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Audiovisual Media and the Law of the WTO¹

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1. A Historical Perspective

Observers of recent developments in international trade law may remember that audiovisual media were a hot issue at the end of the Uruguay Round in 1993. There was a dispute that divided countries into two groups. The first one was made up of governments conceiving audiovisual media as entertainment products, which do not differ from any other products. They wanted audiovisual media to be also subject to the rules of trade liberalisation in the services sector. The second group consisted of countries conceiving audiovisual media as cultural products, i.e. as vectors of the fundamental values and ideas of a society. The slogan of this second group was the notorious «cultural exception».² The whole debate had the structure of an all-or-nothing issue and provoked highly emotional reactions in the media. The general impression was that of a wide gap dividing two completely different ways of conceiving audiovisual media without much hope for bridging it. In the very last moment of the negotiations, however, it was possible to find a compromise: While it was decided that audiovisual services are covered by the GATS, Members agreed on a flexible method of liberalisation³ allowing each country to refrain from making any specific commitments on Market Access and National Treatment in relation to audiovisual services and to put measures related to film and television programmes on a list of exceptions from the general obligation of Most-Favoured-Nation Treatment.⁴ But this

¹ The author would like to thank Bärbel Altes, Mireille Cossy, Michael Girsberger and Mira Nenova for their comments on earlier drafts of the article. The support of the Mercator Foundation Switzerland in the preparation of this article is gratefully acknowledged.

² See CHRISTOPH BEAT GRABER, «Exception culturelle. Une revendication dépassée» (2000) 55 *Courrier de la Planète*, at 46.

³ This flexibility of the GATS is not limited to audiovisual services but applies to all sectors.

⁴ See CHRISTOPH BEAT GRABER, «WTO: A Threat to European Films?» in ENRIQUE BANUS, Ed., Proceedings of the Fifth Conference «European Culture» October 28-31,

time-off for culture can only last for a certain period of time because Members furthermore agreed that audiovisual media are subject to the principle of progressive liberalisation (Article XIX GATS) obligating them to reconsider the respective lists in future rounds of negotiation.

This paper aims at providing an analysis of the tension between trade liberalisation and audiovisual policy with a view to the services negotiations within the Doha Round. It starts with an assessment of the proposals related to audiovisual services which were submitted by Members. After a short overview of the structure of the relevant WTO law, the paper proceeds to undertake a typology of measures of national audiovisual policy in order to get a better view on actual and potential conflicts with principles of trade liberalisation. The paper then explores the range of flexibility the law of the WTO is able to offer to countries which - because of cultural policy reasons - may not be able or may not wish to accept a higher level of liberalisation in the area of audiovisual media. It concludes addressing some open questions which most probably will be of importance in the realm of audiovisual services negotiations of the Doha Round.

2. Audiovisual Services in Doha Negotiations

2.1. General Remark

Following the built-in agenda of Article XIX GATS, Members started negotiations in January 2000 in order to achieve a higher standard of liberalisation of services, including audiovisual ones. These negotiations remained dormant until they were fuelled by the positive results of the Doha Ministerial Conference in November 2001 to follow a request-offer approach based on the existing lists of commitments.⁵ While initial requests were due for 30 June, 2002, initial offers had to be presented before 31 March, 2003.

In the context of these negotiations, until today five countries made submissions relevant for audiovisual media. Of these, three countries presented specific communications and two dedicated a section of their horizontal GATS communications to audiovisual services. Before a detailed

1998, University of Navarra at Pamplona, Elcano: Aranzadi Editorial 2000, 865-878, at 865.

⁵ According to Paragraph 15 Doha Declaration (WTO, Doha Ministerial Declaration, adopted on 14 November 2001, WT/MIN (01)/DEC/1), these negotiations are to be integrated into the larger framework of the new comprehensive trade round.

analysis of the specific communications from the United States, Brazil and Switzerland is provided, a brief look at the two horizontal communications submitted by Japan⁶ and Canada,⁷ might be helpful in order to provide a full view on the situation. Japan⁸ states that the liberalisation of audiovisual services «is important for respecting the right of the citizens of each Member to free access to a variety of cultures and information». Japan expects from the negotiations in this sector that progress of liberalisation will be achieved with regard to the following issues: exemptions of MFN-Treatment in providing services, quantitative limitations, and deviations from the obligation of National Treatment. Canada's communication in pertinent part reads radically different, declaring that it «will (...) not make any commitment that restricts our ability to achieve our cultural policy objective until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established».⁹

2.2. Communication from the United States

The Communication from the United States¹⁰ is the most important and influential of the three specific submissions. It is based on three interrelated elements. Firstly, the United States wants to trigger a discussion whether the classification of the different activities within the Members' lists of commitments should be reviewed. One option - with regard to audiovisual services - would be to replace the old Services Sectoral Classification List by a new structure consisting of Theatrical Motion Pictures (production, distribution and exhibition of movies); Television (production and sale of programmes including advertising); Home Video Entertainment (production, duplication and distribution of home video entertainment); Transmission Services (terrestrial, cable- und satellite-based transmission of broadcasts);

⁶ Communication from Japan, The Negotiations on Trade in Services, S/CSS/W/42 (22 December 2000), paragraphs 36-37.

⁷ Communication from Canada, Initial Canadian Negotiating Proposals, S/CSS/W/46 (14 March 2001) and S/CSS/W/46/Corr.1 (23 March 2001).

⁸ According to Paragraph 15 Doha Declaration, these negotiations are to be integrated into the larger framework of the new comprehensive trade round.

⁹ On behalf of the French-Canadian project for a new international instrument protecting cultural diversity see IVAN BERNIER/HÉLÈNE RUIZ-FABRI, «Evaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle», available at: www.mcc.gouv.ca/international/diversite-culturelle/publications.htm (5 May 2002).

¹⁰ Communication from the United States, Audiovisual and Related Services, S/CSS/W/21 (18 December 2000).

Recorded Music (production, duplication und distribution of sound recordings). Secondly, Members are requested to increase their commitments in the audiovisual sector. Thirdly, the US proposes to develop an agreement concerning disciplines for subsidies in the area of audiovisual services. Such an agreement «will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture». The proposed disciplines might follow the example of the existing Agreement on Subsidies and Countervailing Measures (SCM).

All of the above three proposals may have far-reaching consequences as will be argued in Section 6. Furthermore, some interesting insight may be drawn from the analysis of Annex B of the US proposal. In an apparently neutral manner, the United States lists a number of companies engaged in global activities in the audiovisual sector and therefore supposed to have a natural interest in trade liberalisation. However, the list cannot truly qualify as being exhaustive. The companies listed are mainly based in developing countries. Brazil, for instance, is mentioned several times, and some smaller European and Canadian companies also appear, while the big US multinational media companies are missing. This very list turned out to be a subtle wake-up call for those developing countries possessing expanding export industries in the area of audiovisual services, which is particularly the case for Brazil, India and Mexico.

2.3. Communication from Brazil

It appears that Brazil did wake up by the US proposal. As a consequence, in its submission Brazil requests Members to generally increase their level of commitments in the audiovisual services sector.¹¹ Brazil stresses that special attention should be given to interests of developing countries; television services are mentioned in particular. On the other hand, Brazil is willing to assure the margin of flexibility which governments need for achieving their cultural policy objectives. Therefore Brazil explicitly respects the Member's rights «to preserve and promote cultural identity and cultural diversity». Furthermore, Brazil proposes to create an agreement concerning subsidies for the production and distribution of motion pictures. Brazil wants to assure that such subsidies have the least trade-distorting effect, given the very different capacities of Members to subsidise domestic industries. Finally, Brazil proposes to develop rules against dumping and unfair trade. Such rules should serve to fight unfair advantages and behaviour resulting from an oligopolistic

¹¹ Communication from Brazil, Audiovisual Services, S/CSS/W/99 (9 July 2001).

structure of global media markets, particularly the dominance of the global media enterprises.

2.4. Communication from Switzerland

The Swiss submission is phrased more as a discussion paper rather than as a formal proposal.¹² Members are invited to overcome the all-or-nothing type of discussion of the Uruguay Round in the area of audiovisual media. The aim is to find ways for a sustainable protection of cultural diversity in the area of audiovisual media. According to Switzerland, a safeguard for cultural diversity is necessary, because cultural diversity has emerged as a broadly accepted short-cut formula for a public policy objective to counterbalance cultural dysfunctions of the global media markets. The Swiss submission, however, does not specify what exactly the notions of cultural diversity and cultural identity mean.

