inspired by the European model—a significant number of other WTO Members are undertaking new support measures for the content industries, albeit not necessarily in the form of subsidies or national content quotas.[88] For example, in Japan a law was passed in the beginning of 2004 that strongly resembles the *e*Content programme and other digital content directives of the EC.[89] Growing attention to new broadband content industries is also devoted to by countries like Australia, Canada and Korea.

5.1.3 Link between the Evolving Content and Information Society Policies and the EC's Negotiation Flexibility in the WTO

Analysing from a GATS perspective, the renewal of traditional and new EC content policies are thwarting the EC's ability to help find solutions to the horizontal e-commerce questions in the most trade-liberal way in the WTO

[85] 2311th Council meeting of 23 November 2000, Culture and Audiovisual Affairs, 13437/00 (Presse 442); 2287th Council meeting of 26. September 2000, Culture and Audiovisual Affairs, 11563/00 (Presse 333) and 2427th Council Meeting of 23 May 2002, Culture and Audiovisual Affairs, 8846/1/02 REV 1 (Presse 140) pp 8 f. See the Danish EC Presidency under Internet: www.kum.dk/sw4448.asp and www.eu2002.dk/news/news_read.asp?iInformationID=24613.

[86] *Ibid*. It is stressed that interactive software, which includes PC and video games, reference and educational works on CD-ROM, is the European content industry's fastest growing sector. See for the latter Council of the European Union, Note of 24 June 2003 from the Danish delegation to the Audiovisual Working Party on New Media in Europe (10363/02), Internet: www.kum.dk.

[87] Council Resolution of 19 December 2002 on interactive media content in Europe, OJ C 13/04, para 8 and 2461st Council meeting of 11–12 November 2002, Education, Youth and Culture, 13747/02 (Presse 340). As evidenced by OECD (2005b, d), the economic importance and corresponding policy attention to the area of computer and video games but also any other form of mobile content is increasing in OECD countries.

[88] Communication of the Commission of April 2003 on 'Investing in Research: an Action Plan for Europe' COM(226) 2003.

[89] For the original text of the Japanese legislation and explanations see www.kantei.go.jp/foreign/policy/titeki/kettei/030708f_e.html.

(*Chapter Two*) and to bring forward necessary specific GATS commitments and an elimination of MFN GATS limitations (*Chapter Three*).

— First, domestic law constrains the EC to consider digitally-delivered content products as services.
— Second, the information society policies that—in tandem with changing audiovisual EC policies—form a web of support and framework measures that prevent the EC from taking a liberal stance on trade rules concerning digitally-delivered content products.

  On the one hand, the EC's endeavour to support technological development to spur the exploitation of public sector information or to digitise, for instance, European archaeological content, is not likely to be in contradiction with GATS commitments.

  On the other hand, the direct support to private entities to foster the creation, the dissemination and the marketing of commercially-exploitable content as well as certain direct subsidies to the information infrastructure and specific content technologies might be in direct contradiction to specific GATS commitments. This also applies to potentially upcoming regulatory approaches taken towards digitally-delivered content products.

Again the overlapping cultural and economic interests and the resulting broad interpretation of what the EC will consider 'cultural content' are at the centre of the problem.

The possible treatment of entertainment or educational software as 'cultural content' illustrates this issue: As raised in *Section 2.3.2.4*, the electronic delivery of leisure software spurs particular classification debates in the WTO. There is a risk that some WTO Members may want to subsume this type of digital content product under the audiovisual carve-out. A clear decision on that front has not yet emerged in the EC. But the discussions between 2002 and 2004 revealed that this sector raises many cultural policy and competitiveness issues.[90] The MEDIA Programme already supports the creation of video games but other EC or national measures might also be launched in the future. In 2003, for instance, the French government started to support the development of its video game sector.[91]

At this stage, the Council Resolution on Interactive Media Content and the EC's audiovisual or information society policies are not yet calling for direct subsidies or regulatory measures applicable to leisure software. But the EC's DG Education and Culture has repeatedly declared that '[. . .] recreational software [. . .] can be considered [. . .] audiovisual services and [is] thus covered by the Community exemptions[92]'. This stance of the DG Education and Culture is not

[90] *Cf* Danish Ministry of Culture (2002) p 44; and Danish Ministry of Culture (2003) noting that games are a new media with a broad cultural and commercial impact. See also ELSPA (2003) p 8 and DTI (2003) noting the cultural impact of games.

[91] Rapport Fries (2003) and 'L'Industrie Des Jeux Vidéo Espère Obtenir Des Aides Publiques', in: *Le Monde* (3 December 2003).

[92] European Commission (2000e).

binding for the DG Trade's actions in the WTO. Nevertheless, the arguments of the EC trade negotiators in the Doha Development Round in the field of computer and related services (*cf Section 6.1.2.2*) already point to such an approach.

Other WTO Members that follow the approach of cultural diversity and lacking GATS commitments on audiovisual services, like Canada and Australia, may thus be interested in supporting the stance of the EC. If this logic is pursued, then the audiovisual carve-out can be used overtly to shield most, if not all, digitally-delivered content products from trade liberalisation.

5.2 EXTERNAL DIMENSION: THE EC'S COMMON COMMERCIAL POLICY POWERS RELATING TO DIGITAL CONTENT*

The need for policy flexibility with respect to audiovisual and other content-supporting policies described in *Section 5.1* is mirrored in the external dimension of the EC's negotiation position, namely in the delegation of the commercial policy powers from its Member States to the EC. Indeed, the hands of the EC's trade negotiators are tied on the defensive side with respect to establishing a liberal multilateral trade regime for audiovisual services and digitally-delivered content for two main reasons:

— a defensive EC mandate concerning audiovisual and other 'cultural services' valid for the Doha Negotiations (*Section 5.2.1*); and
— a distribution of trade policy powers that—under the Treaty of Nice—actually excludes audiovisual services from the EC's exclusive common commercial policy powers and thus creates a veto right for each EC Member in audiovisual matters (*Section 5.2.2*).

As was the case for the EC's internal dimension (*cf Section 5.1*), the classification of digitally-delivered content products as services in international trade negotiations plays a critical role for this outcome: If digitally-delivered content products are classified as goods or in service categories other than audiovisual services, a trade agreement falls entirely into the EC's sole trade policy power. If, however, content products are treated as cultural and audiovisual services, then an exemption from the exclusive EC commercial policy applies. In the latter case, individual EC Member States, like France, are able and likely to block specific GATS commitments leading to freer digital trade in content products.

* Pt 5.2 draws on an earlier report to the German Parliament; see Hauser and Wunsch-Vincent (2002). The author thanks Prof Dr Martin Nettesheim (University of Tübingen), Dr Tobias Bender (Bucerius Law School) and Prof Dr Markus Krajewski (University of Potsdam) for valuable input.

5.2.1 The Cultural and Audiovisual Service Carve-Out in the EC's Negotiation Mandate for the Doha Round: The First 'Safety Lock'

The negotiation mandate given to the Commission by the Council for the ill-fated WTO Seattle Ministerial is still valid for the Doha Development Agenda.[93] This fairly narrow mandate acts as the first 'safety lock' against digital trade liberalisation, as it ties the hands of DG Trade in the GATS negotiations and the WTO Work Programme on E-Commerce when it comes to securing free trade for digitally-delivered content products.[94]

The mandate for the service negotiations supports progressive service liberalisation and the development of GATS rules.[95] Although it asks the Commission to ensure the coherence of GATS commitments by sectors and by mode of supply, the liberal nature of the mandate is weakened by specifying that: '[d]uring the forthcoming WTO negotiations the Union will ensure [. . .] that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity'.[96]

The mandate is interpreted by DG Trade, DG Culture and Education as well as by France as a clear-cut instruction not to make any audiovisual service commitments.[97] Resolutely, no fresh mandate was formulated for the Doha Development Agenda to uphold this inflexible instruction.[98]

Again, it can be said that a few EC Member States—France with the support of Spain, Portugal and Belgium—required a cultural exemption not necessarily called for by other EC Member States. Countries like the UK, the Netherlands and Sweden held the view that quotas were becoming obsolete and difficult to enforce, and that leaving out audiovisual services from the new negotiations could induce other countries to exclude—*a priori*—other sectors from the

[93] Equally, the Council Conclusion before the Cancún Ministerial did not change the mandate. See, 'Council Conclusions on the Preparation of the WTO 5th Ministerial Conference', Cancún, 10–14 September 2003, 11439/1/03 REV 1 (Presse 209), 2522nd Council meeting, External relations, Brussels (21 July 2003).

[94] The negotiation mandate of the EC can be seen in 'Preparation of the Third WTO Ministerial Conference, Council Conclusions', European Council, 12092/99 (26 October 1999), Internet: presidency.finland.fi/netcomm/news/showarticle1615.html [EC Doha Negotiation Mandate]. See House of Lords (2001) for a more detailed explanation of the mandate.

[95] According to p 4 of the EC Doha Negotiation Mandate, '[n]egotiations should [. . .] bring about a deeper and broader package of improved commitments from all WTO members to market access and national treatment. Current imbalances in commitments across countries and service sectors should be reduced'.

[96] EC Doha Negotiation Mandate, p 1.

[97] 'L'Exception Culturelle N'Est Pas Négociable', in: *Le Monde* (21 October 1999) and 'Ministerial Conference in Doha', address of the French Ministry of Foreign Affairs Spokesperson, Paris (8 November 2001). Catherine Trautmann (French Minister for Culture in 1999) made clear that this mandate is much sharper than the one obtained during the Uruguay Negotiations in: 'Sur Le Mandat Donné À La Commission Européenne Pour Préserver l'Exception Culturelle', in: *Point presse OMC* (28 October 1999).

[98] Address of Viviane Reding (Commissioner DG Education and Culture) above chapter 2, n 110.

services negotiations as well.[99] But France declined to accept a weaker formulation.[100]

The European Parliament, which may soon have a greater role in formulating the EC's trade policy (*cf Section 5.2.2.5*), also demands that no commitments be taken in the GATS negotiation on cultural services. It also backs the protective EC negotiation mandate as regards cultural and audiovisual services for the Doha Development Agenda.[101]

5.2.2 The Cultural and Audiovisual Service Carve-Out From the EC's Common Commercial Policy: Further 'Safety Locks'

The EC's foreign trade jurisdiction is based on Article 133 EC (ex-Article 113 TEEC), in force since the Treaty of Rome (1958). In the opinion of experts, this specific section from the Treaty of the European Community (TEC) is not clear as to the extent of the EC's power to negotiate and conclude international trade agreements (ie, their shared or exclusive nature?).[102]

As shown by its evolution depicted in Figure 5.1, neither the interpretation nor the substance of Article 133 EC is static. The article describing the EC's common commercial policy had been interpreted by the European Court of Justice (ECJ) in 1994 and was changed through the Treaty of Amsterdam and the Treaty of Nice. Since 1 February 2003, Article 133 EC—in the version of the Treaty of Nice—constitutes the applicable law[103] (repealing Article 133 TEC[104]). The changes to the EC's powers with respect to commercial policy that may arise through Article III–211 of the Draft Treaty establishing a Constitution for Europe are also taken into account.[105]

[99] 'Prodi Meets Clinton Backed By Mandate Calling For A Comprehensive Trade Round', in: *BNA International Trade Reporter* (27 October 1999) and 'EU At Odds Over Audiovisual Services, Labor In WTO Talk', in: *Inside US Trade* (15 October 1999).

[100] Other EU Members asked France to back down from its hard-line position on cultural diversity issues, claiming it was playing into the hands of the US, which was not in favour of entering into a broad round of negotiations. See 'EU Fails To Reach Common Negotiation Position For WTO Meeting In Seattle', in: *BNA International Trade Reporter* (12 May 1999).

[101] See the Resolution of the European Parliament on 18 November 1999 on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round, OJ C 189 (7 July 2000) p 213 where the European Parliament took the view that the GATS rules should not jeopardise the cultural diversity and autonomy of the WTO contracting parties and 'Preparation for the WTO Ministerial Conference for the 5th World Trade Organisation Ministerial Conference Cancún, Mexico', 10–14 September 2003, text adopted by the European Parliament (3 July 2003) para 32 and Resolution of 12 March 2003 on the GATS within the WTO, incl cultural diversity, Text adopted by the European Parliament, P5_TA(2003)0087 (12 March 2003).

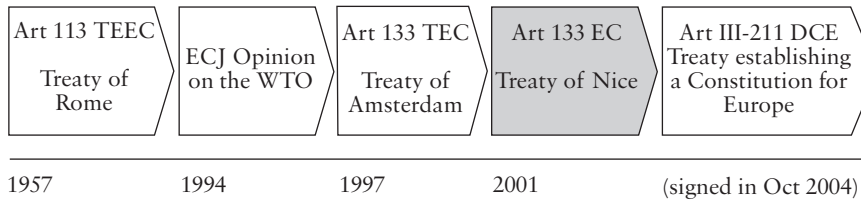
[102] See Everling (1969) p 187; Hahn (1999) para 1; Hahn (2002) para 2; Herrmann (2001); and Herrmann (2002) regarding the lack of clarity of the Treaty of Nice.

[103] See above n 3 and 'Summary of the Treaty of Nice', MEMO/03/23 of the European Commission (31 January 2003), Internet: www.deltur.cec.eu.int/english/nice-treaty-sum.rtf.

[104] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340 (10 November 1997).

[105] Essential parts of these arts are reprinted in *Annex A.5.1.*

Figure 5.1: The evolution of the EC's trade policy jurisdiction[106]



Note: Shading indicates applicable law. On the terminology relating to the EC Treaties see List of Acronyms.

Through time, a different treatment of goods and services has emerged when it comes to the distribution of the commercial policy powers between the EC and its Member States, with goods falling into the exclusive power of the EC and the competence to conclude trade agreements on services being shared by the EC and its Member States. Most importantly, in this evolution audiovisual and other 'cultural services' were singled out as an area for which the EC Member States are not willing to delegate full trade negotiation authority to the EC (*cf* Table 5.1 later in *Section 5.2.2.3*). However, trade policy competence of the EC in audiovisual services is considered to be essential for establishing a liberal trade framework for digitally-delivered content products.

5.2.2.1 Fundamentals of the EC's Common Commercial Policy

Through the Treaty of Rome, the EC Member States have conferred exclusive powers for the common commercial policy to the European Economic Community (EEC). The conferral of an exclusive trade policy jurisdiction (as opposed to a shared jurisdiction) through Article 133 (ex-Article 113), paragraph 1 TEEC from Member States to the EC has the effect that EC Member States are precluded from conducting independent national commercial policy. Also, the conclusion of international trade agreements then no longer presupposes any ratification procedures by national parliaments (see *Annex A.5.1.1* for the treaty text).[107]

So far, the right to conclude international trade agreements constitutes the most important transfer of powers from its Member States to the EC with respect to external relations.[108] This exclusive power regarding the common

[106] The dates below the Figure 5.1 indicate the time of signature of the Treaties and not their entry into force (except for the Constitution for Europe which has not yet been ratified by EC Member States and the date below the WTO Opinion 1/94 of the ECJ).

[107] Art 133, para 1 TEEC and EC This competence is associated with the EC and not the EU, because according to international law the EU does not have the status of an international legal entity, *cf* Craig and Búrca (1998) p 116.

[108] Vedder (2001) paras 3 and 7; Hahn (2002) para 12; Müller-Huschke (2000) para 1 and 'La Politique Commerciale et la Convention: Un Exemple À Parfaire', address of Pascal Lamy to the Working Group on External Action of the European Convention, Brussels (15 October 2002).

commercial policy is described in the literature as a structurally necessary external expansion of the Community's internal free exchange of goods and services.[109]

Article 133 EC grants the European Community (EC) the authority to negotiate international trade matters in accordance with a set of established principles.[110] As this article also delegates certain trade policy responsibilities according to specific procedures it can be compared to the US fast-track negotiation authority discussed in *Chapter Four*. In the EC, two bodies are mainly responsible for shaping this exclusive EC trade policy competence: one is the EC's DG Trade and the other is the Council.[111] In the previous and in the current version of Article 133 the European Parliament does not play a decisive role in concluding trade agreements.[112] Moreover—as opposed to the situation resulting from the US trade jurisdiction (*cf Section 4.2.3.2*)—the private sector has no official role in the EC's trade policy formulation process.[113]

Process-wise, the Commission lays proposals on the conduct of a common commercial policy before the Council (Article 133, paragraph 2 TEEC). Through a negotiation mandate, the Commission is then empowered by the Council to negotiate. To ensure that a consensus is present in the Council when international agreements are approved, the Commission is assisted by the so-called '133 Committee'.[114] Once the negotiations are concluded, the results must again be approved by the Council.[115]

When it comes to the common commercial policy as defined by Article 133, paragraph 1 TEEC, the Council decides by qualified majority on the negotiation mandate and trade agreements (Article 133, paragraph 4 TEEC).[116] An exception is the approval of international agreements in an area where, for enacting internal EC regulations, the Council can decide only unanimously.[117]

The majority principle has apparent advantages over the unanimity rule:

— First, it accelerates decision-making among a growing number of EC Member States.[118]

[109] See Vedder (2001) para 7; Hilpold (1999) pp 118–26; and Bogdandy and Nettesheim (1993) pp 465 f.

[110] See in this respect Hahn (1999) para 2; and Vedder (2001) para 1.

[111] *Cf* Art 133, para 2 TEEC and EC.

[112] It is merely to be consulted regularly on the conclusion of such trade agreements, without having any decision-making powers. *Cf* Art 300 EC (ex-Art 228 TEC) paras 2 and 3.

[113] See Congressional Research Service (2002b) p 6 for this comparison.

[114] Art 133, para 3, subpara 2 TEEC This Committee consists of senior representatives from the bureaucracy of the national ministries and the Commission.

[115] Art 133, para 3 EC.

[116] Art 300, para 1 EC Also see Müller-Huschke (2000) para 236 on the decision-making procedure.

[117] Until the Treaty of Nice, this right was not mentioned in Art 133 but it was laid out in Art 300, para 2.

[118] This is also the reason why—in terms of the expansion of the EU eastwards and in drawing up the Nice Agreement—there was support for accepting the principle of taking decisions by means of a qualified majority.

— Second, qualified majority voting reduces the risk that an explicit veto right might enable one EC Member State to impede progressive trade liberalisation supported by a majority of other EC Member States.

Despite the voting requirements, it has become practice to gain the support of all EC Member States to decide on pending trade agreements.[119]

5.2.2.2 The Incisive 1994 WTO Opinion of the European Court of Justice

From 1970 until the Uruguay Round, the EC exercised its exclusive power to conclude the GATT and other international trade agreements.[120] It was an accepted fact that international trade agreements are fully covered by the full common commercial policy powers of the EC.

This consensus was disturbed during the negotiations leading to the WTO Agreements. The reason was that the WTO Agreements would not only regulate trade in goods, but also trade in services and intellectual property rights.[121]

Thus, the politically contentious and legally difficult question of the scope of the common commercial policy arose. The European Commission and the EC Member States could not agree on whether trade agreements pertaining to services, intellectual property and investments fell under the EC's exclusive common commercial policy powers. After the conclusion of the Uruguay Round on 15 April 1994, an opinion on the matter from the European Court of Justice (ECJ) was requested by the Commission.[122]

To begin with, the WTO Opinion 1/94 of the ECJ[123] concluded that—in accordance with Article 133, paragraph 1 TEEC—agreements covering to industrial goods, agricultural produce, etc, and thus GATT issues, continue to be under the exclusive EC trade policy competence (*cf* Table 5.1).[124]

But the ECJ was only in partial agreement with the arguments of the European Commission that had called for an EC trade policy power flexible enough to deal with trade in services and other new trade issues.[125] The ECJ came to the unforeseen finding that neither the negotiation nor the conclusion

[119] See Hayes (1993); Kuijper (1995) p 223; Meunier and Nicolaidis (2001) p 1; and Hahn (1999) para 27. See also Müller-Huschke (2000) para 234. As Hayes-Renshaw and Wallace (1997) p 88 point out, the Commission rarely insists on going against the wishes of the 133 Committee for the simple reason that its members reflect the wishes of the ministers who ultimately have the power to refuse to conclude an agreement negotiated by the Commission.

[120] See Bourgeois (2001) p 72.

[121] Vedder (2001) para 6 and Herrmann (2001) p 270.

[122] Cremona (2001a) p 9.

[123] WTO Opinion 1/94 of the European Court of Justice (Gutachten über die Zuständigkeit der Gemeinschaft für den Abschluss völkerrechtlicher Abkommen auf dem Gebiet der Dienstleistungen und des Schutzes geistigen Eigentums), Collection 1994 [WTO Opinion 1/94 of the ECJ]. See on the ECJ's WTO Opinion Hilpold (1999) pp 103–49; Bourgeois (1995); Hilf (1995a, b); Hahn (1999) paras 9–19; Vedder (2001) paras 55–56; Dutheil de la Rochère (1995); and Flory and Martin (1996).

[124] Vedder (2001) para 35 based on WTO Opinion 1/94 of the ECJ, para 33. For more details see Hahn (2002) para 23; and Hauser and Wunsch-Vincent (2002) p 164.

[125] WTO Opinion 1/94 of the ECJ.

of the GATS and TRIPS were in the exclusive domain of the EC.[126] Concerning the GATS, the ECJ ruled that the Community is only exclusively responsible for GATS Mode 1.[127] GATS Modes 2 to 4, which necessitate the crossing of national borders by either the service provider or the service recipient,[128] were excluded from the EC's trade policy powers.[129]

Pursuing this logic further, the ECJ ruled that the WTO Agreements were to be concluded as a mixed agreement with shared responsibilities between the EC and its Member States, creating the need for ratification by national parliaments.[130] Finally, it was decided that the unanimity rule is applicable in areas of shared competences.

5.2.2.3 The Amsterdam Treaty and Other Missed Opportunities to Restore the EC's Ability to Conclude Modern Trade Agreements

Since the conclusion of the WTO Agreements, three opportunities—the Treaty of Amsterdam, the Treaty of Nice and the drafting of the Constitution for Europe—arose to restore a fully-fledged common commercial policy of the EC that also applies to treaties affecting content industries (*cf* Table 5.1). Yet, all three opportunities have been missed.

This examination concentrates on the state of affairs brought about by the latest revision of the trade policy powers in force through the Treaty of Nice[131] and the situation after a possible ratification of the Constitution for Europe. Foreshadowing the results of the following sections, Table 5.1 explains how the EC powers to conclude international trade agreements have developed (see *Annex A.5.1* for the treaty texts).

[126] Hilf (1995b) pp 250 f.

[127] See WTO Opinion 1/94 of the ECJ, paras 44–46 and *cf* the statements in Hilf (1995b) pp 250 f; Müller-Huschke (2000) para 18; Hilpold (1999) pp 111–13; Vedder (2001) paras 35–40; and Krajewski (2004) p 1. Art 133 encompasses the service delivery modes that are managed internally in the EC through Arts. 49 f EC. Only services not bound to any person and that are thus of a similar nature than trade in goods, would in terms of international trade encompass an exclusive competence of the EC.

[128] GATS Modes 2–4.

[129] An exception holds when accessory services accompany a certain international trade in goods, such as the assembly of a delivered machine. Only then and due to the connection to the trade in goods are GATS Modes 2 to 4 covered by an exclusive EC trade policy competence. See WTO Opinion 1/94 of the ECJ, paras 46 f.

[130] *Cf* Hilf (1995a) p 210; and Müller-Huschke (2000) para 208. See Neuwahl (1996) on mixed agreements.

[131] Art 133, para 5 TEC (Version of Amsterdam) did introduce the possibility that the European Council could—if unanimous—extend the exclusive EC commercial policy competence to negotiations and agreements on services and intellectual property rights. However, the Council did not resort to this possibility before the Treaty of Nice entered into force. See Cremona (2001a) pp 33–34; Vedder (2001) paras 56, 55–58; Meunier and Nicolaidis (1998) pp 14–17; Cremona (2001b); and Dashwood (1998).

Table 5.1: Varying distribution of EC trade policy powers depending on product type, delivery mode, service sector and nature of targeted liberalisation

Elements of the Trade Agreement		*ECJ Opinion 1994*	*Treaty of Nice 2003*	*Constitution for Europe* **signed but not ratified**
Affecting Goods / GATT		Exclusive EC competence and qualified majority voting		
Services / GATS	Mode 1	Exclusive EC competence and qualified majority voting subject to reservations on provisions that go beyond EC's internal power		
	Mode 2,3,4	Shared powers* Unanimity rule	Exclusive EC competence and qualified majority with explicit sectoral exemptions for provisions beyond EC's internal powers	Exclusive EC competence with explicit exemptions for provisions beyond EC's internal powers. Qualified majority
	Audiovisual and cultural services (Mode 2,3,4)	Shared powers and unanimity rule	Shared powers and unanimity rule	Exclusive competence but unanimity required when agreements risk prejudicing the Union's cultural and linguistic diversity
Other possible characteristics of new trade agreements				
Provisions of trade agreements that go beyond EC's internal powers or that lead to harmonisation in fields excluded by the Treaty rules		Not explicit	Excluded from exclusive EC competence / Agreement cannot be concluded	Exclusive competence cannot be used to conclude and implement such provisions
Provisions of trade agreement for which in the EC unanimity is required internally		Unanimity rule	Unanimity rule	Unanimity rule

* meaning that mixed treaties and the involvement of national parliaments for ratification are not excluded.

Elements of the Trade Agreement	*ECJ Opinion 1994*	*Treaty of Nice 2003*	*Constitution for Europe* **signed but not ratified**
Likely competence distribution in genuine negotiations under the DDA's Single Undertaking procedure	Mixed treaties Unanimity required	Mixed treaties when cultural and audiovisual services are concerned Unanimity likely to be required	No mixed treaties▲ but EC cannot enter into trade treaties entailing full specific GATS audiovisual service commitments Unanimity likely to be required

Table 5.1 also illustrates that—despite an increased EC power as regards services—a formal exclusion of the audiovisual sector from the EC's trade policy powers has been progressively formalised.

This condition is triggered by two legal provisions that can act as further safety locks against liberalisation affecting the content industries:

— a carve-out of audiovisual or cultural services from the exclusive EC powers to negotiate and conclude trade agreements requiring the common accord of the EC Member States in these fields;
— an exemption from the exclusive EC competence of provisions that go beyond EC's internal powers or that lead to harmonisation in fields excluded by the Treaty rules (eg, culture, audiovisual services).

Given that the WTO Agreements are negotiated according to the Single Undertaking principle, the last row of the Table questions under which jurisdiction the results of the Doha Development Agenda, including the necessary steps to create a liberal trade regime (in particular full market access in audiovisual services) for digitally-delivered content products, would fall.

5.2.2.4 The Treaty of Nice: Formalisation of an Audiovisual Carve-Out

The Treaty of Nice has established exclusive EC common commercial policy powers and qualified majority voting for most service sectors. Yet international trade agreements that affect cultural and/or audiovisual services are excluded from this exclusive EC competence as the new Article 133 EC. It is argued that due to the limited powers of the EC in cultural matters (*cf* Article 151 EC and *Section 5.1*), the latter adjustment further diminishes the EC's ability to conclude trade agreements in the field of digitally-delivered content products.

▲ meaning that national parliaments are precluded from ratifying trade agreements.

The dates underneath the ECJ Opinion and the two treaties indicate their entry into effect.

Source: Adapted from Hauser and Wunsch-Vincent (2002), page 183 based on Vedder (2001), Hahn (2002) and Krajewski (2004).

(i) Issues and Expectations Concerning the Treaty of Nice Before the negotiation of the Treaty of Nice, the European Commission had argued for an amendment of Article 133, paragraph 1 TEC to expand the exclusive EC trade policy powers to cover services, intellectual property and other new trade matters.[133] The Commission also saw the chance to achieve the changeover from the principle of unanimity to the principle of qualified majority and to increase the role of the European Parliament in trade matters.[134]

A far-reaching proposal of the European Commission, called for:

— the Commission to be the sole negotiator for the EC; and
— exclusive EC powers and qualified majority to apply[135] regardless of the trade issue involved, and thus all sectors of the GATS Services Sectoral Classification List (including audiovisual services).[136]

The majority of the EC Member States accepted this line of thought (especially, Finland, Sweden, Italy, and the UK[137]). But a vociferous minority—namely France that held the EU presidency at the time but also Spain and Portugal—was determined to defend the principle of shared trade policy powers in the field of services.[138]

Ultimately, the EC Member States had to find a compromise.

(ii) Resulting Substantive Provisions of the Treaty of Nice: An Audiovisual Carve-Out The ratified Treaty of Nice requires the EC to 'speak with one voice' in trade matters. Article 133, paragraph 5, subparagraph 1 EC (Nice Version) specifies that Article 133, paragraphs 1–4 EC, which confer an exclusive trade policy power and the possibility of qualified majority voting to the EC, shall also apply to the conclusion and negotiation of trade agreements regarding trade in services (including GATS Modes 2–4) and intellectual property rights.

It does not, however, formulate that these new trade fields fall under the common commercial policy set out in Article 133, paragraph 1.[139] Moreover, Article 133, paragraph 5, subparagraph 2 EC prescribes that the content of agreements

[133] See Wiedman (2001) for insider views of the negotiations of the related intergovernmental conference.

[134] See 'For The EU, Services Are Central', address of Pascal Lamy to the European Services Forum, Brussels (27 November 2000), Internet: europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/spla40_en.htm. On issues relating to the European Parliament, see the proposals by the Commission under CONFER (2000).

[135] The exclusive competence and unanimity would not be in effect, if the trade agreement covers one or more fields in which unanimity is required for the adoption of internal rules.

[136] CONFER (2000) pp 34–42 referring to Option 1 (especially para 4 and para 5, subpara 2). Art 133 would have been accompanied by a protocol specifying that the EC powers cover all service sectors (Draft Protocol to be annexed to the TEC with regard to Art 133, para 4 TEC).

[137] See Krenzler and Pitschas (2001) paras 292 and 443.

[138] See Krenzler and Pitschas (2001) paras 292 and 443; Meunier and Nicolaidis (2001) p 2; and Goulard (2000). The latter author identifies the French EU Presidency as one of the causes for the disappointing outcome of the Treaty of Nice.

[139] Krajewski (2004) pp 1–2.

needing unanimous approval for the adoption of internal rules should also be approved unanimously by the Council.[140] Making the boundaries of the EC external jurisdiction still more explicit, the new paragraph 6, subparagraph 1 reiterates that an agreement may not be concluded by the EC if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of laws or regulations of the Member States in an area for which the EC Treaties rule out such harmonisation (eg, in the cultural domain).

Most importantly, Article 133, paragraph 6, subparagraph 2 EC derogates from paragraph 5, subparagraph 1 and explicitly excludes agreements relating to trade in cultural and audiovisual services.[141] Accordingly, trade treaties that include these services fall within shared competences. They require the common accord of the Member States and must be concluded jointly by the Community and the Member States thus leading to mixed treaties with the involvement of national parliaments.

Article 133, paragraph 5, subparagraph 2 EC specifies that the Council shall also act unanimously with respect to the negotiation and conclusion of horizontal agreements which entail different trade topics insofar as they call for unanimous approval or insofar as cultural and audiovisual services are treated.[142] As specified above, the trade jurisdiction also largely hinges on the internal distribution of trade policy powers between the EC and its Member States.[143] The Treaty of Nice does, however, not significantly increase the narrow EC powers in cultural and audiovisual matters (*cf Section 5.1* and *Annex A.5.2*).

— Unchanged, Article 87, paragraph 3 EC specifies that under certain conditions state aid granted by EC Member States to promote culture and heritage conservation is compatible with the common market.
— Unchanged, Article 151 EC assigns to the EC merely a 'supporting role' in the field of culture but establishes its mandate to promote the diversity of its cultures (Article 151, paragraph 4 EC).[144] Importantly, on cultural matters the unanimity rule continues to apply.

(iii) Assessment of the EC's Common Commercial Policy Powers After Nice

Here the Treaty of Nice is assessed against the necessary steps to be taken by the EC to achieve a predictable and liberal trade framework for digitally-delivered content products (*cf Chapter Two* and *Three*). These would essentially consist of increased specific GATS commitments for a selected list of

[140] *Cf* Vedder (2001) para 61.
[141] *Cf* Hahn (2002) paras 79–93.
[142] According to Art 133, para 5, subpara 4 EC, Member States retain the right to maintain and conclude agreements with third countries or international organisations, insofar as such agreements comply with Community law and other relevant international agreements. Besides, as explained in Herrmann (2001) p 274 the Treaty of Nice did not increase the importance of the European Parliament.
[143] Art 133, para 5, subparas 2–3 EC.
[144] See Ress and Ukrow (2000) paras 1 and 3 on the limited role of the EC in cultural matters.

services (including audiovisual services) and a removal of GATS MFN exemptions. Besides, WTO Members have pledged to develop a multilateral subsidy discipline that are likely also to apply with respect to content industries.[145]

At first glance the Treaty of Nice reveals that in fact a genuine transfer of trade policy powers has come about.[146] For the first time, an exclusive EC trade policy competence in the field of a set of services is specified (*cf* Table 5.1).[147]

But the Treaty of Nice stops short of unconditionally expanding the EC's common commercial policy.[148] It explicitly introduces a cultural exemption to the EC's common commercial policy competence accompanied by a *de jure* veto right for individual EC Member States.[149] This is the first institutionalisation of curtailed common commercial policy responsibilities when it comes to trade agreements that relate to audiovisual services.[150] Furthermore, the EC Treaties—neither Article 133 nor Article 151—do not clearly define the meaning of audiovisual or cultural services.[151] Problematically, this can translate into a broad interpretation of this type of cultural exception (eg, architectural blueprints, leisure software, and other digital products as being cultural services[152]).

