The GATT and the GATS: Should They Be Mutually Exclusive Agreements?

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Abstract: The GATT 1994 and the GATS contain separate multilateral rules on trade in goods and services. The question arises as to whether the GATT 1994 and the GATS are therefore mutually exclusive. This paper argues that the GATT 1994 and the GATS should be mutually exclusive in the application of their respective obligations to the specific aspects of any given measure. The paper offers a test, based on a similar test applied under EC law, to determine which of the agreements should apply to the specific aspects of any given measure where it appears to affect both trade in goods and services.

1. INTRODUCTION

The successful conclusion of the Uruguay Round marked the creation of a revolutionary framework for economic, legal, and political co-operation and the establishment, for the first time, of a coherent set of rules which cover every aspect of world trade.[1] Two of the key agreements to emerge from the Uruguay negotiations were the General Agreement on Tariffs and Trade (GATT)[2] and the General Agreement on Trade and Services (GATS)[3] – containing separate multilateral rules on trade in goods, and (for the first time) trade in services. Although parallel to and closely modelled on the GATT, the GATS embodies several important differences.[4] Some of these may be attributed to, *inter alia*, the distinctive characteristics of service transactions compared to goods transactions. Service transactions differ from goods transactions in a number of re-

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1. P.D. Sutherland, *Global Trade – The Next Challenge* (Word Economic Forum, Davos, Switzerland, 28 January 1994) (not published). For a comprehensive overview of the results of the Uruguay Round *see generally* J. Bourgeois, F. Berrod & E.G. Fournier (Eds.), The Uruguay Round Results (1995).
2. All references to the 'GATT' shall denote the 1994 General Agreements on Tariffs and Trade, 33 ILM 112 (1994).
3. 1994 General Agreement on Trade and Services, 33 ILM 44 (1994).
4. For a detailed review of the GATS *see* F. Weiss, *The General Agreement on Trade in Services*, 32 CMLR 1177 (1995).

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spects: the interchangeability of services, non-storability of services (i.e. production and consumption of services is simultaneous), and the need for immediate proximity between producers and consumers in order for many service transactions to occur.[5] However, it is not always clear how services are to be defined or how they are to be distinguished from goods: goods and services will often complement one another and goods exports will sometimes have a high services content and *vice versa*. As a corollary, difficulties will continue to arise in classifying the measures by which goods and services are regulated. Is a national restriction on the sale of tickets on behalf of a foreign lottery a measure affecting trade in goods or a measure affecting trade in services?

This classification of measures assumes of course that both the GATT and the GATS cannot apply to the same measure. Its purpose is to determine under which of the two agreements the particular measure should be scrutinized. The question of whether the GATT and the GATS are mutually exclusive has been addressed to an extent in two recent WTO cases at both panel and appellate level but without a definitive answer.[6] This paper examines the issue of mutual exclusivity between these two agreements: Section Two reviews the arguments for and against mutual exclusivity; Section Three examines two recent WTO decisions on this issue; in Section Four, attention is given to the approach to mutual exclusivity in the EC system; and Section Five contains a suggested approach for the WTO system. This paper argues that even if the two agreements may not be mutually exclusive in their coverage they should be mutually exclusive in the application of their respective obligations to specific aspects of a given measure. If one accepts this argument to be correct then it is necessary to formulate a suitable test to determine whether the specific aspect at issue affects either trade in goods or trade in services. The paper concludes by endorsing one such test.

2. ARGUMENTS FOR AND AGAINST MUTUAL EXCLUSIVITY

In this section some of the principal arguments for and against mutual exclusivity of the GATT and the GATS are reviewed.

5. *See* J. Bhagwati, *Economic Perspectives on Trade in Professional Services*, 1 University of Chicago Legal Forum 45 (1986).
6. *See* Panel Report European Communities – Regime for the Importation, Sale and Distribution of Bananas, adopted 22 May 1997, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/HND, WT/DS27/R/MEX, and WT/DS27/USA (EC Bananas Panel Report); Appellate Body Report European Communities – Regime for the Importation, Sale and Distribution of Bananas, adopted 9 September 1997, WT/DS27/AB/R, AB-1997-3 (EC Bananas Appellate Body Report); Panel Report Canada – Certain Measures Concerning Periodicals, adopted 14 March 1997, WT/DS31/R (Canadian Periodicals Panel Report); and Appellate Body Report Canada – Certain Measures Concerning Periodicals, adopted 30 June 1997, WT/DS31/AB/R, AB-1997-2 (Canadian Periodicals Appellate Body Report).

2.1. Arguments for mutual exclusivity

The principle argument upon which all other arguments favouring mutual exclusivity is that the very *raison d'être* of the GATS was that trade in services could not generally be covered by the GATT. It was therefore the intention of the negotiators of the Uruguay Round to create an instrument that would be distinct *ratione materia* from and complementary to the GATT.[7] This is manifested in the distinction made between the types of legitimate trade barriers which determine the benefits to trade in goods (e.g. consolidated tariff and anti-dumping measures), and to trade in services (e.g. measures which require licenses for service activities or which limit foreign banks and insurance companies to a maximum turnover). The GATT and the GATS should therefore only be concerned with trade in goods and trade in services respectively.

