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European Journal of Communication 2003; 18; 291
DOI: 10.1177/02673231030183001

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The WTO and the Audiovisual Sector
Economic Free Trade vs Cultural Horse Trading?

Caroline Pauwels and Jan Loisen

A B S T R A C T

In this article the authors raise historical and legal status questions concerning the audiovisual dossier as discussed within the framework of the World Trade Organization. This implies an overview, first, of the rules applying directly to the audiovisual sector; second, of the liberalization agreements concerning telecommunications; and third, of the rules concerning copyright (TRIPs). In anticipation of the discussions in the new multilateral negotiation round – launched at the end of last year – the main argument of the article is that the interference of the WTO in the audiovisual and related sectors is irreversible, but also partly unpredictable.

Key Words audiovisual services, commodification, GATS, liberalization, World Trade Organization

Introduction

Despite the anti-globalists, and some will claim partly thanks to the dissident globalists, the starting signal for a new round of liberalizing world trade in goods and services was given in Doha (Qatar) in November 2001.
2001. After the 11 September 2001 crisis, and some will again contend that partly thanks to this crisis, the 146 countries which are current members of the World Trade Organization (WTO) have hereby expressed their (symbolic) belief in the importance of deregulating both sectors further. And while it is clear that not everyone will harvest the fruits of this at the same time and to the same degree, all appear to have been won over by the idea that further liberalization of goods and services will benefit all trading partners over time. Because, as a Ugandan observer of the WTO developments said at the launch of the Qatar round: ‘Every right-minded person knows that it is worse outside the WTO than inside’ (De Morgen, 26 November 2001: 9). Further liberalization is on the agenda in the services sector in particular, which was kept far away from the WTO negotiating table or the forum organized under its predecessor GATT (General Agreement on Tariffs and Trade) prior to the previous round of negotiations. Among other things, people wish to take advantage of the economic scale and still largely underused potential of a globally networked knowledge economy. This is occurring within the framework of GATS (General Agreement on Trade in Services), which has comprised part of the WTO since the previous Uruguay round and is covering the audiovisual sector, which was until recently quite strictly associated with culture, for the first time. From the communications theory point of view, the inclusion of the audiovisual sector in this world trade agreement evidently brings interesting questions into discussion. For example, what does this policy shift from national to transnational and even global level mean for an audiovisual policy which in Europe still tends towards cultural interventionism, and even protectionism and so barriers to trade? Will the New World Information and Communication Order, which was exclusively discussed in the culturally oriented UNESCO from the early 1970s to the 1980s, from now on take shape within the commercially oriented WTO?

This article attempts to show that the WTO’s intervention in the audiovisual and related sectors is irreversible, but also partially unpredictable. However, to do this, the scope of the WTO agreements for the audiovisual dossier will first have to be set out historically and from a technical-legal viewpoint. This is because, in addition to the rules which affect the audiovisual sector directly, equal if not greater impact can be expected from the liberalization agreements which have been concluded in telecommunications (a sector which is also covered by the GATS provisions) and copyright (governed by the TRIPs [Trade Related Aspects of Intellectual Property Rights] agreements).
Audiovisual policy in connection with the WTO

The audiovisual sector under GATS

Previous history. To understand the sensitivities associated with the GATS negotiations on the audiovisual dossier, its past history has to be clarified. The United States already appeared to be seeking a liberalization of the audiovisual sector from the first GATT negotiations in 1947 (Sellier, 1993: 15). At this time, they were confronted with quota restrictions on the import of their films into Europe. In exchange for the Marshall Plan, they asked the Europeans to abolish all customs limits, including restrictions on the import of cinema films. It was therefore already clear then that the Americans considered culture as a product like any other. However, this postulate was contested fundamentally by the Europeans. As a result of the European (i.e. mostly French) protests, cinema films were explicitly excluded from Article III of the GATT agreement (National Treatment), which states that the affiliated members cannot treat imported products less favourably than their own products. By excluding cinema films from Article III, Europe was able to continue to use their quota system where necessary (Sapir, 1991: 166).

In the 1960s, the United States then asserted that the European limitations on the import of television programmes contravened the GATT provisions. In their view, television programmes were not the same as cinema films. A special working group to study trade in television programmes was set up at the Americans’ request. However, the Europeans were not ready to make concessions on this occasion either (de Witte, 2001: 242; Sapir, 1991: 166). The European plea that culture is not a product like any other was also easily acceptable in these years, as discussions were held exclusively on liberalizing trade in industrial and agricultural goods.