Switzerland furthermore suggests thinking about disciplines for subsidies in the area of audiovisual services. Finally, it proposes to consider the introduction of some kind of competition rules. According to Switzerland, such rules would be desirable because «a growing vertical integration across the industry reinforces the fears of anti-competitive behaviours such as abuse of dominant positions».

2.5. Preliminary Conclusion

The discussion concerning the liberalisation of audiovisual media in the Doha Round once again risks becoming the stumbling block for the whole services sector. As shown by the above-outlined submissions, there is still a very wide gap separating the countries with strong export interests from those wanting to protect their domestic industries for cultural and/or economic reasons. The proposed reclassification of the lists of commitments only at first glance appears as a mere technical endeavour. A closer look reveals that it might have quite far-reaching consequences leading to a situation where issues that before were ruled under the title of broadcasting now become subject to regulation of telecommunications.¹³ This change could be difficult to accept for those countries which agree on liberalisation in telecommunications but exclude it in the sector of audiovisual services as a consequence of media

¹² Communication from Switzerland, GATS 2000: Audiovisual services, S/CSS/W/74 (4 May 2001).

¹³ For a detailed discussion of this issue see Section 6.2 *infra*.

policy reasons. As will further be shown in Section 6.1, developing disciplines for subsidies in the audiovisual sector may challenge the system of public service broadcasting operated in Europe and Canada.

It is clear that the United States - as the strongest proponent of further liberalisation in this sector - will again face radical opposition mainly from the European Communities¹⁴ and Canada. Developing countries like Brazil, Egypt and Mexico are likely to play a more active role defending specific interests of their emerging media industries. In this situation, the Swiss proposal advocating a cultural diversity safeguard as a counterbalance for further liberalisation could be helpful. As a precondition, however, it would be necessary to find a definition of cultural diversity which is not furthering economic protectionism. This latter issue will be elaborated on in Section 6.

3. Agreements Currently Relevant to Audiovisual Media: An Overview

3.1. General Remark

Trade in audiovisual media is a crosscutting issue which in principle can be relevant under the GATT, the GATS and the TRIPs-Agreement. The TRIPs-Agreement cannot be analysed in this study due to its size limitations, but it should be mentioned that it is of crucial importance for audiovisual media because it incorporates the Berne Copyright Convention into WTO law.¹⁵ This leads to two important consequences: Firstly, the National Treatment obligation of Berne applies to all WTO Members including those States who are not parties to this convention. Secondly, conflicts concerning international protection of copyrights are subject to the compulsory dispute settlement procedures of the WTO. This is a fact which constitutes an important change

¹⁴ In the realm of the ongoing negotiations, the EC until today kept silent on audiovisual media. But in a meeting immediately before the Doha Ministerial Conference, the Council of the EC agreed on a resolution recalling a decision made preparing the Seattle Ministerial Conference in 1999 that «(d)uring the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity.» See 2381st Council Meeting, Cultural Audiovisual Meeting in Brussels, Press Release, Brussels, 5 November 2001, Press: 377 Nr. 13126/01.

¹⁵ Berne Convention for the Protection of Literary and Artistic Works, revised at Paris on 24 July 1971. This Convention *inter alia* obliges Contracting States to treat foreign holders of copyrights not less favourably than its own nationals.

in the enforcement of existing international copyright conventions.¹⁶

3.2. GATT or GATS?

According to the Services Sectoral Classification List,¹⁷ which is used by the WTO as a structural framework for the audiovisual sector,¹⁸ all kinds of production, distribution and exhibition of audiovisual media are subject to the GATS. Nevertheless, some issues remain not entirely clear - like, for example, whether a tax on the ticket sale of movie theatres or trade in television programmes should be considered as covering trade in services exclusively. In its Canada - Periodicals and Banana judgments, the Appellate Body held that GATT and GATS do not exclude each other.¹⁹ On the contrary, it may be possible that certain aspects of the same governmental measure are subject to the GATT and others are subject to the GATS. Since the effects of the non-discrimination principles in the GATT are stronger than in the GATS,²⁰ the preferred strategy of a plaintiff naturally is to allege a violation of the GATT in order to challenge another Member's trade-restrictive measures of cultural policy. One example may confirm this thesis: In June 1996, the US requested consultations from Turkey regarding the taxation of foreign film revenues.²¹ The object of dispute was a tax which Turkey levied on box office receipts from the exhibition of foreign films exclusively. The USA took the view that this cinema tax infringed upon the National Treatment commitment of Article III GATT. The dispute was settled in a mutual agreement on 24 July 1997 after Turkey accepted to equalise the tax in such a way that domestic films

¹⁶ BRUNO De WITTE, «Trade in Culture: International Legal Regimes and EU Constitutional Values» in DE BURCA/SCOTT, Eds., *The EU and the WTO. Legal and Constitutional Issues*, Oxford/Portland: Hart 2001, 237 ff., at 247.

¹⁷ Multilateral Trade Negotiations. The Uruguay Round Group of Negotiations on Services, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991).

¹⁸ WTO, Council for Trade in Services, Audiovisual Services, Background Note by the Secretariat, S/C/W/40 (15 June 1998), at 1.

¹⁹ WTO Appellate Body Report, Canada - Certain Measures Concerning Periodicals, WT/DS31/AB/R (30 June 1997), paragraph IV; WTO Appellate Body Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (9 September 1997), at paragraph IV.C.1.

²⁰ For an explanation see Section 3.3 *infra*.

²¹ Turkey - Taxation of Foreign Film Revenues, WT/DS43/1, Request for Consultations by the United States of 17 June 1996.

would be covered by it as well.²²

3.3. Coverage of the GATS and Summary of Specific Commitments of WTO-Members

3.3.1. GATS Coverage

According to Article I GATS, all internationally traded services are covered by the GATS. One exception applies: Article I Paragraph 3 Letter b states that «services supplied in the exercise of governmental authority» are excluded. Article I Paragraph 3 Letter c gives some further indication stating that such governmental services include any service which is neither supplied on commercial basis nor in competition with other service suppliers. But would this mean that public service broadcasting meeting the conditions of Letter c is excluded from GATS? Article VIII indirectly gives a negative answer setting specific rules for monopolies and exclusive service suppliers. Since public service broadcasters generally benefit from exclusive or monopolistic rights granted by national law, they are covered by this Article and thus are subject to the GATS.

The principles of National Treatment and Most-Favoured-Nation Treatment were originally developed for trade in goods. In order to apply them to the particularities of trade in services some adaptations were necessary. Market access to trade in goods can be limited through customs tariffs. Thus the elimination of quantitative import restrictions does not prevent governments from import regulation, which can be politically essential in areas of sensible goods like agriculture. As services are naturally without frontiers, there is no possibility to regulate imports of services by means of customs tariffs. Hence, it was necessary - in the Uruguay Round - to find another solution to give governments an appropriate instrument for tuning market access of foreign services and service suppliers. The solution found consists of lists of specific commitments for market access and national treatment. According to Article XVII GATS, a Member is only obliged to apply the principle of National Treatment to those sub-sectors and divisions of sub-sectors which are listed in its individual list.

²² Turkey - Taxation of Foreign Film Revenues, WT/DS43/3, Notification of Mutually Agreed Solution, 24 July 1997.

3.3.2. *Summary of Specific Commitments*

The following table shows that until November 2001 only 24 countries accepted commitments in the sector of audiovisual services.