A second argument for mutual exclusivity is based on the claim that when the Members were completing their schedule of commitments under the GATS, they were led to believe that there was no need to make provision for measures which were not direct limitations on trade in services but rather were restrictions on trade in goods.[8] Had it been the case that Members understood that the GATT and the GATS were not mutually exclusive in their coverage, Members would have ensured to limit their commitments more extensively by reference to such measures.[9] Furthermore, an 'exporting' Member should not be allowed to obtain benefits under the GATT that had been expressly excluded under the GATS.

A third argument is the need to avoid double jeopardy. For instance, if measures relating to trade in goods were covered by a GATT exception or waiver such an exception or waiver could not be rendered ineffectual by bringing these measures under the GATS and asserting that they were illegal in that framework, otherwise the reliability of exceptions and waivers would be reduced to naught.[10]

A common theme to all these arguments is that a departure from mutual exclusivity would only serve to introduce uncertainty into the relationship between the disciplines of the GATT and the GATS.

2.2. Arguments against mutual exclusivity

First, there is nothing in the texts of the GATT or the GATS, or the WTO Agreement[11] to support the assertion that a measure cannot be covered by both the GATT and the GATS. Otherwise, one may assume that the negotiators

7. *See* EC Bananas Panel Report, *supra* note 6, at 209, para. 4.614.
8. *See* EC Bananas Appellate Body Report, *supra* note 6, at 19, para. 44.
9. *Id.*
10. *See* EC Bananas Panel Report, *supra* note 6, at 210, para. 4.617 – 4.618.
11. The 1994 Marrakesh Agreement Establishing the World Trade Organization, The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 ILM 112 (1994).

would have provided for such a fundamental principle in the agreements.[12] Nor is there any indication in the texts that the adoption of the GATS was intended to be a limitation on the scope of application of the GATT. The agreements should therefore be applied according to their terms. To do otherwise would be to open a 'huge hole' in the GATT because there is no shortage of service related measures that could be used to discriminate against imported goods.[13] This would appear to have been recognised by the drafters of Article III(4) GATT which refers to measures relating, *inter alia*, to the "transportation, distribution or use" of imported products. The net is thus cast widely to ensure that the GATT does not permit countries to avoid their obligations based simply on the form of the measure. The same is true for the GATS.[14]

Second, to accept the arguments advanced in favour of mutual exclusivity would be undermine the results of the Uruguay Round in two fundamental respects: it would lead to the anomalous situation of the Members erasing all their commitments relating for instance to the distribution of goods; and Members would effectively be granted a licence to impose discriminatory measures on imported goods, [15] a position clearly at odds with the preambular reference in the WTO Agreement to "the elimination of discriminatory treatment in international trade relations".

Finally, there is no reason why a measure could not be discriminatory with respect to both goods and services: it would not be uncommon for a measure to violate more than one multilateral agreement for goods, so why not the GATS?[16]

2.3. Conflicts

All of these arguments both for and against mutual exclusivity are based on the assumption that no conflict occurs between the agreements, e.g. where compliance with one agreement results in non-compliance with the other. This 'conflict issue' is thus separate to and perhaps a more fundamental issue than that of 'overlaps' in the application of the agreements, and poses the difficult questions of which agreement should apply in the case of a 'conflict' and whether one agreement should be given priority over the other.

12. *See* Canadian Periodicals Panel Report, *supra* note 6, at 17, para. 3.36. *See* case note by A. Scow, *The Sports Illustrated Canada Controversy: Canada "Strikes Out" in Its Bid to Protect Its Periodical Industry from U.S. Split-Run Periodicals*, 7 Minnesota Journal of Global Trade 245 (1998).
13. *See* Canadian Periodicals Panel Report, *supra* note 6, at 17-18, para. 3.36 and 3.37.
14. In reply to this argument one may point out that there is no mirror image of GATT Art. III(4) in the GATS, and thus no equal weight given to the repercussions of measures related to goods.
15. EC Bananas Panel Report, *supra* note 6, at 210-211, para. 4.620.
16. *Id.*, at 210-211, para. 4.619.

3. REPORTS OF THE PANELS AND THE APPELLATE BODY

The issues of overlaps and conflicts between the GATT and the GATS have been considered by Panels and the Appellate Body of the World Trade Organization in the *Canadian Periodicals* and the *EC Bananas* Panel and Appellate Body Reports.[17] Without the benefit of provisions in the WTO Agreements expressly dealing with these matters, Panels and the Appellate Body have generally addressed them by reference to the structure of the WTO Agreement and the Annexes thereto.

3.1. The *Canadian Periodicals* case

In the *Canadian Periodicals* Panel Report, the Panel examined the position of whether Canada – assuming that it had intended to carve out the measure in question from the coverage of its GATT's commitments – was exonerated from the Panel's scrutiny regarding the alleged violation of the GATT.[18] In doing so, the Panel first referred to Article II(2) of the WTO Agreement which provides that the Agreements and the associated legal instruments in Annexes 1 to 3 were integral parts of the WTO Agreement binding on all Members. The Panel referred to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties which provides that a treaty must 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 light of their object and purpose.[19] One of the corollaries to 'the general rule of interpretation' in the 1969 Vienna Convention was that the interpreter must give meaning and effect to all terms of the treaty. Hence, an interpreter was not free to adopt a reading that would result in reducing whole clauses and paragraphs of a treaty to a redundancy or inutility.[20]

