

A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in The World Trade Organization and The European Union[†]

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In many legal systems distinctions are made between “goods” and “services” with different regimes applying. The underlying issue is how to determine where the boundary between the two lies. Different imperatives drive this decision at the national and international level. At the national level, policy concerns may not be problematic because the rationale for the decision can be imposed by the “state.” The legitimacy of the state in this context rarely arises therefore. This is not the case at the international level, where the perception of those subject to the rules, or, in the context of an international organization, its members, is as relevant as the rule structure. Interpretation of international rules is therefore driven by the underlying rationale of the rule drafters and by the need to ensure the continued legitimacy of the rules themselves.

Broader implications follow from the recognition that the boundary decision is fulfilling more than just a pragmatic legal role. In particular, disagreement over the classification of products creates tension between members, so that the determination of the boundary between goods and services must try to accommodate the policy imperative of the organization while simultaneously addressing the concerns of its members. Not addressing such

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concerns may lead to calls for the decision to be devolved to the members instead of being retained by the organization itself.

This Article argues that defining the boundary between goods and services is particularly problematic in the World Trade Organization (WTO) as it is unclear from the jurisprudence when the panels and Appellate Body will apply the rules on goods in the GATT or the rules on services from the GATS. Although the European Union Court of Justice's treatment of the boundary in its jurisprudence on free movement of goods and services appears to provide an obvious source of assistance on this issue, this Article suggests that this is not in fact the case. The case law only reveals further disparity between the categorization of products and good or services.

The Article therefore explores the distinction between goods and services at a generic level to provide a fixed reference point that can be used to pinpoint factors used by other jurisdictions to differentiate goods from services. This comparison allows us to identify those decisions, whether within the WTO or the European Union, which are based on the inherent characteristics of goods and services, those which reflect differences in the structures of the two legal orders, and those which seem to suggest mere inconsistency of approach. Such decisions also reveal factors that appear irrelevant to both the WTO and the European Union's boundary decision.

Based on the natural language and economic literature, two concepts underpin the distinction between trade in goods and services: tradability and tangibility. These concepts are linked by the function of the product, that is, the way in which the product is to be used. The function is often defined by the legal relationship, whether contractual or regulatory. Function is also linked to the idea that what we are looking at is not necessarily the product itself but the national rules that may infringe either the WTO agreements or the Treaty of Rome. Tradability and tangibility serve as a series of filters, containing both objective and subjective criteria. Tradability first acts to distinguish between products that are bought and

sold and which therefore fall within the economic sphere addressed by the rules in bodies such as the WTO and the European Union. In practice, few transactions fall outside the scope of these treaties. Tangibility then constitutes a rebuttable presumption that intangible items are services while tangible items constitute goods. The product's function, in combination with tradability, then acts as the determining factor. To form the subject matter of a trade transaction, ownership must be transferred from the producer to the consumer. Following the transfer of ownership, the consumer gains possession of the product, such that they are able to exercise control over it. Whether a product is goods or services depends on whether the consumer needs the product per se or whether they need it to gain access to the product which forms the subject matter of the transaction.

While these criteria form a framework for making decisions, it is clear that in some cases the boundary will remain contested. The benefit, however, of using a consistent framework for analysis is that it allows for greater transparency in the decision-making process, thus minimizing the risk of inconsistencies and arbitrary decisions and thereby supporting the legitimacy of those decisions.

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INTRODUCTION

In many legal systems distinctions are made between “goods” and “services” with different regimes applying to each of them. Although in some instances goods and services may be subject to similar rules despite these distinct regimes, in other cases they may be accorded different treatment. Indeed, it may be that, given their inherent characteristics, goods and services should be treated differently. In either case, the underlying issue is how to determine where the boundary between goods and services lies. The boundary may be determined by reference to the essential characteristics of the product itself or by external considerations, including economic characteristics, the legal context, or even the purposes to which the product may be put.

At the national level, the policy concerns driving the decision to place the boundary between goods and services at a specified point (the boundary decision) may not be problematic because the rationale for the decision can be imposed by the “state.” A range of factors may influence the classification of the product because they reflect national interests, even though they fall outside those directly related to the product’s inherent characteristics. The legitimacy of the state in this context rarely arises. In contrast, problems of legitimacy may arise under international regulatory regimes.

International regulatory structures must be perceived as “legitimate” by those participating in them. As Franck states, “legitimacy,” in this general sense, is “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.”¹ At a generic level, this definition places the emphasis on the acceptability of either the rules themselves or the institution making them to those parties who come within the jurisdiction of the rules and/or the organization presiding over them. On this definition, “legitimacy” is measured vertically,² so that it is the perception of those subject to the rules, or, in the context of an international organization, its members, that is relevant

1. THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONGST NATIONS* 16 (1990).

2. This point is derived from Jackson’s analysis of the construction of the exercise of power within the World Trade Organization (WTO). See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 102 (1998) [hereinafter JACKSON, WTO].

rather than the rule structure per se. Zampetti³ takes this analysis further in the context of international law and measures this acceptability for the purposes of legitimacy using a three-stage analysis: first, states must be willing to cede sovereignty to the extent that this leads them to comply with the rules administered by the relevant organization,⁴ even if it were possible to violate those rules;⁵ second, states' willingness to comply then flows from the rules' coherence, which in turn is thirdly measured by the extent to which the rules mirror the domestic goals and aspirations of those subject to them.⁶ Interpretation of international rules is not only driven by the underlying rationale of the rule drafters, but also by the need to ensure the continued legitimacy of the rules themselves.⁷

In the context of defining where the boundary lies between trade in goods and services, classification for the purpose of the rules can be made as much on the basis of ensuring the continued legitimacy of the regulatory structure as a whole as on the basis of the de facto classification of the product itself. In reality, this means that the boundary may be fluid for borderline products, particularly those that are politically sensitive. In particular, the classification of borderline products as goods rather than services, or vice versa, where this decision is politically driven, may undermine the legitimacy of the organization in the sense defined by Franck and Zampetti. At the international level, achieving such legitimacy means that the boundary decision is about more than just placing the product in one category or another. It becomes a matter of maintaining a single policy imperative within the international regulatory framework. Such an idea should be acceptable to those participating in the regime to the extent that the boundary decision results in the continued adherence to the rules by those members of the organization.

Broader implications follow from the recognition that the boundary decision is fulfilling more than just a pragmatic legal role. In particular, questions arise over who should make the boundary

3. Americo B. Zampetti, *Democratic Legitimacy in the World Trade Organization: The Justice Dimension*, 37 J. WORLD TRADE 105, 107 (2003).

4. Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 49, 53 (V. Rittberger & P. Mayer ed., 1993).

5. Zampetti, *supra* note 3, at 107.

6. Zampetti draws on the work of Hurrell and defines this shared commonality in terms of the "justice component" where rules are made on the basis of common moral values. Zampetti, *supra*, note 3, at 108; see also Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.125, WT/DS285/R (Nov. 10, 2004) [hereinafter *United States—Gambling and Betting Services*].

7. Legitimacy in this context is as interpreted by Zampetti and Franck. Zampetti, *supra* note 3; FRANCK, *supra* note 1.

decision in the international context. Disagreement over the classification of products creates tension between members, so that the determination of the boundary between goods and services must try to accommodate the policy imperative of the organization while simultaneously addressing the concerns of its members.⁸ Not addressing such concerns may lead to calls for the decision to be devolved to the members instead of being retained by the organization itself. Difficulties can then arise if the organization is called upon to adjudicate the classification of a product and it only resolves the immediate conflict, rather than appreciating that the boundary decision must be resolved in the light of the organization's rule structure. Failure to continue to prioritize the organization's goals can lead to conflicting decision-making, meaning that it is even more difficult to decide which category problematic products fall into as judicial decisions are sometimes inconsistent. In particular, the exact place where the boundary lies between goods and services in the context of the World Trade Organization (WTO) is unclear. The WTO panel and Appellate Body jurisprudence is ambiguous. As the discussion will show, the distinction has significance on two levels: the application of WTO rules to particular products and the extent to which the WTO can unilaterally modify members' trade liberalization commitments, particularly under the General Agreement on Trade in Services (GATS).

Is this problem unique to the WTO? A useful comparator is the European Union (EU), another international organization in which questions of competence as to the determination of such a boundary may arise. Focusing on the European Union has another advantage: the European Court of Justice (ECJ) has wrestled with the distinction between goods and services in its interpretation of the EU rules on the free movement of goods and free movement of services. Consequently, there is a greater amount of judicial consideration of this issue within the European Union than in the panel and Appellate Body decisions of the WTO. The Court of Justice judgments present an opportunity to see the difficulties and also to assess any solutions that have arisen from these rulings.

Exploring where the boundary between goods and services lies at a generic level facilitates an understanding of the boundary problems in more detail. Identifying generic issues provides a fixed reference point that can be used to pinpoint factors used by other

8. Note the vehement disagreement between the United States and Antigua and Barbuda over the scope of the U.S. General Agreement on Trade in Services (GATS) commitments on gambling and other betting services. *United States—Gambling and Betting Services*, *supra* note 6, ¶ 5.17.

jurisdictions to differentiate goods from services. This comparison may allow us to identify those decisions, whether within the WTO or the European Union, which are based on the inherent characteristics of goods and services, those which reflect differences in the structures of the two legal orders, and those which seem to suggest mere inconsistency of approach. Such decisions also reveal factors that appear irrelevant to both the WTO and the European Union's boundary decision.

The discussion is divided into three parts. First, in Part I, the WTO's categorization of products as goods and/or services is explored. The analysis focuses on the issues arising from the separation of the rules on goods and services into two distinct agreements, the legal effect of this division, and the interpretation of the rules themselves within the two regimes. This discussion allows us to consider whether there is a distinction in the WTO between goods and services and its significance, if any. Second, Part II considers the European Union's approach to the delineation between goods and services; in particular, how products are categorized and the problems which arise to ascertain whether the European Union encounters similar problems to those faced by the WTO or whether the European Union's approach could inform that of the WTO. Finally Part III considers the definition of goods and services at a generic level. Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna Convention)⁹ advocates using the "ordinary meaning" of the treaty's terms having regard to the general context of the term and also the "object and purpose" of the treaty when interpreting its provisions, an approach endorsed by the Appellate Body for the interpretation of WTO rules.¹⁰ Part III, therefore, starts with an examination of the natural language definition of goods and services and then moves on to determine how the economic and broader trade context of both the WTO and European Union affects the definition. This last Part in particular aims at trying to find criteria which would assist in defining objectively the boundary between goods and services, serving the interests of legal certainty and, crucially, reinforcing the legitimacy of the WTO and the European Union and their respective decision-making processes.

9. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, 691 (1969) [hereinafter Vienna Convention].

10. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *United States—Reformulated Gasoline*]. Also in its latest formulation, see the panel's interpretation of the Vienna Convention. *United States—Gambling and Betting Services*, *supra* note 6, ¶¶ 6.46–53.

I. DETERMINING THE BOUNDARY BETWEEN GOODS AND SERVICES IN THE WTO

A. *Background*

Prior to the creation of the WTO on January 1, 1995,¹¹ only trade in goods was covered by the multilateral trade rules found in the General Agreement on Tariffs and Trade (GATT).¹² Originally negotiated in 1947,¹³ the GATT liberalized trade through the reduction of tariff barriers and the elimination of other governmental restrictions on the import and export of goods and goods alone.¹⁴ All goods are covered by GATT rules, but the contracting parties¹⁵ listed specific goods subject to tariff barrier reduction commitments in schedules that were annexed to the main agreement. These schedules formed the basis of individual contracting parties' binding commitments to the process of liberalization.¹⁶ During subsequent rounds of multilateral trade talks,¹⁷ the contracting parties committed to further reduce tariffs on goods contained in these schedules.

All the GATT rules revolve around two fundamental non-

11. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ¶ 3, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. On the Uruguay Round, see TERENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992* (1993).

12. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. Originally the GATT did not enjoy full legal personality as it was only expected to be temporary in nature. This was in contrast to the WTO which enjoys full independent legal personality as an organization. GATT was brought into force using the Protocol of Provisional Application (PPA), as it was envisaged that the International Trade Organization would come into effect and so the GATT could once again form part of the broader structure. The PPA was therefore a temporary measure to allow the implementation of the commercial rules contained in GATT, Protocol of Provisional Application to the General Agreement on Tariffs and Trade. To underline the temporary nature of the GATT and the fact it specifically was not an international organization, states who subjected themselves to the rules were referred to as "contracting parties." See JACKSON, *WTO*, *supra* note 2, at 12.

13. The GATT encompassed Part IV of the ultimately unsuccessful International Trade Organization. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

14. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL RELATIONS: CASES, MATERIALS, AND TEXT* 305 (2d ed. 1997).

15. Those states participating in trade liberalization under the auspices of GATT were referred to as "contracting parties," rather than members reflecting GATT's lack of independent legal personality and provisional status. Note that customs territories possessing or acquiring "full autonomy in the conduct of their external commercial relations and other matters provided for" by the GATT could also claim the status of contracting party. See GATT art. XXVI(5)(c).

16. GATT art. II. See JACKSON ET AL., *supra* note 14, at 338; see also Appellate Body Report, *EC—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998).

17. See JACKSON ET AL., *supra* note 14, at 344-49.

discrimination provisions: the most favored nation clause (MFN clause)¹⁸ and the national treatment provision.¹⁹ Whereas the MFN clause operates to prevent contracting parties offering more favorable treatment to goods traded by one contracting party over another, the national treatment clause prevents discriminatory treatment of imported products as against “like” domestically manufactured products once those goods have entered the contracting party’s domestic territory.²⁰ GATT also contains some exclusions relating to the imposition of trade barriers in limited circumstances, including some non-trade issues,²¹ although in the pre-WTO period these non-trade exemptions were interpreted highly restrictively.²²

Trade in services was excluded from the scope of the multilateral trade rules until the addition of the General Agreement on Trade in Services (GATS) to the WTO in 1995. GATS reduces barriers to trade in services in two ways. First, on a general level, it eliminates restrictions in domestic regulations. In this respect, GATS contains universal rules which cover all trade in services in Parts I and II and then a series of rules in Part III which apply only to the extent that members elect to be bound by them in their GATS schedules. Second, GATS addresses particular service sectors through subject specific annexes.²³

Normatively, GATS draws heavily on GATT and features many of its rules including the MFN²⁴ and national treatment provisions,²⁵ as well as the general exceptions clause²⁶ in Article XIV.²⁷ However, GATS also includes a separate market access commitment based heavily on a combination of the wording of the

18. GATT art. I.

19. *Id.* art. III.

20. *Id.* art. III(2).

21. *Id.* art. XX; *see also* GATT art. XIX (allowing the contracting parties to impose safeguard measures where domestic industries suffered “serious injury” as a result of excessive importation due to “unforeseen developments” in trading patterns).

22. WTO Panel Report, *Restrictions on Imports of Tuna*, WT/DS29/R (June 16, 1994) (not adopted).

23. *See, e.g.*, Annex on Air Transport; Annex on Financial Services; as well as the highly controversial Annex on Basic Communications. Members entered into further negotiations to liberalize the telecommunications sector, which were concluded in 1997, coming into effect in 1998. *See* Reference Paper on Regulatory Principles, 36 I.L.M. 367 (1997); *see also* MARK NAFTEL & LAWRENCE J. SPIWACK, *THE TELECOMS TRADE WAR* 102–17 (2000).

24. *See* GATT art. I; *see also* General Agreement on Trade in Services art. II, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

25. GATT art. III; GATS art. XVII.

26. GATT art. XX.

27. *See* the extrapolation of the jurisprudence on GATT article XX into GATS article XIV by the panel. *United States—Gambling and Betting Services*, *supra* note 6, ¶ 6.448.

MFN and national treatment rules in Article XVI.²⁸ Article XVI does not define “market access” in the abstract. Instead, it requires any member undertaking full liberalization commitments without restrictions in one service sector in their schedule to give MFN treatment to all services and service suppliers in that sector from other members.²⁹ In addition to the MFN obligation, Article XVI(2) limits the measures a member can take in relation to that service sector. The prohibited measures include imposing quotas on the number of service suppliers,³⁰ limiting the value of any transaction³¹ as well as the number of service operations or their output,³² restricting the number of people that can be employed in the sector,³³ adopting measures which restrict the entity through which the service supplier operates,³⁴ and, finally, imposing restrictions on the use of foreign capital, shareholding, or level of investment used.³⁵ GATS rules also only affect those sectors which members have agreed to liberalize in their schedules annexed to the main agreement.³⁶

B. *GATT or GATS? The Structure of the Agreements*

On one view, it is obvious that a boundary exists between trade in goods and services in the context of the WTO. The Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement) states that the WTO should act to ensure the “implementation, administration and operation, and further the objectives of . . . the Multilateral Trade Agreements”³⁷ contained in the substantive rules in Annex 1 to the Marrakesh Agreement. This structural arrangement means that the rules on trade in services³⁸ and intellectual property³⁹ are added incrementally to those from the

28. GATS art. XVI.

29. *Id.* art. XVI(1).

30. *Id.* art. XVI(2)(a). Note that such limitations can be in the form of numerical quotas, monopolies, exclusive service suppliers, or the imposition of an economic needs test.

31. *Id.* art. XVI(2)(b).