More than 20 years later, the cards were stacked differently. It was decided to extend the GATT framework at the launch of the eighth liberalization round in Punta del Este (Uruguay) in 1986 (Simmonds, 1988). This time, in addition to deregulating trade in goods, a start was also made towards liberalizing the services sector (GATS). The growing importance of the super-symbolic economy and the need for new investment markets was naturally not unrelated (Braman, 1990: 365; Toffler, 1990). Although the European Community initially agreed with this mainly American proposal reluctantly, it also quickly realized that its economy would benefit from partial liberalization of the services sector. As a result, both America and Europe sought liberalization of the services
The Uruguay round (1986–94) In 1990, when the Uruguay round should by rights have been complete, but was extended due to a block on the agricultural dossier, it also appeared that little progress had been made in the area of liberalizing services. The fault for this was ascribed to the disagreements concerning the legal principles which would guide deregulation of services. The audiovisual dossier, which was to push tensions between the US and Europe to a peak, only came to dominate the political and public agenda, however, after the end of the negotiations, i.e. autumn 1993. Notwithstanding the fact that matters had also changed at national level, it was once again the French who launched a polemic centred on this sensitive dossier. The neoclassical view of the market economy–cultural products relationship used by the US came up against heavy resistance (with a prominent role played by the French cultural minister, J. Lang, and his successor, J. Toubon). Resistance was launched against a liberalization of the audiovisual sector – and a threatening onslaught on the European market by American films and television programmes – with the help of the argument that the cultural nature of the film and television industry justified protection via quotas and subsidies (Wheeler, 2000: 255–6). Not only the professionals were affected by this polemic. Political leaders such as President Mitterrand of France and America’s Bill Clinton became involved openly in the audiovisual debate. The very fact that these two world leaders intervened was essentially bound up with the pressure which they were coming under domestically. The cultural industries in France represent an
important sector of the electorate and consequently a lobby group for the French socialists. Hollywood, in the figure of MPAA lobbyist Jack Valenti, is in turn one of the most important financial backers of the US Democratic Party.

The European negotiating delegation tried to find an answer to the American demand to liberalize audiovisual services fully, which would mean that the quota provisions included in the European Directive ‘Television without Frontiers’ would contravene trade regulations. Some thought that the audiovisual sector should be excluded fully from the GATS agreement. However, the majority adopted the view that all services would have to be incorporated in the global agreement, and thus the audiovisual sector as well. In this instance, the separate status of audiovisual services as a cultural product would nevertheless be included in the agreements, with the result that quotas and subsidies would remain possible (Honeck, 2000: 141). Thus, cultural specificity was proposed as a stipulation. The European Community would make a (minimum) number of commitments in the audiovisual sector. The European Parliament also declared itself in favour of this option in July 1993.

However, according to the supporters of a third option, cultural specificity would not offer adequate guarantees for the preservation of European audiovisual regulations and support measures and consequently for its audiovisual industry. The people concerned therefore advocated gaining a cultural exception. In this instance, reference was made to the Free Trade Agreement (FTA) between Canada and the US, where the audiovisual sector was awarded exceptional status. Although the FTA does not contain the guarantees which the advocates of the third option pretended, it nonetheless created an important precedent which was used in a handy way in the public and political debate (Regourd, 1993: 14; Braman, 1990: 375; Tramier, 1993: 35). On 30 September 1993, the European Parliament came back to its original position. It requested the Commission to negotiate on the audiovisual sector on the basis of a cultural exception rather than a cultural specificity. Finally, the ‘cultural exception’ clause received support from all member states despite a number of objections from some of them, among other things, also because according to various Commission departments ‘cultural specificity’ would probably not offer sufficient legal guarantees for the achievement of the European objectives (de Witte, 2001: 238). In this discussion concerning cultural exclusion, specificity or exception, it became clear that defining concepts is of crucial importance in the formation and interpretation of regulations. It emerges from the
audiovisual dossier in particular that various interpretations of concepts largely guide the polemic surrounding it.

Just before the close of the Uruguay round, the Americans in turn set higher requirements. The deadlock appeared irresolvable. In the end, no agreement was reached between the EU and the US concerning the deregulation of the audiovisual sector. The EU adopted a very wide range of exemptions from the MFN (Most Favoured Nation) principle for the audiovisual sector and did not make any commitment to liberalization. Yet, this does not mean that the sector was not subjected to the general GATS rules. Furthermore, no success was achieved in incorporating the concept of cultural exception (de Witte, 2001: 243–4; Barth, 1999: 67). The dispute was therefore ‘put on ice’ via the reaching of a compromise where no single party saw its objectives fulfilled (or was it the opposite?); in Puttnam’s (1997: 343) words:

In fact, the real battle was simply put off for another day. The result was a stalemate. The Americans were unsuccessful in their attempt to secure commitments from the EC to ‘liberalise’ the film and television industries. For their part, the Europeans failed to win any lasting ‘cultural exception’.

The audiovisual sector therefore did fully come under the provisions of the agreement, subject to a range of exceptions and limits. However, to understand the final outcome and the scope of the negotiations for the audiovisual sector, an insight into the global structure of the GATS agreement and the underlying principles is necessary.

