

Classification of E-products Under the WTO System

by

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For Eric, with love and thanks, for making this endeavor possible, even when it seemed impossible.

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Abstract

The WTO Work Programme on Electronic Commerce was established to deal with the implications of E-commerce in trade in the context of the WTO Agreements. One outstanding issue within the Work Programme is the disagreement among members regarding the classification of electronically delivered products (E-products). **Are they goods subject to GATT or services subject to GATS?** This has significant consequences because trade liberalization in GATT and GATS works differently and the relatively free trade E-products currently enjoy could be affected depending on whether they are classified as goods or services. However, a negotiated solution among WTO members that acknowledges that these are complex products that share characteristics of both goods and services could resolve the disagreement on classification. Furthermore, a service classification consensus, provided the current trade liberalization is maintained, would be the most suitable option to ensure that trade barriers do not compromise trade in E-products.

List of Abbreviations Used

AB	Appellate Body of the WTO Dispute Settlement Body
CPC	Central Product Classification
DSB	WTO's Dispute Settlement Body
EC	European Communities
ECIPE	European Centre for International Political Economy
E-Commerce	Electronic Commerce
EU	European Union
FAITC	Foreign Affairs and International Trade Canada
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade, 1994
GATT 1947	General Agreement on Tariffs and Trade, 1947
HS	Harmonized System Classification
IP	Internet Protocol
IT	Information Technology
ITA	Information Technology Agreement
OECD	Organization for Economic Co-operation and Development
OUSTR	Office of the United States Trade Representative
Panel	Panel of the WTO Dispute Settlement Body
TCP/IP	Transmission Control Protocol/Internet Protocol
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL	UN Commission on Trade and Development
US	United States of America
WCO	World Customs Organization
WTO	World Trade Organization
WWW	World Wide Web
W/120	Services Sectoral Classification List

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Chapter 1

Introduction

Electronic Commerce (“**E-Commerce**”) is commerce conducted over the Internet and other computer networks.¹ The rapid growth of E-Commerce over the last 20 years is a well-known fact. The growth of E-Commerce has been accompanied by the increasing trade in electronic products (“**E-products**”), that is, products with electronically delivered content such as software, video games, books, music, etc. that were previously delivered by physical means.² Because of the global and “borderless” nature of the Internet trade in E-products, it is frequently conducted across national boundaries. In such circumstances, E-products are properly subject to the World Trade Organization (“**WTO**”) regulations for international trade.

Exactly how international trade in E-products is to be regulated by the WTO is a subject of much discussion to which this thesis hopes to provide some insight. Specifically, this thesis examines the ongoing and unresolved debate about whether E-products are properly “goods” subject to the General Agreement on Tariffs and Trade (“**GATT**”) as suggested by some members including the US; or “services” subject to the General Agreement on Trade in Services (“**GATS**”) as suggested by many other members, including the EU. The distinction is significant because the trade regulation under GATT and GATS is approached differently and most often trade under GATS is more restrictive than under GATT. The objective of this thesis is to analyze the nature of E-products with a view to answering the above classification dilemma within the WTO system and to propose a mechanism to ensure that trade in E-products is not hampered by new trade barriers.

Chapter 1 examines the definition of E-products. **Chapters 2 and 3** review the technological and structural aspects of trade in E-products, since it is ultimately

¹ *The Merriam-Webster Online Dictionary*, sub verbo “E-commerce”, online: Merriam-Webster <<http://www.merriam-webster.com/dictionary/E-commerce>>.

² See generally, Stewart A. Baker et al, “E-products and the WTO” (2001) 35 Int’l L. 6 at 6 [Baker et al].

technology that will dictate what solutions or enforcement mechanisms are possible and the legal underpinnings and instruments in place to regulate the Internet.

Chapter 4 examines the current trade regime applicable to E-commerce and consequently E-products in the WTO. It focuses on the differences between GATT and GATS and the consequences to trade in E-products. It also discusses the current debate in the WTO regarding the classification of E-products. In particular, it explores the Work Program on Electronic Commerce and the position adopted by the US on the one hand, and the EU on the other and mentions additional submissions by other WTO members.

Chapter 5 undertakes a theoretical analysis based on the definitions and intrinsic characteristics of E-products compared to those of goods and services. **Chapter 6** explores the approach adopted in bilateral Free Trade Agreements entered into by various WTO member States over the past decade and **Chapter 7** analyzes the jurisprudence from two cases of the WTO's Dispute Settlement Body (DSB) dealing with trade conducted through the Internet.

Chapter 8 offers a summary of the thesis findings and its conclusions. Specifically, the Thesis concludes that based on their intrinsic characteristics, the evolution of bilateral Free Trade Agreements and the WTO jurisprudence, trade in E-products should be classified as trade in services as opposed to trade in goods. Nevertheless, given the trade liberalization objectives of the WTO the existing benefits enjoyed by E-products should be maintained. Accordingly, an E-products Agreement similar to the Information Technology Agreement should be adopted by the WTO. The agreement should acknowledge the sui-generis characteristics of E-products, agree on the service classification for E-products, and secure the current liberalization status.

1.1 Definition of E-products

E-products are content/information products that are delivered through the Internet and which have counterparts that are delivered offline.³ More specifically, E-products are intellectual property objects in the form of digital products or electronic intangible products that before the Internet existed were delivered by a physical carrier such as paper, disk, film, or CD and nowadays can be delivered either in hard form (physical form) or soft form (electronically through the Internet). They are also commonly referred to as electronic products, digital products, digital content or just “content”.⁴ This thesis will use the term E-products to describe all such digital products. Some examples of E-products include software, music, games, books, magazines, newspapers, and movies.⁵

E-products are traded through E-commerce, that is, through an electronic medium. In other words, E-commerce is the mode of commerce or platform through which E-products are delivered (the two terms should not be confused). As will be discussed in Chapter 4 of this thesis, the international trade regulations of the WTO are binary and apply to either “goods” or “services”. The physical form of E-products are regarded and regulated as “goods”. Indeed, in the dispute between the United States and China regarding audiovisual products (“*China-Audiovisuals*”) the WTO Panel confirmed that “hard-copy cinematographic films in any tangible form” are goods.⁶ However, as will be seen, E-products can be significantly different than their physical counterparts, and in

³ *Ibid* at 6.

⁴ Harry Newton, *Newton’s Telecom Dictionary*, 23rd ed (New York, NY.: Flatiron Publishing Inc, 2007) *sub verbo* “content”.

⁵ Sacha Wunsch-Vincent, *WTO, E-commerce and Information Technologies. From the Uruguay Round through the Doha Development Agenda* (New York: United Nations Information and Communication Technologies Task Force, 2005) at 138, online: Peterson Institute for International Economics <<http://www.iie.com/publications/papers/wunsch1104.pdf>> [Wunsch-Vincent, *WTO, E-commerce and Information Technologies*].

⁶ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Complaint by the United States)* (2009), WTO Doc WT/DS363/R at paras 7.526 -545 (Panel Report) [*China - Audiovisuals Panel Report*]; *aff’d China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Complaint by the United States)* (2009), WTO Doc WT/DS363/AB/R, at para 174 (Appellate Body Report) [*China - Audiovisuals Appellate Body Report*]. Further analysis of the Audiovisual Dispute will be presented in Chapter 7.

fact, not necessarily “goods”, but instead “services” for international trade purposes. Table 1.1 shows E-products with their physical counterparts.

Table 1.1: E-Products and Physical Counterparts

E-product	Physical Counterpart
E-book	Book
Digital magazine	Magazine
Digital newspaper	Newspaper
Online Music	Music on a Disk, CD, Cassette
Online Movies	Movie on a Reel, CD, Cassette
Software kit	Software on a Disc, CD
Video Games	Video Game on a Console Apparatus, on a CD

1.2 Principal Attributes of E-products

E-products and their physical counterparts share a number of attributes. Namely, that they:

- i. Satisfy a human need. They have the characteristic to entertain, educate, and inform.
- ii. Have value. When talking about other sources of wealth besides real property Bruce Ziff states that “[a]s we move ever more swiftly into the information age, intellectual property rights are perched to assume the league of lead. Financial empires founded on ownership of software or pieces of cyberspace demonstrate that trend”.⁷

⁷ Bruce Ziff, *Principles of Property Law* 4th ed (Canada: Thomson Carswell 2006) at 70.

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- iii. Require substantial labour to produce.⁸ For example, the production of a book requires a comprehensive number of activities such as writing, editing, designing, etc.
- iv. Are subject to property rights (copyrights) and are capable of being licensed by “transactions [that] are governed through classical contract law”.⁹ However, in an E-product transaction the sellers do not typically aim to transfer property rights but instead grant the buyer a non-exclusive license of digital content.¹⁰

At the same time, E-products may be distinguished from their physical counterparts because:

- v. Physical products are disseminated through tangible carriers such as paper, CD, reels that contain information and create a final product in the form of a book, disk or cassette. Instead, E-products are disseminated through the Internet, as a digital combination of binary code passed on in the form of “digital packets of information”,¹¹ and are therefore intangible.
- vi. Cross-border trade in physical products passes through a customs point at which a tariff is applicable and an import tax or customs duty may be levied. On the other hand, the cross-border trade of E-products is seamless due to their intangible nature and, until recently, lack of technology available to create customs points on the Internet.
- vii. The duties of the physical products like software are levied based on either the cost of the carrier, which is minor, or the cost of the transaction (price paid for the

⁸ n.a. “Computer Programs as Goods Under the U.C.C” (1979) 77 Mich L Rev 1148 at 1165.

⁹ Fons Wijnhoven, “The Importance of Information Goods Abstraction Levels for Information Commerce Process Models” (2002) 3 Journal of Electronic Commerce Research 40 at 40.

¹⁰ Robert Bradgate, “Consumer Rights in Digital Products” (2010) at 5, online: UK Department for Business, Innovation and Skills <<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>> [Bradgate].

¹¹ Kariyawasam Rohan, *International Economic Law and the Digital Divide: A new Silk Road?* (Cheltenham, UK: Edward Elgar Publishing Limited, 2007) at 118-127 [Rohan]. Further discussion of how the Internet transmits information is found in Chapter 2 below.

software), which is higher.¹² In the case of E-products, their intangibility means that such duties would have to be levied based on the cost of the transaction (As will be discussed later in this Thesis, while at present E-products are not subject to customs duties, the technological and legal capacity to do so now exists).

- viii. The volume of physical products is measured in units of product, or by weight, size or other physical characteristics. On the other hand the volume of E-products can be measured in units of “bytes” which denote the number of bits encoded in the text behind the content of E-products, and the memory space that the product will take from the computer, MP3 player, portable digital reader, digital tablet, or any other electronic device when delivered.
- ix. The existence and use of E-products relies on information technology devices such as a computer, smart phone, electronic reader, tablet and so on. Without such devices E-products cannot exist and be used.¹³ Instead, their physical counterpart products exist by their own and in some cases products like CDs or DVDs need devices to be used but not to exist.
- x. Due to the electronic delivery, administrative and transportation costs are less for E-products than for their physical counterparts. As a result, E-products cost less to consumers or, alternatively, are more profitable to sellers than their physical counterparts.¹⁴ For example, in a report released in April 2012 IHS Screen Digest found that “consumers paid an average of 51 cents for every movie consumed online, compared with \$4.72 for physically purchased videos”.¹⁵ Furthermore, in most cases electronic delivery means that procurement and distribution of E-

¹² Wunsch-Vincent, *WTO, E-commerce and Information Technologies*, *supra* note 5 at 142.

¹³ Bradgate, *supra* note 10 at 2.

¹⁴ However, the intellectual property reflected in the product is no doubt the single biggest cost of production. Accordingly, the difference created by the cost of the raw material, administrative and transportation costs may be marginal.

¹⁵ Cliff Edwards, “Online Film Viewing in US to Top Discs in 2012, IHS Says” *Bloomberg News* (22 March 2012), online: Bloomberg <<http://www.bloomberg.com/news/2012-03-22/online-movie-viewing-in-u-s-to-top-discs-in-2012-ih-says.html>> [Edwards].

products is more convenient to users and results in a faster commercialization, and spread of E-products.

As will be seen in this thesis, it is these latter attributes of E-products that make them so unique and challenging to regulate.

1.3 Procurement of E-products

E-products can be procured by two methods: access at source, and via download onto the customer's computer or other electronic device.

1.3.1 Access at Source

The customer can access the product from the website or other online source of the provider by logging in so the customer can get access to a changing resource of information. The frequency of use can vary from one-time access or multiple accesses to the product. This form of access is very similar to the provision of a service.

1.3.2 Download into Customer's Computer or Other Electronic Device

E-products can be downloaded onto the customer's computer or electronic device from the provider's website or other online source, or the provider can send the product in a form of an electronic file to the customer to download. In this case the frequency of use can be unlimited but transfers or changes to the product can be limited. For example, in the purchase and use of an E-book the customer typically has unlimited access to the digital book in his/her electronic device but may not alter or reproduce the product. In such cases E-products are commercialized essentially like their physical counterparts as a commodity with the difference that a device, such as Amazon's Kindle or Apple's iPhone or iPad is always necessary to access the product.

1.4 The E-products Market

E-products increasingly participate in the economy as objects/subjects of trade or as assets. The OECD 2008 Policy Guidance for Digital Content states that “[d]igital content has become an increasingly important and pervasive factor shaping economic and social development”.¹⁶ The E-products market has grown so rapidly that in some cases their sales now surpass the sales of their physical counterparts. For example, Amazon reported that in 2011 it sold more E-books than paper books and this trend is expected to grow in the near future.¹⁷ Likewise, in 2011, digital music sales surpassed physical sales for the first time, “accounting for 50.3% of all music purchases in 2011”.¹⁸ In the US, online movie streaming was also expected to overtake physical movie sales in 2012.¹⁹

Under this reality it is necessary and increasingly urgent to determine under the international trade rules of the WTO in to which category the trade of E-products fits: goods or services. This will determine whether governments are legitimately entitled to treat E-products as services and control access and content; or alternatively, as goods in which case it must ensure that the trade in E-products will not be jeopardized by classic trade barriers such as quotas and duties or new and sophisticated trade barriers such as blocking and censorship of content.²⁰

¹⁶ OECD Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy, *OECD Policy Guidance for Digital Content*. Ministerial Meeting on Future of the Internet Economy, Seoul, Korea, 17-18 June 2008 online: OECD <<http://www.oecd.org/dataoecd/20/54/40895797.pdf>>

¹⁷ Matt Hamblen, “Amazon: E-books now outsell print books” *Computerworld* (19 May 2011), online: Computerworld <http://www.computerworld.com/s/article/9216869/Amazon_E_books_now_outsell_print_books>.

¹⁸ Nielsen Holdings N.V., “The Nielsen Company & Billboard’s 2011 Music Industry Report” (05 January 2012), online: Business Wire <<http://www.businesswire.com/news/home/20120105005547/en/Nielsen-Company-Billboard's-2011-Music-Industry-Report>>.

¹⁹ Edwards, *supra* note 15.

²⁰ Tim Wu, “The World Trade Law of Censorship and Internet Filtering” (2006) at 2, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882459> [Wu, “The World Trade Law of Censorship and Internet Filtering”].

1.5 Summary of Chapter

E-products are content/information products that are delivered through the Internet and which have counterparts that are delivered offline. Accordingly, they are distinguishable from products which are only available online and/or only available through a physical carrier. The essence of the E-Product and its offline counterpart is their content or the information delivered, e.g. the music, ideas, images, etc. However, there are significant differences in the way the information is accessed, used, distributed and measured. Accordingly, E-products cannot necessarily be treated under international trade regulations in the same way as their physical counterparts.

The popularity and market growth of E-products is unquestionable. To date, E-products have not been subject to significant trade regulations and benefit from a “free trade” status in which no customs duties, quotas or other trade barrier exist (see discussion in Chapter 3). However, the explosive growth of trade in E-products means that they have become a significant component of international trade and are likely to continue to grow. Therefore, it is important to determine which international trade rules are applicable to them (goods or services) so stakeholders will have a predictable and secure market. In this sense, the WTO should take the necessary steps to maintain the free trade status of E-products as much as possible in accordance with the trade principle of progressive liberalization.

Chapter 2

The Internet: Structure, Organization and Development

The Internet is the medium through which E-commerce and the trade in E-products is carried out, it connects people and organizations worldwide, has blurred frontiers, time zones, economies, and even the differences between goods and services. For international trade those facts offer new opportunities and challenges. This chapter provides a brief non-technical explanation of what the Internet is, how it works, and how it is managed. Furthermore, it describes the development of E-commerce.

2.1 Basic Structure and Operation of the Internet

The Internet is a system of computer networks connected via cables and radio waves that can share information through a common communications protocol, the Transport Control Protocol/Internet Protocol (TCP/IP).²¹

Structurally, the Internet is organized around individual networks that are set up and operated by governmental agencies, universities, private industry, etc.²² These networks are typically joined in mid-level networks such as regional network consortiums or wide-area networks (WANs)²³ that are in turn connected to high-speed high-capacity lines known as “backbones” that interconnect networks.²⁴ Backbones are built and maintained by government agencies or private companies that sell access to their lines (Backbone Network Services, BNS).²⁵ Internet Exchange Points (IXP) link mid-level networks to backbones allowing networks to interconnect directly.²⁶ Nowadays large telephone

²¹ Newton, *supra* note 4 *sub verbo* “Internet”. See also Peter Buckley & Duncan Clark, *The Rough Guide to the Internet*, 12th ed (New York, NY: Rough Guides, Ltd., 2006) at 12 [Buckley & Clark].

²² According to their geographic scope networks may be Personal (PANs), Campus (CANs), Local (LANs), Metropolitan Area Network (MANs) or Wide Area Networks (WANs). A LAN is typically confined to a building or campus network connected through Ethernet, MAN covers a metropolitan area and a WAN extends even further and may be international.

²³ Preston Gralla, *How the Internet Works*, 8th ed (Indianapolis, IN: Que, 2007) at 13-17 [Gralla].

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ A list of IXPs is maintained by Packet Clearing House at: PCH
<https://prefix.pch.net/applications/ixpdir/index.php?show_active_only=1&sort=country&order=asc>.

companies such as Verizon, AT&T, MCI, and Sprint own the major long distance backbones. These companies participate in the Internet by themselves or in connection with other major networks through private “peering” agreements. In addition, they sell access to their backbones to third parties operating WANs, LANs, etc.

Individuals have access to the Internet through private Internet Service Providers (ISPs) who sell access to their network (e.g. monthly fees, data plans, etc.). Individuals may also access the Internet through their employers, government agency, university or other network operator.

The transmission of data over the Internet requires the interaction of hardware and communications protocols that break down and direct data across the Internet.²⁷ The standard communications protocol is TCP/IP. Essentially, the TCP breaks down the data into small individual packets of data,²⁸ the IP puts each packet into “envelopes” which contain addressing information that tells the Internet where to send the data, the TCP then reassembles the packets at the destination computer.

IP “envelopes” contain “headers” that include information such as the sender address, the destination address, the amount of time the packet should be kept before discarding it, and so on. In order for the IP to work each connection to the Internet is given a unique address identifier (IP Address) by the Internet Corporation for Assigned Names and Numbers (ICANN).

Because of the Internet’s de-centralized architecture, when data is sent from one computer to another the packets must typically travel through many levels of networks,

²⁷ The Internet is thus said to be a “packet switched network”. In contrast, circuit-switched networks (such as telephone lines) establish a dedicated line to transmit the data. See generally, Gralla, *supra* note 23 at 19.

²⁸ *Ibid* at 23 at 20-21. As explained by Gralla: “...data sent across the Internet must be broken up into packets of fewer than about 1,500 characters each. Each packet is given a header that contains a variety of information, such as the order in which packets should be assembled with other related packets. As TCP creates each packet, it also calculates and adds to the header a *checksum*, which is a number that TCP uses on the receiving end to determine whether any errors have been introduced into the packet during transmission.

computers and communications lines before they reach their final destination.²⁹ The principal hardware used to forward data packets around the Internet is a router. Routers are intelligent devices that connect like and unlike networks from LANs to WANs to backbones and direct traffic along those networks.³⁰ In order to direct a packet routers examine the IP envelopes, look at their address and determine the most efficient path for sending each packet to the next router closest to its final destination.³¹ Because the traffic load on the Internet changes constantly, the packets might be sent along different routes and the packets might arrive out of order.³²

This system of networks is able to send and receive information to and from sites and platforms worldwide to a wide range of equipment, such as personal computers and mobile devices, connected to it.

2.2 Organization and Management of the Internet

At its beginning the Internet was used more as a communication and research tool. It was conceived by the collaborative efforts of computer scientists in the 1960s as an open network infrastructure based on standards that are well organized and trusted that can be implemented globally without a great burden of licensing restrictions.³³

Organizationally, the Internet is de-centralized, i.e. there is no centralized management or governing entity.³⁴ The Internet is a collection of thousands of individual networks and organizations, each of which is run and paid for on its own”.³⁵ However, in order for the

²⁹ *Ibid.*

³⁰ Newton, *supra* note 4 *sub verbo* “router”. Routers can interface with different physical types of network connections, including copper cables, fiber optic, or wireless transmissions.

³¹ *Ibid.* Routers exchange information about destination addresses and traffic loads, allowing them to consider the network as a whole.

³² *Ibid.* Routing considerations include “destination address, packet priority level, least-cost route, minimum route delay, minimum route distance, route congestion level, and community of interest”.

³³ OECD, Directorate for Science, Technology and Industry, *E-book: OECD Input to the United Nations Working Group on Internet Governance*, Doc No DSTI/ICCP(2005)4FINAL (France, Paris: OECD 2005) at 5, online: OECD <http://www.oecd.org/document/40/0,3343,en_21571361_34590630_34888424_1_1_1_1,00.html> [OECD, *Input to the United Nations Working Group on Internet Governance*].

³⁴ Buckley & Clark, *supra* note 21 at 13; see also Gralla, *supra* note 23 at 5.

³⁵ Gralla, *supra* note 23 at 5.

Internet to operate effectively, the individual networks must work together according to common standards. Accordingly, there are several groups that guide and develop the technical standards of the Internet. Chief among these are:

- **Internet Society (ISOC):** A non-profit organization that provides directions regarding Internet standards and policy. It seeks to ensure that the Internet continues evolving as an open standard that benefits people all over the world.³⁶
- **Internet Corporation for Assigned Names and Numbers (ICANN):** A non-profit corporation that manages the IP numbers and Domain Name System root.³⁷
- **World Wide Web Consortium (W3C):** The main standards organization for the World Wide Web.³⁸ The WWW is “a hypertext-based system for finding and accessing resources on the Internet network”.³⁹
- **Internet Engineering Task Force (IETF):** Standards organization for the Internet.⁴⁰

2.3 Chapter Summary

The Internet is not centrally governed or organized. Accordingly it is not possible to regulate in the traditional sense. However, networks and network exchange points do occupy physical spaces. Accordingly, while it may not be possible to set up a customs point at the border of each country it should be possible, assuming the legal and technological capacity is available (see discussion below at Chapter 3) to establish a customs point along all relevant exchange points.

³⁶ See Internet Society Website, *Who We Are*, online: Internet Society <<http://www.isoc.org/>>.

³⁷ See Internet Corporation for Assigned Names and Numbers Website, *About Us*, online: ICANN <<http://www.icann.org/>>.