As shown in the literature, such a coupling of less than exclusive EC powers with unanimity voting will almost always lead to the most protectionist Member State determining the overall negotiation position of the EC.[153] Given that France had realised that a diminishing number of Member States continue to share French views on audiovisual matters, the veto right has been qualified as a tactic to avoid being outvoted, therefore also referred to as safety lock by French filmmakers.[154] In the context of continued European enlargement, the French rationale for such a safeguard increases. As specified by the Treaties, this safety lock applies only to services and not to physical goods, explaining again the importance of a GATS classification of digitally-delivered content products to some EC Member States.[155]

[145] GATS, Art XV, para 1.

[146] Vedder (2001) para 59; and Herrmann (2001) p 271.

[147] See Herrmann (2001) pp 269 and 272; and Hahn (2002) para 76. However, as opposed to earlier drafts the whole field of investment (except for services under GATS Mode 3) was not put under exclusive competence.[148] For a summary of changes see Krenzler and Pitschas (2001); and Fischer (2003) pp 116–18.

[149] Art 133, para 6, subpara 2 EC *Cf* Hahn (2002) para 70 and Meunier and Nicolaidis (2001) state that France has insisted vigorously on a *de jure* veto right for audiovisual services.

[150] See Vedder (2001) para 64; and Bourgeois (2002) p 15.

[151] Hahn (2002) paras 80–84.

[152] A personal interview with a French WTO negotiator has confirmed this broad interpretation. *Cf* Hahn (2002) para 82.

[153] In this scenario, the most conservative Member State has preferences that are less liberal than the *status quo*. See Meunier (1998) pp 85 f; Meunier (2000) pp 115–17 and 'Le Dialogue Epistolaire Entre Jean-Jacques Aillagon Et Pascal Lamy', in: *Le Monde* (10 July 2003).

[154] 'En l'absence d'un véritable consensus entre les Etats membres sur la question de la libéralisation du secteur audiovisuel, l'unanimité a toujours été considérée [. . .] comme un verrou de sécurité contre toute pression américaine au sein de l'Organisation Mondiale du Commerce.' (Quoted from Scaramozzino (2003) para 6). See also Meunier and Nicolaidis (1998) p 7.

[155] *Cf* Tietje (1999a) paras 19f.

Furthermore, due to the nature of trade agreements and the way Article 133, paragraph 5, subparagraph 3 EC is phrased, the veto right indirectly affects treaties relevant to cross-border audiovisual trade transactions (GATS Mode 1 or 2 depending on classification).

Indisputably, the legal literature asserts that the exclusive EC trade policy competences for GATS Mode 1 granted through the ECJ's WTO Opinion are irrevocable (*cf Section 5.2.2.1*). As a result, future changes like in the Treaty of Nice should—in general—not impinge on these acquired EC trade policy powers.[156] Hence, in strictly legal terms, it has been argued that the new audiovisual exclusion of the Nice Treaty does not affect cross-border GATS commitments relevant for digitally-delivered content products.[157]

Nevertheless, this interpretation of Article 133 EC—which in theory prescribes a separate type of trade policy power in terms of each GATS delivery mode—is almost rendered meaningless in practice.[158] If one takes into account how WTO negotiations are conducted and how WTO agreements are agreed upon—namely, package deals under the principle of single undertaking—this exclusive competence for GATS Mode 1 does not have much practical relevance[159] (*cf* last row of Table 5.1).

It suffices if one of the areas that fall into shared competences is touched upon in a trade agreement to make a unanimous Council vote and the ratification by the national parliaments necessary (Article 133, paragraph 5, subparagraph 3 EC).[160] The fact that—during actual negotiations—these stand-alone trade policy powers of the EC do not play a role, is reflected in the current EC GATS schedule which includes many GATS Mode 1 reservations of individual EC Member States.

The argument that the EC's common commercial policy powers do not encompass trade commitments on digitally-delivered content products can be made even stronger when looking at how internal powers affect external ones. Article 133, paragraph 5 EC only transforms existing and concurrent powers into exclusive ones.[161] In fields where the EC did not have internal jurisdiction before the Treaty of Nice, no new exclusive responsibilities or rights to harmonise laws arise.[162] Specifically, areas in which the treaty does not propose

[156] See Krajewski (2004) p 2; Hilf (1995b) p 252; and Cottier (1994) pp 749 f.

[157] Hahn (2002) paras 72 and 91. See also Krajewski (2004) p 1.

[158] Hauser and Wunsch-Vincent (2002) pp 188–92.

[159] Negotiations on specific GATS commitments always strike deals concerning different (sub)-sectors and delivery modes. Single products, service sub-sectors or certain delivery modes are never treated individually by trade agreements.

[160] See Hahn (1999) para 23; or Müller-Huschke (2000) para 17. Following this logic, Pascal Lamy has stated that like '[. . .] under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV [qualified majority voting] water.' (Quoted from 'The Convention and Trade Policy: Concrete Steps to Enhance the EU's International Profile', address of Pascal Lamy to the European Policy Centre, Brussels (5 February 2002)).

[161] Vedder (2001) paras 56 and 60; and Herrmann (2001) pp 271–72.

[162] Herrmann (2001) p 271. Moreover, it does not give rise to a power to create secondary law necessary to implement international trade agreements in new trade matters.

harmonisation (Article 149–52 EC,[163] but especially Article 151 EC) cannot be negotiated by the EC.

To illustrate: GATS Mode 1 commitments in audiovisual services that would impinge on the EC Member States' right to establish local content quotas, to subsidise content creation, or to limit the choice of preferential treatment of third countries in cultural cooperation would—despite the ECJ's WTO Opinion—fall outside of the EC's exclusive trade policy powers. As indicated by the last row of Table 5.1, following the Treaty of Nice the negotiation reality under the Single Undertaking procedure of the Doha Development Agenda is such that mixed treaties and unanimity are necessary when cultural and audiovisual services are concerned.

The literature reserves harsh criticism for the absence of a complete transfer of trade policy powers to the EC.[164] It criticises that through the new common commercial policy Article of the EC, mixed agreements and shared jurisdiction have become the norm,[165] creating a problematic discrepancy between the interpretation of the meaning of common commercial policy in EC law and its meaning in international economic law.[166] Moreover, it is submitted that the sectoral carve-outs will embed these exemptions and prevent later related GATS liberalisation.[167]

5.2.2.5 Treaty Establishing a Constitution for Europe: Maintaining Special Rules for Audiovisual Services After the conclusion of the Treaty of Nice, the literature predicted that an intergovernmental conference would have to address Article 133 again in the near future.[168] This task has been taken on by the European Convention in preparing the Draft Treaty establishing a Constitution for Europe (CE) which is to replace the current European treaties.[169] The Draft Constitution was submitted to the European Council *in* July 2003 and the EC Member States have signed a final version in October 2004. As it has not been ratified, the Constitution for Europe does not yet constitute applicable law.

Nonetheless, the next sections illustrate that the potential future commercial policy powers of the EC are again skewed against treaties that produce liberalisation in the area of digitally-delivered content products. This bias against

[163] This relates especially to areas like education, public health, the freedom of movement for workers from third countries/immigration, and—of great relevance here—to culture.

[164] See, eg, Pescatore (2001) p 265; Bourgeois (2002); Griller (2002); and Hahn (2002) paras 3 and 119–21.

[165] Hahn (1999) para 28; Hahn (2002) paras 11 and 119–24; and Herrmann (2001) p 246. According to Hahn (2002) para 120, a 'balkanisation' of the exclusive competence on trade policy of the EC is the result.

[166] Hahn (1999) paras 19 and 32 f; Hahn (2002) para 11; and Vedder (2001) para 55.

[167] See Holmes and Rollo (2002) p 5; Pescatore (2001) pp 266–67; and Hauser and Wunsch-Vincent (2002) pp 188–90.

[168] Hahn (2002) para 123.

[169] See above n 4 for the reference to the treaty.

digital content liberalisation is achieved through provisions in the Constitution for Europe that:

— carve out cultural and audiovisual services from majority voting; and
— limit the EC's common commercial policy in fields like culture where incomplete internal powers prevail.

(i) The European Convention's Ambitions: Complete Trade Policy Powers for the EC The European Convention was—to the liking of the European Commission—determined to secure an exclusive competence on commercial policy for all service trade aspects of future trade agreements (including audiovisual services).[170]

The initial draft of the new common commercial policy in Chapter III, Article III–211 CE (see *Annex A.5.1.4*) was built on the model of Article 133 EC of the Treaty of Nice.[171] However, in opposition to the common commercial policy article in the Treaty of Nice, Article III–227, paragraph 1 CE—as first formulated by the European Convention—spelt out that the conclusion of trade agreements relating to *trade in goods and services* falls under the EC's exclusive common commercial policy powers.

This initial version of the Constitution for Europe included similar limitations to the exclusive EC common commercial policy as in the Treaty of Nice. However, if adopted, it would have abolished shared powers in the field of services (including the audiovisual exemption[172]) and the need for parliamentary ratification of trade agreements.[173] Both the Commission and the Convention reiterated, however, that this abolition of an audiovisual exemption was not meant to trigger audiovisual service liberalisation through the Doha Round. In fact, Pascal Lamy and others made clear that the abolition of the unanimity clause on this issue would actually better enable the Commission to work for the cause of the audiovisual exemption.[174]

But the absence of a carve-out for audiovisual policies in the Draft Convention for Europe evoked vivid reactions from France[175] and other

[170] 'Projet d'Articles Du Traité Constitutionnel Sur L'Action Extérieure', Note of the Presidium of the European Convention, CONV 685/03 (23 April 2003) pp 53–54 and 'Entwürfe Für die Ersten 16 Artikel Vor dem Konvent', in: *NZZ* (8 February 2003).

[171] *Ibid*.

[172] 'Draft of Articles 1 to 16 of the Constitutional Treaty', The European Convention Secretariat (from Presidium to Convention), CONV 528/03 (6 February 2003) p 17 and Krajewski (2003) p 2.

[173] See Krajewski (2003) p 3.

[174] 'Comment Préserver "l'Exception Culturelle"', in: *Le Monde* (26 June 2003) and *cf* to Lamy in chapter 3 n 36.

[175] See, eg, 'Propositions de la Convention pour l'Avenir de l'Europe/Diversité culturelle', Déclaration du porte-parole du Quai d'Orsay (10 February 2003), Internet: www.france.diplomatie.fr/actu/article.asp?ART=32255 and 'Intervention du Ministre des Affaires Etrangères Dominque Villepin', Session Plénière de la Convention Européenne, Internet: www.diplomatie.gouv.fr/actu/bulletin.asp?liste=20040206.html and European Convention (2003a, b).

participants (eg, from Germany[176]) to the Convention.[177] Whereas associations representing the international content industries lauded the plan,[178] France saw this proposal as a first step to the abolition of the 'exception culturelle'.[179] Noteworthy political pressure was mobilised to avoid the inclusion of audiovisual services in the exclusive EC common commercial policy powers.[180] The numerous proposals for amendment suggested that:

— the Constitution for Europe should specify that 'agreements which include provisions on cultural and audiovisual services [. . .] fall within the shared jurisdiction, and that their negotiation and conclusion therefore require the common agreement of Member States'[181]; or that
— the text should in the case of cultural and audiovisual services 'incorporate in a more exhaustive manner the text of Article 133, paragraph 6, subparagraph 2 EC, including an indication that agreements are concluded jointly by the Union and its Member States.'[182]

(ii) Substantive Provisions of the Constitution for Europe Consequently, the Constitution for Europe finally submitted to the European Council was changed only in a minor but—for this research—important fashion as compared to the initial draft of the European Convention.

As initially proposed, the Constitution for Europe specifies in Article III–227, paragraph 1 that the EC's exclusive common commercial policy powers include trade agreements relating to trade in goods and services. Consequently majority voting applies to the trade in services and the commercial aspects of intellectual property.[183]

However, at the last minute and under criticism from the UK, Finland and the Commission, France and other EC Member States succeeded in introducing a special approach to cultural and audiovisual services[184] by adding a new sub-

[176] Interventions of Erwin Teufel and Sylvia-Yvonne Kaufmann in European Convention (2003a).

[177] Most of the suggestions have been for the involvement of the EU Parliament, the exclusion of trade treaties affecting investment from the common commercial policy and the issue of an audiovisual exemption. See European Convention (2003a, b).

[178] 'ICRT Position on the first Draft Articles of the EU Constitution', Brussels: International Communications Round Table (14 May 2003), Internet: www.icrt.org/pos_papers/2003/030514_BO_EEpdf.

[179] 'Les Américains Unis Pour Démanteler l'Exception Culturelle', in: *Le Figaro* (16 May 2003) and 'L'Exception Culturelle En Débat Sur La Croisette', in: *Business* (17 May 2003).

[180] Summary of the discussion by the Presidency, Informal Council of EU Ministers of Culture and Audiovisual, 24–25 May 2003, Internet: www.eu2003.gr/en/articles/2003/5/26/2897/; 'Comment Préserver "l'Exception Culturelle"', in: *Le Monde* (26 June 2003) and 'La Bataille Pour l'Exception Culturelle Continue', in: *Le Monde* (5 May 2003).

[181] See European Convention (2003a, b) and therein the amendments suggested by Villepin, Hübner, Lamassoure, Lequiller and Lopes.

[182] See European Convention (2003a, b) and therein the amendments suggested by Haenel, Hübner, Lopes.

[183] See Art III–211 CE in *Annex A.5.1.4* and compare to Art 133, para 4 EC.

[184] 'Plusieurs Tabous Français Ont Eté Levés Par M Giscard d'Estaing', in: *Le Monde* (18 June 2003) and 'Le Dialogue Epistolaire Entre Jean-Jacques Aillagon Et Pascal Lamy', in: *Le Monde* (10 July 2003).

paragraph 2 to paragraph 4 of Article III–211 CE stating that: '[t]he Council shall [. . .] act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity.'

As planned in the initial version and similar to the Treaty of Nice, Article III–211, paragraph 5 CE spells out that:

> the exercise of the competences conferred [. . .] in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonisation.[185]

Again—as put in Article III–211, paragraph 5 CE—the EC trade policy powers largely hinge on the internal competence distribution between the EC and its Member States. Like the Treaty of Nice, the Constitution for Europe does, however, not significantly change the limited EC competences in cultural and audiovisual matters (*cf Annex A5.2*). To the contrary:

— I-Article 16 CE specifies that culture is an area in which the EC can only initiate 'supporting, coordinating or complementary' actions which shall not entail harmonisation of Member States' laws or regulations.
— Unchanged from Article 87 EC, Article III–56 CE allows aids granted by Member States to promote culture-related subsidies.
— Moreover, Article III–181 CE which is almost identical to Article 151 EC, limits the role of the EC in the field of culture and excludes any harmonisation of the laws and regulations of the Member States.[186]

Finally, through Article III–227 CE, the role of the European Parliament would be increased. For example, the Council of Ministers could only decide after consulting with the European Parliament.[187]

(iii) Assessment of the Potentially Forthcoming Common Commercial Policy of the EC After the Constitution For Europe In principle, the Constitution for Europe represents a radical change with respect to the EC's exclusive common commercial policy powers. Differing from the Treaty of Nice, removing any shared competence, all service sectors are, in principle, fully submitted to the EC's exclusive common commercial policy powers. This precludes national parliaments from ratifying future WTO Agreements.

This important extension of the EC powers is, however, qualified by special rules on treaties that touch upon cultural and audiovisual services.

[185] Furthermore, according to Art III–211, para 5 CE, the Council of Ministers and the Commission are responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

[186] The fifth paragraph of the two compared articles differs slightly in structure but not in substance.

[187] Art III–227, para 7, subpara 2 CE. Also, the European Parliament shall be immediately and fully informed at all stages of the procedure, *cf* Art III–227, para 7, subpara 11 CE.

The interpretation of the limitation vis-à-vis cultural and audiovisual services can—at this stage—be only tentative.[188] At the outset, it can be said that the text is clearly a compromise between the European Convention and certain EC Member States, like France, which would have preferred a straightforward exclusion of audiovisual services from the common commercial policy.

— On the one hand, according to Article III–211, paragraph 1 CE audiovisual services are fully covered by the exclusive EC trade competence described, meaning that trade agreements which affect audiovisual services no longer need to be ratified by national parliaments.[189]
— On the other hand, unanimity must be applied when negotiations or agreements 'risk prejudicing the Union's cultural and linguistic diversity'. This reservation and its relation to Article III–211, paragraph 1 may—at some stage—need interpretation by the ECJ.[190] This holds true as—although mentioned numerous times in earlier versions of EC treaties and the Constitution for Europe—the term 'cultural and linguistic diversity' is not defined in the context of EC law.[191]

  Talking down the potential scope of the limitation, EC officials have indicated that—according to the provisions in the Constitution for Europe—the burden of proof of whether cultural diversity is threatened lies with the EC Member State that seeks the veto.[192] To the contrary, France is of the opinion that the Constitution for Europe has reinstated the unanimity rule and thus a veto right when it comes to audiovisual and cultural services.[193] It made clear that neither the French Government nor the French Parliament would consent to the Constitution if the exemption of audiovisual services was not maintained.[194]

In sum, it is quite likely that in this politically-sensitive area the Commission will not challenge the French interpretation and that it will, as a result, abstain from testing its room for manoeuvre on trade agreements that affect audiovisual and cultural services. Consequently, the effect of Article III–211, paragraph 4 CE comes—without actually re-introducing shared powers—rather close to a cultural exception from the EC's common commercial policy.[195] As mentioned

[188] *Cf* Krajewski (2003) p 4; and Krajewski (2004) pp 2–4.

[189] 'EU-Verfassungskonvent Beendet Seine Arbeit', in: *NZZ* (11 July 2003).

[190] Personal interview with officials from the European Commission.

[191] Krajewski (2004) p 3; and Ress and Ukrow, para 11–14. The concept of cultural diversity is not defined in other international contexts as well, like for instance the UNESCO (2001) instrument on cultural diversity.

[192] Personal interviews with officials from the European Commission.

[193] 'Réaction De Jean-Jacques Aillagon Sur L'Adoption Par Le Praesidium De La Règle De L'Unanimité Pour La Diversité Culturelle', address of the French Minister of Culture (10 July 2003), Internet: www.culture.gouv.fr/culture/actualites/communiq/aillagon/accordscommerc.htm and 'A La Convention, Paris Préserve In Extremis "l'Exception Culturelle"', in: *Le Monde* (10 July 2003).

[194] 'Plusieurs Tabous Français Ont Eté Levés Par M Giscard d'Estaing', in: *Le Monde* (18 June 2003).

[195] IFRI (2003) p 6; 'Paris Wins Amendment In New EU Constitution', in: *IHT* (11 July 2003) and 'Exception Culturelle Et l'UE', in: *Le Monde* (9 July 2003).

earlier, the Commission also does not intend to bind itself to audiovisual service commitments.

Two other points buttress the limited ability of the EC to agree to trade agreements that create market access obligations for digitally-delivered content products:

— First, like in the case of the Treaty of Nice, the limited internal EC powers in the field of culture and audiovisual services also have an impact on the extended EC trade policy powers. Although formally an exclusive EC competence for audiovisual services exists, it is also specified that the latter shall not affect the delimitation of internal competences between the EC and its Member States. Also, it shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonisation. Both limitations entail that full GATS market access and national treatment commitments and an elimination of the EC's MFN exemption are not covered by the exclusive EC trade policy competence.
— Second, the increased parliamentary involvement through Article III–227 CE is also likely to reinforce the negotiation constraint that no commitments be taken in the GATS negotiation on cultural services.[196]

As indicated by the last row of Table 5.1, the negotiation reality under the Single Undertaking procedure is such that under the potential new EC common commercial policy power, no need for mixed treaties for trade agreements affecting trade in services would exist. Nevertheless, and despite these fully-fledged EC trade policy powers, the EC cannot—without the consent of all EC Member States—enter into the trade commitments affecting cultural and audiovisual services that are necessary for achieving a liberal WTO trade framework of digitally-delivered content products.

Finally, it needs to be reiterated that the Constitution for Europe will not necessarily take effect as all 25 EC Member States have to ratify it, either through parliamentary votes or through referenda (eg, France, The Netherlands, the Czech Republic, the UK). Early on the ratification process has been overshadowed by early rejections of the Constitution by referendum in France and the Netherlands in May 2005. Thus the audiovisual carve-out formulated in the Treaty of Nice will almost certainly be the basis for the EC's common commercial policy during the Doha Negotiations and possibly thereafter.

5.3 CONCLUSION

Chapter Five has demonstrated the difficulty that EC negotiators will have to approach the issue of trade in digital content in a liberal way and why they will

[196] *Cf* to s *5.2.1* which shed light on the lacking willingness of the European Parliament to liberalise the trade in audiovisual products.

insist on a categorisation of digitally-delivered content products as audiovisual services during trade negotiations.

In the WTO, the EC is constrained by a very restrictive negotiation mandate on audiovisual services as well as a by a restrictive distribution of trade policy competences between its Member States and the EC. The seriousness with which some EC Member States pursue this cultural exemption in the WTO is illustrated by the fact that audiovisual and cultural services will be the only service sector for which—in the potentially upcoming Constitution for Europe—the EC has only an incomplete authority to conclude trade agreements. The Chapter also shows the intricate relationship between internal regulatory stances which are in flux and the corresponding limit imposed on the EC negotiators' ability to sign up for binding, digital trade obligations in the WTO.

Needless to say, that—even without the resistance of some WTO Members to liberalise trade in digital content—there exist legal challenges to formulate a precise trade framework applicable to digitally-delivered content products.

However, the desire of the EC and other WTO Members to exempt digitally-delivered content products from free trade principles is certainly the main stumbling block for advancing on the unresolved horizontal e-commerce questions and on the required new market access commitments.

Problematically, there is no easy way around this problem because—similarly to the US—the room for manoeuvre of the EC negotiators is extremely small. As reflected in *Chapter Six* and in the conclusion of this research, this will also significantly complicate the way forward when trying to agree on an international trade framework for digitally-delivered content products.

Part Four

Outcomes of the Doha Round and US-Driven Preferential Trade Negotiations

As the initial date on which the global trade talks should have been concluded has slipped away and as first bilateral free trade agreements initiated by the United States came into force, *Part Four* takes stock of the results pertinent to digital products achieved so far.

Effectively, the Fifth WTO Ministerial of September 2003 marked the middle of the Doha Round, which was scheduled to end before 1 January 2005. This deadline has now been extended to the Sixth Ministerial in December 2005 but the negotiations are likely to go on at least until 2006–07. This stocktaking shall allow WTO Members to reconsider their negotiation positions and to reap the synergies between the preferential and the multilateral negotiations relating to digital trade in content. To achieve this objective, *Chapter Six* assesses the progress in the Doha Negotiations and anticipates upcoming multilateral developments as regards the requirements formulated in *Part Two*.

Problematically, in the WTO little progress has been achieved so far. At the same time progress in digital trade matters is being pursued in bilateral and regional trade negotiations. *Chapter Seven* sheds light on the parallel US-driven preferential trade negotiations relating to digitally-delivered content products and scrutinises their interrelationship with the Doha Negotiations. As opposed to the multilateral level, it is judged that the state of affairs has been advanced through the concluded bilateral trade agreements.

Nevertheless, it is unlikely that the US liberalisation template will—in its entirety—spread throughout bilateral, to regional and finally to multilateral trade agreements. But the US approach should certainly be used to reinvigorate the debate in the Doha Negotiations.

6

Digital Trade Achievements of the Doha Development Agenda: Slow or Absent Progress

CHAPTER SIX TAKES stock of and analyses the progress made on the multilateral level. *Section 6.1* assesses the situation concerning the unresolved horizontal e-commerce questions, whereas *Section 6.2* examines whether the Doha Negotiations have been used to achieve the market access required for digitally-delivered content products. *Section 6.3* sheds light on the negotiations potentially leading to a UNESCO convention which could—by installing a special multilateral regime for cultural goods and services—put trade liberalisation efforts with regard to digitally-delivered content products at the WTO into question.

It is concluded that a global trade framework which offers a predictable legal regime to trade in digitally-delivered content products is—if no change of course occurs—unlikely to be established soon. On the multilateral level, it currently seems too difficult to negotiate digital trade issues in a coherent fashion because they transcend the standing institutional boundaries erected between the WTO agreements. Clearly, the inflexible negotiation objectives of the US and the EC (*cf Chapters Four* and *Five*) leave little room for fitting compromises. Decreasing the potential for solutions further, the Doha Negotiations have—owing rather to other matters like agriculture—been moving very slowly.

Thus none of the listed WTO negotiation objectives has yet been met. This holds especially true for the horizontal questions which may only have experienced some limited progress through WTO dispute settlement (see *Sec 6.1.3*). But it is—despite some potential achievements—also valid for the market access commitments required. Furthermore, Members have not moved beyond negotiations on commitments, to negotiations on understandings that explain how existing rules and obligations apply to digital trade in content.

This does not mean that no progress in terms of market access will be accomplished on the multilateral level. After all, the Doha Negotiations are a long way from being completed. Furthermore, the Council Decision of July 2004 while providing guidelines for the NAMA negotiations, revised timelines for new

GATS offers (ie, May 2005) and other important decisions gave new impetus to the WTO negotiations.[1] Nevertheless, starting from the rather little achievements relating to digital trade so far, significant efforts will be necessary to approximate the required negotiation results. Efforts will also be necessary to fully understand the potential impact of a UNESCO Convention for Cultural Diversity on the WTO rules and obligations that are of relevance to digitally-delivered content products.

6.1 UNRESOLVED HORIZONTAL E-COMMERCE QUESTIONS: NO SOLUTIONS FORTHCOMING IN THE DOHA NEGOTIATIONS

Despite more than six years of existence of the WTO Work Programme on E-Commerce and four years of the Doha Development Agenda, none of the horizontal questions outlined in *Chapter Two* has been conclusively addressed in the ongoing market access negotiations.

Apart from the lack of willingness to compromise on the part of certain WTO Members, one could ascribe the frailty of the Work Programme to its form of organisation. Undoubtedly, the subsidiary WTO Councils like the Council for Trade in Services contributed competently to the early stages of the Work Programme. But formally they have no decision-making authority as regards the interpretation of WTO rules. As their sessions were not considered negotiations as such, it has thus never been clear in what form the Councils' deliberations would flow into tangible agreements.

Furthermore, throughout the process, much time has been lost through a—possibly tactical—focus on procedural rather than substantive issues.[2] Evidently, just before or during the WTO Ministerial Conferences in Seattle, Doha or in Cancún, neither the General Council nor the trade ministers used the discussions of the Work Programme as the basis for decisions. In fact, the paragraph on e-commerce of the Doha Declaration only instructed the General Council to reconsider the institutional arrangements of the Work Programme until the Cancún Ministerial (*cf Section 1.1.2*). Predictably, this new 'old' point of departure did not lead to any results. In the General Council Decision of July 2004, e-commerce is—for the first time since the initiation of the Work Programme on E-commerce, not mentioned.

[1] General Council Decision of 31 July 2004, WT/GC/W/535 (31 July 2004) [Council Decision of July 2004].

[2] GC, Electronic Commerce—Communication from MERCOSUR, WT/GC/W/434 (7 May 2001); 'Electronic Commerce: WTO Members Preparing To Endorse Ad-Hoc Group On E-Commerce', in: *BNA WTO Reporter* (14 December 2000) and 'WTO Chair to Drop Proposal to Start E-Commerce Task Force', in: *BNA WTO Reporter* (13 July 2000).

6.1.1 Assessment of Work Leading to the Cancún Ministerial: Adoption of a Minimalist Stance

Before the Cancún Ministerial Conference—the most recent opportunity for a step forward—the question had been whether the Ministerial would result in a solution-oriented declaration as regards e-commerce and digitally-delivered content products.

The US urged Members to endorse general objectives on e-commerce and to make suggestions to trade ministers in Cancún.[3] But a number of delegations cautioned that more time was needed to agree on a set of general objectives on e-commerce and that therefore none could be presented in Cancún.[4] A formal declaration that the WTO's rules and obligations apply to digital trade was not supported by a majority of Members. Summarizing this state of affairs, the General Council prepared a draft report stating that:

> [p]articipants [. . .] are of the view that the examination of cross-cutting issues related to e-commerce is not yet complete [. . .]. Accordingly [. . .] the General Council should consider whether to recommend continuing the examination [. . .] under the ongoing Work Programme on E-Commerce with the current institutional arrangements [. . .].[5]

Following a similar logic, in the Draft for the Cancún Ministerial Declaration of July 2003 WTO Members adopted the following minimalist stance:

> We take note of the reports from the General Council and subsidiary bodies on the Work Programme on Electronic Commerce, and agree to continue the examination of issues under that ongoing Work Programme, with the current institutional arrangements. We instruct the General Council to report on further progress to our next session. We declare that Members will maintain their current practice of not imposing customs duties on electronic transmissions until that session.[6]

In Cancún, the majority of WTO Members thus focussed only on obtaining another temporary duty-free moratorium. Progress with respect to the open questions was kept quite separate from the ongoing Doha Negotiations. The mandate also left the General Council in doubt as to how to proceed from both a substantive and a procedural perspective.

But due to the collapse of the trade talks in Cancún, which was entirely unrelated to e-commerce or digital content issues,[7] even this modest plan was not put

[3] Fourth Dedicated Discussion on E-Commerce, paras 1–2; GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493/Rev.1 (8 July 2003); USTR (2004) p 24 and USTR (2003) p 5.

[4] Fourth and Fifth Dedicated Discussions on E-Commerce.

[5] GC, Dedicated Discussions Under the Auspices of the GC on Cross-cutting Issues related to E-Commerce, Work Programme on E-Commerce: Draft Report to the 24–25 July Meeting of the GC, WT/GC/W/505 (21 July 2003) para 7 and Fifth Dedicated Discussion on E-Commerce.

[6] Draft Cancún Ministerial Text, Preparations for the Fifth Session of the Ministerial Conference, Second Revision, WTO JOB(03)/150/Rev.2 (13 September 2003).

[7] GAO (2004b) pp 26–27. Trade ministers could not agree on an overall package of issues.

into effect. Committing themselves to pursue the objectives set out by the Doha Development Agenda,[8] trade ministers noted in their Ministerial Statement that more work was needed to proceed towards the conclusion of the Doha Negotiations.[9]

6.1.2 Assessment of the Situation After the Cancún Ministerial and the Council Decision of July 2004: Lack of Progress on All Fronts

An assessment of the situation after the Cancún Ministerial and the Council Decision of July 2004 yields the following points as regards the unresolved horizontal e-commerce questions.

6.1.2.1 The WTO E-Commerce Work Programme Continues with Uncertainty as Regards its Institutional Arrangements and its Next Steps

Under normal circumstances, the decision to extend the WTO Work Programme on E-Commerce should have been non-controversial for trade ministers in Cancún or when preparing the Council Decision of July 2004. But obviously, no such extension of the work mandate took place.

Despite this lack of express statement on the continuation of the Work Programme, it is argued here that it could continue without a renewed mandate. The Doha Declaration instructed the General Council to continue the Work Programme and to consider its most appropriate institutional arrangements. Trade ministers only asked the General Council to report back on further progress to the Fifth Ministerial Conference. The mandate did not suggest that the Work Programme itself was to be reconsidered. As a result, the absence of this extension is—theoretically—not deemed problematic for the continuation of the Work Programme.

The prospect of a continued Work Programme is, however, not promising in itself. Especially, the institutional arrangements under which the Work Programme should operate were in doubt since the Cancún Ministerial. Without guidance from trade ministers no breakthroughs are to be expected from it. Accordingly, since 2003 activities relating specifically to e-commerce (eg dedicated discussions or reports to the General Council) have not taken place.[10] In the light of this inactivity and the absence of mention in the Council Decision

[8] Ministerial Conference, Fifth Session, Cancún, 10–14 September 2003, Ministerial Statement, adopted on 14 September 2003, WT/MIN(03)/20 (23 September 2003) [Cancún Ministerial Declaration], paras 4 and 6.

[9] Cancún Ministerial Declaration, para 3.

[10] This abstracts from the fact that the CTD has retained e-commerce and its development dimension as a standing item on its agenda even until 2005 and thenafter. However, even there discussions were very limited and did not lead to any tangible results. See, eg, CTD, Report (2004), WT/COMTD/50 (13 December 2004).

of July 2004, the WTO Work Programme on E-Commerce may have already formally collapsed.

6.1.2.2 No Affirmation of the Applicability of WTO Rules to E-Commerce

To date, the situation prevails that no basic affirmation concerning the applicability of WTO Rules to E-Commerce has been forthcoming from trade ministers. This is maybe the strongest illustration of the lacking leadership of WTO Members vis-à-vis the rise of digital trade flows and has—in the most recent discussions relating to GATS Mode 1 commitments and outsourcing of electronically-deliverable services—already led to significant doubt concerning the validity of existing specific GATS commitments. Rulings in recent WTO dispute settlement may however have taken this responsibility from WTO Members and may have brought closure to this important question (*see Sec 6.1.3*).

6.1.2.3 No Prolongation or Clarification of the Duty-Free Moratorium on Electronic Transmissions: Has it Expired Again?

As has been noted before, the duty-free moratorium was bound to elapse again after the Cancún Ministerial (*cf Section 2.1*), but the Dedicated Discussions on E-Commerce have not been able to produce a consensus in favour of a permanent moratorium.

Before Cancún, the US and other WTO Members encouraged other delegations to consider a longer-term, or even a permanent moratorium on customs duties on electronic transmissions.[11] But shortly before the Ministerial, several delegations felt that a permanent moratorium could only be brought about by a political decision by trade ministers or higher bodies.[12] Some Members even admitted that—at this stage—they could not agree to any long-term extension.[13] Downplaying the importance of the moratorium, other delegations repeated that other ways exist to achieve market access, such as liberalisation through the NAMA or the GATS negotiations.[14]

Furthermore, no substantive discussions took place on the meaning or the potential shortcomings of the current e-commerce moratorium and its

[11] Fifth Dedicated Discussion on E-Commerce, pp 10 f and GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493 (16 April 2003).

[12] Fourth Dedicated Discussion on E-Commerce, paras 2–3.

