The International Commercial Rules on the Exchange of Cultural Goods and Services

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1. The Trade and Culture Debate

A. The Audiovisual Market Today

In the last decades, new media technologies have had an important impact on the global exchange of cultural goods and services, changing the capability of States to control their circulation.

Among cultural goods and services, the most economically sensitive sector today is the audiovisual one[1]. Some statistics[2] may provide us with a better idea of the audiovisual market today. As we may see, the domination of US films in most countries is evident.

For instance, in Europe US films represent 72,1% of the market and in 2003 just six films from the new European Union countries were distributed in the existing 15 Member States, amounting to a total audience of 37 000 people and representing a market share of 0.005%[3].

In Canada, the market is also very unbalanced: while US films occupy 87,5% of the market, national products represent 2,7%. In Australia, the market is shared as follows: US films - 89,3%; National films - 3,5%; Great Britain - 4,4%; and films from other origins - 2,9%. In Russia, 89,5% of the film exhibition market is occupied by US movies. The United States market shows 95,1% of US films, European films representing only 3,3% of the market and 1,6% of the market being accorded to films originating from the rest of the world.

On the other hand, it is interesting to note that countries taking more protective policy measures in the film sector present a situation that seems to be a little better controlled: in France, 53 % of the market is kept by US films but national films represent 34,8%. In Italy, 64% of the films exhibited come from the USA but 22% are national.

In fact, the movement towards commercial liberalization in the last decades has been clearly to the advantage of strong established industries in the audiovisual sector. Some countries, like France and Italy, have tried to impose barriers to the free exchange of audiovisual goods and services, in order to preserve some space for their own industries.

It seems that a balance should be found in order to allow every country to properly express itself in the world market. In the next section, a succinct legal perspective of the problem will be presented.

B. Liberalization v. Cultural Expressions

The expansion of World Trade Organisation (WTO) competences to cover audiovisual services and intellectual property in the Uruguay Round of negotiations has raised the question of the interface between commerce and culture[4].

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[1] It is noteworthy that audiovisual services differ from telecommunication services. While the first involve programming content, the latter involve the transmission of information. Most countries, because of their great potential of social, economic and cultural influence, generally heavily regulate audiovisual services.

[2] Recent statistics may be found in "Focus 2004 – European Audiovisual Observatory": http://www.obs.coe.int/online_publication/reports/focus2004.pdf.en

[3] See annex 1.

In fact, the liberalization efforts within the WTO have also brought up non-commercial interests. The preservation and promotion of national cultural expressions, when it comes to negotiations on market liberalization in the cultural sector, features among them. In a nutshell, the "trade and culture" debate may be understood on the basis of two contrasting elements:

On the one hand, the liberalization promoted by WTO negotiations follows a *non-discrimination principle*, expressed mainly by the rules of *national treatment* (non-discrimination between national products and like foreign products) and the *most favoured nation treatment* (non-discrimination between foreign Member States).

On the other hand, considering as shown above that some countries have more powerful cultural industries than others, arguments may be put forward that in the cultural sector open market may lead to cultural standardisation if Member States cannot adopt and maintain cultural policies to preserve their cultural expressions – even if these policies may constitute obstacles to trade.

The question we face today is how to establish a balance between commercial and cultural interests.

In this contribution, the provisions of the WTO which especially affect the cultural sector (and in particular the audiovisual sector) will be contemplated in the first place, in order to examine how this sector may be threatened by the progressive liberalization promoted in the successive WTO negotiations. Secondly, some suggestions for a solution to this problem will be presented and analysed. In fact, a few countries have put forward the need to attain a balance between commercial and cultural interests and have expressed their opinion in formal communications on the audiovisual sector addressed to the WTO Secretariat.

2. Main Agreements in the WTO concerning Cultural Goods and Services

The two WTO agreements mostly and more directly affecting liberalization on cultural goods and services are the GATT (General Agreement on Tariffs and Trade) and the GATS (General Agreement on Trade in Services)[5]. The most relevant provisions of each one of these agreements in this area are highlighted below.

A. Main GATT Provisions

The provisions of the GATT governing the trade on cultural goods date from post 2nd World War. In 1947, States parties to the GATT decided to undertake a general obligation of national treatment on internal taxation and regulation (article III), which prohibited different treatment between imported and domestic products aimed at protecting domestic production.

