

# Can the existing WTO legal framework take into account the cultural specificity of the audiovisual sector?

Jan Loisen

## Introduction

With the adoption of the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, it is important to assess whether the World Trade Organisation and its framework agreements offer any room for manoeuvre to attain a balanced audiovisual policy which takes into account both the economic and cultural aspects of audiovisual goods and services. As the WTO primarily focuses on increased economic efficiency through the liberalisation of trade, our attention will shift to the second aspect the dual nature of the audiovisual sector, namely its cultural component. The fundamental question therefore is whether the WTO can take into account the cultural specificity of the audiovisual sector?

## Treatment of the audiovisual sector in the WTO framework

Although a complex tangle of trading rules applies to the audiovisual dossier (De Witte 2001, 238; Footer & Graber, 2000; Pauwels & Loisen, 2003, 2004), we will focus on the treatment of the audiovisual sector in the services agreement GATS (General Agreement on Trade in Services) and the goods agreement GATT (General Agreement on Tariffs and Trade). These two agreements within the WTO, alongside TRIPs (Agreement on Trade Related Aspects of Intellectual Property Rights), do not only represent the core of the multilateral trade framework, they are also directly relevant for the audiovisual dossier as both agreements explicitly refer to the audiovisual sector. The scope of these goods and services provisions, however, is not always clear and is difficult to interpret.

In the GATS agreement six subcategories are listed which should comprise the specific subsector of “Audiovisual services,” included in the general “Communication Services” sector. The subcategories are: Motion picture and video tape production and distribution services (UN Provisional Central Product Classification [CPC] code 9611); Motion picture projections services (CPC 9612); Radio and television services (CPC 9613); Radio and television transmission services (CPC 7524); Sound recording (CPC not available); and Other (no CPC).

This somewhat rudimentary and broad classification makes it difficult to determine the boundaries between audiovisual and other communication services, especially as traditional and new media increasingly converge. Rental activities, and distribution and exhibition of cinema films are considered as services, but GATT Article IV refers explicitly to screen quotas for cinematograph films (Pauwels, De Vinck & Van Rompuy, 2006). And why not classify radio and television transmission services for example under telecommunication services? To deal with this, “as a general rule of thumb, however, it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications.” (Zampetti, 2003: 4). But, as boundaries between different media increasingly blur, this rule of thumb increasingly comes under pressure. Moreover, overlap does exist between GATS and GATT as regards the audiovisual sector; it is the only services sector which was covered in the original GATT (cf. discussion on Article IV GATT below). That cultural issues are in the twilight zone in the WTO became clear in the so-called Canadian Periodical Case. In any event, the Appellate Body expressly made clear in this case that GATT and GATS rules are not mutually exclusive (WTO, 30 June 1997).

For the time being, however, only a few minor cases dealt with by the WTO's Dispute Settlement Body have addressed which rules apply for the audiovisual sector. The primary agreement for this dossier until now is clearly GATS. We will begin our analysis of how the WTO takes into account the specificity of the audiovisual sector with this agreement.

## GATS

After the conclusion of the Uruguay Round many European media, principally French, reported that the sector had been excluded from GATS, however, the ultimate outcome of the audiovisual services negotiations was different than described. In fact, no success was achieved in incorporating the concept of cultural exception in GATS. What does exist is a services framework that is only starting to take shape and which, for the time being, leaves a wide margin to retain a national cultural policy.

The proponents of further liberalisation in the audiovisual sector like to refer to these flexibilities in GATS. They point primarily to the use of the positive list approach<sup>i</sup> in GATS which means that a party explicitly has to list the liberalisation commitment it is willing to take in a particular sector or subsector.

According to Richardson, (2004: 118) this procedure creates "enormous flexibility in crafting GATS commitments"<sup>ii</sup>: Members can indeed negotiate very specific commitments regarding the principles of market access (Article XVI GATS) and national treatment (Article XVII GATS)<sup>iii</sup> in a sector, subsector or as regards a mode of supply, but are only bound when the commitment is explicitly taken up in its liberalisation schedule. Thus members also have the right not to engage in liberalisation commitments as, for example, the EU has done for the audiovisual services subsector. Furthermore, Members had the opportunity in the Uruguay Round to exempt (parts of) sensitive (sub)sectors from the MFN (most favoured nation) principle, as again the EU and several other Members have done extensively with regard to co-production treaties in the audiovisual sector.