**GATS structure and principles and implications for audiovisual policy**

GATS is a subsection of the Marrakesh agreement which closed the Uruguay round in April 1994. The same agreement also contains an agreement to create a framework for liberalizing intellectual property (TRIPs) as well as the establishment of the WTO itself to supervise the three general trade agreements (GATT, GATS and TRIPs). The basic principles underlying GATS are largely parallel to those behind GATT. The central objective in both cases is to deregulate global trade. However, as services differ from goods in nature, the focus for achieving the goal lies elsewhere in GATS. Where price can primarily form a barrier for goods, in the case of services, regulations which impose restrictions on companies or which prevent market access create the greatest curbs. GATS therefore focuses more on member states’ regulatory policy, with less attention being paid to their pricing policy (Senti and Conlan, 1998: 94; Sampson, 1996: 24–5).
Taken globally, GATS has three important subsections. First, it incorporates a multilateral framework of principles and rules for trade in services, including annexes per subsector such as telecommunications for example. These texts apply to all affiliated members. Second, it involves a list of liberalization commitments which an affiliated member is prepared to accept in a specific sector (concerning market access and national treatment). Third, it has a list of exceptions from the MFN principle (Article II of GATS).

The GATS agreement relates to ‘measures by Members affecting trade in services’. The principle of ‘universal cover’ of all services sectors (Article I.3b) means that the audiovisual sector also comes under the provisions. In view of the fact that no sector-specific provisions relating to the cultural status (cultural specificity/exception) of audiovisual services were incorporated, this sector comes fully under the mechanisms and principles of the agreement, with the exception of the negotiated exceptions and limits. The term ‘measures’ also has a broad scope. It designates measures adopted by any central, local or regional private or public sector authority alike. Some of the competition distorting or influencing measures such as subsidies (Article XV) or public outsourcing in the services sector (Article XIII) were not yet regulated for the moment at the time of the agreement’s conclusion. The goal was to hold further sector-based discussions on the subject prior to the launch of the new round of negotiations. They would also be of importance for the audiovisual sector. However, it is much more difficult to reach a decision in sector-based negotiations as no package deals can be concluded. This ‘package deal’ idea refers to the practice of gaining reluctant partners’ agreement during negotiations with specific proposals of having concessions in one sector (e.g. the audiovisual sector) compensated for by gains in other dossiers or sectors (e.g. maritime transport). This means that in pure sector-based negotiations it is more difficult to unite the participants’ interests and that since then hardly any progress has been made in the audiovisual sector (Lal Das, 1998: 80).

The MFN principle (Article II in GATS – parallel with Article I of GATT) forms the core of the multilateral trading system. It specifies that advantages allocated to one trading partner shall apply immediately and unconditionally to all other members. It applies on a compulsory basis to all services included in the GATS, regardless of the liberalization commitments relating to a specific sector which a member has adopted in its offer plan. It is therefore also a general obligation, a horizontal principle and thus valid for all services. As such, it stands in contrast to the specific ‘negotiated sectors’ which are based on the vertical principles
of ‘market access’ and ‘national treatment’. The MFN rule promotes the multilateral liberalization dynamic because it contains an equally spread distribution of advantages and obligations.\textsuperscript{4} This contrasts with bilateral negotiations, which by definition always discriminate against other parties. Exceptions to the MFN principle nonetheless do exist. The exceptions which derive directly from Article II are of interest for the audiovisual sector. They provide for the possibility of drawing up a separate annex with exceptions to the MFN rule. The exceptions cover a specific sector, are justified for well-defined reasons and apply in principle for 10 years. This annex is evaluated every five years and possibly reviewed. The EU has used this procedure to protect various aspects of audiovisual policy. They have established a list of exceptions to the MFN rule in the audiovisual sector for cultural reasons. As regards these specific list measures, neither the EU nor the member states are bound by any MFN obligation. Canada and Australia have also adopted a defensive strategy of this type. A number of countries which were candidates for EU accession at the time also followed the EU’s defensive position (McDonald, 1998: 244).

However, the MFN principle is no guarantee of an opening up of foreign markets. After all, a country can still discriminate against foreign service providers by imposing more stringent rules than on national residents. To remove this discriminating provision gradually, the GATS agreement provides for successive rounds of negotiation (Article XIX). During these rounds, the members make very precise liberalization 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. 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 liberalization: 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 liberalization 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.
Thus, the EU decided not to enter into any commitment related either to the ‘market access’ or to the ‘national treatment’ clause during the Uruguay round. In other words, measures such as the television quota and charges on sound and recording equipment could be retained.

However, it is important to note that the initial commitments signify a beginning of the wording of a general multilateral agreement concerning trade in services. After all, Article XIX of Part IV of GATS stipulated that by January 2000 (as should have happened in Seattle), WTO members would launch a new round of negotiations on the basis of the built-in agenda of the Uruguay round, after which periodic new rounds would follow depending on a gradually higher level of liberalization (de Witte, 2001: 245; Kakabadse, 1995: 76; WTO Secretariat – Trade in Services Division, 1999). By accepting the GATS principles, all the countries thus commit themselves to working on a further deregulation of global trade, including in services, in following rounds. For example, this is now the case with the launch of the round in Qatar. The audiovisual sector is part of this. Once again, Europe will have to be watchful in the face of US pressure, expectations and demands to make concessions in this dossier for the moment.