Nevertheless, two exceptions to this rule were already established at that time. Firstly, *article IV* determined the possibility for Members to impose *screen quotas* according to the conditions specified in the Agreement. Secondly, *article XX.f*, establishing a *general exception* to the obligations of the GATT for measures designed to protect national treasures, was also foreseen.

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[4] It is important to stress that there is no "cultural exception" in the WTO, as the idea of removing the cultural sector from the WTO agreements was not accepted at the end of the Uruguay Round.

[5] The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) has also very important effects on cultural goods and services, especially when it comes to copyright.

It seems therefore that in 1947 Member States already considered that cultural goods (and in particular cinematograph films) should have a special treatment compared to other goods under the Agreement, being thus removed from the general obligations of non-discrimination. One of the explanations for this exception would be the need, recognized by States parties, to accord special consideration to the cultural aspects related to this kind of product.

As we have seen from the statistics on the audiovisual market presented above, this need still seems to exist in the present day.

B. Main GATS Provisions

It is very difficult today, mainly when we consider the technology evolution in the audiovisual market, to draw a clear distinction between cultural goods and cultural services. For example, we may think about satellite transmissions of television programmes or the rendering of audiovisual services through the internet. However, as most of the audiovisual products are today rarely delivered in traditional cross-border ways, the GATS provisions are the ones affecting most directly the exchange of cultural goods and services.

The three articles of the GATS having the most direct effect in the negotiations on the liberalization of the cultural sector and especially the audiovisual one are as follows:

Article II (*Most favoured nation treatment – MFN clause*) creates a general obligation for States parties, stating that each Member State shall accord to services and service suppliers of any other Member a treatment no less favourable than that it accords to like services and service suppliers of any other country.

Members may however maintain inconsistent measures with this obligation if they have inscribed them in 1994 in a list - Annex II exemptions. Most of the States parties did so, especially in order to exempt co-production and co-distribution agreements, which naturally benefit some foreign countries, excluding others and consequently violating the most favoured nation treatment.

These exemptions though, are "in principle" meant to last for a maximum period of 10 years[6]. Even if many of these exemptions are in practice written as if they should exist for an indefinite time, liberalization efforts will certainly try to eliminate them.

As well as that, countries that have not inscribed to MFN treatment exemptions covering the audiovisual sector in 1994 may no longer do so and are, consequently, completely obliged to give the same treatment to every foreign service or service supplier. In practical terms, they will neither be allowed to sign co-production or co-distribution agreements, nor to adopt any other preferential measure regarding specific States, for example within the framework of a regional or even multilateral treaty.

Article XVI (market access) and article XVII (national treatment) do not institute general obligations for States parties in the GATS. They are strictly applicable to the extent of the specific commitments included in the Schedules of Member States. Each Member so defines its commitments in a positive list ("bottom-up approach") and is even allowed to impose limitations and conditions to these commitments. As we may see, the flexibility of the obligations imposed by this Agreement is much greater than in the GATT.

As for the precise content of articles XVI and XVII, the market access obligation determines that each Member shall accord services and service suppliers of any other Member

[6] Paragraph 6 of the Annex on Article II Exemptions.

treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

National treatment means that each Member shall treat services and service suppliers of any other Member in a manner no less favourable than that accorded to its own similar services and service suppliers.

For the moment, very few Member States undertook commitments in the audiovisual sector. Most of WTO Members are thus still completely able to adopt and to keep national policy measures to protect and promote their audiovisual industry, even if these measures represent a restriction to trade in this sector.

However, although such approach clearly provides State parties with much more flexibility to reach national policy objectives, in practice the new rounds of negotiation will surely pressure Member States to open their markets and undertake commitments in the sector. Members that do not have strong audiovisual industries (mostly developing countries) will probably accept to entirely open their market in this sector to foreign producers and service suppliers, in order to gain advantages in another sector, more economically relevant for the country.

Once commitments in the audiovisual sector are undertaken, countries not having established limitations to them are forbidden, for example, to grant subsidies exclusively to their national cultural industries and to impose local content or performance requirements for the rendering of cultural services. They are, in a few words, prohibited from encouraging the development of their own cultural expressions.

3. Proposals

As said at the beginning of this contribution, some proposals have been presented by a few Member States to resolve the conflict between cultural and commercial interests. Some of them defend that a solution should be found in the framework of the WTO. Others prefer not to discuss the issue within the WTO, fearing that the commercial perspective of this organisation would never give enough space for cultural concerns. According to the latter, the debate should be treated outside the WTO, for example in the UNESCO.