[13] One delegation added that 'it supported the moratorium but did not want to make it permanent, because African countries needed the capacity to be able to benefit from [. . .] e-commerce, and also needed technical assistance to be extended to them [. . .]'. Cited from Fifth Dedicated Discussion on E-Commerce, p 14.

[14] Fifth Dedicated Discussion on E-Commerce, p 12. The EC does not mention the moratorium at all in its latest communication on e-commerce; see 'Trade in Services and E-Commerce', European Commission (March 2004), Internet: europa.eu.int/comm/trade/issues/sectoral/services/ecom_en.htm.

applicability to conduit or content. In fact, the issues discussed in *Section 2.1* relating to the ambiguity of the moratorium were not raised once. Hence, the relevance of the moratorium to digitally-delivered content products remains uncertain.

More disturbingly, the moratorium which is the only tangible result of the Work Programme may—depending on the interpretation of WTO Members—have expired again after the Cancún Ministerial in September 2003. Furthermore, the adopted Council Decision of July 2004 has—for no apparent reason—omitted the section of its draft text[15] that related to the renewed extension of the moratorium. Concretely, this means that the moratorium has expired in 2003. Without a political declaration on the moratorium before the Sixth Ministerial Conference (Hong Kong, December 2005), duty-free digital trade may—like after the Seattle Ministerial—again be in an indeterminate state for another two years or until a renewed decision to extend the moratorium will be taken.

6.1.2.4 No Decision on Valuation of Digital Content Products

Concerning the valuation issue, it was to be expected that neither the Cancún Ministerial nor the Council Decision of July 2004 would produce any decision. It suffices to note that this question has not been discussed in earnest in the WTO since 2001. Neither has it been evoked in the Dedicated E-Commerce Discussions, nor has a WTO Member submitted specific proposals on the topic in recent times. This holds true despite continued interest of the US service industries in this negotiation topic.[16]

The failure to discuss or agree on the topic of valuation in the Work Programme is not surprising. Formally, only the GATT Committee on Customs Valuation can arbitrate on this issue. Putting this limitation aside, it may—as argued before—well be that such a decision could be taken as a side agreement of the NAMA negotiations. However, given the state of these talks (*cf Section 6.2.1*) and the linkage to audiovisual and cultural services, the NAMA negotiations are unlikely to lead to such an agreement in due time. As explained in *Section 2.2*, it may be a consolation to some that ITA Members face restrictions—albeit subject to interpretation—in their use of duties towards digital content products or certain associated carried media.

6.1.2.5 No Progress on the Classification Issues

In the same vein, at no point did it appear likely that the Cancún Ministerial or the Council Decision of July 2004 would produce a finding on the classification debate.

[15] This is the so-called Derbez text (name attributed to the Draft for the Cancún Ministerial Declaration) of which the e-commerce-relevant parts were presented in s *6.1.1*.

[16] US Department of Commerce (2005).

This holds true in spite of the fact that the five Dedicated E-Commerce Discussions were dominated by the classification debate (*cf Section 1.1.3*).[17] Still, a few developments emerged from these discussions. To begin with, the creation of a third category or a new classification entry for digitally-delivered content products was discarded.[18] Given the relatively limited number of products that can be delivered digitally, some delegations then argued that a case-by-case classification could be undertaken.[19] Others, however, wondered about the criteria to be used in such an approach, and suggested that it should be possible to reach a horizontal decision applicable to all digitally-delivered products as regards classification.[20] But neither a new Background Note by the Secretariat[21] nor new contributions from Members brought closure to the topic.[22]

Indeed, the insistence of several delegations on the need for a clear distinction between content where no liberalisation should be undertaken and carriage which should be subject to free trade, and the related diametrically opposed negotiation positions of the US and the EC make compromises unfeasible. Actually, the most recent US and EC submissions demonstrate that no *rapprochement* has occurred so far.[23] The gap between the proponents of a GATT-like treatment and those that propose a GATS classification seems unbridgeable. Thus, the last dedicated discussion on e-commerce so far was concluded by its Chairman stressing that there appeared to be a 'clear gap in perceptions about exactly how the classification issue could be resolved'.[24]

Several points can be made on the pernicious effects of this lacking progress on the classification issue:

To begin with, it implies that digitally-delivered content products continue to be in limbo as regards international trade law. It continues to be uncertain how GATT and GATS market access obligations apply to digitally-delivered content products. It needs to be emphasised that this applies to existing as well as to potentially forthcoming market access obligations.

But the detrimental effect of the classification impasse is more pervasive. Other deliverables of the WTO Work Programme on E-Commerce and of the market access negotiations of the Doha Development Agenda are also negatively affected.

[17] Fifth Dedicated Discussion on E-Commerce.
[18] *Ibid*.
[19] Second Dedicated Discussion on E-Commerce, p 2.
[20] *Ibid*.
[21] WTO JOB (02)/37.
[22] *Cf* to *secs 1.1.3* and *1.1.4*.
[23] GC, Submission from the EC, Classification Issues and the Work Programme on Electronic Commerce, WT/GC/W/497 (9 May 2003) and GC, Submission from the US, Work Programme on Electronic Commerce, WT/GC/W/493/Rev.1 (8 July 2003). The submission from the EC explains why digitised products should be classified as services and are covered by the GATS whereas the US submission suggests to adhere to the most liberal and open trade environment.
[24] Fifth Dedicated Discussion on E-Commerce, para 9.

— **Classification impasse and the WTO Work Programme on E-Commerce:** Next to making a permanent and meaningful duty-free e-commerce moratorium more difficult, the classification debate also blocks progress on other digital trade issues in the Work Programme.[25] For instance, it blocks the further study of the 'likeness' and technological neutrality-questions in the Council for Trade in Services.[26] Moreover, the Council for Trade in Goods has repeatedly raised with the General Council that most digital trade aspects can only be addressed once a determination on classification has been made.[27] The outstanding classification questions have also been used by WTO Members to argue against agreeing on a set of e-commerce principles.[28]
— **Classification impasse and the market access negotiations of the Doha Round:** Furthermore, the issue significantly complicates effective market access negotiations for digitally-delivered content products. As their categorisation is currently uncertain, Members who want to secure market access have to opt for a multi-track strategy in both the goods and services negotiations (*cf Chapter Three* and *Section 4.2.3.1*). Obviously, this fragmentation of discussions across different negotiation platforms is not effective.

It has also been demonstrated in *Chapter Two* that the other unresolved WTO e-commerce questions have overarching importance to the whole GATS framework and thus to negotiations in other service sectors (eg, the applicability of commitments to digitally-delivered services, the GATS Mode 1 vs 2 issue). Reaching beyond the issue of digitally-delivered content products, the value of current and future GATS commitments thus also depends on clarification of some of the unresolved questions.

6.1.3 Implications of the WTO Rulings Concerning The GATS US Internet Gambling Case

In April 2005, the Appellate Body brought closure to the WTO case 'US–Measures Affecting the Cross-Border Supply of Gambling and Betting Services'.[29] At issue was a complaint by Antigua concerning certain US measures that allegedly make it unlawful for suppliers located outside the US to supply gambling and betting services to its consumers. It is important to briefly review the case's significance for the unresolved questions affecting the trade in digitally-delivered content products.[30]

[25] Fifth Dedicated Discussion on E-Commerce, para 9.
[26] First Dedicated Discussion on E-Commerce, p 2.
[27] See CTG E-Commerce Report, para 11.1 and CTG, Report to the General Council on the Work Programme on Electronic Commerce, G/L/635 (9 July 2003).
[28] Fourth Dedicated Discussion on E-Commerce, paras 2–3.
[29] See above Introduction n 26.
[30] A detailed analysis of the case and its relevance concerning cross-border electronic trade and digitally-delivered content products can be found in Wunsch-Vincent (2005).

In sum, the cited WTO rulings on Internet gambling have provided only a very limited set of answers to the unresolved issues at stake and thus did not make up for the lack of progress in the WTO Work Programme on E-Commerce. This is mainly due to the fact that the rulings did not concern digitally-delivered content products but rather dealt with market access being denied to electronically-supplied Internet gambling services. The following essential topics were thus not addressed: the duty-free moratorium on electronic transmissions, the customs valuation of digital products, a definition of digital products and important classification questions having an effect on the applicability of certain commitments. The rulings could of course also not bring about the necessary specific commitments that would facilitate trade in digitally-delivered content products. This deliverable is the subject of *Section 6.2*.

That said, the WTO rulings were not without effect on the questions raised in this book's Chapter 2. Here the text focuses on the applicability of GATS rules and obligations to e-commerce (*cf Section 2.3.2*).[31]

First, the greatest advance of the rulings is the confirmation that WTO rules are indeed applicable to e-commerce and/or to electronically-supplied services (*cf Section 2.3.2.1*). While both the Panel and the Appellate Body do not affirm this decisive opinion directly, both rulings apply the GATS framework to the concerned electronic cross-border delivery of services without hesitation. This finding of applicability of the WTO rules to e-commerce through the dispute settlement bodies holds in the case of the GATS rules as well as for specific GATS commitments. With regard to the latter, the Panel and Appellate Body both affirm that the specific commitments undertaken in the US GATS Schedule extend to cross-border electronically-supplied gambling services. If this decision can be generalised, this is a considerable step forward and it eliminates significant legal uncertainties concerning the relevance of the WTO to digital trade.

Second, it is of interest to find that the concerned parties, Antigua and the US, as well as both WTO rulings seem to confirm the view that indeed GATS Mode 1 and not Mode 2 commitments seem applicable to cross-border electronic service delivery (*cf Section 2.3.2.3*). In the light of the concerned gambling services which are supplied over a foreign web page—a text book example for arguing that a US customer effectively 'visits a foreign service supplier operating under a different legal regime' and thus that GATS Mode 2 is applicable—this quasi-certainty regarding the applicability of Mode 1 commitments is even more apparent.

These two possible clarifications can—if WTO Members interprete them similarly and build on them—have a significant value towards securing liberal digital trade.

[31] From the rulings some important relevant conclusions can also be drawn with respect to the 'likeness' of electronically-delivered versus offline services (cf *Sec 2.3.2.2*). These are treated in the publication mentioned in n 30.

6.2 ESSENTIAL MARKET ACCESS: SLOW PROGRESS OF THE WTO'S DOHA NEGOTIATIONS

As soon as it became obvious that the WTO Work Programme on E-Commerce was stalling, the attention attributed to e-commerce shifted to the market access negotiations conducted as part of the Doha Development Agenda.[32] The US and the EC negotiators did indeed affirm throughout the Work Programme that e-commerce is not a separate negotiation topic in its own right,[33] arguing that the Doha Negotiations should be used to find solutions and to bring about market access benefiting digitally-delivered content products.[34]

If one assumes somewhat daringly that—without a change in the scheduling approach or the classifications and without solutions to the horizontal questions—the market access negotiations achieve the maximum liberalisation for digitally-delivered content products, much would in fact be gained.

— On the goods side, this would, for example, result in zero tariffs on all physical carrier media or—if interpreted this way—a duty-free treatment of digital content products.
— On the side of services, this would, for instance, result in full GATS commitments in possibly relevant modes and sectors for all WTO Members without specifying particular limitations for digitally-delivered content products.

This maximum liberalisation approach would also indirectly address some of the open e-commerce questions. Provided that all WTO Members become ITA participants and commit to full GATS Mode 1 and 2 commitments on the four specified sectors, no need for a special duty-free moratorium on digital content products would exist any longer (*cf Section 2.2*). This ambitious plan may also significantly reduce the need for solutions to the thorny classification matters. In fact, under full GATT and GATS commitments, the difference between the two trade frameworks, between the different service sectors or between the different GATS Modes would not be so relevant anymore. Although it would not have been clarified whether these commitments cover digitally-delivered content products or content as such, this state of affairs is likely to bring about binding free trade for all four digitally-delivered content products.

Regrettably, the existing and likely achievements of the Doha Negotiations do not resemble this—second-best—but rather attractive outcome. To start with, it is granted that—abstracting from slow or absent progress of the Doha

[32] 'US E-Commerce Industry Plots Strategy For WTO Talks', in: *Inside US Trade* (24 May 2002).
[33] *Cf* Third Dedicated Discussion on E-Commerce, para 2.
[34] Based on interviews with the European Commission and the USTR. See also 'Statement To Implement APEC Policies On Trade And The Digital Economy', X APEC Leaders Meeting Declaration, 27 October 2002, Los Cabos (Mexico), Internet: www.apec.org/apec/leaders__declarations/2002/statement_to_implement.html (31 December 2003) para 8.

Negotiations—the developments in the market access negotiations are not as disappointing as those concerning solutions to the open WTO e-commerce questions. Using a multi-track approach in the NAMA as well as in the GATS negotiations, WTO Members can secure some of the commitments suggested in *Chapter Three* (see *Sections 6.2.1* and *6.2.2* for the outcomes). But these achievements come with two problems:

— First, at this stage these outcomes are far from being definitely secured and depend on the successful conclusion of the Doha Development Agenda.
— Second, as indicated at the close of *Part Two*, a patchwork of achievements may not be of much value for digitally-delivered content products. A review shows that the negotiation of market access for digitally-delivered content products is—contrary to the expressed intent of US and EC negotiators—not explicitly pursued.

  So far, there have been few efforts to use the ongoing market access negotiations (eg, through the GATS request-offer process) to address the unresolved e-commerce questions or to innovate concerning the classification issue. But it must be clear that the side-stepping of solutions to the horizontal questions only works if the aforementioned perfect outcome in terms of trade commitments is achieved.[35] As soon as an imbalance of commitments (eg, between goods and services) remains and/or less than full commitments (eg, in audiovisual services) persist—both likely developments in the Doha Round—solutions to the horizontal e-commerce questions are still critical.[36]

Overall, it seems as if a consolidated and timely approach is difficult because the different trade topics (eg, NAMA, GATS) all have their own diverging negotiation agenda and because digital trade issues do not figure prominently in the Doha Round.[37]

These rather slow developments in the WTO must be contrasted to the rather rapidly evolving negotiations at UNESCO to install a special regime for cultural goods and services (and thus potentially digitally-delivered content products) before the end of the Doha Negotiations (*cf Section 6.3*).

6.2.1 NAMA and the Information Technology Agreement: Still Working on Negotiation Modalities

The field of play for reducing tariffs on IT goods has moved from the ITA Committee to the Doha Development Agenda. Provided that certain obstacles are overcome, the NAMA negotiations could contribute to a liberal trade

[35] It can be retained, however, that even then, the situation is hardly satisfactory to protagonists of clear international trade rules.

[36] As will be seen in 6.2, this dilemma also remains valid in the bilateral context.

[37] *Cf* the Doha Ministerial Declaration *secs 1.1* and *6.1.1*.

environment for the trade in physical carrier media and—depending on the interpretation—a free trade treatment for digitally-delivered content products. Before the Council Decision of July 2004, however, real negotiations had never taken off on industrial market access, with Members waiting for an outcome in agriculture first.

6.2.1.1 Failure to Agree on Draft Modalities Before the Cancún Ministerial

Before the market access negotiations for non-agricultural products can begin in earnest, WTO Members must agree on the 'negotiation modalities', ie, the parameters for binding, lowering, and eliminating tariffs that will be applied in the negotiations (*cf Section 1.2.1*). The original Doha schedule called for the participants to reach agreement on modalities by 31 May 2003.[38] But until June 2005 no NAMA Negotiation Guidelines have been brought to the fore.

In April 2003 the Secretariat compiled an overview of the modality proposals submitted.[39] Differences remained over many other aspects of the negotiation modalities, including the formula to reduce tariffs. So far not much room has been available to address IT- or digital content-related matters. Only two proposals explicitly dealt with tariff-reduction applicable to IT products:

— The most radical suggestion from the US proposes to eliminate all duties on industrial and consumer goods by 2015 ('zero-for-zero'-approach) in two steps applicable to all sectors.[40] With respect to IT products, the US proposal suggests that tariffs covered by the ITA should be eliminated as soon as possible but no later than 2010.[41]
— The Japanese submissions seek the participation of all WTO Members in the ITA and an expansion of the ITA product coverage.[42] They propose a 'zero-for-zero'-approach to be applied to digitally-delivered content products, like electronic books.[43]

Issues more directly related to digitally-delivered content products (eg, the applicability of the ITA or the Valuation Decision) have not yet been raised.

[38] TNC-NGMA, Adopted by the Negotiating Group on 19 July 2002, Programme of Meetings for the Negotiations on Market Access for Non-Agricultural Products, TN/MA/3 (22 July 2002) para 2.

[39] TNC-NGMA, Overview of Proposals Submitted: Tariffs, TN/MA/6 (5 February 2003) and TN/MA/6/Rev.1 (1 April 2003).

[40] TNC-NGMA, Communication from the US, Market Access Negotiations for Non-Agricultural Products, TN/MA/W/18 (5 December 2002) [US NAMA Proposal] and USTR (2004) p 5.

[41] US NAMA Proposal, para 8.

[42] See, eg, TNC-NGMA, Communication by Japan, Market Access for Non-Agricultural Products, TN/MA/W/15, (5 November 2002) [First Japanese NAMA Proposal] and TNC-NGMA, Communication from Japan, Market Access for Non-Agricultural Products, TN/MA/W/15/Add.2, (4 March 2003) [Second Japanese NAMA Proposal].

[43] See First Japanese NAMA Proposal, Annex 2, s 3(b) and Second Japanese NAMA Proposal, Annex 2.

Before the Cancún Ministerial, the Chairman released Draft Modalities for the market access negotiations.[44] The NAMA Draft Modalities proposed to:

— apply a formula across-the-board to all tariffs on non-agricultural products[45];
— require zero-for-zero tariff elimination in three equal stages for selected sectors of particular interest to developing country participants, including 'Electronics and electrical goods[46]'; and
— permit 'supplementary modalities' to achieve additional tariff reductions and elimination through zero-for-zero sectoral tariff elimination.[47]

Depending on the coverage and any special and differential treatment accorded to developing countries, the Doha Negotiations could directly or indirectly (ie, an elimination of duties on IT products) accomplish the increase of ITA participation and the expansion of ITA product coverage. Particularly, sector-specific approaches may present itself as an opportunity to agree on a reduction or elimination of duties on physical carrier media and a decision on the valuation matter. Here the question would be if a sectoral approach to IT, the electronics industry or other schemes applicable to digitally-delivered content products would qualify as 'selected sectors of particular interest to developing country participants'. Moreover, the 'multilateralisation' of ITA participation could—if other aspects of the NAMA negotiations proceed very well—be a realistic option.

Even if ambitious zero-for-zero proposals to eliminate IT tariffs fail, a horizontal formula to lower tariffs would also apply on IT products. Given that many WTO Members are bound to zero tariffs on IT products, the effect of such a reduction may, however, not be significant. In addition, it would need to be clarified that any tariff-reduction effort under the GATT applies to digitally-delivered content products. More radically, WTO Members could enter binding commitments on duty-free treatment for both physically-delivered content products. Given the negotiation parameters of the EC, this is however not considered a likely development.

6.2.1.2 No Agreement on NAMA Negotiation Modalities During the Cancún Ministerial or Through the Council Decision of July 2004

An agreement on the modalities was ripe for decision in Cancún. But due to the demise of the Ministerial, an agreement on the Draft NAMA Modalities did not materialise.[48] Until today, differences of views concerning the NAMA

[44] TNC-NGMA, Draft Elements of Modalities for Negotiations on Non-Agricultural Products, TN/MA/W/35 (16 May 2003) [NAMA Draft modalities].
[45] NAMA Draft Modalities, s 1. The formula proposes to reduce higher than average tariffs proportionally less than lower ones.
[46] *Ibid*, s 2.
[47] *Ibid*, s 5.
[48] TNC-NGMA, Report by the Chairman to the TNC, TN/MA/13 (19 April 2004).

Negotiation Modalities remain between developing and developed countries.[49] Moreover, it was felt that progress on key agricultural issues was a precondition for the NAMA talks to advance.[50]

Through the July 2004 Decision which addressed important issues relating to agriculture, delegations only managed to agree on a relatively vague framework for NAMA Modalities (ie initial elements for future work),[51] but not on the modalities themselves. Interestingly, the framework still emphasises the possibility of reducing or eliminating of tariffs in particular sectors.[52] Choosing this approach as the focal point for the NAMA negotiations was however rejected by certain developing countries that prefer a horizontal approach.[53]

Consequently, the current goal to complete the modalities at the Ministerial Conference in December 2005 will be a challenge.[54] A small degree of convergence towards the goal of a 'Swiss' formula[55] for calculating tariff reductions started to become evident in several Members' negotiating positions when this book was concluded, possibly lending itself to an agreement to be adopted at the December WTO Ministerial Conference in Hong Kong.

Without effort to bridge the significant differences that exist between WTO Members on these modalities, tariff-reduction for IT products and more direct negotiations on digital products will not become a reality. Besides, the applicability of these GATT obligations resulting from NAMA to digitally-delivered content products remains to be confirmed. Without such an agreement, the results of the NAMA negotiations could remain largely meaningless for digitally-delivered content products.

6.2.2 Service Negotiations: Ambitious Negotiation Proposals but Modest GATS Offers and Resistance to Liberalise Content Services

Procedurally, the service negotiations are still in a significantly more advanced stage than the NAMA negotiations (*cf Section 1.2.2*). In November 2003 the Chair noted that: '[o]verall the meeting was characterised by a positive

[49] USTR (2004) pt II, p 10 and 'Industrial Market Access Hinges On Agricultural Outcome', in: *Bridges Weekly* (31 March 2004).

[50] 'WTO Members End Disappointing Talks On Access To Non-Agricultural Markets', in: *BNA WTO Reporter* (1 April 2004).

[51] See Annex B of the Council Decision of July 2004. TNC, Minutes of the Meeting held in the Centre William Rappard on 30 June 2004, TN/C/M/13 (12 August 2004).

[52] Council Decision of July 2004, para 7. The sectoral initiative was strongly backed by the US, the EC, Australia and New Zealand.

[53] 'Developed, Developing Countries Disagree On Industrial Market Access Approach', in: *Bridges Weekly* (8 December 2004) and 'US-Backed Sectoral Initiative Continues To Face Opposition At WTO NAMA Talks', in: WTO Reporter (8 December 2004).

[54] 'Differences Persist On How To Structure WTO NAMA Talks', in: *Bridges Weekly* (17 November 2004), 'General Council Reviews Year's Progress', in: *Bridges Weekly* (15 December 2004) and TN/MA/13 (19 April 2004) para 1.

[55] Such an approach would see higher tariffs cut more steeply than low ones, and would 'harmonise' tariffs by bringing them closer to a particular level.

atmosphere. While a number of delegations recognised certain constraints in the aftermath of the Cancún Ministerial, they indicated a desire to pursue the Council's work'.[56]

But whereas the exchange of sector-specific negotiation proposals has been very active and ambitious, the exchange of initial GATS offers has been less so. Visibly, the request-offer process is also under the influence of other complicated dossiers.[57] Broadly speaking, it can be questioned if the service negotiations and the very large potential gains that would result from them,[58] have received the appropriate attention in capitals during the Doha Negotiations.

6.2.2.1 Many Ambitious Negotiation Proposals for the Service Negotiations But . . .

After the completion of the Services Negotiation Guidelines, more than one hundred negotiation proposals[59] were handed in (*cf Section 1.2.2*). Many of them concern the sectors relevant to digitally-delivered content products.

In the proposals, developed country Members seek further liberalisation of virtually all sectors[60] particularly focussing on Modes 1 and 3 (commercial presence) in computer, telecommunication as well as distribution and financial services. Industrialised WTO Members expect developing countries to 'catch-up' with respect to service liberalisation by making new specific GATS commitments. In turn, other industrialised Members are asked to remove remaining limitations. The US and the EC also proposed the liberalisation of a cluster of e-commerce or Internet services[61]; a proposal which was dropped in the latter stages of the negotiations.

In comparison, developing country Members, which are significantly more involved in the service negotiations than during the Uruguay Round, also made sector-specific proposals on telecommunication and computer services. Nonetheless, the main focus of their submissions was on market access through the movement of natural persons, namely GATS Mode 4; a very sensitive area for industrialised countries.[62]

[56] CTS, Report by the Chairman to the TNC, TN/S/14 (6 November 2003) para 1.

[57] 'Services Talks Head Towards Doldrums, As Links Drawn To Wider Round', in: *Inside US Trade* (8 November 2002).

[58] See Drusilla, Deardorff and Stern (2002); and Deardorff and Stern (2003) on the gains of service trade liberalisation through the Doha Round.

[59] See CTS, Report by the Chairman to the TNC, TN/S/10 (11 July 2003) para 3. See WTO, Services Proposals: Proposals for the New Negotiations, Internet: www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm.

[60] *Ibid*, pp 3–6. On the importance of Mode 3 commitments, see CTS, Communication from Canada, TN/S/W/24 (30 September 2004).

[61] Eg, CTS, Communication from the US, Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy, S/CSS/W/30 (18 December 2000) [US Telecom Service Proposal] and CTS, Communication from the EC, Electronic Commerce Work Programme, S/C/W/183 (30 November 2000) paras 8 f.

[62] *Cf* UN ICT TF (2004); and International South Group Network (2002).

It is also noteworthy that—despite of classification problems related to digital trade—most Members went straight to the request-offer process. The latter was mostly carried out on the basis of the old classification structures and a continued reliance on the positive list approach.[63] In the context of difficult classification of digitally-delivered content products and constant product innovations, the disadvantages of this scheduling methodology can hardly be overstated.

Generally awareness of the scheduling problems is now higher.[64] Many proposals have raised classification issues, including the applicability of commitments to 'new services' and the problems resulting from convergence.[65] Switzerland and the EC, for example, suggested similar commitments in Mode 1 and 2 in the case of financial services. Subsequent proposals have suggested for Members to have similar and preferably full commitments in both Mode 1 and 2 in as many sectors as possible[66] or to agree on a common understanding among Members as to how electronically-delivered services could be treated.[67] These suggestions have now resurfaced as India and other Members grew more interested in pre-empting protectionism with respect to outsourcing and stressing that the related unresolved questions had not received the attention they deserve.[68]

Yet, the discussions have up till now not led to an agreed solution and certainly not one which has been put into practise for audiovisual or other content-related products. Furthermore, so far no positive reaffirmation that electronic transactions are covered by existing GATS commitments, no clarification relating to the GATS Modes and no pertinent classification work has occurred (except proposals made in the case of computer services). Problematically, this has led individual Members to resort to their own sector definitions (outside the CPC).

Finally, the specific issue of digitally-delivered content products and associated classification questions have—despite earlier pledges—so far not been explicitly catered for.

[63] See Services Negotiation Guidelines, para 4 and WTO (2001b) p 119.

[64] CTS, Communication from Switzerland, Scheduling Issues, TN/S/W/21 (8 September 2004).

[65] CTS, Minutes of the Meeting Held on 5, 8 and 12 October 2001, S/CSS/M/12 (28 November 2001); CTS, Minutes of the Meeting Held on 3–6 December 2001, S/CSS/M/13 (26 February 2002) and CTS, Minutes of the Meeting Held on 3–6 December 2001, S/CSS/M/13 (26 February 2002).

[66] CTS, Communication from Switzerland, GATS 2000: Financial Services, S/CSS/W/71 (4 May 2001). See in this light also CTS, Communication from the EC and their Member States, GATS 2000: Financial Services, S/CSS/W/39 (22 December 2000). For the same point for all service sectors see CTS, Communication from Switzerland, TN/S/W/21 (8 September 2004) and CTS, Report of the Meeting held on 27 Sept and 1 October 2004, TN/S/M/12 (9 November 2004).

[67] CTS, Report of the Meeting held on 28 June and 28 July 2004, TN/S/M/11 (8 September 2004); with Chinese Taipei, eg, asking whether Members would need a common understanding that electronic delivery of services fell under GATS.

[68] See the joint statement on the 'Liberalization of Mode 1 Under GATS Negotiations' from Chile, India and Mexico contained in WTO JOB (04)/87.

6.2.2.2 . . . Few Results Through Initial GATS Offers and Little Progress on Rule-Making

In sum, it can be said that the head-start of the GATS negotiations has so far not translated into compelling results. Through the General Council Decision of July 2004, WTO Members were thought to have managed to give a new dynamism to the services negotiations. The latter Decision calls for initial GATS offers to be submitted as soon as possible, for revised offers to be tabled by May 2005 and for a conclusion of the negotiations on GATS rules.[69]

By June 2005 around 55 initial offers representing around 70 Members out of 148 had been received.[70] A few initial GATS offers have even been coming in after the Cancún Ministerial (eg, India), after the General Council Decision of July 2004 (eg, Gabon, Indonesia) and after May 2005 (eg, Pakistan, Uganda).[71]

But in sum, the initial or revise offers are unsatisfactory. In June 2005, large developing economies such as the Philippines, South Africa, and Morocco had not yet made their initial offer. Only around 12 revised offers—including from the EC and US—have been submitted with moderate improvements.[72] Both the number and the quality of GATS initial offers—in particular those relating to GATS Mode 1—have been criticised by WTO Members, academics and the industry.[73]

Given that it is mainly the developing countries that have great potential in making new GATS Mode 1 and 2 commitments in the designated sectors (*cf Section 3.2.1–3.2.5*), the low percentage of offers from them is a considerable problem. Furthermore, it is striking that industrialised countries have—often leaving large parts of their GATS schedules unchanged—not significantly improved or clarified the scope of their commitments. This concern applies particularly to the service sub-sectors pertinent to digitally-delivered content products.

Hence, before and after the Cancún Ministerial, the Council for Trade in Services and the TNC Chairmen noted that the number and the quality of the offers fell short of achieving progressively higher liberalisation levels[74] and that the lack of progress concerning the mandated development of GATS rules is of concern.[75] The industry's disappointment concerning the multilateral service

[69] Council Decision of July 2004, para e and Annex C.

[70] CTS, Report by the Chairman to the TNC, TN/S/18 (9 Dec 2004) and Adlung and Roy (2005). For a complete list see Internet: www.esfbe/f_e_negotiations.htm (both 10 June 2004).

[71] 'Services Week Shows Dynamism Despite Stalled Talks', in: *Bridges Weekly* (11 Dec 2003).

[72] See also Adlung and Roy (2005) on revised offers.

[73] ICTSD (2003a,b); 'WTO Service Council: Members Find Services Offers Disappointing', in: *Bridges Weekly* (8 Apr 2004) and 'Services Talks Continue; Quad-Led Group Calls For Better Offers', in: *Bridges Weekly* (15 Dec 2004).

[74] CTS, Report by the Chairman to the TNC, TN/S/10 (11 July 2003) and TNC, Report by the Chairman of the TNC to the General Council, TN/C/3 (23 July 2003), para 24 and CTS, Report by the Chairman to the TNC, TN/S/18 (9 Dec 2004).

[75] TN/C/3 (23 July 2003), para 25. On the lack of progress on the rule-making side see WTO (2003), p 85 and CTS, Report of the Meeting held on 3–6 Mar 2003, TN/S/M/6 (25 Apr 2003). See CTS, Annual Report of the Council for Trade in Services to the General Council (2004), S/C/22 (2 Dec 2004) on the absence of progress with respect to GATS rules in 2004.

negotiations has already translated to some of the latter advocating bilateral FTAs as 'additional' or main trade policy tools.[76] There is a general feeling now that the GATS 'request-offer' approach has not led to significant results and that more pro-active approaches (eg, formulae, benchmarks, etc) are needed to advance the negotiations.[77]

Problematically, the recent WTO ruling on Internet gambling (see *Section 6.1.3*) may deter more GATS commitments for electronically-delivered services.[78] One reason is the increased concern as regards the regulatory control of electronically imported services. But the case has certainly also raised doubts over whether the US is actually willing to adhere to its proclaimed free digital trade approach when being the importer of electronically-delivered products.

6.2.2.3 Sector-Specific Assessment of the Potential Liberalisation Through Initial Offers: Contrasting Negotiation Proposals With Actual Offers

A careful assessment reveals that the GATS negotiations have—if developing countries become more involved in making initial GATS offers—the potential to bring about some notable achievements. The low level of existing commitments, the fact that much of the procedural work is completed, the greater interest in service market access of developing countries and the fact that GATS Mode 1 and 2 commitments are more forthcoming than, for example, those under Mode 4, indicate that improvements with respect to cross-border GATS commitments can be expected in the Doha Negotiations. Finally, as in previous WTO trade rounds, it can be argued that many unexpected offers will be made just before the end of the negotiations. The current GATS offers are thus just a snapshot of events and do not perfectly shed light on the potential achievements of the Doha Negotiations.

However, a more thorough analysis of the negotiation proposals and the available initial GATS offers shows that only few objectives relating to trade in services laid out in *Chapter Three* have so far been attained. In addition, the available revised offers show very little relevant improvements as compared to the initial offers (including with respect to the elimination of relevant MFN exemptions). Visibly, the negotiation proposals are far more liberally-minded than the more binding initial GATS offers.

— On the one side, substantial progress is likely with respect to better market access commitments in at least two of the four fields relevant to digital products, namely for computer and telecommunication services.

[76] 'ESF New Priorities for the DDA', declaration of the European Service Forum (5 Nov 2003), Internet: www.esf.be and 'Global Industry Groups: Liberalisation of Services Must Move Forward', joint position paper by the service industry associations of the EU, Australia, Hong Kong, Japan and the US, 22 Mar 2004.

[77] 'WTO Friends Group Outlines Possible Benchmarks for Financial Services Talks', in: *WTO Reporter* (10 June 2005) and the WTO Symposium on Cross-Border Trade in Services (April 2005), see Internet: www.wto.org/english/tratop_e/serv_e/sym_april05_e/sym_april05_e.htm.

[78] See above n 30.

— On the other side, the resistance from WTO Members against scheduling market access commitments in audiovisual and entertainment services will be vehement. Broad-based progress in the latter areas seems—even after a full pick-up of the Doha Negotiations—improbable when judging by the current offers.

  Also—despite a generally liberal approach to computer and telecom services—the proposals and initial offers mirror the US-EC opposition on this issue and illustrate that serious efforts are being undertaken by the EC and others to avoid a 'liberalisation spillover' from computer and telecom to audiovisual services (*cf Section 2.3.2.4*).[79]

The following sector-specific analysis is built on the negotiation proposals and the full set of public initial and revised GATS offers submitted before June 2005.