This applies all the more as other contracting parties such as the US and New Zealand have actually entered into liberalization commitments compared with Europe and most other countries, who did not. Furthermore, America has not sought exceptions from the MFN rule. It has only retained discriminatory provisions for the allocation of radio and television licences. However, only 12 countries ultimately included the audiovisual sector in their liberalization plans when the agreement was reached, a number which in the following years rose to a very modest 19 countries (Honeck, 2000: 140). Once a member has included a sector in its liberalization planning, it cannot enforce any limit on the ‘market access’ and ‘national treatment’ provisions. There is still a possibility of providing for explicit reservations concerning the liberalization of well-defined measures. It was important for the audiovisual sector that all countries, with the exception of America, New Zealand and the Dominican Republic, wished to retain full policy autonomy in the regulation of future new technologies. Thus, the vast majority of contracting parties apparently shared a general concern to shield their national market against access by foreign audiovisual products. However, attention appears to be necessary in this area when the direction in which the negotiations on telecommunications and copyright are moving is considered.
Relevance of technological convergence in the information society

Another aspect which is relevant (and possibly further reaching in its effects) for coming discussions about the audiovisual sector involves the developments at WTO level (via GATS) concerning the transition to a so-called information society. The increasing convergence between traditional and new, digital, communications media (telecommunications and other ICT services) is leading to a situation where audiovisual sector policy and regulation are increasingly coming into contact with other forms of service provision. The result of this convergence is that borders between formerly relatively isolated concepts such as ‘audiovisual services’, ‘electronic commerce’ or ‘online trading’ are becoming blurred (Wheeler, 2000: 254, 257; Deselaers and König, 1999: 148). In view of the stalemate in the audiovisual dossier during the Uruguay round, it may be supposed that the advocates of imposed liberalization of the audiovisual sector will attempt to dismantle the audiovisual protective measures via the points of contact between various types of service.

This is even more valid insofar as major steps towards liberalizing telecommunications had already been undertaken during the Uruguay round and in subsequent years. Although excessive differences between mainly the US and a number of developing countries meant that only agreement on value-added services was reached during the ministerial conference in Marrakesh (which formed the closing section of the Uruguay round), the deregulation of the entire telecom sector did not have to wait for long. Basic telecommunications services, which represent approximately 80 percent of total turnover in telecommunication services trade (Barth, 1999: 60), were after all fully included in GATS following difficult negotiations on 15 February 1997 (Fredebeul-Krein and Freytag, 1997: 477, 483, 486).

An additional aspect which may ensure that it will constantly become more difficult to consider audiovisual services as a cultural product is the fact that the new concepts resulting from convergence are not yet clearly defined. Where in the past it was possible to fall back on the position that regulatory interference in the distribution of content was defensible for cultural reasons during discussions about the audiovisual sector (and whereby Europe could keep free of liberalization commitments and advance the provisions of the Directive ‘Television without Frontiers’ without being sanctioned), this is much less clear for audiovisual services, seen as a form of electronic transport (Wheeler, 2000: 257; Deselaers and König, 1999: 148, 150). Furthermore, the US wishes to classify some products which are delivered and downloaded via
the Internet as virtual goods, whereby they would fall under the GATT regulation, which (for the time being) demands much stronger liberalization than GATS (Deselaers and König, 1999: 151). Incidentally, this position is not only supported by the US, but can also count on approval from another major trading power, Japan. In view of the dominance of their companies in the production of CDs, the prospect of a fully liberalized Internet market is an important reason for siding with the US (Le Monde, 23 November 1999: 8). This may therefore mean an end for cultural exception and a member state’s opportunity to subsidize the audiovisual sector. K. Falkenberg, head of the WTO department of the EU directorate responsible for foreign trade, has made a similar comment: ‘Si les Américains considèrent les produits audiovisuels, mais aussi la télémédecine ou les systèmes de téléenseignement comme des biens immatériels, on perd le droit de les réglementer’ (Le Monde, 23 November 1999: 8).

Thus, it is expected that the Americans will seek to crack open the audiovisual dossier via the path of the new technologies. By the way, it is immediately noticeable that the emphasis is being placed on the changing nature of audiovisual products in a proposal already launched for the treatment of audiovisual services in the upcoming liberalization round. This argues that the ‘new’ audiovisual sector differs significantly from the one discussed during the Uruguay round and that there is a need for a deregulated market to absorb the costs of creating audiovisual content and to secure the development of both the audiovisual and the ICT sectors (United States, 2000).