32. *Id.* art. XVI(2)(c).

33. *Id.* art. XVI(2)(d).

34. *Id.* art. XVI(2)(e).

35. *Id.* art. XVI(2)(f). See *United States—Gambling and Betting Services*, *supra* note 6, ¶ 6.265 (the panel sees article XVI(1) as a specific manifestation of the MFN commitment in GATS article II).

36. GATS art. XX. Note the re-negotiation deadline imposed by the July 2004 agreement. See WTO Draft General Council Decision of July 2004, ¶ 1(d), JOB 04/96 (July 27, 2004).

37. Marrakesh Agreement Establishing the World Trade Organization art. III(1), Apr. 15, 1994, 1867 U.N.T.S. 154; 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement].

38. See generally GATS.

39. Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter

original GATT.⁴⁰

Physically separating the rules into distinct parts in Annex 1 on a subject specific basis in this way points to a distinction between trade in goods and trade in services, and a boundary beyond which a product ceases to be goods and becomes services. The wording of the rules themselves within GATT and GATS also supports the existence of such a boundary. This occurs in three ways. First, GATS includes a definition of “trade in services” in Article I(1), which implies a distinction between trade in goods and trade in services that is relevant to the application of the rules in some way.⁴¹ Second, GATS distinguishes between different types of commitment, which the rules in GATT do not. Finally, the wordings of the obligations in the two agreements are drafted differently.

The first of these points was endorsed by the Appellate Body in *Canada—Certain Measures Affecting the Automotive Industry (Canada—Autos)*.⁴² In the case, the panel found Canada’s import measures on certain motor vehicles violated GATS because they failed to conform to the MFN obligation in Article II. In reaching its conclusion, the panel focused on the measure’s effect but argued that, as the measures in dispute were capable of violating Article II of GATS, a separate analysis whether they did in fact concern services at all was unnecessary.⁴³ On the panel’s interpretation, it is the

TRIPS]; Marrakesh Agreement, Annex 1C.

40. The original GATT is legally distinct from the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 (1994) [hereinafter GATT 1994] which is contained in Annex 1A of the Marrakesh Agreement, Article II(4). GATT 1947 is annexed to the Marrakesh Agreement and its rules are incorporated into the WTO scheme by virtue of article 1 of GATT 1994.

41. GATS art. I(1). GATS defines trade in a service in terms of its supply, either between members across borders, by the presence of the consumer in another member’s territory, the commercial presence of an entity within the member’s territory, or by the presence of a natural person within the territory of another member.

42. Appellate Body Report, *Canada—Certain Measure Affecting the Automotive Industry*, WT/DS139/AB/R & WT/DS142/AB/R (May 31, 2000) [hereinafter *Canada—Autos*]. Note that in the landmark case on GATS, the panel refused to make any analysis of the scope of the definition of the scope of “trade in services” under GATS article II(1). Panel Report, *Mexico—Measures Affecting Telecommunications Services*, ¶ 7.39, WT/DS204/R (Apr. 2, 2004) [hereinafter *Mexico—Telecommunications*]. Emphasis in this case is more on the scope of the commitments made by Mexico in its GATS schedule and the extent to which they comply with the Reference Paper on Basic Telecommunications. *Mexico—Telecommunications*, ¶ 3.1. There is no argument by the parties that the products at issue are services at all; instead, it is the classification point within the general designation as services which is at issue. See *id.* ¶¶ 4.72–73 (Mexico’s argument); *id.* ¶ 4.74 (U.S. argument). Optimistically the panel argues that the definition of “services” in Article II is “comprehensive.” *Id.* ¶ 7.41.

43. Panel Report WT/DS39/R & WT/DS/142/R, ¶¶ 10.233–234 (Feb. 11, 2000). This follows the reasoning in the Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 221, WT/DS27/AB/R (Sept. 9, 1997)

nature of the violation that determines whether GATT or GATS applies, rather than any nebulous distinction between the type of trade involved in the dispute per se. However, on appeal, the Appellate Body rejected the panel's interpretation. While accepting that the analysis should center on the national measure, the Appellate Body stressed the need to show that the measure did in fact concern trade in services under Article I of GATS before finding a violation of the other substantive provisions. Consequently, it placed the emphasis on the existence of trade in services per se, thereby focusing on the "ordinary meaning" of the provisions.⁴⁴ Placing emphasis on whether the measure applies to trade in goods or services highlights a distinction between the types of trade and, consequently, as both agreements cover distinct subject matter, the existence of a boundary between GATT and GATS.⁴⁵

Further, GATS rules are divided into "general obligations and disciplines" in Part II and specific commitments in Part III. Under GATS, the MFN clause is included in the general commitments, meaning it will apply to all trade in services, unless the member has notified an MFN exemption.⁴⁶ In contrast, the national treatment and market access rules in Part III of GATS only cover specific commitments.

Locating both these rules in Part III means that members need only comply with the national treatment and market access rules to the extent that they have elected to do so in those service sectors specifically listed in their schedules of commitments annexed to the GATS.⁴⁷ If members do not include the sector at all, they are

[hereinafter *Bananas*]. The Appellate Body argued that there were some measures that would fall under both provisions and so a determination of which category they fell into was unnecessary.

44. Vienna Convention art. 31 (advocating the "ordinary meaning" of a phrase when considering its interpretation). See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU] (supporting the "ordinary meaning" approach); *United States—Reformulated Gasoline*, supra note 10, at 17 (endorsing the "ordinary meaning" approach); see also Part III of this article for greater analysis of the "ordinary meaning" of trade in goods and services.

45. *Canada—Autos*, supra note 42, ¶¶ 150–51, 167.

46. MFN exemptions had to be notified at the time GATS came into force. See GATS Annex on Article II Exemptions, ¶ 1. Exemptions can be notified after this date, but these are subject to the waiver requirements in Marrakesh Agreement article IX(3), rather than through GATS itself. MFN exemptions are time-limited to ten years maximum. See GATS Annex on Article II Exemptions, ¶ 6.

47. The panel in *United States—Gambling and Betting Services* interpreted this obligation in the light of what was actually written in the schedule rather than the U.S. intention when they drafted it. *United States—Gambling and Betting Services*, supra note 6, ¶ 6.136.

presumed to make no commitment in that sector.⁴⁸ This structural disparity means that GATS operates in a different way from GATT, as liberalization under GATS occurs on an ad hoc piecemeal basis dependent on the level of commitment made by all members in a service sector.

Crucially for borderline products, this distinction means that a member's obligations differ if the product is classified as goods rather than services, as liberalization commitments are more stringent under GATT. Under GATT, both the MFN and national treatment rules apply in every case so as to compel simultaneous liberalization on a member's external and internal trade policies for that product. Making the national treatment obligation dependent on the existence of a specific commitment in the member's schedule in GATS means there could be instances where only one of the fundamental backbones of the multilateral trade rules applies. For example, the MFN clause might apply even though the national treatment obligations do not.⁴⁹

The fact that the GATS' core rules are drafted differently from those of GATT raises the question of whether they will be interpreted differently despite being based on the latter's fundamental principles.⁵⁰ This proposition follows from the general exhortation by the Appellate Body to work from the text of the rules themselves looking for the ordinary meaning⁵¹ of the language of the WTO rules.⁵² Using this interpretative tool,⁵³ it is clear that the wording used in the MFN clause in GATT is different from that in GATS: Article II of GATS states that members should accord treatment "*no less favorable* to like services or service suppliers" from other

48. Geza Feketekuty, *Improving the Architecture of GATS*, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 98, 85–111 (Pierre Sauv  & Robert M Stern eds., 2000).

49. It is difficult to perceive a situation where a member would not want an MFN exemption as well as a reservation in their GATS schedule. This is because if the member did not reserve an MFN obligation, then any export concession granted to one member must then be granted unconditionally to all other members. If a member wishes to protect a specific sector, it is desirable for it to retain control over its external trade policy as unilateral concessions could affect the domestic industry's ability to compete in the international market. Likewise, national treatment and market access reservations in the member's schedule allow differential treatment of the imported products once they are within the member's territory, consequently protecting the designated domestic sector from cheaper imports. By retaining both reservations, a member preserves control over both external and internal trade in a specific sector.

50. Aaditya Mattoo, *MFN and the GATS*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 51, 55 (Thomas Cottier & Petros C. Mavroidis eds., Partrick Blatter 2000).

51. This follows from the use of Article 31 of the Vienna Convention.

52. *United States—Reformulated Gasoline*, *supra* note 10, at 17.

53. The ordinary meaning of "goods" and "services" is explored in detail in Part II.

members. This wording borrows heavily from Article III(4) of GATT, the national treatment provision, rather than Article I of GATT containing the MFN clause in relation to trade in goods. In contrast to Article II of GATS, Article I of GATT states that in relation to “customs duties and charges of any kind . . . *any advantage, favor, privilege, or immunity granted by any contracting party to any [goods] originating in or destined for any other country shall be accorded immediately and unconditionally to the like product* originating in or destined for the territories of all other contracting parties.”⁵⁴ Article I appears more specific, placing the emphasis clearly on the rights granted, rather than on a general commitment to achieve equal treatment found in Article II of GATS.

In *Bananas*,⁵⁵ the panel accepted that the discrepancy in wording required a different interpretation of the obligations. It proceeded therefore on the basis that the jurisprudence from Article III of GATT, rather than that of Article I of GATT, should be used to interpret Article II of GATS.⁵⁶ By adopting this approach, the panel clearly indicated that a measure subject to the MFN obligation in GATS would potentially be treated differently from one that fell within the GATT. On the panel’s view, it mattered whether the measure at issue concerned trade in goods or trade in services, as the interpretation of the obligations is different.⁵⁷

The Appellate Body rejected the panel’s interpretation,⁵⁸ arguing that as Article II of GATS was an MFN commitment, it was more appropriate to use the corresponding MFN jurisprudence in GATT as a guide rather than that on national treatment despite the difference in wording.⁵⁹ The Appellate Body went on to extend the coverage of Article II of GATS to both de facto and de jure discrimination so that both MFN clauses had the same scope.⁶⁰ On its view, the nature of the obligation was crucial rather than its phraseology.⁶¹ Consequently, it appears from the *Bananas* analysis

54. GATT art. I(1) (emphasis added).

55. WT/DS27/AB/R (May, 22, 1997).

56. *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.301, Complaint by the United States (May 22, 1997). This approach mirrors the second element of Article 31(1) of the Vienna Convention where the term in the treaty must be interpreted in its context within the general overall meaning of the treaty as a whole. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.16.

57. The emphasis here is placed clearly on the “trade” aspect of the definition. See *generally infra* Part III.

58. *Bananas*, *supra* note 43, ¶ 231.

59. *Id.*

60. *Id.*

61. This approach follows on from the general considerations in the Vienna Convention even if it does lead to confusion. Under Article 31(2), it is possible to determine the “ordinary meaning” of the language used in the treaty by assessing the general context in

that the Appellate Body dismissed the importance of the type of trade in order to achieve a homogenous interpretation of the substantive scope of the MFN clause in GATT and GATS.⁶²

In *Canada—Autos*, the panel found a violation of Article II(1) of GATS⁶³ by focusing on the question of whether the Canadian measure provided less favorable treatment to a “limited and identifiable group of manufacturers/wholesalers of motor vehicles of some Members,”⁶⁴ allowing some manufactures/wholesalers to import vehicles duty-free whereas others were specifically excluded from this exemption.⁶⁵ The Appellate Body rejected this approach, arguing that by equating the treatment of wholesalers with that of manufacturers, the panel was applying a “goods” analysis rather than one applicable to GATS. It argued that the wording of GATS meant that the effect on both the manufacturers and the wholesalers had to be considered separately and it was not possible to merely extrapolate the analysis from one sector to the other, as would be the case for the MFN analysis in GATT.⁶⁶ Although the Appellate Body was very careful to state that this did not mean that the Canadian measure would not adversely affect wholesale manufacturers,⁶⁷ it stated firmly that GATS rules could not simply be equated to GATT rules.⁶⁸

It is interesting to note that in its analysis the panel placed the emphasis on the type of breach of the rules rather than the classification of the products. In contrast, the Appellate Body’s insisted on an assessment of the type of trade affected by the measure first before analyzing the breach of the substantive rules.

These approaches appear diametrically opposed to those taken by both bodies in their respective decisions in *Bananas*. In *Bananas*, the panel reiterated the difference between the two types of trade in contrast to its stance in *Canada—Autos*, whereas the

which the rules operate. Under Article 31(2)(a), any agreement can be considered alongside the original wording to ascertain what the ordinary meaning is. Also, Article 31(4) allows a special meaning to be accorded to the wording used if it is clear that the parties to the treaty intended this to be so. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.15 (on the use of the Vienna Convention in the context of the GATS).

62. Note the earlier discussion where it is still imperative to decide whether there is a trade in services for the purposes of the application of the GATS per se.

63. A violation of Article II(1) of the GATS is a violation of MFN clause.

64. *Canada—Autos*, *supra* note 42, ¶ 178.

65. *Id.* ¶ 179.

66. *Id.* ¶ 181.

67. *Id.* ¶ 183.

68. *Id.* ¶ 184. Note however, the panel’s acceptance of GATT article XX as an interpretative tool for GATS article XIV. See *United States—Gambling and Betting Services*, *supra* note 6, ¶ 6.448. The panel merely imported the GATT jurisprudence without further analysis. This goes against the Appellate Body approach and may be contested on appeal.

Appellate Body's views in *Bananas*, unlike its approach in *Canada—Autos*, supported a homogenous interpretation of the obligations in GATT and GATS which diminished the importance between the types of trade.

One interpretation of this dichotomy is that the panel's analysis in *Canada—Autos* was influenced by the Appellate Body's view in *Bananas* that the scope of the GATT and GATS substantive obligations should be the same, as the context of both agreements clearly pointed to a homogenous approach,⁶⁹ therefore diminishing the necessity of defining the boundary between the types of trade. Nevertheless, the Appellate Body's analysis supports the existence of a boundary between trade in goods and services which is significant only for deciding which set of rules applies to the measure at the first instance rather than interpreting the scope of the obligations once the threshold test is met. On this construction, the distinction between trade in goods and trade in services remains, but only at a superficial level dictated by the pragmatic separation of trade into two distinct agreements. However, in *Canada—Autos*, the Appellate Body appears to introduce the question of the type of trade back into the interpretation of the substantive rules, most notably, in the scope of the MFN obligation itself, thereby re-emphasizing a boundary between the two agreements that goes beyond merely de facto separation of the rules.⁷⁰

This bifurcated approach is problematic on a number of levels. First, the jurisprudence is unclear as to whether the classification of a product as goods or services has implications for the application of the GATT and GATS. While *Bananas* removes the importance of the categorization of the product from the scope of the MFN clause by homogenizing the GATT and GATS rules, *Canada—Autos* re-introduces it. Perhaps the explanation for the incoherent approach lies in an imperative to encourage adherence to "new" rules in GATS by preventing members from circumventing rules by arguing that trade in goods is involved in order to bring the measure outside the scope of GATS, or vice versa.⁷¹ Although such pragmatism may be necessary politically, it means that wider questions concerning the purpose of both agreements and the significance of the distinction between the types of trade stay

69. See generally Part III.

70. *Canada—Autos*, *supra* note 42, ¶ 181.

71. This defense was raised by Canada. See Panel Report, *Canada—Certain Measures Concerning Periodicals Report of the Panel*, ¶ 3.3, WT/DS31/R (Mar. 14, 1997); see also Appellate Body Report, *Canada—Certain Measures Concerning Periodicals Report of the Panel*, WT/DS31/AB/R (June 31, 1997)[hereinafter *Canada—Periodicals*].

unanswered and interpretational difficulties remain.⁷²

C. *Classification Methodology: How is the Boundary Drawn?*

Both the WTO rules' structure and application as interpreted by the panels and Appellate Body point to a distinction between trade in goods and trade in services. Establishing whether trade in goods or trade in services is implicated is problematic because there is little guidance in the WTO agreements or dispute settlement reports. GATT does not contain a definition of "goods" in the abstract, but GATS does have a limited definition of "services." Article I(2) of GATS defines "trade in services" in terms of a product's mode of supply: either products are traded across borders (mode 1), the consumer travels to another member's territory to receive the product (mode 2), products are supplied by the "commercial presence" of the service supplier within the member's territory (mode 3), or there is movement of "natural persons" to another member in order to supply the product (mode 4).⁷³ The emphasis is placed on the way in which the product is traded rather than on its inherent characteristics, thereby concentrating on the economic element or legal nature of the transaction to drive the scope of the definition.⁷⁴ This approach follows the general economic context of GATS in paragraph two of its Preamble,⁷⁵ which aims to create a "multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners" It is mirrored in the panel discussion in *Mexico—Measures Affecting Telecommunication Services*.⁷⁶

Rather than discussing the notion of "services" in the abstract,

72. See the difficulties created by the Appellate Body approach in *Canada—Periodicals* where the emphasis was placed on ensuring the measure in question was covered by the rules. Despite emphasizing the distinction between earlier cases and the need to differentiate between the different types of analysis in relation to the GATT and GATS rules, the Appellate Body in *Canada—Periodicals*, and to an extent in *Canada—Autos*, argued that it was possible for one type of trade to be implicated, so that was enough to bring the measure within one set of rules. On this view, there is a boundary, but the exact place is blurred: see the later discussion of this case. *Canada—Periodicals*, *supra* note 71; *Canada—Autos*, *supra* note 42.