Countries	Motion Picture and Video Tape Production and Distribution Services (02.D.a.)	Motion Picture Projection Services (02.D.b.)	Radio and Television Services (02.D.c.)	Radio and Television Transmission Services (02.D.d.)	Sound Recording (02.D.e.)	Other (02.D.f.)	Total
Albania	X	X	X	X	X	X	6
Central African Rep.	X	X	X	X	X	X	6
Dominican Republic				X		X	2
El Salvador				X		X	2
Gambia	X	X	X	X			4
Georgia	X	X	X		X		4
Hong Kong	X				X	X	3
India	X						1
Israel	X						1
Japan	X	X			X		3
Jordan	X	X			X		3
Kenya	X	X					2
Korea RP	X				X		2
Kyrgyz RP	X	X	X	X	X		5
Lesotho	X	X	X	X			4
Malaysia	X			X			2
Mexico	X	X					2
New Zealand	X	X	X	X		X	5
Nicaragua	X	X					2
Oman	X	X					2
Panama	X	X	X		X		4
Singapore	X				X		2
Thailand	X		X				2
USA	X	X	X	X	X	X	6
Total	22	15	11	10	10	7	75

(Source: WTO Secretariat, November 2001)

Most of these commitments are listed in the category Motion Picture and Video Tape Production and Distribution Services (02.D.a). Full commitments in all six categories were accepted only by Albania, the Central African Republic and the USA. New Zealand and the Kyrgyz Republic committed to five, Panama, Lesotho, Georgia and Gambia to four and Hong Kong, Japan and Jordan to three categories. Neither the EC, its Member States nor Canada made any commitments.

4. Typology of Specific Measures of National Cultural Policy in the Area of Audiovisual Media

The aim of this Section is to offer a typology of measures of governmental audiovisual policy. Hence it is not about establishing an exhaustive inventory, but rather about identifying typical measures as well as some of their actual or potential points of conflict with the law of the WTO. The compatibility with the law of the WTO will be examined in some detail only in those cases which, in the past, led to formal or informal disputes. The focus is on measures of audiovisual and cultural policy which excludes all those national regulations serving the cause of public moral, the rights of others or the protection of minors in the media.

4.1. Subsidies

4.1.1. Level of the Individual States

Subsidies are the financially most important governmental measures in the audiovisual area.

a) Especially in Europe, but also in Canada, the local audiovisual industry is, to a great extent, supported by public funds. In Europe, France offers the biggest amounts for the promotion of the national film industry,²³ followed by Germany²⁴ and the United Kingdom.²⁵ The main focus of these State aids lies

²³ Every year, the French audiovisual industry is subsidised by 33.5 million EUR taken directly from the budget of the Ministry for the Arts. In addition, there are payments of about 200 million EUR generated by contributions from cinema admissions, turnovers from television companies and video dealers (see also Section 4.4. *infra*). Although these funds come from the audiovisual industry itself, it can be assumed that they will be viewed as subsidies under the law of the WTO. For a definition of «subsidy» within the law of the WTO see *infra*, Section 6.1.

²⁴ According to Paragraph 1 of *Gesetz über Massnahmen zur Förderung des deutschen Films* (FFG) of 6 August 1998, BGB1. I 2046, the *Filmförderungsanstalt* (FFA) is

on supporting the production of films with national origin. While traditional schemes of film promotion funded projects on a selective basis, the instrument of automatic support has become more and more significant in the last few years. This scheme aims at automatically rewarding the success of a film at the box office thus supplementing the existing selective film promotion with a measure responding to market performance.²⁶ Furthermore, most European countries have a system of public service television, thus rewarding certain broadcasting operators with subsidies or revenues from licence fees for supplying a valuable service with regard to cultural policy.

To give an example of a country with a small audiovisual industry, Switzerland has a total annual budget for the promotion of cinema which amounts to about half of what is being spent on advertising for an average Hollywood movie.²⁷ More notable, though, are the annual funds from licence

responsible for the support of films on the national level. Paragraph 2 FFG entrusts the FFA with supplementing the activities of the federal States in the promotion of films and provides for the financing from public funds. In 2000, the FFA invested a total of about 120 million DEM in the support of films (see FFA intern, No. 1/2001 of 5 February 2001, at 16). The FFA has to use 40 percent of its funds for promoting the production of full-length films (reference films, see Paragraph 22 FFG), 30 percent are for the sales promotion, and the rest is used for the support of screenplays and projects as well as further education (Paragraph 67a FFG). In addition to the FFA, in 2000 the official responsible of the federal government for cultural affairs and media (BKM) invested 26.6 million DEM on the national level. The lion's share of the film subsidies, though, came from the governments of the German *Länder*, which contributed a total of about 220 million DEM. See FFA intern, No. 1/2001 of 5 February 2001, at 16.

²⁵ The Films Act of 1985 put an end to the tax on cinema admissions, which had been the main source of income for the British film support since 1951, and replaced it by a system of loans of the National Lottery and tax reductions. See BRITISH FILM INSTITUTE, *BFI Film and Television Handbook*, London 2000, at 250. Using the National Lottery funds, the Films Council grants loans to film projects which would not be affordable otherwise. In 1999, a total of 27.8 million GBP flowed from this source into the production of cinematographic works. Although in principle these loans are repayable, in reality less than 10 percent are paid back (*loc. cit.*, at 31).

²⁶ In France, today's share of the automatic film support is 60 percent. See MARC ZITZMANN, «Asterix contra Sauron. Die französische Filmwirtschaft und ihre Erfolgsrezepte» *Neue Zürcher Zeitung* of 7 January 2002.

²⁷ In 1998, the Swiss Confederation had 21 million CHF at its disposal for all activities in the audiovisual sector, whereof about 45 percent flowed into the production of films. See *Botschaft des Bundesrates zum Bundesgesetz über Filmproduktion und Filmkultur*, 18 September 2000, BB1 2000, 5436. In comparison with this, the marketing expenses for an average Hollywood movie amounted to 25.3 million USD in the same year. See MOTION PICTURE ASSOCIATION OF AMERICA (MPAA), *World-wide Market Research 1998*, at: www.mpaa.org/useconomicreview/1998/sld018.htm (19 December 2001).

fees which go to the Schweizerische Radio- und Fernsehgesellschaft (SRG), the Swiss public service broadcasting company, amounting to more than 1.1 billion CHF in 2000.

b) Outside Europe, Canada is the biggest subsidiser of audiovisual industries. The Canadian State supports public broadcasting with more than one billion Canadian Dollars per year.²⁸ From 1996 to 1997, more than 30 million Canadian Dollars flowed from the Feature Film Fund to the production of cinematographic works, and the Canadian Television Fund fosters the domestic television film production by granting an annual sum of approximately 200 million Canadian Dollars. Furthermore, Canada subsidises the music industry, the publishing industry and the press with non-repayable State subsidies, interest-free loans or reduced transport charges.²⁹

In the USA, a governmental support of the film production is non-existent.³⁰ The National Endowment for the Arts (NEA) had supported movie projects on a modest scale until the nineties, but recently withdrew from the audiovisual sector.³¹ Nonetheless State subsidies have been flowing indirectly into the broadcasting sector since 1998 as part of the US-American drug combat policy. The American State places its own anti-drug commercials with TV companies whose programmes are in accordance with the official anti-drug policy. In this way, the government indirectly helps these companies to bear their costs.³²

²⁸ See CANADIAN INDUSTRIES CULTURAL ADVISORY GROUP ON INTERNATIONAL TRADE, *Canadian Culture in a Global World*, February 1999, at: www.infoexport.gc.ca/trade-culture, at 8 (26 October 2001).

²⁹ See *supra*, note 28, 11 f. For more information on Canada's support of the domestic periodicals industry, see WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (30 June 1997).

³⁰ See DONALD E. BIEDERMAN, (et al.), *Law and Business of the Entertainment Industries*, Westport: Praeger 2001, at 639.

³¹ See CHRISTINE VACHON, *Shooting to Kill. How an Independent Producer Blasts Through the Barriers to Make Movies that Matter*, New York: Avon 1998, at 297. In the GATS commitment list of the USA, there still exists an entry enabling the NEA to restrict its possible aid exclusively to American citizens or foreigners with an establishment permit.

³² Until fall 2000, public funds of 21.8 million USD flowed to the television companies. See the report of MARLÈNE VON ARX, *Neue Zürcher Zeitung* of 3 November 2000.

4.1.2. *European Level*

a) The European Community

The EC's Media Programme supports the audiovisual industries. As a result of the EC's limited authority for cultural affairs,³³ the funds available are by far lower than those of some of the individual Member States. In contrast to the support instruments of the EC Member States and to the film support of the Council of Europe, the Media Programme refrains from production funding. It centres on three activities of support: development of audiovisual projects, promotion of audiovisual programmes³⁴ and training of professionals.³⁵ Media Plus which has been in force since 1 January 2001 has taken over the reins of the Media II programme. All three pillars exclusively foster projects which (within the Community) cross the borders of Member States. In the distribution sector, even more pronouncedly than in the past, Media Plus puts particular emphasis on the automatic support.³⁶ Whereas Media II was endowed with 310 million EUR, Media Plus now has 400 million EUR at its disposal.³⁷ The programme is now also open to the associated countries of

³³ Due to the EC's cultural mandate not representing an exclusive responsibility of the Community, the subsidiarity principle is effective (Article 5 EC). See GEORG RESS/JÖRG UKROW, «Artikel 151 EGV» in GRABITZ/HILF, Eds., *Das Recht der Europäischen Union, Kommentar*, München: C.H. Beck 2000, at 16. Accordingly, Article 151, paragraph 2 EC limits the cultural competence of the Community to promoting the co-operation of the Member States and supporting and complementing the activities of the Member States.