³⁸ See World Wide Web Consortium Website, *About W3C*, online: W3C <<http://www.w3.org/>>.

³⁹ Newton, *supra* note 4 at 1023. The WWW is “a hypertext-based system for finding and accessing resources on the Internet network.”

⁴⁰ See The Internet Engineering Task Force Website, *About the IETF*, online: IETF <<http://www.ietf.org/>>.

Chapter 3

E-commerce and the Regulation of E-commerce

This chapter sketches the history of the Internet (and consequently E-commerce) from the original assumption that it was an uncontrollable and borderless entity that fosters commerce from anywhere to anyplace without any kind of control to the subsequent recognition that the Internet can be governed and controlled. It also explains how controlling the Internet can impact E-commerce and therefore trade in E-products.

3.1 E-commerce: Development and Evolution

E-commerce is “the buying and selling, and marketing and servicing of products, services and information over a variety of computer networks”⁴¹ including the Internet. It relies on technology to support its processes. An E-commerce transaction can be business-to-business (B2B), business-to-consumer (B2C), consumer-to-business (C2B), and consumer-to-consumer (C2C). Usually, an E-commerce transaction undergoes various phases: the research phase where the buyer is looking for a product and the seller publicizes the product; the ordering of the product; the payment and the delivery which can be physical or, in case of E-products, electronic. If a transaction undergoes all these phases and the delivery is electronic it is called a pure E-commerce transaction, which is the case for E-products.

E-commerce can be conducted through the Internet, the telephone, fax, and even the T.V. (telemarketing and pay-per-view channels). However, E-commerce is primarily conducted through the Internet because it is a cost effective means of connecting individuals, without limitation of time or distance in a multimedia environment capable of transmitting images, text, and sound at a fast pace. Furthermore, a connection to the Internet is available virtually everywhere. Accordingly, the Internet makes trade easier, faster and more efficient and the growth of E-commerce is closely tied to growth of the

⁴¹ James A. O'Brien, *Management Information Systems*, 5th ed (New York, NY.: McGraw-Hill, 2002) at 23.

Internet. The Internet may have started as a robust computer network used primarily for communication, but it is now part of most peoples' every day life.

When it started, the Internet was primarily used by a relatively small demographic of academics, researchers and government agencies. However, in the early 1990s, Internet access became more readily available to the general population and a resulting wider demographic. This was the result of several factors such as: the Internet connectivity and sharing capabilities, its decentralized and collaborative management by many entities instead of one organization or nation and the non-proprietary nature of its core standards.⁴² In addition, the WTO's GATS and the Agreement on Basic Telecommunications Services⁴³ entered into force. These Agreements paved the way for the liberalization of the telecommunications markets and facilitated worldwide competition in the provision of telecommunication services in the signatory countries which led to the termination of long term monopolies in telecommunication services and a quick reduction in the cost of access to the Internet. Consequently, more people gained access to the Internet, a trend that is not slowing down as shown in by the following International Telecommunications Union chart:⁴⁴

⁴² OECD, *Input to the United Nations Working Group on Internet Governance*, *supra* note 33.

⁴³ WTO, *Post-Uruguay Round negotiations on basic telecommunications*, online: WTO <http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_posturuguay_neg_e.htm>.

⁴⁴ International Telecommunications Union Statistics, *Individuals using the Internet per 100 Inhabitants 1997-2011* (Switzerland, Geneva, 2012), online: International Telecommunications Union <<http://www.itu.int/ict/statistics>> (The developed/developing country classification is based on the UN M49 which is a standard area codes for statistical purposes developed and maintained by the United Nations Statistic Division).

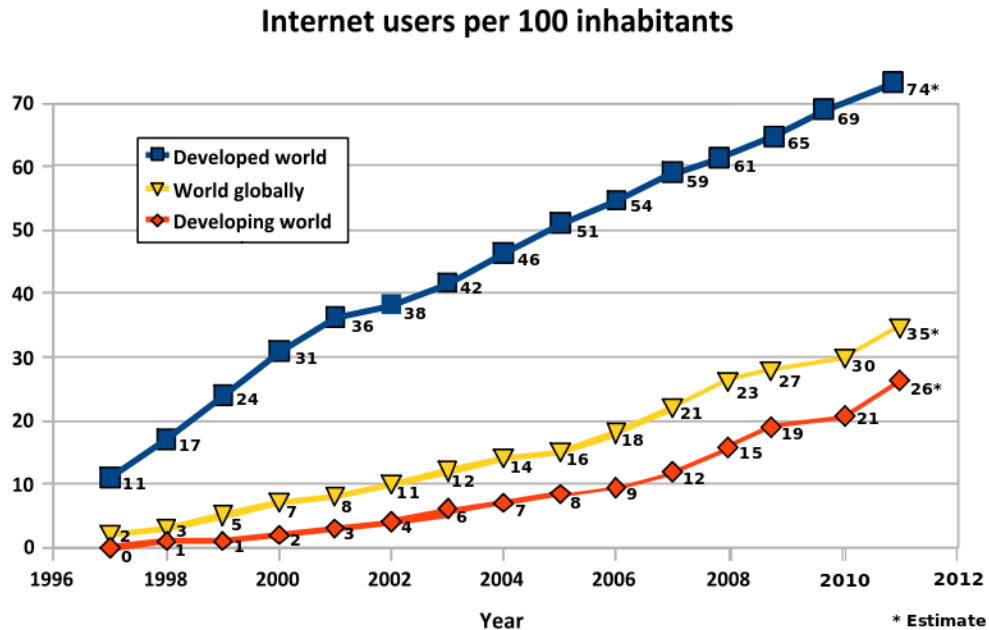


Figure 2.1: Internet Users per 100 Inhabitants Chart

The commercial capability of the Internet was soon leveraged and E-commerce became a business tool for new and existing companies to enter in a new market place referred to as “cyberspace”. This gave participants almost instant worldwide presence. For companies the start up cost for an E-store or E-business was, and is still today, very low taking into account the global market exposure gained.⁴⁵ At the same time, many existing brick-and-mortar companies realized that in order to stay in business a presence on the Internet was required. Consequently, E-commerce grew at fast pace creating a rush for registration of domain names and starting the “dot-com” boom⁴⁶ in which anything with the prefix “E-” was expected to be an instant success.

The volume of E-commerce transactions has grown extraordinarily with the increase of Internet usage and the development of business applications such as payment systems that

⁴⁵ The start up cost for a SME website varies, but hosting costs can be as low as US\$ 12 per month plus a nominal set-up fee that includes a domain name and access to free website design software and templates. See Ralph F. Wilson, “Start-Up Cost” (16 October 2002), online: Web Marketing Today <<http://www.wilsonweb.com/06/021016b.htm>>.

⁴⁶ Dot-coms are companies that operate their businesses mainly in the Internet. In the 1990s with the boom of the Internet many new companies started in the Internet and it seemed like a profitable business but many of them soon went out of business.

made E-commerce transactions highly convenient and secure. E-commerce developed from almost non-existence in 1995 to more than \$100 billion industry in 1999.⁴⁷

More recently, “China's online shopping sales rose to \$36.6 billion last year [2009] and one of the reasons behind that growth has been that retailers have been able to help consumers feel more comfortable shopping online”.⁴⁸

Canada is also a good example of the growth of E-commerce. In 2005, nearly 50 million orders for goods and services were placed on-line and in 2007 the amount of orders increased to 69.9 million.⁴⁹ A recent survey confirmed that in Canada 80% of the population aged 16 and older used the Internet frequently for personal use, including for buying goods and services.⁵⁰ The importance of E-commerce to the Canadian economy was recognized as early as 1999 when an Industry Canada Report stated that “E-commerce will be an important contributor to national wealth. It is therefore critical that Canada has a viable and reliable Internet”.⁵¹

In summary, the Internet, and by extension E-commerce, can create economic growth for countries, as stated by the Directorate for Science, Technology and Industry Committed for Information, Computer and Communications Policy of the OECD:⁵²

The Internet and wider ICT [Information and Communication Technology] sector provide the platform for societies to evolve toward the Information Society. In the OECD countries, ICTs have had, and continue to have a significant and wide-ranging beneficial impact on economies and societies. ICTs are mainstreamed throughout OECD economies as a whole and contribute to social goals and economic growth in terms of the impact of ICT investment on productivity. Non-

⁴⁷ Carlos A. Primo Braga, “E-commerce Regulations: New Game, New Rules?” in Aadita Mattoo et al, *A Handbook of International Trade in Services* (New York: Oxford University Press, 2008) 459 at 462 [Primo].

⁴⁸ Robert Oslen, “China’s Migration To E-Commerce” (18 January 2010), online: Forbes <<http://www.forbes.com/2010/01/18/china-internet-commerce-markets-equities-alibaba.html>>.

⁴⁹ Statistics Canada, “E-commerce: Shopping on the Internet” (17 November 2008), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/081117/dq081117a-eng.htm>>.

⁵⁰ Statistics Canada, “Canadian Internet Use Survey” (10 May 2010), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/100510/dq100510a-eng.htm>>.

⁵¹ Gerry Miller et al, *Regulation of the Internet A technological Perspective* (1999), online: Industry Canada <[http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/005082_e.pdf/\\$FILE/005082_e.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/005082_e.pdf/$FILE/005082_e.pdf)>.

⁵² OECD, *Input to the United Nations Working Group on Internet Governance*, *supra* note 33.

OECD countries are increasingly benefiting from connection to the Internet and increasingly participating in the information society...

3.2 Early Attempts to Regulate the Internet and E-commerce

In the late 1980s and early 1990s, when the Internet was in its early stages, it seemed that it could not be subjected to any control and that governments could not control the transmission of content. The Internet appeared to be a completely anarchic and borderless entity. This was fueled by the so-called cyber-libertarianism that advocates that the Internet is free and independent of any State control.⁵³

However, as usage grew, it became apparent that the Internet and E-commerce were new facts in human life that in order to work had to be regulated like any other part of human life by institutions that exert some control such as States and international organizations.⁵⁴ In the E-commerce field some of those issues were: consumer protection, the protection of privacy, tax implications and international trade policies among others. Consequently, a series of rules started to arise to control important aspects of E-commerce. This thesis will reference only on those rules that have relevance for international trade of E-products.

Starting in the later half of the 1990s the United Nations Commission on International Trade Law (UNCITRAL) undertook several initiatives related to E-commerce in an effort to change the anarchic status of the Internet. The basic objective of the UNCITRAL was to encourage the promulgation of national legislation related to the use of the Internet for commerce creating a predictable legal and regulatory environment within each country. These initiatives, resulted in the adoption of two model laws and one convention on the subject which are discussed briefly below:

⁵³ Milton L. Mueller, *Networks and States: The Global Politics of Internet Governance* (Cambridge, Massachusetts: The MIT Press, 2010) at 3.

⁵⁴ Jack Goldsmith & Tim Wu, *Who Controls the Internet Illusion of a Borderless World* (New York, NY: Oxford University Press 2006) at 142 [Goldsmith & Wu, *Who Controls the Internet Illusion of a Borderless World*].

(i) *UNCITRAL Model Law on Electronic Commerce (1996)*.

The development of the *UNCITRAL Model Law on Electronic Commerce*⁵⁵ was motivated by the fact that States had inadequate legislation to deal with E-commerce.⁵⁶ It establishes international standards such as functional equivalence of written and electronic information, recognition at law of the validity of electronic data, and recognition of the validity of contracts entered into by electronic means and procedures to form such contracts.⁵⁷ This model law has been widely implemented by States' national legislation without modification, and in other cases its principles have been incorporated into pre-existing national statutes.⁵⁸

The *Model Law on E-Commerce* is relevant in the context of trade in E-products not only because it recognized the legal validity of electronic data messages but also because it provided guidelines on how to deal with the time and place of dispatch and receipt of data messages which by extension can be applied to the international trade in E-products.⁵⁹

(ii) *UNCITRAL Model Law of Electronic Signatures (2001)*.⁶⁰

This model law seeks to increase confidence in the use of electronic signatures by establishing “criteria of technical reliability for the equivalence between electronic and

⁵⁵ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Commerce* (1996), online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html>.

⁵⁶ Alan Davidson, *The Law of Electronic Commerce* (Melbourne: Cambridge University Press, 2009) at 25.

⁵⁷ Examples of National legislation influenced by the Model law can be found online: *Status UNCITRAL Model Law on Electronic Commerce* (1996), online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html>.

⁵⁸ *Ibid.* Implemented by national legislation in 27 countries including China and Mexico. Its principles have also been implemented in federal and State or provincial legislation in both Canada and the US.

⁵⁹ See *Article 15. Time and place of dispatch and receipt of data message. UNCITRAL Model Law on Electronic Commerce*, *supra* note 55.

⁶⁰ United Nations Commission on International Trade Law, *UNCITRAL Model Law on Electronic Signatures* (2001), online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html>.

hand-written signatures”.⁶¹ This continued the trend of recognizing the legal validity of electronic data and electronic transactions.

(iii) *United Nations Convention on the Use of Electronic Communications in International Contracts (2005)*.

The UN *Convention on the Use of Electronic Communications in International Contracts, 2005* (the “CUECIC”) intends to create certainty and predictability in the rules for the formation of contracts by electronic means. It addresses the issue of time and place of formation of the contract, the use of electronic agents in its formation, and reaffirms the criteria of functional equivalence between written and electronic documents and signatures.⁶² This Convention only applies to business-to-business electronic international contracts. Unlike the previous model laws, this is a Convention and may be enforced by States that have ratified it. The Convention entered into force March 1st, 2013; however, to date only three States are party.⁶³ Nevertheless, the provisions of the Convention are being incorporated into the domestic legislation of some WTO member States.⁶⁴ Accordingly, the Convention serves, together with the model laws to further facilitate the use of electronic communications in international trade.⁶⁵

3.3 Technology to Control E-commerce

In addition to the rules set out in the Model Laws, the CUECIC and subsequent national legislation, new technologies have emerged for controlling E-commerce and enforcing national laws by exercising State coercion. Accordingly, the view that the Internet and

⁶¹ *Ibid.* According to the UNCITRAL website eight countries, including China and Mexico have adopted legislation based on this model law.

⁶² United Nations Commission on International Trade Law, *UNCITRAL United Nations Convention on the Use of Electronic Communications in International Contracts (2005)*, online: UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html>.

⁶³ *Ibid.* According to the UNCITRAL website as of 02 November 2012, only Dominican Republic, Honduras and Singapore are parties.

⁶⁴ *Ibid.*

⁶⁵ *UNCITRAL United Nations Convention on the Use of Electronic Communications in International Contracts*, *supra* note 62.

consequently E-commerce transactions are not subject to any control and are borderless has become an illusion.⁶⁶

(i) Geo-Identification

Geo-identification technologies make it possible to control the Internet by linking an Internet user to a geographical location so Internet Service Providers and website operators can control access to a website and ultimately the delivery of content.⁶⁷ It translates the Internet Protocol (IP) addresses into a geographical place thanks to the use of a geo-location database that keeps track of the IP address.⁶⁸

This technology is not very expensive, it is easy to implement and it is known to be very reliable; but at the same time, can be circumvented by Internet users. Nevertheless, as technology advances geo-identification tools are becoming more sophisticated and harder to evade.⁶⁹ Nowadays geo-identification technologies are widely used in E-commerce transactions to customize advertisement, for tax purposes, and as a risk management tool in order to access or deny services based on the user's location so the service provider is not subject to undesired or unknown legal regimes.

(ii) Firewalls

Firewall technologies also control the Internet by preventing unauthorized access to computer networks; firewalls enforce boundaries among different computer networks and allow or deny access to them.⁷⁰

⁶⁶ Goldsmith & Wu, *Who Controls the Internet Illusion of a Borderless World*, *supra* note 54 at viii.

⁶⁷ Dan Jerker B. Svantesson, "The Legal Implications of Geo-identification" (2006) *Law papers*, online: Bond University <http://works.bepress.com/dan_svantesson/11>.

⁶⁸ Dan Jerker B. Svantesson "Imagine there's no countries...- Geo-identification, the law and the not so borderless Internet" (2007) *Law papers*, online: Bond University <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1131&context=law_pubs>.

⁶⁹ *Ibid.*

⁷⁰ Newton, *supra* note 4 *sub verbo* "Firewall".

(iii) Censorship

Censorship is another technique capable of controlling the Internet. Censorship consists of blocking, misdirection and data filtering.⁷¹ Blocking can be accomplished by subjecting the national Internet entry/exit points (such as router hubs and backbone connections) to State control or by requiring ISPs to deny access to certain URL or IP addresses (websites). Misdirection consists in re-routing the URL and IP-addresses of an Internet server that is not subject to State control to another Internet server that is subject to State control. Misdirection works to censor search engine services, like Google or Yahoo, because they do not hold any data but simply retrieve content on the Internet and provide an indexed list to the user, who can then access the data. Consequently, blocking search engines is pointless. Finally, filtering is a more selective form of blocking. Instead of blocking access to the entire website or foreign websites access is only restricted if the website contains certain words or banned content.⁷²

Censorship techniques can have a significant controlling effect over the Internet on a broad spectrum of issues that go from political ideologies, moral issues, and even freedom rights to commercial matters. A good example is when the Chinese government blocked Google's IP and users were misdirected to a Chinese search engine.⁷³ In commercial terms Google's market in China decreased while the Chinese search engine to which users were re-directed, Baidu, won market share.⁷⁴ While China's censorship practices are indeed the most controversial, these practices are not limited to China, more and more countries are censoring Internet content that is deemed to be morally or politically inappropriate.⁷⁵ Furthermore, it is known that censorship can be used for

⁷¹ See for more information on how censorship works: Pingp, "The Great Firewall of China: Background" *Torfox A Stanford Project* (1 June 2011), online: Computer Science Stanford University <<http://www-cs-faculty.stanford.edu/~eroberts/cs181/projects/2010-11/FreedomOfInformationChina/category/great-firewall-of-china/index.html>>.

⁷² Fredrik Erixon et al, "Protectionism Online: Internet Censorship and International Trade Law" (2009) European Centre for International Political Economy ECIPE Working Paper No. 12/2009 at 4-6 online: ECIPE <http://www.ecipe.org/media/publication_pdfs/protectionism-online-internet-censorship-and-international-trade-law.pdf> [Erixon].

⁷³ Wu, "The World Trade Law of Censorship and Internet Filtering" *supra* note 20 at 17.

⁷⁴ Erixon, *supra* note 72 at 4-6.

⁷⁵ Wu, "The World Trade Law of Censorship and Internet Filtering" *supra* note 20 at 2.

commercial purposes only. For example, Telmex, the Mexican State-owned telecommunications operator, blocked online communication services that offered inexpensive voice-over IP (VoIP Services) such as Skype and Vonage.⁷⁶ In the context of an international cross-border supply of service such blocking, if allowed by national measures, would be regarded as carrying out a trade restrictive measure.

Therefore censorship of content could easily become a trade barrier especially for E-products if such filtering, blocking, and misdirection are applied based only on the origin of the E-products. For example, international trade could be obstructed if State “X” blocks the transmission of all foreign E-books so that nobody in State “X” can acquire them online. But national E-books can still be acquired online. Another example is if State “X” misdirects traders who want to read the New York Times website to State X’s official news website or a local newspaper. Consequently, foreign providers can face more blocking, filtering and IP misdirection than their counterpart national providers.⁷⁷

(iv) Online Payments

Online payment facilitates E-commerce transactions by allowing payment through the Internet. The most common methods of payments are: credit card payments, electronic transfer of funds by using online banking services, or using payment service providers such as PayPal. These methods of payments allow for micropayments, i.e. payment of a small amount of money, which benefits the commerce of E-products.⁷⁸ At the same time, online payment may be used to control E-commerce. Such was the case in 2002 when major credit card providers and payment systems were asked by US officials to stop honoring online gambling transactions as a means to control online gambling in the US.⁷⁹

⁷⁶ Erixon, *supra* note 72 at 4-6.

⁷⁷ Cynthia Liu, “Internet Censorship as a Trade Barrier: A look at the WTO Consistency of the Great Firewall in the Wake of the China-Google Dispute” (2001) 42 *Geo J Int’l L* 1199 at 1206 online: Georgetown Law <<http://gjl.org/wp-content/uploads/archives/42.4/zsx00411001199.PDF>> [Liu].

⁷⁸ Usually the cost of E-products is small. For example the price for watch a movie is approx. CAD \$4.

⁷⁹ Jack Goldsmith & Timothy Wu, “Digital Borders” (January/February 2006) *Legal Affairs the Magazine at the Intersection of Law and Life*, online: Legal Affairs <http://www.legalaffairs.org/issues/January-February-2006/feature_goldsmith_janfeb06.msp>[Goldsmith & Wu, Digital Borders].

This initiated a major dispute in the WTO between the US and Antigua (*US-Gambling Dispute*). Further analysis on the *US-Gambling Dispute* will be presented in Chapter 7.

Venezuela's exchange control system offers another example of control of E-commerce and more specifically trade in E-products, through online payment systems. Currently, Venezuela's exchange control system imposes strict limits on foreign currency available to online traders. Accordingly, national traders cannot purchase E-products in foreign websites using their national credit card, or if they can it will be limited to certain amount.⁸⁰ The result is that by implication Venezuela has established quotas on foreign E-products.

3.4 Chapter Summary

The trade in E-products through E-commerce has grown significantly over the past two decades and continues to grow as more and more countries increase Internet accessibility.

While at first the Internet was borderless and unregulated, there is no doubt that nowadays the Internet and E-commerce are controllable and States do control it. China's content review polices are a clear example of that.

From a businesses perspective the growth and sustainability of E-commerce to some extent is proportional to the capability of control exercised over the Internet. Legally, it extends certainty over the validity of international transactions conducted over the Internet. In addition Geo-identification and other technologies allow businesses to target customers by tailoring advertisement, adapt to different places and languages, adapt to different customers' likes and needs, collect taxes, and control the place where the business is carried out and potential risk associated with carrying on business in a foreign jurisdiction.

⁸⁰ For further information see: United States of America Department of Commerce, US COMMERCIAL SERVICES, "Doing Business in Venezuela: 2011 Country Commercial Guide for US Companies" (2011), online: America.gov <http://photos.state.gov/libraries/venezuela/19452/pdfs/2011_-_doing_business_in_venezuela.pdf>.

From an international trade governance perspective, what was a difficult scenario a decade ago, an E-book being subject to a tariff, nowadays could be feasible taking into account that geo-identification technologies can identify the geographic location of the exporter and importer and electronic payment systems have evolved to allow charges of small amounts of money (micropayments). It may be burdensome for a State to charge such tariffs but no doubt possible. At the same time, geo-identification along with censorship and firewalls could be applied in discriminatory ways and used as trade barriers to deny or restrict the trade of E-products based only on the origin of the product, particularly if it is unclear what the applicable trade rules are, rules for services or rules for goods. Accordingly it has become more important than ever to determine with certainty what international trade rules, GATT or GATS are applicable to the trade in E-products.

Chapter 4

The WTO and E-products: an Ongoing Dilemma

The WTO's regulation of international trade operates on the basis that the subject of trade can be either goods or services. Accordingly, there are distinct rules for trade in goods and in services. However, when it is not clear under which category the product that is the subject of trade falls, there is uncertainty that could create an issue for the tradability of such products. That is the case of E-products under the WTO Agreements. Accordingly, an analysis of the WTO system has to be made in order to understand the root of the E-products classification dilemma and the implications of classifying E-products one way or another.