The tenor of the proposal is similar to the American standpoint during the Uruguay round, i.e. that audiovisual services are primarily economic goods. As previous negotiations within the GATS framework seemed to be disappointing for the US, however, an attempt is now being made to apply the rules already negotiated for other sectors to the audiovisual sector, rules which in contrast to what has been agreed concerning the audiovisual sector, do imply a sweeping commitment to liberalization on the part of the signatories. Anticipating the position which Europe will probably adopt in this dossier, the US is attempting to demonstrate that sufficient safeguards exist for preserving the cultural component of audiovisual services. Thus, Article IV of GATT (dating from 1947) provides for an exception concerning the rules for national treatment of cinema films; GATS Article XIV(a) and GATT Article XX(a) provide for possibilities to intervene on a regulatory basis ‘to preserve public morality’, and the acceptance of obligations does not by
definition mean no possibility of acting via regulation, ‘so long as the regulation is not administered in a way that represents an unexpected trade barrier’ (United States, 2000).

In other words, room for manoeuvre is again limited, at least insofar as rules are always amenable to interpretation. Thus, as regards Article IV of the GATT specifically, the US argued that exception should be interpreted closely and that it therefore merely applied to cinema films and not to television programmes. For its side, the EU has naturally always struggled against characterizing audiovisual products as belonging under the GATT regulation (de Witte, 2001: 242). But the Europeans’ room for manoeuvre is decreasing or stands at a close, as continually tricky demarcation and definition of new concepts such as ‘virtual goods’ or ‘virtual services’ come into being. And in view of the fact that strictly demarcated definitions possibly also limit (welcome) market developments, it also means Europe going through its paces.

Relevance of the TRIPs agreement

In addition to developments at the audiovisual and telecommunications level, a qualified analysis seems necessary as the ‘commodification of culture’ also appears to be gaining ground in another field. During the Uruguay round it was decided that, in addition to liberalizing services, negotiations should also be held on ‘aspects of intellectual property rights relating to trade’, better known as the TRIPs (Reinbothe and Howard, 1991). These negotiations aim to establish a multilateral agreement managed by the WTO for enhanced protection of intellectual property rights. In this instance, a professed attempt is made to strive towards a balance between the questions of the developing countries and industrialized countries. Their partially conflicting interests and the unequal power relationships, however, made this balance doubtful from the outset (Braman, 1990). From the industrialized countries’ point of view the task primarily concerns finding an efficient means of combating piracy from developing countries – some figures suggest that 5 percent of world production is made up of counterfeit imitations, which naturally represents a major loss of income for western countries. Here, an attempt is made in the first place to protect the interests of the party’s own business world, i.e. including the interests of the western, primarily American culture industry. The fact that the industry based on copyright (books, computers, films, etc.) is America’s first export item, ahead of the
aviation industry for example, explains this position. Some argue that inclusion of copyright in the GATT agreement was essential. After all, the WIPO (World Intellectual Property Organization) intervenes too slowly to adapt international treaties to technological development in the copyright area. The last update of the Berne Convention dates from 1971 (Paris Treaty). In addition, this institution does not have an adequate legal framework to sanction copyright violations. The TRIPs agreement could remedy this fault (Doutrelepont, 1994: 10; Sutherland, 1993: 33).

In contrast to the audiovisual sector, where Europe has ultimately not entered into any commitment, a final agreement was reached concerning copyright. Some aspects of this naturally interest the audiovisual sector directly and have been branded relative improvements from the author's point of view. Thus, it is stipulated that the TRIPs agreement signatories are obliged to adhere to the Berne Convention, as amended by the 1971 Paris Treaty. Recognition of lease rights is an important addition to existing international treaties. Another positive aspect is that the TRIPs agreement provides for a system of sanctions for member states which violate the rules.

However, the omissions are also equally important, especially from a cultural policy viewpoint. At the special request of the US, it has been stipulated that the agreement signatories are not bound by Article 6b of the Berne Convention. This article specifically aims at protecting authors’ moral rights, and forms part of a more cultural approach in the continental droit d'auteur philosophy. This in opposition to the Anglo-Saxon copyright tradition, where the interests of the economic party, i.e. the producer, take clear precedence over the interests of the generating, creative party, i.e. the author (e.g. according to this logic there are no objections for interrupting a movie for television commercials; or for the producer interfering or changing the final cut of the movie as seen by the scriptwriter or director). The TRIPs agreement is also more liberal than the Berne Convention on other points. Nor does the TRIPs agreement end the legal fragmentation at copyright level, including in the area of the length of protection of copyright. While the longest protection periods in the world apply in the EU, due to the directive of 29 October 1993, the contracting parties to the TRIPs agreement are only bound by the minimum protection periods of the Berne Convention and the Treaty of Rome. The question also arises of how the international treaties and in this case internal Community law can be reconciled over this and other points (Doutrelepont, 1994: 10).
Other relevant issues

In addition to the audiovisual sector, telecommunications and TRIPs, a number of topics were raised during the Uruguay round which indirectly affect audiovisual policy. These include investment, competition and subsidies. It was intended to reach agreement on these issues in negotiations after 1995. However, this appeared to be particularly difficult to do. They will appear in the coming round as a subsection of the in-built agenda of the Uruguay round.