³⁴ Council Decision 2000/821/EC of 20 December 2000 on the implementation of a programme to encourage the development, distribution and promotion of European audio-visual works (MEDIA PLUS - development, distribution and promotion) (2001-2005), OJ L 13/34 of 17 January 2001.

³⁵ Decision No. 163/2001/EC of the European Parliament and of the Council, of 19 January 2001, on the implementation of a training programme for professionals in the European audio-visual programme industry (MEDIA training) (2001-2005), OJ L 26/1 of 27 January 2001.

³⁶ See EUROPEAN COMMISSION, Principles and guidelines for the audio-visual policy of the Community in the digital age. Announcement of the Commission to the Council, to the European Parliament, to the Economic and Social Committee and to the Committee of the Regions, COM (1999) 657, final, 14.12.1999, at 22 ff.

³⁷ In May 2001, the establishment of an investment fund aiming at the promotion of risk capital for the cinema film production was agreed upon. See EUROPEAN COMMISSION Press Release IP/01/717 of 18 May 2001. The European Investment Bank disposes of 500 million EUR to grant long-term loans to specialised banks intending to become committed to the production of big pan-European film projects.

Central and Eastern Europe, as well as to the Parties to the Council of Europe's Convention on Transfrontier Television.³⁸

b) The Council of Europe

Eurimages is a fund established by the Council of Europe which primarily promotes the co-production in Europe.³⁹ In addition to production, Eurimages on a modest scale also supports film distributors as well as cinemas, restricting this aid to those States which do not already take part in EC's Media Programme.⁴⁰ Eurimages may support the financing of a film with a repayable loan on the condition that the film in question is a co-production in which at least two parties from two different contracting States participate.⁴¹ Furthermore, the project is required to be European. In the appendix to the European Convention on Cinematographic Co-production, there is a schedule of European elements defining which cinematographic works qualify as European.⁴² Economically promising and culturally interesting projects have to be pre-financed to different extents: While the financing of the former has to be secured by 75 percent, Eurimages requests coverage of only 50 percent for the latter. There is a general upper limit for promotion funds which does not apply to culturally interesting projects; in return, proof of the participation of a public institution for support must be produced.

³⁸ See RESS/UKROW, *supra*, note 33, at paragraph 127.

³⁹ COUNCIL OF EUROPE, Resolution (88)15 of 26 October 1988.

⁴⁰ Thus the scope of this section of support is restricted to Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Turkey and Switzerland. See Article 1.2.1 of the Regulations (of the Board of Management) concerning distribution support for full length feature films, animation and documentaries, at: www.culture.coe.fr/Eurimages/eng/eurprof.dis.html (29 November 2001), and Article 1 of the Regulations (of the Board of Management) concerning assistance to cinemas, at: www.culture.coe.fr/Eurimages/eng/eurprof.sal.html (29 November 2001).

⁴¹ COUNCIL OF EUROPE, Resolution (88)15 of 26 October 1988.

⁴² COUNCIL OF EUROPE, European Convention on Cinematographic Co-production, 2 October 1992, European Treaties, ETS No. 147. On this schedule, see in more detail Section 5.3.2 *infra*.

4.2. Restrictions of Market Access and National Treatment

4.2.1. *Import Quotas*

The general prohibition of quantitative import restrictions of Article XI GATT⁴³ also applies to the imposition of quotas in the film industry. Before the WTO Agreement came into effect, a grandfather-exception applied for Switzerland. If, at the moment of this country's accession to the GATT of 1947, its national law already intended the imposition of import quotas, then the requirements of part II GATT acknowledged this legal situation.⁴⁴ The WTO law put an end to the grandfather-rights of the GATT of 1947, so that they now cannot be appealed to any longer.⁴⁵

4.2.2. *Duties*

Duties coming into effect when goods are crossing national borders are of secondary importance for the audiovisual sector. However, making use of customs duties in order to achieve cultural policy objectives, is not excluded by the GATT. Recent decisions of the WTO Dispute Settlement Body show that the national governments are given a certain leeway in specifying customs tariffs, provided that they comply with commitments in tariff schedules and are imposed in a non-discriminatory manner.⁴⁶

4.2.3. *Exhibition Quotas*

a) Cinema Screen Quotas

Regulations which reserve a certain share of the total screen time in cinemas to domestic works fall into the category of measures restricting the access to the domestic film market. Such screen quotas for cinemas are allowed by Article IV of the GATT and exist in France, Mexico, South Korea and Spain, to mention a few. The South Korean quotas and their compatibility with the GATT will be examined in detail in Section 5.1.

⁴³ See *infra*, Section 5.1.

⁴⁴ See THOMAS COTTIER, «Die völkerrechtlichen Rahmenbedingungen der Filmförderung in der neuen Welthandelsorganisation WTO-GATT» (1994) *Zeitschrift für Urheber- und Medienrecht* 749, at 751.

⁴⁵ See *loc. cit.*, note 44.

⁴⁶ See WTO Appellate Body Report, European Communities - Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (5 June 1998), at paragraphs 74-99.

b) Television Quotas

Measures aiming at the promotion of programmes of a certain national origin exist, for instance, in the EC,⁴⁷ in the Council of Europe,⁴⁸ in Australia,⁴⁹ Canada⁵⁰ and France.⁵¹ Their effect is to restrict market access for other foreign TV programmes which are not subject to the privilege.

Taking a closer look at the cultural quotas set forth in the EC Directive «Television Without Frontiers» (TV Directive),⁵² one has to distinguish two provisions: Article 4 requests broadcasters to reserve for European works a

⁴⁷ See Arts. 4 and 5 of Directive 97/36/EC of the European Parliament and the Council, amending Council Directive (89/552/EEC) of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202/60 of 30 July 1997.

⁴⁸ COUNCIL OF EUROPE, European Convention on Transfrontier Television (ECTT) of 5 May 1989, European Treaties, ETS No. 132, text amended according to the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002. The relevant requirements of the ECTT concerning the cultural quotas (Article 10 in conjunction with Article 2 Letter e) have a weaker effect, though, due to the Council of Europe not disposing of a monitoring procedure comparable to the one the Commission of the EC successfully uses to implement its Directive.

⁴⁹ The Australian Content Standard was defined by the Australian Broadcasting Authority on 15 December 1995. Regulation 9 in part 5 stipulates that a 55 percent proportion of all programmes being broadcast between 6 a.m. and midnight must be of Australian origin. A second quota obliges the pay-TV operators oriented towards fictional programmes to devote 10 percent of their programme budget for new, domestically produced contents. The industry criticises these directives for being too narrow, particularly since only fictional programmes belong to them, pure entertainment shows, however, do not. See also *Variety* of 1 May 2000.

⁵⁰ For further information on the fostering of Canadian contents, see CANADIAN INDUSTRIES CULTURAL ADVISORY GROUP ON INTERNATIONAL TRADE, *supra*, note 28, at 10-13.

⁵¹ France requires that a minimum proportion of 60 percent of all programmes broadcast between 6 p.m. and 9 p.m. (prime time) are of European origin. See JOHN DAVID DONALDSON, «Television Without Frontiers: The Continuing Tension between Liberal Free Trade and European Cultural Integrity» (1996) 20 *Fordham International Law Journal*, 90, at 103, footnote 66.