(i) Computer and Related Services: Liberal Approach But Often Excluding Certain Software Types WTO Members have filed a number of submissions regarding classification issues and the liberalisation of computer services.[80] These submissions indicate that improving specific commitments and classification issues in this sector are a key focus of the Doha Negotiations.

a. Negotiation Proposals: Improving and Clarifying the Scope of Specific Commitments All submissions stress the importance of further liberalisation of this sector. Judging by the submissions, this seems to be a priority of both the developing and developed countries. Canada, for example, seeks new commitments on computer and related services and the elimination of existing limitations on cross-border supply,[81] whereas Costa Rica asks for specific commitments for all modes of supply.[82]

When it came to clarifying the scope of these commitments, WTO Members examined whether and what changes were necessary to reflect the current nature of (electronic) business activity.[83] Members also examined matters arising through the described convergence of content and transmission services, the emergence of new services and the coverage of software itself.[84]

[79] EBU (2003a) p 5.

[80] See *Annex A.6.1.1* for a list of GATS Negotiation Proposals concerning computer and related services. The great interest in computer services is corroborated by the existence of a Geneva-based 'Friends Group' that meets periodically to discuss trade issues related to this sector.

[81] CTS, Communication from Canada, Initial Negotiating Proposal on Computer and Related Services, S/CSS/W/56 (14 March 2001) [Canadian Computer Service Proposal].

[82] CTS, Communication from Costa Rica, Computer and Related Services, S/CSS/W/129 (30 November 2001) [Costa Rican Computer Service Proposal].

[83] CTS, Communication from the US, Computer and Related Services, S/C/W/81 (9 December 1998) and CTS, Communication from the EC and their Member States, GATS 2000: Computer and Related Services (CPC 84)—Addendum, S/CSS/W/34/Add.1 (15 July 2002) [First EC Computer Service Proposal].

[84] See, eg, Canadian Computer Service Proposal, para 5; Costa Rican Computer Service Proposal, para 11 and First EC Computer Service Proposal, paras 2 and 6–11. *Cf Secs 2.3.2.4* and *3.2.2.*

More concretely, two specific proposals—one from Taiwan[85] and the suggestion to adopt an 'Understanding on the Scope of Coverage of Coverage of CPC 84—Computer and related Services' from the EC[86]—have received significant attention. The proposals have in common that they call for commitments on the higher two-digit CPC 84 level to cover all existing and future computer services.

— Taiwan proposes that full commitments should be taken for the CPC 84 and that these should cover all stages in the computer service value chain.
— The EC proposes that the CPC 84 covers computer programmes defined as the 'sets of instructions required to make computers work and communicate (including their development and implementation), data processing and storage, and related services'.[87] Taking a big step forward, the definition of the EC would assure that full commitments under CPC 84 cover traditional (business) software.[88] Moreover, the EC has suggested that—in the case of less than full commitments for the CPC 84—Members should ensure that GATS Mode 1 and 2 commitments are consistent in order to avoid uncertainties.[89]

These proposals to schedule at the two-digit level are—at first sight—a very inclusive approach which was also recommended in *Part Two* and which—if interpreted in a liberal fashion—closely resembles a targeted positive list approach in one sector.

Nevertheless, in the light of digitally-delivered content products, both proposals have the disadvantage that they exclude 'content, core or converging services'. Taiwan proposes that certain converged services, including the delivery of multimedia content should be covered by the telecom and/or audiovisual sectors and not by the CPC 84.[90] As expected, the EC also puts forward that digitally-delivered 'content service' is not covered by the CPC 84 but by other commitments (*cf Section 5.1.2.2*).[91]

[85] CTS—Committee on Specific Commitments, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, Computer and Related Services, S/CSC/W/37 (8 Jan 2003) [Taiwanese Computer Service Proposal].

[86] CTS—Committee on Specific Commitments, Communication from the EC and their Member States, GATS 2000: Computer and Related Services, S/CSS/W/35 (24 Oct 2002) [Second EC Computer Service Proposal]. For an overview of the EC negotiation strategy see European Commission (2000c,d,e).

[87] *Ibid*, para 7. Related services are, eg, consultancy and training services.

[88] According to the EC's revised offer, the following is included: Computer programs defined as the sets of instructions required to make computers work and communicate (in and of themselves), plus consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, adaptation, maintenance, support, technical assistance, management or use of or for computer programs.

[89] First EC Computer Service Proposal, para 10.

[90] Taiwanese Computer Service Proposal, para 6.

[91] First EC Computer Service Proposal, para 8 and Second EC Computer Service Proposal, paras 7–9.

Obviously, other WTO Members, like the US, have difficulty with these proposals because of limited existing commitments and initial GATS offers that would apply to these content services (ie, audiovisual service commitments).

b. Initial GATS Mode 1 and 2 Offers for Computer and Related Services: Progress but Uncertain Applicability to Different Software Types The relatively liberal stance towards computer services on the one hand, and the attempt to extract content services apart from standard business software, on the other, is mirrored in the current initial GATS offers.

Starting on a positive note, the computer service category is—as compared to all other service sectors—one of the areas where Members seem to be willing to make most new commitments. Problematically, the available initial GATS offers mainly come from industrialised countries. Nevertheless, some key developing countries have made particularly important strides, moving from almost no to full specific GATS commitments (eg, India and Pakistan). Starting with relatively good commitments, other WTO Members have incrementally improved their schedules through the removal of limitations or the scheduling of some sub-sectors that are, however, unrelated to digitally-delivered content products (eg, Israel, Turkey, Iceland, New Zealand and Switzerland). Finally, already having full GATS commitments across all sub-sectors, some OECD and other countries have not undertaken changes (eg, Canada, Japan).

In an effort to clarify the scope of commitments, some Members followed the Taiwanese and the EC's negotiation proposals and scheduled full commitments at the two-digit CPC 84–level. It is a great step forward, that in its revised GATS offer the US followed this approach and scheduled at the CPC 84-level, however, without committing to the EC's 'Understanding on the Scope of Coverage of CPC 84'. Other Members next to the EC followed the approach of the Understanding more closely and scheduled at the CPC 84-level while excluding content services (eg, Australia[92], Bulgaria[93]).

Neither the stance of the latter countries nor of the other WTO Members guarantees market access to digitally-delivered content products.

— First, through adoption of the 'Understanding on the scope of coverage of computer and related services—CPC 84', the EC and Bulgaria make clear that digitally-delivered software is covered, but that entertainment software and the two other digitally-delivered content products treated in this research are likely not to be (*cf Section 5.1.3*). This comprehensive treatment of digitally-delivered software under the GATS, but exclusion of more content-related software from the scope of CPC 84, mirror the EC's stance and is directly opposed to affirmed US interests.

[92] Making full commitments at the two-digital CPC 84-level but excluding 'measures relating to content covered by CPC 844 database services and 849 other computer services' and leaving trade partners in doubt whether software is covered.

[93] The EC and Bulgaria subscribe to the EC's 'Understanding on the scope of coverage of computer and related services—CPC 84'.

— Second, other WTO Members have not entered into new commitments relevant to digitally-delivered content products or have not clarified whether their commitments under computer services apply to, for example, digitally-delivered business and/or leisure software (including the US).

As a result, the outcome is not satisfactory.

(ii) Value-Added Telecommunication Services: Liberal Approach But Uncertain Meaning for the Content Industries

a. Negotiation Proposals: Improving and Clarifying the Scope of Specific Commitments As with computer services, WTO Members take a relatively liberal stance vis-à-vis value-added telecommunication services such as 'On-line information and data base retrieval' and 'On-line information and/or data processing'.[94]

The telecom-related submissions indicate that Members seek to increase the number and scope of specific commitments, to remove limitations on existing commitments[95] and to eliminate MFN exemptions.[96] The EC is, for example, asking its trade partners to make specific commitments for all telecom sub-sectors and for all modes of supply without limitations.[97] Others are requesting liberalisation of selected modes or sub-sectors (eg, data transmission services, or direct-to-home satellite video and audio services) and seeking the liberalisation of new delivery technologies (eg, cable and satellite).[98]

When it comes to clarifying the scope of these commitments, two main classification issues have been raised[99]:

— the adequacy of the existing classifications in W/120, given the convergence of telecommunications services; and
— the coverage of new telecommunication services by existing commitments.

Without achieving a consensus, some Members have argued that existing commitments should be interpreted broadly to incorporate technological developments,[100] whereas others questioned whether these new services would

[94] See *Annex A.6.1.2* for a list of GATS Negotiation Proposals concerning telecommunication services.

[95] Some Members are asking for phase-in periods to be removed. See eg, CTS, Communication from the EC and their Member States, GATS 2000: Telecommunications Services, S/CSS/W/35 (22 December 2000) [EC Telecom Service Proposal].

[96] Eg, MFN exemptions on one-way satellite transmission of DTH and DBS television services/digital audio services. See EC Telecom Service Proposal, paras 12 and 14. This request is particularly aimed at the US (*cf s 3.2.4*).

[97] EC Telecom Service Proposal, paras 12–14.

[98] See, eg, CTS, Communication from Australia, Negotiating Proposal on Telecommunication Services, S/CSS/W/17 (5 December 2000).

[99] See, eg, CTS, Communication from US, Work Programme on Electronic Commerce, S/C/7 (12 February 1999) and US Telecom Service Proposal.

[100] See, eg, US Telecom Service Proposal, Sec V and CTS, Communication from Switzerland, GATS 2000: Telecommunications, S/CSS/W/72 (4 May 2001).

be covered by existing specific commitments.[101] Essentially, the question of carriage vs conduit coverage, to which an answer is necessary to determine the applicability of telecom commitments to digitally-delivered content products, has not been debated conclusively. Thus, no solution to the content vs carriage debate has been found.

b. Initial GATS Mode 1 and 2 Offers for Value-Added Telecommunication Services: Progress but Uncertain Applicability to Content Yet again, the generally rather liberal stance with respect to value-added telecom services in the proposals are only partly reflected in the initial GATS offers. These offers entirely reflect the diverging US vs EC views on the delineation of content vs carriage.

In sum, the improvement made through new initial GATS offers is—as compared to other service sectors—above-average but somewhat less good than in the domain of computer services. Some Members have explicitly taken up new and full specific GATS commitments in 'On-line information and database retrieval' and in some cases also in 'On-line information and/or data processing' (eg, Bulgaria, Hong Kong, Japan, Turkey). Again, many WTO Members which have full specific GATS commitments across all telecom sub-sectors did not offer improvements (eg, Argentina, Australia, Canada, Korea and Singapore). Finally, some Members continue to have either or both GATS Modes in these two sub-sectors unbound or not included in their schedule (eg, Chile, Pakistan, India). This certainly applies to the great majority of developing countries who—despite of having the greatest potential for upgrading—have not submitted initial GATS offers so far.

Furthermore, the applicability of commitments as regards some digitally-delivered content products still poses problems in the area of value-added telecom services.

— On the one side, Members like Australia, Canada and the EC—sometimes with direct entries in their schedules—continue to maintain that their telecom commitments cover only 'carriage' and not 'content' (*cf* Section *2.3.2.4*). In its revised offer the EC, for instance, makes a significant step forward in proposing one-stop commitments for all telecommunication services (including value-added ones) but while also excluding broadcasting or any content services from this offer.[102]
— On the other side, as expected, the US has moved in the opposite direction with its initial GATS offer whilst replacing its commitments on value-added

[101] *Cf s 2.3.2.1.*

[102] EC revised offer on which full GATS commitments are entered: 'All services consisting of the transmission and reception of signals by any electromagnetic means, 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. Telecommunications services do not cover the economic activity consisting of the provision of content services which require telecommunications services for their transport.'

telecom services with commitments on a newly introduced 'Information service[103]' category. The latter commitments also refer to the 'generating, storing, transforming, processing, retrieving, utilizing, or making information available via telecommunications'. As data transmissions over the Internet are covered by this commitment, digitally-delivered content products are also. Moreover, the US has tabled a new offer while fully committing different types of transmission services (as defined in the CPC), including cable and satellite transmission services and different 'Programme Transmission Services, CPC 7524' (including TV and Radio broadcasting services[104] excluded by the EC offer).

All in all, the disagreement between the US and the EC and the debate about content vs carriage commitments have not been resolved. Due to the lack of consensus, so far no understanding or Chairman's note on the issue have been brought forward. This debate has to be seen in the context of proposed additional commitments as part of the Reference Paper on Basic Telecommunications under Article XVIII of the GATS that have been offered by the US and Australia in their revised GATS offers.

(iii) Audiovisual Services: Déjà-Vu from the Uruguay Round?

a. Negotiation Proposals: Desire for New Commitments for Audiovisual Services Vs the Desire to Block Any Audiovisual Service Liberalisation As indicated earlier, the negotiations concerning new commitments in audiovisual services—the sector probably most closely related to digitally-delivered content products—show less potential than those aimed at computer and value-added telecom services.[105] Nevertheless, unlike during the Uruguay Round, the audiovisual service negotiations have not been paralysed from the beginning because of a direct transatlantic confrontation.

The new technological environment, the new interest of developing countries in market access for audiovisual services (ie, India, Brazil),[106] the notion that trade rules may be sufficiently flexible to address all aspects of the audiovisual sector, and the pronounced interest of some Members (eg, next to the US: Japan, Hong Kong, Chinese Taipei[107]) have introduced new invigorating elements to

[103] Defined as: 'The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications [. . .]. Services include, but are not limited to: [. . .] On-line Information and/or data base retrieval, [. . .] On-line information and/or Data processing, Packet-switched information services.' Quoted from the US revised GATS offer.

[104] CPC 75241, 75242 and 96133.

[105] See *Annex A.6.1.3* for a list of GATS Negotiation Proposals concerning audiovisual services. See Iapadre (2000); Graber (2002); Wunsch-Vincent (2002a) pp 46 f; and Graber, *et al*, (2004) for more details.

[106] See CTS, Communication from Brazil—Audiovisual Services, S/CSS/W/99 (9 July 2001) [Brazilian Audiovisual Service Proposal], UNCTAD (2002) and UNCTAD (2004).

[107] See CTS, Report of the Meeting Held on 4 and 10 July and 3 September 2003, TN/S/M/8 (29 September 2003). See, for instance, Japanese Ministry of Foreign Affairs (2002) and CTS, Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42 (22 December 2000).

the debate. India has, in fact, made requests to consider liberalisation in audiovisual services. Moreover, the softer course of the US (*cf Sections 4.1.2.1* and *4.2.3.1*[108]) which is, for example, asking other WTO Members to freeze their current levels of liberalisation in areas such as cinema and TV, rather than asking it to enter full specific GATS commitments, has also created room for discussion.[109]

These developments have been reflected in four innovative sectoral proposals on audiovisual services,[110] in corresponding consultations in Geneva[111] and in a significant number of GATS requests in the field, notably from developing countries.[112] The tenor of the submissions is well summarised in the Brazilian submission that states that the interested WTO Members ask 'how to promote the [. . .] liberalisation of the sector [. . .] without affecting the [. . .] flexibility of governments to achieve their cultural policy objectives[113]'.

Specifically, the few but important proposals converge on a number of points:

— First, it is argued in the proposals that the 'all-or-nothing approach' taken during the Uruguay Round should not be pursued in the Doha Negotiations. The new technological environment simply does not warrant the absence of audiovisual market access commitments.[114] Moreover, substantial commercial export interests (especially developing countries[115]) exist in the field.
— Second, there seems to be some agreement on the point that the liberalisation of audiovisual services is not incompatible with the protection of cultural diversity. The proposals actually call for the establishment of a framework where liberalisation and cultural diversity would co-exist. In particular, the possibility of an understanding on subsidies was put forward.[116] Attracting great criticism from the EC, Switzerland suggested a debate on questions like public service objectives and competition issues.[117]

[108] CTS, Communication from the US—Audiovisual and Related Services, S/C/W/78 (8 December 1998) [First US Audiovisual Service Proposal] and CTS, Communication from the US—Audiovisual and Related Services, S/CSS/W/21 (18 December 2000) [Second US Audiovisual Service Proposal].

[109] For an executive summary of the US requests see Internet: www.ustr.gov/sectors/services/2002–07–01–proposal-execsumm.PDF (12 April 2004).

[110] First and Second US Audiovisual Service Proposals; Brazilian Audiovisual Service Proposal and CTS, Communication from Switzerland—GATS 2000: Audiovisual Services, S/CSS/W/74 (4 May 2001) [Swiss Audiovisual Service Proposal]. For more details see Hauser and Wunsch-Vincent (2002) pp 137 f.

[111] CSS, Audiovisual Services in the GATS 2000 and Doha Contributions, S/CSS/M/13 (26 February 2002).

[112] The EC, for instance, has received requests from the US, Brazil, Japan and from developing countries (in total 16 countries).

[113] Brazilian Audiovisual Service Proposal, para 7.

[114] *Cf,* eg, the intervention of Japan in CSS, Audiovisual Services in the GATS 2000 and Doha Contributions, S/CSS/M/13 (26 February 2002) and Swiss Audiovisual Service Proposal, para 3 which discusses technological changes.

[115] *Cf* Brazilian Audiovisual Service Proposal, para 6.

[116] The establishment of a working group on this topic was suggested by Switzerland, Brazil and the US.

[117] Swiss Audiovisual Service Proposal, paras 11–17.

— Third, the proposals recognise that new commitments cannot be separated from work on the classification system. The sector has changed significantly since the Uruguay Round (*cf Section 3.2.4*) and, at the minimum, a clear understanding of where the different elements of the sector (especially digital deliveries) were classified in W/120 is deemed relevant.[118]

It is obvious from the submissions that these WTO Members feel that the above-mentioned issues should be addressed before the bilateral GATS request-offer phase.

But it would be false to believe that these existing GATS submissions reflect a consensus of the WTO Members to start audiovisual service liberalisation. To the contrary, the resistance from many WTO Members against moving from their strategy of full commitments on 'conduit', on the one side, but absent commitments on 'content', on the other side, is fierce.

Especially influential Members like the EC, Canada and Australia have already stated clearly that no offers will be made for the cultural service sectors and that no explicit GATS commitments on digitally-delivered content products will be undertaken.[119] These WTO Members contain the topic altogether in the WTO and they try to avoid related classification debates.[120] This resistance continues to be inspired by the anxiety that:

— in the absence of internationally-agreed standards on cultural and audiovisual policies that would help distinguish legitimate from protectionist audiovisual policy measures, it is impossible to formulate targeted commitments[121]; and
— the protection of cultural diversity would be endangered if the room for policy flexibility was not maintained with regard to 'new services' and especially Internet-delivery (ie, a 'freeze' of current commitments is not acceptable).

Instead of showing willingness to discuss the above-mentioned elements of audiovisual service liberalisation in the WTO, Members like the EC, Canada and many others are in fact very much interested in transferring this 'cultural diversity'-discussion from the WTO to UNESCO; ideally before new GATT or GATS commitments have to be agreed on. The main argument is that the WTO is not the competent authority to deal with norms related to culture. Specifically, the goal is to create a legal framework that recognises the fact that cultural goods and services should not be treated as ordinary merchandise or consumer

[118] CSS, Audiovisual Services in the GATS 2000 and Doha Contributions, S/CSS/M/13 (26 February 2002).

[119] Australian intervention on negotiating proposals on audiovisual services, CTS Special Session (July 2001), Internet: www.dfat.gov.au/trade/negotiations/services/audio_visual_neg_proposal.html. See also European Commission (2002b, c, d, e, 2003). For Canada see 'Cultural Diversity in the FTAA—Canada's Position', Internet: www.dfait-maeci.gc.ca/tna-nac/C-P&P-en.asp?format=print and International Trade Canada (2004).

[120] See, eg, the intervention of the EC in CTS, Report of the Meeting Held on 3–6 December 2001, S/CSS/M/13 (26 February 2002) para 216.

[121] *Cf* EBU (2003a) pp 4–5.

goods (*cf Section 3.2.4.1*). As a result, this legal framework also grants Member Countries the right and even imposes the obligation to conduct cultural policies. This point is taken up in more detail in *Section 6.3*.

Within the WTO, the plan of the EC is to react to the growing number of developing countries' requests through an extension of increased bilateral cooperation (*cf* the EC-Chile FTA in *Section 6.2.1.2*).[122]

b. Initial GATS Mode 1 and 2 Offers for Audiovisual Services: No Progress

The true test concerning the commitment of WTO Members to liberalise audiovisual services and digitally-delivered content products is in fact the progress made in the initial GATS offers or in the development of new rules.

Disappointingly, it must be said that the existing initial GATS offers rather reflect the stance of WTO Members which refuse audiovisual service liberalisation. This holds true in spite of the initially rather constructive submissions. None of the aforementioned proposals has been discussed in earnest before or in the bilateral GATS request-offer phase started. In sum, virtually none of the current initial GATS offers proposes increased audiovisual service liberalisation, including those from Switzerland, Hong Kong or Japan that had raised further liberalisation in the first place. Certainly, the absence of active and goal-oriented negotiations since the Cancún Ministerial has contributed to the lack of progressive and 'cultural diversity'-minded liberalisation of the audiovisual sector.

Some small exceptions apply. For its part the US has offered some changes in its classification scheme and commitments. Complementing its content-related approach in the telecom domain, the US has tabled a revised GATS offer which includes full commitments on 'Motion Picture & Video Prodution and Distribution[123]' as defined as theatrical and non-theatrical motion pictures, whether provided on fixed media or electronically[124], ie, also digitally-delivered content products and including advertising services. It also includes a full GATS offer on 'Radio & Television Services' (including distribution but excluding transmission services covered under the telecom classification).[125]

Nearly all other existing initial GATS offers have not included new specific commitments on audiovisual services, mostly continuing to leave the whole sector unscheduled. As expected, the EC, Canada and Australia belong to this group of countries and they have in fact re-affirmed their desire to leave this sector sensitive to public interest unbound when making their revised offers. In

[122] *Cf* speech of Pascal Lamy in chapter 3, n 36.

[123] The US offer notes in n 35 that distribution services in this context may include the licensing of motion pictures or video tapes to other service providers for exhibition, broadcasting, or other transmission, rental, sale or other use.

[124] See n 34 of the revised US offer.

[125] CPC 96131 and 96132. According to the US offer n 36, again distribution services may include the licensing of radio and television programs to other service providers for exhibition, broadcast or other transmission, rental, sale or other use. Transmission services for radio and television programs are classified in CPC 7524 and 96133 (combined program making and broadcasting services).

the case of the EC's consolidated schedule, there has even been a decrease of audiovisual service liberalisation which is currently generating debate among WTO Members.[126] Specifically, on audiovisual services, the EC has proposed that Austria, Finland and Sweden join the rest of EC Member States in scheduling a reservation for MFN treatment, effectively pulling back their original pledge of non-discrimination.[127]

To conclude, it is not clear whether the conflicting views on audiovisual services have—as in 1994—the potential to block the Doha Development Agenda. 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. A prelude to this new sort of US-EC debate could already be observed in the WTO accession negotiations concerning certain recently acceded EC Member States (Lithuania, Croatia, etc). Disputes over their WTO commitments in audiovisual services between the US and the EC have considerably slowed their accession.[128]

Further coalition-building around the issue of audiovisual service trade will take place outside of the WTO, namely in the negotiations preparing a UNESCO Convention on Cultural Diversity (*cf Section 6.3*). Before this exercise is concluded, few WTO Members will be wanting to commit to additional specific GATS commitments for audiovisual services. This two-way dynamic between the UNESCO and the WTO negotiations has to be more actively recognised and debated.

(iv) Entertainment Services

a. Negotiation Proposals: Lack of Submissions by WTO Members When it comes to GATS negotiation proposals, entertainment services have attracted no attention from WTO Members. Still, some requests have been submitted.[129]

b. Initial GATS Mode 1 and 2 Offers for Entertainment Services: not Currently a Topic in the GATS Negotiations Mirroring the approach taken in the audiovisual service sector, almost all WTO Members continue to exclude this service sub-sector from their schedule or to leave it unbound. This holds true except for Hong Kong which has offered full specific GATS commitments on a selection of entertainment services. Nevertheless, most WTO Members remain without any specific commitments in entertainment services.

[126] Consolidated schedule of the EU–15 as communicated to the CTS, S/DCS/W/EEC (22 April 2003). See on the debate CTS—Report of the Meeting Held on 3 and 7 July 2003, S/C/M/67 (17 September 2003) paras 53, 65 and 66 and CTS—Report of the Meeting Held on 2, 9 and 24 October 2003, S/C/M/68 (28 November 2003).

[127] 'WTO Members Press EC On Consolidation Of Services Schedule', in: *Inside US Trade* (10 October 2003) and 'Final Services Draft Unlikely To Settle Key Negotiating Decisions', in: *Inside US Trade* (29 October 1999).

[128] See 'Croatian Accession to the WTO', Embassy of Croatia, Washington DC (10 April 2000), Internet: www.croatiaemb.org/politics/fsheets/wto.htm.

[129] The EC, eg, received around 20 requests in the entertainment service-category.

6.3 PARALLEL NEGOTIATIONS ON A UNESCO CONVENTION ON THE DIVERSITY OF CULTURAL EXPRESSIONS

Whereas until now progress with respect to digitally-delivered content products has been quasi absent in the Doha Negotiations, parallel negotiations at UNESCO scheduled to create a 'UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions'[130] were concluded in October 2005.

For reasons very similar to the debate surrounding digitally-delivered content products, the UNESCO negotiations were not without controversy. While the EU, Canada and some developing countries have been calling for a Convention, other countries like the US, the UK and Japan have expressed concerns about its implications. In November 2001, the General Conference of the UNESCO adopted a Universal Declaration on Cultural Diversity.[131] The decision to draw up an international standard-setting instrument on cultural diversity was taken by the UNESCO General Conference in 2003. The goal is to agree on an international instrument on cultural diversity which also entails an arbitration tribunal before the end of the Doha Negotiations.

A possibly final text agreed on 3 June 2005 has been adopted at the 33rd session of the UNESCO General Conference in October 2005.[132] This latter text is the basis for the discussion in *Sections 6.3.1* and *6.3.2*.

6.3.1 Scope and Objective of the UNESCO Convention on Cultural Diversity

This Convention is to apply to cultural policies and measures that the signatories undertake for the protection and promotion of the diversity of cultural expressions.[133]

Essentially, the objective of such a Convention is (i) to promote the respect for the diversity of cultural expressions; (ii) to give recognition to the distinctive nature of cultural goods and services as vehicles of identity, values and meaning; (iii) to reaffirm the sovereign rights of States to maintain, adopt and implement

[130] This is the working title for the Convention suggested when passed on in June 2005 for consideration of the General Conference in October 2005. Alternatively, this text refers to the UNESCO Draft Convention On Cultural Diversity.

[131] See UNESCO (2001) for the declaration and UNESCO (2003b), pp 26–27 and UNESCO (2003a,c) for further details.

[132] Preliminary-Draft Convention on the Protection and Promotion of the Diversity of Cultural Expressions (revised text as of 3 June 2005, copy obtained from the UNESCO Secretariat) [UNESCO Draft Convention]. This text must be read in the light of previous versions, notably: Consolidated Text Prepared By The Chairperson of the Intergovernmental Meeting, CLT/CPD/2005/CONF.203/6—Add. (29 April 2005), Paris: UNESCO. A draft of the Convention has been public since July 2004 and was revised in December 2004 (see UNESCO, 2004c) and April 2005.

[133] See the Preamble of the UNESCO Draft Convention.

policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory and, for instance, (iv) to strengthen international cultural cooperation to protect and promote the diversity of cultural expressions.[134]

The objects of the Convention, namely Cultural Diversity, Content, Expressions, Activities, goods and services, Industries and Cultural Policies are defined in Art 4(2)–(6).

As rights and obligations, the Parties 'reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of [the] Convention'.[135] This implies the right of the parties to adopt regulatory and financial measures, including with respect to new media.[136] Amongst others, this encompasses policies 'aimed at providing domestic independent cultural industries [. . .] effective access to means of production, [. . .] and distribution'[137] and/or 'measures aimed at providing public financial assistance'.[138] Articles 7 and 8 of the UNESCO Draft Convention encourages parties to take measures to promote and protect cultural expressions.

Moreover, international cooperation to create the conditions conducive to the promotion of the diversity of cultural expressions and cooperation for development (including preferential treatment for developing countries and international cooperation in situations of serious threat to cultural expressions) are explicitly called for by the Draft Convention.[139]

Article 20 of the UNESCO Draft Convention regulates its relationship to other international instruments. Currently, the text calls on parties to 'foster mutual supportiveness between this Convention and [. . .] other treaties [. . .]; and when interpreting and applying the other treaties [. . .] or when entering into other international obligations, parties shall take into account the relevant provisions of this Convention'.[140] It also states that '[n]othing in this Convention shall be interpreted as modifying rights and obligations of the parties under any other treaties to which they are parties'.[141]

Settlements of disputes are handled by an arbitration procedure.[142] It is currently proposed that—once agreed—the Convention come into force if at least 30 UNESCO Members ratify it.[143]

[134] UNESCO Draft Convention, Art 1 (e), (g), (h) and (i).
[135] *Ibid*, Art 5(1).
[136] *Ibid*, Art 6(1) and (2).
[137] *Ibid*, Art 6(2)(c).
[138] *Ibid*, Art 6(2)(d).
[139] *Ibid*, Arts 12, 14 and 16.
[140] UNESCO Draft Convention, Art 26(1)(a)–(b).
[141] UNESCO Draft Convention, Art 26(2).
[142] UNESCO Draft Convention, Art 26 and Annex on the Conciliation Procedure.
[143] UNESCO Draft Convention, Art 29.

6.3.2 Possible Implications of The UNESCO Convention on The Specified WTO Negotiation Requirements for Digital Trade

Analysing the merit or demerits of an internationally binding instrument on cultural diversity, like the one proposed in the UNESCO, or the virtues and vices of cultural policies is not the intention of this work.

It suffices to say that—in the context of an increasing concentration of the 'copyright industries' and of increased globalisation which may imperil certain forms of culture—a good case for an international legal instrument devoted to cultural diversity could possibly be made. Arguments that the WTO alone may not be the right institution to determine the framework for permissible cultural policies—and thus the sole place where audiovisual service liberalisation should be discussed—also merit attention.

Nonetheless, the objective of this work is to lay out the steps to be taken in the WTO to achieve a free trade framework for digitally-delivered content products. As such it needs to ask the question how the UNESCO Draft Convention—once adopted—would relate to current or future WTO rules and obligations to achieve unfettered digital trade of content products.

Pursuing this objective, it is fair to say that the objectives, and in particular the rights and obligations of the UNESCO Draft Convention, are very likely to challenge existing and future multilateral trade rules and commitments applicable to digitally-delivered content products, in particular specific GATS commitments for audiovisual services.

The inherent difficulty of unmistakably defining the concept of cultural diversity, cultural content, expressions, activities and goods and services and the resulting potential for protectionist abuse of such instruments when it comes to commercial exchanges is at the origin of the problem. Given the difficulty of defining and narrowing down the concept of 'cultural diversity', the scope of applicability of the UNESCO Draft Convention is particularly vague and potentially broad, both in terms of covered cultural products and in terms of suggested possible policy measures. This holds particularly true for the latest version of the Draft Convention.

To begin with, a broad and non-exhaustive list of 'cultural goods and services' was originally annexed to the UNESCO Draft Convention under Annex I but was dropped in the latest version. Many of the listed items were relevant to the concept of digitally-delivered content products as defined in this work. In fact, the definition of cultural activities, goods and services has already been judged as 'overly broad and imprecise' by a number of national delegations to UNESCO and in the closing remarks of the Rapporteur.[144] Currently, the Convention potentially also extends to new forms of media and commercial

[144] UNESCO (2004e), p 24. See also the address by Professor Kader Asmal, Chairman of the Conference at the Opening Session of the Third Intergovernmental Meeting of Experts on the Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO, 25 May–4 June 2005.

products, such as video games, and other digitally-delivered content products.[145]

While earlier drafts included a non-exhaustive list of 'cultural policies' (under Annex II), the list of permissible measures was—aside of its current Art 6—also left open in the final draft.

Raising most difficulties, the relationship of the UNESCO Draft Convention to the WTO rules and commitments is currently unclear. It was argued during the drafting process that

> '*certain forms of protection for cultural products or cultural industries, would risk running counter to the basic principles of WTO agreements (GATT and GATS), in particular the gradual liberalization of commercial exchanges [in particular GATS Art XIX], the restriction of preferential national treatment and the 'most favoured nation' clause.*'[146]

Especially the word 'protection' in the title and in the text of the Convention raised concerns of cultural protectionism and inconsistencies with WTO obligations and ongoing multilateral trade negotiations.[147] Due to its wide scope, it can in fact be criticised that the Convention could lead to a justification for a broad carve-out of cultural / audiovisual services from the multilateral trade framework and a *carte blanche* for all types of cultural policies, including the ones motivated by protectionist motives.[148]

Problematically, it is in fact the declared goal of the EC and some other WTO Members to use this legal international instrument under UNESCO to avoid further 'progressive liberalisation' of certain digitally-delivered content products at the WTO and to reaffirm their right to conduct cultural policies; ie, the formalisation of a 'cultural exception' on the multilateral level through a UNESCO treaty (cf *Sec 3.2.4.2*).[149]

[145] In earlier drafts, the targeted audiovisual and new media-category covered a wide range of audiovisual and new media products: film, video recording, radio and television programmes, entertainment software (video games, educational programmes, etc.), Internet creativity sites, virtual reality, broadband video broadcasting (videostreaming), etc.; radio and television services, radio broadcasting service, services for the production, distribution, operation, dissemination and promotion of film, video recording, and radio and television programmes; royalties and licence fees; etc.

[146] UNESCO (2004a), pp 6 f.