<p style="text-align: center;"><b>Article XVI</b> <b>Market Access</b></p> <p>1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.</p> <p style="text-align: center;"><b>Article XVII</b> <b>National Treatment</b></p> <p>1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.</p> <p style="text-align: center;">Extracts of GATS Articles XVI &amp; XVII</p>
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This, however, does not mean that the sector can be exempted *de facto* from further liberalisation, as all trade partners have committed themselves by means of GATS Article XIX to attain a progressively higher level of liberalisation commitments for the whole services sector in subsequent multilateral trade negotiating rounds. The MFN exemptions are also, in principle, of a temporary nature and in any event shall be subject to (re)negotiation in the Doha Development Round and beyond (GATS Annex on MFN exemptions, § 6).

"To summarise, GATS is characterised by some flexibility concerning the scope and speed of trade liberalisation, but also establishes a dynamic in favour of liberalization." (Krajewski, 2003: 49)

## GATT

Somewhat paradoxically - as the cultural and audiovisual sectors are mainly addressed in the services negotiations – the specificity of audiovisuals has been stressed explicitly in the GATT, which targets trade in goods. Notably, GATT Articles IV and XX point directly to the different nature of audiovisual products. However, the question arises as to whether these Articles entail, in effect, an exceptional status for the sector. Article IV provides for a departure from Article III (National Treatment) by allowing special treatment of cinematographic films through the use of screen quotas.

These quotas should in principle discriminate only between foreign and national films (§a). Moreover, they are subject to negotiations on their limitation, liberalisation or elimination (§d). Bernier (1998: 114) interprets Article IV as a compromise between two different goals: the elimination of discrimination between foreign and national products on the one hand, and the preservation of the possibility

to guarantee a minimum of national production in the film sector on the other. Notwithstanding U.S. efforts from 1947 onwards to eliminate Article IV, it was continued without change in the GATT 1994 agreement within the WTO.

Although Article IV refers specifically to screen quotas for cinematographic films, a practice which has diminished in importance since the 1950s, it can be seen as an important precedent. It recalls the valid initial reasoning of leaving regulatory space to attain non-economic (in this case cultural-political) objectives in certain sectors (Neuwirth, 2002).<sup>iv</sup> It is, however, doubtful that it can be used as a concrete policy instrument to preserve cultural diversity in the audiovisual sector. Article IV only refers to cultural goods (and more specifically cinema films); the U.S. is tenacious in applying a strict interpretation to the Article (de Witte, 2001: 242; US, 2001); and the Doha Ministerial Declaration – in spite of the emphasis on uniting free trade and public policy objectives (Herold, 2002: 2) – does not explicitly mention the reconsideration of general (e.g. cultural diversity) or specific (e.g. the audiovisual sector) cultural issues. Therefore Neuwirth (2002: 13) concludes that the Article IV heritage mainly provides a political mandate to negotiate culture in the spirit of its conception. This means that the juridical leverage of Article IV seems to be small and is only specifically applicable to the use of screen quotas. It cannot be used directly to protect other aspects of a national audiovisual sector. But the arguments for drafting Article IV in 1947 could be taken up again as the audiovisual sectors of most countries still remain in a difficult position vis-à-vis U.S.

#### Article III

##### National Treatment on Internal Taxation and Regulation

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

#### Article IV

##### Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

(a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

(b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;

(c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;

(d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

movies. Therefore, Article IV provides some sort of precedent which is juridically weak, if not non-existent, but can be exploited politically in upcoming negotiations within the WTO.

<b>Article XX</b> <i>General Exceptions</i>
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value.
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

Also negotiated in 1947, GATT Article XX provides for a few general exceptions from the non-discrimination obligation.

According to the chapeau of the Article, discriminatory measures can be allowed, if they are not applied arbitrarily or imply a disguised restriction on international trade. After the formulation of the chapeau, the conditions for the use of such discriminatory measures are set out. With regard to the audiovisual sector, Richardson (2004: 117) identifies paragraphs (a), (b) and (f) as relevant. Paragraph (a) could make censorship or measures relating to ratings systems possible and (b) could be used to discuss, for example, people smoking in

audiovisual products. But the most important paragraph, which refers specifically to cultural products, is without a doubt (f), which authorizes measures “imposed for the protection of national treasures of artistic, historic or archaeological value”.