⁵² Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 298/23), as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202/60).

majority proportion of their transmission time in «fiction» programmes.⁵³ According to Article 5, TV Directive, broadcasters should reserve at least 10 percent of their transmission time in «fiction» programmes or, alternately, at the discretion of the Member State, at least 10 percent of their programming budget for European works created by producers independent from broadcasters. The difference between these two quotas lies in the fact that the former aims at enlarging the diffusion of European works, whereas the latter wants to further the production of European works on the condition that producers are independent from broadcasters.⁵⁴ Article 6, TV Directive, defines European works mainly as programming produced in the EU or in European third States, parties to the European Convention on Transfrontier Television (ECTT) of the Council of Europe. According to Paragraph 2 of the same Article, these works are such mainly made with the participation of authors and workers residing in one or more European States, provided that they comply with one of the following three requirements:

- they are made by one or more producers established in one or more of those States, or
- production of the works is supervised and actually controlled by one or more producers established in one or more of those States, or
- the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

Paragraph 5 provides furthermore that works which are not European works (in the sense explained *supra*), but made mainly by authors and workers residing in one or more Member States, shall be considered to be European works to the extent corresponding to the proportion of the contribution of Community co-producers to the total production costs.

Both quotas shall be respected «where practicable». Although they are not formulated in a legally binding way, they are in fact binding due to an obligation of Member States to report on a biennial basis to the Commission on their observation of Articles 4 and 5 and to give the reasons for possible

⁵³ More precisely, Articles 4 and 5 TV Directive require to observe the quotas in all programmes, excluding «news, sports events, games, advertising, teletext services and teleshopping» .

⁵⁴ The term «production», used in conjunction with cinematographic works, has a specific meaning. Both raising the funds necessary for the financing of the project and the creative function of initiating, controlling and supervising the whole process of the film production are thereby understood.

deviations. In particular, this report has to contain a statistical overview from which it can be followed to what extent the quota was respected. The Commission then informs the rest of the Member States as well as the European Parliament on these reports. If necessary, the Commission is obliged to enforce Articles 4 and 5, TV Directive, by means of a complaint to the European Court of Justice.

The Motion Picture Association of America (MPAA) representing the export interests of the US-American entertainment industry criticises these quotas and considers them a tool of protectionism. According to the MPAA, the cultural objectives are only used as a pretext and, strictly speaking, the quotas mainly serve the purpose of protecting the economic interests of domestic producers. This criticism, spreading not only from the ranks of US-American,⁵⁵ but also of European authors,⁵⁶ is not completely unjustified. With regard to the principle of non-discrimination of the GATS, especially Article 6 Paragraph 5, TV Directive, appears to be problematic: Assume a film with a total duration of 100 minutes is made by an author residing in Italy and mainly with workers residing in Italy, France, Spain and the United Kingdom. If this movie is financed to 20 percent by a producer established or residing in Italy and to 80 percent by US capital it is considered, according to Paragraph 5, to be a «European work» to the extent of 20 minutes. If, however, 60 percent of the total co-production costs are financed by a producer established or residing in Italy, the entire work counts as a European work, provided that in the sense of Paragraph 2 (c) the co-production is not controlled by one or more producers established or residing outside Europe. This example shows how these rules discriminate against service suppliers who are not established or residing in Europe; as - according to these provisions - for European producers it is easier than for foreign ones to have their films recognised as «European works», foreign service suppliers are treated less favourably in the meaning of Article XVII GATS.⁵⁷ Moreover, the criteria operating in Articles 4 to 6, TV Directive, do not focus on subjects, themes or other elements which might serve as a specific support for the protection of European cultural values, but merely on the national origin of

⁵⁵ See DONALDSON, *supra*, note 51, at 154.

⁵⁶ For a criticism of the quotas from a European point of view, see BERENT JAN DRIJBER, «The Revised Television Without Frontiers Directive: Is It Fit for the Next Century?» (1999) 36 *Common Market Law Review*, 87, at 117 ff.

⁵⁷ This applies, provided that the sector is scheduled in the list of commitments and no limitations are taken. For an explanation of the functioning of the GATS schedules, see Section 5.3 *infra*.

the producers, authors and workers. The quotas of the TV Directive appear not to support cultural policy objectives but economic goals or, at least, there is no clear criterion according to which such a distinction could be made. In this line of reasoning, the 20th recital to the TV Directive states clearly that the first priority of the quotas is to generate economies of scale:

«It is, therefore, necessary to promote markets of sufficient size for television productions in the Member States to recover necessary investments not only by establishing common rules opening up national markets but also by envisaging for European productions where practicable and by appropriate means a majority proportion in television programmes of all Member States».⁵⁸

In this context, a comparison with the Australian practice concerning the cultural quotas of the Australian Content Standard may be of interest. In a judgement of 28 April 1998, the Australian High Court interpreted the term Australian content of programmes in such a way as to relate it more closely to criteria specific to culture.⁵⁹ Australian content is assumed primarily in those cases where the topic of the transmitted programme reflects the Australian identity, character or culture. It is only of secondary importance whether the actors, authors or producers of the programme are Australian nationals.

4.2.4. Dubbing Restrictions

Regulations restricting the access to the domestic market include special limitations on the dubbing of foreign films which can be found in the law of various countries:

While Mexico prohibits the dubbing of all foreign films, a Spanish Film Act provided for a dubbing licence until the nineties. As Spanish public preference is, to a large extent, for US films when they were dubbed into one of the official languages of Spain, this instrument served to limit market access of Hollywood movies. Furthermore, film distributors were entitled to a maximum of four licences for dubbing films originating in third countries for each Spanish film for which they demonstrated to have concluded a distribution contract. The Federación de Distribuidores Cinematográficos (Fedicine) filed a complaint at the ECJ against these measures. The Spanish government stated in its defence that the regulation in question aimed at the

⁵⁸ 20th recital of the TV Directive 89/552/EEC.

⁵⁹ See judgement of the High Court of Australia, *Project Blue Sky v. Australian Broadcasting Authority* (1998) H.C.A 28, 28 April 1998, S41/1997, available at: www.austlii.edu.au/au/cases (10 October 2001).

cultural objective of protecting the domestic film production. The ECJ rejected this argument on the grounds that distribution of domestic films was treated in a privileged manner taking into consideration neither content nor quality. The ECJ therefore concluded that the measure was not backed by legitimate cultural objectives.⁶⁰

4.3. Licensing Requirements

Measures restricting access to radio or television transmissions by means of licence requirements or similar regulatory barriers are also widespread. Several States make the granting of licences to foreign broadcasters conditional upon the domestic operators being granted a reciprocal right in the country in question. Switzerland, for example, made a reservation of that kind in its exemption list to Article II GATS.⁶¹

The Canadian Radiotelevision and Telecommunications Commission's (CRTC) practice of granting licences led to disputes between Canada and the USA which were settled outside the WTO.⁶² In 1994, the CRTC licensed a series of new Canadian pay and speciality services. While the operator New Country Network (NCN) received a transmission permit, the US-American speciality channel Country Music Television (CMT) was removed from the list of eligible services in spite of CMT's presence in the Canadian market for a period of more than 10 years. At first, according to Paragraph 301 of the US-American Trade Act, the United States Trade Representative (USTR) opened a proceeding against the decision at the Federal Court of Canada, but then halted it when NCN and CMT merged and NCN brought itself to grant CMT a 20 percent share of its stock capital.⁶³

⁶⁰ See ECJ Case C-17/92, *Federación de Distribuidores Cinematográficos v. Estado Español*, (1993) E.C.R. I-2239.

⁶¹ See *infra*, Section 5.3.2.

⁶² For detailed information on this case, see ANDREW M. CARLSON, «The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports» (1997) 6 *Minnesota Journal of Global Trade*, 585, at 586 ff., and AMY E. LEHMANN, «The Canadian Cultural Exemption Clause and the Fight to Maintain an Identity» (1997) 23 *Syracuse Journal of International Law and Commerce*, 187, at 207 ff.

⁶³ 20 percent are the maximum amount of foreign investments permitted by the Investment Canada Act of 1985.

4.4. Taxes

There are numerous forms of taxation of audiovisual works which differ considerably: In France, for instance, the revenues from the sale of cinema tickets,⁶⁴ the incomes of broadcasting operators⁶⁵ as well as the revenues from the sale of video tapes⁶⁶ are subject to tax. Most of the French film promotion organised through the Centre national de la cinématographie (CNC) is financed by these proceeds. The German Filmförderungsanstalt des Bundes (FFA), the agency responsible for the federal film promotion, finances its involvement in the German cinema in a similar way. In Brazil a new audiovisual law was introduced which rewards investments in the productions area by granting a 100 per cent tax-exemption. On the basis of this law, since 1995 more than 180 million Dollars have been flowing into 70 Brazilian production projects.⁶⁷ To conclude this exemplifying list, even Italy grants a deduction from the cinema tax to those cinema operators who exhibit domestic films.