73. GATS art. I(2)(a)-(d).

74. This view is endorsed by the Appellate Body in *Canada—Autos*. *Canada—Autos*, *supra* note 42, ¶ 155. The emphasis on trade may change the categorization of the product from goods to services or vice versa. See *infra* Part III.

75. See Part III on the significance of "trade" in a product to determine whether the product falls within the GATT and the GATS at all.

76. See *Mexico—Telecommunications*, *supra* note 42, ¶¶ 7.41–43.

the panel placed the emphasis on the scope of the member's commitments in its schedule,⁷⁷ an approach followed by the panel in *United States—Gambling and Betting Services*.⁷⁸ The panel in *Mexico—Telecommunications* noted that the definition of “trade in services” in Article I(2) of GATS was “defined comprehensively.”⁷⁹ The difficulty with this view is that it places the emphasis on the method of transfer without specifying the essential characteristics of the product itself, as Article I is silent on these points. This is problematic when viewed against the Appellate Body's approach in *Canada—Autos* where it clearly stated that the inherent economic characteristics of the product were relevant to the scope of the MFN obligation in GATT and GATS, as both agreements covered different subject matters.⁸⁰ On this view, the essential characteristics of the product only appear relevant once the substantive obligations are assessed rather than when the threshold criteria for the application of GATS are considered. This seems strange when it is not clear that the product constitutes services in the first instance.⁸¹

Relying on the GATS definition alone to predict where the boundary lies is difficult. First, fitting the product into one mode of supply does not guarantee that it will automatically amount to trade in services. For example, products traded across borders could constitute trade in services in accordance with mode 1, but equally could be trade in goods for GATT, as both envisage physical product transfer in some respect.⁸² Second, GATS uses tautologous definitions forcing the emphasis back onto the existence of a “service” before the rules apply.⁸³ For example, GATS applies to “measures affecting *trade in services*”; “trade in services” is then defined in Article I(2) as the “supply of a service” under one of four

77. *Id.* ¶ 7.57.

78. Note that in this case the panel did not even question whether the measures at issue were services at all, but went firmly on the scope of the panel reference. *United States—Gambling and Betting Services*, *supra* note 6, ¶ 6.28.

79. *Mexico—Telecommunications*, *supra* note 42, ¶ 7.41.

80. *Canada—Autos*, *supra* note 42, ¶ 181.

81. See *infra* Part III for an assessment of how all these criteria fit together.

82. This issue is not really resolved by *Mexico—Telecommunications* either. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.33. The panel in that case was very careful to restrict its analysis to the facts of the case before it and was reluctant to give any general guidance on the scope of the obligations in GATS. *Id.* ¶ 7.3. See generally, Guy Karsenty, *Assessing Trade in Services by Mode of Supply*, in *GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION* 33, 35–40 (Pierre Sauvé & Robert M Stern eds., 2000). There are problems with online trading and broadcasting. Note also the difficulty in the European Union context concerning “retail services.” See *infra* Part III.

83. Ascertaining the “ordinary meaning” of the language used in GATS would seem to indicate the necessity to ascertain what “services” means in the abstract, especially given the general context of the definition which forces the definition continually back on to the notion of “services.” See *infra* Part II.

modes; and “supply of a service” for this purpose includes “the production, distribution, marketing, sale and delivery of a service.”⁸⁴ Even “services” themselves are defined as “including any service in any sector except service sectors in the exercise of governmental authority.”⁸⁵ This tautologous approach is perpetuated in the other modes including “commercial presence” in mode 3, which comprises “the creation or maintenance of a branch or representative office within the territory of a member for the purposes of supplying a service.”⁸⁶ Finally, the definition in Article I of GATS recognizes that there may be distinctions between types of service, though these distinctions (e.g. the distinction between a service which requires an individual to move to perform and a service which does not) are not expressly addressed in the more detailed GATS rules.

One way to identify the boundary between goods and services could be by reference to scheduling. Classification for scheduling purposes is complex, but similar for both GATT and GATS. Both adopt numerical categorization systems, where products are allocated distinct codes, which are then listed in the members’ schedule.⁸⁷ Once a product fits within a code, it is classed as either goods or services purely based on the code allocated by the relevant nomenclature. Again, different systems are used for GATT and GATS. GATT generally uses the Harmonized Description and Coding System (HS) nomenclature for goods devised by the World Customs Organization.⁸⁸ Members are under no obligation to accept the HS code for scheduling purposes but a significant proportion of

84. GATS art. XXVIII(b) (emphasis added).

85. GATS art. I(3)(b) (emphasis added).

86. GATS art. XXVIII(d)(ii) (emphasis added). Note that the EU approach segregates those issues covered by mode 3 and mode 4 in separate categories outside the scope of its rules on services. See *infra* Part III. See generally LORNA WOODS, *FREE MOVEMENT OF GOODS AND SERVICES IN THE EUROPEAN COMMUNITY* (2004).

87. See Steve Orava, *Commercial Reality (or Lack Thereof) in the Classification and Definition of Services in the WTO GATS Negotiations*, 8 INT’L TRADE L. & REG. 5 (2002) (discussing the categorization system in the context of the GATS).

88. The HS code is divided into ninety-seven separate chapter headings according to the physical characteristics of the products concerned. Each chapter is then subdivided into headings and subheadings; each individual product carries a six digit code which reflects its own characteristics as well as the chapter, heading and sub heading it comes under. It is this final six-digit code which is used in the member’s schedule to indicate that the product is subject to the rules on goods in GATT. See the International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, as amended by Customs Cooperation Council Recommendation, June 25, 1999, entered into force Jan. 1, 2002, available at http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html. See GATT Panels, Report of the Panel, *Spain—Tariff Treatment on Unroasted Coffee*, L/5135, June 11, 1981, GATT B.I.S.D. 28S/102 at 111 (1981); *Canada-Japan—Tariffs on Imports of Spruce, Pine Fir (SPF) Dimension Lumber*, L/6470, July 19, 1989, GATT B.I.S.D. 36S/167 (1989). See also JACKSON ET AL., *supra* note 14, at 394.

them rely on it.⁸⁹

GATS also employs a numerical coding system for scheduling purposes. Initially there was considerable disparity among members over the appropriate scheduling methodology,⁹⁰ despite the general exhortation that there should be a common method wherever possible.⁹¹ Following the introduction of Guidelines by the Council for Trade in Services in 2001,⁹² members now are encouraged to adopt the Services Sectoral Classification List (W/120) used during the negotiations of the Uruguay Round,⁹³ based on the more comprehensive United Nations' Central Product Classification System (CPC).⁹⁴ W/120 comprises a list of generic services, which are then sub-divided according to the CPC code. This means that once a product is listed under a generic heading in W/120, the interpretation of the individual product coding is that adopted by the CPC code.⁹⁵ Like the HS code for goods, the CPC code operates on a multi-level numerical coding system.⁹⁶

In *United States—Gambling and Betting Services*,⁹⁷ the United States disputed the assumption that it had GATS commitments on gambling and betting in its schedule. Despite omitting any reference to the CPC in its schedule, the panel still went on to interpret the U.S. commitments using the CPC and W/120 as customary rules of treaty interpretation under Article 31(2) of the Vienna Convention.⁹⁸

Adopting a numerical methodology to determine when a product constitutes trade in goods or services means that the

89. See JACKSON ET AL., *supra* note 14, at 394 (noting that ninety-five percent of members rely upon it).

90. World Trade Organization, *Scheduling of Initial Commitments in Trade in Services: Explanatory Note*, ¶ 16, MTN.GNS/W/164 (Sept. 3, 1993).

91. See *id.* ¶ 1; see also Marc Bacchetta et. al., *Special Studies 2, Electronic Commerce and the Role of the WTO 51* (1998), available at http://www.wto.org/english/res_e/booksp_e/special_study_2_e.pdf.

92. World Trade Organization, *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS)*, ¶ 23, S/L/92 (Mar. 28, 2001).

93. World Trade Organization, *Services Sectoral Classification List, Note by the Secretariat*, MTN.GNS/W/120 (July 10, 1991).

94. United Nations, *Provisional Central Product Classification*, Statistical Papers M no. 77, version 1.1 U.N. Doc. ST/ESA/STAT/SER.M/77/Ver.1.1, Mar. 2002. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.43 (interpreting the Guidelines).

95. See Marc Bacchetta et al., *supra* note 91, at 51.

96. There are five levels: level one is the section heading and has a one-digit code, which is in turn subdivided into four further levels. Level two is the division heading using a two-digit code; level three has a three-digit code, referred to as the group heading; level four is the class of service with a four-digit code and finally, level five is the service subclass and has a five-digit code. The CPC also includes an explanation of the scope of each level of the code available at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=16&Lg=1>.

97. *United States—Gambling and Betting Services*, *supra* note 6.

98. *Id.* ¶ 6.82.

boundary between the two is drawn on a product-by-product basis using criteria centered on the perceived inherent characteristics of the products themselves based on subjective criteria determined by the members. Consequently, there is no single identifying trait that makes products either goods or services, as the decision on which numeric classification to allocate a product is made on an ad hoc basis. Despite these difficulties, the panel in *Mexico—Telecommunications*⁹⁹ made it clear that it was important to define the relevant service sector first according to the CPC criteria and then assess the member's scheduling commitment.¹⁰⁰ The panel appeared happy to accept the member's categorization of the measure under the CPC code and did not concentrate their analysis on this issue.¹⁰¹

Although this approach may not be problematic for many traditional products, new products may not fit easily into the existing coding systems with disagreement arising over the correct classification of the product. There is a risk of discrepancies arising in two contexts: either products can be classified differently within the HS or W/120/CPC code, or, more radically, products can be classified as goods in one scheme and services in another. This problem is acute for products traded online although more established products, such as those of the communications industry, have also given rise to problems.¹⁰²

Using the classification methodology to determine the point at which trade in a product ceases to be trade in goods but instead

99. *Mexico—Telecommunications*, *supra* note 42, ¶ 7.77.

100. *Id.* ¶ 7.77.

101. *Id.* ¶ 7.35.

102. World Trade Organization, Council for Trade in Goods—Work Programme on Electronic Commerce—Background Note by the Secretariat, Considerations Concerning the Relationship Between WTO Provisions and the Subjects Listed Under Paragraph 3.1 of the Work Programme, ¶ 2, G/C/W/128 (Nov. 5, 1998). The various views are discussed at length in the WTO Secretariat's background note, Job No. (02) 38, May 1, 2002, annexed to the second dedicated discussion on e-commerce in May 2002: World Trade Organization, Second Dedicated Discussion on Electronic Commerce Under the Auspices of the General Council on 6 May 2002, WT/GC/W/475 (June 20, 2002). Note that the WTO has resolved some issues by the classification of some electronic products as "goods" under the WTO Ministerial Declaration on Trade in Information Technology Products. World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/16 (Dec. 13, 1996). However, it is unclear what criteria were used to determine whether such products are goods or not, as the products covered are merely annexed to the agreement, rather than being identified by any objective description. Note the European Union suggestions that the computer and other related services CPC category should cover "basic functions used to provide all computer and related services: computer programs . . . data processing and storage." However, this is not universally accepted by other members. World Trade Organization, Coverage of CPC-84-Computer and Related Services, ¶ 7, TN/S/W/6 (Oct. 24, 2002); *see also* World Trade Organization, Work Programme on Electronic Commerce: Classification Issue: Submission by the European Communities, ¶ 16, WT/GC/W/497 (May 9, 2003).

constitutes trade in services is problematic: despite the apparent certainty that a numeric classification system creates, in reality the boundary between the types of trade is still fluid because it is not until a product is classified that it acquires a designation as “goods” or “services.” A decision over the type of trade involved must still be made before the classification methodology applies and places the product within a specific code.¹⁰³ It is only by ascertaining what type of trade is involved that the appropriate coding nomenclature can be applied: either W/120/CPC or the HS code. While this decision potentially affects which WTO rules apply, it is the member who retains a significant element of choice whether to designate the product as goods or services in the first instance as there are no agreed criteria for choosing the most appropriate coding nomenclature, but only which part of the code in which to place the product once the coding nomenclature is selected.¹⁰⁴

Relying on the classification methodology to place this boundary rather than any workable definition in the WTO rules means that the classification decision is removed from the WTO and firstly placed on to the two external bodies that devised the nomenclature. Both the World Customs Council and the United Nations might classify products using economic criteria broadly defined, but they operate outside the scope of the WTO and may not take the WTO’s broader trade liberalization goals into consideration.¹⁰⁵ Potentially, tension could exist between the interpretation of the classification methodology used by the non-WTO bodies, driven by their goals on the one hand and the views and aims of the WTO on the other.¹⁰⁶

Second, the boundary decision also lies with members as they make the decision whether to include a product in their GATT and/or GATS schedules in the first instance. If it is possible to classify a product as both goods and services, then a member may classify the product based on historical imperatives rather than on a conscious decision based on the benefits of classifying a product in one category rather than another. Nevertheless, if a member only wants to make a commitment under one set of rules to benefit from their

103. *Mexico—Telecommunications*, *supra* note 42, ¶ 7.77.

104. The WTO has retaken control over the classification decision in some instances, but this is only done in dispute settlement proceedings and is seemingly done on an ad hoc basis. See *Canada—Periodicals*, *supra* note 71.

105. Deciding classification on a product by product basis arguably excludes any other criteria in the boundary decision. See Marrakesh Agreement, pmbl. ¶ 1.

106. Note the problematic discussion of classification in *Mexico—Telecommunications*, where the panel used its own assessment of the scope of the CPC coding based on the “ordinary meaning” of the language to define the scope of Mexico’s GATS commitments. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.67.

narrower liberalization commitments then, arguably, the member may classify the product based on its own domestic political considerations rather than any global criteria initiated by the WTO.¹⁰⁷

This problem is manifest principally in audiovisual products and products traded online. In these sectors, members disagree on the appropriate classification methodology based on their desire to protect such domestic interests. In relation to audiovisual products, many members excluded the sector from their original GATS commitments and the European Union obtained an MFN exemption.¹⁰⁸ Divergent views between the United States and the European Union in particular originally centered on whether the broadcast content in audiovisual products should be classified as goods or services.¹⁰⁹ This debate arose because the content can be physically transferred by virtue of the disc or videocassette on which it is recorded, or it can be transmitted via other transmission means. While the former could be regarded as goods, the latter is more appropriately classified as services.¹¹⁰ The United States supported classification of the audiovisual products as goods following from the historical inclusion of the film sector within GATT,¹¹¹ whereas the European Union argued for its classification as services.¹¹² Disagreement remains between United States and the European Union views, especially over European Union quotas on broadcast

107. For example, the disagreement between the United States and the European Union on the audiovisual sector has its roots in the different classification of the sector as goods by the United States and as services by the European Union. Note that the European Union position is shaped by the European Court of Justice's judgment in *Sacchi*. Case 155/73, *Sacchi*, 1974 E.C.R. 409. See John David Donaldson, *Television Without Frontiers Directive: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 *FORDHAM INT'L L.J.* 90, 110–11 (1996).

108. European Commission, *Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions the Future of European Regulatory Audiovisual Policy*, at 11–12, COM(2003) 784 final (Dec. 15, 2003). See generally Fiona Smith & Lorna M. Woods, *GATS and the Audiovisual Sector*, 9 *COMM. L.* 1 (2004). It may be possible that the reason for exclusion of these products is because they do not contain a commercial element. See *infra* Part II.

109. GATT, Report of the Working Party, at 2–3, GATT Doc./L/1741 (Mar. 13, 1962). Note that this dilemma was not discussed in *Mexico—Telecommunications*. *Mexico—Telecommunications*, *supra* note 42.

110. This debate is not new as is evident from the GATT working party set up to discuss the scope of the film exception in GATT article IV. *GATT Working Party on International Trade in Television Programmes*, in GATT, Report of the Working Party, *supra* note 109.

111. GATT art. IV.

112. The United States objected to the use of “European Quotas” and “European Independent Works” in the Television Without Frontiers Directive. Council Directive 89/552/EEC, 1989 O.J. (L 298) 23 (on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities), as amended by Directive 97/36/EC, 1997 O.J. (L 202) 60.

content, although the debate is currently centered on the correct classification within the CPC and W/120 coding.¹¹³

In the case of both audiovisual products and products traded online, therefore, it can be argued that the extent to which each is covered by the WTO rules is still a matter of debate among members. Consequently, it is unclear for participating businesses which rules apply to them, or even, in the case of the audiovisual sector, whether the rules apply at all.¹¹⁴

The involvement of both international organizations and members in the classification decision means that the point at which trade in goods is distinguished from trade in services potentially shifts depending at what level the decision is made. Consequently, there is a potential tension between the motivation behind a member's decision on the classification of a product and that of the international organizations. This tension could be alleviated by the intervention of the WTO, clearly delineating the point at which a product is viewed as trade in goods rather than trade in services for the purposes of the rules.¹¹⁵ As noted, little clear guidance is available¹¹⁶ and the discussion has already highlighted the Appellate Body's divergent opinions on the distinction between trade in goods and trade in services, and whether there is a boundary between GATT and GATS.¹¹⁷ Further problems from its pragmatic stance are

113. Council for Trade in Services, *Background Note by the Secretariat: Audiovisual Service*, at 8, S/C/W/40 (June 15, 1998); Council for Trade in Services Special Session, *Communication from the United States: Audiovisual and Related Services*, at 1, S/CSS/W/21 (Dec. 18, 2000). It is not possible to conclude that the classification issue has been resolved even though the United States is now negotiating concessions in the sector within the GATS framework. This is because the center of the debate has not shifted due to public concessions on the issue by the United States, but more as a result of a change in emphasis within the Doha negotiations. Disagreements could therefore re-occur during the course of the GATS negotiations.