The scope of Article XX(f) is unclear, however, as no jurisprudence exists so far on its interpretation. Furthermore, the initial motivations for drafting the exception in 1947 remain obscure (Richardson, 2004: 117). The interpretation of the exception is therefore a difficult exercise: firstly with regard to the evaluation of the artistic, historic or archaeological value of a product, and secondly with regard to the underlying motivation of a policy that creates protectionist measures. The Article can be situated at the border between rules and standards: “A law is more standard-like to the extent that it established less specific guidance in advance of the conduct regulated by the law.” (Sauvé, 2003: 213). From a juridical perspective, standards are not *per se* better or worse than a rules-based approach. In a WTO context we indeed often see Articles such as Article XX vaguely formulated, as otherwise the negotiating costs would be too high. In other words, should very specific rules concerning culture be negotiated, an agreement would be practically impossible. The downside of the standards approach is that it generates uncertainty in international law, which is, of course, contrary to its aim of promoting legal security and stability (Sauvé, 2003: 212-213). A similar problem occurs for example for the environmental movement. Article XX(b) offers some margin to exempt a regulation that raises trade barriers in order to protect the environment, but it is uncertain if the paragraph offers a clear juridical instrument to protect the environment.

Nevertheless there exists some jurisprudence concerning Article XX in general. It indicates that discriminatory measures should meet the conditions set out in, for example, (f) or (g), as well as in the chapeau. According to the WTO Appellate Body, in its ruling in the U.S. Shrimp Case, this is a difficult act of balance, which moreover needs to be contextualised: “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. [...] The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary

and as the facts making up specific cases differ.” (Appellate Body Report on U.S. Shrimp, paragraphs 156 and 159.)

In this report, an evolutionary approach<sup>v</sup> was used for the interpretation of the term “exhaustible natural resources”, which we find in Article XX (g). Concretely, this meant that, on the basis of other conventions such as the *UN Convention on the law of the sea* or the *Convention on trade in endangered species of wild fauna and flora*, the concept was broadened from fuels and minerals to living resources, such as species threatened with extinction (Krajewski, 2003: 54). If we transpose this approach to the audiovisual case, one could argue that this offers an entry point in WTO negotiations for the concept of cultural diversity, as discussed within UNESCO. However, one needs to recall that the WTO has one inalienable and fundamental objective, to implement further liberalisation, and it is also expected that anything which looks and feels like a trade barrier will have to disappear over time - a compulsion which the audiovisual sector is not likely to escape either given U.S. sensitivities in this area.

## Conclusion

The relationship between Article XX or other exceptions and audiovisual policy remains, for the time being, ambiguous. On the one hand, flexibilities do exist but their robustness is questionable. No clear and straightforward reference to the specificity of the audiovisual sector can be found in WTO agreements. Moreover, the implicit exceptions towards the audiovisual sector are always subject to further (re)negotiation. On the other hand, although in the WTO exceptions are, as a rule, interpreted restrictively (Herold, 2003: 3), these flexibilities do indicate recognition of the relationship between cultural objects and national identity (Bernier, 1998: 114). As such, they mainly provide a political mandate to negotiate on the specificity of the audiovisual sector. In this context, the *Convention on the protection and promotion of the diversity of cultural expressions* would be essential in strengthening this political mandate.

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<sup>i</sup> This approach is opposite to the negative list approach, which is used in e.g. the bilateral trade treaties the U.S. is negotiating with its trading partners. A negative list approach refers to the practice of liberalisation as a rule, unless an exception is specifically inscribed and motivated in the liberalisation schedule.

<sup>ii</sup> To remove discriminatory barriers to trade in services, the GATS agreement provides for successive rounds of negotiation (Article XIX). During these rounds, the members make very precise liberalisation commitments relating to two principles which apply vertically, i.e. sector per sector. These rules are market access (Article XVI) and national treatment (Article XVII). They stipulate that a member is to abandon limits for foreign service providers gradually within a given sector. These limits are either quantitative (e.g. a film or television quota) or qualitative (e.g. reserving charges on sound and recording equipment for national residents only, linking the allocation of television licences to a nationality requirement, etc.). The following steps are taken to achieve this progressive liberalisation: after the negotiations with the other members, each GATS contracting party submits a list (or offer) of commitments. The Uruguay round was the first round during which a list of liberalisation commitments in the services sector could be submitted (“initial commitments”). These lists of planning schedules are added to the GATS agreement and are legally binding. A contracting party does not have any “market access” or “national treatment” obligation as long as it does not incorporate the sector or activity into its list of commitments.

<sup>iv</sup> One however needs to remember the exceptional situation, the post World War II period, in which Article IV was drafted. Besides a cultural-political reasoning, economic motives were important as well in response to the devastation World War II had meant for the European film industry.

<sup>v</sup> The evolutionary principle means that rules are interpreted in their current context. It is mainly used when the rules’ terminology is evolutionary instead of static. This approach deviates from the general principle of contemporaneity, where interpretation is based on the meaning of the rule at the time it is drafted.