This Chapter will briefly summarize the foundation of the WTO and how its principal agreements, GATT and GATS, work. It will review the WTO's work on E-commerce including the Moratorium on customs duties on E-products, and it will highlight the different consequences that would affect trade in E-products if they are classified as goods subject to GATT or services subject to GATS. This will provide the context for a full analysis of the issue of the classification of E-products in light of the WTO Agreements.

4.1 The WTO, GATT and GATS

4.1.1 The WTO

The WTO is an international organization that oversees international trade rules. The WTO came into being on January 1, 1995 under the *Marrakesh Agreement* and today is the main forum for the negotiation and implementation of multilateral trade agreements.⁸¹

⁸¹ *Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 [*Marrakesh Agreement*].

It evolved out of and is the successor to the “GATT”, a quasi-international organization that administered the *General Agreement on Tariffs and Trade* (GATT 1947).⁸²

The “multilateral trading system” which the WTO currently oversees was developed through a series of trade negotiations or “rounds” held under the GATT 1947.⁸³ The WTO was created out of the Uruguay Round held from 1986 to 1994. In addition to the WTO, the Uruguay Round resulted in new agreements covering trade in goods (GATT),⁸⁴ trade in services (GATS),⁸⁵ and other agreements related to different aspects of trade such as trade related aspects of intellectual property and dispute resolution.

The overall goal of the WTO is to “improve the welfare of the peoples of the member countries”.⁸⁶ It does this by:

- Implementing and administering the WTO agreements;
- Providing a forum for negotiations on issues dealing with multilateral trade relations;
- Administering the rules related to the WTO dispute settlement mechanism;
- Carrying out trade policy reviews; and
- Cooperating with the International Monetary Fund and the International Bank to reach greater coherence in global economic policy making.⁸⁷

The WTO provides a legal framework to negotiate and formalize trade agreements among member States. However, it does not define or specify the outcome of trade negotiations.

⁸² *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 187, Can TS 1947 No. 27 . GATT 1947 is now incorporated into GATT 1994, *infra*, note 84.

⁸³ WTO, “The WTO...In brief...” *What is the WTO?* (Retrieve on 10 November 2012), online: WTO <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm>.

⁸⁴ *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187, 33 ILM 1153. GATT 1994 is Annex 1A: Multilateral Agreements on Trade in Goods of the *Marrakesh Agreement*. GATT 1994 must be read in conjunction with GATT 1947 [*GATT*].

⁸⁵ *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 [*GATS*]. GATS is Annex 1B of the *Marrakesh Agreement*.

⁸⁶ WTO, “About the WTO – a statement by the Director-General” *What is the WTO?*, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>.

⁸⁷ *Marrakesh Agreement*, *supra* note 81 Article III.

Specific commitments and agreements are agreed by each member and listed in the appropriate schedule of concessions under GATT or GATS, respectively. The WTO also offers a dispute resolution process aimed at enforcing members' compliance with their commitments.

Both the GATT and GATS embrace the principles of trade liberalization for goods and services and contain the acceptable exceptions to that principle. In essence, the GATT codifies the member's commitments to lower and progressively eliminate customs tariffs and any other trade barriers for goods, and the GATS codifies the member's commitment to gradually open the services market. The applicable principles of each agreement are discussed below.

4.1.2 The GATT

Under GATT each member makes specific commitments for the tariffs that will be applied to specific categories of goods listed in its own schedule of "bound" commitments and in respect of which the following principles apply:

- **Most favoured nation (MFN):** This principle stipulates that all favours, privileges and/or immunities that one member grants to goods of another member must be granted to like goods of all members.⁸⁸ This principle is intended to minimize, subject to specific exceptions, discrimination between members and permit market access to members through MFN treatment.
- **National Treatment:** This principle forbids members from discriminating between domestic and like imported products; once a product is imported into a country it has to be treated the same as the national like product is treated, it can

⁸⁸ *GATT, supra* note 84 at Art. I.

not be subject to a higher internal tax, special license, or any other discriminatory measure.⁸⁹

- **Prohibition of protective measures other than tariffs:** Makes import duties the only form of trade restrictions.⁹⁰
- **Progressive reduction and binding of national tariffs:** Once a member agrees on the elimination or reduction of a customs duty, tariff, import ban or quantitative restriction, and it is included in its schedule of concessions it cannot be increased anymore except in specific extraordinary circumstances.⁹¹
- **Transparency for trade policies and regulations affecting trade in goods:** Members should make public any regulation that relates to the importation, exportation or sale of goods and should administer their regulations in a uniform and reasonable manner.⁹²

Article XX of the GATT regulates the general exceptions to the prohibition of discriminatory measures. Pursuant to Article XX, some reasons why discriminatory measures may be justified are: that they are necessary to protect public morals; human, animal or plant life; that they are necessary to secure compliance with laws and regulations that are not inconsistent with the GATT, including the protection of copyrights, trade mark and patents and deterrence of dishonest practices; that they are imposed for the protection of national treasures; that they are related to conservation of natural resources; and others.⁹³

The interpretation of Article XX is very restrictive as its chapeau provides that such measures may not be applied “in a manner which would constitute a means of arbitrary or

⁸⁹ *Ibid* at Art. III.

⁹⁰ *Ibid* at Art. VI.

⁹¹ *Ibid* at Art. XXVIII.

⁹² *Ibid* at Art. X.

⁹³ *Ibid* at Art. XX.

unjustifiable discrimination between countries where the same conditions prevail, or [as] a disguised restriction on internal trade”. The WTO Appellate Body has established a test to determine if a trade restrictive measure is justified under Article XX. In the first instance it must be determined whether the measure is “necessary”. This is not limited to whether the measure is indispensable, but rather whether the measure contributes to a legitimate objective, taking into account the importance of the value protected and the impact on trade.⁹⁴ The second stage involves an analysis of whether the measure is the “least trade restrictive” measure available to achieve the member’s objective, if there are less trade-restrictive alternatives that offer the same level of protection such are to be preferred.⁹⁵

4.1.3 The GATS

The GATS principles at first seem similar to the GATT (MFN, National Treatment, Transparency) but they govern trade in services as opposed to trade in goods. The GATS establishes four different modes of service supply and different levels of obligations for each.

The four modes of supply trade in service are:⁹⁶

- **Mode 1: Cross-border supply:** Service supplied “from the territory of one member into the territory of any other member”.⁹⁷
- **Mode 2: Consumption abroad:** Service supplied “in the territory of one member to the consumer of any other member”.⁹⁸

⁹⁴ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by the United States)* (2009), WTO Doc WT/DS169/AB/R at paras 160-164 (Appellate Body Report).

⁹⁵ *Brazil – Measures Affecting Import of Retreaded Tires (Complaint by the European Communities)* (2007), WTO Doc WT/DS332/AB/R at para 156 (Appellate Body Report).

⁹⁶ See generally WTO, “The WTO Agreement on Trade in Services (GATS): objectives, coverage and disciplines”, online: WTO

<http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm>.

⁹⁷ *GATS*, *supra* note 85 at Art. 1(2)(a).

⁹⁸ *Ibid* Art. 1(2)(b).

- **Mode 3: Commercial presence:** Service provided “by a service supplier of one member, through commercial presence in the territory of any other member”.⁹⁹ This implies that a foreign service supplier has established a territorial presence in the member.
- **Mode 4: Supply of service through the presence of natural persons:** Service supplied “by a service supplier of one member, through presence of natural persons of a member”.¹⁰⁰ This implies the international movement of natural persons from members to other member’s territory with the purpose of providing services.

In addition, under GATS there are three different levels of obligations for trade in services:¹⁰¹

- **Unconditional General Obligations:** These apply directly and automatically to all service sectors and all members. They are:
 - a) **MFN Treatment:** Under Article II members are required to extend “immediately and unconditionally” to services and service suppliers of all other members the same treatment that is accorded to “like services and service suppliers of any other country”;¹⁰² and,
 - b) **Transparency:** Pursuant to Article III members must publish promptly “all relevant measures of general application which pertain to or that affect the operation of” the GATS.¹⁰³

⁹⁹ *Ibid* Art. 1(2)(c).

¹⁰⁰ *Ibid* Art. 1(2)(d).

¹⁰¹ Gilbert R. Winham, “Negotiations on Trade in Services: Simulation Exercise” (2003) Dalhousie University, Halifax, Nova Scotia at 5.

¹⁰² *GATS*, *supra* note 85 at Art. II(1) “Most-Favoured Nation Treatment”.

¹⁰³ *Ibid* Art. III “Transparency”.

- **Conditional General Obligations:** These are applicable only to sectors where a member has made specific concessions in its Schedule of Specific Commitments. The conditional general obligations are:
 - a) **Domestic regulations:** Article VI requires that each member’s national regulations relating to trade in service are applied in a reasonable, objective and impartial way;
 - b) **Monopolies and exclusive service suppliers:** Under Article VIII members must ensure that monopoly suppliers do not act in a manner inconsistent with specific commitments and the MFN principle;
 - c) **Payments and transfers:** Article XI prohibits restrictions on international transfers and payments related to service transactions.

- **Specific Commitments:** These obligations are only applicable to specific service sectors and sub-sectors that a member may enter into voluntarily through negotiation. Any specific commitments undertaken by a member must be notified to the WTO and are listed in the member’s Schedule of Specific Commitments.¹⁰⁴ The specific commitments which may be agreed to are:
 - a) **Market access:** Pursuant to Article XVI, once market access through one of the modes of supply is negotiated and listed in the member’s Schedule of Specific Commitments it must be given equally to all members. However, members can limit market access in their schedule by limiting the number of service suppliers, the value of the service transaction or assets, the number of service operation or in the quantity of service output, in the total number of persons that may be employed. Members may also make or maintain regulations that require specific legal structures such as joint ventures to be able to operate as a service provider and limitations on

¹⁰⁴ This procedure is known as the positive list approach, which means an agreement (e.g.: GATS) will apply only to those items listed in a subsequent schedule. It contrasts with the negative list approach in which the agreement (e.g.: NAFTA) applies to all relevant items except those listed as exceptions in the original agreement. Hence the common phrase in the negative list approach: “list it or lose it”.

participation of foreign capital and limiting ownership share of foreign capital.¹⁰⁵

- b) **National treatment:** Article XVII seeks to prevent discrimination in favor of domestic service suppliers against foreign service suppliers.¹⁰⁶ However, in their Schedules members can set conditions and qualifiers on their national treatment commitment. For example, the so-called cultural exception for broadcasting, which in essence is a limitation to any national treatment commitment.¹⁰⁷

Pursuant to GATS Article XIV, general exceptions to trade commitments in services may be justified on any of the following grounds: to protect public morals, maintain public order, protect life and health, comply with law and regulations that prevent deceptive or fraudulent practices or deal with a default in service contracts, additionally, laws or regulations that are necessary to protect privacy of individuals in relation to the dissemination of personal data and the protection of confidentiality of individual records and accounts.¹⁰⁸ This is equivalent to GATT Article XX thus it has a very restrictive interpretation and application.

4.2 Scope and Key Differences Between GATT and GATS

The application of trade obligations in GATT and GATS work differently, in part because they regulate different situations, trade in goods versus trade in services, and in part because trade rules in services are new compared to the rules for trade in goods. Accordingly, liberalization under GATT and GATS also works differently.

¹⁰⁵ *GATS*, *supra* note 85 at Art. XVI.

¹⁰⁶ *Ibid* Art. XVII. See generally Rolf H. Weber, “International E-Trade” (2007) 41.3 Int’l Law at 3.

¹⁰⁷ Mira Burri, “Cultural Diversity as a Concept of Global Law: Origins, Evolution and Prospects” (5 August 2010) Diversity ISSN 1424-2818, online: Diversity – Open Access Journal <www.mdpi.com/1424-2818/2/8/1059/pdf>.

¹⁰⁸ *GATS*, *supra* note 85 at Art. XIV.

The liberalization in GATS is more flexible; each member gets to choose the service sectors they want to grant market access and national treatment and the conditions and limitations of such concessions in the four different modes of service supply as well as any other additional commitments that member may wish to make. But even if it is more flexible, the liberalization of services is a complex process that requires more preparation and efforts in the negotiation than a traditional GATT negotiation for goods where the only subject of the negotiation is the tariff levels applicable to goods, which in principle can only be lowered. Thus, for goods the scope of the negotiations is narrowed to a reciprocal exchange of concessions.¹⁰⁹

Accordingly, there are similarities but also differences in the application of the main obligations and principles of GATT and GATS, and in the methodology used to list commitments in the schedules for goods and services as discussed below.

(i) Most Favoured Nation (MFN)

The MFN treatment is a general obligation in both GATT and GATS. However, exceptions to the MFN under GATS are permitted for a limited period of time provided that the member made those exceptions at the time of the GATS negotiation or for specific cases in regional integration agreements.¹¹⁰

¹⁰⁹ Antonio Fernandez-Martos Montero, “El Comercio de Servicios un Complejo Proceso de Liberalizacion” (2000) 785 *Informacion Comercial Española* at 19, online: *Revista ICE* <http://www.revistasice.com/CachePDF/ICE_785_13-25__99106E596FC61F4C8965A3480B6760F3.pdf>.

¹¹⁰ *GATS*, *supra* note 85 at Art. II (2), (3). See also Aaditya Mattoo, “MFN and the GATS” (Paper presented at the World Trade Forum Conference on “Most-Favoured Nations (MFN): Past and Present” at Neuchatel, 28-29 August 1998), online: *Institute for Agriculture and Trade Policy* <http://www.iatp.org/files/MFN_and_the_GATS.htm>.

(ii) Transparency

Transparency is a general obligation in both GATT (Article X) and GATS (Article III) to publish or make publically available all relevant measures that affect trade so traders from all members have clear knowledge of the measures affecting their trade.

(iii) Market Access

Market access in the context of the WTO agreements refers to measures that are imposed on importation, that is, at the border. Usually, they are customs duties or charges in connection to the importation and/or quantitative restrictions such as import quotas.¹¹¹

Tariffs or customs duties are charges that are payable at the time the product enters the country. They are the acceptable form of border protection under GATT, mainly because they are less trade disrupting than quotas because they do not impose a limit to the import.¹¹² It is unclear whether services can be subject to tariffs because GATS does not deal with tariffs. Indeed, “[u]ntil now tariffs on services has been largely unknown”.¹¹³ In fact, only one example of a customs duty being levied on a service could be found and it involved customs duty levied by the US on a ship repair service obtained abroad.¹¹⁴

On the other hand, quantitative restrictions and/or quotas set limitations on the amount of products that can be imported into a country. GATT Article XI expressly prohibits the use of such quantitative restrictions and only allows them in very limited emergency

¹¹¹ Joost Pauwelyn, “Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS” (2005) 4:2 *World Trade Center Review* 131 at 134, online: Duke Law Scholarship Repository <<http://scholarship.law.duke.edu>>.

¹¹² *Turkey – Restrictions on Imports of Textile and Clothing Products (Complaint by India)* (1999), WTO Doc WT/DS34/R at paras 9.61, 9.62, 9.63 (Panel Report).

¹¹³ Sacha Wunsch-Vicent, *Outstanding WTO Issues and Deliverables with respect to the Electronic Cross-border Trade of Digital Products* (M Sc Thesis, University of St. Gallen, 2002) at chapter II 16 online: Center for international Development at Harvard University <http://www.cid.harvard.edu/cidtrade/Papers/Wunsch_WTO.pdf>.

¹¹⁴ WTO Council for Trade in Services, *The Work Programme on Electronic Commerce Note by the Secretariat*, WTO Doc S/C/W/68 (1998) at para 34, online: United Nations Conference on Trade and Development <http://r0.unctad.org/ecommerce/event_docs/colombo_wto.pdf>.

situations.¹¹⁵ On the contrary, GATS Article XVI allows the use of quotas provided that limited market access has been granted by the member in its schedule of specific commitments.¹¹⁶ Some examples are the number of licenses that a member will award in the banking or telecommunication services.¹¹⁷

(iv) National Treatment

A “national treatment” creates an obligation not to discriminate between imported goods and services and like domestic goods and services which extends to “every governmental policy, whether it is a tax, a law, a regulation, etc., as long as it affects the conditions, widely interpreted for the sale and distribution of imported goods, service, and intellectual property”.¹¹⁸

National treatment is an unconditional obligation under the GATT. Conversely, under GATS, national treatment obligations can be qualified or limited because it depends on the member’s negotiated level of commitment in a specific service and its modes of supply. Accordingly, in trade in services if a member does not grant unlimited national treatment to imported service “X” in its Schedule of Specific Commitments it is free to discriminate against such imported service “X”. Therefore, it is possible to impose a higher tax or demand certificates that are not required for a like national service.

(v) General exceptions

General exceptions in both GATT and GATS are very restrictive and any measures taken by a member to restrict its commitments under either agreement cannot constitute an

¹¹⁵ *GATT*, *supra* note 84 at Article XI General Elimination of Quantitative Restrictions.

¹¹⁶ Arvind Panagariya, “E-Commerce, WTO and Developing Countries” (1999) at 8, online: Columbia University <<http://www.columbia.edu/~ap2231/Policy%20Papers/e-commerce-3.pdf>>.

¹¹⁷ Rohan, *supra* note 11 at 129.

¹¹⁸ Henrik Horn, “National Treatment in the GATT” (2006) 96 *The American Economic Review* 394 at 394.

arbitrary or unjustifiable discrimination between members where the same conditions prevail.

The justification for general exceptions under both GATT and GATS are much the same. However, there are some differences. Of significance to the trade in E-products is that GATT allows measures that are necessary to secure compliance with national laws and regulations, as long as they are GATT-consistent measures, that protect patents, trade marks and copyrights¹¹⁹ whereas GATS does not. On the other hand, GATS permits discriminatory measures, as long as they are GATS-consistent, that are necessary to protect the privacy of individuals in relation to the processing and dissemination of personal data and personal information,¹²⁰ while GATT has no such exception. The reason for the differences is the subject of the agreements, namely that GATT applies to trade in goods and GATS to trade in services.

The effect of these differences is relevant to the trade in E-products. Indeed, in the context of GATT, for example, a hypothetical State “X” could impose fines to ensure compliance with a ban on the import of movies in formats that are capable of being copied. The purpose of such law is to protect copyrights of movies and prevent the creation of illegal copies. However, such a ban and the associated fine would also apply to anyone who imports a movie in a specific format of electronic file as an E-product through the Internet since electronic movies can be used to make illegal copies.

Alternatively, under GATS general exceptions, the EU can justify rigorous privacy legislation that does not allow companies to send personal data to countries that do not guarantee the same level of protection as that afforded in the EU. The prohibition aims to protect personal data. Thus, hypothetically, someone in the EU could try to use his EU credit card to buy an E-book from an online store in remote State “X” which does not have measures in place to guarantee the safety of personal data. Such a person could find

¹¹⁹ *GATT*, *supra* note 84 at Art. XX(d).

¹²⁰ *GATS*, *supra* note 85 at Art. XIV (c) (ii).

that the transaction cannot be completed because the EU bank cannot send or confirm the personal information of the card holder to entities in State “X”.¹²¹

(vi) Liberalization Methodology

GATT and GATS use different procedures for scheduling trade commitments because, as mentioned above, trade liberalization works differently for goods and services. GATT Article II uses an approach under which members must specify in their schedules of concessions the applicable maximum tariff levels for trade in specific goods, this is the so called “bound tariff” or a “binding”. Tariffs can be applied lower than the bound level, but there is no obligation not to raise such tariff up to the bound level. If no bound tariff is listed for a given good in the schedule then there is no limit at which a tariff can be applied. Most members follow the international classification of products under the Harmonized Commodity Description and Coding System of the World Customs Organization (the "Harmonized System")¹²² for describing and listing the goods in the schedules of concessions. This provides for clarity and consistency among documents.

On the other hand, GATS uses a hybrid positive-negative list approach for negotiating and scheduling services.¹²³ First the member must list in their Schedule of Specific Commitments the service sectors in which they make commitments. If the service sector is not listed it is not included in the Schedule of Specific Commitments and therefore the member is free to impose any trade restrictive measures. However, once a service sector

¹²¹ According to the European Commission credit card numbers are personal data. For further information see: European Commission, *eYou Guide to your rights online* (2012), online: EC <http://ec.europa.eu/archives/information_society/eyouguid/fiches/1-vi-a/index_en.htm>.

¹²² The Harmonized System is a standard classification and nomenclature list of goods developed for trade purposes by the World Customs Organization (WCO). See generally, “Nomenclature – Overview- What is the Harmonized System (HS)?” (2012), online: WCO <http://www.wcoomd.org/home_hsoverviewboxes_hsharmonizedsystem.htm>. The HS lists tangible products only with the exception of electricity, which is an intangible and still classified as good. The reason for this goes from historical to politics and is beyond the scope of this research since electricity and E-products are very different commodities. For reference see: WTO, “Energy Services” WTO Doc S/C/W/52 (1998), online: WTO <www.wto.org/english/tratop_e/serv_e/w52.doc>.

¹²³ Mary E. Footer & Carol George, “The General Agreement on Trade in Services” in Patrick F. J. Macrory et al ed, *The World Trade Organization: Legal, Economic and Political Analysis* Vol II (New York: Springer, 2005) 799 at 821.

is listed in the Schedule of Specific Commitments it is deemed to be fully committed in all four modes unless the member sets out market access or national treatment exceptions in the relevant column of the schedule for each mode of supply. This forces the member to set out clearly the level of the commitment regarding market access and national treatment. The service sectors are identified in the WTO document called “Service Sectoral Classification List”, usually referred as W/120.¹²⁴ This document cross references the service classification of the United Nations’ Central Product Classification List (CPC)¹²⁵ to identify the scope of the services sector. Most members use this latter document to identify the services in their schedules.

Based on the foregoing it will readily appreciated that while there are similarities between GATT and GATS (e.g. MFN Treatment, Transparency), there are equally significant differences regarding the scope of application of market access, national treatment and permissible general exceptions, as well as in the procedure followed to schedule commitments. These differences have an impact on how E-commerce and trade of E-products specifically would be regulated. Accordingly, significant efforts have been made at the WTO to determine this question. A discussion of the WTO’s efforts in this regard is offered below.

4.3 The WTO and E-commerce

When the WTO was created in 1994, the Internet was not fully developed and E-commerce was an incipient phenomena. Accordingly, none of the Uruguay Round

¹²⁴ WTO, *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991), online: WTO <http://www.wto.org/gatt_docs/English/SULPDF/92120215.pdf> [W/120].

The document identifies 11 Service Sectors: (1) Business Services; (2) Communication Services; (3) Construction and Engineering Services; (4) Distribution Services; (5) Educational Services; (6) Environmental Services; (7) Financial Services; (8) Health-related Services and Social Services; (9) Tourism and Travel Related Services; (10) Recreational, Cultural and Sporting Services; (11) Transport Service.

¹²⁵ United Nations Statistics Division, *Central Product Classification List* (current Version 2 completed 31 December 2008), online: UN <<http://unstats.un.org/unsd/cr/registry/cpc-2.asp>> [CPC V2].