114. During the GATS negotiations, Canada, Switzerland, and the European Union argued that audiovisual products are "fundamental instruments of social communication and contribute to the cultural identity of a society." Such cultural content meant they could not be regarded as "commercial" in the trade sense and so should be outside the scope of the trade rules completely. See Council for Trade in Services Special Session, *Communication from Switzerland: GATS 2000: Audio-visual services*, at 2, S/CSS/W/74 (May 4, 2001); Ted Madger, "Made in Canada—An International Instrument on Cultural Diversity" for "On the Edge: Is the Canadian Model Sustainable?," Weatherhead Center of Int'l Aff., at 1, May 9–10, 2003. For further discussion on this point, see *infra* Part III.

115. This has not been resolved by the *Mexico—Telecommunications* as the panel accepted that the measures at issue were in fact services and the only went on to discuss the relevant mode of supply for the purposes of GATS art. 1(2) and also the scope of Mexico's commitments in the Reference Paper. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.140.

116. *Id.* ¶ 7.3.

117. Whilst in *Bananas* it diminished the importance of the boundary between trade in goods and services in the GATT and the GATS, it appeared to depart from this view in *Canada—Autos* and re-emphasize the distinction between the types of trade as well as

apparent when trying to ascertain where the boundary should be drawn.

D. Is the Product Goods or Services? Classification by the Panels and Appellate Body

In both *Canada—Autos* and *Canada—Periodicals*, the core of Canada's defense was that the disputed product related to trade in services rather than trade in goods.¹¹⁸ Canada argued that as it had not made any liberalization commitment in its GATS schedule, the measure automatically fell outside the rules.¹¹⁹ Canada's construction identifies a clear boundary between the competence of the WTO and the members as the former would only be able to review the impact of a measure if the member chose to undertake liberalization commitments under the agreement at issue.¹²⁰ Canada's view was rejected in both cases.

Whereas Canada adopted a retrospective analysis focusing on the nature of the product itself, emphasizing the essential characteristics that placed it within a specific CPC code, the Appellate Body used a forward-looking approach, focusing on the effects of the measure in the sector rather than on whether the product was goods or services in terms of its classification.¹²¹ Although the Appellate Body's construction follows the wording of GATS closely, it does not address GATS' tautologous language because it assumes that if there is *any* effect in a service sector, then this is enough to bring the measure within the GATS rules without more comprehensive analysis. In *Canada—Autos*, the Appellate Body discussed whether "trade in services" was implicated in one paragraph,¹²² stating that provided the product was covered by the CPC classification methodology in some way and there was no dispute on whether the service supplier actually was resident in

stressing a fundamental difference between the interpretation of the rules within the two agreements.

118. This defense was not raised in *Mexico—Telecommunications*. See *Mexico—Telecommunications*, *supra* note 42, ¶ 4.71. The United States only argued that the measures at issue could be classified as "public services" rather than stating they did not relate to services at all. *Id.* ¶ 4.8.

119. Panel Report, *Canada—Periodicals*, *supra* note 71, ¶ 3.33; *Canada—Autos*, *supra* note 42, ¶ 20.

120. DSU art. 3(2) (stressing that the role of the dispute settlement body is merely to "clarify the existing provisions . . ." and that "rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements").

121. This follows from the panel's determination in *Bananas*. See *Canada—Autos*, *supra* note 42, ¶ 6.710. For further details, see *infra* Part III.

122. *Canada—Autos*, *supra* note 42, ¶ 157.

Canada in some way, this was enough to implicate GATS, making discussion of the nature of the product itself unnecessary.¹²³

The Appellate Body's dismissal of Canada's argument in *Canada—Periodicals* and *Canada—Autos* allows the WTO, rather than the member, to retain competence over the decision where the boundary between the types of trade lies to avoid circumvention of the rules. From both cases, it is clear that the member must present an argument whether the measure affects trade in goods or trade in services in the first instance,¹²⁴ but this decision is subject to challenge through the dispute settlement process. By adopting a pragmatic interpretation based on maximum compliance, the Appellate Body gives no definitive guidance on how to draw the boundary. It is clear from the reports that there is a distinction between the types of trade and the interpretation of the rules within GATT and GATS, indicating a boundary between the two agreements, but not where it lies.

The classification decision therefore still rests with the members and international organizations at the first instance unless there is a dispute. Even when there is a dispute, taking the classification decision away from a member in circumstances where it does not wish to make a commitment in a specific service sector undermines its sovereignty over decisions it had not ceded to the WTO. Inevitably, a tension arises as all participants have conflicting goals, creating uncertainty for businesses and individuals directly affected by the WTO rules.

The analysis indicates that the WTO's attempt to address the boundary between goods and services is problematic. Both the rules and their interpretation in the panel and Appellate Body reports indicate that there are differences between goods and services. However, it seems unclear whether this distinction is predicated on the inherent characteristics of the products themselves, whether it is based on the context in which the rules operate, that is, the method by which the products are traded, or whether the approach draws on a combination of these two issues.

123. A similar approach was taken in the Appellate Body Report of *Canada—Autos*. *Id.* ¶ 157.

124. This follows from the interpretation of GATS article 1(2) in *Canada—Autos*. Note that the GATT/GATS boundary only received limited discussion in *Mexico—Telecommunications* and was not discussed at all in *United States—Gambling and Betting Services*. *Mexico—Telecommunications*, *supra* note 42; *United States—Gambling and Betting Services*, *supra* note 6.

II. CAN WE GET ANY HELP FROM THE EUROPEAN UNION CASE LAW?

When considering problems in a given arena, a way forward is often found by considering similar questions in comparable bodies. In the case of the WTO, a trading organization, help might be found in the context of one of the regional trading organizations, the longest established of which is the European Union. Certainly, similarities between the underlying rationale of the WTO and that of the European Union can be seen.¹²⁵ In its original incorporation, the European Union established by the Treaty of Rome (TEC) had an essentially trade-based purpose.¹²⁶

Even now after numerous amendments,¹²⁷ the central vehicle by which the European Union aims to achieve its objectives is through the establishment and proper functioning of a common market.¹²⁸ One of the essential elements of the common market is the four freedoms¹²⁹ making up the elements of the internal market.¹³⁰ These four freedoms are defined as the free movement of goods,¹³¹ services,¹³² people,¹³³ and capital.¹³⁴ Although the

125. Although since the Maastricht Treaty there has been a distinction between the European Communities and the European Union, only the term European Union will be used in this Article in the interests of simplicity. Further, the European Constitution, if it is ratified, will remove this distinction.

126. Treaty Establishing the European Community art. 2, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter TEC].

127. In addition to the treaties dealing with the various enlargements of the European Community, the main treaties amending the Treaty of Rome are: the Single European Act (SEA), the Treaty on European Union (the Maastricht Treaty), the Treaty of Amsterdam, and the Treaty of Nice. Further discussions on the structure of the European Union are currently in progress; a new Constitution has been signed although the ratification process may take some time. The Treaty of Amsterdam renumbered the treaties; the Constitution will amend the numbering further. Treaty of Amsterdam numbers will be used in this Article.

128. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) [hereinafter European Constitution]. The European Constitution will change this position: the first of the Union's objectives is to promote peace, its values, and the well-being of its peoples. As a second objective, European Constitution article I-3(2) specifies that the Union is to "offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted."

129. TEC art. 3(1)(c). The European Constitution does not refer to the common market, using the term internal market instead. Some commentators have suggested that the terms internal market and common market should have different meanings, for example because TEC articles 94 and 95 distinguish between the two terms. Jurisprudence of the Court of Justice suggested otherwise and it seems that the Constitution reflects this position. The text of Article 94 has not found its way into the European Constitution.

130. TEC art. 14(2). This definition is carried over into the European Constitution in article III-130(2).

131. TEC arts. 23–31.

132. TEC art. 49.

133. This comprises free movement of workers, TEC art. 39, as well as freedom of

European Community Treaty therefore deals with a greater subject matter than the WTO (for example, by dealing with the free movement of capital¹³⁵), it can be seen that there are commonalities between the two. In particular, the TEC distinguishes between goods and services. Consequently, there are similarities between the questions which need to be addressed by the European Union and those with which the WTO has to deal. Three issues arise. First, to what extent has the distinction between goods and services had any significance in the context of the European Union? Second, how has the European Union dealt with this matter? Finally, is the difference between goods and services institutionalized within the European Union in the same way as it is in the WTO? Our starting point, therefore, is a brief outline of the institutional structure of the European Union.

A. *Structure of the EC Treaty*

Although the general objectives of the TEC are identified in Articles 2 and 3, these provisions are very general and are considered to be of interpretative value only.¹³⁶ Greater detail is added through subsequent articles which, as they are more precise, constitute the relevant specific legal obligation. Separate provisions deal with each of the four freedoms, and, thus, goods and services are dealt with under different articles. These are however dealt with in the same treaty, albeit within separate titles of the part of the TEC dealing with substantive policies. Services and goods are therefore subject to the same enforcement mechanisms.¹³⁷

There is an additional, structural difference between these two freedoms: whereas a single provision, Article 49, identifies the

establishment, TEC art. 43. Often the free movement of services contained in TEC art. 49 is dealt with under this heading, although it is listed separately in the “four freedoms.” The new section in the TEC, Title IV, concerning visas, asylum, immigration, and other policies relating to the free movement of people is not usually considered to be part of the “four freedoms.” They seem to refer specifically to the movement between Member States rather than movement into the European Union by third country nationals. This statement itself is problematic because both the goods provisions and those relating to capital have elements which deal with the flow of goods/capital into the European Union.

134. TEC arts. 56–60. Note also the separate title, Title VII, dealing with economic and monetary policy. Although linked, these latter provisions do not fall within the ambit of free movement of capital.

135. *Id.*

136. Case 270/80, *Polydor v. Harlequin Record Shops*, 1982 E.C.R. 329, ¶ 16.

137. See TEC art. 226 (regarding Commission enforcement actions); TEC art. 227 (allowing Member States to bring actions against other Member States). More indirectly, note the preliminary ruling mechanism in TEC Article 234. The new preliminary ruling mechanism does not relate to Articles 28–30 or Article 49 et seq.

freedom to provide services, several different articles deal with the free movement of goods.¹³⁸ Somewhat confusingly, the provisions dealing with the free movement of goods are dealt with in the same section as that dealing with the creation of a customs union, blurring the two concepts. Thus, Article 23 defines a customs union as covering “all trade in goods” including “the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.”¹³⁹ Developing this provision, Article 25 prohibits customs duties and Article 26 gives the Council the power to set the common customs tariff.¹⁴⁰ Despite the fact that the customs union is a broader concept than just trade in goods, effectively it is trade that this section of the Treaty addresses: people, capital, and services are not considered here. The EC Treaty also prohibits non-tariff barriers to trade: Article 28 prohibits quantitative restrictions on imports and all measures having equivalent effect (MEQR), and Article 29 is the equivalent provision in relation to exports.¹⁴¹ Article 30 identifies the grounds of derogation in relation to Article 28 and Article 29.

Although these provisions elaborate the aims of the TEC and have been held to be capable of being relied upon directly in proceedings before national courts,¹⁴² the provisions are still very broad. Because of the framework nature of the TEC, the institutions have been given the power to enact various types of secondary legislation,¹⁴³ which will take effect across the European Union.¹⁴⁴

138. Although TEC article 3(1)(c) refers to all four freedoms together, TEC article 3(1)(a) also refers separately to “the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect.” Services are not separately identified within TEC article 3.

139. Note that the European Union would have had to satisfy the requirements of the original GATT article 24.

140. Note that there is also a provision in dealing with a discriminatory taxation. See TEC art. 90.

141. Note that although the phraseology of TEC article 29 mirrors that of TEC article 28, TEC article 28 has been interpreted to apply more restrictively. See Case 15/79, *Groenveld v. Produktschap voor Vee en Vlees*, 1979 E.C.R. 3409.

142. That is, they are “directly effective.”

143. Proposals are put forward by the European Commission, the body which effectively represents the pan-European interest, for agreement by the Council, which is made up of the representatives of the Member States, either on its own or, in an increasing number of cases, in conjunction with the European Parliament. The procedure used in each case depends on which provision of the EC Treaty is used as the basis for Community action—the enabling provision will in each case specify the procedure to be used and in some instances the instrument (i.e., regulation or directive, which have different legal effects) to be used. The European Parliament is directly elected by the populations of the various Member States; as such it has a claim to represent the peoples of the European Union rather than the Member States themselves. Decision-making within the Union is

In this, there is a difference in the type of action which the two organizations may take, the European Union having legislative powers that the WTO lacks.¹⁴⁵ With regard to the internal market, which according to Article 14(2) of the TEC includes the free movement of both goods and services, harmonizing measures are the most usual form of action.¹⁴⁶ Article 95 is a general provision to be used “for the achievement of the objectives set out in Article 14.” Nonetheless, certain areas are expressed to fall outside the scope of Article 95: it does not apply to “fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.”¹⁴⁷ On this basis, Article 95 has tended to deal with matters relating to the functioning of the internal market as regards goods. Specific treaty provisions deal with the issues relating to services, establishment, and people. Notably, Article 52 enables the Community to take action to liberalize a specific service, and Article 47 provides that directives may be issued to “make it easier for persons to take up and pursue activities as self employed persons,” again facilitating the freedom to provide services as well as freedom of establishment.

The difference between these provisions is crucial, as they utilize different negotiating procedures. Depending on which procedure is used, the European Parliament will have different levels of involvement and influence. Under Articles 95 and 47(2), its consent to a proposal is required, whereas under Article 52(1), the Parliament need only be consulted. Further, in some instances unanimity in the Council will be required, for example, under Article 47(2), but in others, such as Article 52(1) and Article 95, it will not be. Thus, the categorization of an issue as falling within goods and services or, more precisely, as a general internal market matter rather

therefore complex, representing a kaleidoscopic range of interest groups. The role of the European Parliament is often felt to be crucial in giving the Union and its decision-making some form of democratic legitimacy, although whether this is sufficient has been the subject of some debate: *See, e.g.,* Paul Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in *THE EVOLUTION OF EU LAW* (Paul Craig & Gráinne de Burca eds., 1999).

144. TEC art. 249.

145. Community legislation takes direct effect in the legal systems of the Member States. The terms of the WTO treaties will not necessarily have such effect, depending on the terms of each state’s constitution. Furthermore, the WTO does not have direct effect within the Union legal order.

146. These are sometimes referred to as “positive harmonization” measures, as they replace inconsistent national rules with Community standards which are then implemented in national law. These measures contrast with the decisions of the Court of Justice which strike down inconsistent national rules, but do not replace them with a Community standard. The decisions of the Court of Justice in this area are sometimes referred to as negative harmonization.

147. TEC art. 95(2).

than relating to the freedom of establishment and the freedom to provide services, has significance for the way in which decisions are made. This has a particular impact on the freedom of the Member States to maintain their own national position. Where unanimity in the Council is required, each state effectively has a veto. By contrast, where qualified majority voting is required, a state may have an interest in compromise. The Council in general may have to compromise when the European Parliament effectively vetoes a legislative proposal (co-decision procedure).

Some of the difficulties in this area arise because the precise scope of each of the provisions is not clear and there is some potential for overlap. For example, the relationship between the services harmonization provisions and Article 95 is unclear.¹⁴⁸ The recent telecommunications package included a number of harmonizing directives which were based on Article 95, that is, the internal market provisions, rather than the services provisions.¹⁴⁹ It is not entirely clear why telecommunications services should have been dealt with in this way, as they clearly constitute services and it would seem more natural to use the service specific provisions or indeed other provisions on Trans-European Networks. By contrast, the Television Without Frontiers Directive,¹⁵⁰ which concerns the creation of the internal market in television services, was based on Article 47(2) of the TEC, that is, the provisions relating to services. This inconsistency in approach between types of communication service does not seem to be capable of explanation on the characteristics of the services themselves. The decisions may have been influenced by considerations about the respective involvement in the law-making process of the various institutions and the sensitivity to the Television Without Frontiers Directive. Given the extension of the qualified majority voting and co-decision procedures, the significance of this boundary, at least in terms of the respective strength of the political institutions within the European Union, is likely to diminish though political influences on

148. See comments of Advocate-General Fennelly in Joined Cases C-376/98 & C-74/99, *Germany v. European Parliament and R v. Secretary of State for Health, ex parte Imperial Tobacco Ltd.*, 2000 E.C.R. I-8419, ¶ 63.