[147] *Ibid*, p 11 and UNESCO (2004e), pp 23 f. See also CTS, Report of the Meeting held on 2 Apr 2004, TN/S/M/10 (18 May 2004) and CTS, Report of the Meeting held on 23 Sept. 2004, S/C/M/74 (10 Nov. 2004) for first interactions on the UNESCO Convention in the WTO. Concerning the Convention, no significant interaction has taken place between the WTO and UNESCO so far.

[148] See Sagit (1999, 2002); Groupe de Travail Franco-Québécois Sur la Diversité Culturelle (2002) and Scaramozzino (2003) that create the impression that, in fact, the effort at UNESCO has been created with the specific aim to drive the topic out of the WTO.

[149] Pt 4 of the EC Communication in chapter 5, n 2 See the European Commission Webpage on 'Cultural Diversity at the international level' for more background under Internet: europa.eu.int/comm/avpolicy/extern/culdi_en.htm. See also Commissariat Général Du Plan (2004), pp 123 and 124. It notes that the UNESCO Convention could permanently and irrevocably create an exemption of cultural goods and services from the rules and obligations of the WTO. See also 'Cultural Diversity: a major Step towards the Adoption of a UNESCO Convention', European Commission, IP/05/676 (6 June 2005).

In practise this is likely to mean that—flagging the UNESCO Convention—certain WTO Members would resist any progressive liberalisation with respect to digitally-delivered content products (in particular for the GATS 'audiovisual service'-category). Discussions tailored to liberalising market access for digitally-delivered content products could also be resisted in the same light. Existing WTO rules and obligations—eg, the applicability of the general GATS obligations on audiovisual services—could be put into question. Particulary, the US but also other WTO Members have been alarmed by this possibility.[150]

Thus, due to its implications on trade rules and obligations, Art 20 which regulates the relationship of the Convention to other international legal instruments was subject to intense discussions for the duration of the negotiations. Currently, it has not been decided how the UNESCO Convention would affect the rights and obligations of the parties under other international instruments.[151] In addition, the relationship between the arbitration tribunal and procedure corresponding to the UNESCO Convention and the WTO dispute settlement system has not been clarified.

To conclude: Further work will be necessary to fully understand and delimit the potential impact of the UNESCO Draft Convention on current and future WTO rules and obligations of relevance to digitally-delivered content products. Currently it certainly looks as if the UNESCO and the WTO negotiations may follow diverging or even contradictory objectives. Consequently, the US has distanced itself from the current UNESCO Draft Convention.[152]

A more positive outcome could result, if the two international negotiations were actually coordinated in a closer fashion. It could well be that an agreeable UNESCO Convention could contribute to create the right background for WTO Members to engage in clarifications of rules and increased commitments that apply to digitally-delivered content products; thus a form of controlled liberalisation in the WTO against the backdrop of the UNESCO Convention. So far, however, rather limited exchange between the two negotiation fora has taken place on this topic.

6.4 CONCLUSION

As shown by this analysis, most requirements as set out by *Chapters Two* and *Three* have not yet been addressed by the ongoing WTO Doha Negotiations.

[150] See USG Intervention Re Articles 19 and 13, 2 Feb 2005 (position paper made available in physical form during the pertinent debate at UNESCO). The US has only recently re-joined UNESCO. Although not confirmed officially, there are good reasons to believe that the US wants to retain its ability to influence the drafting process of this UNESCO Convention through its renewed membership.

[151] UNESCO (2004d).

[152] 'Final statement of the United States Delegation', The Honorable Robert S. Martin, Paris (3 June 2005).

To the contrary, the present state of absent classification possibilities for any digitally-delivered content product and possible classification as audiovisual services with lacking corresponding specific GATS commitments may translate into least liberal trade treatment of digital content. Concretely, this means that—apart from possible moves in relation to business software—it continues to be uncertain if digitally-delivered content products are submitted to non-discrimination and market access obligations. In sum, thus far, the Doha Negotiations can be characterised as a missed opportunity in terms of securing free digital trade.

At the same time, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions has been agreed which could further limit the applicability of WTO rules to digitally-delivered content products and/or deter further relevant specific trade commitments.

7

Digital Trade Achievements of Parallel US Bilateral and Regional Trade Negotiations: Mixed Results

AT THE MOMENT, progress on digital trade issues does not seem feasible on the multilateral level. This trailing of WTO Agreements behind digital trade flows described in *Chapter Six* has already led to a gravitation of this trade topic to bilateral negotiations. In view of an effect on the multilateral level, the US has effectively started to spread its 'model approach' through preferential trade negotiations. This attainment has taken place in the context of an acceleration of the number of preferential trade agreements and in the absence of progress on the diverse items of the Doha Negotiation Mandate on the multilateral front.[1]

Chapter Seven sheds light on the parallel US-driven preferential trade negotiations relating to digitally-delivered content products and scrutinises their interrelationship with the Doha Development Agenda. *Section 7.1* analyses the details applicable to three concluded agreements (ie, Chile, Singapore, and Australia) and, when relevant, other bilateral FTAs of the US.[2]

Section 7.2 addresses two questions relating to the interrelationship between the Doha Negotiations and these FTAs. After an appraisal of the US liberalisation template, the author inquires whether a malign or benign relationship between these preferential and multilateral trade negotiations exists. Finally, the author appraises the likelihood that the US 'competitive liberalisation'-strategy will function as a stepping stone for progress on the regional and the multilateral level.

It is concluded that the US bilateral trade agreements set landmark precedents for securing free trade in digitally-delivered content products without causing harm to the multilateral trading system. In fact, these preferential trade negotiations function as laboratories for new trade rules.

But the US liberalisation template for digitally-delivered content products is not perfect. In some cases the legal language employed to secure free digital trade provides only partial answers to the requirements set out by this research.

[1] *Cf* GAO (2004b) p 34; and Heydon (2003).

[2] For the other concluded US FTAs see Table 4.3.

Moreover, trade partners with greater economic weight and preferences in the area of audiovisual services similar to the EC (eg, Australia) are unlikely to agree fully to the US approach. Consequently, it is found that the approach taken at the bilateral level by the US is—in its entirety—not likely to serve as a straightforward template for digital trade rules that could be adopted on the multilateral level.

Still, it is judged that the US bilateral trade agreements and the ensuing coalitions of adherents to free digital trade create a welcome stimulus to the debate taking place in the Doha Negotiations.

7.1 TOWARDS LIBERAL DIGITAL TRADE LAWS: US-CHILE AND US-SINGAPORE FTAS BREAK NEW GROUND

For some time, efforts have existed to build consensus around liberal trade rules applicable to e-commerce through voluntary agreements that are unrelated to trade pacts.

Since 1997, the US and other WTO Members have concluded a significant number of non-binding, bilateral 'Understandings' or 'Joint Statements on E-Commerce' that also call for liberal digital trade principles.[3] One US-driven understanding of this sort has also been concluded on the regional level (ie, the APEC Leaders' Statement on Trade and the Digital Economy[4]). Next to bilateral understandings, the EC has also been active on e-commerce policy issues on the regional level in the context of the Asia-Europe Meetings.[5] These non-binding pledges that make frequent reference to the unsolved digital trade questions prepared the ground for tackling digital trade issues through a formally binding trade agreement.[6]

Nonetheless, binding new trade rules and obligations as regards digital trade were really first achieved through the US-Chile and the US-Singapore FTAs entered into by the US one year after the passage of the TPA. These two trade agreements that took effect on 1 January 2004 constitute binding trade law. Unimpressed by the deadlock on digital trade matters in the WTO, the US-Chile

[3] Since 1997, the US concluded 13 E-Commerce Statements of this sort with the Netherlands, EC, Ireland, Japan, France, Australia, UK, Egypt, Chile, Colombia, Philippines, Jordan and Singapore. The US has also included non-binding language on e-commerce in Art 7 of its FTA with Jordan, in force since 17 December 2001, Internet: www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf.

[4] See 'Statement To Implement APEC Policies On Trade And The Digital Economy' chapter 6, n 34, paras 6, 7 and 8. Interestingly, Australia has—because of concerns for its cultural policies—not signed this APEC statement.

[5] ASEM (2002).

[6] *Cf* to the Fourth Dedicated Discussion on E-Commerce, para 3 where WTO Members debated the link between the negotiations at the WTO and the increasing activity at the bilateral or regional level to come to understandings on the trade treatment of e-commerce and digitally-delivered content products.

and the US-Singapore[7] FTAs are the first trade agreements to reflect the TPA trade negotiation objectives through:

— novel E-Commerce Chapters that address the issue of digital products as a discipline separate from the issue of trade in goods or services; and
— through complementary Cross-Border Trade in Services Chapters which are referred to as 'GATS-Plus' due to their extended scope,

both of which are subject to the dispute settlement Chapters of the respective FTA.

This partly explains why—despite growing reticence of the US Congress towards FTAs—the two agreements are the only FTAs that have—since the new TPA—been put up for vote and passed with comfortable majorities in US Congress. Moreover, it explains why these and the following FTAs received the full support of the US industry.[8]

To achieve this important success, the US intentionally chose Chile and Singapore because they were easy initial negotiation partners for the achievement of the US liberalisation template in bilateral negotiations.[9] Both are rather open trading nations, they had both longed for an FTA with the US for some time and—in terms of economic and political weight—they are, vis-à-vis the US, very unequal bargaining partners.

Moreover, these two agreements and the ensuing web of bilateral agreements also have a regional dimension.[10] The US-Singapore FTA must be seen as a blueprint for further agreements in the Asian region,[11] whereas the agreement with Chile or the negotiations between the US and CAFTA and the Andean countries must be seen as initial steps to anchor these digital trade principles in the FTAA negotiations.[12] These two trade agreements' digital trade rules and obligations have set high initial benchmarks and raised significant expectations with the US industry as to the following FTAs, therefore referred to as 'gold standard FTAs'.[13]

[7] US-Chile Free Trade Agreement, in force since 1 January 2004, and US-Singapore Free Trade Agreement, in force since 1 January 2004 (all available over Internet: www.ustr.gov).

[8] In the House of Representatives, the US-Singapore FTA passed by a vote of 272 to 155, and the US-Chile FTA passed by a vote of 270 to 156, see Internet: thomas.loc.gov (20 May 2004). See the ACPTN documents listed in n 16. See also, eg, 'Service Industry Backs Chile, Singapore FTAs, But Notes Shortcomings', in: *Inside US Trade* (7 March 2003).

[9] The literature predicts that a hegemonic power is likely to gain a greater payoff by bargaining sequentially with a group of non-hegemonic powers than simultaneously. See Panagariya (1998) p 44; and Bhagwati (1994).

[10] Eg, 'CSI Directors Call for High Standard FTAs and WTO Progress', CSI Press Release (2 December 2003), Internet: www.uscsi.org/publications/papers/12–05–03.htm.

[11] House of Representatives (2003) pp 3 and 70; and Wunsch-Vincent (2003b) p 34. Singapore has, in fact, concluded an agreement with Australia which also addresses e-commerce issues.

[12] See Congressional Research Service (2002c) pp 2–3 and 15; and Gresser (2001b) pp 2, 3 and 6 for a similar argument.

[13] For the gold-standard concept see: Statement of USTR Robert B Zoellick, Trade Policy Report to the Committee on Appropriations, Subcommittee on Commerce, Justice, and State, the Judiciary, and Related Agencies of the United States House of Representatives (25 March 2004) p 10.

Accordingly, the readiness of potential FTA partners to imitate the provisions of these two agreements has been (eg, CAFTA, Australia, Morocco, and Bahrain[14]), or will now be, key criteria in the ongoing negotiations (eg, SACU) and in the selection of further US bilateral FTA partners (*cf Section 4.2.4*).[15]

Sections 7.1.1 and *7.1.2* present and discuss the provisions most relevant to digitally-delivered content products anchored in the rather homogeneous trade agreements concluded between the US and Chile, Singapore and Australia. The latter case is particularly interesting as—in the WTO context—Australia is opposed to US views concerning trade in digital content. To facilitate the comparison, *Annex A.7.1* depicts parts of all three E-Commerce Chapters. Table 7.1 anticipates the results of the following sections indicating with a check where progress has been registered.[16] Where useful, reference is made to additional US FTAs or—for comparison—to the recently concluded EU-Chile Association Agreement or the ongoing EC-Mercosur Negotiations.

At first sight, these bilateral rules and obligations address the requirements of *Part Two* in a satisfactory manner. This is also well-reflected in Table 7.1. But as will be seen, the interpretation of the agreements is complicated significantly through the overlapping rights and obligations resulting from the E-Commerce Chapters on the one hand, and their Trade in Services Chapters on the other. Derogations from the Services Chapter obligations of the agreements, especially in the audiovisual field, may diminish the commitments in the E-Commerce Chapters (especially the US-Australia FTA).

7.1.1 Successful Conclusion of E-Commerce Chapters with a Focus on Digital Content Products

In this context, the greatest innovation of the new bilateral FTAs of the US is their legally binding E-Commerce Chapters with direct applicability to digitally-delivered content products. The agreements recognise that e-commerce is an important means of trade and that digital trade barriers should be avoided.[17] They also include novel language on other important e-commerce-related issues (eg, pledges for increased cooperation[18]). This research focuses, however, on the proposed solutions concerning the negotiation requirements which have been identified.

[14] US-Central American Free Trade Agreement, signed on 28 May 2004; US-Australia Free Trade Agreement, signed on 18 May 2004; US-Morocco Free Trade Agreement, concluded on 2 Mar 2004 and US-Bahrain Free Trade Agreement, signed on 27 May 2004 (all available over Internet: www.ustr.gov).

[15] 'USTR Defends Choice Of Free-Trade Agreement—Partners Against Critics', in: *Inside US Trade* (10 January 2003). See for example 'US and Central American National Launch Free Trade Negotiations', USTR Press Release (8 January 2003).

[16] On top of the original trade agreements, the analysis draws on ACPTN (2003a, b, c, d); and ACPTN (2004a, b, c, d, e, f, g, h).

[17] Eg, US-Chile FTA Art 15.1, para 1; and US-Singapore Art 14.1, para 1.

[18] Eg, US-Chile FTA Art 15.5; and US-Singapore Understanding on E-Commerce annexed to the FTA. See also, eg, US-Australia FTA Art 16.5 on Authentication and Digital Certificates or, eg, US-Australia FTA Art 16.6 on On-Line Consumer Protection.

Table 7.1: Assessment of the US bilateral trade agreements with Chile, Singapore and Australia

E-Commerce Chapter: Solutions to the Horizontal Questions			
	US-Chile	*US-Singapore*	*US-Australia*
Applicability of WTO rules to e-commerce	No	✓	✓
Clear and applicable moratorium	✓	✓	✓
Customs valuation based on carrier media	✓	✓	Not needed, moratorium applies
Applicability of service commitments to electronic transmissions	✓	✓	✓
Classification decision taken	No	No	No
E-Commerce Chapter: Non-discrimination for Digitally-Delivered Content Products			
Non-discriminatory market access	✓	✓	✓
Services Chapter: Market Access, National Treatment and MFN for Pertinent Services			
	US-Chile	*US-Singapore*	*US-Australia*
Scheduling methodology	✓ Negative list approach	✓ Negative list approach	✓ Negative list approach
Computer services	✓ No reservations	✓ No reservations	✓ No reservations
Value-added telecom services	✓ No reservations	✓ No reservations	✓ No reservations
New audiovisual / cultural services and content delivery technologies (especially Internet-delivery)	✓ No reservations	✓ No reservations	Reservations on current and future measures and on interactive media like the Internet
Entertainment	✓ No reservations	✓ No reservations	Cultural reservations apply

Note: ✓ stands for the fact that a solution has been advanced through the trade agreement or that no reservations have been listed to the market access, national treatment and MFN obligations of the Cross-Border Trade in Services Chapters.

Source: US-Chile, US-Singapore and US-Australia FTAs; ACPTN (2003a, b, c, d, 2004a, b).

7.1.1.1 FTAs Address Unresolved Horizontal E-Commerce Questions

The E-commerce Chapters bring about direct or indirect solutions with respect to nearly all unresolved horizontal e-commerce questions raised in *Chapter Two*. In sum, for the first time these trade agreements formalise a definition of digital content products, confirm the applicability of WTO trade rules to e-commerce, assure a zero-duty rate and provide for well-built language on non-discrimination and MFN treatment for digital content products.[19] Without actually taking the politically-contentious classification decision, the E-Commerce Chapters create special trade disciplines uniquely tailored to digital content products.

Although it is apparent that parts of the agreements vary according to the different FTAs, the different E-Commerce Chapters that exist thus far are very similar. It can be noted, however, that—except for the US-Australia FTA—improvements have been made in the passage from the first (US-Chile) to the following E-Commerce Chapters.

— **Formulation of relevant digital trade definitions:** Departing from existing trade agreements, the bilateral E-Commerce Chapters introduce the concept of 'digital [content] products'[20] and the concept of 'electronic delivery'[21] (*cf Annex A.7.1*). In most cases, it is made clear that these definitions do not include digitised representations of financial instruments.[22] Remarkably, it is explicitly stated that these definitions are without prejudice to the ongoing WTO classification discussions.[23] Due to the fact that the 'digital product'-definition refers to off-line and on-line-delivered digital content products, the treaties bring about technologically-neutral treatment of both delivery forms.

Four steps have been taken that make direct reference to the multilateral level and that significantly advance the anchoring of liberal treatment of digitally-delivered content products in trade law.

— **Recognition of the applicability of WTO rules to e-commerce:** Except for the very first bilateral agreement between the US and Chile, the E-Commerce Chapters of all other US bilateral agreements (ie, those with Singapore,

[19] *Cf* House of Representatives (2003) pp 18, 43–44; and Hauser and Wunsch-Vincent (2004) pp 66 f.

[20] Here the US term 'digital product' is used interchangeably with the here-utilised term 'digital content product'. According to most bilateral FTAs, 'digital products means the digitized form, or encoding of, computer programs, text, video, images, sound recordings, and other products, regardless of whether they are fixed on a carrier medium or transmitted electronically'. The definition in the US-Australia FTA differs slightly (*cf Annex A.7*).

[21] Electronic transmission or transmitted electronically means the transfer of digital products using any electromagnetic or photonic mean.

[22] Eg, US-Chile FTA Art 15.6, n 3; and US-Singapore FTA Art 14.4, para 2, n 14–3.

[23] Eg, US-Singapore FTA Art 14.4, para 2, n 14–3; and US-Australia FTA Art 16.8, para 2, n 16–5.

Australia but also the more recent ones like CAFTA and Morocco, Bahrain) explicitly recognise the applicability of WTO rules to e-commerce (*cf Annex A.7.1*).[24]

— **Recognition of the applicability of trade rules to electronically-delivered services:** Moreover, the E-Commerce Chapters affirm that the supply of a service using electronic means falls within the scope of the Chapter of Cross-Border Trade in Services,[25] signifying that trade rules, obligations, non-conforming measures and exceptions specified in the Services Chapters are fully applicable to digitally-delivered services.

On the surface, this provision is helpful because it confirms the applicability of service trade commitments to electronically-delivered services and thus brings closure to the unresolved questions raised in *Section 2.3.2.1*. But it also means that the rules and obligations of the Services Chapters, and especially the non-conforming measures listed in Annexes I and II, are fully applicable to digitally-delivered content products[26]; a problematic legal construction discussed later in greater detail.

— **Establishment of a clear and applicable duty-free moratorium:** All E-Commerce Chapters after the US-Chile FTA specify that the parties 'shall not impose customs duties or other duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission'[27]. Thus, a permanent duty-free moratorium on both the content and the transmission of digitally-delivered content products is secured. The US-Australia FTA goes even one step further and adds that the duty-free moratorium applies to digital products, regardless of whether they are delivered on- or off-line. Thereby, full technological neutrality is instated between off-line and on-line content.

Due to the national treatment obligations included in the E-Commerce Chapters (see below), the duty-free status has to be accorded to digitally-delivered content products that 'transit' via a third party to the FTA as well.[28] As in the case of the WTO Moratorium, the agreement to eliminate

[24] Eg, US-Singapore FTA Art 14.1; and US-Australia FTA Art 16.1.

[25] Eg, US-Chile FTA Art 15.2; and US-Singapore FTA Art 14.2. The definition in the US-Australia FTA varies slightly (*cf* its Art 16.2).

[26] Eg, US-Chile FTA Art 15.3, n 1 notes that '[. . .] nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services except in accordance with the provisions of Chapter Eleven (Cross-Border Trade in Services) or Chapter Twelve (Financial Services), including their Annexes (Non-Conforming Measures)'.

[27] Eg, US-Singapore FTA Art 14.3, para 1. The US-Chile FTA Art 15.3 notes that neither party may apply customs duties on digital products of the other party. Although this clarifies that no customs duties shall be levied on the digital content it does not create legal certainty as to the duty-free status of the digital transmission of content.

[28] An exception applies in the US-CAFTA FTA Art 14.3, n 1 of the latter specifies that the duty-free moratorium 'does not provide any dispute settlement rights to governments of a non-party to this Agreement, or to nationals or enterprises controlled by nationals of a non-party to this Agreement'.

customs duties on digital content products does not preclude a party from imposing internal taxes or other internal charges.[29]

— **Customs valuation based on the value vs the cost of the carrier media:** When tariffs are not reduced to zero automatically on ICT products via the E-Commerce Chapter (as in the case of US-Australia), the texts specify that the customs value of an imported carrier medium shall be determined 'according to the cost or the value of the carrier medium alone'[30] (*cf Annex A.7.1*). The US FTAs also lock in duty-free treatment of ICT goods in other parts of the agreements.[31]

Finally, this study is led to a more controversial point of the US liberalisation template:

— Classification decision: Following the internal negotiation parameters (*cf Section 4.2.3.1*), the US aims at achieving free trade for digitally-delivered content products without addressing the classification questions.[32] This is, at the same time, the strength and the weakness of the US liberalisation template. Clearly, the creation of a self-standing E-Commerce Chapter has helped to secure liberal trade treatment for digitally-delivered content products.

But this approach also leaves the reader in doubt as to whether digitally-delivered content products are goods or services. In case these are to be considered services, it is also not clear as to what service (sub)-sector commitments are applicable. As in the WTO, especially the difference between value-added telecommunication and audiovisual services or the correct classification of leisure software remain unsolved.

In fact, the introduction of this hybrid category with tight links to the non-conforming measures in the Services Chapters has made the difference between goods, services and digitally-delivered content products even more uncertain than it is currently the case in the WTO. As will be seen, this uncertainty can be almost discarded when all relevant service sectors are fully liberalised as is mostly the case in the US FTAs.

In that sense, the state of affairs is similar to the one of the WTO (*cf Section 6.2*); namely the horizontal e-commerce questions can be addressed indirectly by far-reaching and complete market access commitments. But even under full commitments a fundamental question remains in the case of the US FTAs. Namely, in the latter bilateral agreements it is not clear as to what other general obligations like rules on transparency, subsidies, domes-

[29] Eg, US-Chile FTA Art 15.1, para 2; and US-CAFTA FTA Art 14.3, para 2. See Art 16.3 in the case of the US-Australia FTA.

[30] Eg, US-Singapore FTA Art 14.3, para 2; and US-Australia FTA Art 16.3, n 16–1. In the case of the US-Chile FTA this provision is anchored in Art 3.5 of the Chapter on National Treatment and Market Access for Goods.

[31] The fact sheets of the different agreements can be gleaned from Internet: www.ustr.gov/new/fta/index.htm (15 June 2004).

[32] House of Representatives (2003) pp 65, 67–68 and, eg, ACPTN (2004a) p 5.

tic regulation, etc are applicable to digitally-delivered content products.[33] In that sense, without providing similar general obligations, the E-Commerce Chapters sit squarely between the general obligations of the goods and services agreements without specifying which is, if any at all, pertinent.

7.1.1.2 Essential Free Trade Principles of the E-Commerce Chapters

At first glance, the E-commerce Chapters bring about unambiguous, non-discriminatory treatment of digitally-delivered content products through broad national treatment and MFN non-discriminatory obligations. Importantly, these provisions are binding without FTA partners making explicit, additional commitments.

— **Non-discriminatory treatment obligation for digital content products:** The E-Commerce Chapters specify a national treatment obligation for digital content products (*cf Annex A.7.1*). Specifically, a party shall not accord less favourable treatment to certain digital content products than it accords to other like products, on the basis that these are:

  — 'created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms' outside its territory; or
  — 'whose author, performer, producer, developer, or distributor is a person of another party or a non-party'.[34]

  In principle, these obligations also constrain both parties to accord the same treatment to 'like' physically- and digitally-delivered content products.

  Noticeably, the E-Commerce Chapters do not contain market access obligations. This implies the freedom to impose non-discriminatory market access limitations. Hence, market access barriers or regulations—for example, content regulation for the protection of children, but also quantitative limitations[35]—that are applied in a non-discriminatory manner[36] and that

[33] Discussions with negotiators representing other WTO Members (including the EC) have yielded particular criticism towards this problem associated with the US approach.

[34] Eg, US-Singapore FTA Art 14.3, para 3 and US-Australia FTA Art 16.4, para 1. The US-Chile FTA is—as can be gleaned from its Art 15.4—somewhat narrower. It specifies that the non-discrimination principles only apply to digitally-delivered content products associated with the 'territory of the other party', para 1(a) or where the author, performer, etc is a 'person of the other party', para 1(b). In subsequent FTAs, the scope of this non-discrimination principle has been extended to ensure that digitally-delivered content products originating from non-parties to the agreement (or persons from non-parties) are covered.

[35] *Cf* the Cross-Border Trade in Services Chapters of the US FTAs. See, eg, US-Chile FTA Art 11.4 that specifies market access limitations which are almost identical to GATS Art XVI. Eg, limits on the total value of service transactions, limits on the total number of service operations or the total quantity of services output that are applied without discriminating between local and foreign content products are thus permitted when no contrary commitments have been adhered to through the Services Chapters.

[36] These regulations are thus applied to all digital content products no matter whether these products originate from a party or a non-party to the agreement.

are consistent with the rules and obligations under the Cross-Border Trade in Services Chapters, can be maintained. This characteristic must be seen in the light of the fact that the US and other trading partners are mostly interested in avoiding discriminatory quantitative limitations (ie, local content quotas) that put imported digitally-delivered content products at a disadvantage.[37]

In practice, however, the value of securing only national treatment but no market access commitments for digitally-delivered content products remains to be confirmed.

— **MFN treatment obligation for digital content products:** The E-Commerce Chapters use very similar wording to specify an MFN obligation for digital content products.[38] Specifically, a party shall not accord less favourable treatment to a digital product 'created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms' in the territory of the other party than it accords to a like digital content product 'created, produced, published, etc' in the territory of a non-party.[39] In the same vein, a party shall not accord less favourable treatment to digital content products whose 'author, performer, producer, developer, or distributor is a person of the other party' than it accords to like digital products whose 'author, performer, producer, developer, or distributor is a person of a non-party'.[40]

Interestingly, digital content products must not be fully created and exported via one of the contracting parties of the bilateral FTAs to benefit from these obligations that assure non-discrimination.[41] Due to the way the 'origin' of a digital content product is specified in the E-Commerce Chapters (except for the US-Chile FTA), the scope of the national treatment and the MFN obligation is very broad. For instance, a film or software created in Europe by a Chinese filmmaker or programmer would—under the US-Chile FTA—qualify as a Chilean digital product deserving national treatment on an MFN basis when being exported to the US, if it was only first 'stored' or 'commercialised' in Chile.[42] In the case of the FTAs following the US-Chile agreement, the national treatment obligations extent unequivocally to all digitally-delivered content products, and thus including to those that come from non-parties to the agreement.

The parties of the US-driven FTAs made an effort to extend the favourable treatment accorded to digital content products beyond the products fully

[37] Conversations with the EC's DG Trade officials, however, revealed that they considered both market access and national treatment principles as essential for free trade to be applicable. This thinking is strongly influenced by how the GATS is structured. The MPAA itself was also calling for disciplines securing national treatment and full market access commitments; see Richardson (2003) p 4.

[38] Eg, US-Singapore FTA Art 14.3, para 4 and US-Australia FTA Art 16.4, para 2.

[39] *Ibid*.

[40] *Ibid*.

[41] Hauser and Wunsch-Vincent (2004) p 68.

[42] Gobierno de Chile (2003) p 23.

created and distributed on the soil and created/produced via nationals of the other party.[43] This sound approach takes into consideration that it would be impractical or nearly impossible to develop 'rules of origin' for digital content products, especially when different processes of their creation and diffusion take place in various geographic locations or when different nationals of parties and non-parties of the FTA are involved.

Judging from these principles alone, the E-Commerce Chapters provide clarity and sound principles of non-discrimination and MFN obligations. A comparison of this E-Commerce Chapter to similar agreements shows how far-reaching these are. Taking the recent EC-Chile FTA[44] as a good benchmark, it is seen that the latter only includes a pledge for cooperation in e-commerce matters that, very similarly to the previously-cited Understandings on E-Commerce, has no substantive implications in terms of non-discrimination or any binding trade laws.[45] Moreover, in the context of the EC-Mercosur negotiations, it was recently decided to drop the idea of having legal language referring to e-commerce which would also address the issue of customs duties.[46] Accordingly, when publicising the negotiation results, the USTR, Congress and even the industry have focussed on these eye-catching provisions of the US FTAs.[47]

It must be noted, however, that the non-discrimination obligations of the US-driven E-Commerce Chapters come with 'exceptions to the rule' that can—depending on the limitations listed under the Cross-Border Trade in Services Chapters—be as far-reaching as to render valueless the E-Commerce free trade principles agreed upon in the first place. This phenomenon of granting liberal trade treatment, on the one hand, but taking it away, on the other, is referred to as 'carve-in/carve-out'-dilemma in this research.[48]

[43] This approach is strengthened in the FTAs following the one between the US and Chile.

[44] Association Agreement between the European Community and its Member States and the Republic of Chile, adopted on 3 October2002, Internet: trade-info.cec.eu.int/doclib/html/111620.htm [EC-Chile Association Agreement].

[45] *Ibid*, Art 104: 'The Parties, recognising that the use of electronic means increases trade opportunities in many sectors, agree to promote the development of electronic commerce between them, in particular by co-operating on the market access and regulatory issues raised by electronic commerce.' Interestingly, although this paragraph on e-commerce is included in Part IV, Title III on Trade in Service and Establishment, it is noted in Art 104, n 7 that the inclusion of this provision is made without prejudice of the Chilean position on the question of whether or not e-commerce should be considered as a supply of services.

[46] *Cf* Final Conclusions of the Eleventh Meeting of the Mercosur-EU Bi-Regional Negotiations Committee on 2–5 December 2003, p 13 and Final Conclusions of the Thirteenth Meeting of the Mercosur-EU Bi-Regional Negotiations Committee on 3–7 May 2004, pp 2 and 16, both Internet: europa.eu.int/comm/trade/issues/bilateral/regions/mercosur/index_en.htm. It was decided that e-commerce should be discussed only during the business facilitation initiative; meaning that no binding trade rules will be formulated on e-commerce (including no duty-free moratorium on e-commerce).

[47] Eg, see USTR Trade Fact Sheet on the US-Chile FTA (11 December 2002), Internet: www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Section_Index.html or for the industry statements on, eg, the US-Morocco FTA see ACPTN (2004c, d).

[48] Discussions with Pierre Sauvé (Institut des Sciences Politiques) have led to this terminology.

7.1.1.3 Limitations in the E-Commerce Chapters: Carve-In/Carve-Out?

The full list of exemptions for three FTAs treated in detail is listed in *Annex A.7.1.* Here the study focuses on the most noteworthy limitations that are relevant to all US FTAs and that are potentially damaging to the trade treatment of digitally-delivered content products.

Most importantly, all E-Commerce Chapters make very clear that they are subject to 'any relevant provisions, exceptions, or non-conforming measures set forth in other Chapters or Annexes of [the] Agreement'.[49] Particular emphasis is placed on the fact that nothing in the E-Commerce Chapters imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services except, in accordance with the provisions on trade in services.[50]

But nowhere is the difference between services, goods or digital content products defined. In plain terms, this means that in overlapping cases, it is the trade in service-obligations and the related non-conforming measures that override the principles of national treatment and MFN specified by the E-Commerce Chapters. In this case, the technologically-neutral approach to off-line and on-line digital content products is also at stake.

The US-Singapore and the US-Australia FTAs make this point even more explicit and stress that their limitations on audiovisual service liberalisation are not touched upon by their respective E-Commerce Chapters:

— **US-Singapore:** The US-Singapore FTA, for example, excludes point-to-multipoint broadcasting services from the scope of its E-Commerce Chapter.[51] This limitation concerns a broad range of audiovisual services but does not touch upon the issue of digitally-delivered digital content products.
— **US-Australia:** The US-Australia FTA goes as far as noting that its E-Commerce Chapter shall not prevent a party from adopting new or maintaining existing measures in the audiovisual and broadcasting sectors.[52] As opposed to the limitation introduced in the US-Singapore FTA, in the Australian case, a broader range of audiovisual services, including digitally-delivered content products, is touched upon by these limitations. Furthermore, the new element of this provision is that the exemption does not only apply to existing but is also extended to future content-related measures.

  Moreover, the US-Australia FTA provides for a blanket exception for subsidies and grants in this area.[53] The limitation on certain audiovisual

[49] Eg, US-Chile FTA Art 15.1, para 3.
[50] Eg, US-Singapore FTA Art 14.3, para 5 and US-Australia FTA Art 14.1, para 3.
[51] US-Singapore FTA Art 14.3, para 6.
[52] US-Australia FTA Art 16.4, para 4.
[53] US-Australia FTA Art 16.4, para 3(c); and ACPTN (2004a, b).

services and the fact that audiovisual subsidies are excluded are—although made very explicit only in the FTA between the US and Australia Agreement—also applicable in the other FTAs.[54]

In sum, the E-Commerce provisions can therefore only be completely appraised after an analysis of the commitments in the Services Chapters. In this context, the non-conforming measures entered for computer, telecom, audiovisual, cultural or entertainment services are particularly relevant as they override the E-Commerce Chapters.