Agreements dealt with or even mentioned E-commerce.¹²⁶ However, the issue has since grown in importance as discussed below.¹²⁷

4.3.1 First WTO Ministerial Conference: Information Technology Agreement

The First Ministerial Conference held in 1996 did not address E-commerce. However, a number of members and customs territories agreed on a Declaration on Trade in Information Technology Products, known as the *Information Technology Agreement (ITA)*, pursuant to which they agreed to tariff elimination for trade in information technology products on an MFN basis.¹²⁸ The ITA is a significant achievement and is discussed further in this thesis in Chapter 8.

4.3.2 Second WTO Ministerial Conference: The Work Programme on Electronic Commerce and Moratorium on Customs Duties

By 1998 the WTO recognized the impact of E-commerce on trade. Accordingly, the Second Ministerial Conference adopted the Declaration on Global Electronic Commerce which instructed the General Council to establish a “comprehensive work programme to examine all trade-related issues relating to global electronic commerce”.¹²⁹ In the same Declaration, the members agreed to the so-called “Moratorium on customs duties on electronic transmissions”.¹³⁰

¹²⁶ Bashar H. Malwaki, “E-commerce in Light of International Trade Agreements: The WTO and the United States-Jordan Free Trade Agreement” (2006) 15:2 Int’l JL & IT 153 at 156.

¹²⁷ The following discussion is based significantly on the Ministerial Declarations issued after each Ministerial Conference of the WTO. A summary of each Ministerial Declaration, Decision and/or Briefing Notes related to E-Commerce is enclosed as Appendix 2. See also WTO, *Ministerial Conferences*, online: WTO <http://www.wto.org/english/thewto_e/minist_e/minist_e.htm>.

¹²⁸ WTO Ministerials, *Singapore Ministerial Declaration* (adopted on 13 December 1996), WTO Doc WT/MIN(96)/DEC at para 18, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm>.

¹²⁹ WTO, *The Geneva Ministerial Declaration on Global Electronic Commerce* (adopted on 20 May 1998), WTO Doc WT/MIN(98)/DEC/2, 2nd Sess, online: WTO <http://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm> [*WTO Declaration on Global E-Commerce*].

¹³⁰ *Ibid.*

(i) Work Programme on Electronic Commerce

Pursuant to the Declaration on Global Electronic Commerce the General Council created the Work Programme on Electronic Commerce on 25 September 1998.¹³¹ The Work Programme is composed of 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. Under the Work Programme “the WTO Secretariat has produced a number of background notes and members have submitted documents expressing their views on various issues related to E-Commerce”.¹³²

Significantly, when the General Council established the Work Programme it agreed on the definition of E-commerce as the “production, distribution, marketing, sale or delivery of goods and services by electronic means”.¹³³ The definition therefore recognizes E-commerce as a means of trade and not an object of trade. This in turn enabled the Councils to agree that the WTO-treaties, their rights, obligations, and members’ specific commitments were applicable to E-commerce.¹³⁴

(ii) Moratorium on Customs Duties on Electronic Transmissions

Also in 1998, the members agreed to “continue their current practice of not imposing customs duties on electronic transmissions”.¹³⁵ This moratorium is a political commitment not to impose customs duties on electronic transmissions, and was intended

¹³¹ WTO, *Electronic Commerce Briefing Note: Work continues on issues needing clarification* (28 November 1999), online: WTO <http://www.wto.org/english/tratop_e/ecom_e/ecom_briefnote_e.htm> [WTO Electronic Commerce, 1999 Briefing Note].

¹³² *Ibid.*

¹³³ WTO General Council, *Work programme on electronic commerce* (adopted on 25 September 1998), at para 1.3, online: WTO <http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm> [WTO, *Work programme on electronic commerce*].

¹³⁴ Heinz Hauser & Sacha Wunsch-Vincent, “A Call for a WTO E-commerce Initiative” (2001) *Iss 6 Int’l J. Comm. L. & Pol’y* 11 at 11, online: *International Journal of Communications Law & Policy* <www.ijclp.org> [Hauser & Wunsch, “A Call for a WTO E-commerce Initiative”].

¹³⁵ *WTO Declaration on Global E-Commerce*, *supra* note 129.

to be valid until the Seattle Conference of 1999.¹³⁶ It is not legally enforceable by the dispute settlement system of the WTO, but nevertheless represents an important initiative of how trade rules should be applied to E-commerce and more specifically E-products.¹³⁷ However, its scope is limited because the Moratorium only covers customs duties and no other forms of trade barriers or restrictions, such as quotas, discriminatory treatment in the form of different internal tax for imported E-products or special licensing requirements to name some.

4.3.3 Third WTO Ministerial Conference: Deadlock at the Work Programme

The Work Programme was intended to present a progress report and any recommendations at the Third Ministerial Conference in 1999. While discussions at the Seattle Ministerial Conference broke down and no Declaration was produced, it is clear that within the Work Programme members had reached an impasse. While members generally agreed that “the vast majority of transactions over the Internet are services” and therefore subject to GATS, there was disagreement over the classification of a number of digital/content products such as books and software delivered electronically (E-products).¹³⁸ Specifically, the Progress Report adopted by the Council for Trade in Services on 27 July 1999 states that:¹³⁹

25. Some delegations were of the view that all electronic deliveries are services and could not see any non-services products, which could be delivered electronically. Other delegations suggested that it still remained to be clarified whether there were a number of electronically delivered products which should be classified as goods and therefore subject to the GATT rather than the GATS. The question was also raised as to whether such products, even if classified as services, should be subject to full MFN and national treatment obligations and to general prohibition of quantitative restrictions. It was also suggested that there might be categories other than goods and services for classifying certain

¹³⁶ Wunsch-Vincent, *WTO, E-commerce and Information Technologies*, *supra* note 5 at 129.

¹³⁷ *Ibid.*

¹³⁸ WTO General Council for Trade in Services, *Work Programme on Electronic Commerce Progress Report to the General Council* (27 July 1999), WTO Doc S/L/74 at paras 6 & 25, online: WTO <<http://docsonline.wto.org/DDFDocuments/t/S/L/74.doc>>. See also WTO Electronic Commerce, 1999 Briefing Note, *supra* note 131.

¹³⁹ *Ibid.*

electronically delivered products; in some cases a downloaded product might be regarded as neither a good nor a service. However, it was pointed out that no suggestion was made to the effect that there was any product that would fall outside the scope of WTO agreements. It was agreed that further consideration, including the consideration of concrete examples, should be given to this question.

The disagreement regarding the classification of E-products appears to be largely centered on the United States, which supports the view that E-products should be classified as goods, and the European Union, which takes that position that E-products should be categorized as services.

Despite the fact that both the US and EU have achieved more or less the same level of development in E-commerce, the US is the leading exporter of such products and therefore wishes to obtain the MFN and national treatment advantages, along with non quantitative restrictions and the reduction or elimination of customs tariffs that would be available to E-products under the GATT.¹⁴⁰ On the other hand, the European Union's concerns regarding protection of culture means that by treating E-products as services it has greater flexibility to apply content restrictions to E-products and discriminatory measures against non-scheduled services. Furthermore, because GATS rules allow restrictions on E-products trade, it can have the effect of limiting the leading position of the US in E-commerce companies and making room for the development of E-commerce industries elsewhere.¹⁴¹ The US position is the minority view compared with the one of the EU that is supported by more members.¹⁴² A detailed discussion on the different consequences resulting from the classification of E-products as goods or services is offered below at heading 4.4.

4.3.4 Fourth WTO Ministerial Conference and Beyond

¹⁴⁰ Baker et al, "E-products and the WTO", *supra* note 2 at 7.

¹⁴¹ *Ibid.*

¹⁴² *Ibid* at 8.

The Fourth Ministerial Conference in 2001 in Doha agreed that “the work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for members at all stages of development” and agreed to continue the Work Programme and the moratorium on customs duties on electronic transmissions.¹⁴³

Subsequently, between 2001 and 2003 the General Council held “dedicated” discussions on a number of cross-cutting issues, including E-commerce. The issues discussed included:¹⁴⁴

- Classification of the content of certain electronic transmissions;
- Development-related issues;
- Fiscal implications of e-commerce;
- Relationship (and possible substitution effects) between e-commerce and traditional forms of commerce;
- Imposition of customs duties on electronic transmissions;
- Competition;
- Jurisdiction and applicable law/other legal issues.

However, it is clear there had been little progress reported with members essentially agreeing to disagree on the question of classification and to continue work to clarify this and other issues.¹⁴⁵

The Fifth WTO Ministerial Conference ended without consensus but the members issued a Ministerial Statement in which they “reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully”.¹⁴⁶

¹⁴³ WTO Ministerials, *Doha Ministerial Declaration* (adopted on 14 November 2001), WTO Doc WT/MIN(01)/DEC/1 at para 34, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

¹⁴⁴ WTO Ministerial Conference, *Cancun WTO Ministerial 2003 Briefing Notes: Electronic Commerce* (September 2003), online: WTO <http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief15_e.htm>.

¹⁴⁵ *Ibid.*

¹⁴⁶ WTO Ministerial Conference, *Cancun WTO Ministerial 2003 Conference ends without consensus* (14 September 2003), at para 6, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm#statement>;

The Ministerial Declarations and Decisions from the Sixth, Seventh and Eighth WTO Ministerial Conferences held in 2005, 2009 and 2011 respectively, confirm the lack of progress on the issues under the Work Programme, including the classification of E-product and call for a “reinvigoration” of the Work Programme.¹⁴⁷ Nevertheless, in each case the moratorium on customs duties on electronic transmissions was maintained until the next Ministerial Conference.

In summary, except for the moratorium on customs duties on electronic transmissions it appears that progress on the issues referred to the Work Programme on Electronic Commerce has stalled. Accordingly, the classification of E-products continues to be an open issue within the WTO. No doubt this is in large part due to the different consequences that result from the classification of E-products as goods subject to GATT or as services subject to GATS. Accordingly, the different consequences are discussed below.

4.4 Consequences of the Classification of E-products

4.4.1 Consequences if E-products are Services Subject to GATS

(i) Determination of Service Sector and Mode of Service

If E-products are considered services subject to GATS then it is necessary to determine under which sectors and subsectors of the GATS’ Service Sectoral Classification List

¹⁴⁷ WTO Ministerial Conference, *Hong Kong Ministerial Declaration* (adopted on 18 December 2005), WTO Doc WT/MIN(05)/DEC, at para 46, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm>; WTO Ministerial Conference, *Geneva Ministerial Decision* (02 December 2009), WTO Doc WT/L/782, online: WTO <http://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm>; WTO Ministerial Conference, *Geneva Ministerial Decision* (17 December 2011), WTO Doc WT/L/843, online: WTO <http://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm#adopted>.

(W/120) they fall.¹⁴⁸ A review of the W/120 in conjunction with the United Nations Central Products Classification (CPC)¹⁴⁹ is necessary.¹⁵⁰ In addition, it will be necessary to determine what mode of service the delivery of E-products falls under, mode 1 on a cross-border basis, meaning the E-products are traded online from the territory of one WTO member to the territory of another WTO member, or mode 2 on a consumption abroad basis, meaning the E-products are deemed to be traded online in the territory where the vendor or supplier is domiciled to consumers of other WTO members.¹⁵¹

(ii) Market Access and Customs Duties

If classified as a service, E-products would be subject to market access limitations on each mode of supply. Therefore, members can include in their schedules restrictions pursuant to Article XVI. Such restrictions may include:¹⁵²

- the number of E-products providers,
- the total value of E-products transactions,
- total number of operators or total number of E-products output,
- the number of persons employed in the creation and offer of certain E-products,
- the form of legal entity or joint venture that E-product providers should hold, and
- limitation of participation of foreign capital or foreign investment.

As can be appreciated from the above, Market Access restrictions permit quantitative limitations, that is, quotas on the number of service and/or service suppliers.

On the other hand it is unclear if customs duties can be levied on services. The

¹⁴⁸ *W/120*, *supra* note 124.

¹⁴⁹ The current version of the CPC is 2.0 in which many online services had been added. For easy reference see UN, *Central Product Classification List Version 2* (31 December 2008), online: United Nations Statistics Division <<http://unstats.un.org/unsd/cr/registry/cpc-2.asp>>.

¹⁵⁰ Liu, *supra* note 77 at 1222.

¹⁵¹ See Wunsch-Vincent, *WTO, E-commerce and Information Technologies*, *supra* note 5 at 77.

¹⁵² *GATS*, *supra* note 85 at Art. XVI. See also Rohan, *supra* note 11 at 130.

application of customs duties is a trade barrier at the border that is mainly applicable for goods and is very rare in services. Moreover, until recently, there were significant technological challenges to collecting duties on services at the border, especially if the service was electronically delivered. Nevertheless, as discussed below, members can impose discriminatory taxes on foreign services pursuant to the National Treatment limitations of GATS Article XVII. Accordingly, members have the option to charge a discriminatory tax instead of difficult to collect customs duties.

(iii) National Treatment

If E-products are classified as services members would be able to impose national treatment restrictions pursuant to Article XVII of GATS to achieve domestic policy objectives or to protect domestic industry. An example would be content restrictions based on the origin of the content in order to protect cultural values, such as in the case of Europe's Television Without Frontier Directive that limits foreign television content.¹⁵³ Moreover, members will be able to impose discriminatory taxes on foreign E-products. However, if the member makes a national treatment commitment excluding discriminatory taxes in a particular sector of E-products then all discriminatory taxes in the sector will be banned.¹⁵⁴

(iv) General Exceptions

If E-products are services and subject to the exceptions of GATS Article XIV, members would be able to have measures in place that protect the privacy of individuals and their personal data that the individual provides when procuring E-products.¹⁵⁵ These measures are essential to the protection of consumer rights in pure E-commerce transactions.

¹⁵³ Rohan, *supra* note 11 at 120-126.

¹⁵⁴ *Ibid* at 133.

¹⁵⁵ See *GATS*, *supra* note 85 at Art. XIV(c)(ii).

4.4.2 Consequence if E-products are Goods Subject to GATT

(i) Determination of Goods (like products versus new products)

The first step is to determine whether electronically delivered E-products are “like products” and fall within the same category as their physical counterparts or if they are a separate category. In the context of international trade the “like product” analysis is the criteria by which the likeness of products is assessed in order to determine whether a particular foreign product is comparable or the same as a national product and therefore whether the foreign product should not be subjected to different treatment once imported.

In order to carry out a like product analysis reference should be made to the Harmonized System (HS) Classification to assess under which product category they fall. In addition, the WTO ruling on *Japan – Taxes on Alcoholic Beverages (Japan-Alcohol AB Decision)* provides a test to assess if imported goods are “like products” of their domestic counterparts using the following factors: “(1) the product’s end-users in a given market; (2) consumers’ tastes and habits; and (3) the product’s properties, nature and quality”.¹⁵⁶ The same analysis could be used to determine whether E-products are “like products” of their physical counterparts. The determination of whether E-products are or are not “like products” of their physical counterparts will impact their treatment for customs duties and also potentially national treatment issues (see below).

(ii) Market Access and Customs Duties

Market access for goods does not depend on specific commitments (as in the case of services). In general customs duties are the only market access restrictions for goods. Consequently, classifying E-products as goods will provide significant trade liberalization advantages. Indeed, it has been argued that “treating all E-commerce transactions as services raises the danger that policy regimes may become more restrictive than the status

¹⁵⁶ Baker et al, “E-products and the WTO”, *supra* note 2 at 9. Citing *Japan – Taxes on Alcoholic Beverages (Complaint by European Communities)* (1996) WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at paras 23 - 24 (Appellate Body Report).

quo, because many members have not made specific commitments on products that are traded electronically”.¹⁵⁷

Nonetheless, if E-products are considered goods they could be subject to customs duties. There are two scenarios: if E-products are considered “like products” to their physical counterparts they will be subject to the same tariff. This will avoid different treatment and standards when trading E-products versus their physical counterparts.

On the other hand if E-products are considered goods but not “like products” to their physical counterparts they will most likely be considered IT products and consequently share the advantages that the Information Technology Agreement (ITA) offers of gradual elimination of customs duties for information technology products.¹⁵⁸

(iii) National Treatment

If they are classified as goods, E-products will enjoy the same national treatment as their physical counterparts (if they are “like products”) or in any case they will enjoy the same national treatment of domestic E-products. This would guarantee that E-products would not be subject to discriminatory treatment or standards. Nonetheless, if E-products are considered goods, their importation will be subject to the Agreement on Import Licensing Procedures so suppliers might have to obtain import licenses.¹⁵⁹ Furthermore, the WTO anti-dumping provisions of GATT Article VI and its implementation Agreement will apply to the trade of E-products.¹⁶⁰

¹⁵⁷Primo, *supra* note 47 at 472.

¹⁵⁸ *Ibid* at 125.

¹⁵⁹ Rohan, *supra* note 11 at 129. The author stated that “The License Agreement requires parties to publish information for traders making transparent the basis on which licenses are granted... This could lead to an indirect restriction on trade”.

¹⁶⁰ *Ibid* at 130. The author stated that “[d]umping effectively aims to prevent a Member from exporting a product at an unduly low price to drive out competition in the imposing country... Under Article VI, there are three requirements for dumping: (1) the export price of a product must be lower than the price (normal value) of that product in the domestic market of the exporting country; (2) exports of such products must call to or threaten to cause material injury to the domestic industry or materially retard the establishment of

(iv) General Exceptions

If E-products are considered goods and subject to GATT the General Exception of Article XX will apply. Among those exceptions, the one related to “the protection of patents, trade marks and copyrights”¹⁶¹ is of capital importance for trade of E-products because the value of these products relies on the protection of their Intellectual Property (IP) rights. Thus members would be able to have measures in place to protect those rights.

Chapter Summary

The analysis of the WTO agreements shows that the trade of E-products would work differently if they are classified as “goods” subject to GATT or “services” subject to GATS. Any determination will have a significant impact on the scope of liberalization of trade in E-products and the degree to which members can protect domestic policy objectives that free trade in E-products can affect. A summary of the main consequences that result from the categorization of trade in E-products as trade in goods subject to GATT or trade in services subject GATS is set out in table 4.1.

a domestic industry; and (3) there must be a causal relationship between dumping and the injury or retardation”.

¹⁶¹ *GATT*, *supra* note 84 at Art. XX(d).

Table 4.1: Main Consequences if E-products are Subject to GATT or GATS

Key Matters	GATT	GATS
Categorization within the treaty	Determination whether “like products” or “new products”	Determination of service sector (W/120 and CPC) and mode of service (Mode 1 or Mode 2)
Market Access - Quotas	No restrictions permitted - Quotas allowed on very restrictive basis	As per Member’s Schedule of Commitments - Quantitative Restrictions possible
Market Access - Customs Duties	May be imposed - Subject to existing tariffs if “like goods” or, if “new products” possibly to benefit from ITA. If not may be subject to a different tariff	Possible, but unclear how they would be applied
National Treatment	No discrimination permitted	As per Member’s Schedule of Commitments – Qualitative Restrictions possible
General Exceptions	Generally restricted, but measures for the protection of patents, trade marks and copyrights possible	Generally restricted, but measures that protect the privacy of individuals and their personal data possible

Given the significant differences outlined above, it is not surprising that a debate has originated within the WTO regarding the classification has originated with the US advocating for their categorization as “goods” subject to GATT and the European Union arguing they should be categorized as services, ostensibly on the basis of protecting cultural values. However, it has also been noted that because GATS rules allow restrictions on E-products trade, it can have the effect of limiting the leading position of the US in E-commerce companies making room for the development of E-commerce

industries elsewhere.¹⁶² Which position will benefit developing countries within the WTO is still unclear since for many of them E-commerce is still very incipient and customs duties are an important source of revenue which may be limited if E-products are classified as services. Nevertheless, it is significant that since it was agreed in 1998 several Ministerial Conferences have successively extended the Moratorium on Customs duties on electronic transmissions because there has not been a consensus to make it permanent, no doubt partly due to the lack of progress of the Work Programme and the outstanding issue of the classification of E-products.¹⁶³

Neither GATT nor GATS provides a definition for “goods” or “services” which complicates the issue of the classification because of the lack of guidelines to assist in determining under which concept E-products can fall. Therefore to have a comprehensive approach of which WTO Agreement better suits E-products the next chapters deal with the concept of “goods” and “services”, their characteristics, and current treatment of E-products in bilateral trade.

¹⁶² Baker et al., “E-products and the WTO”, *supra* note 2 at 7.

¹⁶³ Sacha Wunsch-Vicent, “Trade Rules for the Digital Age” (2008), Cambridge University Press at 4 online: Peterson Institute for International Economics <<http://www.iie.com/publications/papers/wunsch1106.pdf>>.

Chapter 5 Theoretical Approach

An analysis of the GATT and GATS language reveals that there is a distinction between trade in goods and trade in services, but neither GATT nor GATS defines or differentiates between goods and services. Nevertheless, the scope of application of trade rules, GATT or GATS, varies depending on whether the subject matter of trade is goods or services.¹⁶⁴ Therefore, this chapter explores the concepts behind the issue of the classification of E-products: “goods” and “services” by reviewing definitions found in dictionaries, legal theories, and academic literature as well as analyzing the essential characteristics of goods and services compared with those of E-products. The objective is to determine under which concept E-products reasonably fall.

5.1 Definition and Characteristics of Goods and Services

5.1.1 Definition and Characteristics of Goods

Goods are defined in general dictionaries as “things for sale, or the things that you own”.¹⁶⁵ In economics dictionaries, goods are defined as “the physical embodiment of the metaphysical quality of good”,¹⁶⁶ “[a] tangible output rather than a service... [and] [o]utput which bestows utility on the person possessing it”.¹⁶⁷

At law, the definition of goods can vary from one system of law to another. For instance, the German Civil Code, the Bürgerliches Gesetzbuch (or BGB), provides in its General

¹⁶⁴ Fiona Smith & Lorna Woods, “A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in the World Trade Organization and The European Union” (2005) 12:1 Colum J Eur L at 6 & 11 [Smith & Woods].

¹⁶⁵ *Cambridge Dictionaries Online*, *sub verbo* “goods”, online: Cambridge Dictionaries Online <<http://dictionary.cambridge.org/define.asp?key=33822&dict=CALD>> [*Cambridge Dictionaries Online*].

¹⁶⁶ Steven N. Durlauf & Lawrence E. Blume, *The New Palgrave a Dictionary of Economics*, 2nd ed (New York, NY: Stockton Press, 1987) *sub verbo* “goods and commodities”.

¹⁶⁷ Donald Rutherford, *The Dictionary of Economics*, (London & New York: Routledge, 1992) *sub verbo* “goods” [Rutherford, *The Dictionary of Economics*].

Part that “only corporeal objects are things as defined by law”.¹⁶⁸ On the other hand, the Civil Law theory considers any thing that can be subject to trade and legal relations, regardless of whether it is tangible or intangible as “goods”.¹⁶⁹ Thus, goods are a portion of the exterior world that have a separate and autonomous existence detached from humans. In addition, they must be capable of satisfying human needs and have value in society.¹⁷⁰ Similarly, in the common law system in North America, goods are defined as “[t]angible or movable personal property other than money; esp., articles of trade or items of merchandise <goods and service>”,¹⁷¹ or as:¹⁷²

Chattels personal other than things in action or money, and includes emblements, industrial growing crops and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale. 2. Includes tokens, coupons or other documents or things issued or sold by a seller to a buyer that are exchangeable or redeemable for goods or services. *Consumer Protection acts*. 3. Anything that is the subject of trade or commerce.... Tangible personal property other than chattel paper, documents of title, money and securities, and includes fixtures, growing crops, the unborn young of animals...