149. Council Directive 2002/21/EC, 2002 O.J. (L 108) 33 (Framework Directive); Council Directive 2002/20/EC, 2002 O.J. (L 108) 21 (Authorisation Directive); Council Directive 2002/19/EC, 2002 O.J. (L 108) 7 (Access Directive); Council Directive 2002/22/EC, 2002 O.J. (L 108) 51 (Universal Service Directive); Council Directive 2002/58/EC, 2002 O.J. (L 201) 37 (Privacy and Electronic Communications Directive); Council Directive 90/387/EEC, 1990 O.J. (L192) 1 (ONP Directive) (Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision). The previous ONP Directive was also based on Article 95.

150. Council Directive 89/552/EEC, 1989 O.J. (L 298) as amended by Council Directive 97/36/EC.

categorization are unlikely to disappear entirely.

The fact that separate treaty provisions deal with the free movement of goods and services, which is to some extent repeated in the law-making provisions, suggests that a distinction should be made between the two provisions, an assumption which is supported by decisions of the European Court of Justice (ECJ) that indicate that the four freedoms are mutually exclusive.¹⁵¹ Furthermore, the terms of Article 50 state that the provisions relating to services apply to services “insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital and persons.” This distinction between the freedoms, however, may be of lesser significance now than might hitherto have been thought.

Some commentators have argued that the jurisprudence of the ECJ over the last decade has suggested a convergence in approach towards the various freedoms, specifically one which focuses on the need to ensure access to markets throughout the Member States and which borrows authorities from the jurisprudence in relation to one freedom to another.¹⁵² On this basis, the categorization as goods or services is less significant, as the same conclusion is likely to be reached whichever provision is used.

Although there is clearly some merit in this argument, one cannot suggest that there is no difference in scope between goods and services. In this, there are similarities to the questions faced by the WTO about whether the structural distinction reflects a difference in the way goods and services should be or are treated. The crucial difference relates to scope of Article 28 as opposed to Article 49 (and arguably even Article 29). The original scope of Article 28 of the TEC was uncertain. The central question was whether it only operated to catch those measures that were overtly discriminatory. The cases of *Dassonville*¹⁵³ and *Cassis de Dijon*¹⁵⁴ made clear that the scope of Article 28 would not be so limited; it could apply to “indistinctly applicable” rules which nonetheless might affect trade. The actual test for the application of Article 28 in *Dassonville* was so broad that an actual impact on trade would not be required.¹⁵⁵ This

151. See Case 74/76, *Iannelli v. Meroni*, 1977 E.C.R. 557, ¶ 9; see also Case 7/68, *Commission v. Italy (Re: Export Tax on Art Treasures)*, 1968 E.C.R. 423.

152. Behrens, 1992 E.U.R. 145. Catharine Barnard, *Fitting the Remaining Pieces into the Goods and Persons Jigsaw*, 26 EUR. L. REV. 35–39 (2001).

153. Case 8/74, *Procureur du Roi v. Dassonville et al.*, 1974 E.C.R. 837.

154. Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649.

155. The *Dassonville* test reads: “[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.” Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, summary ¶ 1.

point is illustrated by the infamous *Sunday Trading* cases¹⁵⁶ where an English rule which prohibited trading on a Sunday, irrespective of the origin of goods, was found to fall within Article 28. In that case, there had been no proof of an actual effect on inter-state trade.

Following much criticism of the “over-extension” of Article 28, whereby virtually any rule which had a potential impact on trading goods could fall within Article 28, the ECJ limited the scope of Article 28.¹⁵⁷ It sought to distinguish between those indistinctly applicable rules which did have an impact on intra-Community trade and those which did not. This was significant because, as has famously been noted, Article 28 delimits the boundary between legitimate and illegitimate Member State action¹⁵⁸ (i.e. that which is compatible with the terms of the Treaty and that which is not) and thereby affects the scope of Member State national competence in other fields, such as consumer or environmental protection.¹⁵⁹

The case in which this change occurred was *Keck*.¹⁶⁰ It concerned French rules prohibiting sales at a loss. *Keck*, who operated in a border town, argued that the national rule affected his ability to sell imported goods, following the line of reasoning established in the *Sunday Trading* cases. After expressly stating that it was overturning some of its previous decisions (but not identifying which ones), the ECJ held that “selling arrangements,” which apply equally in law and in fact, would not fall within the scope of Article 28. “Selling arrangements” include rules relating to opening hours for example, as in the *Sunday Trading* cases, or advertising. “Requirements to be met” or “product requirements,” which are rules relating to the content of a product such as recipe or packaging rules, would continue to fall within Article 28. In adopting this approach, the ECJ seems to be distinguishing between those rules which impose

156. Case 145/88, *Torfaen BC v. B & Q plc*, 1989 E.C.R. 3851.

157. See, e.g., Josephine Steiner, *Drawing the Line: Uses and Abuses of Article 30 EEC*, 29 COMMON MKT. L. REV. 749 (1992); Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?*, 28 COMMON MKT. L. REV. 115 (1991); Eric White, *In Search of Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235 (1989) (suggesting that Article 30 had been overextended); but see L. Gormley, *Commentary on Torfaen BC v. B&Q*, 27 COMMON MKT. L. REV. 141 (1990); Wouter Wils, *The Search for the Rule in Article 30 EEC: Much ado about nothing?*, 18 EUR. L. REV. 475 (1993) (expressing views in favor of a broad interpretation of Article 28).

158. Wils, *supra* note 157.

159. Note that even when justifying a national measure, a Member State still lies within the scope of Community law. Such areas do not fall outside the scope of the Treaty entirely. In this there is a distinction between the tradability function (see *infra* Part III) and non-trade values in general. For commentary on the ECJ's approach to balancing competing interests; see Stephen Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation*, 36 COMMON MKT. L. REV. 51 (1999).

160. Joined Cases C-267 & C-268/91, *Keck and Mithouard*, 1993 E.C.R. I-6097.

an additional burden on imported products and those rules which, although they may affect access to the market, do not impose a specific additional burden on imports. One might also argue that product requirements affect the tangible condition of the goods while selling arrangements do not. Although the precise impact of *Keck* has been the subject of some debate, it is clear that the notion of “selling arrangement” has limited the field of application of Article 28.¹⁶¹

Subsequently, in *Alpine Investments*,¹⁶² which concerned national rules prohibiting cold calling as a mechanism for selling financial services, it was argued that the distinction between “selling arrangements” and “product requirements” should apply in the context of services as well. The ECJ rejected this argument on the facts, but did not specify whether the *Keck* distinction could ever apply to services. Although the precise position is not clear,¹⁶³ it is normally accepted that rules concerning “selling arrangements” in relation to services may fall within Article 49. Although more recent case law might suggest that the ECJ is, at least in some circumstances, seeking to limit the application of the selling arrangements argument in the goods context,¹⁶⁴ the seeming exclusion of the *Keck* distinction from the services jurisprudence would suggest that the scope of Article 28 is now narrower than that of Article 49, thereby re-emphasizing the significance within the European Community of making a distinction between goods and services.

It might be suggested that the ECJ, in characterizing an issue as relating to services rather than to goods, extends the possibility of reviewing national measures for compliance with Community principles. There are parallels here with the approach of the WTO in *Canada—Autos*, where the issue was considered under the goods regime, thus allowing the matter to come within the scope of the

161. This discussion does not arise in relation to TEC Article 29 concerning exports; TEC Article 29 is triggered only when a two stage test involving discrimination is satisfied.

162. Case C-384/93, *Alpine Investments BV v. Minister van Financiën*, 1995 E.C.R. I-1141.

163. See, e.g., Stefan Enchelmaier, *The Awkward Selling of a Good Idea or a Traditionalist Interpretation of Keck*, 22 Y.B. EUR. L. 249 (2003); Stefan Weatherill, *After Keck: Some Thoughts on How to Clarify the Clarification*, 33 COMMON MKT. L. REV. 885 (1996). As will be discussed below, the position is more uncertain following Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products AB*, 2001 E.C.R. I-1795. See also Panos Koutrakos, *On Groceries, Alcohol and Olive Oil: More on Free Movement of Goods after Keck*, 26 EUR. L. REV. 391 (2001); Alina Kaczorowska, *Gourmet Can Have His Keck and Eat It!*, 10 EUR. L. J. 479 (2004).

164. See C-405/98, *Konsumentombudsmannen v. Gourmet International Products AB*, 2001 E.C.R. I-1795; but see, J. Stuyck annotated, *Case C-71/02 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, 41 COMMON MKT. L. REV. (2004).

WTO.¹⁶⁵ In the context of the European Union, for example, in *de Coster*,¹⁶⁶ a tax imposed on satellite dishes was considered to be the provision of trans-frontier television services rather than goods.¹⁶⁷ It was found to be contrary to Article 49. It is questionable whether such a measure would have fallen within the scope of Article 28. *De Coster* and the boundary between the two categories are discussed in the next section. It should, however, be noted that there is another linked question which will be discussed in greater detail below, namely, should the provisions relating to goods and services be applied cumulatively or in the alternative?¹⁶⁸ A cumulative approach could extend the possible scope of review by the European Union of national laws.

B. *Definition of Goods*

Notwithstanding any questions about why one might wish to distinguish between goods and services within the jurisprudence of the ECJ, it is clear that such a distinction has been made. So, how are goods and services defined within the European Union context? As part of this question, a further issue arises: is there a difference between goods (or services) in a general sense, as opposed to their meaning within the TEC? Re-phrased, do some categories of goods and services fall outside the TEC altogether? Essentially, this is the argument seen in the context of cultural products within the WTO.¹⁶⁹ The investigation starts by looking at the definition of goods, taking into account this question, and then considering that of services, before trying to identify where the boundary between the two categories lies.

The starting point of any analysis must be the TEC. Although it gives some clues as to the scope of “services,” providing a partial definition in Article 50 of TEC, it is silent on the meaning of “goods.” Indeed, despite the centrality of the free movement of goods to the European project, many of the relevant provisions do not refer to “goods” at all. Instead we see references to “imports,” for example, in Article 28 of the TEC, and “exports,” in Article 29 of the TEC. Confusingly for those used to the terminology in the WTO, the

165. See *supra* Part I.

166. Case C-17/00, *De Coster v. College des Bourgmestre et Échevins de Watermae-Boitsfort*, 2001 E.C.R. I-9445.

167. Contrast the discussion on pay television in Part III. See *infra* Part III.

168. Note that the approach within the WTO is cumulative and not alternative. See the discussion of *Bananas*, *supra* Part I.

169. For further information, see *infra* Part III (discussing of tradability function).

TEC will also refer to “products”¹⁷⁰ and mean “goods” to the exclusion of “services.” Despite the varying terminology, it seems that the ECJ has adopted a common approach to the meaning of “goods” across the various articles.

Arguments about the scope of the goods provisions arose quite early in the ECJ’s jurisprudence.¹⁷¹ The question was not whether the items in question, which were art treasures, were goods as an abstract notion but whether they were goods for the purposes of the TEC.¹⁷² The national rule at issue was an Italian law which imposed taxes on the export of objects of historical, ethnographic, or artistic importance. The Commission argued that the imposition of taxes was contrary to the prohibition on customs duties contained in the Treaty. The Italians countered by suggesting that art treasures were not goods for the purposes of the Treaty because of their cultural nature. The ECJ rejected this argument, defining goods as products which have a monetary value ascribed to them and as such can then form the basis of a commercial transaction.

The *Art Treasures* case can therefore be seen as significant in two respects: it excludes the notion that items which have a non-trade value lie outside the scope of the TEC,¹⁷³ and it also provides the definition for goods which has been used in the context of rules relating to non-tariff barriers as well as customs duties. Central to this definition is that the products must be capable of being the subject matter of trade. In relation to non-trade issues or Member States’ concerns of public interest, these are protected within the European Union legal order by specific provisions derogating from the Treaty freedoms. The question whether the ECJ maintained the right balance between the free movement of goods and other policy issues has been much debated in academic literature, but a review of this issue lies outside the scope of this Article.¹⁷⁴

170. See, e.g., TEC art. 32, 90.

171. Case 7/68, *Commission v. Italy* (Re: Export Tax on Art Treasures), 1968 E.C.R. 423 [referred to in authors’ discussion as *Art Treasures*].

172. Contrast the approach of the WTO in *Canada—Periodicals*. *Canada—Periodicals*, *supra* note 71.

173. Note the comments of Advocate-General La Pegola Case C-124/97, *Markku Juhani Läära, Cotswold Microsystems Ltd, Oy Transatlantic Software Ltd v. Kihlakunnansyöttäjä (Jyväskylä), Suomen Valtio (Finnish State)*, 1999 E.C.R. I-6067, ¶ 18 (suggesting that only lawful transactions are protected by Article 28, which would suggest a contrary view to that which excludes all ethical considerations from the question of whether the Treaty freedoms might apply, as the *Art Treasures* case seems to imply). This seems to be quite an isolated opinion and this argument may be developing too much significance from what is essentially *obiter dicta*. Cf. the discussion about non-trade concerns within the WTO.

174. In the field of human rights, compare Jason Coppel & Aidan O’Neill, *The European Court: Taking Rights Seriously?*, 29 COMMON MKT. L. REV. 669 (1992), with Joseph Weiler & Nicolas Lockhart, “*Taking rights seriously*” *Seriously: The European Court and its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51, 579

Although the *Art Treasures case*¹⁷⁵ provides a starting point, it does leave some questions unanswered, notably whether items which have no “value in money” should be considered goods. This issue came before the ECJ in the *Belgian Waste*¹⁷⁶ case which concerned, amongst other types of waste, waste that was neither reusable nor a recyclable. On the facts, if the waste had a value at all, it had a negative value.¹⁷⁷ How would waste be dealt with in the light of the two-pronged test identified in the Italian *Art Treasures case*? The ECJ focused on the second element of that test that is the commercial transaction element.¹⁷⁸ According to the ECJ, “objects which are shipped across borders for the purposes of commercial transactions are subject to Article [28] et seq. of the Treaty, including non-recyclable waste.”¹⁷⁹ It seems that the central notion in determining the applicability of the goods provisions is whether there is an object of a type which is likely to be the subject of a commercial transaction, even where the transaction may involve the provision of a service such as the disposal of waste.

In adopting this approach, the ECJ seems to be adopting a natural language-based definition based on the ability to trade and to transfer the product. Emphasis is also placed on the tangible nature of the product, implied by the use of the word “object.”¹⁸⁰ The implicit centrality of tangibility to the definition of goods can be seen in other cases,¹⁸¹ and it should be noted that in many instances where items are self-evidently goods, the ECJ does not consider whether there is a commercial transaction at issue in the case. Thus, any items which are not the immediate subject matter of a contract may also benefit from the free movement of goods provisions. This would include, for example, goods taken on holiday and returned to

(1995); Geert van Calster, *Court Criticizes Restrictions on Free Movement of Waste*, 24 EUR. L. REV. 178 (1999); Stefan Weatherill, *Recent Case Law Concerning the Free Movement of Goods: Mapping the frontiers of market deregulation*, 36 COMMON MKT. L. REV. 51 (1999).

175. Case 7/68, *Commission v. Italy*, 1968 E.C.R. 423 [*Art Treasures*].

176. Case C-2/90, *Commission v. Belgium (Walloon Waste)*, 1992 E.C.R. I-4431 [referred to in authors’ discussion as *Belgian Waste*].

177. In some cases concerning disposal of waste, it has been suggested that the case be dealt with as a matter of services. The ECJ has not yet accepted this argument. The boundary between goods and services is discussed further below.

178. For further information, see the discussion on commercial capability in Part III.

179. Case C-2/90, *Commission v. Belgium (Walloon Waste)*, 1992 E.C.R. I-4431, ¶ 26.

180. The definition in Oxford English Dictionary includes “thing placed before eyes or presented to sense, material thing, thing observed with optical instrument or represented in picture,” though there are of course alternative meanings not relevant to this context in which “object” is intangible. Compare the wording used in the *Art Treasures case*, with Case 7/68, *Commission v. Italy*, 1968 E.C.R. 423 (i.e., “product,” which does not carry the same inescapable meaning in the natural language). See *infra* Part III.

181. See Case 155/73, *Sacchi*, 1974 E.C.R. 409.

the state of origin as well as goods bought on holiday. In considering the nature of the commercial transaction, the ECJ emphasized and clarified that the commercial transaction in issue need not involve the transfer of ownership.¹⁸² This position is not unproblematic: some cases involving, for example, the long-lease of cars have been held to fall within the services provisions.¹⁸³

C. Services

Articles 49 and 50 identify the scope of the freedom to provide services, both in terms of the nature of the services themselves and as regards those who may benefit from the right. Article 50 states that services for the purposes of the Treaty are those that are provided for remuneration insofar as they are not governed by the provisions relating to the other treaty freedoms on goods, capital, and persons. Article 51 excludes the transport sector from the scope of Article 49. Special provisions applying to this sector are contained in Articles 70–80 of the TEC although in some cases Article 49 has also been relevant. A list of examples in Article 50 of the TEC states that activities of an industrial or commercial character fall within the definition of services, as do the activities of professionals or craftsmen. Thus, although it gives examples, the Treaty does not outline the characteristics of services as a general concept.¹⁸⁴ It seems implicit from this open definition that the precise scope of services is not clear, being defined almost by what they are not.