The Panel stated that "[t]he ordinary meaning of the texts of the GATT and the GATS and Article II(2) of the WTO Agreement indicated that obligations can *co-exist* and that one does not override the other".[21] Otherwise, if the consequences suggested by the respondent were intended, there would have been provisions similar to Article XVI(3) of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish a hierarchical order between the GATT and the GATS.[22] The Panel concluded that the absence of such provisions

17. *Id.*
18. Canadian Periodicals Panel Report, *supra* note 6.
19. 1969 Vienna Convention on the Law of Treaties, reproduced *in* 8 ILM 679 (1969).
20. *Id.*, at 70, para. 5.17. This was a view which had been upheld by the Appellate Body: *see, e.g.*, Appellate Body Report United States – Standards for Reformulated and Conventional Gasoline, adopted 29 April 1996, WT/DS2/AB/R, at 23; and Appellate Body Report Japan – Taxes on Alcoholic Beverages, adopted 4 October 1996, WT/DS11/AB/R, at 12.
21. Canadian Periodicals Panel Report, *supra* note 6, para. 5.17 (emphasis added).
22. Art. XVI(3) of the WTO Agreement, *supra* note 11, reads as follows: "[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements,

between the instruments implies that the GATT and the GATS "are standing on the same plain in the WTO Agreement without any hierarchical order between the two".[23]

The Panel also rejected the argument that overlaps between the GATT and the GATS should be avoided.[24] First, it believed that such overlaps were inevitable and would further increase with the progress of technology and the globalization of economic activities.[25] Second, such overlaps would not undermine the coherence of the WTO system. In fact, services such as distribution and transportation were recognised as disciplines of GATT Article III(4), and there were several adopted Panel Reports that examined the issue of services in the context of GATT Article III.[26] Finally, the Panel noted that in any event since Canada admitted that there was no conflict between its obligations under the GATS and the GATT there was no reason why both the GATT and the GATS should not apply to the measure at issue.[27]

On appeal, the Appellate Body affirmed the Panel's finding that the GATT applied to the measure in question.[28] With reference to the issue of overlaps, the Appellate Body made essentially three points. First, the entry into force of the GATS as Annex 1B of the WTO Agreement did not diminish the scope of application of the GATT.[29] Second, it affirmed the Panel's view that the ordinary meaning of the texts of the GATT and the GATS as well as Article II(2) of the WTO Agreement taken together indicated that the obligations under the GATT and the GATS can co-exist and that one does not override the other.[30] Third, the Appellate Body did not find it necessary to pronounce on the issue of whether there can be potential overlaps between the GATT and the GATS as both parties agreed that it was not relevant to the appeal.[31] It was not therefore necessary nor appropriate to consider Canada's obligations under the GATS.[32]

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the provisions of this Agreement shall prevail to the extent of the conflict." The General Interpretative Note to Annex 1A, *supra* note 11, at 3, reads as follows: "[i]n the event of a conflict between a provision of the GATT 1994 and a provision of another Agreement in Annex 1A to this Agreement establishing the WTO the provision of the other agreement shall prevail to the extent of the conflict."

23. Canadian Periodicals Panel Report, *supra* note 6, para. 5.17.
24. *Id.*, at 71, para. 5.18.
25. The Panel did not expand on this further.
26. Canadian Periodicals Panel Report, *supra* note 6, para. 5.18.
27. *Id.*, para. 5.19.
28. *See* Canadian Periodicals Appellate Body Report, *supra* note 6, at 20. *See also* Scow, *supra* note 12.
29. *Id.*, at 19. Canada had conceded its position with respect to the inapplicability of the GATT would have been the same under the GATT 1947 before the GATS had ever been conceived. *See* Canada's Appellant's Submission, 12 May 1997, *id.*, at 19.
30. *Id.*, at 19.
31. *E.g.*, Canada had submitted on appeal that its principal argument was not based on the need to avoid overlaps and potential conflicts were based instead on a textual interpretation of the provision or the plain meaning of the reference in Art. III(2) of the GATT to 'indirectly', *See* Canadian Periodicals Appellate Body Report, *supra* note 6, Canada's Statement at the oral hearing, 2 June 1997, at 19.
32. Canadian Periodicals Appellate Body Report, *supra* note 6, at 19.

3.2. The *EC Bananas* case

The issues of potential overlaps and conflicts cropped up again in the *EC Bananas* case. The Panel approached the issue by examining the scope of the GATS.[33] It noted that nothing in the Agreements reflected the view that the GATT and the GATS cannot overlap. On the contrary, the provisions of the GATS explicitly take the approach of being inclusive of any measures that affect trade in services whether directly or indirectly.[34] No distinction was made between measures that directly govern or regulate trade in services and measures that otherwise affect trade in services. The Panel took the view that that if it was to find that the scope of the GATS and the GATT to be mutually exclusive, the value of the Members' commitments and obligations would be undermined, and so the object and purpose of both Agreements would be frustrated. Thus Members could adopt measures under one Agreement with indirect effects on trade covered by the other without the possibility of any legal recourse for the Member prejudiced by such measures.[35] Citing the Report of the Panel in the *Canadian Periodicals* case, the Panel pointed out that no explicit limitation was provided for in the GATS or the WTO Agreement,[36] and in the absence of such a provision, it found that the view that the argument that the scope of the GATS and the GATT cannot overlap had no legal basis.[37] The Panel deemed it unnecessary to decide on how bringing a measure relating to trade in goods under the GATS would undermine the effectiveness of an exception or waiver under the GATT as there was no applicable waiver under the GATS' claim in the case. However, it did note that "the appropriate drafting of waivers"[38] could avoid such problems and that in regard to exceptions, the exception clauses of the GATT and the GATS were similar thus reducing the likelihood of conflict between the GATT and the GATS's provisions.[39] Finally, the Panel summed up its findings by stating in principle that: no measures were excluded *a priori* from the scope of the GATS as defined by its provisions; and the scope of the GATS encompasses any measure of a Member to the extent *it affects the supply of a service* regardless of whether such a measure directly governs the supply of a