4.4.1. *Taxes on Revenues of Cinemas, Television Operators and Video Dealers*

The taxation of cinema revenues is an instrument for financing the domestic film production which is practised in several European countries. In this very way, Sweden siphons off a 10 percent share of the gross box-office takings to foster the Swedish Film Institute.⁶⁸ The Institute uses these funds to support

⁶⁴ For more information on the French tax on cinema tickets see Section 4.4.1.

⁶⁵ This tax was introduced in 1986. 5.5 percent of the total incomes (including licence fees and income from advertising) of those broadcasters having a French licence must be paid to the tax authorities. In 1996, a sum of 257 million EUR was accumulated from this source. The Centre national de la cinématographie (CNC) spent 62 percent thereof financing selected television programmes and 38 percent on producing French cinema films. In a similar way, Switzerland levies a 2 percent licence tax on the net incomes of private broadcasters and spends these funds on the promotion of the Swiss film industry.

⁶⁶ Since 1993 a 2 percent tax is charged on sales and renting of recorded video tapes which have contributed a total of 11.5 million EUR to the CNC's budget. The CNC spends 15 percent of this sum on financing movies and 85 percent on the production of television programmes.

⁶⁷ See PATRICK STRAUMANN, «Renaissance des brasilianischen Films? Positive Folgen des Audiovisions-Gesetzes» *Neue Zürcher Zeitung* of 20 April 2000.

⁶⁸ According to the Swedish Film Institute, the proceeds from the levy on cinema tickets amounted to about 12 million EUR in 2000. The legal basis for this financing may be found in Article 5 of the 2000 Film Agreement between the Swedish State, the film industry and the Swedish TV operators AB and TV 4 AB, which is valid from 1 January 2000 until 31 December 2004. Cinema operators are to remit their contributions

the production of Swedish films.⁶⁹ France has been imposing the Taxe Spéciale Additionnelle on cinema tickets since 1948 which makes cinema admissions more expensive by 11 percent. For 2001, the revenues generated by this tax were estimated to be 96.7 million EUR.⁷⁰ This cinema tax had been the main source for financing the activities of the CNC for a long period of time.⁷¹ But nowadays much more significance is attached to the Compte de soutien de l'industrie cinématographique et de l'industrie des programmes audiovisuels (COSIP) which has been existing since 1984. In 2001, approximately 118 million EUR flowed from this source to the CNC which is equivalent to 36 percent of the total revenues of the COSIP.⁷² The financial means of the COSIP are generated by television operators which are to remit an average of 5.5 percent of their annual incomes into this account. Finally, there is also a 2 percent tax burden imposed on the sale of video tapes for financing the CNC's activities. In Germany, too, a similar tax is levied. Paragraph 66 of the German film support act (FFG)⁷³ provides that the FFA is financed by contributions imposed on the annual revenues of cinema operators

equivalent to 10 percent of their gross box-office takings directly to the Swedish Film Institute (Article 7). Those operators refusing to agree to this commitment in writing will be excluded from the distribution (Article 8). For further information on this topic, see SWEDISH FILM INSTITUTE, at: www.sfi.se/eng/meng.htm (15 October 2001).

⁶⁹ According to Article 13, 2000 Film Agreement, the funds accruing to the Swedish Film Institute shall be used for subsidising the production of Swedish films (Article 14 et seq.) as well as the distribution and exhibition mainly of Swedish films in Sweden (Article 22 et seq.) and film-related cultural activities in Sweden (Article 29 et seq.). According to Article 4, a film is deemed to be Swedish if its producer is Swedish and if a substantial proportion of the actors or other performers involved are Swedish. A «Swedish producer» is defined as a natural person residing in Sweden or a legal person registered in Sweden. A film which does not have a Swedish producer in the above-mentioned sense may nevertheless be regarded as Swedish provided that at least 20 percent of its production costs are financed by Swedish capital and a substantial proportion of the actors or other performers involved are Swedish.

⁷⁰ See ZITZMANN, *supra*, note 26.

⁷¹ The CNC uses the funds at its disposal for financing a large number of various instruments promoting the activities of the domestic film industry mainly in the areas of production, distribution and exhibition. Although the CNC has the benefit of financial independence being an institution incorporated under public law, it is under the control of the Ministry for the Arts. The utmost responsibility for the centralist French film policy is taken by the Conseil National de la Cinématographie, the legal basis of which is Décret 83-1084 of 8 December 1983. The Minister for the Arts acts as president of this council.

⁷² See ZITZMANN, *supra*, note 26.

⁷³ *Gesetz über Massnahmen zur Förderung des deutschen Films* (FFG) of 6 August 1998, BGBl. I 2046.

(1.5 to 2 percent) and of video dealers (1.8 percent). According to Paragraph 67 FFG, further proceeds flow to the FFA from contributions of the private radio and television operators.

As a consequence of Hollywood's big share of the film market, the revenues used to fostering the domestic film production in the above countries are generated mainly by US-American works. Therefore an adequate question is whether a contribution which is generated from products originating in one country only is in compliance with the obligation of National Treatment. The WTO law differentiates between receiving public funds and spending them. The exemption to the principle of National Treatment, which is enshrined in Article III Paragraph 8 Letter b GATT gives expression to this principle: This provision exclusively exempts payments of subsidies which flow directly to domestic producers.⁷⁴ Thus, in *Canada - Periodicals* the Appellate Body held that no exception applies in cases where a discriminatory imposition of taxes is practiced:

«Indeed, an examination of the text, context and object and purpose of Article III: 8(b) suggests that it was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government».⁷⁵

Conversely, it follows from this that Article III Paragraph 8 Letter b GATT cannot be appealed to if the discriminatory imposition of a tax is challenged. This may be the reason why Turkey - in the dispute concerning the taxation of foreign film revenues as discussed in Section 3.2 - was not able to neutralize the United States' contention of having violated Article III GATT. In contrast to the Turkish cinema tax, the taxes as they apply in Sweden, France and Germany, are in accordance with Article III GATT from the outset due to being imposed on all cinema admissions without differentiating between domestic and foreign films. From the perspective of the GATS, discriminatory cinema taxes, if any, are permissible, provided that the country in question has not accepted any specific commitment in its schedule.⁷⁶ With a view to ongoing negotiations such measures are subject to potential requests for further liberalisation.

⁷⁴ See WTO Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (30 June 1997), at 23.

⁷⁵ See *supra*, note 74, at 24.

⁷⁶ Neither Turkey nor Sweden, France or Germany accepted any commitments in the audiovisual area. For an explanation of the functioning of the GATS schedules, see Section 5.3 *infra*.

4.4.2. *Tax Cuts for Domestic Industries*

Legislation in Canada⁷⁷ and in several European States provides for tax cuts for domestic film production. In the United Kingdom, for instance, British film projects in the production phase are allowed to deduct a maximum amount of 15 million GBP of the production costs from their taxable income. Completed films are subject to 100 per cent tax-exempt.⁷⁸

As explained in Section 4.4.1., discriminatory tax reductions cannot be justified under Article III Paragraph 8 Letter b GATT, because they are related to the imposition of a tax. It is rather surprising that so far no proceedings have been initiated in connection with tax reductions for domestic film projects.

4.5. **Copyright-Based Cultural Funds**⁷⁹

Copyright laws in several European countries (and elsewhere, for example in Canada) guarantee secondary use rights such as a private copying right⁸⁰ or a re-transmission right.⁸¹ The revenues from these secondary use rights are often administered exclusively by one collecting society, authorised by the government.⁸² Such secondary rights schemes apply to national right holders as well as to foreign ones. Consequently, foreign right holders, in order to be compensated for their works which subsist in these countries, are forced to have their secondary use rights administrated by these collecting societies and

⁷⁷ See IVAN BERNIER, «Cultural Goods and Services in International Trade Law» in DENNIS BROWNE, Ed., *The Culture/Trade Quandry: Canada's Policy Options*, Ottawa: Centre for Trade Policy and Law 1998, at 118.

⁷⁸ The legal basis of tax relief for British film projects is the Finance (No. 2) Act of 1997; see BRITISH FILM INSTITUTE, *supra*, note 25, at 252.