Certainly, the question of what a service is has never been answered particularly clearly, and in some instances the Community institutions have had difficulty identifying the scope of a service in a given case.¹⁸⁵ No sector is excluded in principle from the scope of the TEC, so it seems that the potential category of services is wide indeed.¹⁸⁶ In principle, it seems that no specific category is excluded

182. Contrast this with the discussion in Part III.

183. Case C-451/99, *Cura Anlagen GmbH v. ASL*, 2002 E.C.R. I-3193.

184. The approach in GATS mirrors this. See GATS art. 1; *supra* Part I.

185. See Case 352/85, *Bond Van Adverteerders v. Netherlands*, 1988 E.C.R. 2085. One might suggest that there are parallels with the approach of the GATS in this context, but contrast the reasoning in the Telecommunications Report in which the services definition was described as being comprehensive; Report from the Commission to the Council and the Eur. Parliament on Standardization in the Field of Information Technology and Telecommunications Report 1988–1989, SEC/91/786 Final.

186. In many cases the ECJ does not discuss which of the freedoms are appropriate and in some instances may seem to have come to inconsistent decisions. This point was noted early in the Community's life. See Walter Van Gerven, *The Right of Establishment and Free Supply of Services within the Common Market*, 3 COMMON MKT. L. REV. 344 (1965–

from the potential ambit of the TEC¹⁸⁷ and it is generally accepted that the morality and desirability, or otherwise, of the provision of a particular service will not affect its categorization for purposes of EU law as a service.¹⁸⁸

This is similar to the approach adopted in relation to the definition of goods, as illustrated by the *Art Treasures* case and the fact that cultural goods fall within the scope of the TEC, as well as with the approach taken in the context of the WTO. The apparent intention is to adopt the widest possible interpretation of the relevant provisions to ensure that the maximum number of national measures come under review, thus increasing the effectiveness of the TEC (or WTO). Further, although the TEC contains certain derogation provisions on which national rules may be justified, the ECJ has developed a further category of justifications which is broader and may be used in relation to non-discriminatory national measures which in principle trigger the application of the free movement provisions. The scope for derogation therefore seems broader under the TEC than under the WTO, which may be why non-trade concerns have been less of an issue in this context. In addition, the Community is supposed to take certain non-trade concerns into account, such as sustainable development, when developing and implementing its policies.¹⁸⁹

Although the terms of Article 49 cover the situation in which a person travels temporarily to another Member State to provide a service there, the freedom to provide services is broader than this. As the ECJ made clear:

the freedom to provide services includes the freedom, for recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments . . . tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as the recipients of

66).

187. See, e.g., Case C-159/90, *Society For the Protection of Unborn Children v. Grogan*, 1991 E.C.R. I-4685, 4739; Case C-275/92, *H.M. Customs and Excise v. Schindler*, 1994 E.C.R. I-1039, 1089–90; Case 36/74, *Walrave v. Union Cycliste Internationale*, 1974 E.C.R. 1405, 1417; Case C-158/96, *Kohll v. Union des Caisses de Maladie*, 1998 E.C.R. I-1931; Case 263/86, *Belgian State v. René Humble and Marie-Thérèse Edel*, 1988 E.C.R. 5365; Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, 1995 E.C.R. I-4921; 1996 1 C.M.L.R. 645; Joined Cases C-51/96 & C-191/97, *Christelle Delière v. Ligue francophone de judo et disciplines associées ASBL*, 2000 E.C.R. I-2549.

188. See Case 15/78, *Société Générale Alsacienne de Banque SA v. Koestler*, 1978 E.C.R. 1971.

189. See TEC art. 6; see also European Constitution arts. I-3(3), III-119.

services.¹⁹⁰

Since Article 49 originally envisaged the situation where a service provider is moving to another Member State (and not necessarily from the service provider's state of origin), it will cover the situation in which both service provider and recipients move to a third Member State. A fourth category can be identified, that is, when the services themselves move. In this situation, services such as broadcasting, telecommunications, and even banking and insurance are considered.

Although these possibilities might be considered analogous to the modes of supply identified by the GATS, there is not an exact match and the "mode of supply" terminology is not used within the European Union. In fact, the ECJ rarely considers this issue expressly although one might suggest that the distinction between services and their modes of supply is implicit within the Community structure. As noted above, there are different treaty bases for harmonizing measures relating to different aspects of service provision. It is arguable that there is a different approach to cases involving the movement of persons (workers, establishment, and some services cases), which are influenced by the concept of European citizenship,¹⁹¹ and those in which the service moves, which do not refer to citizenship.¹⁹²

In the context of goods, it did not matter whether the goods in a particular case were the subject of a commercial contract for the purposes of the TEC. In services, although a parallel approach would seem desirable in principle, there is a crucial difference between the goods provisions and those relating to services. While there is no definition of goods, there is a limited definition of services which specifies that services should be provided "for remuneration." This reinforces the economic element of the definition of a service. Does this requirement mean, however, that we are looking for services of that type that are generally provided for remuneration or for those which are provided for remuneration in a given set of circumstances?

Initially, the question came before the ECJ in the context of education. The Advocate General noted that, "[s]tate education, however, like health care, is *largely* financed from State taxes."¹⁹³ It was eventually decided that state education fell outside the scope of Article 49 of the TEC, so this might be taken as implying that it will

190. Case 186/87, *Cowan v. Trésor public*, 1989 E.C.R. 195, ¶ 16.

191. TEC art. 18.

192. This issue will be unique to the European Union; issues of citizenship do not arise within the context of the WTO.

193. Case 263/86, *Belgian v. René Humble and Marie-Thérèse Edel*, 1988 E.C.R. 5365, 5379 (authors' emphasis).

be necessary to look at each individual case to determine whether remuneration existed. The ECJ did not expressly develop the point. A similar approach was taken in other cases concerning public education. As the Advocate General in *Wirth* argued, “the possibility that a provision of services is involved cannot be ruled out when the tuition or studies are financed entirely or essentially out of contributions from the students”¹⁹⁴

It could be suggested that there was a difference between educational services depending on who provided them and how they were paid for, i.e., the question whether a situation fell within the definition of “services” for the purposes of Article 49 would be decided on a case-by-case basis. In *Wirth*, the ECJ seemed to accept the distinction between private and state-provided education without ruling on the general point about the scope of services.¹⁹⁵

Other cases concerning tourism take a different view. To determine whether a service falls within Article 49, the approach in these cases suggests the type of service as a general issue should be looked at rather than the individual case.¹⁹⁶ Furthermore, the emphasis on the precise existence of a contract, implicit in the education cases, is weakened in a move towards the “commercial character” approach we find in the goods jurisprudence. For example, in a number of cases concerning broadcast advertising, the ECJ was not concerned with who was paying for the broadcast programming provided it was paid for.¹⁹⁷ This development has the effect of suggesting that an approach based on the *type* of services has now been adopted rather than looking to see if there is a commercial transaction (one based on remuneration) in a given case. In this regard, we can see parallels between the goods and services jurisprudence being developed. At the very least, a potential distinction has been eradicated.

194. Case C-109/92, *Wirth v. Landeshauptstadt Hannover*, 1993 E.C.R. I-6447, 6456.

195. For another example of another area in which the distinction between economic and non-economic is significant, see the case law on sports. *See, e.g.*, Case C-415/93, *Union Royale Belge des Sociétés de Football Association ASBL v. Bosman*, 1995 E.C.R. I-4921; Joined Cases C-51/96 & C-191/97, *Christelle Delière v. Ligue francophone de judo et disciplines associées ASBL*, 2000 E.C.R. I-2549.

196. *See, e.g.*, Case 186/87, *Cowan v. Trésor public*, 1989 E.C.R. 195; Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, 1998 E.C.R. I-7637.

197. *See* Case 352/85, *Bond Van Adverteerders v. Netherlands State*, 1988 E.C.R. 2085. Even within the public sector, which following the education cases might have been thought to lie outside the scope of the Treaty, there have been developments in the field of health care. These cases again operate to blur the boundary between public (funded by taxation system) and private (direct payment, or payment via an insurance company) provision of a service, thereby removing the significance of the payment mechanism in a specific case.

D. *Boundary between Goods and Services*

The ECJ has generally taken the view that where the service is the main object of the transaction, the issue falls under Article 49, even though the TEC specifies that the services provisions are residuary in character. For example, in *Schindler*,¹⁹⁸ which concerned the import of lottery tickets into the United Kingdom, the tickets were found to be merely instrumental to the provision of the game of chance, a service.¹⁹⁹ Significantly, the tickets had no value in themselves but only as evidence of participation in the game of chance. Similarly, in *van Schaik*,²⁰⁰ the ECJ found the supply of car parts was incidental to the contract for services to repair the car. By contrast, in the case of manufacture of goods, because the process “leads directly to the manufacture of a physical article,” manufacture is viewed as the supply of goods rather than the provision of manufacturing services.²⁰¹

The boundary is not always clear. A number of cases concerning the processing of waste, which might be considered to constitute the provision of a service, have been dealt with as concerning a prohibition on the export of goods.²⁰² Equally, the ECJ has gone to great lengths to emphasize that commercial contracts need not involve the transfer of ownership to trigger the protection of the goods provisions, yet in some leasing cases it has held that what is at issue is a service because what is being supplied is not the object itself but the use of the object.²⁰³ In some of the services cases discussed below, the legal relationship between product and trader is not necessarily considered.²⁰⁴

More questions arise where an item is required for the provision of a service. In a Dutch case concerning the acquisition of surgeons’ scalpels, the ECJ held that the goods provisions were applicable.²⁰⁵ In doing so, it was following the approach adopted in the *Dundalk Water Case*, in which it was held that, “the fact that a

198. Case C-275/92, *H.M. Customs and Excise v. Schindler*, 1994 E.C.R. I-1039.

199. Case C-42/02, *Lindman*, 2003 E.C.R. I-13519 (affirming the approach).

200. Case C-55/93, *Van Schaik*, 1994 E.C.R. I-4837.

201. Case 18/84, *Commission v. France*, 1985 E.C.R. 1339 (regarding tax breaks).

202. Case C-209/98, *FFAD v. Københavns Kommune*, 2000 E.C.R. I-3743.

203. See Case C-294/97, *Eurowings Luftverkehrs*, 1999 E.C.R. I-7447, ¶ 33; see also Case C-451/99, *Cura Anlagen GmbH v. ASL*, 2002 E.C.R. I-3193 (confirming this decision).

204. See, e.g., Case C-17/00, *De Coster v Collège des Bourgmestre et échevins de Watermael Boitsfort*, 2001 E.C.R. I-9445. In *de Coster*, it seemed entirely irrelevant to the discussion as to whether *de Coster* owned the satellite dish or was merely hiring it, for example from a satellite television service provider.

205. See Case C-157/94, *Commission v. Netherlands*, 1997 E.C.R. I-5699, ¶¶ 15–20; see also *id.*, Opinion of the Advocate General, ¶ 15.

public works contract relates to the provision of services cannot remove a clause in an invitation to tender restricting the materials that may be used from the scope of the prohibitions set out in Article [28].”²⁰⁶

These cases do not sit easily with cases like *van Schaik*, where the provision of goods was absorbed into the provision of services.²⁰⁷ *Dundalk Water* may have been the product of its own time since at that stage the goods jurisprudence was broader and better developed than the case law relating to services. Another factor may be the question whether the goods remain separate and have a capital value themselves. For example, in *Schindler* the ECJ noted that the only value of the lottery tickets was as evidence of the service, the game of chance. By contrast, in *Läärä*,²⁰⁸ the ECJ found that gaming machines were goods with a capital value in addition to being necessary for the provision of gambling services.

The question of the boundary between goods and services in relation to the import of gaming machines arose again in *Anomar*.²⁰⁹ There were two issues: one related to the distinction between rules relating to the import and distribution of gaming machines as opposed to their operation, the other concerned the issue of whether the two sets of rules were severable. The ECJ followed the approach *Läärä* applied, arguing “even though the operation of slot machines is linked to operations to import them, the former activity comes under the provisions of the Treaty relating to the freedom to provide services and the latter under those relating to the free movement of goods.”²¹⁰ Confusingly, the ECJ then added:

the activity of operating gaming machines must, irrespective of whether or not it is separable from activities relating to the manufacture, importation and distribution of such machines, be considered a service within the meaning of the Treaty and, accordingly, it cannot come within the scope of Articles 28 EC and 29 EC relating to the free movement of goods.²¹¹

Although *Anomar* and *Läärä* may be consistent in identifying the independent existence of gaming machines as key in determining

206. Case 45/87, *Commission v. Ireland*, 1988 E.C.R. 4929, ¶ 17 [referred to in authors’ discussion as *Dundalk Water*].

207. See also Case C-108/96, *Mac Quen and Others*, 2001 E.C.R. I-837; Case C-17/00 *De Coster v. Collège des Bourgmestres et échevins de Watermael Boitsfort*, 2001 E.C.R. I-9445.

208. Case C-124/97, *Läärä and Others*, 1999 E.C.R. I-6067.

209. Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português*, 2003 E.C.R. I-8621.

210. *Id.* ¶ 55.

211. *Id.* ¶ 56.

the boundary between goods and services, in the light of cases such as *de Coster* (discussed below), it is hard to discover a consistent rule within the cases applied by the ECJ, thus adding an element of uncertainty into the jurisprudence.

Anomar raises another question; that is, whether goods and services provisions should be applied cumulatively or in the alternative. A linked issue is whether the goods provisions should be applied, given the wording of Article 50 of the TEC, in preference to Article 49 of the TEC. *Anomar* is not clear. On the one hand, it suggests that the import of gaming machines is an issue to be dealt with as goods. Looking at the rules as a question relating to imports, and therefore goods, suggests the possibility of two situations that may be assessed separately: one dealing with imports, the other dealing with the operation of gambling services. One might argue that the existence of different national measures creating separate violations of the TEC justifies treating the situations individually despite the same products being in issue each time. In spite of this, the ECJ finally dealt with the issue as a question of services and services alone. *Anomar* can be contrasted with the approach taken in *GIP*, where the same national measure was viewed as affecting two different markets: the sale of the product subject to the advertising restrictions and the provision of advertising services. This judgment would seem either to dilute the principle that only one of the four freedoms should apply to a given situation by constructing different “situations” based on the same set of facts and national rules, or to blur the distinction between goods and services, at least in this context. The approach seems to be the reverse of that taken in *Anomar* on two levels. In *Anomar*, there were arguably two sets of rules in issue, yet the judgment suggests the rules concern services to the exclusion of goods irrespective of whether the two situations are severable or not. In *GIP*, one set of rules seemed to be capable of being subject to different treaty provisions.

The reasoning in *Anomar* suggests that goods and services be applied in the alternative, and it also appears to reverse the order of preference expressed in the Treaty. Despite their residual quality, the services provisions are being applied in preference to the goods provisions. This approach may seem unproblematic when services are clearly at issue, but when import rules seem to be subsumed under the services provision, as is the case here, difficulties arise.

A similar concern could be expressed in relation to *de Coster*. In *de Coster*, the question would be why were the services provisions applicable rather than the rules on goods. A separate question is whether there are two distinct legal situations as the ECJ created in *GIP*, and arguably existed in *Anomar*.

Within the European Union legal order, this question has significance which may not translate into the WTO, especially in relation to the possible viewing of advertising as a second legal situation subject to the Treaty as seen in *GIP*. As noted above, following the *Keck* case, national rules restricting “selling arrangements” will not necessarily be caught by Article 28. By contrast, national rules affecting advertising services would clearly fall within Article 49.

Initially at least, the ECJ appears to have adopted the former approach, as can be seen in cases involving auctioneers²¹² as well as those relating to broadcast advertising.²¹³ As noted in *GIP*,²¹⁴ which concerned restrictions on the advertisement of alcoholic beverages in magazines available at the point of sale, the ECJ considered both the impact on the goods and on the provision of advertising services of the impugned rules.²¹⁵ The extent to which *GIP* can be seen as a rule having general application has been cast into doubt by *Karner*,²¹⁶ handed down in 2004. *Karner* concerned a national rule limiting the advertising of auctions, with particular reference to sales of goods from insolvent estates. This rule was held to be a “selling arrangement” and therefore fell outside the scope of Article 28. The question was whether Article 49 could be used in relation to the impact on cross border advertising. Although the ECJ did not exclude the possibility of Article 49 being used in this way, it held:

Where a national measure relates to both the free movement of goods and freedom to provide services, [the Court] will in principle examine it in relation to one only of those two fundamental freedoms if it appears that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it.²¹⁷

This approach has the advantage of treating all goods/services

212. Case C-239/90, *SCP Boscher, Studer et Frometin v. SA British Motors Wright and Others*, 1991 E.C.R. I-2023.

213. Case C-412/93, *Société d'Importation Édouard Leclerc-Siplec v. TF 1 Publicité SA and M6 Publicité SA*, 1995 E.C.R. I-179; *Joined Cases C-34, C-35 & C-36/95, Konsumentombudsmannen v. De Agostini and TV-Shop*, 1997 E.C.R. I-3843.

214. Case C-405/98, *Konsumentombudsmannen v. Gourmet International Products*, 2001 E.C.R. I-1795 [referred to in authors' discussion as *GIP*].

215. In *GIP*, it was also suggested, in contrast to *Joined Cases C-267 & C-281/91, Keck and Mithouard*, 1993 E.C.R. I-6097, that the rules did fall within Article 28.