33. EC Bananas Panel Report, *supra* note 6.
34. *See e.g.* Art. XXIII of the GATS (definitions section). *See* also EC Bananas Panel Report, *supra* note 6, at 360, para. 7.282.
35. The Panel cited as an example, a measure in the transport sector regulating the transportation of merchandise in the territory of a Member that subjected imported goods to less favourable transport conditions compared with those applicable to like domestic goods. *See* EC Bananas Panel Report, *supra* note 6, at 360, para. 7.283.
36. According to the Panel, if the drafters intended such a limitation they would have included such a provision. *See* EC Bananas Panel Report, *supra* note 6, at 360-361, para. 7.283.
37. *Id.*
38. *Id.*, at 361, para. 7.284.
39. *See* Arts. XII, XX, and XI of the GATT, *supra* note 2; and Arts. XII, XIV, and XIV*bis* of the GATS, *supra* note 3.

service or whether it regulates other matters but nevertheless affects trade in services.[40]

With reference to the issue of 'conflicts', the Panel considered that a 'conflict' would exist between the GATT and another agreement where there were mutually exclusive obligations or where what was permitted by one agreement was forbidden by the other. On the other hand, there would be no conflict if an agreement merely provided different or complementary obligations to those in the GATT, and where all the obligations could be complied with a the same time without the need to renounce explicit rights or authorizations.[41]

The Appellate Body addressed two issues in its Report: the scope of the GATS, and the question of whether the GATT and the GATS were mutually exclusive – treating the two as separate issues.[42] The Appellate Body upheld the Panel's finding that there was no legal basis for an *a priori* exclusion of the measures in question from the scope of the GATS. It shared the view of the Panel that the term 'affecting' reflected the intent of the drafters to give a broad scope of application to the GATS but it approached the matter in a slightly different manner. It found that the term 'affecting' meant 'has an effect on' thus indicating a broad scope of application. This was reinforced by the conclusions of previous panels that the term in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.[43] Moreover, the term 'services' was defined in GATS Article I (3b) as any service in any sector except those supplied in the exercise of governmental authority, and the GATS Article XXVIII(b) defined 'the supply of services' to include 'the production, marketing, sale and delivery of a service'. Nothing in these provisions suggested a limited scope of application of the GATS.

The Appellate Body then addressed the separate issue of whether the GATS and the GATT were mutually exclusive agreements.[44] First, it noted that the GATS was not intended to deal with the same subject matter as the GATT but rather with a subject matter not covered by the GATT, i.e. trade in services. Second, like the GATT the GATS provides for, *inter alia*, Most Favoured Nation (MFN) and national treatment for services and service suppliers.[45] Third, given the respective scope of application of both Agreements, they may or may not overlap depending on the nature of the measures at issue. The Appellate Body defined three categories of measures:

40. EC Bananas Panel Report, *supra* note 6, at 361, para. 7.285.
41. As McGovern observes: "[t]he meaning of the final qualification may require some elaboration". *See* E. McGovern, International Trade Regulation 1.12-4 (1995) (loose-leaf binder).
42. *See* EC Bananas Appellate Body Report, *supra* note 6.
43. *See, e.g.*, Panel Report Italy – Agricultural Machinery, adopted 23 October 1958, BISD 7S/60.
44. EC Bananas Appellate Body Report, *supra* note 6, at 93-95, para. 217-222.
45. *Id.*, at 94, para. 221.

1. those measures falling exclusively within the scope of the GATT because they affect trade in good as goods; and
2. those measures falling exclusively within the scope of the GATS because they affect trade in services as services; and
3. those measures which fall within the scope of both the GATT and the GATS, that is to say, measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good.[46]

While the Appellate Body affirmed the Panel's view that such a measure could be scrutinised under both the GATT and the GATS, it took a more nuanced approach: "[w]hile the same measure could be scrutinised under both agreements, the *specific aspects* of that measure examined under each agreement could be different".[47] Under the GATT the focus is how the measure affects the goods involved. Under the GATS the focus is on how the measure affects the supply of a service involved. The Appellate Body stopped short, however, of proposing a general test to determine to which category a measure may belong, stating instead that the question of

> whether a certain measure affecting the supply of a service relating to a particular good is scrutinised under the GATT or the GATS, or both, is a matter that can only be determined on a case by case basis,[48]

citing the conclusions of the Appellate Body in the *Canadian Periodicals* case.