Based on the foregoing it can be concluded that main characteristics of goods are:

- Tangibility, they are mostly tangible products that can be seen, touched, and counted;
- Ownership, they are subject to proprietorship; and,
- Transferability, they can be transferred from one entity to another.

¹⁶⁸ *German Civil Code BGB* section 90, translation by Langenscheidt Translation Service, online: Gesetze im Internet <http://www.gesetze-im-internet.de/englisch_bgb/index.html#gl_p0261>.

¹⁶⁹ Jose Luis Aguilar G., *Cosas, bienes y derechos Reales*, 6th ed (Caracas, Venezuela: Universidad Catolica Andres Bello, 1999) at 1-9 [translated by the author].

¹⁷⁰ *Ibid.*

¹⁷¹ Bryan A. Garner, *Black's Law Dictionary*, 2nd pocket ed (St. Paul, Minnesota: West Group, 2001) *sub verbo* “goods” [*Black's Law Dictionary*].

¹⁷² Daphne A. Dukelow, *The Dictionary of Canadian Law*, 3rd ed (Scarborough, Ontario: Thomson/Carswell, 2004) *sub verbo* “goods”.

5.1.2 Definition and Characteristics of Services

Service is defined as “the help provided to a customer by someone who works in esp. a restaurant or store”.¹⁷³ Similarly, at law, Black’s Law Dictionary defines “service” as “[t]he act of doing something useful for a person or company for a fee” and as “[a]n intangible commodity in the form of human effort, such as labor, skill, or advice” (Emphasis added).¹⁷⁴

In economics dictionaries services are defined as “[t]he non-physical output which flows from the employment of a factor of production. The major example is labour services which can be menial, e.g. cleaning, or as demanding as the provision of professional advice”.¹⁷⁵ According to Wolak, Kalafatis and Harris, in economics literature it is generally accepted that the concept of service implies the following characteristics:¹⁷⁶

- Intangibility as a key characteristic that differentiates services from goods;
- Inseparability of delivery and consumption of the services;
- Heterogeneity in the delivery and quality of the service, meaning that the exact same service cannot always be delivered because of the high content of labour. In other words, the delivery and quality of a service can vary if it is delivered by different persons or at a different time; and
- Perishability, meaning that services cannot be stored to be used in the future. Services are time dependent.

¹⁷³ *Cambridge Dictionaries Online*, *supra* note 160 *sub verbo* “service” online: Cambridge Dictionaries Online <http://dictionary.cambridge.org/dictionary/american-english/service_1?q=service>.

¹⁷⁴ *Black’s Law Dictionary*, *supra* note 166 *sub verbo* “service”.

¹⁷⁵ Rutherford, *The Dictionary of Economics*, *supra* note 162 *sub verbo* “services”.

¹⁷⁶ Russell Wolak, Stavros Kalafatis & Patricia Harris, “An Investigation Into Four Characteristics of Services” (1998) 3 *Journal of Empirical Generalizations in Marketing Science* 22 at 24-27 online: n.a <<http://members.byronsharp.com/empgens/emp1.pdf>>.

It will be readily appreciated that apart from being intangible, the other characteristics of services stated above are not necessary or even present in E-products. Thus, based on the definition and characteristics of services E-products do not necessarily fit within the concept of services.

5.2 Distinguishing Between Goods and Services: The Challenge of the Theoretical Approach

5.2.1 Distinctions Based on Tangibility

Based on the foregoing it is readily apparent that there are significant inconsistencies from one source to another regarding the definition of goods and services. Thus, some definitions, such as the ones provided in dictionaries of economics and the German Civil Code rely mainly or only on the tangible quality to define goods and explicitly exclude services. Under that definition goods can only be tangible and accordingly E-products, which are intangible, cannot constitute goods. On the other hand, under civil law and common law doctrine intangibles could be considered goods and therefore E-products could fit under the concept of goods. Such opposing positions within the members domestic law contribute to the challenge of the classification.

5.2.2 Distinction Based on Ownership Rights

Clearly, a distinction between goods and services based solely on their tangibility is insufficient because services can often produce a tangible result. Accordingly, alternatives focusing on one or more characteristics have been proposed. One of the most significant alternatives, based on the ownership rights, is advanced by Peter Hill. As explained by Peter Hill, “[m]any services consist of material changes in the persons or property of consumers, such as haircuts, surgical operations or the repainting of houses, which it is

wholly inappropriate, and misleading, to describe as ‘immaterial’ just because no new entity is created”.¹⁷⁷

According to Hill, the focus of the distinction between goods and services is in the ownership rights and the separation between production and consumption. As explained by Hill:¹⁷⁸

Goods are entities of economic value over which ownership rights can be established. If ownership rights can be established they can also be exchanged, so that goods must be tradable. As goods are distinct entities which are separate from their producers or owners, the production and trading of goods are activities which can be organized separately and carried out at different locations and times. Channels of distribution can be developed with goods changing hands several times. Goods can be consumed or used long after they are produced at locations which are remote from their place of production. This separation of distribution and use from production is not feasible for services.

Hill goes on to state that the economic characteristics of goods can exist not just in material objects, but also in intangible entities. If so, those entities, which have to have to be recorded or stored on physical media, are still goods. “Like material objects, they are separate entities over which ownership rights may be established (and traded) and which may be of considerable economic value to their owners. Originals may be used to produce, or even mass produce, copies”.¹⁷⁹

On the other hand, says Hill, services mainly consist in an activity, a performance, and experience based on someone’s skills over which the transfer of ownership rights is not feasible. Instead of possession or ownership, for services there is the “right of enjoyment”, of receiving an activity for a fee because services, like goods, have economical value.

Since E-products may be owned as well as just being subject to a “right of enjoyment” or being owned subject to limitations, a distinction based on ownership rights does not

¹⁷⁷ Peter Hill, “Tangibles, Intangibles and Services: A New Taxonomy for the Classification of Output” (1999) 32:2 Can J Econ 426 at 441 [Hill].

¹⁷⁸ *Ibid* at 427; cited in Rohan, *supra* note 11 at 140.

¹⁷⁹ Hill, *supra* note 177 at 427.

significantly advance the classification of E-products as goods or services. Further analysis of the characteristics of goods and services compared to those of E-products is required.

5.3 Characteristics of Goods and Services Compared with E-products

According to Smith and Woods goods and services can be distinguished from all other things because they are tradable.¹⁸⁰ Tradability is the capacity of goods and services to be transferred from one entity to another, this is called the transfer element and together with the economic and value factor form the “tradability” characteristic.¹⁸¹ If so, it is their intrinsic characteristics that differentiates goods from services and causes them to be classified as different categories subject to distinct international trade rules. Based on the above definitions it is submitted that goods and services share the following characteristics: they belong to commerce, are subject to commercial transactions, have value, and are tradable.

At the same time, there are relevant differences between goods and services that make them distinctive categories for trade purposes. Table 5.1 lists those differences and compares both goods and services with the characteristic of E-products, to assess to which category E-products are more like products, goods or services.

¹⁸⁰ Smith & Woods, *supra* note 164 at 50.

¹⁸¹ *Ibid.*

Table 5.1: E-products Characteristics

Goods	Services	E-Products
Tangible	Intangible	Intangible
Consistent product specifications	Heterogeneity (Not always consistent product specification)	Consistent product specifications
Moveable commodity	Limited moveable commodity	Limited moveable commodity
Low customer interaction	High customer interaction	High customer interaction
Mass production often automated	Knowledge-based non-mass production difficult to automate	Mass production often automated
Separate production, procurement and consumption	Inseparable production-procurement-consumption	Separate production, procurement and consumption
Can be inventoried by the manufacturer	Cannot be inventoried by the manufacturer	Cannot be inventoried by the manufacturer
Transferable	Nontransferable	Nontransferable
Time independent usage - non perishables	Time dependent usage - perishables	Time independent usage - non perishables
Ownership	Right to enjoyment	Right to enjoyment and Ownership (IP rights)

As can be appreciated E-products are sui-generis products that share characteristics with both “goods” and “services” and are therefore a unique type of product.

However, classifying E-products as a new sui-generis category of trade would create major problems for the WTO because trade rules are established for “goods” and “services”. Recognizing a new sui-generis product creates the challenge that as technology evolves, the existing WTO trade agreements, namely GATT and GATS, have to be amended through negotiation to accommodate new categories of trade such as E-

products and put through the lengthy ratification period. Accordingly, the focus must be on whether E-products are “more like” goods or services.

Based on their intrinsic characteristics it is evident that in addition of being intangible E-products share other key characteristics with services that makes it difficult to lean toward a “goods” classification. These characteristics are:

5.3.1 Limited Moveable Commodity

The download of E-products is typically limited to a specified number of devices. For example iTunes only allows downloads to “Associated Devices” under the following terms:¹⁸²

B. ITUNES STORE TERMS AND CONDITIONS AUTOMATIC DELIVERY AND DOWNLOADING PREVIOUS PURCHASES

...

Association of Associated Devices is subject to the following terms:

- (i) You may auto-download iTunes Auto-Delivery Content or download previously-purchased iTunes Eligible Content from an Account on up to 10 Associated Devices, provided no more than 5 are iTunes-authorized computers.
- (ii) An Associated Device can be associated with only one Account at any given time.
- (iii) You may switch an Associated Device to a different Account only once every 90 days.
- (iv) You may download previously-purchased free content onto an unlimited number of devices while it is free on the iTunes Service, but on no more than 5 iTunes-authorized computers.

5.3.2 High Customer Interaction

E-products allow for customization; for example, in the case of E-books, users can use zoom functions to resize letters and can customize the color of the letters and background. Also most formats of E-books come with html links and cross-references that create a more interactive experience for the user.

¹⁸² Apple Online Store Terms and Conditions, “iTunes Store Terms and Conditions” (30 June 2012), online: Apple <<http://www.apple.com/legal/iTunes/us/terms.html#GIFTS>> [iTunes Store Terms & Conditions].

5.3.3 Cannot be inventoried

Because of their format E-products are created and copies are sold through downloads so there is not a determined number of products manufactured and in inventory, resulting in practically no cost associated with unsold merchandise.

5.3.4 Nontransferable

The usage of E-products is limited and once the product is acquired in theory it cannot be re-transferred unless the device that houses the product is transferred as well; but even in those cases the transaction is questionable considering that most of the terms and conditions under which E-products are procured prohibit transfers of any kind for the product. Legally the license can not be transferred to anyone other the original purchaser. For example the iTunes terms and conditions provide that:¹⁸³

C. MAC APP STORE, APP STORE AND IBOOKSTORE TERMS AND CONDITIONS

LICENSED APPLICATION END USER LICENSE AGREEMENT

a. Scope of Licence: This license granted to you for the Licensed Application by Licensor is limited to a nontransferable license to use the Licensed Application on any Apple-branded products running iOS ... This license does not allow you to use the Licensed Application on any Apple Device that you do not own or control, and except as provided in the Usage Rules... You may not rent, lease, lend, sell, transfer redistribute, or sublicense the Licensed Application and, if you sell your Mac Computer or iOS Device to a third party, you must remove the Licensed Application from the Mac Computer or iOS Device before doing so. You may not copy (except as expressly permitted by this license and the Usage Rules), decompile, reverse-engineer, disassemble, attempt to derive the source code of, modify, or create derivative works of the Licensed Application, any updates, or any part thereof (except as and only to the extent that any foregoing restriction is prohibited by applicable law or to the extent as may be permitted by the licensing terms governing use of any open-sourced components included with the Licensed Application). Any attempt to do so is a violation of the rights of the Licensor and its licensors. If you breach this restriction, you may be subject to prosecution and damages.

¹⁸³ *Ibid.*

5.3.5 Limited Ownership and Right to Enjoyment

Beyond the nontransferable quality most usage rules of E-products state that the products are not sold but licensed to the users.¹⁸⁴ At first instance this does not seem to be an issue because it is the same case for the physical counterparts: a consumer buys a book and owns it but does not own the content. However, the usage of the E-product is dependent on a specific and separate device. For example: most formats of E-books are incompatible so E-books purchased from Amazon will most likely only be readable on a Kindle device or app, likewise E-books purchased from Barnes & Noble are only readable on a Nook device or app, and Apple are only readable on the iBooks app.¹⁸⁵ Thus, unlike their physical counterparts, E-products are more like a service provided through a specific and separate device than an independent product subject to ownership like the physical counterparts.

5.4 Chapter Summary

The theoretical approach does not resolve the issue of the classification because of the incompatibility in the various definitions and doctrines makes it possible to argue the matter both ways, i.e. that E-products are goods or services. Furthermore, the analysis of the specific characteristics of goods and services compared with those of E-products showed that E-products have characteristics of both categories and therefore are sui-generis products.

The conclusion that E-products are “sui generis” products is problematic because the current classification under the WTO agreements is binary and refers only to goods and services, so products must fit within those concepts. If a position must be taken as to whether E-products are goods or services it could be concluded that because E-products

¹⁸⁴ *Ibid.*

¹⁸⁵ Melissa J. Perenson, “The Pitfalls of E-Books Buying: What to Look Out for Before You Purchase” (2011), online: PCWorld <http://www.pcworld.com/article/219335/the_pitfalls_of_ebook_buying_what_to_look_out_for_before_you_purchase.html>.

share key characteristics including key factor of intangibility with services it would be more reasonable to classify such products as services than goods.

However the differences from one legal system to another could translate into different approaches among WTO members so a deeper analysis should be made to examine how E-products are being treated in current trade practices. The next chapter will review a representative number of bilateral trade agreements that include provisions regarding trade in E-products to see how WTO members have dealt with trade in E-products and if they take a position regarding the classification of these products.

Chapter 6

Pragmatic Approach

This chapter reviews how the issue of the classification of E-products has been dealt with in bilateral Free Trade Agreements (FTAs). The objective is to determine if the current bilateral trade practices suggest any tendency in favour of classifying trade in E-products as trade in goods or in services and how their trade is regulated and if so, whether the treatment under the FTAs is suitable for the WTO Treaty System.

6.1 Current treatment of E-products in Bilateral FTAs

This Chapter examines the E-Commerce provisions in a representative number of FTAs entered into by various WTO members. In particular the treatment of trade in digital products (E-products) as trade in goods or services, is scrutinized.

FTAs are comprehensive trade arrangements that individual parties undertake which are greater than their commitments under the WTO agreements. The purpose of the FTAs is to in some areas enhance bilateral trade among parties by opening new markets for goods and services, increasing investment opportunities, eliminating or reducing trade barriers such as customs duties, and in general facilitating trade in a more predictable environment from a policy standpoint. The GATT and GATS have rules to establish the FTAs to avoid conflicts with the trading principles of the WTO.¹⁸⁶

¹⁸⁶ GATT, *supra* note 84 at Article XXIV and GATS, *supra* note 85 at Article V allows for the establishment of regional trading partnerships and FTAs. *See*: WTO, *Regionalism: friends or rivals?*, online: WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm>.

6.1.1 US Free Trade Agreements

(i) US – Jordan (signed 2000, in force 2001)

The earliest FTA incorporating an E-commerce Chapter was the agreement entered into between the US and Jordan.¹⁸⁷ Article 7 of the *US-Jordan FTA* provides that:¹⁸⁸

ARTICLE 7: ELECTRONIC COMMERCE

1. Recognizing the economic growth and opportunity provided by electronic commerce and the importance of avoiding barriers to its use and development, each Party shall seek to refrain from:

- (a) deviating from its existing practice of not imposing customs duties on electronic transmissions;
- (b) imposing unnecessary barriers on electronic transmissions, including digitized products; and
- (c) impeding the supply through electronic means of services subject to a commitment under Article 3 of this Agreement, except as otherwise set forth in the Party's Services Schedule in Annex 3.1.

...

(Emphasis added)

The *US-Jordan FTA* avoids any definition or categorization of digital products and therefore taking a position on the question of whether E-products are goods or services. Nevertheless, Article 7(1)(b) reasserts the parties commitment to maintaining the current customary moratorium on customs duties on electronic transmissions.

Article 7(3) of the *US-Jordan FTA* reaffirms the US – Jordan Joint Statement on Electronic Commerce, which is also part of the FTA.¹⁸⁹ The Joint Statement provides that the parties “agree that electronic commerce falls within the scope of the WTO rules and commitments” and should be conducted in conformity with the WTO rules.¹⁹⁰ While the FTA does not take a position regarding the classification of E-products (consistent with

¹⁸⁷ Malwaki, *supra* note 126 at 159.

¹⁸⁸ *Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area*, 24 October 2000, 41 ILM 63, online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/jordan-fta>>[*US-Jordan FTA*].

¹⁸⁹ Malwaki, *supra* note 126 at 160.

¹⁹⁰ *US-Jordan Joint Statement on Electronic Commerce*, 7 June 2000, at Tariff and Trade Principles, online: Organization of American States Foreign Trade Information System <<http://www.sice.oas.org/Trade/us-jrd/St.Ecomm.pdf>>.

the discussions then ongoing under the Work Programme)¹⁹¹ the Joint Statement does contain a number of statements, which are more consistent with the classification of E-products as goods as opposed to services. In particular, it provides that:

- The moratorium on customs duties “should be maintained with a view to making it permanent and binding as soon as possible”.
- Governments should promote access to all information posted on the Internet and that the Internet should be used to promote cultural diversity.
- Trade barriers to the free flow of content (which did not exist at the time) should not be created in the future. “In instances where users do not wish to receive certain types of content, such as that which is unsuitable for children, filtering/blocking systems or other tools should be made available so that the individual consumer can exercise his or her choice.” (Emphasis added)
- Any taxation of electronic commerce “should be clear, consistent, neutral and non-discriminatory”. (Emphasis added)

In summary, the Joint Statement calls for the perpetuation of the moratorium, focuses on the “cultural diversity” achieved by the Internet and content posted thereon, decisions by the individual consumer and tax non-discrimination, as opposed to cultural protection, government policy decision-making and tax discrimination possible only under GATS.

¹⁹¹ *US-Jordan FTA*, *supra* note 188 at Chapter 4.3.2.

(ii) US – Chile (signed 2003, in force 2004)

In the *US-Chile FTA* the parties agree to cooperate in the development of E-commerce. In connection with E-products specifically, the US-Chile FTA defines “digital products” as follows:¹⁹²

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 on-going WTO discussions on whether trade in digital products transmitted electronically is a good or a service.
(Emphasis added)

In connection with such digital products the parties agree not to impose customs duties,¹⁹³ and commit to their non-discriminatory treatment.¹⁹⁴ Nevertheless, as in the *US-Jordan FTA*, this *FTA* expressly avoids taking a position on the broader question of the classification.¹⁹⁵ However, it is interesting to observe that the parties refer to their domestic law in the actual definition of digital products, thus suggesting that at least one of them has taken a position on the issue in its statutes.

(iii) US – Singapore (signed 2003, in force 2004)

The *US – Singapore FTA* was the first US FTA with an Asian nation.¹⁹⁶ The FTA recognizes the growth opportunity provided by E-commerce and applicability of E-commerce.¹⁹⁷ The FTA defines digital products as:¹⁹⁸

¹⁹² *United States - Chile Free Trade Agreement*, 6 June 2003, 42 ILM 1026 at Art15-6, online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta>> [*US-Chile FTA*].

¹⁹³ *Ibid* at Art. 15.3.

¹⁹⁴ *Ibid* at Art. 15.4.

¹⁹⁵ *Ibid* at Art. 15.6 footnote 3.

¹⁹⁶ *United States – Singapore Free Trade Agreement*, 6 May 2003, 42 ILM 1026, online: Office of the United States Trade Representative <http://www.ustr.gov/webfm_send/2657> [*US – Singapore FTA*].

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.

Unlike the *US-Chile FTA* this FTA is silent on the issue of categorization. However, the definition of “digital products” is not limited to products delivered electronically or online but includes products delivered on hard media. Nevertheless, while the *FTA* expressly prohibits customs duties on digital products and contains non-discrimination commitments,¹⁹⁹ customs duties may still be imposed on digital products delivered on hard media, but such duties are to be based solely on the value of the media, not on the value of the digital product contained on the hard media.²⁰⁰

Significantly, it “affirms that any commitments made related to services in the Agreement also extend to electronic delivery of such services, such as financial services delivered over the Internet. This sets a very good precedent for services liberalization efforts in the WTO and in other FTAs”.²⁰¹

(iv) *US – Australia (signed 2004, in force 2005)*

In Chapter 16 of the *US-Australia FTA*²⁰² the parties acknowledge the growth opportunities that E-commerce provides. The FTA defines “digital products” as:²⁰³

4. **digital products** means the digitally encoded form of computer programs, text, video, images, sound recordings, and other products,¹⁶⁻³ regardless of whether they are fixed on a carrier medium or transmitted electronically;¹⁶⁻⁴

¹⁹⁷ *Ibid* at Art. 14.1.

¹⁹⁸ *Ibid* at Art. 14.4.

¹⁹⁹ *Ibid* at Art. 14.3.1 & 14.3.3.

²⁰⁰ *Ibid* at Art. 14.3.2.

²⁰¹ *Ibid* at Long Summary 4, online: <http://www.ustr.gov/webfm_send/2656>.

²⁰² *United States-Australia Free Trade Agreement*, 18 May 2004, 43 ILM 1248, online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text>> [*US-Australia FTA*].

²⁰³ *Ibid* at Art. 16.8.

...

¹⁶⁻³ For greater clarity, 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 central bank-sponsored payment or settlement system.

¹⁶⁻⁴ The definition of digital products should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorized as trade in services or trade in goods.

As in the *US-Jordan* and *US-Chile FTAs* the parties explicitly refrain from categorizing the trade of digital products as trade of goods or services. The FTA provides that neither party may impose customs duties on electronic products, “regardless of whether they are fixed on a carrier medium or transmitted electronically”.²⁰⁴ Accordingly, this FTA appears to be the first to recognize the principle of technology neutrality between electronic products on a physical carrier and delivered electronically, in other words, it acknowledges the functional equivalence between different modes of digital products delivery.²⁰⁵ As in other FTAs, the parties also commit to the non-discriminatory treatment of digital products produced or commissioned in each others territory or by each others nationals, subject to exceptions in the audio-visual sector.²⁰⁶

The provisions in this agreement are followed in the *US-Korea FTA*, signed in 2007 and which entered into force on March 15, 2012.²⁰⁷

²⁰⁴ *Ibid* at Art. 16.3.

²⁰⁵ See Chris Reed, “Taking Sides on Technology Neutrality” (2007) 4:3 *SCRIPTed* 263 at 266, online: *SCRIPTed* <<http://www.law.ed.ac.uk/ahrc/script-ed/vol4-3/reed.asp>>.

²⁰⁶ *US-Australia FTA*, supra note 202 at Art. 16.3 & 16.4.

²⁰⁷ *United States – Republic of Korea Free Trade Agreement*, 30 June 2007, at Art. 15.1, 15.3 & 15.9, online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>> [*US-Korea FTA*].