As regards investment, the Multilateral Agreement on Investment (MAI), initiated at OECD level, fell through in 1998, among other reasons, again because of a block for cultural reasons. More specifically, there was a fear that, as a result of investment and establishment of foreign companies, a country’s or region’s cultural identity would be affected. As had happened previously in the GATT and WTO round, the French ‘njet’ – culture deserves separate treatment – supported by both the political left and right ensured the suspension of the negotiations.

Regulation of subsidies in the services sector is another important issue which will stand on the agenda. This naturally interests the audiovisual sector directly, given that subsidization of the European audiovisual sector is one of the sore points in the dispute between Europe and America (de Witte, 2001: 248–9; Deselaers and König, 1999: 150). Deselaers and König (1999: 152) postulate that the existing anti-subsidy framework for trade in goods could serve as a model for the services sector. This would mean that if the broad definition of subsidies in the Agreement on Subsidies and Countervailing Measures (part 1, Article 1) of GATT – ‘a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member and . . . a benefit is thereby conferred’ – is also applied to trade in services, the European support measures could be challenged via the disputes body set up within the framework of the WTO. The WTO Dispute Settlement Body (DSB) can be seen as the fourth pillar of the WTO next to the three global trade agreements. The fundamental object of this unique mechanism is, first, to resolve trade disputes quickly and, second, to achieve long-term objectives such as predictability and stability in the interpretation of legal texts (Jackson, 2000: 68). When a WTO member does not comply with its obligations according to another member and the members cannot reach agreement via bilateral consultations, a case can be brought before the WTO Dispute Settlement Body. These suits (with appeal facilities) are settled in record time in contrast to those heard by other ‘courts’ operated by many other governments and
institutions. When the jury deems that the member is in breach, the anomaly must be rectified quickly or heavy economic sanctions will follow (Hoekman and Kostecki, 1995; Bronckers, 1999: 549). However, difficulties arise with use of the dispute settlement body. The high cost of proceedings plus a lack of legal expertise and financial resources among the majority of the 146 members and the fear of economic reprisals from strong economic blocks (Hoekman and Mavroidis, 2000: 540–1) help to ensure that not all partners use the body equally and the body consequently tends to operate to the advantage of the large economic powers. Furthermore, it is difficult to reach a well-defined ruling in controversial issues. The result is often that in such complex and sensitive negotiations agreement is only reached through compromise, which in practice results in vague, generally described rules which encompass everyone’s point of view, i.e. they achieve the opposite of legal stability and predictability. Of crucial importance for the audiovisual sector and policy is, for example, the fact that there are no clear rules for distinguishing services from goods or to what extent they have to be regulated differently from each other (de Witte, 2001: 246). And this much is clear: vague rules create rear doors which economic power blocs find handy for circumventing cultural policy objectives.

Conclusion

The preceding overview shows that there are many interfaces between the WTO and the audiovisual sector. The agreements concluded within the framework of the telecommunications sector and the TRIPs agreement are after all at least as important as what is specified directly about the audiovisual sector in the GATS agreement. A complex tangle of trading rules thus also counts for the audiovisual dossier; ‘The culture-and-trade question crops up in other fields of the WTO legal order which have their own, partly distinctive rules: trade in goods, intellectual property, investment and subsidies’ (de Witte, 2001: 238). As a result of this, it can be concluded that the impact of the WTO provisions for the audiovisual sector is unavoidable, although to a large extent unpredictable.

On the basis of the built-in agenda of the Uruguay round, negotiations on services should have started in 2000. In practice though, the new negotiations on audiovisual services are nowadays still in their preliminary phase. Only bilateral discussions are taking place – which are not organized via the WTO – and the offers for improving on the existing schedules are minimal. Future developments should point out
who makes which offers and when a sector-specific negotiation group could be launched.

In the meantime, the ‘commodification of culture’ is irreversible (Mosco, 1996). Although the EU was able to postpone the dismantling of its audiovisual policy and the liberalization of the audiovisual sector during the Uruguay round, it did not succeed in exacting a separate cultural status for the audiovisual sector. The European audiovisual sector is therefore not safeguarded against future attempts at liberalization. On the contrary, other contracting parties have already started on this liberalization and have made concrete commitments. As few liberalization commitments have been made in the audiovisual sector and an elaborate list of MFN exceptions has been drawn up, the only immediate effect of the GATS agreement is that all members who have not entered into agreements will undertake to keep the rules and measures in the audiovisual sector which they subscribe to now or the future transparent (Article III of GATS agreement). In this way, the largest and most important opponent of imposed liberalization of the sector, the EU, has primarily gained time and a certain room for manoeuvre. It remains temporarily free to enforce its regulatory framework and support measures. As the EU has not bound itself to any multilateral liberalization in the audiovisual sector, there is no legal ground for challenging it within the WTO framework for non-compliance with obligations. There is still a possibility that the US will use its existing defence system to instigate unilateral reprisals against the EU if they judge that their trade interests in the audiovisual sector have been harmed.