4. MUTUAL EXCLUSIVITY BETWEEN GOODS AND SERVICES IN THE EUROPEAN COMMUNITIES

4.1. Treaty provisions

Under the Treaty of the European Communities (Treaty) free movement of goods is covered by Articles 30 to 36 of the Treaty and freedom to provide services is dealt with by Articles 59 to 66 of the Treaty.[49] The concept of goods is not defined in the Treaty. The European Court of Justice has found that "by goods, [...] there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transac-

46. *Id.*
47. *Id.*, at 94 (emphasis added).
48. *Id.*, at 94-95, para. 221.
49. 1957 Treaty Establishing the European Economic Community, 296 UNTS 17 (1958). *See* P. Oliver, Free Movement of Goods in the European Communities, 27 *et seq.* (1996).

tions."[50] Services are defined by Article 60 of the Treaty in the following manner:

> [s]ervices shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration and in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons.

Three consequences may be said to flow from this 'negative' definition:

1. services would appear to be relegated to a residual category;
2. the rules on the free movement of services and those on the free movement of goods cannot apply to the same aspect of a given measure;[51] and
3. services may come under the provisions relating to goods but only in so far as they are governed by such provisions.[52]

Article 61 of the Treaty excludes transport services from the chapter on services since transport is dealt with elsewhere in the Treaty[53] and further provides that banking and insurance services connected with capital movements are to be dealt with in line with the Treaty provisions on the movement of capital.[54]

4.2. The case law of the European Court of Justice

How then has the Court of Justice determined the relationship between Articles 30-36 of the Treaty and Articles 59-66 of the Treaty when confronted with national restrictions which strike at goods and services at the same time? The Court's approach has generally been to consider whether in the instant case the measure *predominately affects goods or services*, bearing in mind that according to Article 60 the provisions on services only apply when those on goods do not.[55] However, the Court has modified its approach in its recent case law in line with the growing importance of services and their broad coverage.

One area in which the question of mutual exclusivity has arisen is advertising in relation to which the Court has delivered a number of differing rulings. On the one hand, the Court has held in the *Sacchi*[56] and *Debauve*[57] cases that prohibitions or restrictions on television advertising come within the rules of the

50. Case 7/68, Commission *v.* Italy, ECR 1968, at 423.
51. *See* Oliver, *supra* note 49, at 27.
52. Case 155/73, Criminal Proceeding Against Giuseppe Sacchi, ECR 1974, at 409, para. 6.
53. Arts. 74-84 of the EC Treaty, *supra* note 49.
54. *Id.*, Arts. 70–73.
55. *See* Oliver, *supra* note 49, at 27.
56. *See* Sacchi case, *supra* note 52.
57. Case 52/79, Criminal Proceedings Against Marc JVC Debauwe and Others, ECR 1980, at 833

Treaty relating to services.[58] On the other hand, Article 2(3) of EC Commission Directive 70/50 lists as measures of equivalent effect within the meaning of 'quantitative restrictions' prohibited under Article 30 of the Treaty those measures which "prohibit or limit publicity in respect of imported goods only, or totally or partially confine publicity to domestic products only"[59]. In line with this, the Court has held in a series of cases that restrictions on advertising or promoting goods from other member states fall under Article 30. Thus, the following measures have been caught by Article 30: a prohibition on promoting encyclopaedias by free gifts;[60] a system of restrictions on advertising alcoholic drinks which fell more heavily on imported drinks than equivalent domestic ones;[61] and a ban on advertising of special offers.[62] According to Oliver, " there is no contradiction here: in the *Sacchi* and *Debauve* cases the restriction was more closely linked with services, while in the [other cases] it was more closely connected with goods".[63]

As mentioned earlier, the Court appears to have modified its approach in recent case law. In *Schindler*[64] the defendants were charged with attempting to sell German Lottery tickets in the UK, contrary to English law. The High Court in its reference for a preliminary ruling asked, *inter alia*, whether lottery tickets constituted goods within the meaning of Article 30 of the Treaty and whether such legislation was to be considered under that provision or under Article 59 of the Treaty. Advocate General Gulmann took the view that the transaction in question was to be regarded as the provision of services within the meaning of Article 59 of the Treaty and not as the sale of goods. He drew an analogy between the sale of a lottery ticket and the purchase of an insurance policy or of a bus ticket: in each case the purchased document was simply proof that a service had been provided. The Court followed the Advocate General[65] as to the final outcome in the following terms:

58. In Sacchi, *supra* note 52, para. 7, the Court of Justice proceeded to note "[o]n the other hand, trade in material sound recordings, film apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods".
59. Commission Directive of 22 December 1969 based on the provisions of Article 33(7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ EC Special Edition 1970 (I), at 17, original reference OJ EC L13/29.
60. Case 286/81, Oosthoek, ECR 1982, at 4575.
61. Case 152/78, Commission *v.* France, ECR 1980, at 2299.
62. Case C-362/88, GB-Inno-BM, ECR 1990, at I-667.
63. *See* Oliver *supra* note 49, at 28; *cf.* M. Hunnings, Annotation on Case 52/79 and Case 62/79, 17 CMLR 564 (1980).
64. Case C-275/92, HM Customs and Excise Commissioners *v.* Schindler, ECR 1994, at I-1039.
65. Although it would appear that the findings of the Court of Justice were not based on the reasons proposed by the Advocate General; *see* case note by V. Hatzopoulos, *Her Majesty's Customs and Excise v. Gerhart and Jörg Schindler*, ECR 1994, at I-1039, 32 CMLR 841, at 846 (1995).