In the following sections, the main points expressed in each of these proposals will be briefly examined.

A. Within the WTO

Three countries have submitted to the WTO a communication on audiovisual services in order to suggest a balanced solution for the "trade and culture" debate in the framework of the WTO: the United States of America, Switzerland and Brazil.

1. The United States of America (December 18th, 2000)[7]

The US communication basically treated the three following points:
a - The need of reclassification of audiovisual services in view of new technologies. According to this country, the classification used today does not seem to be adapted to the rapid evolution of media technologies.

[7] S/CSS/W/21.

b - Commitments in the audiovisual sector should be negotiated in the WTO, even if the specificities of the sector are to be taken into account. The GATS is, from their point of view, the most flexible and correct framework to take the cultural aspects of the audiovisual sector into consideration.
c - An understanding on subsidies for the audiovisual sector should be signed, considering the need of Member States to foster their cultural industries.

2. Switzerland (May 4th, 2001)[8]

Switzerland has also highlighted the need for special provisions concerning the audiovisual sector in the framework of the GATS. Suggestions were made on the following aspects:
a - Cultural diversity should be guaranteed and protected through safeguard mechanisms, which would avoid abusive restrictions in the sector. Barriers would only be imposed under certain conditions foreseen in the agreement and safeguard provisions should be developed in the services sector as prescribed by article X of the GATS.
b - Important questions to be treated concerning this matter would be: subsidy rules, public service purposes, the protection of public morals and competition rules.
c - An Annex to the GATS, specifically providing rules for the audiovisual sector, would perhaps be a solution to the problem.
d - Any relevant development outside the WTO should be taken into account. This statement seems to make reference to the initiative in the framework of the UNESCO to adopt the Universal Declaration on Cultural Diversity in 2001 and to negotiate an International Convention on the Protection of Cultural Expressions.

3. Brazil (July 9th, 2001)[9]

Brazil was the sole developing country to submit its opinion on this matter to the WTO. Its communication stressed the following points:
a - Attention should be accorded to developing countries interests.
b - The GATS is sufficiently flexible and provides appropriate means for reaching a balance in the "trade and culture" debate. Nevertheless, according to this country, additional instruments should also be considered, as a special mechanism for subsidies in the audiovisual sector;
c - Unfair competition exists in the audiovisual sector, as audiovisual products are normally offered in foreign markets at a "dumping level". Strong cultural industries - and especially the American majors - are able to recover their costs in their huge national market and, consequently, to offer their products in foreign markets at very low prices. In this sense, trade defence mechanisms like antidumping and safeguard provisions would be necessary to protect weaker industries.

All of the above suggestions deserve special attention and should be carefully considered in the next negotiation round in the WTO. Nevertheless, some critical observations may be done.

For instance, as mentioned above, the separating line between cultural goods and cultural services has become, due to new technologies, progressively difficult to define. Therefore, the

[8] S/CSS/W/74.
[9] S/CSS/W/99.

distinction between the implementation of the strict provisions of the GATT and the flexibility of the GATS is hardly applicable in practice[10].

As well as that, safeguard mechanisms, subsidies and even antidumping provisions as they exist in the GATT for trade in goods cannot be easily transposed to the services sector[11].

Furthermore, the progressive liberalization prescribed by the WTO rules and the different relevance accorded by each country to its cultural services (including audiovisual services), will likely lead to more liberalization commitments in the sector, threatening the capacity of more countries to promote and protect its cultural expressions in the future.

In addition, the flexibility which still exists in the GATS for audiovisual services seems to be challenged by the US strategy to sign bilateral free trade agreements, where countries (and especially developing ones) may be confronted by even more pressure to open their audiovisual markets.

That is why some WTO Member States, like Canada and the European Community countries, today defend a solution that would start outside the WTO.

B. Outside the WTO

1. Canada (March 14th, 2001)[12]

In a communication on trade in services in general, Canada succinctly expressed its position concerning the treatment of cultural industries in the WTO.

It stated that commercial progressive liberalization must be promoted in respect of national policy objectives (according to article XIX of the GATS) and that Canada will not make any commitment in the sector until a new international instrument specifically related to this matter is adopted outside the WTO.

This statement makes reference to the Canadian strong support to the current negotiations within the UNESCO on a new International Convention on the protection of cultural contents and artistic expressions.