However, the US has another strategic and at least equally important angle of attack for undermining the Europeans’ audiovisual protectionism, i.e. the obligations and developments within the framework of the agreement on the telecommunications sector. Due to the absence of clear definitions between virtual goods and services, the convergence between telecommunications, computing and audiovisual services certainly provides rear doors for circumventing cultural quotas, for example, which apply to the audiovisual sector, when ‘new’ services such as e-commerce or online trading are concerned. On this topic, Deselaers and König (1999: 148–9) state:

... since it is difficult to demarcate precisely between services classified under telecommunications and those classified under audiovisual services, it has become a generally accepted rule of thumb within the GATS that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications. However, these are the
definitions of the GATS, which differ from the various definitions put forward by its members.

In view of this lack of clarity and vagueness in the demarcation of concepts it is not unimaginable that the WTO’s disputes system will be called on to achieve a workable interpretation for one of the partners: a step whose outcome (again due to the general and vague definitions) can only be guessed at (see later).

The fact that the US places everything that hints of cultural policy protectionism under review via the WTO agreements also appears extremely clear from the TRIPs agreement. Among other things, this is indicated by the abolition of the author’s moral rights, a right which is so beloved of the European droit d’auteur tradition, although it does not exist within the Anglo-Saxon common law tradition where the interests of the economic party, i.e. the producer, take clear precedence over the interests of the generating, creative party, i.e. the author. Incidentally, it can rightfully be asked whether the incorporation of copyright in a commercial trading agreement means that this right has simply become an instrument of international trading policy and has thus lost its cultural policy content (Edelman, 1990; Burch, 1995: 215; Venturelli, 1998: 63).

While the progressive impact of the WTO agreements on the audiovisual sector is irreversible, it is at least also unpredictable for three definite reasons.

First, as discussed earlier, the absence of definitions in particular mortgages the retention of specific cultural-policy-inspired trade barriers. But even if definitions could be agreed, there is still uncertainty about a predictable and stable legal interpretation, and implementation to an even greater degree. The fact that the WTO, with the dispute settlement body, is currently tending to work to the advantage of western groups which can afford high procedural costs is a known sore point. Some are apparently more equal than others at the international trade forum. The chance of obtaining a policy with two sizes and two weights is again very real. In addition, the WTO has an inalienable and fundamental objective, i.e. to implement further liberalization, and it is also in the line of expectations that anything savouring of trade barriers will have to disappear over time. Free trade, in other words no support, is the organization’s underlying credo, a compulsion which the audiovisual sector will not escape either, in view of the Americans’ sensitivity in the area. Furthermore, there is a mortgage on the survival of cultural-policy trade barriers such as subsidies or quotas in the dynamic and operation of
the negotiations themselves. After all, the negotiations are carried out via package deals whereby one sector is often used as small change for other sectors. If no settlement can be reached at one level, then the entire deal will not go through: a stalemate which the various trading partners naturally cannot afford, with the result that thorny dossiers are piloted through the gates of liberalization come what may. This game of give and take increases efficiency by setting demands in the negotiations despite the large numbers of members – a plus point for the WTO in comparison with other international institutions which are often viewed as ponderous, inefficient mechanisms. However, in reverse, this also contributes to unpredictability. Nor is the fact that the audiovisual sector must come off the worse vis-a-vis progress in negotiations in the telecommunications area an inconceivable prospect.

This is all the more valid and is simultaneously the second aspect contributing to the unpredictability of the WTO developments in the audiovisual sector, because a clear breach has been made in the traditional European argument that the audiovisual sector requires separate treatment. A real polemic on the matter has mainly been launched on the French side. Because whereas the right- and left-wing political groups in France traditionally defended cultural specificity unanimously, the discourse has revealed a number of cracks since the end of the 1990s. This escalated recently in the debate which the right wish to launch surrounding the privatization of the public broadcaster A2 (the second after TF1). However, the polemic which started after declarations by Jean-Marie Messier, (now former) chief executive of the Franco-American Vivendi/Canal Plus/Universal group, that the French ‘cultural exception’ was written off, was even more important. And although the French political class now feels betrayed by the statements made by this top industrialist, it had already weakened its traditional protectionist attitude during the preparations for the Seattle meeting. Incidentally, it was the Belgians who, as a result of the preparations for the unsuccessful summit in Seattle, came home feeling poorly done by when they were forced to realize that the French were no longer defending cultural exception with heart and soul. The official French position was that cultural exception bore an overly French and thus protectionist stamp. Consensus was found in defending cultural diversity, a position which in Belgian eyes threatened to undermine the gains made in the previous round. The political cards were thus rearranged to reflect the economic situation. Jean-Marie Messier’s position was not surprising. After all, as head of Vivendi/Canal Plus/Universal he was part of the American lobby MPAA, which has long been struggling to break down European trading barriers
such as subsidies and quotas. The question now is to what extent the French political class will attune its political position to economic interests.