> [t]he activity pursued by the defendants in the main proceedings appears, admittedly, to be confined to sending advertisements and application forms; and possibly tickets on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot be considered independently of the lottery to which they relate. *The importation and distribution of objects are not ends in themselves*. Their sole purpose is to enable residents of Member States where those objects are imported and distributed to participate in the lottery.[66]

One commentator notes that following this judgment:

> an activity consisting of the movement of goods can nevertheless, be treated under the rules on services, if it is economically ancillary to some service activity [...]. Whereas in [*Sacchi*] the Court followed an objective test, which focused on the very nature of the economic activity in question, in this case it seems to adopt a more subjective and economically sound approach, whereby *auxiliarium pricipali sequitur* and the whole matter is subject to the same set of rules.[67]

This 'ancillary theory'[68] has been since followed by the Court in JGC van Schaik[69] where it held that a contract to repair a car was to be regarded as the supply of services not goods: in such a case, the supply of goods involved in the replacement of spare parts was merely ancillary to the provision of services. National restrictions on garages in other Member States carrying out such repairs was therefore to be considered under Article 59 of the Treaty.[70]

4.3. The definition of services in the European Community Treaty: a criticism

To conclude this section, attention will be given to the manner in which services are negatively defined in the alternative, by reference to other fundamental freedoms:

> [t]his *a contrario* definition of the concept of services is not intellectually satisfactory, to the extent that it dissimulates a fundamental contradiction: conceptually, services appear to correspond to a subsidiary, unimportant category to which are reduced activities which cannot be covered by the other provisions of the Treaty; in practice, however, services constitute *a catch all* category, covering virtually every economic operation.[71]

This conceptual weakness may be explained in part by the far less important role played by services in intra-European trade at the time of the drafting of the

66. *See* the Schindler case, *supra* note 64, para. 22 (emphasis added).
67. Hatzopoulos, *supra* note 65, at 846.
68. *Id.*, at 846.
69. Case C-55/93, Criminal Proceeding Against JGC Van Schaik, ECR 1994, at I- 4837.
70. *Id.*
71. Hatzopoulos, *supra* note 65, at 845-846.

Treaty, in contrast to the their prominent position today. The shift in the Court's approach would appear to reflect the increasing importance of services to regional and global trade.[72]

5. AN ARGUMENT FOR MUTUAL EXCLUSIVITY

5.1. Summary of the WTO case law

The decisions in the *Canadian Periodicals* and the *EC Bananas* cases may be briefly summed up as follows. The decisions distinguish as separate concepts, those of co-existence, overlaps, and conflicts of obligations. The GATT and the GATS can co-exist and one does not override the other. Likewise, the entry into force of the GATS does not limit the scope of application of the GATT. That said, the GATS was not intended to deal with the same subject matter as the GATT but rather to cover subject matter not covered by the other agreement. However, overlaps will inevitably occur with changing technology and increasing globalization but they do not serve to undermine the coherence of the WTO system. Whether such overlaps occur will depend on the nature of the measure. Obligations of the GATT and the GATS may apply to the same measure. While the same measure may be scrutinised under each agreement, scrutiny of the specific aspects thereof can be different. The question as to whether a measure affecting the supply of a service relating to a particular good is scrutinised under the GATT or the GATS, or both, is a matter that can only be determined on a case by case basis. The issue of conflicts was not directly addressed but it may be inferred from the *Periodicals* case that in the case of a conflict between a Member's obligations under the GATS and the GATT, both agreements should not apply to the same measure in question.

5.2. A suggested approach for future decisions

It would appear that conceptually the subject matter of the GATT and the GATS is mutually exclusive but in practice overlaps may occur where goods and services have become bound up. On the basis of the decisions in the *EC Bananas* case and the thrust of the interpretation of Article 31(1) of the 1969 Vienna Convention adopted by the *Canadian Periodicals* Panel – unlike the formal position under the EC Treaty – there appears to be no question of services comprising a subsidiary category within the WTO system.[73] However, as the GATS was intended to cover subject matter not covered by the GATT, it does appear

72. *See* E. Gippini Fournier, *GATS. Introductory Note*, *in* J. Bourgeois *et al.* (Eds.), *supra* note 1, at 363.
73. Rather, the relationship between the two agreements has been clearly classified in the decisions as one of 'equals'.

that the WTO law should follow EC law to the extent that the rules on the free movement of services (GATS) and those on the free movement of goods (GATT) cannot and should not apply to *the same aspect* of a given measure. Put another way, while overlaps may be said to occur in the scope of the coverage of the two agreements, overlaps should not occur in the application of their respective *obligations*.

The C*anadian Periodicals* and the *EC Bananas* cases would appear to support this view. As McGovern notes from the *Canadian Periodicals* case:

> the Appellate Body appeared to take the view that the question whether a measure 'affects trade in goods', and is therefore subject to GATT is one that a respondent can insist must be answered, *prior* to deciding the scope of individual GATT provisions that might be relevant. Logic would suggest that a similar question could be raised in response to GATS claims.[74]

This indicates that a measure (or specific aspect thereof) must first be classified as one affecting either trade in goods or trade in services before deciding which of the two agreements applies. Thus, even if a measure appears to cover both goods and services the specific aspects thereof should be classified as affecting either trade in goods or trade in services. Moreover, the Appellate Body concluded, in its analysis of mutual exclusivity in the *Bananas* case, that the specific aspects of a given measure examined under each agreement "could be different", and so seems to leave open the possibility of adopting in future cases the approach advocated here.[75]