7.1.2 Cross-Border Trade in Services Chapters: Liberalisation due to Negative List Approach but Remaining Audiovisual Limitations

The bilateral FTAs entered into by the US also significantly innovate with their Cross-Border Trade in Services Chapters which create considerable 'GATS-plus'-market access.

To start with, the negotiation objectives of the US Trade Promotion Authority are followed to the letter in the US FTAs. A case in point is the fact that the FTAs use the most liberal form, namely the negative list approach, to schedule service trade commitments (*cf* Table 7.1).[55] This implies that existing and new services that are delivered across borders must be afforded market access, national and most-favoured nation treatment unless specific non-conforming measures are specified in the two associated annexes.

Assuming that no reservations are made for the four service sectors identified, this top-down approach guarantees that narrow classification schemes (ie, the classification of entertainment games under audiovisual vs computer services) or uncertainties relating to the mode of delivery do not limit the applicability of commitments to digitally-delivered content products. Chile, for instance, has dropped its original reservation on new or electronically-delivered services (including Internet-based services).[56] As outlined before (*cf Section 2.3.2.4*), this approach can—if no reservations are made—also render the search for solutions to unresolved horizontal WTO e-commerce questions superfluous.

Again, this 'GATS-plus'-achievement is true progress and compares favourably to the recent EC-Chile Agreement. The latter bilateral FTA of the EC relies on the less trade-liberal positive list approach to schedule service commitments.[57]

[54] Given that the obligations of the Cross-Border Trade in Services Chapters of the US FTAs do not apply to subsidies (*cf sec 7.1.2*), this limitation in the US-Australia FTA is, in legal terms, not a significant departure from the usual US template.

[55] Eg, US-Singapore FTA Art 8.3 (national treatment), Art 8.4 (most-favoured nation treatment), Art 8.5 (market access) and Art 8.7 (non-conforming measures). *Cf*, eg, ACPTN (2003b) p 3; and Hauser and Wunsch-Vincent (2004) p 67.

[56] ACPTN (2003b) p 10.

[57] EC-Chile Association Agreement Art 97, Art 98 and Art 99.

It must be noted, however, that the use of the negative list approach has come at a price that the USTR does not discuss in detail in explanations accompanying the agreements. Specifically, the Services Chapters do not apply to subsidies or grants provided by a party to the agreement.[58] In this context, this qualification is most relevant vis-à-vis the financial support measures accorded to cultural and audiovisual services and thus potentially digitally-delivered content products. Despite of a national treatment commitment under the US bilateral trade agreements, a signatory party can continue to reserve subsidy schemes only to its national service providers.[59] To the contrary, a national treatment commitment under the GATS prevents WTO Members from employing subsidy schemes that discriminate against foreign service suppliers (*cf Section 3.2.4.2*).

Still, it can be affirmed that these provisions of US-driven FTAs coupled with fairly moderate lists of limitations have—in combination with the E-Commerce Chapters—made ground-breaking progress with respect to free trade in services. This is demonstrated in the following sector-specific evaluations (particularly *Section 7.1.2.1*).

It is also true, however, that like in the case of the WTO, audiovisual services and thus content products remain—despite a truly more progressive approach—again a 'special case' for which limitations are listed. Similarly to the WTO, this imbalance of full market access and national treatment commitments between audiovisual, other pertinent services or digital products leaves trade partners with legal uncertainty and the need to secure commitments on all fronts.

7.1.2.1 Computer, Value-Added Telecommunication and Entertainment Services: Full Liberalisation Without Reservations

In the cases of US-Chile, US-Singapore and US-Australia, the computer, value-added telecommunication and entertainment[60] services were committed without any sector-specific limitations. This example has also been followed by the FTAs with Morocco, CAFTA and Bahrain.

[58] Eg, US-Singapore FTA Art 8.2, para 3(d) and US-Australia FTA Art 10.1, para 4(d). This approach of excluding subsidies from the scope of service trade obligations has also been taken in the recent EC-Chile Association Agreement. EC-Chile Association Agreement Art 95, para 4. It states that, '[t] he provisions of this Chapter shall not apply to subsidies granted by the Parties. The Parties shall review the issue of disciplines on subsidies related to trade in services in the context of the review of this Chapter, as provided in Article 100, with a view to incorporating any disciplines agreed under Article XV of the GATS'.

[59] *Cf* Bernier (2004) p 6 who concludes that the articles on non-conforming measures of the investment Chapters of these bilateral US trade agreements also stipulate that the national treatment, the most-favoured-nation treatment obligation, etc do not apply to 'subsidies or grants provided by a Party'.

[60] Except those entertainment services that would be subsumed under cultural or audiovisual services.

As no limitations are entered on the services side, either the free trade principles of the E-Commerce Chapters or the more far-reaching trade principles of the Services Chapters are applicable to digitally-delivered content products. It is worth reiterating that—as opposed to the E-Commerce Chapters—the Services Chapters contain market access obligations. As will be raised again later, it is actually not fully clear which of the two sets of rules and obligations apply in this case. But given that the treatment under both Chapters is very liberal in most US FTAs, this uncertainty does not pose significant problems for these specific services. In particular, software will thus receive unqualified market access and national treatment.

7.1.2.2 Audiovisual and Cultural Services: A Special Case Even in the Bilateral US FTAs

The situation is more difficult concerning audiovisual and cultural services; the category which is most likely to override free trade commitments on digitally-delivered content products made through the E-Commerce Chapters.

At the outset it must be said that all FTAs break new ground in that they dismiss the notion of a fully-fledged 'exception culturelle' and even that of a 'spécificité culturelle' (ie, absent market access commitments on audiovisual services).[61] Current and future audiovisual and cultural services are entirely submitted to the negative list approach and, in areas where no limitations are listed, the full set of specific service rules and obligations apply.

Again this is not the approach taken by the EC in recent, comparable bilateral FTAs. Taking the fundamentally opposite route, the EC-Chile Association Agreement, for example, entirely excludes cultural services from its trade rules and obligations.[62] The exclusion of these content services from the general and specific obligations of the agreement actually goes a step further than the positive list— and the 'spécificité culturelle'—approach pursued in the GATS.

This demonstrates that the 'cultural diversity vs free trade'-debate is also taking place outside the WTO (*cf Section 6.2.2.3*). Similarly to the provisions on e-commerce, the bilateral and regional free trade negotiations have thus become a means to build coalitions around a trade approach concerning particular provisions of trade law and corresponding sectors.

The following points shed light on how the US FTAs have managed to approach the audiovisual sector in the US-Chile, US-Singapore FTAs, on the one hand, and the US-Australia FTA, on the other.

(i) US-Chile and US-Singapore FTAs: Significant Achievements as Regards Pertinent Audiovisual Service Commitments Starting with Chile and Singapore, it can be said that—instead of maintaining full policy flexibility—

[61] See, eg, ACPTN (2003b) p 9.

[62] EC-Chile Association Agreement Art 95, para 2(b). Of course, the obligations that result from the GATS for audiovisual services are still valid for both parties.

these two US trade partners both agreed to schedule and thereby freeze their existing discriminatory regulations applicable to audiovisual services. This means that both Chile and Singapore renounce the implementation of new regulations or discriminatory measures concerning content services that are not listed in their Annexes for non-conforming measures. Measures that limit market access and national treatment to digitally-delivered content products—except for subsidies that are excluded here (*cf* to points made earlier)—are thus incompatible with these new trade obligations.

But despite the negative list approach taken, the non-conforming measures listed can be fairly significant when it comes to traditional audiovisual services, leading, for instance, the Chilean Government to argue that the cultural exemption has been maintained in the FTA with the US.[63] When assessing these limitations, one again has to think in terms of regulatory and financial support measures that influence the 'creation' and the 'transmission' of digital content. Some examples of the non-conforming measures listed by Chile and Singapore shall illustrate:

— **US-Chile:** Chile introduced a broad definition of cultural industries which includes the music, the film and the publishing industries but excludes any reference to software or computer and video games.[64] Chile also derogated from the national treatment concerning satellite broadcasting[65] and it maintains the right to a 40% local TV broadcasting quota.[66] Furthermore, it derogated from its MFN obligations[67] and it also specified that government-supported cultural subsidy programmes are not subject to the treaty's obligations.[68] For its part, the US maintains an MFN exemption for one-way satellite transmissions and the right to restrict media ownership.[69]
— **US-Singapore:** Similarly, Singapore scheduled a fairly broad reservation that excludes all broadcasting services from most obligations of the Cross-Border Trade in Services Chapter[70] and from its obligations under the Chapter on Telecommunication Services.[71] The US has maintained the right to restrict media ownership.[72]

[63] See 'El TLC Con Estados Unidos Y El Desarrollo De La Industria Cultural Chilena', press statement from the Chilean government (19 December 2002), Internet: www.direcon.cl/html/noticias/noticias/2002/noti_12_36mnphp (26 February 2003) and Gobierno de Chile (2003) p 5.

[64] US-Chile FTA, Service Annex II—Schedule of Chile, p II–CH–3.

[65] Eg, US-Chile FTA, Service Annex II—Schedule of Chile, pp II–CH–4 and II–CH–5.

[66] US-Chile FTA, Service Annex I—Schedule of Chile, p I–CH–3; and Gobierno de Chile (2003) p 19.

[67] US-Chile FTA, Service Annex II—Schedule of Chile, p II–CH–3. It must be noted that the MFN exemption does not free Chile or the US from the principle of national treatment. Clearly, the cases where, eg, Chile will provide better terms to third parties than it provides to own producers will be rare.

[68] *Ibid*. Note the similarity to the US-Australia FTA.

[69] US-Chile FTA, Service Annex II—Schedule of US, pp II–US–1 and I–US–12.

[70] US-Singapore FTA, Service Annex I—Schedule of Singapore, p 8B-Singapore–8. *Cf* ACPTN (2003d) p 8; and Richardson and Lane (2003) p 4.

[71] US-Singapore FTA Art 9.1, para 2.

[72] US-Singapore FTA, Service Annex I—Schedule of US, p 8A-United States–12.

The limitations of both agreements are not specifically targeted to digitally-delivered content products. No explicit measures as regards digitally-delivered content products can be maintained or introduced in the future.

This does not mean that these limitations have no effect on digitally-delivered content products; especially when one focuses on measures to boost the content creation. As argued in *Chapter Five,* it must be recognised that the limitations to the creation and delivery of traditional content also impact the availability of digitally-delivered content products (*cf Section 5.1.2.1*). Furthermore, it has been noted before that discriminatory state aids remain possible both in the traditional audiovisual sector and for digitally-delivered content products. Due to this fact, the subsidisation of traditional or new content products (like the EC's *e*Content programme) is not in question. But a complete elimination of subsidies for the content industries was not a negotiation objective of the US (*cf Section 4.2.3.1*).

Importantly, in the case of the FTAs between the US, Chile and Singapore, the chief objective of the US to secure a liberal trade approach to new technologies like cable, satellite and notably the Internet (*cf Section 4.2.3.1*) has been achieved. This holds true as the scheduled limitations do not directly concern the creation or the delivery of digitally-delivered content products. This means that a liberal trade treatment—and thus at the minimum national treatment and MFN obligations but also full market access—has been secured for all four digitally-delivered content products treated. But as shown by the next section, the US has not succeeded with this negotiation objective in all its recently concluded FTAs.

(ii) US-Australia: Limited Achievements as Regards Relevant Audiovisual Service Commitments As already seen in the discussion of the E-Commerce Chapters, and as expected from the Australian stance in the WTO, the FTA between the US and Australia has introduced a significant shift in the approach taken to digitally-delivered content products in US-driven FTAs.

— On the one side, Australia has—in principle—also agreed to submit its audiovisual sector to market access, national treatment and MFN obligations.[73] Given that, like the EC, Australia has hitherto refused any specific commitment on audiovisual services, this presents a remarkable achievement for US trade negotiators.
— On the other side, however, the US has accepted a carve-out for the Australian capacity to regulate and subsidise content—regardless of the technology associated with the delivery of audiovisual services.[74] This holds true despite enthusiastic announcements of the USTR on achievements in

[73] US-Australia FTA Art 10.1, para 4, Art 10.2 (national treatment), Art 10.4 (market access) and Art 10.6 (non-conforming measures).

[74] 'US, Australia Conclude FTA Following Drawn-Out Talks', in: *Bridges Weekly* (12 February 2004) and ACPTN (2004b) p 10.

the audiovisual field[75] and is reflected in the concern that the MPAA has expressed regarding these Australian reservations on Internet-delivery.[76]

Similarly to Chile and Singapore, Australia has listed a great number of limitations to traditional audiovisual services, allowing it to maintain existing local content requirements in relation to free-to-air commercial TV, subscription TV and radio broadcasting.[77] The local content requirements are, for instance, 'frozen' to the existing 55% local content transmission quota on programming.[78]

But going a significant step further, the limitations also ensure Australia's freedom to introduce new or additional local content requirements in relation to traditional and new delivery technologies; for example, cable, satellite but most importantly including interactive audio and/or video services and thus Internet-delivered content.[79] In other words, Australia has not frozen all of its audiovisual policies to their current level. If the Australian Government finds that Australian content is not readily available, it can introduce such restrictions while respecting certain procedural requirements.[80]

As the limitations of the Services Chapter override the obligations of the E-Commerce Chapter (*cf Section 7.1.1.3*), the far-reaching limitations on Internet-delivery render the commitments Australia has made in the E-Commerce Chapter *quasi* meaningless. Certainly, the liberal approach to computer services in the Services Chapter combined with the E-Commerce provisions guarantees that business software benefits from market access and national treatment. However, music, films and potentially also computer games delivered over the Internet are—like in the WTO—not covered by clear and liberal trade obligations.

In this scenario, the value of having a new architecture in terms of trade agreements, ie, a separate Chapter on digital content products which is highly

[75] USTR Trade Fact Sheet on US-Australia FTA, Internet: www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/fact_sheets/Section_Index.html. See also ACPTN (2004b) pp 10–11 for such misleading pronouncements.

[76] 'MPAA Statement on the US-Australia Free Trade Agreement', MPAA Press Release (9 February 2004), Internet: www.mpaa.org/legislation/press/2004/2004_02_09.htm.

[77] US-Australia FTA, Service Annex I—Schedule of Australia, Annex I–14 to Annex I–15 and Service Annex II—Schedule of Australia, pp Annex II–6 to Annex II–9.

[78] US-Australia FTA, Service Annex I—Schedule of Australia, Annex I–14. Limitations have also been entered that allow for taxation concessions and co-production agreements with other countries.

[79] US-Australia FTA, Service Annex II—Schedule of Australia, Annex II–6 (in particular, point f) to Annex II–9. *Cf* 'The Australia-United States Free Trade Agreement: The Outcome On Local Content Requirements In The Audiovisual Sector', Background Note by the Australian Department for Foreign Affairs and Trade (March 2004), Internet: www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html.

[80] *Ibid*, Australian Background Note stating that: '[m]easures to ensure that, upon a finding by the Government of Australia that Australian audiovisual content or genres thereof is not readily available to Australian consumers, access to such programming on interactive audio and/or video services is not unreasonably denied to Australian consumers'.

dependent on the Services Chapter commitments, must be called into question. But these derogations are symptomatic of what would—at the minimum—have to be expected in trade agreements where the EU, Canada or some other WTO Members would be approached bilaterally by the US.

(iii) Other FTAs: Audiovisual Service Commitments Tailored to Digitally-Delivered Content Products As noted earlier, this problem of listed reservations concerning new audiovisual services and thus digitally-delivered content products currently remains confined to the US-Australia FTA.

The US FTAs that have since been concluded with less significant trading partners (eg, CAFTA, Morocco, Dominican Republic, Bahrain) do not include this type of limitation and more closely resemble the original US liberalisation template. In the CAFTA, some out of the six states have maintained some reservations regarding national treatment and market access in cultural services. However, these limitations vary widely, they usually do not apply to the cross-border trade in services and never mention the delivery of cultural services over digital networks.[81] When it comes to the US-Morocco trade agreement, despite of a potentially far-reaching limitation that pertains to investment facilities for the transmission of radio and television broadcasting and cable radio and television,[82] no limitation is specified by Morocco which would be of direct relevance to digitally-delivered content products.

As such, these US FTAs guarantee full market access, national treatment and MFN status to digitally-delivered content products.

7.2 ASSESSMENT OF THE BILATERAL US TRADE AGREEMENTS: HALF-WAY HOUSE OR REMARKABLE STEP FORWARD?

The use of the US liberalisation template in practise yields mixed results.

— On one side, it has been shown that—in terms of the legal language utilised and in terms of the market access commitments achieved for digitally-delivered content products—the US FTAs innovate in a substantial and helpful manner. Primarily, the approach taken towards audiovisual services—and thus a negative list approach with reservations that affect only traditional audiovisual services and which does not discipline subsidies—has particular merits. In combination with the E-Commerce Chapter, it allows trading nations to liberalise market access for digitally-delivered content products without encroaching on their prerogative to maintain policy flexibility in areas like public broadcasting. The approach also reduces the imbalance of commitments between the four different digitally-delivered content products.

[81] The Dominican Republic and Costa Rica have the more far-reaching limitations.
[82] See Bernier (2004) p 15 on this Moroccan exemption.

— On the other side, a number of weaknesses of the US approach prevail. Particularly, the legal architecture of the E-Commerce Chapters and their relationship to the non-conforming measures of the Services Chapters have been criticised in the previous sections. While in cases like the US-Singapore FTA, the US approach completely eliminates the legal uncertainties raised in the WTO context, it has been shown that other questions come up instead.

Most importantly, the problem of overlapping rights and obligations for digitally-delivered content products lacks precision. Although the E-Commerce Chapters make an effort to develop a unified approach to all four digitally-delivered content products, this objective is—at times—rendered meaningless again due to sector-specific reservations on trade in services. In the least ideal case, namely the agreement between the US and Australia, the original intent of the E-Commerce liberalisation blueprint has not been achieved.

Moreover, in some cases the value gained from having a special E-Commerce Chapter is not obvious. In cases where no service sector reservations are taken in pertinent sectors, many provisions of the E-Commerce Chapter—for instance, its duty-free moratorium or its commitments for national treatment obligations for digital content products—become superfluous. This holds true as the signatory parties are either committed to full market access, national treatment and MFN obligations through the Cross-Border Trade in Services Chapter (in the case of services) or to duty-free treatment of ICT goods and non-discrimination through the Chapters on market access for goods.

It must also be recalled that the Services Chapters contain elements that the E-Commerce Chapters do not. For example, they guarantee market access as well and they boast a solid framework of general obligations. All in all, it also seems that other trade rules, like the affirmed applicability of WTO rules to e-commerce or the affirmed applicability of service trade commitments to electronically-delivered services, could have been formulated in other parts of the overall trade agreement without having to create a stand-alone E-Commerce Chapter.

Finally, it must be retained that the Services Chapters of the US FTAs do not contain broad disciplines on subsidies or—more particularly—none on financial support measures to digital content.

On the whole, the US approach is clearly a second-best solution that can only be appreciated when judged against its negotiation background. The latter was influenced by the reluctance of the US to prejudge the classification debate in the WTO through its FTAs, its inability to concert its own industries on the desired approach and by a lack of readiness of many US trading partners to completely eliminate audiovisual policy measures (*cf Section 4.2.3.1*).

This negotiation context also answers the question as to why the US opted for a stand-alone E-Commerce Chapter instead of declaring the usually very liberal

service trade commitments of its FTAs to be applicable to digitally-delivered content products. The US simply wants to avoid the creation of a precedent of service classification for digitally-delivered content products that could be imitated in the WTO context, in which service trade commitments are and will be far less liberal for some time to come (*cf Section 6.2.2.3*).

Given this context, from the US perspective the first FTAs must—despite their shortcomings—be considered a success. This holds true as liberal trade treatment has been secured for all four digitally-delivered content products (ie, except in the case of the US-Australia FTA).

But the evaluation of the US liberalisation templates would not be complete if they were assessed only as stand-alone items and not in their broader context, and thus especially their relationship to the multilateral level.

This last Chapter concludes by addressing two interrelated questions:

— First, it is inquired whether the US-driven preferential trade treaties cause harm to possible progress on the multilateral level or the multilateral trading system as such.
— Second, it is appraised how probable it is that the US bilateral blueprints will function as a stepping stone for progress on the regional and the multilateral level. It is assumed that the US liberalisation template can be considered a real success only if this interrelationship between the US FTAs and the multilateral trading system is produced.

7.2.1 Does the US Digital Trade Template Constitute a Stumbling Block for the WTO?

In the literature, it is often advanced that preferential trade agreements negatively impact the multilateral trading system.[83] Malign relationships between preferential and multilateral trade treaties can arise because the engendered two-speed liberalisation can distort trade, create vested interests that prevent the further liberalisation in other—often greater—geographical contexts and/or create rules and obligations that are in conflict with the WTO Agreements.

Concerning the question of whether the bilateral US digital trade agreements are a 'stumbling block' to the WTO, it is fairly safe to deny this hypothesis. This holds true because is not the intention of the US to stop short at the conclusion of a few bilateral FTAs. Due to the nature of the Internet, digitally-delivered content products are—as compared to other trade items—in great need for a liberal trade regime which is global in scope. The US negotiators and especially

[83] This way of thinking concerning malign or benign relationships between preferential and multilateral trade agreements has been coined by Bhagwati (1991). See Panagariya (1998); and Panagariya (2000a) for an overview of the costs and benefits of regionalism. See Heydon (2003) p 9; or Lawrence (2003) who ask this question of malign relationship between bilateral and multilateral trade agreements in the Post-Cancún context.

the US content industries know that a set of a few, scattered bilateral agreements is not satisfactory. It is understood as well that Chile, Singapore, SACU, etc are still fairly unimportant economies, especially when it comes to trade in digital content.[84] Consequently, it is judged as necessary to increase the geographical scope of these digital trade principles.

But the bilateral route alone is not ideal to achieve global coverage:

— First, it is not feasible for the US to negotiate 148 bilateral and rather homogeneous trade agreements on the issue with all other WTO Members. In fact, both the US Congress and the US industry have already recognised that the cost of bilateralism in terms of negotiation resources of the USTR is very big whereas their outcome alone is—considering their small number and the choice of bilateral trade partners so far—not very significant.[85]
— Second, the most relevant digital trade flows are obviously with trade partners like the EC, Canada, and Japan with whom the US is unlikely to sign bilateral FTAs in the near future. Also, these more important trading partners are less likely to concede to the US approach.[86]

All these arguments reinforce the impression that—coupled with its competitive liberalisation approach—the US perceives these bilateral agreements as a building block to subsequent negotiations.

When assessing the relationship of these bilateral agreements to the multilateral level, the particular nature of the digital trade objectives pursued by the US must also be taken into account. Agreements to keep the Internet free from trade barriers are—in terms of trade diversion and the creation of vested interests—very different from, for example, tariff agreements for an agricultural product. Given the different prevailing regulatory approaches to e-commerce and digital content, these trade negotiations can be seen as an effort by the US to establish its regulatory approach to digital trade in an international context. Both the legal language used and its subsequent implementation on the bilateral or regional level can also act as a much more flexible test-bed and laboratory for agreements that can later be adopted on the multilateral level.

Moreover, it is judged here that the costs incurred due to trade diversion through the US bilateral FTAs are negligible. The reason is that, in principle, these new digital trade rules and obligations are applicable to arising rather than current trade flows in digitally-delivered content products. It may well be that—at the expense of other regions or countries—more future electronic trade flows arise between geographical areas with liberal digital trade rules. But it is

[84] See opening statement of the Hon. Sander Levin, Hearing before the US House of Representatives on the 2003 Trade Agenda of President Bush on 26 February 2003. See also 'International Trade Commission Expects Little To No Economic Impact From Singapore, Chile FTAs', in: *Inside US Trade* (20 June 2003).

[85] See, eg, ACTPN (2003d) p 5; and GAO (2004a, b). The US service industry has, eg, deplored in ACPTN (2004d) pp 4–5 that with the exception of Australia, more significant economies were not chosen for FTAs.

[86] *Cf* Lawrence (2003) who makes this point in a more generally.

assumed here that these 'outsiders' are free to join the club of digital free-traders at any point in time ('open regionalism for digital trade'[87]).

Furthermore, non-parties to the US FTAs—and thus other WTO Members—also benefit from the specified trade rules and obligations through an *erga omnes*-effect. This is because, in addition to profiting from a potential liberalisation blueprint for the multilateral level, non-parties can actually free-ride on the reciprocal commitments made between the US and its trading partners.

— First, it has been shown in *Section 7.1.1.2* that the benefits of the US FTAs' national treatment and MFN obligations are formally extended beyond digitally-delivered content products originating from the signatory parties or their nationals. This comes close to a naturally built-in measure to avoid trade diversion potentially brought about by preferential agreements.
— Second, some free trade principles positively affect non-parties despite the fact that the digital trade rules and obligations are not extended *de jure* to third parties. The example of the binding e-commerce and service trade commitments to keep the Internet free from trade barriers illustrates this point. If, for instance, Chile and Singapore bind themselves bilaterally to eliminate their trade barriers concerning software, to 'freeze' their limitations to free trade in audiovisual services and to renounce new market access trade barriers concerning digitally-delivered content products, this act is likely to positively affect other trading nations as well.

  This is true because digital trade concessions that must be mirrored in the domestic implementing-legislation and applied on the Internet are not easily confined to partners of bilateral or regional trade agreements. It is, for example, very unlikely that Chile would attempt or be able to levy different tariffs on the Internet on digitally-delivered content products originating from different trading partners. Domestic Chilean legislation that treats Internet-delivered content in a different manner (eg, local content quota for digitally-delivered content products applicable to European content but not to US content) is also very unlikely. Hence, non-discrimination principles anchored in the bilateral FTAs tend to favour non-discrimination relating to other trading nations as well.

  Furthermore, in this context, bilateral trade negotiations must also be seen as a significant effort to set political trade preferences that are then extendable to further agreements. Once, for instance, Chile has decided not to apply discriminatory content regulations for digitally-delivered content products (ie, no cultural exemption in the area of new media) in its FTA with the US, these trade rules and obligations are also likely to be more acceptable on a broader scale, and thus, for example, in other bilateral, regional or even in multilateral trade agreements. The US FTAs thus help to prepare the ground for agreements at the next higher level.

[87] Open regionalism as defined by Bergsten (1997).

All in all, the argument can therefore be made that, in the jargon of the regionalism debate, these preferential trade deals are 'friends' to the WTO and to global free trade in digitally-delivered content products.[88]

7.2.2 Regional or Global Consensus via US-Driven Preferential Trade Agreements?

Concerning the second question of how probable it is that the new US strategy will succeed in fostering a common approach to digital products in a step-wise fashion up to the WTO, the assessment is less clear-cut.

7.2.2.1 Further Bilateral or Regional Digital Trade Ambitions of the US: Encountering First Resistance

To begin with, it is very likely that in the next bilateral or regional negotiations (with, for example, the Andean countries, Thailand) the US may fruitfully use its much greater bargaining power to continue achieving its objectives relating to digitally-delivered content products.

But it is highly uncertain whether the US bottom-up approach to secure liberal treatment of digital content products will work 'all the way through' to more significant regional agreements or the multilateral level. Considering the diversity of countries that the US must bring on board, and considering also that the US has started with relatively unproblematic trading partners, it will be difficult to pursue the negotiation objectives on a broader geographical scale.

To the contrary, it can be forecasted that very soon the US will start to feel the limits of its concurrent negotiation approach. The lacking ability of the US to spread its liberalisation template widely, begins in its preferential trade negotiations. When the US starts approaching partners for preferential trade agreements that are more important in economic terms and/or that are also very inclined to rank 'cultural diversity' high on their agenda, the US negotiators will face the same problems as within the WTO. The FTA with Australia already lends support to this argument.

When it comes to regional agreements that can—at once—establish the US liberalisation template for a significant geographical territory, the same problem applies.

After successful regional establishment of the US template through the CAFTA, currently, only the FTAA negotiation would lend itself to further broad extension of digital trade principles. But currently it does not look as if the FTAA can secure free trade for digitally-delivered content products. From their start, the FTAA negotiations were accompanied by a government-private

[88] See Bhagwati and Panagariya (1999) for the categorisation of preferential trade agreements in 'strangers, friends and foes' to the multilateral trading system.

sector committee on e-commerce.[89] Moreover, the third draft FTAA agreement shows that it is fairly certain that the negative list approach will be used for the FTAA's Services Chapter.[90] This draft text also includes a proposal to determine the customs value of digital products according to the cost or value of the carrier media alone.[91]

But apart from that, the FTAA draft text does not resemble the attainments of previous FTAs. Most importantly, it includes no E-Commerce Chapter as no formal negotiation group on e-commerce existed. Canada—an important player in the FTAA negotiations—has repeatedly announced that it will not make concessions on cultural services or sign up to a discipline concerning digital content products that is anywhere close to the blueprint proposed in the FTAs.[92] Brazil, a follower of the EC approach in the WTO and an important player in the FTAA, is also not likely to bend to the US arguments.

On another front, the negotiations on an FTA between the US and SACU are stalling because SACU Members would like to concentrate the talks on traditional market access issues while leaving other negotiation dossiers outside the scope of the negotiations.[93]

Furthermore, it currently seems as if the speed with which the US administration can conclude new bilateral or regional trade agreements has slowed considerably since mid–2004, with US Congress even struggling to ratify the signed US-CAFTA trade agreements.

The US liberalisation template affecting digitally-delivered content products is also not spreading through the parallel conclusion of FTAs to which it is not a signatory partner. Whereas, for example, other trade agreements in the Asian region increasingly include an e-commerce Chapter (eg, the Singapore-Australian FTA[94] or even the FTA Between the Association of South East Asian Nations and the People's Republic of China[95]), they do not explicitly liberalise trade in digitally-delivered content products.

[89] See the 'Second Report with Recommendations to Ministers' of the FTAA Joint Government-Private Sector Committee of Experts on E-Commerce, FTAAe-commerce/03/Rev.3 (9 April 2001).

[90] See Third Draft FTAA Agreement, Free Trade Area of the Americas, FTAATNC/w/133/Rev.3 (21 November 2003) [Third Draft FTAA Agreement], Ch XVI on Services and the 'Public Summary of US Position for the FTAA Negotiating Group on Services', Internet: www.ustr.gov/regions/whemisphere/services.html (15 January 2003).

[91] Third Draft FTAA Agreement, Ch XII Customs [Procedures][Matters], Art 14.2. Brackets indicate that the title of the Chapter has not been agreed upon yet.

[92] The Canadian position on cultural services in the FTAA can be found at Internet: www.dfait-maeci.gc.ca/tna-nac/S-FAQ-en.asp (27 February 2003). The government's position is to seek an exemption for culture on the model of the Canada-Chile and Canada-Israel free trade agreements.

[93] 'US-SACU FTA Deadlocked', in: *Bridges Weekly* (6 October 2004). So far the US has rejected this approach, arguing that it has a Congressional mandate to negotiate on all subjects.

[94] See Chapter 14 of Committee on Regional Trade Agreements, Singapore-Australia Free Trade Agreement (SAFTA), WT/REG158/3 (27 September 2004). Original text published by the Australian Department of Foreign Affairs and Trade, entry into force: 28 July 2003, Internet: www.dfat.gov.au/trade/negotiations/safta/Chapter_14.pdf.

[95] CTD, Framework Agreement on Comprehensive Economic Cooperation Between the Association of South East Asian Nations and the People's Republic of China, WT/COMTD/51(21 December 2004).

In sum, it is not probable that the US liberalisation template which worked with Chile, Singapore and other bilateral trade partners will soon cover wider geographical areas.

7.2.2.2 Will the US Liberalisation Template Resonate in the WTO?

If one thinks one step ahead and tries to test the viability of the US approach for the WTO, reservations also apply. Most importantly, many WTO Members will not accept the limitations of the audiovisual policy measures, no matter whether on traditional or new media. Moreover, the idea of formulating a trade discipline for digital products that is detached from the standing WTO Agreements and is situated between the GATT and the GATS will not be acceptable to the majority of WTO Members.

Maybe rightly so, as the US liberalisation template raises many questions and challenges to the current architecture of the WTO Agreements. The cost of creating a WTO E-Commerce Chapter that would mimic the US template and sit between the GATT and the GATS, with lack of clarity as to which general obligations apply to digital products, may be rather high and introduce systemic uncertainties in the goods vs service delineation that may not be in the interest of the multilateral trading system. Especially WTO Members like Hong Kong, Brazil, Switzerland and Norway that pursue the EC's idea of classifying digitally-delivered content products as services, will not adhere to the US approach.[96] The US negotiators are well-aware of this dilemma and have, in fact, not tabled a similar proposal in the WTO to date.

In sum, the practical value of the US liberalisation blueprint in terms of adopting an identical approach at the WTO may not be of much value. Nevertheless, it can be hoped that the bilateral and regional moves of the US will inject a new, healthy dynamism to the discussions on digital trade in content and even service-trade issues on the multilateral level.

To start with, some particular elements of the US liberalisation template could be used as blueprint in the WTO negotiations. Whereas an identical E-Commerce Chapter may not work in the WTO, the bilateral US FTAs have brought about a number of succinct legal building blocks that could be used on the multilateral level.

Specifically, the author refers to the digital trade definitions, the affirmation of WTO rules to e-commerce, the affirmation of the applicability of GATS commitments to electronically-delivered services, the language used to specify a duty-free moratorium on digitally-delivered content products, and the language used to regulate the customs valuation of digital content products. It should also

[96] The EC refutes ideas that would make digitally-delivered content products stand between the GATT and the GATS because it 'would wreak havoc in the WTO architecture'. Personal interviews and GC, Submission from the EC, Classification Issues and the Work Programme on E-Commerce, WT/GC/W/497(9 May 2003) p 2.

be assessed whether the comprehensive language on non-discrimination used in the E-Commerce Chapters would have its place at the multilateral level. As the determination of 'origin' with respect to digital content products is problematic, the broad non-discrimination principles introduced in the US template would be a plus at the multilateral level.