Despite the fact that this agreement is still being negotiated and that its final version is not ready yet, the draft recently presented to governmental experts recognizes that signatory parties to the Convention shall have the right and the obligation to protect and promote its cultural expressions, even if this objective may only be attained by the adoption or the maintenance of trade restrictive measures.

The general idea of this international instrument is that, if a large number of countries sign the Convention and, therefore, undertake the obligation to adopt measures to protect its cultural expressions, the pressure in the WTO negotiations (especially from countries having

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[10] An illustration of this difficulty appeared clearly in the dispute settlement practice of the WTO, in the *Periodicals case* (WT/DS31/R and WT/DS31/AB/R), involving Canada and the United States, and the *EC-Bananas case* (WT/DS27/R/ECU, WT/DS27/R/GTM,HND, WT/DS27/R/MEX, WT/DS27/R/USA and WT/DS27/AB/R).

[11] An analysis of the feasibility and desirability of emergency safeguard measures in the services sector and for each mode of supply was presented in the Communication from the European Community and their Member States at the Working Party on GATS Rules (S/WPGR/W/38) on the 21st January 2002.

[12] S/CSS/W/46.

strong audiovisual industries like the US and Japan) for Members to eliminate restrictions in the cultural sector would be diminished.

If a provision as article 13 of the draft convention is maintained[13], countries will be obliged at least to consult each other and to undertake to promote the principles and objectives of the Convention in other international fora (including the WTO).

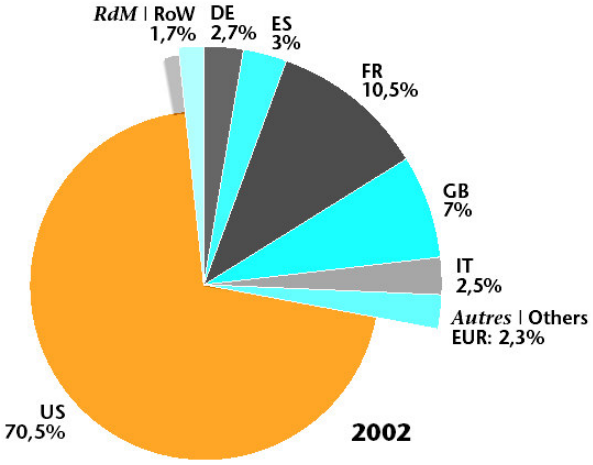
In the case of a dispute opposing WTO Members on a matter involving cultural concerns, the Convention provisions could be used in order to justify trade restrictive measures aimed at protecting the cultural identities of a Member. They would serve as guidelines for clarifying the existing rules. Nevertheless, it is difficult to imagine to what extent the Dispute Settlement Body of the WTO would take these "cultural protective" provisions into consideration when its greatest objective is to promote commercial liberalization.

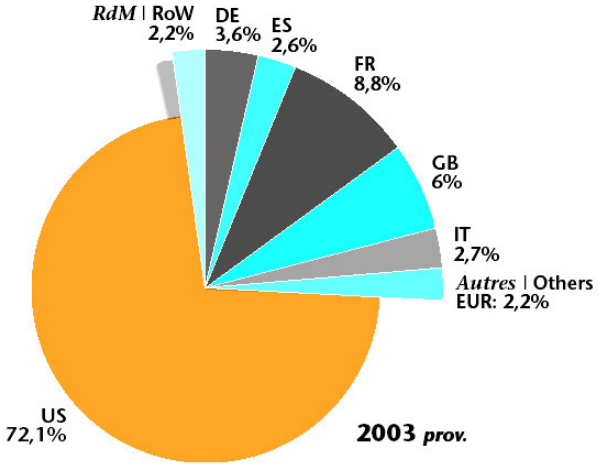
When the time comes, every pro and contra of each of the proposals presented above will have to be weighed. The complexity of the subject deserves great attention and it seems that the "trade and culture" debate will still be the object of many discussions in future years.

[13] Article 13, entitled "International consultation and coordination", states that "States Parties shall bear in mind the objectives of this Convention when making any international commitments. They undertake, as appropriate, to promote its principles and objectives in other international fora. For these purposes, States Parties shall consult each other within UNESCO in order to develop common approaches".

Annex 1

Répartition des entrées dans l'Union européenne (15) suivant l'origine des films | 2002-2003
Breakdown by origin of films of admissions in the European Union (15) | 2002-2003





Source: OBS/LUMIERE