(v) US – Dominican Republic – Central America (signed 2004, in force 2006)

The *US- Dominican Republic – Central America FTA* is the first FTA between the US and a group of smaller developing economies.²⁰⁸ The agreement acknowledges the importance of E-commerce and avoiding barriers to it as well as the applicability of WTO rules to E-commerce.²⁰⁹ The FTA defines digital products as:

Article 14.6: Definitions

...

digital products means computer programs, text, video, images, sound recordings, and other products that are digitally encoded;

The Agreement provides that digital products transmitted electronically shall not be subject to duties, fees or other charges and commits to their non-discriminatory treatment.²¹⁰ However, as in the *US-Singapore FTA* this agreement distinguishes between electronically delivered digital products and digital products contained on a hard medium, in which case the customs value shall be based on the value of the medium alone and not the digital product stored on it.²¹¹

6.1.2 Canada Free Trade Agreements

(i) Canada – Peru (signed 2008, in force 2009)

The General Provisions of the *Canada – Peru FTA* provide, *inter alia*, that:²¹²

... The Parties recognize the importance of avoiding unnecessary barriers to trade conducted by electronic means. Having regard to its national policy objectives, each Party shall endeavour to guard against measures that:

²⁰⁸ *Dominican Republic-Central America-United States Free Trade Agreement*, 5 August 2004, 43 ILM 514 (2004) (draft), online: Office of the United States Trade Representative <<http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>> [*US-CAFTA-DR FTA*].

²⁰⁹ *Ibid* at Art. 14.1.

²¹⁰ *Ibid* at Art. 14.3; *US – Singapore FTA*, *supra* note 196 at Art. 14.3.

²¹¹ *US-CAFTA-DR FTA*, *supra* note 208 at Art. 14.3.2.

²¹² *Canada and Peru Free Trade Agreement*, 29 May 2008, Can TS 2009/15, at Art. 1502, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng&view=d>> [*Can- Peru FTA*].

unduly hinder trade conducted by electronic means; or,

have the effect of treating trade conducted by electronic means more restrictively than trade conducted by other means.

In connection with E-products specifically the Agreement defines “digital products” as “computer programs, text, video, images, sound recordings and other products that are digitally encoded”.²¹³ The Agreement provides that “[n]either Party may apply customs duties, fees, or charges on or in connection with the importation or exportation of digital products by electronic means”.²¹⁴ Unlike US trade agreements there are no specific non-discrimination provisions. In addition, there is no express “reservation” as to the issue of classification under the WTO. However, the Parties confirm that Chapters Nine (Cross-Border Trade in Services) and Two (National Treatment and Market Access for Goods) amongst others apply to trade conducted by electronic means. Accordingly, it seems clear that the parties’ intention was to maintain the status quo in regards to trade of E-products without taking sides on whether trade in “digital products” is trade in goods or services.

(ii) Canada – Jordan (signed 2009 – in force , 2012)

The *Canada – Jordan Free Trade Agreement*²¹⁵ contains only one Article on E-Commerce pursuant to which the parties confirm they “shall not apply customs duties on products delivered electronically”, i.e. not on hard media.²¹⁶ There is no definition of electronic or digital products, rather, “products” fall under the general definition of “goods” under Article 1-7 which provides that:

- (p) good means any merchandise, product, article or material;
- (q) goods of a Party means domestic products as these are understood in the *GATT 1994* or such goods as the Parties may agree, and includes originating goods of that Party;

²¹³ *Ibid* at Art. 1510.

²¹⁴ *Ibid* at Art. 1503.

²¹⁵ *Canada - Jordan Free Trade Agreement*, 28 June 2009, Can TS 2009/9, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/jordan-jordanie/agreement-toc-tdm-accord.aspx?lang=eng&view=d>> [*Can-Jordan FTA*].

²¹⁶ *Ibid* at Art. 3-1(1).

Accordingly, since the definition of “good “includes “product” without differentiating the means of delivery then under this Agreement it would appear that E-products are considered goods. However, it is not clear if this was the intention of the parties or just an unintentional result. As “goods”, products delivered electronically would benefit from the general national treatment and market access provisions under the Agreement,²¹⁷ rendering unnecessary any specific non-discrimination clause for E-products.²¹⁸

(iii) Canada – Panama (signed 2010, in force 2013)

The Agreement refrains from classifying E-products. In connection with “digital products” the parties confirm that they will “not apply a customs duty, fee or charge on a digital product delivered electronically”.²¹⁹ The definition of digital product is similar to previous definitions: “**digital product** means a computer program, text, video, image, sound recording or other product that is digitally encoded”. There is no specific non-discrimination clause. Nevertheless, as in previous FTAs the parties acknowledge the importance of avoiding unnecessary barriers to E-commerce and confirm that they will guard against measures that treat E-commerce more restrictively than commerce conducted by other means.²²⁰ This last part highlights one more time that is important to resolve the issue of the classification, because it is vital to know what is the subject of this kind of trade, goods or services, in order to protect the trade liberalization already achieved. Unfortunately this agreement does not do that.

²¹⁷ *Ibid* at Chapter 2.

²¹⁸ A similar result would occur under the *Canada – Colombia Free Trade Agreement*, 21 November 2008, Can TS 2011/11 (in force 15 August 2011), which also does not have a specific definition of digital products.

²¹⁹ *Canada - Panama Free Trade Agreement*, 14 May 2010, at Art. 15.01, online: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/panama-toc-panama-tdm.aspx?lang=eng&view=d>> [*Can-Panama FTA*].

²²⁰ *Ibid* at Art. 15.03.

6.1.3 European Union Free Trade Agreements

(i) EU – South Korea (signed 2009, in force 2010)

In the *EU – South Korea* FTA²²¹ Electronic Commerce provisions are under Chapter Seven “Trade in Services, Establishment and Electronic Commerce”. Under Sub-section F “Electronic Commerce” the general provisions recognize the importance of E-commerce and states that the parties shall refrain from measures that affect E-commerce and shall not impose customs duties on “deliveries by electronic means”²²² (i.e. E-products). The location of the E-commerce provisions within the FTA coupled with the position maintained by the EU at the WTO on the classification of E-products as services suggests that there was significant pressure on its part to achieve a classification in its favour. However, at footnote 42 South Korea expressly reserves the issue of classification:

(42) The inclusion of the provisions on electronic commerce in this Chapter is made without prejudice to Korea’s position on whether deliveries by electronic means should be categorized as trade in services or goods.²²³

(ii) EU – Colombia – Peru (signed 2012)

The negotiations of this Trade Agreement ended in May 2010; in April 2011 its legal review was done but it has not entered into effect at the time this thesis was written.²²⁴ Under Chapter 6 “Electronic Commerce” Articles 162 and 163 the parties recognize that E-commerce creates trade opportunities and its development should be consistent with standards of data protection and consumer protection. Most significantly for this thesis though the parties explicitly state “that a delivery by electronic means shall be considered

²²¹ *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic Korea, of the other part*, 15 October 2009, [2011] OJ, L 127/6, online: EUR-Lex <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:0006:1343:EN:PDF>> [EU-South Korea FTA].

²²² *Ibid* at Art. 7.48 (3).

²²³ *Ibid* at footnote 43.

²²⁴ European Commission Trade, “Countries and Regions Andean countries”, online: European Commission <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/andean/>>.

as a provision of services, within the meaning of Chapter 3 (Cross-border Supply of Services), and shall not be subject to customs duties”.²²⁵

Thus, this would be the first FTA that takes a position on the issue of classification: trade in E-products would be classified as trade in services under this FTA, albeit not subject to any customs duties. As indicated earlier, in this thesis customs duties in services are extremely rare to a point that only one case was found in which a service was subject customs duties. However, the parties opted to explicitly exclude customs duties and refrain from making any non-discrimination commitments as to any other trade barriers so it should be possible to impose market access and national treatment limitations on E-products under this Agreement.

6.2 Chapter Summary

Based on the timing and parties involved in the FTAs examined above it can be concluded that the main driver for the inclusion of the E-commerce chapter was to maintain the status quo of not imposing customs duties on E-products and to avoid new trade barriers that may emerge in the trade in E-products. This position is maintained from the earliest to the most recent FTAs and regardless of the parties.

A trend that can be observed is that early FTAs, particularly those adopted by the US, specifically provide that no position is taken with respect to whether trade in E-products is trade in services or trade in goods. However, more recent FTAs such as the *Canada – Jordan* FTA (2009) and *EU – Colombia – Peru* FTA (2012) are more proactive. The *EU – Colombia – Peru* FTA in particular expressly takes the position that trade in E-products is trade in services and further specifies the mode of trade as cross-border supply of services (mode 1). While that FTA is not yet in force, it is expected that this will be the trend in future FTAs to which the US is not a party because of the nature and characteristics of E-products.

²²⁵ *Trade Agreement between the European Union and Colombia and Peru Trade Agreement*, 26 June 2011, online: European Commission <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf>.

The next chapter will analyze two WTO dispute settlement cases regarding issues related to trade and the Internet to determine if the approach taken in those decisions can assist in finding a solution to the classification of E-products.

Chapter 7

Jurisprudential approach: WTO Dispute Settlement Mechanism

The Dispute Settlement Mechanism of the WTO provides a jurisdictional forum for the interpretation and application of the WTO rules. Without it enforcement of WTO rules would be a challenge and interpretation of WTO commitments could be inconsistent between members.

Since the establishment of the Dispute Settlement Body (DSB), Panels in first instance and Appellant Bodies in appeal have heard many cases related to all aspects of trade. Among those cases only two have dealt with trade conducted through the Internet and indirectly dealt with issues of the E-product classification dilemma. The two cases are: the *US-Gambling* and *China-Audiovisuals* which are considered in detail below.

In addition, there have been cases, such as the *Canada - Certain Measures Concerning Periodicals (Canada – Periodicals)*, dealing with the challenge of delimiting what constitutes trade in services and trade in goods and which WTO rules should be applied. In the *Canada – Periodicals* case the DSB confirmed that in international trade goods and services can be intertwined or interrelated. Thus, goods such as magazines and periodicals were found to contain services, in particular, advertisements. Accordingly, the advertisement service is part of a physical product, a periodical, and as such is considered a good, subject to GATT rules and not to GATS rules for advertisement services. In this case, the trade in magazines, while incorporating trade in services, was held to be subject to GATT because of the physicality of the magazines.²²⁶ Specifically, the 1997 Panel Report stated that:²²⁷

5.14 ... Canada seems to argue that if a member has not undertaken market-access commitments in a specific service sector, that non-commitment should preclude all the obligations or commitments undertaken in the goods sector to the extent that there is an overlap between the non-commitment in services and the obligations or

²²⁶ Baker Stewart & Shenk Maury, “Trade and Electronic Commerce” in Macrory Patrick F. J. et al ed, *The World Trade Organization: Legal, Economic and Political Analysis* Vol II (New York: Springer, 2005) 469 at 474- 475.

²²⁷ *Canada - Certain Measures Concerning Periodicals (Complaint by the United States)* (1997), WTO Doc WT/DS31/R at paras 5.14 & 5.18 (Panel Report) [*Canada - Periodicals Panel Report*].

commitments in the goods sector. Canada claims that because of the existence of the two instruments - GATT 1994 and GATS - both of which may apply to a given measure, "it is necessary to interpret the scope of application of each such as to avoid any overlap". ...

5.18 In this connection, Canada also argues that overlaps between GATT 1994 and GATS should be avoided. We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In fact, certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4 of GATT 1994..." (Footnotes omitted)

In foreseeing that as technology and globalization advances overlaps of the GATT and GATS are unavoidable, the Panel Report was indeed far-sighted and foreshadowed the difficulties to be encountered in respect of the classification of E-products.

Notwithstanding the wide range of jurisprudence created by the WTO's DSB, this thesis will only analyze the rulings that are directly relevant to the scope of the thesis, that is, the *US-Gambling* and *China-Audiovisuals* rulings. These rulings are the only ones in which the DSB was required to deal with issues of trade carried out through the Internet and, although they do not explicitly address the issue of the classification of E-products, they set precedent on issues related to trade in services conducted through the Internet and the nature of audiovisual and cultural products that are fixed to a physical carrier.

7.1 United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (*US – Gambling*)

7.1.1 Background

In 2003, Antigua demanded the establishment of a Panel under the WTO DSB to deal with a complaint that some US Federal and State laws were making unlawful the supply

of cross-border online gambling services from suppliers outside the US in violation of the US's GATS commitments.²²⁸

The commitments at issue were the ones stated in GATS Article XVI “specific market access commitments” that require that a member that made specific sector commitments in its Schedule to accord market access to all members.²²⁹ Antigua claimed that the US made full commitments in its Schedule for cross-border supply of gambling services under sub-section 10.D of the Services Sectorial Classification list W/120 “Sporting and other Recreational Services” and equivalent CPC number “964” which reads:²³⁰

- 964 Sporting and other recreational services
 - 9641 Sporting services
 - 96411 Sports event promotion services
 - 96412 Sports event organization services
 - 96413 Sports facility operation services
 - 96419 Other sporting services
 - 9649 Other recreational services
 - 96491 Recreation park and beach services
 - 96492 Gambling and betting services
 - 96499 Other recreational services n.e.c.

The US argued that it did not make commitments on online gambling services and such services are banned to foreign and US suppliers and alike. The US further argued that if the Panel found that the US made commitments on online gambling services, then GATS General Exceptions of Article XIV “necessary to protect public morals and/or public order” would justify a derogation of such commitments.²³¹

²²⁸ *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2004), WTO Doc WT/DS285/R at paras 1.1 – 2.1 (Panel Report) [*US-Gambling Panel Report*].

²²⁹ *United States - Measures Affecting the Cross-border Supply of Gambling and Betting Services (Complaint by Antigua and Barbuda)* (2005), WTO Doc WT/DS285/AB/R at para 214 (Appellate Body Report) [*US-Gambling Appellate Body Report*].

²³⁰ *US-Gambling Panel Report*, *supra* note 228 at para 3.30.

²³¹ Sacha Wunsch-Vincent, “The Internet, cross-border trade in services, and the GATS: lessons from *US-Gambling*” (2006) 5:3 *World Trade Review* 319 at 322, online: Peterson Institute for International Economics <<http://www.iie.com/publications/papers/wunsch1205.pdf>> [Wunsch-Vincent, “The Internet, cross-border trade in services, and the GATS: lessons from *US-Gambling*”].

7.1.2 The DSB Rulings and their Aftermath

The Panel and Appellate Body heard the case and in both instances concluded, albeit on different grounds, that the US made commitments on gambling services under “other recreational services (except sporting)”.²³² The Panel found that the correct interpretation of the aforementioned commitment was that it included gambling and betting services.²³³ Moreover, it found that for this service sector the US opened mode 1 (cross-border supply) and also mode 2 (consumption abroad) of service supply, which were the two modes of supply that have been arguably assigned to online trade transactions.²³⁴ Consequently, there was no hesitation that the US committed to open online gambling services. However, the Panel clarified that the online gambling service was a mode 1 (cross-border supply) supply of service because this is the only mode of supply that allows remote delivery.²³⁵

The Appellate Body affirmed the above analysis but went on to conclude that the US bans on Internet gambling were necessary for the protection of public morals and with the exception of one law which did not satisfy the chapeau of GATS Article XIV not to discriminate between countries, the measures at issue were consistent with that provision.²³⁶ Thus the Appellate Body ruling demanded that the US bring itself into compliance by either amending its law and prohibiting online gambling to foreign and domestic operators or allowing foreign operators to access the US market.²³⁷ A WTO Arbitrator gave the US until April 2006 to bring its law into compliance with the ruling.²³⁸

²³² *US-Gambling Panel Report*, *supra* note 228 at para 6.134; and, *US-Gambling Appellate Body Report*, *supra* note 229 at paras 208 & 213.

²³³ *US-Gambling Panel Report*, *supra* note 228 at paras 3.31- 3.32.

²³⁴ Wunsch-Vincent, “The Internet, cross-border trade in services, and the GATS: lessons from *US-Gambling*”, *supra* note 231 at 325.

²³⁵ *Ibid* at 326. And *US-Gambling Panel Report*, *supra* note 228 at para 6.29.

²³⁶ *US-Gambling Appellate Body Report*, *supra* note 229 at paras 299 & 327.

²³⁷ *Ibid* at para 374.

²³⁸ Isaac Wohl, “The Antigua –United States Online Gambling Dispute” (2009) *J of Int’l Com & Econ* at 7, online: United States International Trade Commission <http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf>.

The US did not meet the deadline set by the Arbitrator. Accordingly, Antigua asked the WTO to establish a Compliance Panel. In March 2007 the Compliance Panel ruled in favor of Antigua. In response, in May of that year the US invoked a procedure under GATS Article XXI “Modification of Schedules” to revise its schedule commitment to exclude online gambling. However as a condition of such withdrawals the US had to compensate any affected WTO members, which it has started to do.²³⁹

In addition to the Compliance Panel Antigua also asked for permission to impose retaliation against US on Intellectual Property rights from the US by suspending some obligations imposed by the TRIPS (Trade-Related Aspects of Intellectual Property Rights). The WTO approved the request and settled the amount of the retaliation at \$21 million annually.²⁴⁰

7.1.3 Significance of the Decision

The case is significant to the trade of E-products for three reasons.

First, it confirmed that the “*WTO and GATS rules and obligations are applicable to e-commerce... [consequently] [n]ew services that arise through the Internet benefit from a liberal trade treatment, if they are adequately captured by existing specific GATS commitments and thus the corresponding classifications*”.²⁴¹ In other words, existing service commitments will include like-services that are supplied through the Internet.²⁴² Accordingly, any doubt that services delivered through the Internet need new specific commitments negotiations was eliminated.

²³⁹ *Ibid.*

²⁴⁰ *Ibid* at 8.

²⁴¹ Wunsch-Vincent, “The Internet, cross-border trade in services, and the GATS: lessons from *US-Gambling*”, *supra* note 231 at 354.

²⁴² *Ibid* at 323. See also *US-Gambling Panel Report*, *supra* note 228 at para 6.287. In that the Panel stated that if a Member does not explicitly make exception on the mode 1 of delivery it includes delivery through Internet.

Secondly, it confirmed that the Internet is only a means to deliver services and clarified that it fell under GATS mode 1 (cross-border supply of service).²⁴³ Until this ruling there had been significant discussion as to whether online trade fell within mode 1 (cross-border supply) or mode 2 (consumption abroad).²⁴⁴ Therefore, according to Wunsch-Vincent, the mode of supply dilemma for online services was resolved by clarifying that the only way to deliver remote services, such as those delivered online, is through mode 1 (cross-border supply of services).²⁴⁵

Third, it confirmed that all WTO rules were applicable to services delivered online, including those pursuant to which a member can restrict services on the basis of the public morals exception.²⁴⁶

For E-commerce these contributions are valuable because they offer clarity and predictability to members' commitments and mode of service supply for trade in services through the Internet. It also guarantees the right that members have to regulate activities that occur through the Internet for the benefit of its residents based on public moral exceptions.

²⁴³ *Ibid* at 323-326. See also *US-Gambling Panel Report*, *supra* note 228 at para 6.285. The Panel stated: "Therefore, a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule. We note that this is in line with the principle of "technological neutrality", which seems to be largely shared among WTO."

²⁴⁴ See: WTO, *Work programme on electronic commerce*, *supra* note 133. It calls for the Council for Trade in Services to examine and report on the scope of electronic commerce and the modes of supply.

²⁴⁵ Wunsch-Vincent, "The Internet, cross-border trade in services, and the GATS: lessons from *US-Gambling*", *supra* note 231 at 326.

²⁴⁶ *Ibid* at 323.

7.2 China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (*China – Publications and Audiovisual Products*)

7.2.1 Background

In October 2007 the US requested the establishment of a DSB Panel to deal with certain Chinese laws and regulations that the US alleged:²⁴⁷

- a) Restricted trading rights regarding reading materials (including electronic publications fixed on physical carriers), audiovisual home entertainment (AVHE) products, sound recordings, and films for theatrical release by limiting importation rights to wholly State-owned enterprises or prohibited foreign-invested enterprises in China from importing such goods; and
- b) Violated China's market access and national treatment commitments regarding foreign suppliers of distribution services of the above-mentioned products within China. In particular, Chinese measures that:
 - i. Prohibited foreign-invested enterprises from engaging in the master distribution of such goods (e.g. reading materials and electronic distribution of sound recordings), or required them to do so through a Chinese majority owned joint-venture (e.g. AVHE products) and/or imposed more onerous capitalization and/or legal operating requirements to foreign-invested sub-distributors of such products.
 - ii. Discriminated against foreign products by restricting their distribution, but not that of similar domestic products to State-owned enterprises (e.g. imported materials if not restricted to distribution through subscription and films for

²⁴⁷ *China - Audiovisuals Panel Report*, *supra* note 6 at paras, 1.6 & 2.1 – 2.3.

See generally, WTO, *Dispute Settlement: DISPUTE DS363 China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, online: WTO <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm>.

theatrical release); or, subjecting them to more burdensome content review regimes than similar domestic products (e.g. imported sound recordings intended for electronic distribution).

The US claimed that China's measures inconsistent with its Protocol of Accession to the WTO, the GATT, and GATS. In particular, paragraphs 5.1 and 5.2 the Protocol of Accession provide that:²⁴⁸

5. Right to Trade

1. Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years of accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those listed in Annex 2A [which was not applicable to this dispute]... Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994...

2. Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to right to trade.

The US also relied on additional provisions contained in the Working Party Report on China's accession which were incorporated by reference into the Accession Protocol. In particular, the Working Party Report confirmed China's commitment that foreign-invested enterprises would not be required to "establish a particular form" in order to engage in import and export; and China's commitment to eliminate "its system of examination and approval of trading rights within three years after accession" at which time it would grant all enterprises domestic and foreign the right to import and export in a non-discriminatory and non-discretionary way all goods except those listed in Annex 2A.²⁴⁹

²⁴⁸ *Ibid* at para 7.235; WTO, *Accession of the People's Republic of China, Decision of 10 November 2001*, WT/L.432, 23 November 2001, online: WorldTradeLaw.net <<http://www.worldtradelaw.net/misc/chinaaccessionprotocol.pdf>>.

²⁴⁹ *Ibid* at paras 7.230 – 7.235. The products listed in Annex 2A were not relevant to the dispute.

It is important to clarify that the subject matter of this dispute was certain Chinese measures that were inconsistent with China's trading commitments and were affecting the trade of certain products such as: publications and audiovisual products carried on physical means such as CDs, DVDs, film reels, videocassettes, etc., except for non-physical electronic distribution of sound recording (music) carried out through the Internet.²⁵⁰

Even though this case does not deal directly with trade in E-products, it is relevant to E-commerce and trade in E-products because it examines the distinction between goods and services in the context of films for theatrical release and also it analyses the scope of service commitments regarding the electronic distribution of a product via the Internet.²⁵¹ Both items are explained below.

7.2.2 Films for Theatrical Release

The first relevant issue raised in the case concerns the division between goods and services, specifically as it relates to films for theatrical release. The analysis has a significant impact on the classification issue of E-products.

China argued that neither GATT nor the Accession Protocol obligations applied to the importation of films for theatrical release because films for theatrical release are not tangible goods but "content" and "an intangible work" which is neither a good nor a service.²⁵² In support of this position China argued that films only have commercial value and are only exploited through a series of services, namely the distribution of films for

²⁵⁰ Tania Voon, "International Decisions: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products" (2009) 103:4 Am J Int'l L 710 at 715.