On top of these elements coming from the E-Commerce Chapters, the Cross-Border Trade in Services Chapters of the US FTAs will also stimulate debate in the WTO and prepare the ground for a future, more modern multilateral service trade agreement. Particularly, the use of a negative list approach with few reservations applicable to the cross-border trade in services (ie, regardless of whether GATS Mode 1 or 2) and the tailored submission of audiovisual and cultural services under specific service trade commitments may—depending on the explicit and implicit relationships to the UNESCO Convention on Cultural Diversity—resonate in the multilateral negotiations.

7.3 CONCLUSION

In the absence of progress on the multilateral level, the US has started to develop its model approach for free trade in digitally-delivered content products through bilateral and regional trade negotiations. The bilateral agreements are concluded in the view of progress on a broader regional or on the multilateral level.

Chapter Seven has shown that the US has undertaken this project with some noteworthy achievements, notably the inclusion of the first E-Commerce Chapters ever to be integrated in international trade agreements. The analysis of the FTAs between the US and Chile, Singapore and Australia shows that these bilateral agreements include appealing legal provisions. Particularly the approach of securing non-discrimination on an MFN-basis in bilateral trade agreements demonstrates foresight and a genuine interest to establish a free trade zone on the Internet. It is thus argued that these preferential trade agreements do not cause harm to the multilateral level. To the contrary, they serve as laboratories for devising new trade rules.

Unfortunately, this does not mean that the US model will enable the WTO to progress rapidly on digital trade matters through the straightforward adoption of the US approach. Although the bilateral agreements offer new inspiration and precise legal provisions to the WTO negotiators, the US approach is—in its entirety—very unlikely to be adopted on the multilateral level.

This has mainly to do with the unwillingness of WTO Members like the EC to liberalise the trade in digitally-delivered content products and the unwillingness of many WTO Members to move to a negative list approach for services liberalisation; thus stumbling blocks entirely unrelated to the US template. But it is also shown that the US approach has some weaknesses (ie, especially the relationship between rules and obligations for services and e-commerce) that should not be imitated in the case of the multilateral trading system. These

weaknesses were discussed in detail in order to enable US and other negotiators to partially reconsider their trade policy stance.

Finally, it has been argued that specific elements of the US FTAs could serve as building blocks for legal provisions agreed upon in the WTO. Especially, the language on non-discrimination and MFN is particularly fitting for digital content products made available through a global medium.

8

Conclusion

THE EMERGENCE OF the Internet will soon cause the electronic trade of software, movies and other digital content products to be an eminent share of international commerce.

WTO Members are confronted with a unique opportunity: that is, locking in free trade in digitally-delivered content products before governments start imposing pertinent discriminatory limitations. To grasp this opportunity, a set of identified measures—essentially solutions to the unresolved horizontal E-commerce questions and additional market access commitments—needs to be undertaken in the WTO. As demonstrated, it has not been possible to initiate these measures outside of the WTO's market access negotiations—namely, in the WTO Work Programme on E-Commerce—alone. Therefore, the hopes are high that related actions will be taken during the Doha Negotiations.

But this research reveals that to date very few of the identified negotiation objectives have been satisfactorily met through the Doha Negotiations. This is explained by the applicable negotiation parameters of the US and EC that lead to diametrically opposed trade policy objectives. Furthermore, the sheer complexity of negotiating market access for intangible content products that fall between goods and service trade agreements complicates the matter further. The vastness of issues involved in associated negotiations, especially in the absence of classification decisions, are also responsible for the fact that the deliverables to be produced by the Doha Round keep slipping off the WTO negotiation table.

Manifestly, this inaction in the WTO negotiations has already led to a gravitation of this important topic towards preferential trade negotiations. Especially, the US has experimented with digital trade agreements in its preferential trade negotiations that show that there exist ways to move forward on this novel trade phenomenon.

But despite these successes in bilateral negotiations a return to the WTO negotiation table is important. The reason is that—given the global nature of the Internet-medium—a few, heterogeneous bilateral free trade agreements alone are not satisfactory to secure far-reaching market access.

However, giving advice on how to move forward in the WTO is not a simple undertaking.

Clearly, in the process of returning to the WTO negotiation table, the existing preferential trade agreements may actually help, either *directly*, as some of their legal provisions can be used as building blocks, or *indirectly,* through the momentum they generated around the issue.

Nevertheless, the analysis of the internal negotiation parameters in this research has shown that little room for compromise exists. For progress to materialise, WTO Members like the EC and Australia would have to accept that digitally-delivered content products receive a different, more favourable, trade treatment than other content-related products like broadcasting or traditional cinemas. Whereas it seems acceptable that subsidies accorded for the creation and distribution of (digital) content can be maintained or initiated by these WTO Members, they would have to agree to irrevocable obligations guaranteeing non-discriminatory market access (ie, the absence of quotas, or other market access limitations based on national origin of the content or its creator).

If this broad-based move throughout the WTO Membership is not feasible, decisions should be taken on where to classify digitally-delivered content products, allowing some WTO Members to move ahead with liberalisation, thus taking a plurilateral route in the WTO. At the minimum, an agreement to formalise a meaningful WTO Duty-Free Moratorium on E-Commerce and to affirm the applicability of WTO and GATS commitments to electronically-delivered goods and services should result from the Doha Development Agenda.

However, without prompt efforts in the WTO, the opportunity to lock in free trade for digital products at the global level will slip away and it will be more difficult to eradicate trade barriers *ex post*. It must be remembered that the ambitious proposals made here merely bind the *status quo* and do not propose the elimination of existing protection explicitly targeted at digital trade. Tomorrow when digital trade flows are an important trade flow, the temptation to use sub-optimal trade policy instruments may be much more difficult to resist.

The rise of discriminatory digital trade barriers would be more than unfortunate as the use of technology to conduct digital trade would actually be discouraged. Nascent cross border exchanges and the business models that go with it could be choked off before they even develop. Worse of all, in an economy increasingly driven by intangible assets, the relevance of the multilateral trading system, as perceived by global business, would be damaged. There is thus also a symbolic value in keeping the WTO Agreements in line with the reality of international trade flows. Waiting for the next global trade talks to be launched—possibly not before many years—is definitely not a satisfactory option.

Progress is also important with respect to other open questions. Although already complex in nature, this underlying work was mainly devoted to securing market access and national treatment for digitally-delivered content products. But this is only the beginning of WTO-related research on digital trade issues. Once the here-discussed issues have been taken care of, other

factors essential to achieving unfettered electronic trade warrant further attention from academics and trade negotiators. Examples are the question of *if* and *how* to afford adequate copyright protection to digitally-delivered content products through the WTO Agreements.[1] Moreover, many other e-commerce and digital trade issues like technical standards, rules of origin, taxation and competition need to be addressed (cf Table 1.1). The improvement of free trade in electronically-delivered services may also entail the development of a GATS regulatory discipline and, for example, the clarification of important concepts of 'likeness' and 'technological neutrality'. On the more difficult front, the increasingly blurred boundaries between goods and services[2] and the related consequence for the multilateral trade framework also deserve attention.

To conclude on a positive note: When this book was completed, new signs of a possible second take-off of the Doha Negotiations were under way due to the desire to achieve some results leading to the Sixth Ministerial in Hong Kong. If some of the more complex negotiation dossiers will be resolved, windows of opportunities to deal with issues relating to digitally-delivered content products may surface. Ideally, this systematic stocktaking and analysis of digital trade issues and the proposed solutions will succeed in putting a spotlight on electronic trade and in providing direction on the issues to be resolved.

[1] See TRIPS Council, The Work Programme on Electronic Commerce, IP/C/W/128 (10 February 1999); UN ICT TF (2004) Sec VIII C and Hauser and Wunsch-Vincent (2002) pp 100 f on this topic.

[2] See for instance Feketekuty (2000) pp 108–10 who has argued that—in the long term—the division of the WTO into GATT, GATS and TRIPS will be difficult to maintain.

Annex

A.1.1 HS Codes for Physical Carrier Media

Heading	*HS Code For Different Types of Physical Carrier Media*
37.06 Cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track	**Cinematographic film:** 3706.10—Of a width of 35 mm or more 3706.90—Other
85.24 Records, tapes and other recorded media for sound or other similarly recorded phenomena, incl matrices and masters for the production of records, but excluding products of Chapter 37	**Records:** 8524.10 — Gramophone records CDs Discs for laser reading systems: 8524.31 — For reproducing phenomena other than sound or image (ie, software) 8524.32 — For reproducing sound only 8524.39 — Other **Tapes** 8524.40 — Magnetic tapes for reproducing phenomena other than sound or image (ie, software) **Other magnetic tapes:** 8524.51 — Of a width not exceeding 4 mm 8524.52 — Of a width exceeding 4 but not exceeding 6.5 mm 8524.53 — Of a width exceeding 6.5 mm **Other:** 8524.90 — Video discs, laser disc sound recordings, etc 8524.91 — For reproducing phenomena other than sound or image (ie, software) 8524.99 — Other
95.04 Articles for funfair, table or parlour games	**Video games**: 95.0410 — Video Games of a Kind Used With a Television Receiver

Source: Harmonised Commodity Description and Coding System ("Harmonised System"), established by the World Customs Organisation (WCO), Chapters 37 / 85 and Teltscher (2000), p 40.

A.1.2 GATS Market Access and National Treatment Commitments

GATS Art XVI on Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. [footnote deleted by author]
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
   a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
   b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
   c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; [1]
   d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
   e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
   f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

GATS Art XVII on National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. [footnote deleted by author]
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

[1] Subpara 2(c) does not cover measures of a Member which limit inputs for the supply of services.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

A.1.3 Correspondence Between GATS Services Classification List and The Provisional CPC

W120 Services	*Corresponding Provisional CPC Categories*
1. Business Services, B. Computer and related services	
b. Software implementation services	842 Software implementation services All services involving consultancy services on, development and implementation of software. The term "software" may be defined as the sets of instructions required to make computers work and communicate. A number of different programs may be developed for specific applications (application software), and the customer may have a choice of using ready made programs off the shelf (packaged software), developing specific programs for particular requirements (customised software) or using a combination of the two. 84210 Systems and software consulting services 84220 Systems analysis services 84230 Systems design services 84240 Programming services 84250 Systems maintenance services
d. Data base services	84400 Database services All services provided from primarily structured databases through a communication network
e. Other computer services	845 Maintenance and repair services of office machinery and equipment incl. computers *[not relevant]* 84910 Data preparation services Data preparation services for clients not involving data processing services. 84990 Other computer services n.e.c.
2. Communication Services, C. Telecommunication services	
j. On-line information and data base retrieval	7523 Data and message transmission services 75231 Data network services Network services necessary to transmit data between equipment using the same or different protocols. This service can be provided via a public or dedicated data network (i.e., via a network dedicated to the customer's use).

A.1.3 (*cont.*)

W120 Services	*Corresponding Provisional CPC Categories*
2. Communication Services, C. Telecommunication services	
	75232 Electronic message and information services Network and related services (hardware and software) necessary to send and receive electronic messages (telegraph and telex / TWX services) and / or to access and manipulate information in databases (so-called value-added network services).
n. On-line information and / or data processing (incl. transaction processing)	84310 Input preparation services Data recording services such as key punching, optical scanning or other methods for data entry. 84320 Dataprocessing and tabulation services Services such as data processing and tabulation services, computer calculating services, and rental services of computer time. 84330 Time- Sharing services 84390 Other data processing services
2. Communication Services, D. Audiovisual services	
a. Motion picture and video tape production and distribution services	9611 Promotion or advertising services 96112 Motion picture or video tape production services 96113 Motion picture or video tape distribution services 96114 Other services in connection with motion picture and video tape production and distribution
b. Motion picture projection service	96121 Motion picture projection services 96122 Video tape projection services
c. Radio and television services	96131 Radio services. Production services of radio programs whether live or on tape or other recording medium for subsequent broadcast. *Exclusion*: Transmission services for radio programs produced by others are classified in class 7524 (Program transmission services). 96132 Television services. Production of television programs whether live or on tape or other recording medium for subsequent broadcast. 96133 Combined program making and broadcasting services
d. Radio and television transmission services	75241 Television broadcast transmission services Network services necessary for the transmission of television signals, independently of the type of technology (network) employed. 75242 Radio broadcast transmission services Network services necessary for the transmission of

	audio signals such as radio broadcasting, wired music and loudspeaker service
e. Other	
10. Recreational, cultural & sporting services (other than audiovisual services)	
A. Entertainment services (incl. theatre, live bands & circus)	96191 Theatrical producer, singer group, band and orchestra entertainment services Live theatrical presentation services, incl. concert, opera and dance production services, whether on professional or amateur basis and whether set up for only a single attraction or multiple attractions. 96192 Services provided by authors, composers, sculptors, entertainers and other individual artists 96199 Other entertainment services n.e.c.

Source: GATS Services Sectoral Classification List in Group of Negotiations on Services, Note by the Secretariat, Services Sectoral Classification List, MTN.GNS/W/120 (10 July 1991) and provisional Central Product Classification in UN (1991).

A.1.4 Central Product Classification 1.1, Version 2002

Central Product Classification 1.1 (Version 2002)	
7 Financial and related services; real estate services; and rental and leasing services 73 Leasing or rental services without operator	
733 Licensing services for the right to use non-financial intangible assets	This group includes: permitting, granting or otherwise authorizing the use of intangible produced assets. This covers all rights to exploit these intangible assets, such as licensing to third parties, reproducing and publishing software, books etc This group does **not** include: — limited end user licences, which are sold as part of a product (eg, packaged software, books) / licence fees as integral part of consumer goods (books, records, software). **7331 Licensing services for the right to use computer software** This subclass does **not** include: — off the shelf (packaged) software, cf 47520 — limited end-user licenses as part of packaged software, see 47520 **7332 Licensing services for the right to use entertainment, literary, acoustic originals** **7339 Licensing services for the right to use other non-financial intangible produced assets**

A.1.4 Central Product Classification 1.1, Version 2002 (*cont.*)

8 Business and production services 83 Other professional, technical and business services	
831 Consulting and management services 8314 Computer consultancy services	**83142 Software consultancy services** This subclass includes: — development (analysis, design and programming) of software — adaptation of existing software — provision of advice and assistance on matters related to computer software: This subclass does **not** include: retail sales of packaged software. **83149 Other computer consultancy services** **8315 Computer facilities management services**
84 Telecommunications services; information retrieval and supply services	
841 Telecommunications and program distribution services	**8415 Data transmission services** **8417 Program distribution services** This subclass includes: — delivery of audio and video programming in analog or digital mode by using a ***cable, satellite or wireless terrestrial network***. Programming is generally made available on a subscription basis in packages defined by the service provider or by the customer or on a pay-per-view basis for individual programs.
842 Internet telecommunications services	This group includes the carriage of traffic on, access to and telecommunications services on the Internet and similar distributed computer networks that rely on but are not part of the normal telecommunications network.
843 On-line information provision services	**8430 On-line information provision services** This subclass includes: — database services — provision of information on web- Sites — provision of on-line data retrieval services from databases and other information, to all or limited number of users — provision of on-line information by **content** This subclass does **not** include: — provision of telecommunication net- Services such as Internet access services, necessary to access the databases or information holdings of information content providers / on-line access to web- Sites / **Internet sales**
9 Community, social and personal services 96 Recreational, cultural and sporting services 961 Audiovisual and related services	

96111 Sound recording services	**96111 Sound recording services** **96112 Audio post-production services**
9612 Motion picture, video tape, television and radio programme production services	**96121 Motion picture, video tape and television programme production services** This subclass includes: — production and realization of motion pictures including animated cartoons primarily designed for showing in movie theatres — production and realization of motion pictures of all types primarily designed for showing on television — production and realization of promotional or advertising motion pictures
	— production of television programme services, live or recorded **96122 Radio programme production services** other relevant production services: **9613 Audiovisual production support services** **9614 Services related to the production of motion pictures / television / radio programmes**
96141 Motion picture and television programme distribution services	**96141 Motion picture and television programme distribution services** This subclass includes: — distribution services of motion pictures and video tapes to other industries (but not to the general public) — services connected with film and video tape distribution such as film and tape booking, delivery, storage This subclass does **not** include: — rental services of video tapes to the general public, cf 73220 — distribution of television and radio programmes to the final consumer through third party cable, satellite or wireless terrestrial networks cf84170
9615 Motion picture and video tape projection services	**96151 Motion picture projection services** This subclass includes: motion picture projection services in movie theatres, in open air or in cine-clubs, in private screening rooms or other projection facilities **96152 Video tape projection services** This subclass includes: video tape projection services in movie theatres, in open air or in cine-clubs, in private screening rooms or other projection facilities
9616 Broadcasting (programming and scheduling) services	**96160 Broadcasting (programming and scheduling) services** This subclass does **not** include: — transmission of television and radio programmes to the final consumer through third party cable, satellite or wireless terrestrial networks, cf 84170

Source: UN (2002). For correspondence tables of the provisional CPC to the CPC 1.1 see UN (2002), pp 357 f.

A.2.1 Decision on the Valuation of Carrier Media Bearing Software for Data Processing Equipment

1. It is reaffirmed that transaction value is the primary basis of valuation under the Agreement on Implementation of Article VII of the GATT and that its application with regard to data or instructions (software) recorded on carrier media for data processing equipment is fully consistent with the Agreement.
2. Given the unique situation with regard to data or instructions (software) recorded on carrier media for data processing equipment, and that some Parties have sought a different approach, it would also be consistent with the Agreement for those Parties which wish to do so to adopt the following practice:

   In determining the customs value of imported carrier media bearing data or instructions, only the cost or 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.

   [. . .]; the expression 'data or instructions' shall not be taken to include sound, cinematic or video recordings.
3. Those Parties adopting the practice referred to in paragraph 2 of this Decision shall notify the Committee of the date of its application.
4. Those Parties adopting the practice in paragraph 2 of this Decision will do so on a MFN basis, without prejudice to the continued use by any Party of the transaction value practice.

Source: Reprinted in CTG, Work Programme on Electronic Commerce—Background Note by the Secretariat, G/C/W/128 (5 November 1998). Decision originally adopted by the Tokyo Round Committee on 24 September 1984 and subsequently adopted by the WTO Committee on Customs Valuation at its first meeting on 12 May 1995, see GATT Council, Committee on Customs Valuation, Decisions Adopted by the Tokyo Round Committee on Customs Valuation, G/VAL/W/1 (28 April 1995), Section A.4.

Relevant Provisions of the Trade Act of 2002

Only the relevant parts of the trade law are presented.

A.4.1 Congressional Oversight Committee and Consultation Requirements

Section 2102 (d) (1) Consultations with Congressional Advisers

In the course of negotiations conducted under this title, the USTR shall consult closely and on a timely basis with, and keep fully apprised of the negotiations, the Congressional Oversight Group convened under Section 2107 and all committees of the House of Representatives and the Senate with jurisdiction over laws that would be affected by a trade agreement resulting from the negotiations.

Section 2102 (d) (2) Consultations before Agreement Initialed

In the course of negotiations conducted under this title, the USTR shall—(A) consult closely and on a timely basis [. . .] with, and keep fully apprised of the

negotiations, the congressional advisers for trade policy and negotiations [. . .], the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and the Congressional Oversight Group convened under Section 107 [. . .].

Section 2104 Consultations and Assessment

(a) **Notice and consultation before negotiation.**—The President, with respect to any agreement that is subject to the provisions of Section 103(b), shall—(1) provide, at least 90 calendar days before initiating negotiations, written notice to the Congress of the President's intention to enter into the negotiations and set forth therein the date the President intends to initiate such negotiations, the specific United States objectives for the negotiations, and whether the President intends to seek an agreement, or changes to an existing agreement; (2) before and after submission of the notice, consult regarding the negotiations with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives, such other committees of the House and Senate as the President deems appropriate, and the Congressional Oversight group [...]; and (3) upon the request of a majority of the members of the Congressional Oversight Group under Section 107(c), meet with the Congressional Oversight Group before initiating the negotiations or at any other time concerning the negotiations.[. . .].

(b) **Consultation with Congress before Agreements Entered Into.**— (1) CONSULTATION.—Before entering into any trade agreement under section 2103(b), the President shall consult with—(A) the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate; (B) each other committee of the House and the Senate, and each joint committee of the Congress, which has jurisdiction over legislation involving subject matters which would be affected by the trade agreement; and (C) the Congressional Oversight Group convened under Section 107.—- (2) SCOPE.—The consultation described in paragraph (1) shall include consultation with respect to—(A) the nature of the agreement; (B) how and to what extent the agreement will achieve the applicable purposes, policies, priorities, and objectives of this title [. . .].

Section 2105. Implementation of Trade Agreements

(a) **In General (1) Notification and Submission.**—Any agreement entered into under Section 103(b) shall enter into force with respect to the United States if (and only if)—(A) the President, at least 90 calendar days before Federal Register, the day on which the President enters into the trade agreement, notifies the House of Representatives and the Senate of the President's intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register; (B) within 60 days after entering into the agreement, the President submits to the

Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the agreement; (C) after entering into the agreement, the President submits to the Congress, on a day on which both Houses of Congress are in session, a copy of the final legal text of the agreement, together with—(i) a draft of an implementing bill described in Section 103(b)(3); (ii) a statement of any administrative action proposed to implement the trade agreement; and (iii) the supporting information described in paragraph (2); and (D) the implementing bill is enacted into law.

[. . .]

(**b**) **Limitations on Trade Authorities Procedures.**

(1) FOR LACK OF NOTICE OR CONSULTATIONS.

(a) In general. The trade authorities procedures shall not apply to any implementing bill submitted with respect to a trade agreement or trade agreements entered into under Section 103(b) if during the 60–day period beginning on the date that one House of Congress agrees to a procedural disapproval resolution for lack of notice or consultations with respect to such trade agreement or agreements, the other House separately agrees to a procedural disapproval resolution with respect to such trade agreement or agreements.

(b) Procedural disapproval resolution. (i) For purposes of this paragraph, the term 'procedural disapproval resolution' means a resolution of either House of Congress, the sole matter after the resolving clause of which is as follows: 'That the President has failed or refused to notify or consult in accordance with the Bipartisan Trade Promotion Authority Act of 2002 on negotiations with respect to and, therefore, the trade authorities procedures under that Act shall not apply to any implementing bill submitted with respect to such trade agreement or agreements.', with the blank space being filled with a description of the trade agreement or agreements with respect to which the President is considered to have failed or refused to notify or consult. (ii) For purposes of clause (i), the President has 'failed or refused to notify or consult in accordance with the Bipartisan Trade Promotion Authority Act of 2002' on negotiations with respect to a trade agreement or trade agreements if—(I) the President has failed or refused to consult (as the case may be) in accordance with Section 104 or 2105 with respect to the negotiations, agreement, or agreements; (II) guidelines under Section 107(b) have not been developed or met with respect to the negotiations, agreement, or agreements; (III) the President has not met with the Congressional Oversight Group pursuant to a request made under Section 107(c) with respect to the negotiations, agreement, or agreements; or (IV) the agreement or agreements fail to make progress in achieving the purposes, policies, priorities, and objectives of this title.

A.4.2 Comparison Of The Negotiation Objectives Of The Trade Act Of 1974, The OCTA Of 1988 and The Trade Act Of 2002

	Trade Act of 1974	*Omnibus Trade and Competitiveness Act of 1988*	*Trade Act of 2002*
Dates covered	1975–1980. Renewed in '79/'84.	1988–1991. Extended twice to Apr 1994 (for Uruguay Round only).	6 Aug 2002–1 June 2005 renewable until 1 June 2007
Overall negotiating objectives	To obtain more open and equitable market access and reduction of trade distortions in the manufacturing and agricultural sector. Market access to mining and commerce shall also be increased.	To obtain more open equitable and reciprocal market access; the reduction or elimination of barriers and other trade-distorting policies and practices; a more effective system of international trading disciplines and procedures. One of its parts (Telecommunications Trade Act of 1988) focuses on country-Specific promotion of US telecommunication service exports.	Emphasis on links between national security and trade. To obtain more open, equitable, and reciprocal market access; to obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade; to further strengthen the system of international trading disciplines and procedures, incl dispute settlement; to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy; goals for trade and environment, related to trade and labor laws; for SMEs and goals on child labor.

A.4.2 (*cont.*)

	Trade Act of 1974	*Omnibus Trade and Competitiveness Act of 1988*	*Trade Act of 2002*
Principal negotiating objectives	Tariff reduction and elimination of non-barriers to trade in manufacturing and the agricultural sector. No specific mentioning of trade in services.	Objectives on (1) improvement of dispute settlement, (2) improvement of the GATT and other multilateral trade negotiation agreements, (3) transparency, (4) developing countries, (5) current account surpluses, (6) trade and monetary coordination, (7) open and fair trade in agriculture, (8) reduction of unfair trade practices, (9) trade in services, (10) intellectual property, (11) foreign direct investment, (12) safeguards, (13) specific barriers, (14) worker rights, (15) access to high technology, (16) border taxes. More open foreign markets for US manufacturing, services and agricultural goods and promotion of foreign direct investment. Detailed new mandate for the service negotiations (especially telecommunication services) and special emphasis placed on high technology products and intellectual property. Special emphasis is also placed on the discouragement of unfair trade practices and the promotion of worker rights	Objectives on (1) trade barriers and distortions, (2) trade in services, (3) foreign investment, (4) intellectual property, (4) transparency, (5) anti-corruption, (6) improvement of the WTO and multilateral agreements, (8) regulatory practices, (9)e-commerce, (10) reciprocal trade in agriculture, (11) labor and the environment, (12) improvement of dispute settlement and enforcement, (13) WTO extended negotiations, (14) trade remedy laws, (15) border taxes, (16) textile negotiations and (17) worst forms of child labor. More open and equitable market access for US manufacturing and services, the promotion of foreign direct investment, the protection of intellectual property rights, Detailed mandate for the e-commerce negotiations, reciprocal trade in agriculture and advice on the use of least-trade restrictive regulatory practices for a given policy objective. Special emphasis is also placed on the protection of environmental and labor standards, greater cooperation between ILO and the WTO, other priorities related to labor issues and the protection of US trade remedy laws.

A.4.3 Comparison of the Procedural Requirements Of The Trade Act Of 1974, The OCTA Of 1988 And The Trade Act Of 2002

Congressional Involvement	*Trade Act of 1974*	*OCTA of 1988*	*Trade Act of 2002*
Institutional oversight	5 advisers from each congressional trade committees plus other designated members of these committees.	Increased congressional oversight: *Status quo* of 1974 plus increased consultation requirements between USTR and both congressional trade committees	Increased congressional oversight that includes the involvement of other congressional committees: *Status quo* of 1988 plus the Congressional Oversight Group (COG) that consists of 10 advisers from both congressional trade committees and chairman and ranking member of House or Senate Committees that have jurisdiction over laws affected by trade agreements.
Notice of intention to sign the agreement and consultation prior to entering into agreement	President must consult with Congressional committees of jurisdiction during negotiations and notify Congress at least 90 days before signing the trade agreement. Congressional advisers and other designated members of the congressional trade committees must be currently informed.	Increased consultation requirements before trade agreement is entered into: *Status quo* of 1974 plus — for free-trade agreements, President must notify and consult Congres-sional trade committees at an early stage of negotiations. — consultations before trade agree-ments are entered into must now yield how the agreement will achieve the treaty objectives	Increased notification and consultation requirements before negotiation, during negotiation and before trade agreement. Increased cooperation now begins before negotiations actually start: *Status quo* of 1988 plus — new required notification and consultation requirements vis-à-vis Congress and possible compulsory meeting with the COG before negotiations start — before negotiations with a specific country are started it shall be taken into account if this country implemented its obligations under the Uruguay Round Agreement — consultations with congressional advisers is enlarged to all committees of the House and Senate with jurisdiction on issues involved / increase in congressional committee staff to meet increased consultation needs

A.4.3 (*cont.*)

Congressional Involvement	*Trade Act of 1974*	*OCTA of 1988*	*Trade Act of 2002*
		— special consultation requirements with Congress and advisory committees and implication of the Federal Communication Commission with respect to negotiations on telecommunication services	— special consultation procedures with the COG that follow special guidelines, that (if necessary) involve various congressional committees, that guarantee timely access to important documents and negotiators on negotiation sites, etc — special consultation and reporting requirements on agriculture and import sensitive products — special consultation requirements on textiles and on the fishing industry — special reporting requirements concerning trade remedy laws
Requirements for supporting documentation	After agreement is reached, President must submits a draft bill to Congress, details as how to implement the trade agreement, an explanation how current law is changed or affected and a statement as to how the agreement serves the interest of US commerce.	Increased requirements on supporting information to be submitted: *Status quo* of 1974 plus a statement asserting that the agreement makes progress achieving the objectives of the 1988 Trade Act and explaining why and to what extent the agreement does not achieve other applicable purposes, and others.	No significant change: *Status quo* of 1988 plus — statement as to how the promotion of certain priorities of Sec 2102 (c) will be reached.

Congressional Involvement	*Trade Act of 1974*	*OCTA of 1988*	*Trade Act of 2002*
Procedure for withdrawing fast-track procedures	No specific procedure included. Concurrent resolution of the two Houses of Congress can Only be filed after a trade agreement has been submitted to Congress.	Increased means with which Congress may refuse to extend or withdraw "fast-track" if President fails or refuses to consult with Congress: *Status quo* of 1974 plus Trade agreement regarding non-tariff trade barrier can only be entered into if progress is made on negotiation objectives. Extension disapproval resolution can be invoked if sufficient tangible progress has not been made in negotiations. Report of advisory committee is required to evaluate progress and the necessity of extension. Procedural disapproval resolution can be invoked if President has failed or refused to consult with Congress in accordance with the treaties provisions. Resolutions can only be introduced by Chairman or ranking minority member of relevant two House and one Senate Committee.	Increased means with which Congress may refuse to extend or withdraw "fast-track" if President fails or refuses to consult with Congress. Increased means with which Congress may withdraw "fast-track" if President fails or refuses to consult with Congress and if objectives are not achieved: *Status quo* of 1988 plus Extension disapproval resolution: Increased reporting requirements: In addition to Status quo requirements from Trade Act of 1988 report from International Trade Commission on newly enacted trade agreements is required for extension. Procedural disapproval resolution *Status quo* of 1988 plus but reduced barriers for the introduction of disapproval resolution: Resolutions can be introduced by any member of the House or Senate. Resolution can be introduced like before (failure to consult) but also for 1) failure to notify, 2) failure to develop or comply with consultation guidelines, 3) failure to meet with COG, 4) the agreement or agreements fail to make progress in achieving the purposes, policies, priorities, and objectives of this title. Also new: one disapproval resolution per trade agreement

A.4.3 (*cont.*)

Congressional Involvement	*Trade Act of 1974*	*OCTA of 1988*	*Trade Act of 2002*
Consultation requirements with the private sector	Establishment of the Advisory Committee for Trade Negotiations and public hearings are mandated	*Status quo* of 1974 plus more detailed rules on the advice and consultation regarding trade policy, negotiations and agreements.	No change: *Status quo* from 1988

Sources for A.4.2 and A.4.3: Own tables based on information taken from the trade treaties (Trade Act of 1974, Public Law 93/618, OTCA, Public Law 100–418, Trade Act of 2002, Public law 107–210) and all documents from Congressional Research Service (2001a–d, 2002a–d). Voting procedures (prohibition of amendments, mandatory deadlines, etc), details concerning the trade agreements authority that are not relevant to services or e-commerce, all duties vis-à-vis the International Trade Commission, details as to the implementation of trade agreements and other issues are not compared.

Relevant Provisions of the Treaties of the European Communities

A.5.1 The Evolution of the EC's Common Commercial Policy Competence in the Treaties

A.5.1.1 Article 113 (Later Article 133) TEEC (Treaty of Rome)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

   The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The relevant provisions of Article 228 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

A.5.1.2 Article 133 TEC (Amsterdam Version)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The relevant provisions of Article 300 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.
5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

A.5.1.3 Article 133 EC (Nice Version)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.
5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational

services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States.

Agreements thus negotiated shall be concluded jointly by the Community and the Member States. [. . .].

A.5.1.4 Article III–217 Constitution for Europe

Text in italics indicates departure from the last draft version before the final version submitted to the President of the European Council.

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
2. European laws or framework laws shall establish the measures required to implement the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated and concluded, the relevant provisions of Article III–227 shall apply. The Commission shall make recommendations to the Council of Ministers, which shall authorise the Commission to open the necessary negotiations. The Council of Ministers and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

   [. . .]

4. For the negotiation and conclusion of agreements in the fields of trade in services involving the movement of persons and the commercial aspects of intellectual property, the Council of Ministers shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

   The Council shall also act unanimously for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services, where these risk prejudicing the Union's cultural and linguistic diversity.

   [. . .]

5. The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of internal competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonisation.

   [. . .]

A.5.2 Culture in the Treaties Of The European Communities

Treaty of the EC (Nice Version)	*Draft Treaty establishing Constitution for Europe*
Art 87, Aids granted by Member States **3. The following may be considered to be compatible with the common market:** (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest	**Art III-56, Aids granted by Member States** 3. The following may be considered to be compatible with the internal market: (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest
Art 151, Culture 1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: — improvement of the knowledge and dissemination of the culture and history of the European peoples; — conservation and safeguarding of cultural heritage of European significance; — non-commercial cultural exchanges; — artistic and literary creation, incl in the audiovisual sector. 3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe. 4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.	**Art III-181, Culture** 1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and complementing their action in the following areas: (a) improvement of the knowledge and dissemination of the culture and history of the European peoples; (b) conservation and safeguarding of cultural heritage of European significance; (c) non-commercial cultural exchanges; (d) artistic and literary creation, incl in the audiovisual sector. 3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe. 4. The Union shall take cultural aspects into account in its action under other provisions of the Constitution, in particular in order to respect and to promote the diversity of its cultures.