216. See also Case C-6/01, *Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v. Estado português*, 2003 E.C.R. I-8621.

217. Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, 2004 E.C.R. I-3025, ¶ 46. This approach might be seen in direct contrast to the approach in *Bananas*, *supra* note 43.

boundary disputes where double application is possible in the same way. As we have seen, however, the Court of Justice has not been consistent in its approach in this area. How will the national courts fare when asked to resolve this issue as “a matter of fact”?

The area in which problems determining the boundary between goods and services have arisen concerns intangible products. It is generally considered that one of the differences between goods and services is that while the latter are intangible, the former are tangible.²¹⁸ With respect to some products, especially those relating to the entertainment and information businesses, this distinction may be sometimes hard to apply. In the early case of *Sacchi*, the Court had to determine whether broadcasting should be viewed as falling within the goods or services provisions. It adopted the latter position, a view it has subsequently reaffirmed,²¹⁹ arguing that “trade in material sound recordings and other products used for the diffusion of television signals are subject to the rules relating to the freedom of movement for goods.”²²⁰

Although the point has not been developed, it would appear from this that the Court of Justice focused on the product’s physical nature and the mechanism of transmission to distinguish between the same product in a different medium (e.g. seeing a film on video or seeing on television). One might suggest, however, that this is consistent with the approach in *Anomar* and *Läärä* because the technical means of transmission has a value independent of the service provided. For example, blank videos and cds have a separate value even if they have a specific, service-related function.

It is, however, debatable whether the Court of Justice has consistently maintained the distinction between material items and non-material or intangible items. In *de Coster* in which satellite dishes were at issue,²²¹ the Court did not even consider the question of whether the matter should be viewed as goods. Even if this is justified by reference to the fact that the satellite box is clearly tied to the provision of a service and has no function outside of that,²²² *de Coster* is inconsistent with the wording of *Sacchi* which specifies that items for transmission or reception of signals constitute goods.

Although one might suggest that the lack of analysis in *de*

218. For a more in-depth discussion, see *infra* Part III.

219. See, e.g., Case 52/79, *Procureur du Roi v. Debauve*, 1980 E.C.R. 833. In more recent cases, it has often not considered the question of whether goods or services provisions are relevant.

220. Case 155/78, *Sacchi*, 1974 E.C.R. 409, ¶ 7.

221. Consider also the approach to hire contracts discussed earlier.

222. Thereby in a position analogous to goods which are incorporated during the provision of a service, as discussed above.

Coster hides a pragmatic desire to ensure that the national measure fell within the TEC, on one view de *Coster* perhaps reflects the better position.²²³ The emphasis on the form of a product has been criticized²²⁴ since it may give rise to difficulties with the development of digital products and artificial distinctions between the same products delivered via different mechanisms. For example, do different rules apply to music sold on compact discs as opposed to those downloaded directly from the Internet?²²⁵

Equally, the Court of Justice is not necessarily consistent in other cases as to whether the material, or tangible, nature of a product is definitive or not in determining whether goods or services rules should apply. It has, indeed, held that electricity should be viewed as goods.²²⁶ The Court did not explain this finding although the Advocate General suggested that this approach is “perhaps justifiable by virtue of its function as an energy source and, therefore, its competition with gas and oil.”²²⁷

From the discussion it appears that the WTO and the European Union suffer similar problems when determining where the boundary lies between goods and services. While the solution does not lie in comparing the jurisprudence of both systems, answers may be found by looking at the problem at a generic level.

III. DISTINGUISHING BETWEEN GOODS AND SERVICES: DEFINING THE BOUNDARY IN A GENERAL CONTEXT

Determining where to place the boundary between goods and services for regulatory purposes is based on the premise that products comprising “goods” differ fundamentally from those constituting “services.”²²⁸ Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the “DSU”) makes it clear that the WTO rules can be interpreted “in accordance with customary rules of public international law.” The Appellate Body has interpreted this statement to include the treaty interpretation tools

223. Note in the jurisprudence on intellectual property rights and parallel imports, the ECJ has recognized the special nature of videos and DVDs which links to the nature of them as products that can be repeatedly consumed.

224. N. March Hunnings, Case Note, Cases 52 and 62/79, *Procureur du Roi v. Debauve and Coditel S.A. v. Cinè Vog Films S.A.*, 17 COMMON MKT. L. REV. 560 (1980).

225. Contrast the approach in the WTO which deals with this issue at the level of customs code.

226. Case C-393/92, *Almelo*, 1994 E.C.R. I-1477.

227. *Id.* at 1490.

228. In this context, the term “products” is used to refer to both goods and services. Contrast the approach taken in EC law. *See supra* Part II.

in the Vienna Convention.²²⁹ Article 31(1) of the Vienna Convention states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

This approach places the emphasis firmly on two aspects: first, the “ordinary meaning” of the language used and second, the “context” in which the language is used.²³⁰ Both the panels²³¹ and the Appellate Body²³² have interpreted these obligations to require an investigation into both the natural language construction of the wording and then the purpose which the rules are designed to fulfill. The discussion will take these issues in turn.

The Oxford English Dictionary perpetuates a distinction between both products, defining “goods” as “saleable commodities; merchandise [or] wares.”²³³ “Merchandise” is “the commodities of commerce” or “goods to be bought or sold,”²³⁴ with “commodities” as “a thing of use or value; *spec* . . . a thing that is an object of trade.”²³⁵ In contrast, “services” are “the sector of the economy that supplies the needs of the consumer but produces no tangible goods.”²³⁶

Focusing on the dissimilarity between services and goods suggests that the starting point for deciding which category the product falls into is whether it constitutes goods, as it is only the failure to meet the “goods” test that pushes the product into the “services” category.²³⁷ The Oxford English Dictionary approach assumes that the definition of “goods” is self-evident, deriving from the value of a tangible product measured in monetary terms which then allows that product to be traded. From this view, once tangibility and tradability are established, the product must be goods.

The notion of “tangibility” refers to the product “having material form,”²³⁸ which allows it to be “touched; discernible or perceptible by touch.”²³⁹ In essence, to satisfy the first characteristic

229. Vienna Convention, *supra* note 9.

230. Vienna Convention, *supra* note 9, art. 31(1).

231. See *Mexico—Telecommunications*, *supra* note 42, ¶ 7.16.

232. The Appellate Body noted in *United States—Reformulated Gasoline* that the WTO rules should not be interpreted in isolation from public international law. *United States—Reformulated Gasoline*, *supra* note 10

233. [1 A–M] THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, 1116 (Lesley Brown ed., 1993) [hereinafter [1 A–M] OED].

234. *Id.* at 1745.

235. *Id.* at 452.

236. [2 N–Z] THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES, 2788 (Lesley Brown ed., 1993) [hereinafter [2 N–Z] OED].

237. For a similar approach taken by the EC Treaty, see *supra* Part II.

238. [2 N–Z] OED, *supra* note 236 at 3216.

239. *Id.*

in the definition from the Oxford English Dictionary, the product must have an inherent physical existence.²⁴⁰ This idea is also prevalent in the economics literature.²⁴¹ Jagdish Bhagwati argues that it is this tangibility which results in different treatment of the product; for example, such products can be stored.²⁴² As a consequence, the producer can allow a period of time to elapse before the goods are disposed of, so proximity between the manufacturer and the ultimate consumer is not necessary.²⁴³ In contrast, “services” are “intangible,” or “not able to be touched,”²⁴⁴ generally because they must be consumed immediately on production and cannot be stored in the same way as goods.²⁴⁵ Consequently, a certain degree of proximity between the service provider and consumer is necessary, increasing the likelihood of interaction between them both, unlike the position regarding goods where disposal of the product can be conducted at arms length.

In addition to showing that a product must have a physical manifestation to be designated “goods,” the dictionary definition suggests that the product also must be “saleable,”²⁴⁶ a commodity “of commerce”²⁴⁷ and, specifically, “an object of trade.”²⁴⁸ From this view, the product must also have some inherent economic value indicated by its inclusion in the trade transaction.

While the dictionary definition explicitly refers to a product’s “tradability” in relation to goods only, it is arguable that even products designated as “services” must exhibit this “tradability” characteristic.²⁴⁹ The definition states that the product’s supply and

240. *Id.* at 3216 (the definition of “tangible”).

241. John David Donaldson, “*Television Without Frontier*”: *The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 *FORDHAM INT’L. L.J.* 90, 123 (1996); Jagdish N. Bhagwati, *Economic Perspectives on Trade in Professional Services*, 1986 *U. CHI. LEGAL F.* 45 (1986); Robert M. Stern & Bernard M. Hoekman, *Issues and Data Needs for GATT Negotiations on Services*, 10 *WORLD ECON.* 39 (1987); LORNA WOODS, *FREE MOVEMENT OF GOODS AND SERVICES WITHIN THE EUROPEAN COMMUNITY* (2004).

242. Bhagwati, *supra* note 241, at 45.

243. *Id.* Note that Bhagwati argues that not all services will require this close physical proximity, for example, where a consumer applies for a bank loan via the internet, but that there will still be an on-going relationship between bank and client which may be helped by a closer relationship than occurs via trade in goods. This is a similar analysis to that adopted by the panel in *Mexico—Telecommunications* on the scope of the “services at issue” in the dispute. *see Mexico—Telecommunications*, *supra* note 42, ¶ 7.22.

244. [1 A–M] OED, *supra* note 233, at 1386.

245. Donaldson, *supra* note 241, at 124.

246. [1 A–M] OED, *supra* note 233, at 1116.

247. *Id.* at 1745.

248. *Id.* at 452.

249. In *Mexico—Telecommunications*, the panel placed more emphasis on the mode of supply of the service, i.e. the trade method, rather than on the inherent characteristics of the product themselves. *See Mexico—Telecommunications*, *supra* note 42, ¶ 7.33.

consumption takes place within the economy, emphasizing first, the product's transfer from the producer to the consumer even though tracking the physical transfer may not be as straightforward for the movement of services as for goods, and second, that transfer occurs in a commercial context usually for financial gain.²⁵⁰

Focusing on both these elements in the "services" definition mirrors the Oxford English Dictionary's characterization of "trade" as a transaction where products are bought and sold for profit.²⁵¹ For a product to satisfy the "tradability" characteristic, it must be transferred from one party to another (the transfer element)²⁵² and also be capable of being the subject of a commercial transaction (the commercial capability element).

The dictionary definition assumes that both the transfer and commercial capability elements are self-evident. However, both elements are based on other fundamental assumptions about the nature of the trade transaction, which make it possible to identify a distinct group of products that can be further subdivided into goods and services. "Tradability" therefore acts as a device to filter out those products that cannot be classified as "goods" or "services" at all, but are instead *sui generis* and potentially outside any "trade" regime completely.²⁵³ On this view, "tangibility" allows a differentiation between goods and services, whereas "tradability," in this context, makes a distinction between those products which can be classed as goods or services and all other products which do not fall into either the goods or services definition at all.

By including the "tradability" test, it is possible to exclude products from any regulatory framework which are incapable of transfer in the sense that it is not possible to transfer ownership from the producer to the consumer, for example, in the case of national defense policies. In addition, products incapable of being the subject of a commercial transaction can also be excluded. This argument may have important implications, particularly in the WTO, because it

250. [1 A–M] OED, *supra* note 233, at 451 (defining "commerce" as "carry on trade" and "commercial" as "interested in financial return rather than artistry; likely to make a profit," while defining "economy" as "the management or administration of resources (freq. financial)"). *Id.* at 783.

251. [2 N–Z] OED, *supra* note 236, at 3357.

252. The panel did point to "ownership" transfer in *Mexico—Telecommunications* although it did not give a detailed explanation on this point. *Mexico—Telecommunications* *supra* note 42, ¶ 7.33.

253. Note the problems with cultural products, which some WTO members argue should fall outside the WTO rules completely. See Richard L. Matheny III, *In the Wake of the Flood: 'Like Products' and Cultural Products After the World Trade Organization's Decision in Canada Certain Measures Concerning Periodicals*, 147 U. PA. L. REV. 245 (1998); W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105 (1995).

recognizes that some products either have no value in the commercial sense or have a value which exceeds the price which would be placed on them if they were disposed of pursuant to a “trade” transaction.²⁵⁴

Although the WTO is primarily a trading agreement where products are exchanged for their market value,²⁵⁵ questions have been raised about the extent to which it should broaden its scope and include non-economic or, more specifically, non-trade issues such as environmental concerns, labor rights, cultural concerns, and human rights defined broadly.²⁵⁶ While the academic literature has explored the wider implications of the integration of non-trade concerns into the WTO scheme,²⁵⁷ the debate within the WTO itself has been driven by its members’ contributions to the multilateral trade negotiations, which initially focused on the pragmatic possibility of incorporating non-trade issues but premised on adapting the existing rules rather than fundamentally rethinking the entire economic rationale of the treaty.²⁵⁸

A shift in the WTO debate means that the classification of products as non-trade issues may move them beyond the competence of the WTO completely rather than classifying them as goods or

254. Contrast the position of the European Union discussed above in Part II.

255. See generally JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL RELATIONS: CASES, MATERIALS, AND TEXT* (4th ed. 2002) (subject to subsidies and other questionable trade practices).

256. This has been an issue for the European Union as well. See Jason Coppel & Aidan O’Neill, *The European Court: Taking Rights Seriously?*, 29 *COMMON MKT. L. REV.* 669 (1992); J. H. H. Weiler & Nicolas J.S. Lockhart, “*Taking Rights Seriously*” *Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part I*, 32 *COMMON MKT. L. REV.* 51 (1995); Geert Van Calster, *Court Criticizes Restrictions on Free Movement of Waste*, 24 *EUR.L.REV.* 178 (1999). The literature on this area is vast in the WTO context, but the following provide a useful reference to the main issues. See José E. Alvarez (ed.), *Symposium, The Boundaries of the WTO*, 96 *AM. J. INT’L L.* 1 (2002); Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 *J. WORLD TRADE* 241 (2003); Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 *J. INT’L ECON. L.* 665 (1999); Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 *J. INT’L ECON. L.* 43 (2000); Thomas Cottier, *Trade and Human Rights: A Relationship to Discover*, 5 *J. INT’L ECON. L.* 111 (2002); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?* 49 *WASH. & LEE L. REV.* 1227 (1992). Note the classic treatment of the trade and environment nexus in DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE* (1994); STEVE CHARNOWITZ, *TRADE LAW AND GLOBAL GOVERNANCE* (2002); Steve Charnowitz, *The Moral Exception in Trade Policy*, 38 *VA. J. INT’L L.* 689 (1998).

257. In the context of trade and human rights, see Ernst-Ulrich Petersmann, *Human Rights and the Law of the World Trade Organization*, 37 *J. WORLD TRADE* 241 (2003); JOHN JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 103 (1998); Kent Jones, *The WTO Core Agreement, Non-Trade Issues and Institutional Integrity*, 1 *WORLD TRADE REV.* 257 (2002).

258. Even though some members are in fact looking to insert derogations from the economic rationale underpinning the WTO agreements by advocating the pursuit of non-trade goals in certain agreements. See e.g., WTO, *Communication from Japan—Agriculture*, ¶ 2(a), WT/GC/W/220 (June 28, 1999).

services. The problems with cultural products, particularly in the audiovisual sector, are relevant in this context.²⁵⁹ The European Union argued during the Uruguay Round of multilateral trade discussions that audiovisual products should be classified as trade in services rather than goods. Despite initial objections from the United States to the classification of the sector as involving trade in services,²⁶⁰ the audiovisual sector is currently subject to discussions within the context of the GATS negotiations. Building on the existing exemption within GATS, the European Union and Canada are now arguing that the cultural content or value of audiovisual means that they have a worth outside the “commercial” one traditionally within the competence of trade rules.²⁶¹ The heart of these members’ argument is that the cultural content of such products means that they fall outside the scope of the multilateral trade rules completely.²⁶² Clearly, the classification decision in this case is taken on the basis of non-economic considerations, which feeds directly into the role that non-trade concerns play in the WTO.

Once a product has been categorized as one that is capable of being the subject of a trade transaction, then the economics literature indicates that the essential character of the product as either goods or services is inextricably linked to its tangibility.²⁶³ It assumes that because a product is intangible it cannot be stored and, therefore,

259. Note the substantial disagreement between the United States and the European Union during the Uruguay Round concerning the classification of audiovisual products as trade in goods or trade in services. An EBU document refers to a summary of the United States’ initial request: “. . . the United States requests countries to schedule commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services.” European Broadcast Union, *WTO—Update on GATS Negotiations and Audiovisual Services*, Feb. 18, 2003.

260. It is not possible to say definitely that the United States accepts the EU’s interpretation that the audiovisual sector involves trade in goods, merely that they are not pushing the point in the current negotiations. *See id.*

261. This is an interesting position for the European Union to adopt, given the Court of Justice’s position that all products are either goods or services, so very few fall outside the ambit of the EC treaty at all. *See* Section II; *Communication from the Commission to the Council and the European Parliament: Towards an International Instrument on Cultural Diversity*, COM (2003) 520 final (Aug. 27, 2003); Council for Trade in Services Special Session, *Communication from Switzerland: GATS 2000: Audio-Visual Services*, S/CSS/W/74 (May 4, 2001); Ted Madger, “*Made in Canada—An International Instrument on Cultural Diversity*” for “On the Edge: Is the Canadian Model Sustainable?” Weatherhead Center of Int’l Aff., May 9–10, 2003.