⁷⁹ Parts of this section are taken from MARY FOOTER/CHRISTOPH Beat GRABER, «Trade Liberalization and Cultural Policy» (2000) 3 *Journal of International Economic Law*, 115, at 127 f.

⁸⁰ As it is almost impossible to prevent private copying, many countries have introduced a private copying levy on blank audio and/or video recording media (audio and video cassettes and CD-ROMs), sometimes known as a «blank levy». See for a presentation of the rules for compensation of private copying under Swiss copyright law, CHRISTOPH GASSER, «Der Eigengebrauch im Urheberrecht», Bern: Stämpfli 1998, at 145-176.

⁸¹ See for an overview on the different schemes for collective administration of secondary use rights, WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Collective Administration of Copyright and Neighbouring Rights*, Geneva: WIPO 1990.

⁸² See FOOTER/GRABER, *supra*, note 79, at 128.

to pay the relevant administration fee.⁸³ The collecting societies then reserve a total sum of the revenues collected for their own cultural funds in order to subsidise projects involving local audiovisual production. Under French law, for instance, collecting societies have to use 25 percent of their remuneration for private copies (including void video cassettes) for the promotion of local artists or artistic production.⁸⁴ Under Austrian law even less than 50 percent of the proceeds go to the individual right holders.⁸⁵

Since Hollywood movies generate the biggest share of the revenues flowing into the cultural funds, it does not come as a surprise that the United States repeatedly alleged that these schemes of mandatory collective administration violate the National Treatment obligation contained in Article 3, TRIPs.⁸⁶ Although this was one of the contentious issues of the GATT Uruguay Round,⁸⁷ the US finally refrained from its claim for a just share in the benefits of such schemes in order not to endanger the conclusion of the negotiations. The US entertainment industry, however, was bitterly disappointed by this result of the Uruguay Round and not willing to resign itself to this situation.⁸⁸

Thus, it seems to be evident that in the process of the Doha negotiations the United States will sooner or later request again the principle of National Treatment to be applied to the spending of revenues from copying levies on

⁸³ DANIEL GERVAIS, *The TRIPs Agreement. Drafting History and Analysis*, London: Sweet & Maxwell 1998, at 74 ff.

⁸⁴ See Article L 321-9 of the French Code de la propriété intellectuelle of 1 July 1992. See also FOOTER/GRABER, *supra*, note 79, at 128. The copying levy on blank audiovisual recording media was extended to digital data carriers such as CD or DVD blanks by means of a revision of the French copyright law which came into force on 22 January 2001. This tax increases the price for a recordable blank DVD by 24.75 FFR. For the situation in Canada, see CANADIAN INDUSTRIES CULTURAL ADVISORY GROUP ON INTERNATIONAL TRADE, *supra*, note 28, at 16.

⁸⁵ See WIPO, *supra*, note 81, at 50.

⁸⁶ See BERNIER, *supra*, note 77, at 142 f.

⁸⁷ See TERENCE P. STEWART, Ed., *The GATT Uruguay Round. A Negotiating History (1986-1994)*, volume IV, *The End Game (Part I)*, The Hague, London, Boston: Kluwer 1999, 512; GERVAIS, *supra*, note 83, at 74 ff.

⁸⁸ The International Intellectual Property Alliance representing the interests of the American entertainment industry commented on the conclusion of these negotiations as follows: «The result is that, on the intellectual property issues, we are left with an inadequate national treatment provision which preserves in part the ability of the Europeans and others to discriminate against our works, and unless we are able to find a remedy in other forums, will cause continued losses to the United States.» Quoted in STEWART, *supra*, note 87, at 527, footnote 476.

blank audiovisual recording media.⁸⁹ The European and Canadian collecting societies, however, consider the retention of these revenues in favour of the national production a justified compensation for the insufficient protection of foreign right holders in the US.⁹⁰ In view of the substantial market share of US-American films, the provision of National Treatment in the Berne Convention (which has been integrated by reference into Art. 3, TRIPs) leads to the consequence that European collecting societies have to pass on by far the biggest part of their proceeds to the big Hollywood studios. Since collecting societies do not exist for moving pictures in the United States, remunerations are flowing only in one direction. European and Canadian collecting societies therefore take the view that they are justified by the principle of reciprocity to restrict the rights of US authors since the United States does not grant an equivalent right concerning the remuneration of private copying.⁹¹ This argumentation stands on shaky ground, however, since the Berne Convention does not provide for exemptions to the principle of National Treatment.⁹²

4.6. Ownership Rules

Measures restricting foreign investments or reserving the ownership on certain companies to its own nationals can be found in numerous legal systems. In the broadcasting area, this applies, for instance, to Australia,⁹³ Canada,⁹⁴ Austria⁹⁵

⁸⁹ Even the WIPO considers the non-observance of National Treatment in the case of using the revenues from copying levies on blank video tapes a reason for conflict in future international negotiations on copyright. See WIPO, *supra*, note 81, at 52 f.

⁹⁰ See CANADIAN INDUSTRIES CULTURAL ADVISORY GROUP ON INTERNATIONAL TRADE, *supra*, note 28, at 17.

⁹¹ See *supra*, note 28, at 17.

⁹² The reservation of the principle of reciprocity in the Berne Convention is restricted to works of applied art (Article 2 Paragraph 7, Berne Convention), the term of protection (Article 7 Paragraph 8) and the *droit de suite* (Article 14^{ter} Paragraph 2). See ALESCH STAEBELIN, *Das TRIPs-Abkommen*, Berne: Stämpfli 1999, at 45 f.

⁹³ In 1997, the Australian Broadcasting Authority and Australia's treasurer ordered the Canadian broadcaster CanWest Global to partially divest its shares in Australia's Ten network in order to comply with ownership restrictions for broadcasting undertakings. Under Australian law, the maximum foreign investment allowed in Australian broadcasting companies is 15 percent. See www.infoexport.gc.ca/trade-culture, (20.11.2001).

⁹⁴ See the case of NCM and CMT already mentioned in Section 4.3.

⁹⁵ In accordance with Article 5, Paragraph 1 of the Austrian Cable and Satellite Broadcasting Act of 1 July 1997, broadcasting operators transmitting their programmes via cable or satellite must be Austrian citizens as regards natural persons and have their registered office in Austria as regards legal persons respectively. The area of terrestrial

and the United Kingdom.⁹⁶ France restricts the shares in broadcasting companies to a maximum of 49 percent without making this conditional upon the owner's nationality.⁹⁷ The Swiss Federal Council changed its licensing practice in February 1998 granting equal treatment to foreign and Swiss applicants for transmission licences, provided that the country of establishment of the foreign broadcasting station accords the same rights to Swiss petitioners on a reciprocal basis.⁹⁸

In US law, there is a complex of regulations prescribing the upper limits of individual ownership in broadcasting corporations.⁹⁹ According to the regulations enacted by the Federal Communications Commission (FCC), based on Sections 308 to 310 Communications Act of 1934,¹⁰⁰ the share of one individual television operator in the nation-wide broadcasting market, for

broadcasting at regional level is still monopolised by the ORF. The European Court of Human Rights, in its verdict of 21 September 2000 in the case of *Tele 1*, declared this intervention in Article 10 European Convention on Human Rights (ECHR) admissible provided that the transition to digital technologies had not yet taken place and therefore competition was not yet possible. See ECHR judgement of 21 September 2000 in the case of *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, Application Number 00032240/96, available at: <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=&ActionHtml&Notice=1&NoticeMode=2&RelatedMode=0> (15.12.2001). In the meantime, the Austrian government submitted a draft law on the extensive liberalisation of the broadcasting sector. See WALTER DILLENZ, «Elektronische Medien: Entwicklungsschub in Österreich» *medialex* 2/2001, at 64 f.

⁹⁶ See THOMAS GIBBONS, «Aspiring to Pluralism: The Constraints of Public Broadcasting Values on the De-Regulation of British Media Ownership» (1998) 16 *Cardozo Arts & Entertainment Law Journal*, 475-500, and GILLIAN DOYLE, «Regulation of Media Ownership and Pluralism in Europe: Can the European Union Take Us Forward?» (1998) 16 *Cardozo Arts & Entertainment Law Journal*, 451-473. The draft of the new British communications bill with liberalised ownership rules is available at: www.communicationsbill.gov.uk/ (15 May 2002). According to chapter 9, remaining restrictions apply to owners of more than 20% of the national newspaper market, who will not be allowed to own ITV, though they can own Channel 5, a small commercial broadcaster. For a comment on the draft, see *The Economist*, 11 May 2002, at 37-38.