Treaty of the EC (Nice Version)	*Draft Treaty establishing Constitution for Europe*
5. In order to contribute to the achievement of the objectives referred to in this Article, the Council: — acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251, — acting unanimously on a proposal from the Commission, shall adopt recommendations.	5. In order to contribute to the achievement of the objectives referred to in this Article: (a) European laws or framework laws shall establish incentive actions, excluding any harmonisation of the laws and regulations of the Member States. They shall be adopted after consultation of the Committee of the Regions; (b) the Council of Ministers, on a proposal from the Commission, shall adopt recommendations.

A.5.3 Acronyms Used for Treaties of the EC/the EU

In chronological order:

TEEC Treaty of the European Economic Community (Treaty of Rome), Example: Article 133 (ex-Article 113), paragraph 5 TEEC

TEU Treaty on the European Union (Treaty of Maastricht), Example: Article 87, paragraph 5 TEU

TEC Treaty of the Economic Community (version after the Treaty of Amsterdam which renumbers the articles of the Treaty establishing the European Community and the articles of the Treaty on the European Union), Example: Article 133, paragraph 5 TEC

EC Treaty of the Economic Community (version after the Treaty of Nice), Example: Article 133, paragraph 5 EC

CE Treaty establishing a Constitution for Europe (Constitution for Europe), Example: I-Article 133, paragraph 5 CE

The citation of articles of the Treaties follows the official note of citation of the European Court of Justice formulated in ECJ (1999) adapting it to the situation after the Treaty of Nice.

Where reference is made to an article of a Treaty as it stands after the Treaty of Nice, the number of the article is immediately followed by two letters EC, indicating the current version of the EC Treaty (Nice Version).

Where reference is made to an article of a Treaty as it stood before the Treaty of Nice, the number of the article is followed by abbreviations for the words 'of the Treaty on European Union (TEU)', 'of the EC (or EEC) Treaty (TEC)'. Thus,

Article 85 TEC refers to Article 85 of the Amsterdam version of the Treaty of the EC, Article 113 TEEC refers to Article 113 of the EC Treaty as in the Treaty of Rome and Article 87 TEU refers to Article 87 as in the Treaty of Maastricht.

Where reference is made to an article of the Treaty of Rome or the Treaty of Maastricht which have since been renumbered by the Treaty of Amsterdam, the article numbering as provided by the Treaty of Nice (equivalent numbering to Treaty of Amsterdam) is used and then followed by text in brackets indicating the previous numbering (for example: ex-Article 113).

Where reference is made to an article of the Constitution for Europe, the number of the article is followed by its abbreviation CE.

A.6.1 GATS Negotiation Proposals

A.6.1.1 Computer and Related Services

Five members have filed submissions dedicated to computer and related services as part of the Doha negotiations:

CTS—Special Session, Communication from Canada, Initial Negotiating Proposal on Computer and Related Services, S/CSS/W/56 (14 March 2001);
CTS—Special Session, Communication from MERCOSUR, Computer and Related Services, S/CSS/W/95 (9 July 2001);
CTS—Special Session, Communication from Costa Rica, Computer and Related Services, S/CSS/W/129 (30 November 2001);
CTS—Special Session, Communication from India, Negotiating Proposal on Computer and Related Services, S/CSS/W/141 (22 March 2002);
CTS—Special Session, Communication from the EC and Their Member States, GATS 2000: Computer and Related Services (CPC 84)—Addendum, S/CSS/W/34/Add.1 (15 July 2002).
Other Members have included computer and related services in general services submissions. See eg,
CTS—Special Session, Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42 (22 December 2000), paragraphs 30–31;
CTS—Special Session, Communication from Norway, The Negotiations on Trade in Services, S/CSS/W/59 (21 March 2001), paragraphs 17–21; and
CTS—Special Session, Communication from Colombia, Proposal for the Negotiations on the Provisions of Services Through Movement of Natural Persons, S/CSS/W/97 (9 July 2001), paragraph 6.
Two Members have filed submissions in the GATS Council Committee on Specific Commitments
CTS—Committee on Specific Commitments, Communication from the EC and their Member States, Computer and Related Services, S/CSC/W/35 (24 October 2002), and
CTS—Committee on Specific Commitments, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Computer and Related Services, S/CSC/W/37 (8 January 2003).

Others have filed submissions as part of the GATS Council's 'Information Exchange Programme' related to the Council's assessment of trade in services. See:

CTS, Communication from the United States, Computer and Related Services, S/C/W/81 (9 December 1998).

The United Sates also addresses computer and related services in its negotiating submission on telecommunications:

CTS—-Special Session, Communication from the United States, Market Access in Telecommunications and Complementary Services: Market Access in Telecommunications and Complementary Services: The WTO's Role in Accelerating the Development of a Globally Networked Economy, S/CSS/W/30 (18 December 2000).

A.6.1.2 Telecommunication Services

Since 2000, nine WTO Members have made specific submissions regarding further liberalisation of telecommunications services.

CTS, Communication from Cuba, Negotiating Proposal on Telecommunications Services, TN/S/W/2 (30 May 2002);

CTS—Special Session, Communication from Colombia, Telecommunications Services, S/CSS/W/119 (27 November 2001);

CTS—Special Session, Communication from Mexico, Telecommunications Services, S/CSS/W/101 (10 July 2001);

CTS—Special Session, Communication from Korea, Negotiating Proposal for Telecommunication Services, S/CSS/W/83 (11 May 2001);

CTS—Special Session, Communication from Switzerland, GATS 2000: Telecommunications, S/CSS/W/72 (4 May 2001);

CTS—Special Session, Communication from Canada, Initial Negotiating Proposal on Telecommunication Services, S/CSS/W/53 (14 March 2001);

CTS—Special Session, Communication from the EC and their Member States, GATS 2000: Telecommunications Services, S/CSS/W/35 (22 December 2000);

CTS—Special Session, Communication from the United States, Market Access in Telecommunications and Complementary Services: The WTO's Role in Accelerating the Development of a Globally Networked Economy, S/CSS/W/30 (18 December 2000);

CTS—Special Session, Communication from Australia, Negotiating Proposal on Telecommunication Services, S/CSS/W/17 (5 December 2000).

Three additional Members address the liberalisation of telecommunications services in their general GATS submissions.

CTS—Special Session, Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42 (22 December 2000);

CTS—Special Session, Communication from Chile, The Negotiations on Trade in Services, S/CSS/W/88 (14 May 2001);

CTS—Special Session, Communication from Norway, The Negotiations on Trade in Services, S/CSS/W/59 (21 March 2001).

A.6.1.3 Audiovisual Services

— CTS, Communication from the United States—Audiovisual and Related Services, S/C/W/78 (8 December 1998);
— CTS—Special Session—Communication from the United States—Audiovisual and Related Services, S/CSS/W/21 (18 December 2000);
— CTS—Special Session—Communication from Switzerland—GATS 2000: Audiovisual Services, S/CSS/W/74 (4 May 2001); and
— CTS—Special Session—Communication from Brazil—Audiovisual Services, S/CSS/W/99 (9 July 2001)

Japan addresses the liberalisation of audiovisual services in its general GATS submission

— CTS, Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42 (22 December 2000); see also Japanese Ministry of Foreign Affairs (2002).

A.6.1.4 Entertainment Services

No submissions.

A.7.1 US Free Trade Agreements On Digitally-Delivered Content Products

Issue	*Chile*	*Singapore*	*Australia*
Applicability of WTO Rules	No reference	**Art 14.1: General** The Parties recognize [. . .] the applicability of WTO rules to electronic commerce.	**Art 16.1: General** The Parties recognize [. . .] the applicability of the WTO Agreement to measures affecting electronic commerce.
Duties	**Art 15.3: Customs duties on digital products** Neither Party may apply customs duties on digital products of the other Party. **Art 15.1: General Provisions** 2. Nothing in this Chapter shall be construed to prevent a Party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with this Agreement.	**Art 14.3: Digital products** 1. A Party shall not apply customs duties or other duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic transmission.[14-1] *14-1 Paragraph 1 of this Article does not preclude a Party from imposing internal taxes or other internal charges provided that these are imposed in a manner consistent with this Agreement.*	**Art 16.3: Customs duties** A Party shall not impose customs duties or other duties, fees or charges[16-1] on or in connection with the importation or exportation of digital products, regardless of whether they are fixed on a carrier medium or transmitted electronically. *16-1Article 16.3 does not preclude a Party from imposing internal taxes or other internal charges on digital products, provided that such taxes or charges are imposed in a manner consistent with this Agreement.* **Article 14.1: General** 2. Nothing in this Chapter shall be construed to prevent a Party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with this Agreement.

A.7.1 (*cont.*)

Issue	*Chile*	*Singapore*	*Australia*
Valuation	In Chapter Three: National Treatment and Market Access for Goods, Art 3.5 1. For purposes of determining the customs value of carrier media bearing content, each Party shall base its determination on the cost or value of the carrier media alone.	2. Each Party shall determine the customs value of an imported carrier medium bearing a digital product according to the cost or value of the carrier medium alone, without regard to the cost or value of the digital product stored on the carrier medium.	Not applicable as duties on any digital products are prohibited by the moratorium.
Electronic supply of services	**Art 15.2: Electronic supply of services** The Parties recognize that the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of Chapter Eleven (Cross- Border Trade in Services) and Chapter Twelve (Financial Services), subject to any nonconforming measures or exceptions applicable to such obligations.[1] [1] *For greater certainty, nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services except in accordance with the provisions of Chapter Eleven (Cross-Border Trade in Services) or Chapter Twelve (Financial Services), including their Annexes (Non-Conforming Measures).*	**Art 14.2: Electronic supply of services** For greater certainty, the Parties affirm that measures related to the supply of a service using electronic means falls within the scope of the obligations contained in the relevant provisions of Chapters 8 (Cross-Border Trade in Services), 10 (Financial Services), and 15 (Investment), subject to any exceptions applicable to such obligations and except where an obligation does not apply to any such measure pursuant to Articles 8.7 (Non-Conforming Measures), 10.9 (Non-Conforming Measures), or 15.12 (Non-Conforming Measures).	**Art 16.2: Electronic supply of services** For greater certainty, the Parties affirm that measures related to the supply of a service employing computer processing fall within the scope of the obligations contained in the relevant provisions of Chapters Ten (Cross-Border Trade in Services), Eleven (Investment), and Thirteen (Financial Services), subject to any exceptions applicable to such obligations and to the nonconforming measures described in Articles 10.6 (Non-Conforming Measures), 11.13 (Non-Conforming Measures) or 13.9 (Non-Conforming Measures).

Issue	*Chile*	*Singapore*	*Australia*
Non-discrimination for digital products	**Art 15.4: Non-discrimination for digital products** 1. A Party shall not accord less favorable treatment to a digital product than it accords to other like digital products, on the basis that: (a) the digital product receiving less favorable treatment is created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party; or (b) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party.[2] [2] For greater certainty, if one or more of the criteria of paragraph 1(a) or (b) is satisfied, the obligation to accord no less favorable treatment to that digital product applies even if one or more of the activities listed in paragraph 1(a) occurs outside of the territory of the other Party, or one or more persons listed in paragraph 1(b) are persons of the other Party or a non-Party.	**Art 14.3: Digital products** 3. A Party shall not accord less favorable treatment to some digital products than it accords to other like digital products: (a) on the basis that (i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, outside its territory; or (ii) the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party, or (b) so as otherwise to afford protection to the other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, in its territory.	**Art 16.4: Non-discriminatory treatment for digital products** 1. A Party shall not accord less favourable treatment to some digital products than it accords to other like digital products: (a) on the basis that the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside its territory; (b) on the basis that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party; or (c) so as to otherwise afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned or first made available on commercial terms in its territory. 2. A Party shall not accord less favourable treatment to digital products[16-2]

A.7.1 (*cont.*)

Issue	*Chile*	*Singapore*	*Australia*
	2. (a) A Party shall not accord less favorable treatment to a digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to a like digital product created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party. (b) A Party shall not accord less favorable treatment to digital products whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.	4. (a) A Party shall not accord less favorable treatment to digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms, in the territory of a non-Party. (b) A Party shall not accord less favorable treatment to digital products whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party.	(a) created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party than it accords to like digital products created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of a non-Party, or (b) whose author, performer, producer, developer, or distributor is a person of the other Party than it accords to like digital products whose author, performer, producer, developer, or distributor is a person of a non-Party. [16-2] *Nothing in this Article shall be construed as affecting the application of Article 4 of the TRIPS Agreement.*

Exemptions	3. A Party may maintain an existing measure that does not conform with paragraph 1 or 2 for one year after the date of entry into force of this Agreement. A Party may maintain the measure thereafter, if the treatment the Party accords under the measure is no less favorable than the treatment the Party accorded under the measure on the date of entry into force of this Agreement, and the Party has set out the measure in its Schedule to Annex 15.4. A Party may amend such a measure only to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with paragraphs 1 and 2. *1 For greater certainty, nothing in this Chapter imposes obligations to allow the electronic supply of a service nor the electronic transmission of content associated with those services except in accordance with the provisions of Chapter Eleven (Cross-Border Trade in Services) or Chapter Twelve (Financial Services), including their Annexes (Non-Conforming Measures).*	5. Paragraphs 3 and 4 do not apply to any non-conforming measure described in Article 8.7 (Non-Conforming Measures), 10.9 (Non-Conforming Measures), or 15.12 (Non-Conforming Measures). 6. This Article does not apply to measures affecting the electronic transmission of a series of text, video, images, sound recordings, and other products scheduled by a content provider for aural and / or visual reception, and for which the content consumer has no choice over the scheduling of the series.	3. Paragraphs 1 and 2 do not apply to: (a) non-conforming measures adopted or maintained in accordance with Article 10.6 , Article 11.13, and Article 13.9; (b) the extent that they are inconsistent with the provisions of Chapter Seventeen (Intellectual Property Rights), in which case the provisions of Chapter Seventeen shall prevail; (c) subsidies or grants provided to a service or service supplier by a Party, including government-supported loans, guarantees, and insurance; and (d) services supplied in the exercise of governmental authority within the territory of each respective Party. 4. For greater certainty, paragraphs 1 and 2 do not prevent a Party from adopting or maintaining measures in the audio-visual and broadcasting sectors, in accordance with its reservations to Chapters Ten and Eleven.

A.7.1 (*cont.*)

Issue	*Chile*	*Singapore*	*Australia*
	Art 15.1: General Provisions 3. This Chapter is subject to any other relevant provisions, exceptions, or non-conforming measures set forth in other Chapters or Annexes of this Agreement.		**Article 14.1: General** 3. This Chapter is subject to any relevant provisions, exceptions, or non-conforming measures set forth in other Chapters or Annexes of this Agreement.
Digital product definition	**Art 15.6: Definitions** **digital products** means computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a Party treats such products as a good or a service under its domestic law;[3] [3] For greater certainty, digital products do not include digitized representations of financial instruments, including money. The definition of digital products is without prejudice to the ongoing WTO discussions on whether trade in digital products transmitted electronically is a good or a service. **electronic means** means employing computer processing; and	**Art 14.4: Definitions** 1. **carrier medium** means any physical object capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape; 2. **digital products** means computer programs, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically;[14-3] [14-3] For greater clarity, digital products do not include digitized representations of financial instruments.	**Art 16.8: Definitions** For the purposes of this Chapter: 1. **carrier medium** means any physical object capable of storing a digital product, by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes optical medium, floppy disk, and magnetic tape; 2. **digital products** means the digitized form, or encoding of, computer programs, text, video, images, sound recordings, and other products,[16-4] regardless of whether they are fixed on a carrier medium or transmitted electronically;[16-5] 3. **electronic transmission** or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means;

Issue	*Chile*	*Singapore*	*Australia*
	electronic transmission or transmitted electronically means the transfer of digital products using any electromagnetic or photonic means.	3. **electronic transmission** or **transmitted electronically** means the transfer of digital products using any electromagnetic or photonic means; and 4. **using electronic means** means employing computer processing.	4. **trade administration documents** means forms issued or controlled by a Party which must be completed by or for an importer or exporter in relation to the import or export of goods. [16-4] *For greater certainty, digital products can be a component of a good, be used in the supply of a service, or exist separately, but do not include digitized representations of financial instruments that are settled or transmitted through a central bank-sponsored payment or settlement system.* [16-5] *The definition of digital products is without prejudice to the on-going discussions at the WTO on whether trade in digital products transmitted electronically is trade in goods or trade in services.*

Source: US-Chile FTA Chapter 15; US-Singapore FTA Chapter 14 and US-Australia FTA Chapter 16. All agreements can be downloaded on the USTR webpage under Internet: www.ustr.gov (20 May 2004).

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Index

Advisory Commission on Electronic Commerce 111–112
Amsterdam Treaty
  EC negotiation parameters 129–164
Audiovisual service classifications
  inadequacy of 73–75

Broadband
  digitally-delivered content products 4–5

Cancun Ministerial Conference
  assessment of situation after. *see* Doha Development Agenda
  preparations for 23–24
Carrier medium
  value of 43–44
    software for data processing equipment, bearing 240–242
Central Product Classification 1.1, Version 2002, 237–239
Chile
  US-Chile FTAs 202–219
Classification, unresolved questions 48–79
  alternatives 79
  arguments in favour of classification as TRIPS 60–61
  arguments in favour of GATT-like treatment 52–56
    consumption patterns 56
    EC view 56–57
    financial assistance by governments 55
    GATS compared 52–54
    GATS more liberal than GATT in long run 59
    GATT tariff schedules 54
    legal certainty increased via across-the-board GATS classification 59–60
    national treatment obligations 52
    neither GATT nor ITA liberalise trade in digitally-delivered content products 57–58
    no rule guaranteeing technological neutrality exists between GATT and GATS 58
    physical conditions of digitally-delivered content products point to GATS 60
    physical patterns 56
    quantitative restrictions 52–54
    regulatory disciplines 54
    safeguarding technological neutrality of WTO Agreements 55–56
    software covered by ITA 57–58
    trade more liberal under GATT 52–55
  arguments in favour of treatment under GATS 56–60
  categorisation of content 49–51
  GATS, and 50
    application of existing commitments to digitally-delivered content products 63
    audiovisual classification, problems with 74
    bilateral request-offer process 69
    classification probabilities 71
    distinguishing Mode 1 from Mode 2, 65–70
    electronic cross-border delivery covered by GATS Mode 1 or 2, whether 65–70
    electronic services 'like' non-electronic ones, whether 64–65
    existing services sectoral classification list and its inadequacies 70–75
    Internet service category 74
    leisure software 74
    'likeness', meaning 64
    modal classification and implications on degree of liberalisation 67
    modal classification and other legal implications 68
    no improvement forthcoming from newer nomenclatures 76
    'on-line information provision services' 77
    problems with CPC 1.1: computer and related services 76
    problems with CPC 1.1: intangible assets 78
    problems with CPC 1.1: telecommunications services 77–78
    problems with W120: content vs conduit 72–73
    problems with W120: inadequacy of audiovisual service classifications 73–75
    problems with W120: "regulatory creep" 75
    problems with W120: value-added telecommunications vs computer services 73
    'program distribution services' 77

Classification, unresolved questions
GATS (*cont.*):
service trade commitments which apply 62–79
solicitation, meaning 66
specific commitments which apply 70–79
suggested solutions for Doha negotiations 78
unsatisfactory solutions to model classification debate in WTO Work Programme 69–70
GATT, and 50
'good', meaning 49
hybrid solution: GATS classification with GATT treatment 61–62
industry classifications, and 49–50
market access negotiations, and 48
politically-contentious market access situation, and 51
product classifications, and 49–50
'service', meaning 49
software, and 50–51
Commodity description
harmonised 26
Comparison of negotiation objectives
OCTA 1988, 243–248
Trade Act 1974 243–248
Trade Act 2000 243–248
Computer and related services
problems with CPC 1.1, and 76
Cultural goods and services 197–198
Customs valuation of digital content 43–48
consensus on 44
Decision on Valuation 43–44, 45–48
direct effect 45
indirect effect 45
WTO duty-free moratorium, and 47
electronically-traded software as good or service 46–47
GATS, and 48
GATT, and 44, 48
software 43
value of carrier medium 43–44

Decision on valuation of carrier media bearing software for data processing equipment 240–242
Digital trade achievements of parallel US trade negotiations 201–228
assessment 219–227
CAFTA, and 224
costs of trade diversion through US bilateral FTAs 222–223
erga omnes effect 223
FTAA negotiations, and 224–225
further bilateral or regional digital trade ambitions of US 224–226
imperfections of US liberalisation template 201–202
mixed results 201–228
nature of objectives pursued by US 222
noteworthy achievements 227
regional or global consensus, and 224–227
results of US liberalisation template 219–220
US digital trade template
stumbling block for WTO, whether 221–224
US-Chile and US-Singapore FTAs 202–219
assessment 205
audiovisual and cultural services 215–219
audiovisual service commitments tailored to digitally-delivered content products 219
breaking new ground 202–219
classification decision 208–209
computer, value-added telecommunication and entertainment services 214–215
cross-border trade in services chapters 213–219
customs valuation based on value vs cost of carrier media 208
effect 202–203
essential free trade principles of e-commerce Chapters 209–211
establishment of clear and applicable duty-free moratorium 207–208
formulation of relevant digital trade definitions 206
liberalisation due to negative list approach but remaining audiovisual limitations 213–219
limitations in e-commerce Chapters 212–213
limited achievements as regards relevant audiovisual service commitments 217–219
MFN treatment for digital content procedure 210
non-discriminatory treatment obligation for digital content products 209–210
pertinent audiovisual service commitments 215–217
recognition of applicability of trade rules to electronically-delivered services 207
recognition of applicability of WTO rules to e-commerce 206–207
regional dimension 203–204
successful conclusion of e-commerce Chapters 204–213
unresolved horizontal e-commerce questions 206–209
whether US liberalisation template will resonate in WTO 226–227
Digitally-delivered content products
broadband, and 4–5
classification of
TRIPS, under 61
contribution of research 11–12

definition 2–3
Doha Round, and 10–11
drivers to 3–5
examples 3
growing trade in 2–7
internal US and EC negotiation parameters 9–10
new business activity 5
obstacles to 3–5
requirements in WTO for free trade in 8–9
research approach 8–11
research context 12
research question 7–8
services relevant to 30–31
WTO negotiation context 8
WTO, role of 6–7
Doha Development Agenda 24–31, 167–200
assessment of situation after Cancun Ministerial Conference 170–174
classification impasse 174
no affirmation of applicability of WTO Rules to e-commerce 171
no decision on valuation of digital content products 172
no progress on classification issues 172–174
no prolongation or clarification of duty-free moratorium on electronic transmissions 171–172
WTO e-commerce Work Programme continues with uncertainty 170–171
assessment of work leading to Cancun Ministerial Conference 169–170
adoption of minimalist stance 169–170
digital trade achievements 167–200
essential market access 176–194
ambitious negotiation proposals 181–182
failure to agree on draft modalities before Cancun Ministerial 178–179
few results through initial GATS offers 183–184
ITA 177–180
little progress on rule-making 183–184
NAMA 177–180
no agreement on NAMA negotiation modalities 179–180
sector-specific assessment of potential liberalisation through initial offers 184–194
service negotiations 180–194
slow progress of Doha negotiations 176–194
focus on procedural issues 168
GATS Services Sectoral Classification List (W120) 29–30
implications of WTO rulings concerning GATS
US Internet Gambling case 174–175
initially planned deadline for completion of negotiations 29
Market Access Negotiations for Non-agricultural Products 25
Non-Agricultural Market Access Negotiations (NAMA) 26–27
relevance to digitally-delivered content products 25
requirements for audiovisual service liberalisation 97
scope 24
sector-specific assessment of potential liberalisation 184–194
audiovisual services 190–194
computer and related services 185–188
entertainment services 194
value added telecommunication services 188–190
services relevant to digitally-delivered content products 30–31
trade in services negotiations 27–31
UNESCO Convention on Cultural Diversity, and 195–199
unresolved horizontal e-commerce questions 168–175
Doha Ministerial Declaration
e-commerce, on 21
Doha Round
digital trade achievements 10–11

E-commerce
meaning 2
EC negotiation parameters 9–10, 129–164
Amsterdam Treaty 151–153
common commercial policy powers relating to digital content 145–163
creation of new content measures 133–143
cultural and audiovisual service carve-out from commercial policy 147–163
cultural and audiovisual service carve-out in negotiation mandate for Doha Round 146–147
digital content as driver of growth and challenge to cultural diversity 141–142
e-content as major policy focus 141–143
EC/EU treaties, and 130
eContent programme 142–143
eEurope initiative 141–142
evolution of trade policy jurisdiction 148
evolving mandate of EC as regards culture and content 131–133
cultural diversity 132–133
expanded 132–133
limited mandate 131
evolving scope of content policies 133–143
expanding audiovisual and information society policies 130–145
external dimension 145–163
first ‘safety lock’ 146–147

EC negotiation parameters (*cont.*):
fundamentals of common commercial policy 148–150
absence of carve-out for audiovisual policies 159–160
maintaining special rules for audiovisual services 158–163
right to conclude international trade agreements 148–149
incisive 1994 WTO Opinion of European Court of Justice 150–151
internal dimension 130–145
internal measures 129–164
link between evolving content and information society policies and EC's negotiation flexibility in WTO 143–145
long-established EC audiovisual support measures 133–135
missed opportunities to restore EC's ability to conclude modern trade agreements 151–153
new audiovisual and information society policies for digital age 135–141
EC Broadcasting Directive 136–140
financial support measures: updates to reflect digital age 140–141
regulatory uncertainty as regards digital content 136–140
renewal of traditional policies 136–141
results of TVWF review 137–138
securing and adapting the 'acquis' 135–143
uncertain regulatory approach 138–140
new information society policies 141–143
objectives 130
rationale 129
supporting European digital content 142–143
trade jurisdiction 129–164
Treaty Establishing Constitution for Europe 158–163
assessment of potentially forthcoming common commercial policy of EC 161–163
complete trade policy powers for EC 158–160
substantive provisions 160–161
Treaty of Nice 153–158
assessment of common commercial powers after 155–158
cultural exemption 156
expectations concerning 153–154
formalisation of audiovisual carve-out 153–158
GATS Mode 1 commitments, and 157–158
issues concerning 153–154
resulting substantive provision 154–155
shared competences 157
update of traditional content measures 133–143
varying distribution of EC trade policy powers 152
EC Treaties
acronyms used for 253
culture in 252
relevant provisions 249–251
eEurope initiative 141–142
Electronic trade in digital content
importance of 1
Entertainment services
GATS negotiations, and 98
Erga omnes effect 223
Essential improvements of WTO trade commitments 81–100
scope for interpretation 98–99
summary of requirements for free trade in digitally-delivered content products 99–100

GATS
customs valuation of digital content, and 48
digitally-delivered content products
physical conditions of 60
market access commitments 234
Mode 1 cross-border supply 28
Mode 2 consumption abroad 28
national treatment commitments 234–235
negotiation proposals 254–256
negotiations
services. *see* Services: GATS negotiations
Service Sectoral Classification List (W120) 29–30
services classification list
provisional CPC, and 235–237
GATT
customs valuation of digital content, and 44, 48
GATS, and
technological neutrality, existence of 58
tariff schedules 26
trade liberalisation
digitally-delivered content products, and 57–58
Goods: NAMA negotiations and ITA 81–83

Harmonised Commodity Description and Coding System 26
Hong Kong
Sixth Ministerial 231
HS Codes for physical carrier media 233

Identified negotiation objectives
failure to meet 229
Information Technology Agreement 81–83
accession to 81
expanding participation 82–83
NAMA negotiations, and 83
participants 82

Intangible assets
problems with CPC1.1, and 78
Intellectual property rights
Council for Trade-Related Aspects of 17
Internal negotiation parameters
compromise, and 230
Internet Gambling Case
implications of WTO rulings concerning 174–175
Internet service category 74
ITA
liberalisation of trade
digitally-delivered content products, and 57–58
software covered by 57–58

Legislation
US
fast-track 112–113
new policies for digital age 109–112
Leisure software
GATS, and 74
Likeness
meaning 64

MFN exemptions
temporary
GATS negotiations, and 96
Ministerial Declaration on Trade in Information Technology 27
Modal classification
implications on degree of liberalisation, and 67
legal implications 68

Non-agricultural Market Access Negotiations (NAMA) 26–27
GATT framework, and 26
negotiation modalities, and 27
no agreement on 179–180
negotiations
ITA, and
scope 26

'On line information provision services'
GATS, and 77

Program distribution services 77

Regulatory creep
problems with W120, and 75

Seattle Ministerial Conference 18, 19–22
Service
meaning 49
Services: GATS negotiations 84–98
additional specific commitments 84
audiovisual services 92–98
commercial nature of 93
cultural and social dimension 93
Doha Round 97–98
EC view 93
effect on Uruguay Round negotiations 94–97
'exception culturelle' 94
general GATS obligations, and 95–96
opposed views on liberalisation 92–94
policies based on two pillars 93–94
specific GATS commitments 96–97
'specificite culturelle' 95
temporary MFN exemptions 96
US view 93
computer and related services 90–91
clarification 91
relatively high number of commitments 90–91
divergent levels of commitment 85
entertainment services 98
GATS Mode 1 commitments of selected WTO Members 2005, 86
inventory of GATS commitment levels under Mode 1/2 for 146 WTO Members and pertinent service sectors 2003, 88–89
limited cross-border liberalisation 85
national treatment commitments 84
stock-taking of GATS commitments for cross-border delivery of services 84–90
value-added telecommunications services 91–92
scope for further commitments 91–92
Services relevant to digitally-delivered content products 30–31
Singapore
US-Singapore FTAs 202–219
Software
classification, and 50–51
customs valuation of digital content, and 43
data processing equipment, for
valuation of carrier media bearing 240–242
electronically traded
good or service, as 46–47
leisure. *see* Leisure software
Solicitation
meaning 66

Telecommunications services
problems with CPC 1.1, and 77–78
Trade agreements
EC's ability to conclude 151–153
Treaty Establishing Constitution for Europe. *see* EC negotiation parameters
TRIPS
classification of digitally-delivered content products under 61

UNESCO Convention on Cultural Diversity 195–199
'cultural goods and services' 197–198
objective 195–196
possible implications on specified WTO negotiation requirements for digital trade 197–199
'protection' 198
scope 195–196
United States
bilateral FTAs
costs of trade diversion through 222–223
Free Trade Agreements on digitally-delivered content products 257–263
negotiation parameters. *see* US negotiation parameters
trade negotiations
digital trade achievements of. *see* Digital trade achievements of parallel US trade negotiations
Unresolved horizontal WTO e-commerce questions 35–79
US-EC disagreement 35–37
classification issue 36
GATS 36
moratorium 36
valuation decision 36
US Free Trade Agreements on digitally-delivered content products 257–263
US negotiation parameters 103–127
campaign donations of US content industries 107
'competitive liberalisation' of trade in digital content 125–127
digital trade mandate 103
export-oriented US content industry 104–107
political clout 105–107
external dimension 112–127
freedom of speech 104–112
hands-off approach 103
internal dimension 104–112
internal measures 103–127
laissez-faire approach 104–112
multi-track strategy as regards goods and services market access negotiations 120–123
audiovisual services: tailored approach to new delivery technologies 121–123
computer and telecommunications services call for full liberalisation 121
new US policies for digital age 107–112
Advisory Commission on Electronic Commerce 111–112
corresponding US legislative efforts 109–112
Framework for Global Electronic Commerce 110–111
free global e-commerce 109–112
new influential US industry coalition 108–109
non-interventionist approach 104–105
quasi-inexistence of US audiovisual policy 104–107
specific procedural negotiation requirements 123–125
Advisory Committee system 124–125
Congressional Oversight Group 123
status of US preferential trade agreements 126
Trade Act of 2002, 115–125
Congressional mandate for digital trade agenda 118–123
content-related requirements 118–123
mandate for free trade in digital content 117–125
special mandate on e-commerce and digitally-delivered content products 118–120
specific US digital trade policy objectives 119
trade jurisdiction 103–127
trade policy jurisdiction 112–127
Congress, and 113
delegation of trade negotiation authority 114
fast-track bills 114
fast-track legislation 112–113
fast-track negotiation authority 113–114
fundamentals 113–115
Trade Act of 2002, 115–125
trade policy objective 103

WTO
agreements
technological neutrality of 55–56
free trade requirements 8–9
negotiation context
digitally-delivered content products, and 8
requirements for free-trade in digitally-delivered content products 8–9
role in digital trade 6–7
rulings in Internet Gambling Case 174–175
trade commitments
essential improvements of. *see* Essential improvements of WTO trade commitments
unresolved horizontal e-commerce questions. *see* Unresolved horizontal WTO e-commerce questions
Work Programme
solutions to model classification debate in 69–70
work relating to digitally-delivered content products 15–32
WTO Duty-free Moratorium on Electronic Transmissions 37–43
'current practice' 39

EC, and 38
'electronic transmissions' 38–39
imperfections 38–41
inconsistency with principle of technological neutrality 39
lack of permanence 41
political commitment, as 38
political signal, as 42–43
possible digital trade barriers, and 40
taxation of electronic transactions, and 40–41
temporary nature of 41–42
US, and 38
Valuation Decision, and 47
WTO negotiation context 8
WTO Work Programme on Electronic Commerce 15, 16–24
agreements found in 21
Council for Trade in Goods 21
Council for Trade in Services 21
background papers 16–17
Committee on Trade and Development 17
council responsibilities 17
Council for Trade in Goods 17
Council for Trade in Services 17
Council for Trade-Related Aspects of Intellectual Property Rights 17
cross-sectoral issues 22–23
December 2000 General Council meeting 19
dedicated discussions on horizontal e-commerce 22–23
framework 16
Geneva Ministerial Conference 16–18
institutional arrangements 22
Phase Four: preparations for Cancun Ministerial Conference and General Council Decision of July 2004, 23–24
Phase Three: Doha Ministerial Conference-preparations for Cancun Ministerial Conference 22–23
Phase Two: Seattle Ministerial Conference-Doha Ministerial Conference 19–22
plan to revive 20
preparations for Cancun Ministerial Conference 23–24
Seattle Ministerial Conference 18