²⁵¹ *Ibid.*

²⁵² *China - Audiovisuals Panel Report*, *supra* note 6 at paras 4.184 & 7.524; *China - Audiovisuals Appellate Body Report*, *supra* note 6 at para 169.

theatrical release, and that the only goods involved in the film are the film reels which are a mere accessory of the service and have no commercial value on their own.²⁵³

The US reply to that argument was that “the vast majority of goods are commercially exploited through a series of associated services and that China’s argument would transform virtually all goods into services”.²⁵⁴ Furthermore, the US argued that Articles III:10 (quantitative regulations relating to exposed cinematograph films) and IV (Special Provisions relating to Cinematograph Films) of GATT 1994 confirm that films are goods. Likewise, the Harmonized System of the World Customs Organization and China’s Schedule of Concessions for goods included the heading “cinematograph films”.²⁵⁵

The Panel delimited the scope of the dispute, which it found related only to “hard-copy cinematographic films in any tangible form” and adopted the US position that the matter at issue referred to “an integrated product –a good – that consists of a carrier medium carrying content that can be used for projection in a theatre”.²⁵⁶ In deciding whether such films were goods or services the Panel adopted the US argument and relied on classification in the Harmonized System (HS), and China’s Schedule of Concessions. Accordingly, it concluded that such films were in fact goods notwithstanding that they are used to provide a service.²⁵⁷

On appeal, the Appellate Body (AB) confirmed the findings of the Panel and rejected the distinction between “content” and “goods” finding instead that “[c]ontent can be embodied in a physical carrier, and the content and carrier together can form a good” and

²⁵³ *Ibid China - Audiovisuals Panel Report*, at paras 4.96-4.101, 7.494-7.499, 7.515, & 7.516; *China - Audiovisuals Appellate Body Report* at para 173.

²⁵⁴ *Ibid China - Audiovisuals Panel Report*, at paras 4.304, 4.305, & 7.504.

²⁵⁵ *Ibid China - Audiovisuals Panel Report*, at paras 4.201, 4.308, & 7.507; *China - Audiovisuals Appellate Body Report* at para 173. For the definition of the Harmonized System, see above note 122. The relevant heading is heading 3706, which defines as a good “cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track”.

²⁵⁶ *Ibid China - Audiovisuals Panel Report* at paras 7.521 - 7.526.

²⁵⁷ *Ibid* at paras 7.525 & 7.526.

affirmed the jurisprudence of the decision in *Canada – Periodicals*.²⁵⁸ Like the Panel, the AB relied on the Harmonized System and China’s Schedule of Concessions on goods.²⁵⁹

The AB also confirmed that the regulation of “content” and “goods” is not mutually exclusive. Because of the fact that products may have goods and service components which make them subject to GATT and GATS, and that the rules of GATT and GATS are not mutually exclusive.²⁶⁰

7.2.3 Sound Recording Distribution Service

The second relevant issue concerns the scope of China’s national treatment commitment for “sound recording distribution service” in the audiovisual sector for non-physical products, e.g. music distributed through the Internet in a pure E-commerce transaction.

According to China its commitments regarding “sound recording distribution services” were limited to the hard-copy sound recordings and not electronic distribution on the basis that, *inter alia*, at the time of its accession to the WTO there was not yet an established business and legal framework for the electronic distribution of sound recordings. China argued that the scope of its commitment must be interpreted in accordance with the rules of the *Vienna Convention on the Law of Treaties*, which requires reference to the “common intention” of the parties.²⁶¹ The Panel agreed and found that “in seeking to confirm the “common intention of members” with respect to a commitment in a GATS Schedule, evidence on the technical feasibility or commercial reality of a service at the time of the service commitment constitute circumstances relevant to the interpretation”.²⁶² In that regard, the Panel found that the electronic distribution of sound recording was technically and commercially feasible at the time

²⁵⁸ *China - Audiovisuals Appellate Body Report*, *supra* note 6 at paras 195 & 199 - 200.

²⁵⁹ *Ibid* at para 195.

²⁶⁰ Joost Pauwelyn, “Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on *China – Audiovisuals*” (2010) 11:1 *Melbourne J Int’l L* 1 at 6 [Pauwelyn, “Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on *China – Audiovisuals*”].

²⁶¹ *China - Audiovisuals Panel Report*, *supra* note 6 at para 7.1161.

²⁶² *Ibid* at para 7.1237.

China acceded to the WTO.²⁶³ Thus, distribution through the Internet was included in China's commitments.

The Appellate Body (AB) concurred with the Panel but centered its reasoning on the meaning of the terms "sound recording" and "distribution" and the dynamic interpretation that such terms must have in the context of the WTO's multilateral agreement platform in which members enter with the intention that their commitments be applicable over time.²⁶⁴ Thus the AB found the Panel's conclusions were consistent with the progressive nature of treaty law and the principle of "progressive liberalization" embodied in the WTO system.²⁶⁵

While the Panel and AB decisions do not expressly address the issue of whether pure electronic audiovisual products without a physical carrier are goods or services, it would appear that they rely on the physical attribute of tangibility to determine whether audiovisual products are goods or services.²⁶⁶ In this sense, music in a pure electronic form traded through the Internet is a service and films traded on physical carriers are goods. Additionally, market access commitments for services include the performance and/or delivery of the service through the Internet. Accordingly, there is no need to re-negotiate market access on online services just because they are carried out through the Internet they are included in previous service commitments. Hence as Pauwelyn states: "GATS is technologically neutral, [and] GATT technologically biased".²⁶⁷ By this Pauwelyn means that GATS is technologically neutral because it does not differentiate between a service delivered by traditional offline means or new means of delivery, such as through the Internet, as long as commitments were made in the relevant modes of supply. On the other hand, it seems that GATT is technologically biased because goods must be tangible for the GATT to apply and therefore new formats of the same product are not considered goods for the purposes of the GATT.

²⁶³ *Ibid* at para 7.247.

²⁶⁴ *China - Audiovisuals Appellate Body Report, supra* note 6 at para 396.

²⁶⁵ *Ibid* at paras 390 - 398.

²⁶⁶ *Ibid* at paras 195 & 395.

²⁶⁷ Pauwelyn, "Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on *China - Audiovisuals*", *supra* note 260 at 13.

7.3 Chapter Summary

The *China-Audiovisuals* case suggests that the WTO's jurisprudence relies primarily on the concept of "tangibility" as the differentiator between goods and services. Both the Panel and the AB relied on that concept, and the Harmonized System and W/120 to delimit the issues in dispute and to assess the scope of the member's trading rights commitments. It will be recalled that the Harmonized System and W/120 rely on tangibility to distinguish between goods and services.²⁶⁸ Accordingly, it would appear that the WTO DSB would lean towards a classification of E-products, which are by definition intangible, as services.

It is equally apparent that the WTO jurisprudence takes a proactive pro-trade approach to service commitments under GATS. The jurisprudence in both the *US-Gambling* and *China-Audiovisuals* cases confirms that unless explicitly excluded in a member's service commitments schedule, market access commitments of a service include the distribution of the service by Internet because it is simply a means of service delivery and accordingly covered by preexisting commitments. Indeed, in both cases the AB took a technologically neutral approach on service commitments and asserted that old fashion physical delivery and electronic delivery are both included in the relevant service sector, i.e. gambling, and sound recording distribution service, respectively.²⁶⁹ The AB's jurisprudence in this regard is very appropriate for service sectors, such as audiovisual and telecommunication sectors, that are constantly changing because of technological evolution and would no doubt be applicable to trade in E-products.²⁷⁰

²⁶⁸ See above at 4.2. Moreover in both cases it relied on the HS and W/120 to assess the scope of the Member's commitments. This is which goods and/or services they open for trade and those documents list products as goods (tangible form) in the HS and as services (intangibles commodities) in the W/120.

²⁶⁹ Pauwelyn, "Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on *China – Audiovisuals*", *supra* note 260 at 20.

²⁷⁰ Tania Voon, "China and Cultural Products at the WTO" (2010) 37:3 Legal Issues of Economic Integration 253 at 257 online: Australasian Legal Information Institute <<http://www.austlii.edu.au/au/journals/UMelbLRS/2010/10.pdf>>.

Assuming trade in E-products is classified as trade in services, the *US – Gambling* decision, which states that services supplied through the Internet fall under GATS mode 1 (Cross-border supply of service), provides clarity as to which mode of service would be applicable to the trade in E-products.

In any event, both the *US-Gambling* and *China-Audiovisuals* cases confirmed that all WTO rules were applicable to trade conducted through the Internet, including those pursuant to which a member can restrict services or restrict the import of goods²⁷¹ on the basis of a number of factors, including measures “necessary to protect public morals”.²⁷² Again, such measures would be applicable to trade in E-products whether they are classified as services or goods. This will no doubt give members the assurance that they will be able to protect public morals by regulating what kind of content will be allowed to be commercialized and traded within their territory providing that such regulations comply with the public moral exceptions of the GATT if goods or GATS if services.

²⁷¹ See restriction on cultural goods based on public morals in *China - Audiovisuals Panel Report*, *supra* note 6 at para 7.712.

²⁷² GATT, *supra* note 84 at Article XX (a) or GATS, *supra* note 85 at Article XIV (a).

Chapter 8 Conclusion

The Internet and E-commerce have re-shaped the way business is conducted and increased the amount of international trade by making it easier for parties to communicate and to transfer trade related data. In some cases, as in the case of E-products, it is the data or “content” itself that is the subject of trade. In this regard E-products have resulted in the reinvention of entire industries such as entertainment (including music, movies and gaming), editorials, news and software. In each case the Internet has forced -or is forcing- the industry to adjust to the new demands of the market and shift their business model from the sale of tangible goods to the sale or licensing of intangible products such as electronic publications, and online music, movies, games or software.

While these industries continue to successfully shift to online “content” and increase the number of international E-commerce transactions, it is unclear what WTO rules are applicable to such transactions, GATT or GATS, because it is not clear if these intangible commodities are goods, like their physical counterparts are, or services. The WTO Work Programme on E-commerce is currently deadlocked on this question. Still, members have implemented a palliative solution agreeing not to levy customs duties for trade in E-products.²⁷³ Nevertheless, there are other forms of trade barriers besides customs duties that could hamper the trade in E-products in the near future if it is not clear what these products are, and which rules apply to them. Consequently, the classification of E-products is an outstanding issue that needs resolution to prevent new forms of trade barriers from harming their trade.

Conclusion 1: Trade in E-products Should be Classified as Trade In Services

An examination of the intrinsic qualities of goods and services supports the conclusion that E-products are unlike their physical “goods” counterparts because of their unique characteristics, namely:

²⁷³ The Moratorium on Customs Duties on Electronic Transmissions (Chapter 4 under heading 4.3.2 (ii))

- they are intangible,
- they are procured in pure E-commerce transactions,
- their use and existence is always dependent on a device such a computer or smart phone,
- they are usually of limited tradability,
- they provide a multilayered experience in which the customer can upgrade the product and/or interact with features that the product offers such as hyperlinks to artists websites, dictionaries, encyclopedias, forums and so the product can be highly customized by the users.

Using a theoretical approach to the classification of E-products, it is readily apparent that the main differentiator between “goods” and “services” is their tangibility or intangibility. Nevertheless, the distinction is more nuanced and takes into account several additional factors such as property rights, delivery mode, usage, consumption and overall product lifecycle. In the case of E-products they share a number of characteristics with both goods and services as detailed in Table 5.1. The synthesis of goods and services characteristics in E-products together with the lack of consensus between academic sources and legal systems of what should be considered “goods” make it impossible to conclude with certainty that E-products are, or should be, classified as either goods or services.

Notwithstanding the above, a comparison of the intrinsic characteristics of goods and services against those of E-products shows that they share more characteristics with “services” than with “goods”. Accordingly, the theoretical approach, if not conclusive, suggests that E-products would fit more reasonably within the concept of services.

From a pragmatic perspective, the recent FTA experience of various countries indicates that most of these agreements recognize the importance of E-commerce and ban customs duties and unnecessary barriers to the trade in E-products. At the same time, the FTAs generally refrain from classifying E-products and accordingly do not provide an answer to the classification dilemma nor the assurance that in the future new technologies will not obstruct the trade in E-products. However, at least one recent FTA, the *EU-Colombia-*

Peru FTA, expressly classifies E-products as services and at the same time maintains the practice of not imposing customs duties. It is suggested that this will be the trend in future FTAs because the nature and characteristics of E-products seem to conform more readily with the characteristics of services.

The WTO jurisprudence also suggests that if the issue were presented for dispute resolution before the DSB that body would classify E-products as a service because of the reliance on tangibility or intangibility to distinguish, respectively, between goods and services.²⁷⁴

In summary, the theoretical factors, FTA practice, and DSB caselaw weigh in favour of classifying E-products as a service. Accordingly, it is concluded that trade in E-products should be properly classified as trade in service on the basis that:

- (i) E-products are intangibles and it is the majority position that only tangible things are goods and intangibles services;
- (ii) E-products share more characteristics with services than goods;
- (iii) E-products are not like-products to their physical counterparts, thus, as a new separate category of goods, different from their physical counterparts, E-products might be subjected to different tariffs than their physical counterparts;
- (iv) The FTA practice suggests that if classified at all, E-products will be classified more regularly as services;
- (v) WTO jurisprudence relies on tangibility and the Harmonized System to determine what is a good, therefore it is assumed that its position leans towards a service classification for intangibles;
- (vi) WTO jurisprudence is technologically neutral for services. Accordingly, existing service commitments apply to equivalent online services. A benefit which could be extended to trade in E-products.

²⁷⁴ See *Canada - Periodicals Panel Report*, *supra* note 227 and *China - Audiovisuals Appellate Body Report*, *supra* note 6 at paras 195 & 199 - 200.

Conclusion 2: The Existing Trade Liberalization of E-products Should be Maintained

One of the key concerns and obstacles to a service classification for E-products is that it entails the issue of the lower trade liberalization under GATS than what would be available under GATT. However, the general assumption that GATT provides a more liberal trade environment than GATS may not necessarily hold true in the case of E-products:

- First, if E-products are treated as goods, they would nevertheless be treated differently than their physical counterparts (see discussion above at p. 104). Thus, they will be subject to different tariffs. Accordingly, unless E-products are regarded as IT-goods under the *ITA* and benefit from tariff-free status, is open the possibility of imposing higher duties on E-products than on their physical counterparts.²⁷⁵ For example: The US has a general tariff for sound media or video under “other magnetic tapes of a width not exceeding 4mm”, HS heading and subheading 8523.29.30, imposing a duty of 4.8 cents/m² of recording surface.²⁷⁶ As an E-product and consequently a different good the same sound media or video will be subject to a different tariff and most likely different customs duty.
- Second, until very recently the technology was not available to subject E-products to tariffs and customs duties, however, it may now be possible to charge such duties on E-products through geo-identification technologies and electronic payment systems.
- Third, the WTO DSB has concluded that online services are covered by members’ preexisting GATS commitments as cross-border supply of services (mode 1) and

²⁷⁵ Tariff is the maximum amount listed by Countries to charge for importation of goods and customs duties is the actual duty levied on the importation and can be lower than the tariff but not higher.

²⁷⁶ United States International Trade Commission, *Harmonized Tariff Schedule of the United States (2013)*, Chapter 85, online: United States International Trade Commission <<http://www.usitc.gov/publications/docs/tata/hts/bychapter/1300c85.pdf>>.

as such there is no need for new negotiation of commitments for these products if they fall within the member's existing service commitments.²⁷⁷ Thus, E-products would benefit from any existing GATS commitments. Moreover, if members allow the use of new technologies such as filtering or blocking content that could lead to trade barriers, such actions would have to be justified under GATS Article XIV, in the same manner as the US had to justify the ban on online gambling.²⁷⁸

Accordingly, a service classification would be suitable for trade in E-products provided the current trade status/practices can be maintained. A decision to classify trade in E-products as trade in services should take into account the complex characteristics of E-products and the current trade liberalizations are maintained in accordance with the principle of "progressive liberalization" embodied in the WTO system.

In order to guarantee the current trade liberalization and at the same time to settle the issue of the classification dilemma, a negotiated solution among WTO members that makes the current concessions permanent and classifies trade in E-products as trade in services subject to GATS should be pursued. The structure of such an agreement is discussed below in Conclusion 4. However, it is first necessary to determine under which particular service sector E-products would fall.

Conclusion 3: E-products Should be Classified in the Business Services Sector or the Communication Services Sector

If trade in E-products is treated as trade in services, before any specific concessions can be made under GATS, it will be necessary to establish under which service sector E-products fall. As indicated in Chapter 4.2(a), service sectors under GATS are identified following the Service Sectoral Classification List (W/120), and to the United Nations Central Product Classification (CPC). In this context, trade in E-products could be classified under the W/120 as part of the "business service sector" with "sub-sector

²⁷⁷ See *US-Gambling Panel Report*, *supra* note 228; *US-Gambling Appellate Body Report*, *supra* note 225; and *China - Audiovisuals Panel Report and Appellate Body Report*, *supra* note 6.

²⁷⁸ Wu, "The World Trade Law of Censorship and Internet Filtering", *supra* note 21 at 23.

computer and related services” or under the “communication services sector” with “sub-sector telecommunication services”. Both of these service sectors cross-reference to the corresponding CPC Ver.2 Group 843 for online content.

CPC group 843 originally referred to “Data processing services” in the provisional CPC.²⁷⁹ In CPC Version 1.1, published in 2002 Group 843 was updated to “Online information provision services”.²⁸⁰ In the most recent CPC publication, Version 2 of 2008 Group 843 was again revised and now refers to “On-line content”.²⁸¹ The current version provides in its structure and explanatory notes the following:²⁸²

Structure

Hierarchy

- Section: 8 - Business and production services
- Division: 84 - Telecommunications, broadcasting and information supply services
- **Group: 843 - On-line content**

Breakdown:

This Group is divided into the following Classes:

- 8431 - On-line text based information
- 8432 - On-line audio content
- 8433 - On-line video content
- 8434 - Software downloads
- 8439 - Other on-line content

As can be seen, the classification under CPC Ver.2 accommodates E-products perfectly in its breakdown of the service, for this reason it is used to determine the service sector in which E-products fall.

Table 8.1 (on page 98) outlines the service sector and sub-sectors in which E-products may fall together with its corresponding CPC group. In addition, a cross-reference to the corresponding classification for the E-product’s most likely physical counterpart and its description in the HS list is included by way of reference.

²⁷⁹ United Nations Statistics Division, *Central Product Classification List (Provisional version)*, online: UN <<http://unstats.un.org/unsd/cr/registry/regcst.asp?cl=9&lg=1>> [CPC Prov].

²⁸⁰ United Nations Statistics Division, *Central Product Classification List (version 1.1)*, online: UN <http://unstats.un.org/unsd/publication/SeriesM/SeriesM_77ver1_1E.pdf> [CPC V1.1].

²⁸¹ CPC V2, *supra* note 125.

²⁸² *Ibid* at “Detail structure and explanatory notes CPC Ver.2 code 843”.

As between a classification of E-products under the “business service sector” or the “communication services sector” it would be preferable to agree on the former sector because the communication/audiovisual sector, as explained by Voon, is a highly contentious service sector due to its cultural content implications. As a result, only a few members have made national treatment or market access commitments in this service sector.²⁸³ Nevertheless, it is undeniable that some E-products enter into the cultural content products category thus it will be up to the member to decide under which service sector it will “bound” trade in E-products.

²⁸³ Tania Voon, “A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS” (2007) 14:1 UCLA Ent L Rev at 14-16.

Table: 8.1: E-products Service Sector, CPC Description and HS Description

Service Sector (W/120)	Sub-Sector (W/120)	Description (W/120)	Corresponding CPC Group	Corresponding CPC Class	Corresponding CPC subclass	CPC Description	Physical Counterpart	Description HS	Corresponding HS
1. Business Services	B. Computer and Related Services	c. Data processing services	843			On-line content			
2. Communication Services	C. Telecommunication Services	n. On-line information and/or processing	843			On-line content			
				8431		On-line text based information			
					84311	On-line books	Books	Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets	4901
					84312	On-line newspaper and periodicals	Newspaper, magazines, periodicals	Newspaper, journals and periodicals, wheather or not illustrated or containing advertising material	4902
				8432		On-line audio content			
					84321	Musical audio content	Music	Records, tapes and other recorded sound media	8524
					84322	Streamed audio content	Sound media	Records, tapes and other recorded sound media	8524
				8433		On-line video content			
					84331	Films and other video downloads	Movies	Cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track	3706
								Video film for educational nature	8523
					84332	Stream video content	Video media	Audiovisual news or audiovisual views Video film for educational nature	8523
				8434					
					84341	System software downloads	Software kit	Information technology software	8523
					84342	Application software downloads	Software kit	Information technology software	8523
				8439		Other on-line content			
					84391	On-line games	Video games	Video games consoles and machines	9504
					84392	On-line software	Software kit	Information technology software	8523

Conclusion 4: An E-products Agreement Should be Adopted

As explained by Erixon, Hindley and Lee-Makiyama, the “WTO is mainly a member-driven organization, where fundamental principles are established in negotiations between the member states unanimously”²⁸⁴ thus the approach to solve the issue of the classification of E-products has to be through negotiations. In this sense WTO members should negotiate a Sectoral Agreement on E-products that resolves the issue of classification and upholds the current status of trade liberalization of E-products on similar terms to the *Information Technology Agreement* (“ITA”) that has proven to be a success. To better understand how this proposed agreement could work the next part will summarize what the ITA is, how it works and its scope of product coverage to determine how the proposed agreement on E-products could be structured.

Information Technology Agreement (ITA)

As indicated in Chapter 4.3.1 the ITA is the product of the First Ministerial Conference in 1996 in which a number of WTO members agreed to gradually eliminate tariffs on IT-goods until they reached a tariff-free policy by 2000. The ITA was entered into by only 28 members but today includes 74 members²⁸⁵ which together account for 96 percent of world trade on IT products.²⁸⁶ The concessions made under the ITA are guided by the MFN principle, therefore all WTO members benefit from the tariff elimination even if they are not signatories of the agreement.

The success of the ITA is attributed to the efforts of industry and strong political leadership that actively pursued opening the trade in IT products in the early 1990s

²⁸⁴ Erixon, *supra* note 72 at 8.

²⁸⁵ The ITA is not a WTO “Multilateral Trade Agreement” as understood in Article II.2 of the Marrakesh Agreement, and binding on all members; therefore it is only enforceable on signatory parties. To check ITA participants and their schedules look at WTO website <http://www.wto.org/english/tratop_e/inftec_e/itscheds_e.htm>.

²⁸⁶ Pascal Lamy, “15 Years of the Information Technology Agreement” (2012) at 3-4, online: WTO <http://www.wto.org/english/res_e/publications_e/ita15years_2012_e.htm>.

because of the expansion of trade in these products and the pursuit of the so-called “global information society”.²⁸⁷

The ITA sets out the following principles: “1) all products listed in the Declaration must be covered, 2) all must be reduced to a zero tariff level, and 3) all other duties and charges (ODCs) must be bound at zero. There are no exceptions to product coverage, however for sensitive items, it is possible to have an extended implementation period”.²⁸⁸

The ITA’s scope is IT goods. Divided into seven major categories: “(1) computer and calculating machines; (2) telecommunication equipment; (3) semiconductors; (4) semiconductor manufacturing equipment; (5) instruments and apparatus; (6) data storage media and software provided on physical media; and (7) parts and accessories.”²⁸⁹ It can be seen that the ITA only applies to physical/tangible products, reinforcing the idea that intangible products are not goods. As a result, software on a physical carrier, such as a CD, is covered but digital software procured through a pure E-commerce transaction, i.e. an E-product, is not covered. All successive expansions of the ITA coverage have been to include physical/tangible IT products only.