5.3. Conflicts between the GATT and the GATS

This approach also appears to help resolve the issue of conflicts between the GATT and GATS agreements. In the EC system, it may be that the distinction between goods and services will not always be of great practical importance: it would appear from the case law that the result of applying Article 59 of the Treaty to a given measure will often be the same as that of applying Articles 30–36 of the Treaty.[76] However, in the WTO system, the consequences of applying the GATT may be quite different to that of applying the GATS. The cornerstone of both the GATT and the GATS is the principle of non-discrimination which expressed in terms of, *inter alia*, MFN and national treatment. However, unlike the GATT, national treatment is expressed in the GATS as a specific commitment rather than as a general obligation. Thus, national treatment as stipulated in Article XVII GATS only applies in respect of those services listed in Member's

74. McGovern, *supra* note 41, at 1.12-4 (emphasis added).
75. *See* Bananas Appellate Body Report, *supra* note 6.
76. *See* Oliver, *supra* note 49, at 30-31.

Schedule of Commitments,[77] subject to any conditions and qualifications set out therein. The question of which agreement should apply to a given measure may therefore be of significance particularly where a member has excluded certain services, with which the measure has a connection, from its specific commitments.

A 'conflict' may be said to occur where as a result of the application of the GATT to a given measure, the 'exporting' member may obtain the benefit of national treatment where it had been (or at least, thought to have been) expressly excluded by the 'importing' member under the GATS. Conversely, a 'conflict' may also occur where as result of the application of the GATS to a given measure and a finding of compliance therewith (in the same circumstances) will necessarily result in non-compliance with the GATT.

It is submitted that such 'conflicts' may be avoided by ensuring that no single aspect of a measure is subject to both disciplines at the same time. As noted above, this may be achieved by first establishing whether a given measure is a measure affecting either trade in goods or affecting trade in services. This approach is more satisfactory from a conceptual point of view, and it is also more logical. If a measure having some connection to services of a particular kind can be classified as a measure affecting trade in goods no 'conflict' can be said to occur – if the measure affects trade in goods then it should be subject to the disciplines of the GATT and *vice versa*. If the application of both agreements to a single aspect of a measure is permitted, and a 'conflict' of the kinds described above should occur, then one is faced with the dilemma of deciding which agreement should take precedence. This situation is plainly at odds with the decisions in the *Canadian Periodicals* and the *EC Bananas* cases which preclude the possibility of either agreement overriding the other or the creation of a hierarchy between the GATT and the GATS.

One potential weakness of the approach advocated here is that may allow for some circumvention to occur. As the United States argued in the *Canadian Periodicals* case, to confine the scrutiny of a service-related measure to the GATS could result in allowing the measure to alter the terms of competition between imported and domestic products contrary to Article III GATT[78]. Two observations may be made in this respect. First, if some degree of circumvention should result, it is more a consequence of GATS' own '*geometrie variable*'[79], i.e. the varying coverage in the Schedules thereto, than of any inherent weakness in the approach itself. If, as the price for bringing services within the WTO system, Members have been allowed to confine their national treatment commitments according to particular service areas, this is bound to have some repercussions for the WTO system as a whole. However, such distortions are likely to be re-

77. See GATT, *supra* note 2.
78. *See* Canadian Periodicals Panel Report, *supra* note 6, at 18, para. 3.37.
79. *See* Weiss, *supra* note 4, at 1208.

duced with the successful conclusion of future negotiations. Second, the degree of circumvention should be minimised as the approach advocated here allows for dual application of the GATT and GATS to a given measure, if not to the specific aspects thereof. It seems unlikely that one single provision will facilitate an appreciable degree of circumvention. By avoiding a 'blunderbuss' effect the suggested approach allows for other specific aspects of the measure to be targeted under the other agreement.

5.4. The search for a suitable test

This brings us to the question of how one may establish whether a measure – or specific aspect thereof – affects trade in goods or services. In many cases the answer will be self-evident. However, in cases of measures falling within the scope of both agreements the position will be more problematic. A number of different 'tests' are possible.

5.4.1. Principal/incidental object and effects test

In the *Canadian Periodicals* case, Canada proposed that in order to determine which agreement should apply one should analyse the given measure by examining both the object and effects of the measure and distinguish between the principal and incidental effects. Some relevant factors for such an analysis include: the nature of the economic activity covered by the measure; and the structure, effects, and intention of the measure. In any case at the margins of the two disciplines, the dominant or essential characteristics of the activity should control the determination of whether GATT or the GATS applied.[80]

In the same case, the United States criticised this test on the grounds that it was simply an invention, it found no support in any of the WTO Agreements or the negotiating history and contrary to Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) would alter the rights and obligations of WTO Members.[81] However, by analogy, the Canadian test may not be wholly without precedent in the GATT *acquis*. Although the question of overlaps between the GATT and the GATS is novel, the Panel in the first *Tuna/Dolphin* case was confronted with a similar dichotomy between 'products' and 'production' in determining whether Article III of the GATT ap-

80. Canadian Periodicals Panel Report, *supra* note 6, at 18-19, para. 3.40. In the EC Bananas case, *supra* note 6, the EC argued that a distinction should be made between measures which directly influenced the ability to perform a service and those having only 'indirect and incidental' repercussions, the latter of which were of no concern to the GATS.