Finally, a third aspect which contributes to the unpredictable nature of the upcoming negotiations, at least as regards the audiovisual dossier, is the position on the matter adopted by the anti- or dissident-globalists on the one hand, and the global cultural umbrella organizations such as UNESCO, for example, on the other. The so-called anti-globalist movement (perhaps more aptly ‘dissident globalist movement’) is demonstrating its disappointment and anger about progress in international rather economically oriented forums ever more vociferously and in greater numbers. This is a force which should not be underestimated and which has acquired considerable mobilization power and experience in a relatively short period. The evidence of this includes the contributions which this movement’s demonstrations made to ‘discrediting’ the original launch of a new WTO round in Seattle or their role in MAI falling through. The demand for a more democratic and more transparent world trade organization and the incorporation of social, ecological, ethical and cultural aspects in the discussions will certainly be put forward by the dissident globalists – demands which may be followed up. But complaining about excesses is different from turning the clock back fully.

An alternative voice can also be heard from a different angle. More specifically, UNESCO wishes to have its say in the dialogue with the WTO. Thus, its director-general, Koïchiro Matsuura, stated:

A l’Unesco, nous avons des ministres de la culture, de l’éducation et de la science. A l’OMC, ce sont plutôt les ministres des finances et du commerce. C’est à eux d’assurer une plus grande coordination de leurs engagements dans les diverses instances. C’est aussi à nous de le leur rappeler. (Le Monde, 3 October 2000: III)

However, the question is whether the lure of prospects of economic gain will threaten to drown out UNESCO’s cultural arguments. In view of the rearrangements on the economic front, where media groups are increasingly becoming larger and more global on the one hand, and with the weakening of the French political discourse concerning political specificity on the other, it may happen that the New World Information and Communication Order, which had previously merely been discussed within the culturally oriented UNESCO, will take actual shape within the economically oriented WTO.
Notes

1. The MPAA (Motion Picture Association of America) is the umbrella representative body for the American film sector. J. Valenti has been head of the MPAA since 1966. In view of the fact that the American film sector earns almost half of its income from exports overseas, further liberalization of the audiovisual sector was naturally of prime importance for the MPAA.

2. According to Article 2005.1, cultural matters are excluded from the FTA, unless explicitly designated otherwise. On the other hand, it is stipulated that a party can adopt measures when it deems that the other party is acting against the spirit of the treaty. According to Article 2011.2, however, the culture industry may no longer form the subject of state intervention (Lannie, 1989: 103ff.; Comor, 1991: 239ff.).

3. Member states were also won over to the idea of an exception for culture. This was ratified in Bergen on 5 October 1993 during an informal meeting of ministers responsible for audiovisual matters. In a joint statement they defined six points which were to form the basis for negotiations with the US: (1) retention and further development of all existing and future Community and national financial support measures; (2) exclusion of these provisions from the MFN principle which obliges affiliated GATT members to extend advantages which they award to one trading partner to other partners (Article I of the GATT); (3) safeguarding of the possibility to regulate future broadcasting technologies at their own discretion; (4) a guarantee to be able to implement an audiovisual support policy in the future; (5) retention of the ‘Television without Frontiers’ Directive; (6) the guarantee that these acquired rights would not come under review under any circumstances during subsequent negotiation rounds.

4. One of the most fundamental criticisms of the GATT is nonetheless that essential principles such as MFN, which initially appear to be democratic (i.e. involving equal treatment for everyone) are actually oppressive tools in some parties’ hands (Braman, 1990: 362). The peripheral and less developed countries enter the global competition market with unequal resources relative to the mainly western central countries. As such, GATT institutionalizes a range of inequalities which the global system apparently needs in order to function according to Wallerstein’s (1984) analysis.

5. Intellectual property is a very broad term, covering a range of issues: copyright, trademarks, geographical designations, industrial drawings and models as well as inventions for which rights or patents could be granted.

6. Practice indicates that companies from industrialized countries in possession of intellectual property rights were the first to profit from the establishment of the TRIPs agreement. The discussion of what the agreement now means for global trade is largely focused on the North–South relationship: its establishment has always been bathed in controversy due to the fact that developing countries are said to have been bought off by western countries to
give up their resistance to the agreement in exchange for greater access to the import markets of countries which accommodate the companies that own most of the intellectual property rights (Stegemann, 2000: 1263). This exchange is said to have reproduced the asymmetry in power between the trading partners in an unacceptable manner (an example is the conflict concerning the price for medicines between poor third world countries and the western pharmaceutical companies which hold the patents) (Burch, 1995). However, the consequences for the audiovisual sector are unclear.

7. In this context, reference is usually made to provisions 301 and special 301 in the 1974 American Trade Act. These offer the US the opportunity to take unilateral reprisals against countries which, in their view, do not respect international treaties or harm American trading interests (Delacotte, 1993: 418).

References


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