Overall, the ITA has played a crucial role in the development of E-commerce because it has increased world trade in IT goods that make possible the technical infrastructure of E-commerce²⁹⁰ and consequently, trade in E-products. While the ITA is structured for tangible IT-goods and not E-products, it can be used as a guideline for the creation of an Agreement on E-products modeled on the ITA.

²⁸⁷ WTO, *The road to the Information Technology Agreement “15 Years of the Information Technology Agreement”* (2012) at 8-16, online: WTO <http://www.wto.org/english/res_e/publications_e/ita15years_2012_e.htm>.

²⁸⁸ WTO, *Information Technology Agreement – introduction*, online: WTO <http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm>.

²⁸⁹ WTO, “Appendix: Methodological challenge and assumptions” in *The road to the Information Technology Agreement “15 Years of the Information Technology Agreement”* (2012) at 99, online: WTO <http://www.wto.org/english/res_e/publications_e/ita15years_2012_e.htm>.

²⁹⁰ Hauser & Wunsch-Vincent, “A Call for a WTO E-commerce Initiative”, *supra* note 134 at 13.

Taking into account the issues regarding the classification of E-products identified in previous chapters, it is proposed that WTO members agree on a service classification provided that the current trade practice of maximum liberalization, non-barriers and non-discriminatory treatment to trade in E-products is maintained. To that end members should negotiate an agreement similar to ITA but specifically designed to grant full service commitments on E-products.

Such an E-products Agreement would guarantee the status quo of trade liberalization in E-products. It would also bring certainty for the industry, members, and other trade stakeholders as to which rules apply to trade in E-products. Accordingly, it will provide the assurance that no discriminatory regulation or discriminatory trade practices contravening the Agreement and other applicable WTO rules can be implemented and/or maintained. Furthermore, as a WTO Agreement, members can bring matters relating to the application and interpretation of the Agreement to the Dispute Settlement Mechanism of the WTO.

Such an E-products Agreement should take into account the following:

- (i) Notwithstanding the difficulty regarding the classification of E-products, trade in E-products should be classified as trade in services subject to GATS.
- (ii) That E-products, while more like “services” are in fact particular products of trade that share characteristics with both goods and services.
- (iii) That full commitments on trade in E-products have been granted *de facto* because, until recently, they have been subject to international trade without being subjected to any discriminatory regulation or practice.
- (iv) The principle of progressive liberalization provides that once commitments on a service have been made they cannot be withdrawn.

Accordingly, an E-products Agreement should set out the following principles:

- (i) All products covered by the agreement are considered services for international trade purposes and subject to GATS,
- (ii) All services listed in the agreement must be covered, but only services listed in the agreement will be covered;
- (iii) Services covered by the agreement will not be subject to border trade barriers such as customs duties;²⁹¹
- (iv) Full service commitments on mode 1 is granted for the services covered by the agreement in the business service sector or communications service sector; and
- (v) Due to the hybrid nature of E-products they will be subject to the General Exceptions of both GATS Article XIV and GATT Article XX.²⁹² This will allow members to adopt or enforce measures that are: necessary to protect public morals or maintain public order; necessary to secure compliance with law and regulations related to the prevention of deceptive and fraudulent practices or with the effects of a default on service contract, and also relating to the protection of privacy of individuals in relation of the processing and dissemination of personal data and the protection of confidentiality of individuals records and account; and necessary to secure compliance with law and regulations that protect patents, trade marks and copyrights. All of the foregoing exceptions are relevant for E-products.

The scope of the proposed agreement will be E-products under the business service sector or communication service sector with cross-reference to CPC V.2 group 843. This will be included in the members' schedule of concessions. Appendix 1 provides a draft of the proposed agreement.

²⁹¹ At the time that research for this thesis was concluded E-products have never been subject to customs duties; however, recent and future technologies could make that possible.

²⁹² See above Chapter 4 items 4.4.1 d) General Exceptions and 4.4.2 e) General Exceptions.

Until recently, technological limitations meant that E-products could not be the subject of discriminatory trade treatment. Accordingly a resolution to the classification dilemma was not urgent. However, technological breakthroughs such as geo-identification and micro-payments, censorship and firewalls now make it possible to impose discriminatory measures on the trade in E-products, making a satisfactory resolution to the classification dilemma necessary.

While a theoretical analysis suggests E-products share more significant characteristics with services, they also share a number of characteristics with goods making it impossible to conclude that trade in E-products is trade in “services” and not in any way trade in “goods”. Accordingly, in addition to any theoretical basis, a resolution has to be based on a political decision. Such a resolution could be achieved in the form of the proposed recognition of E-products as services subject to GATS subject to an E-products Agreement. Indeed, the proposed E-products Agreement would achieve the goals of both the US and the EU, the chief “rivals” in the classification dilemma. On the one hand, the US while conceding the point that E-products are goods would achieve a very liberalized, customs duty free trading field for its E-products industry. On the other hand, the EU would be able to impose restrictions based on the cultural exception in GATS. In short, it offers a solution that should appeal to all parties interested in free trade that recognizes the importance of cultural and national values of each member.

Appendix 1

Proposed E-products Agreement Draft

Representing the following members of the World Trade Organization (“WTO”), [members] (“Parties”), which have agreed on the expansion of world trade in electronically delivered products that have a physical counterpart which physical counterpart is classified as good subject to the General Agreement on Tariffs and Trade 1994 (“GATT”) discipline. The electronically delivered product hereinafter called (“E-products”);

Considering the key role of trade in E-products in the development of content based industries and in the dynamic expansion of the world economy;

Recognizing the goals of raising standards of living and expanding the production and trade in E-products;

Desiring to maintain the current status of maximum freedom of world trade in E-products;

Desiring to avoid potential measures that allow the use new technologies that can hamper the development of and trade in E-products;

Mindful of the positive contribution E-products make to the global economic growth and welfare;

Having agreed to put into effect the results of these negotiations which involve concessions additional to those included in member’s Schedules of Commitments under the General Agreements on Trade in Services;

Declare as follows:

1. The Parties agree to define E-product as an intellectual property object in the form of digital product or electronic intangible product that is traded in a pure electronic transaction and has a physical or tangible counterpart that is traded as a good. E-products are also referred to as electronic products, digital products, and digital content or just content.
2. The parties agree to classify the trade in E-products as trade in services subject to the General Agreement on Trade in Services (“GATS”).
3. Pursuant to the modalities set forth in the Product Coverage Annex of this Agreement (“ANNEX”) each party shall acknowledge full commitments on trade in E-products and shall refrain from imposing trade barriers of any kind, including without limiting customs duties, tariffs and quotas.

4. The Parties shall include the commitments agreed herein in their GATS Schedules of Services and each Parties' horizontal and sector-specific commitments shall be accordingly reviewed and updated.

ANNEX on E-products Agreement Product Coverage

Any member of the WTO, or State or separate customs territory in the process of acceding to the WTO, may participate in the expansion of the world trade of E-products in accordance with the following modalities:

1. Each participant shall incorporate the measures described in this Agreement into its Schedule to the General Agreement on Trade in Services (GATS) using either the *Services Sectoral Classification List* (MTN.GNS/W/120, 10 July 1991) and corresponding Central Product Classification (CPC) number or other internationally recognized classification system to clearly describe the service sector and/or sub-sector of the commitments. Each participant that is not a member of the WTO shall implement these measures on an autonomous basis, pending completion of its WTO accession, and shall incorporate these measures into its WTO Service Schedules.

2. The measures of this Agreement shall cover the following services:

<u>SECTORS AND SUB-SECTORS</u>	<u>CORRESPONDING CPC</u>
<u>[to be determined]</u>	
<u>[to be determined]</u>	
Data processing services	843
On-line text based information	8431
On-line books	84311
845+849	
On-line newspaper and periodicals	84312
On-line audio content	8432
845+849	
Musical audio content	84321
845+849	
Streamed audio content	84322
On-line video content	8433
845+849	
Films and other video downloads	84331
845+849	
Streamed video content	84332
	8434
845+849	
System software downloads	84341
845+849	
Application software downloads	84342
Other on-line content	8439
845+849	
On-line games	84391
845+849	

3. The parties shall make to the maximum extent possible full concessions with no limitations on Market Access and National Treatment pursuant to Articles XVI and XVII of the GATS on mode 1 cross-border supply of service.
4. The parties shall not impose customs duties on the services covered by this Agreement on cross-border (mode 1) supply.
5. The General exceptions of both GATS Article XIV and GATT Article XX may be applied.

Appendix 2

WTO Ministerial Conferences – E-commerce

List of WTO Ministerial Conferences and their respective Declarations on E-Commerce
 (See generally WTO, Ministerial Conferences, online: WTO
 <http://www.wto.org/english/thewto_e/minist_e/minist_e.htm>.)

Ministerial Conference	Declaration on E-commerce	Summary
First WTO Ministerial Conference - Singapore (9 - 13 December 1996)	<p><u>WTO Document: WT/MIN(96)/DEC</u></p> <p>“18. Taking note that a number of members have agreed on a Declaration on Trade in Information Technology Products, we welcome the initiative taken by a number of WTO members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis...”</p>	No declaration on E-commerce only reference to ITA

Ministerial Conference	Declaration on E-commerce	Summary
<p>Second WTO Ministerial Conference - Geneva, Switzerland (18 and 20 May 1998)</p>	<p><u>WTO Document: WT/MIN(98)/DEC/2</u></p> <p>“Declaration on global electronic commerce — adopted on 20 May 1998 The General Council shall, by its next meeting in special session, establish a comprehensive work programme to examine all trade-related issues relating to global electronic commerce, including those issues identified by members. The work programme will involve the relevant World Trade Organization (“WTO”) bodies, take into account the economic, financial, and development needs of developing countries, and recognize that work is also being undertaken in other international fora. The General Council should produce a report on the progress of the work programme and any recommendations for action to be submitted at our third session. Without prejudice to the outcome of the work programme or the rights and obligations of members under the WTO Agreements, we also declare that members will continue their current practice of not imposing customs duties on electronic transmissions. When reporting to our third session, the General Council will review this declaration, the extension of which will be decided by consensus, taking into account the progress of the work programme.”</p>	<p>Work Program on E-commerce created.</p> <p>Declaration to continue with the moratorium on customs duties on E-products.</p>

Ministerial Conference	Declaration on E-commerce	Summary
<p>Third WTO Ministerial Conference (Seattle, Washington State, US (30 November -3 December 1999)</p>	<p><u>WTO Document</u>: ELECTRONIC COMMERCE Work programme reflects growing importance – <i>briefing note</i></p> <p>“-WTO member Governments hold the general view that the GATS does not distinguish between technological means of delivery. -The general view of member Governments is that all the provisions of the GATS apply to trade in services through electronic means. -There is a disagreement on the classification of a small number of products made available on the Internet, as to whether or not they are services or goods. This disagreement is on products such as books and software. Whereas a printed book delivered through conventional means is classified as a good, there are member Governments of the WTO who hold the view that the digital version of the text of such a book is a service which should be covered by the GATS. Other member Governments hold the view that such a product remains a good which is subject to customs duties and other provisions of the GATT Agreement. There are also those who think that such a product constitutes a third category of products which are neither goods nor services and for which special provisions need to be devised.”</p>	<p>Confirmed issue of classification of E-products.</p> <p>Silent on the extension of the moratorium on customs duties on E-products.</p>

Ministerial Conference	Declaration on E-commerce	Summary
<p>Fourth WTO Ministerial Conference - Doha, Qatar (9 - 14 November 2001)</p>	<p><u>WTO Document: WT/MIN(1)/DEC/1</u></p> <p>“34. We take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic 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.”</p>	<p>Commitment to continuing working and maintain a favorable environment to the development of E-commerce.</p> <p>Declaration to continue with the moratorium on customs duties on E-products.</p>

Ministerial Conference	Declaration on E-commerce	Summary
<p>Fifth WTO Ministerial Conference - Cancún, Mexico (10 - 14 September 2003)</p>	<p><u>WTO Document:</u> Draft Cancún Ministerial Text – <i>Second Revision</i>.</p> <p>“24. 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.”</p>	<p>Recognized the work of the Work Programme is unfinished.</p> <p>The classification dilemma still an outstanding issue.</p>
<p>Sixth WTO Ministerial Conference - Hong Kong, China, (13–18 December 2005)</p>	<p><u>WTO Document:</u> WT/MIN(05)/DEC</p> <p>“46. We take note of the reports from the General Council and subsidiary bodies on the Work Programme on Electronic Commerce, and that the examination of issues under the Work Programme is not yet complete. We agree to reinvigorate that work, including the development-related issues under the Work Programme and discussions on the trade treatment, <i>inter alia</i>, of electronically delivered software. We agree to maintain the current institutional arrangements for the Work Programme. We declare that members will maintain their current practice of not imposing customs duties on electronic transmissions until our next Session.”</p>	<p>Recognize the work of the Work Programme is unfinished.</p> <p>Declaration to continue with the moratorium on customs duties on E-products.</p>

Ministerial Conference	Declaration on E-commerce	Summary
<p>Seventh WTO Ministerial Conference - Geneva, Switzerland (30 November - 2 December 2009)</p>	<p><u>WTO Document: WT/GC/W/613</u></p> <p>“9. Subsequently, members agreed that the following text should be sent to the General Council for forwarding to Ministers:</p> <p>We take note of the reports from the General Council and subsidiary bodies on the Work Programme on Electronic Commerce and express our concern that the examination of issues under the Work Programme is not yet complete. We decide to intensively reinvigorate that work, based on the Work Programme and guidelines given in the General Council Decision of 25 September 1998.</p> <p>We instruct the General Council to hold periodic reviews of the progress on the Work Programme in its sessions of July 2010, December 2010 and July 2011. The reports of these reviews, including any recommendations for action, would be taken into consideration during our next session, which we have decided to hold in 2011, for decisions under this item.</p> <p>The Work Programme shall include development-related issues, basic WTO principles including among others non-discrimination, predictability and transparency, and discussions on the trade treatment, <i>inter alia</i>, of electronically delivered software. We agree to maintain the current institutional arrangements for the Work Programme.</p> <p>We decide that members will maintain their current practice of not imposing customs duties on electronic transmissions until our next session, which we have decided to hold in 2011.”</p>	<p>Expressed concerned that the work of the Work Programme is not completed.</p> <p>Work Programme to be reinvigorated.</p> <p>Declaration to continue with the moratorium on customs duties on E-products until next Ministerial Conference.</p>

Ministerial Conference	Declaration on E-commerce	Summary
<p>Eight WTO Ministerial Conference - Geneva, Switzerland (15 – 17 December 2011)</p>	<p><u>WTO Document: WT/L/843</u></p> <p><i>“Decides:</i> To continue the reinvigoration of the Work Programme on Electronic Commerce, based on its existing mandate and guidelines and on the basis of proposals submitted by members, including the development-related issues under the Work Programme and the discussions on the trade treatment, <i>inter alia</i>, of electronically delivered software, and to adhere to the basic principles of the WTO, including non-discrimination, predictability and transparency, in order to enhance internet connectivity and access to all information and telecommunications technologies and public internet sites, for the growth of electronic commerce, with special consideration in developing countries, and particularly in least-developed country members.</p> <p>...</p> <p>To further instruct the General Council to hold periodic reviews in its sessions of July and December 2012 and July 2013, based on the reports submitted by the WTO bodies entrusted with the implementation of the Work Programme, to assess its progress and consider any recommendations on possible measures related to electronic commerce in the next session of the Ministerial Conference,</p> <p>We decide that members will maintain the current practice of not imposing customs duties on electronic transmissions until our next session, which we have decided to hold in 2013.”</p>	<p>Discussion on the trade treatment of software as E-product and to maintain basic principles of the WTO.</p> <p>Declaration to continue with the moratorium on customs duties on E-products until next Ministerial Conference.</p>

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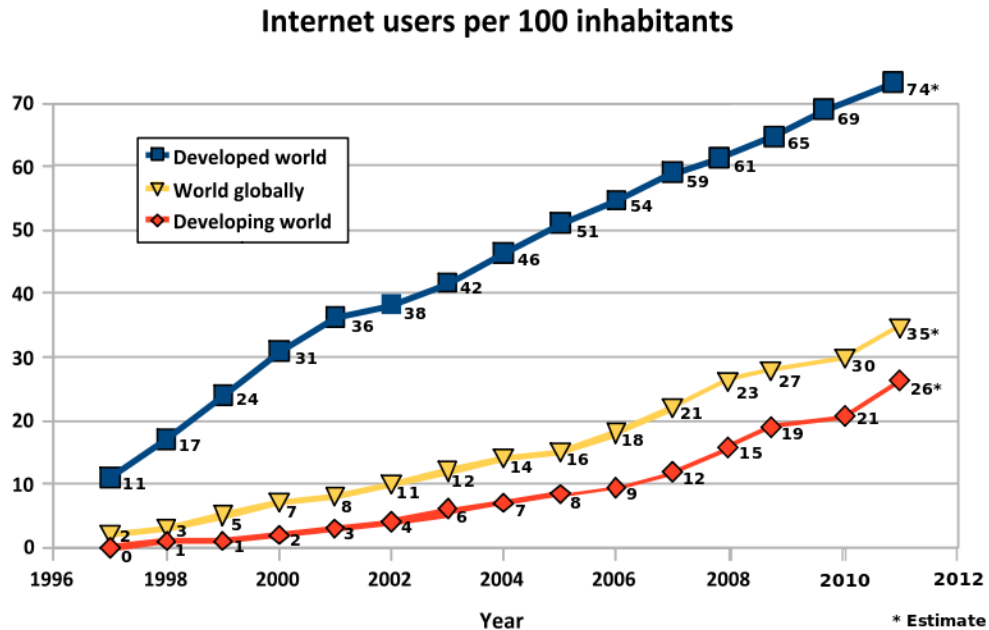


Figure 2.1: Internet Users per 100 Inhabitants Chart

The commercial capability of the Internet was soon leveraged and E-commerce became a business tool for new and existing companies to enter in a new market place referred to as “cyberspace”. This gave participants almost instant worldwide presence. For companies the start up cost for an E-store or E-business was, and is still today, very low taking into account the global market exposure gained.⁴⁵ At the same time, many existing brick-and-mortar companies realized that in order to stay in business a presence on the Internet was required. Consequently, E-commerce grew at fast pace creating a rush for registration of domain names and starting the “dot-com” boom⁴⁶ in which anything with the prefix “E-” was expected to be an instant success.

The volume of E-commerce transactions has grown extraordinarily with the increase of Internet usage and the development of business applications such as payment systems that

⁴⁵ The start up cost for a SME website varies, but hosting costs can be as low as US\$ 12 per month plus a nominal set-up fee that includes a domain name and access to free website design software and templates. See Ralph F. Wilson, “Start-Up Cost” (16 October 2002), online: Web Marketing Today <<http://www.wilsonweb.com/06/021016b.htm>>.

⁴⁶ Dot-coms are companies that operate their businesses mainly in the Internet. In the 1990s with the boom of the Internet many new companies started in the Internet and it seemed like a profitable business but many of them soon went out of business.

Table 4.1: Main Consequences if E-products are Subject to GATT or GATS

Key Matters	GATT	GATS
Categorization within the treaty	Determination whether “like products” or “new products”	Determination of service sector (W/120 and CPC) and mode of service (Mode 1 or Mode 2)
Market Access - Quotas	No restrictions permitted - Quotas allowed on very restrictive basis	As per Member’s Schedule of Commitments - Quantitative Restrictions possible
Market Access - Customs Duties	May be imposed - Subject to existing tariffs if “like goods” or, if “new products” possibly to benefit from ITA. If not may be subject to a different tariff	Possible, but unclear how they would be applied
National Treatment	No discrimination permitted	As per Member’s Schedule of Commitments – Qualitative Restrictions possible
General Exceptions	Generally restricted, but measures for the protection of patents, trade marks and copyrights possible	Generally restricted, but measures that protect the privacy of individuals and their personal data possible

Given the significant differences outlined above, it is not surprising that a debate has originated within the WTO regarding the classification has originated with the US advocating for their categorization as “goods” subject to GATT and the European Union arguing they should be categorized as services, ostensibly on the basis of protecting cultural values. However, it has also been noted that because GATS rules allow restrictions on E-products trade, it can have the effect of limiting the leading position of the US in E-commerce companies making room for the development of E-commerce

Table 5.1: E-products Characteristics

Goods	Services	E-Products
Tangible	Intangible	Intangible
Consistent product specifications	Heterogeneity (Not always consistent product specification)	Consistent product specifications
Moveable commodity	Limited moveable commodity	Limited moveable commodity
Low customer interaction	High customer interaction	High customer interaction
Mass production often automated	Knowledge-based non-mass production difficult to automate	Mass production often automated
Separate production, procurement and consumption	Inseparable production-procurement-consumption	Separate production, procurement and consumption
Can be inventoried by the manufacturer	Cannot be inventoried by the manufacturer	Cannot be inventoried by the manufacturer
Transferable	Nontransferable	Nontransferable
Time independent usage - non perishables	Time dependent usage - perishables	Time independent usage - non perishables
Ownership	Right to enjoyment	Right to enjoyment and Ownership (IP rights)

As can be appreciated E-products are sui-generis products that share characteristics with both “goods” and “services” and are therefore a unique type of product.

However, classifying E-products as a new sui-generis category of trade would create major problems for the WTO because trade rules are established for “goods” and “services”. Recognizing a new sui-generis product creates the challenge that as technology evolves, the existing WTO trade agreements, namely GATT and GATS, have to be amended through negotiation to accommodate new categories of trade such as E-

Table: 8.1: E-products Service Sector, CPC Description and HS Description

Service Sector (W/120)	Sub-Sector (W/120)	Description (W/120)	Corresponding CPC Group	Corresponding CPC Class	Corresponding CPC Subclass	CPC Description	Physical Counterpart	Description HS	Corresponding HS
1. Business Services	B. Computer and Related Services	c. Data processing services	843			On-line content			
2. Communication Services	C. Telecommunication Services	n. On-line information and/or processing	843			On-line content			
				8431		On-line text based information			
					84311	On-line books	Books	Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets	4901
					84312	On-line newspaper and periodicals	Newspaper, magazines, periodicals	Newspaper, journals and periodicals, wheather or not illustrated or containing advertising material	4902
				8432		On-line audio content			
					84321	Musical audio content	Music	Records, tapes and other recorded sound media	8524
					84322	Streamed audio content	Sound media	Records, tapes and other recorded sound media	8524
				8433		On-line video content			
					84331	Films and other video downloads	Movies	Cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track	3706
								Video film for educational nature	8523
					84332	Stream video content	Video media	Audiovisual news or audiovisual views Video film for educational nature	8523
				8434					
					84341	System software downloads	Software kit	Information technology software	8523
					84342	Application software downloads	Software kit	Information technology software	8523
				8439		Other on-line content			
					84391	On-line games	Video games	Video games consoles and machines	9504
					84392	On-line software	Software kit	Information technology software	8523