81. *Id.*, para. 3.42. *See* also Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 11, Annex II.

plied to the United States' measure.[82] Article III could only be applied where an imported product is regulated, not where a foreign process is regulated. One commentator has observed that this dichotomy

> may be analysed as *a conflict of laws rule intended to allocate jurisdiction* between the United States and Mexico. Mexico is accorded exclusive jurisdiction over domestic production processes, while the United States is accorded jurisdiction over products physically brought into the United States.[83]

Furthermore, he argues that

> this conflict of laws concept is applied also to the exceptions under paragraphs (b) and (c) of Article XX [GATT]. These exceptions may not be invoked to protect the health of foreign animals, persons, or resources [...] the Panel would look at *the primary target* of protection and would allow exceptions to the principles of GATT where *the primary target* of protection is domestic.[84]

Although the link is somewhat tenuous, one could surmise from this that in the case of *intra-systemic conflicts of law* in the WTO system involving the allocation of jurisdictions between different agreements over a given measure (or specific aspects thereof), one should distinguish between the primary (principal) and secondary (incidental) object, and moreover effects of the measure.

5.4.2. The objective and subjective tests under European Community law

The EC system offers both an objective and subjective test to distinguish between goods and services.[85] The objective test (*Sacchi*), corresponding to a conception of services as a subsidiary and unimportant category, focuses on the very nature of the economic activity in question. In reflecting the economic reality that services constitute a 'catch-all' category, the subjective test is based on 'the ancillary theory' whereby "*auxiliarium pricipali sequitur* and the whole matter is subject to the same set of rules".[86] Taking into account the conceptual foundations of each test, the subjective test has more to recommend it to the WTO system.

82. Panel Report United States – Import Restrictions and Labelling of Tuna from Mexico, BISD 39S/155 reproduced *in* 30 ILM 1594 (1991).
83. *See* case note by J. Trachtman, *GATT Dispute Settlement Panel*, 86 AJIL 142, at 150 (1992) (emphasis added).
84. *Id.*, at 151 (emphasis added).
85. It should be noted that the scope and material content of the rules of the GATS does not entirely correspond to the freedom to provide services under the Treaty. The freedom to provide services under Arts. 59-66 of the Treaty covers three of the 'modes of supply' contemplated in the GATS. *See* Fournier, *supra* note 1, at 364.
86. Hatzopoulos, *supra* note 65, at 845.

5.4.3. Panel and Appellate Body Reports

The decisions in the *Canadian Periodicals* and the *Bananas* cases are generally silent on this matter. The *Bananas* Appellate Body declined to formulate a test to determine whether a certain measure – affecting the supply of a service relating to a particular good – was to be scrutinised under the GATT or the GATS or both. It decided instead that this was a matter that "can only be determined on case by case basis".[87]

5.5. Recommended test

It is submitted that in the case of where a measure falls within the coverage of both the GATT and the GATS, the most suitable test is one formulated along the lines of the test proposed by Canada in the *Canadian Periodicals* case and the subjective test under EC law. First, one should analyse the given measure or specific aspect thereof – whichever is at issue – by examining both its object and effects. Second, on the basis of this analysis, one should distinguish between the principal activity and incidental activity affected by the measure or specific aspect thereof, i.e. trade in goods or trade in services. The principal activity so identified should then determine under which of the two agreements – the GATT or the GATS – the offending measure or specific aspect thereof, as the case may be, should be assessed.

The adoption of this two-step test is to be preferred over the case by case approach advocated by the *EC Bananas* Appellate Body as it fulfils more satisfactorily the objectives of Article 3(2) DSU.[88] It lends greater security and predictability to the GATT and the GATS in the application of their respective obligation to measures by WTO members. Moreover, the 'principal/ancillary' distinction employed in the scrutiny of *specific aspects* of a given measure should provide a more precise way of preserving the rights and obligations of the Members under the respective agreements.

6. Concluding Remarks

The title to this paper raises a question to which has been offered a qualified 'yes': if the GATT and the GATS do not always appear to be mutually exclusive in their coverage, the GATT and the GATS should be mutually exclusive in the application of their respective obligations to the specific aspects of any given measure. A more authoritative answer will no doubt be provided by the Appellate Body in due course. The hazy boundary lines which can sometimes exist

87. EC Bananas Appellate Body Report, *supra* note 6, at 95.
88. *Id.*, at 94-95, para. 221.

between trade in goods and services, and hence, between the agreements by which they are regulated will no doubt continue to provide a challenge for future panels.[89] The responsibility for defining the spheres of these agreements should perhaps not lie with them. The problem is essentially one of legislation: the failure of the WTO Members to provide comprehensive rules regarding, *inter alia,* regulatory jurisdiction between the GATT and the GATS (and indeed, the Agreement on Trade Related to Intellectual Property Rights).[90] The solution should perhaps be provided elsewhere in the WTO system by, for example, an authoritative interpretation by the Governing Council in accordance with its procedures.

89. *See* Scow, *supra* note 12, at 278.
90. The 1994 Agreement on Trade Related to Intellectual Property Rights, 33 ILM 424 (1994). *See* T. Friederichs, *Some Comments on GATS, in* J. Bourgeois (Ed.), *supra* note 1, at 398-399. Friederichs notes, at 398: "[w]hat is probably insufficient at this stage, is the existence of more detailed multilateral criteria and guidelines, on what constitutes a so-called good or bad measure in terms of access or providing a service."