262. *See* Council for Trade in Services Special Session, *Communication from Switzerland: GATS 2000: Audio-visual services*, ¶ 6, S/CSS/W/74 (May 4, 2001).

263. Television services provided by SKY & TIVO allow the consumer to pause live TV feed and then re-start the programme when they are ready to watch it. Whilst it can be argued that this is an exception to the instantaneous consumption example, in reality the television signal is still transmitted in real time, but the technology records the relevant program and then the consumer watches the recording and not the live TV per se.

production and consumption occur simultaneously. As a consequence, the trade method differs from tangible products because the method must accommodate such instantaneous use.

For tangible products, the emphasis is placed on the product itself because it is possible to track its physical transfer from the producer to the consumer, taking into consideration any storage to accommodate rising prices. In contrast, the focus for intangible products is on the way the product is provided rather than on the product per se. For example, the product provider may be required to move to the place where the consumer is situated or the consumer to the product provider;²⁶⁴ alternatively, the supply of the product takes place via an intermediary who is physically present where the consumer is located. Even if physical movement of either the provider or consumer is not necessary, instantaneous consumption still means that the product must be supplied in a manner which accommodates the fact that the product will be consumed in this manner.²⁶⁵ On this interpretation, separate rules regulating goods and services are necessary on pragmatic grounds solely due to the different ways in which products are traded.

Although we have suggested that tradability fulfils a filter function, we must question whether this is its sole function. In particular, does this concept manifest itself in the same way in respect to goods and services? If not, it may act as a further conceptual tool for determining the boundary between goods and services. The economics literature has suggested that there is a link between tangibility and the mechanisms by which different products may be traded. Can a similar link be found within the legal context? Implicit in the transfer element of “tradability” is the transfer of products from the producer to the consumer in a way which allows the consumer to enjoy the product freely without interference from the producer. Commonly, what is envisaged is the transfer of property in the product from the producer to the consumer.²⁶⁶ Therefore, to fulfill the transfer element it must be possible for property in the product to move from the producer to the consumer as a prerequisite or concurrent requirement of the product’s physical transfer.²⁶⁷

264. Jagdish Bhagwati, *Economic Perspectives on Trade in Professional Services*, 1. U. CHI. LEGAL. F. 45 (1986).

265. Although it might be possible to store an element of the service, for example saving a film on videocassette, this does not change the essential intangibility of the initial product because it is only the manifestation of the service that is stored and not the service per se. On this example, it is the film which is stored on the videocassette and not the provision of the film.

266. ROY GOODE, *COMMERCIAL LAW* 27 (3d ed. 2004).

267. In certain circumstances, property may be retained by the producer until payment

Acquiring property in the product gives the consumer legal rights in relation to it. Predominantly, transfer of property is synonymous with the transfer of ownership and the correlative right to immediate possession of the product.²⁶⁸ Ownership is notoriously difficult to define in the abstract, but nonetheless the concept has implications for the goods/services boundary.²⁶⁹

On one level, the notion of property transfer appears inherently bound up with goods and not services because the acquisition of ownership from the producer is predicated on the transfer of possession of the product. Such possession entails “actual holding or having something as one’s own,”²⁷⁰ implying either physical existence of the thing possessed or the right to exercise control over the product.

In relation to goods, control over the product is self-evident through the act of physical possession of the product itself. Although services’ intangibility means it is difficult to possess the service per se, the consumer can still have physical evidence of the existence of the service or legal evidence of their right to receive it. Physical existence can occur in three ways. First, after the provision of the service, physical evidence may exist demonstrating that the service has been received. For example, when a consumer receives a haircut, the receipt of the service is evident as the hair is shorter. Second, physical evidence of the service may be available before it is provided to indicate that the consumer has the right to receive that service. A legal document, such as a contract or receipt, may fulfill this function. A third, more complex situation may arise as in the case of pay television where the consumer must subscribe to a package first and obtain a decoder card and box before they are able to access the television signal sent by the broadcaster.

Evidence of provision of services is linked, but essentially different from the question of whether services in themselves are tangible and whether a national measure affecting a product should

by the consumer. Even here, retention is conditional on payment or other specified condition and once that condition is fulfilled, the property will transfer to the consumer. However, in the English law context this is surrounded by controversy and the courts have been reluctant to allow retention of property except in very limited circumstances. *Id.* at 239–241.

268. *Id.* at 27–28.

269. In English law, the consumer who “owns” the product is entitled to the “residue of the legal rights in an asset... after specific rights over the asset have been granted to others.” The right to these residual rights gives the consumer an absolute interest in the product, unless another consumer can show they have a better right (or title) to that product. From this view, both consumers “own” the product, but one has a better right to possession than the other. More than one consumer can be entitled to ownership and possession provided they both show that they all have identical title to the products. *Id.* at 31–32.

270. [N–Z] OED, *supra* note 236, at 2301.

be viewed within a goods or services regime. For example, should pay television be viewed as services, goods, or a combination of goods and services? The classification depends on whether the emphasis is placed on the physical manifestation of the product, on what the buyer thought they were paying for, or on the type of contract they entered into.²⁷¹ Has ownership passed in the set-top box or is it in the possession of the viewer only for the period the pay-television subscription lasts?

In these difficult situations, the key to classification of products as goods or services could lie in the notion of ownership²⁷² and, more specifically, possession. It has been argued above that a product is capable of forming the subject matter of a trade transaction when ownership is transferred from the producer to the consumer. Such ownership gives the consumer an immediate right to possession of the product, that is, the consumer/purchaser of the product acquires the right to exercise “control, directly or through another . . . of the asset.”²⁷³ This control manifests itself in different ways dependent on whether the product transferred is goods or services. In the case of goods, control is the right to enjoy the *physical* product itself, whereas in services, it is control over the right to receive the product. This approach would seem to mirror the tangible/intangible distinction. However, in borderline cases, this may not be enough, particularly when it is not clear what the product actually is – at least from the consumer’s perspective. To ascertain the answer to this question and consequently to identify whether the product is goods or services, the starting point must be the function of the product or how it is perceived by the parties to the transaction.

Where the product’s function is to form the subject matter of the transaction, the product will be goods because its possession is enough to transfer ownership from the producer to the consumer. For example, the sale of a chair is clearly goods because the transfer of ownership requires control over the physical possession of a chair. In contrast, the pay-television decoder and satellite dish may be goods when purchased independently, but when purchased as part of a contract to acquire access to the relevant television package, they are services. This is because their function is to allow control over

271. The emphasis seems to have been placed on what the buyer thought they were contracting for. *Mexico—Telecommunications*, *supra* note 42, ¶ 7.42. However, this can be contrasted with the Appellate Body’s view in *Canada—Autos* where the consumer’s determination does not appear to be a relevant issue, as the emphasis was placed on the type of breach instead. *Canada—Autos*, *supra* note 42, ¶ 181.

272. Note problems experienced by the European Union in this context. See *supra* Section II.

273. GOODE, *supra* note 266, at 47.

access to the satellite signal, thereby permitting possession of the television pictures and the transfer of ownership in the service. Both the decoder box and satellite dish have no function in the contract other than to purchase access to the signal. On this interpretation, the inherent tangible nature of a product will not necessarily be determinative of its classification as either goods or services if its function is to facilitate control over another product.²⁷⁴ We can see in this context that a certain amount of relativism may arise in characterizing the regime to apply in a given situation and that, in some circumstances, the types of trading transactions rather than the inherent characteristics of the product itself affect the classification.

Using the definitions in the dictionary and economics literature provide a coherent starting point for distinguishing between goods and services, but problems arise from relying solely on this material. Both definitions assume that the distinction is intuitive, flowing directly from the economic characteristics inherent in all products. They also assume there is a single economic criterion that places products into one category or another, so all goods of the same type are always placed in the same category. As we have seen, this view is inadequate. It also neglects the role of political imperatives which may influence the product's categorization. The issue ceases to be about the product in isolation, but instead moves more to the context in which the classification question arises. Although a product may be defined as goods or services using economic tools, such classification may be based on an understanding of those tools' application arising from historic views that certain products are more correctly classified as goods rather than services. In problematic borderline cases, differing interpretations of the same tools can result in conflicting classification because placing the emphasis on a different part of the transaction can lead to different results. Specifically, deciding whether a product is a good depends on which characteristic of the product is deemed to be the tangible element. This problem is manifest in the audiovisual sector.

Historically, the United States argued that television programs were "goods" because it is possible for programs to be recorded on to videocassette thereby giving them a tangible form.²⁷⁵ In contrast, the

274. This approach is similar to that adopted by the Appellate Body in *Canada—Autos*. *Canada—Autos*, *supra* note 42, ¶ 155.

275. See Report of the Working Party, *Working Party on International Trade in Television Programmes*, at 2–3 L/1741 (Mar. 13, 1962); see also John David Donaldson, *Television Without Frontiers: The Continuing Tension Between Liberal Free Trade and European Cultural Integrity*, 20 *FORDHAM INT'L. L.J.* 90, 110 (1996). Note that the United States has not officially resigned from its position that television programs are goods not services, but it is negotiating concessions within the GATS concerning this sector which suggests a change in its views. See *supra* Part I; Council for Trade in Services Special

European Union argued that such products were services.²⁷⁶ Although both the United States and the European Union were basing their categorization on television programming's tangibility, the United States emphasized the final manifestation of the product on a physical media which has a tangible form, meaning that the product being classified is tangible, whereas the European Union placed importance on the transmission element of the product which has an intangible form, meaning that the product is a service, not a good. Both interpretations make sense in economic terms, so it is not the economic nature of the product alone that drives the boundary distinction, but the political utilization of it.

Second, the approach in the dictionary and economics literature assumes that products are always assessed purely in economic terms to facilitate trade in those products while it is clear that this will not always be the case. In certain circumstances, political imperatives construct national policies based on the premise that some products' value lies beyond their inherent commercial worth. We have seen that the European Union has argued that products supplied in the audiovisual sector should not be valued purely in economic terms because of the role of the media in society and in forming cultural identity.²⁷⁷ Members of the WTO in the services negotiations,²⁷⁸ including the European Union²⁷⁹ and Canada,²⁸⁰ have also taken this view.²⁸¹ In these circumstances, products may be defined as goods if the decision is driven by economic considerations; products may be defined as services if broader issues are included because the products are no longer

Session, *Communication from the United States: Audiovisual and Related Services*, ¶ 10(i), S/CSS/W/21 (Dec. 18, 2000).

276. See Case 155/73, *Sacchi*, 1974 E.C.R. 409, ¶ 6; but see Case C-17/00, *De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort*, 2001 E.C.R. I-9445. Films were excluded from this definition following from their historic classification as goods within GATT article IV. See Report of the Working Party, *Application of GATT to International Trade in Television Programmes*, L/1615 (Nov. 16, 1961).

277. Commission Report of the High Level Group, *The Digital Age: European Audiovisual Policy* (Oct. 1998).

278. Discussions on the future of GATS commenced in 2000 and were endorsed after the fourth WTO Ministerial Meeting held in Doha, Qatar, in November 2001. See World Trade Organization, Ministerial Declaration WT/MIN(01)/DEC/1 (Nov. 20, 2001).

279. *Communication from the Commission to the Council and the European Parliament: Towards an International Instrument on Cultural Diversity*, COM (2003) 520 final (Aug. 27, 2003).

280. Ted Madger, *Made in Canada—An International Instrument on Cultural Diversity*, prepared for "On the Edge: Is the Canadian Model Sustainable?" Weatherhead Center of Int'l Aff. (May 9–10, 2003).

281. Switzerland particularly noted that audiovisual products can be viewed as "fundamental instruments of social communication" which contribute "to the cultural identity of a society." See Council for Trade in Services Special Session, *Communication from Switzerland: GATS 2000: Audio-Visual Services*, S/CSS/W/74 (May 4, 2001).

merely “goods” purely based on their tangibility.

The dictionary definition and economics literature assume that the reason why a distinction is made between goods and services is merely that they are objectively traded differently, so mechanisms must be put in place to accommodate these divergent trading methods. In other words, rules have a passive role because their function is only to support the reality of trade. However, this interpretation means that legal rules have no other function.²⁸² Instead, the discussion has shown that the private law relationship between trading parties may affect our analysis and that relevant legal rules may reflect the national political imperatives underlying product classification. Within national jurisdictions, this means that rules may be heavily based on economic criteria to achieve the requisite goal in one jurisdiction, whereas in another, a combination of economic and non-economic criteria may be adopted. Even where two members use similar economic criteria, the emphasis may change dependent on national objectives. Whether a product is a good or a service is therefore a question of law, rather than of economics or fact.²⁸³

Lack of homogeneity between members on the political imperatives driving the product classification decision means that divergent legal regimes exist. This divergence becomes apparent when those rules are subject to scrutiny by an external arbiter like the European Union or the WTO. Reclassification of the product in line with the rules of the external body becomes a question of direct interference with members’ national policies, rather than merely being a question of just amending their rules. Reclassification is instead a matter of replacing existing policy imperatives with those of the external organization. If the essential link between the construction of legal rules and political imperatives lies at the heart of the members’ classification decision, then the key to resolution is to formulate a coherent policy on classification based on objective criteria which reflects the goals of the organization itself. This way, members are able to see a clear rationale for interference with their classification decisions, and more specifically, their national policies.

CONCLUSION

We have seen that there is a difference between goods and

282. See material on NTCs. *See, e.g.*, José E. Alvarez (ed.), *Symposium, the Boundaries of the WTO*, 96 AM. J. INT’L L. 1 (2002).

283. “Fact” is used in this context to denote the “natural language” interpretation of a product.

services within the WTO centered on the structure of the underlying agreements. The interpretation of the agreements does not clarify where the boundary between goods and services lies. Although the decisions of the WTO Appellate Body and the panels in a number of cases suggest that there may be some significance in the distinction, beyond the purely formal, this too is not clear. Even within the context of the formal ascription to the category of either goods or services, inconsistencies may arise resulting from who makes the decision and on what basis. It should be noted that the WTO is not alone in facing unclear and inconsistent jurisprudence, as the discussion of the European Union illustrates. Against this background, a discussion of the characteristics of goods and services respectively may serve to identify objective criteria for determining the boundary which can be used not only within the context of the WTO, but also within the European Union.

Based on the natural language and economic literature, it seems that there are two concepts underpinning the products captured by the WTO: tradability and tangibility. Both these ideas can be seen in the jurisprudence of the WTO and, particularly, in the European Union, though they are not necessarily coherently expressed in this way. These concepts are linked by the function of the product—that is, the way in which the product is to be used. The function is often defined by the legal relationship, whether contractual or regulatory. Here we might emphasize the importance of transfer of property as key to the definition of goods; unfortunately, such an approach does not tie in with the jurisprudence of the European Court of Justice in particular.

Function in this sense also links to the idea that what we are looking at is not necessarily the product itself but the national rules that may infringe either the WTO agreements or the Treaty of Rome. Such arguments underpin the reasoning in *GIP* within the European Union, again a line of reasoning not consistently elaborated. In looking at the product's function, the definition of goods and services may overturn decisions that would be made purely on the basis of tangibility, as can be seen in the television cases within the European Union and in the arguments of Advocate-General Jacobs comparing electricity (intangible) and oil (tangible), both of which were classified as goods. What we seem concerned with is not necessarily the inherent nature of the product itself but the manner in which legal rules relate to it.

So how can the conflicting approaches to defining the boundary between goods and services be resolved? Tradability and tangibility serve as a series of filters, containing both objective and subjective criteria. Tradability first acts to distinguish between

products that are bought and sold and which therefore fall within the economic sphere addressed by the rules in bodies such as the WTO and the European Union. In practice, few transactions fall outside the scope of these treaties. Tangibility then constitutes a rebuttable presumption that intangible items are services while tangible items constitute goods. The product's function, in combination with tradability, then acts as the determining factor. To form the subject matter of a trade transaction, ownership must be transferred from the producer to the consumer. Following the transfer of ownership, the consumer gains possession of the product, such that they are able to exercise control over it. Whether a product is a good or a service depends on whether the consumer needs the product per se or whether they need it to gain access to the product which forms the subject matter of the transaction.

While these criteria form a framework for making decisions, it is clear that in some cases the boundary will remain contested. The benefit, however, of using a consistent framework for analysis is that it allows for greater transparency in the decision-making process, thus minimizing the risk of inconsistencies and arbitrary decisions and thereby supporting the legitimacy of those decisions.

On a broader level, it is clear that if a supra-national body like the WTO or European Union substitutes a different boundary from that drawn by its members, then that institution is interfering directly with the members' national policies. This raises legitimacy questions: specifically, whether the judicial body is competent to intervene in all subject areas without specific acquiescence by the member and whether the institution is competent to make the decision at all. If re-drawing the goods/services boundary is within the competence of the institution, then another question is the decision's acceptability to its members. Members are more likely to accept interference with their national policies if the goods/services boundary is re-drawn according to coherent established principles, rather than being merely a rash response which differs in each dispute brought before the judicial body. The ad hoc approach currently taken in the WTO and the European Union may undermine their credibility and lead to a reconsideration of the extent to which both bodies can interfere with national policies.