⁹⁷ See ALISON JAMES/ADAM DAWTREY, «Oui are the World» *Variety* of 19 June 2000, at 1, 85.

⁹⁸ For illustration, see Switzerland - List of Article II MFN Exemptions, Audiovisual Services (GATS/EL/83), reprinted in Section 5.3.2 *infra*. In pertinent part, the entry states that «concessions for the operation of radio or television broadcast stations may be granted, normally on the basis of bilateral agreements» .

⁹⁹ The FCC regulations are available at: www.fcc.gov/resources.html (11.10.2001).

¹⁰⁰ 47 U.S.C.A.

instance, must not amount to more than 35 per cent.¹⁰¹ Further restrictions refer to the local radio or television operator ownership as well as to daily newspaper/broadcasting cross-ownership and cable operators/television cross-ownership respectively. The safeguarding of diversity and competition in the broadcasting sector is considered to be the purpose of these regulations.¹⁰² The share of foreign companies in American broadcasting operators is specially regulated and limited in several ways by Section 310 of the Communications Act of 1934: As a principle, it is not possible for foreign natural or legal persons to be granted a licence.¹⁰³ Although foreign investors are allowed to possess a share in US companies holding such licence, no more than one-fifth of the capital stock may be owned or voted by aliens.¹⁰⁴ Furthermore, it is provided that a possible parent company of the US-American licence holder must not be controlled by foreign capital by more than 25 percent.¹⁰⁵ The Communications Act leaves it to the discretion of the FCC, however, to decide whether the public interest will be served by a foreign investment or not. If the FCC gives an affirmative answer to this question it is authorised to admit a vertical ownership which would be inadmissible per se.¹⁰⁶ This regulation was effective in 1995 when the Australian News Corporation controlled by Rupert Murdoch took over Fox Broadcasting Network. The FCC decided that the take-over which did not comply with Section 310 (b) (4) Communications Act was justified by means of public interest.¹⁰⁷

¹⁰¹ In 1996, the US Congress increased the admissible market share from 25 to 35 percent. In spite of several operators pressing for a further increase of this threshold, the FCC refrained from an amendment in the context of its ordinary review of ownership rules in June 2000. See FEDERAL COMMUNICATIONS COMMISSION, *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, 1998, Biennial Regulatory Review Report, FCC 00-191, 20 June 2000; CHRISTOPHER STERN, «Nets Push to Remove National Ownership Cap» *Variety* of 20 September 1999, at 6.

¹⁰² See FEDERAL COMMUNICATIONS COMMISSION, *Biennial Regulatory Review 2000*, Staff Report of 18 September 2000, 144; HARVEY L. ZUCKMAN, et al., *Modern Communication Law*, St. Paul: West Group 1999, at 1196 f.

¹⁰³ See Section 310 (b) (1 and 2) Communications Act.

¹⁰⁴ See Section 310 (b) (3) Communications Act. The USA has entered this 20 percent restriction of foreign investment in broadcasting operators on its special commitment list.

¹⁰⁵ See Section 310 (b) (4) Communications Act.

¹⁰⁶ See ZUCKMAN et al., *supra*, note 102, at 1209.

¹⁰⁷ See *loc. cit.*, at 1209.

As regards compliance of such ownership rules with the WTO law, it can generally be stated that these are admissible, provided that the country in question did not accept any relevant obligations in its GATS schedules of commitments.¹⁰⁸ In any case such measures are subject to potential requests in negotiations aiming at progressive liberalisation of the services sector.

4.7. Agreements on Cinematographic Co-production

Numerous European States, but also countries such as Australia, Canada or Israel, concluded bilateral treaties on supporting the cinematographic co-production. In the context of the Council of Europe, the European Convention on Cinematographic Co-production (ECCC) is the relevant act in force serving as a multilateral instrument for financing larger cinematographic projects. As this type of instruments accords preferential treatment to partners of certain countries exclusively, the question arises whether this is a violation of the Most-Favoured Nation Obligation. Further observations on this latter question will be extensively provided in Section 5.3.2.

4.8. Competition Rules Protecting Free Access to Information and Media Pluralism

The safeguarding of a diverse and high quality supply of programmes is an objective of both the film and television areas with an increasingly great significance to be attached to in view of ongoing market concentrations. To this end, the legislation of several WTO Members provides for a series of measures all of which ultimately serve to safeguard competition in the media sector in cases where competition law per se is not sufficient. Competition law intends to prevent the emergence, and prohibits the abuse of, a dominant position as well as agreements between undertakings which may distort competition. The general competition law rules cater for creating and sustaining markets with free access and multiple players on them. Nevertheless, since such disciplines can only exert an influence on economic competition, the experience of liberalised broadcasting markets shows that the existence of a multitude of legally independent broadcasting operators alone does not guarantee a high quality supply of programmes expressing a variety of social, political, cultural and ideological views.

¹⁰⁸ This is the case for the United States, see Sector Specific Commitments United States (GATS/SC/90). For an explanation of the functioning of the GATS schedules, see Section 5.3 *infra*.

4.8.1. Access to Major Events

On the European level, two basic types of rules ensuring the access of the public to events of major importance are operative. The first type of rules is represented by Article 9 of the European Convention on Transfrontier Television (ECTT) of the Council of Europe recommending to its contracting parties the introduction of a right to short reporting. This provision aims at avoiding the right of the public to information being undermined due to the exercise by a broadcaster of exclusive rights for the transmission of a major public event and the exclusion of other operators. This right of access is regulated, for instance, in Paragraph 5 of the German Rundfunkstaatsvertrag¹⁰⁹ or in Article 7 of the Swiss Radio- und Fernsehgesetz.¹¹⁰ The second type of rules is the lists embodied both in Article 3a of the EC Television Directive¹¹¹ and in Article 9^{bis} of the ECCT. Both regulations aim at ensuring that important events are accessible to the broad public on free TV. To this end, Member States and Contracting States respectively are authorised to take measures to prevent the less affluent audience from being excluded from consumption because events of major importance are only available on pay-TV. The operators are obliged to respect the law of the receiving State which prescribes what qualifies as an event of major importance in the country in question.¹¹² For safeguarding transparency both regimes oblige the individual State, in case it makes use of such access rights, to draw up a list of events which are considered to be of major importance for the society and to determine the measures taken. Once a year, the authorised committees publish a consolidated list in order to avoid differences between the European Community provisions and the rules of the ECTT.¹¹³

Both the right to short reporting and the lists for major events may be associated with restrictions on exclusive rights of TV companies. As such restrictions apply in a non-discriminatory manner to both domestic and foreign programme operators, they give no cause for concern as regards the

¹⁰⁹ See HERMANN WALDHAUSER, *Die Fernsehrechte des Sportveranstalters*, Berlin: Duncker & Humblot 1999, at 297 ff.

¹¹⁰ See OLIVER SIDLER, *Exklusivberichterstattung über Sportveranstaltungen im Rundfunk*, Berne: Stämpfli 1995.

¹¹¹ See DRIJBER, *supra*, note 56, at 117 ff.

¹¹² See *loc.cit.*, at 119.

¹¹³ See Report of the EC Commission of 26 July 2001, with an overview on the lists of Denmark, Italy, the United Kingdom and Germany, OJ C 208/25, 26 July 2001.

WTO law. As far as copyrights are restricted, these limitations do not go further than allowed by Article 13 TRIPs.

4.8.2. Competition Measures against Media Concentration

Several States apply special measures to combat the concentration of media and to protect media diversity respectively. While the EC - in spite of ten years of effort - still has not succeeded in agreeing on a directive against media concentration,¹¹⁴ various European countries have enacted appropriate measures. The German model, which takes account of a company's share in the viewer market,¹¹⁵ or the complicated British schedule of points, including rules concerning cross-media ownership, are among the better-known European examples.¹¹⁶

Such measures should not get into conflict with the WTO law because Members enjoy a very large leeway as regards regulation of competition.¹¹⁷

4.8.3. Distribution Privileges

a) Must-carry Rules

Cable operators in many countries are limited in their freedom of transmission by provisions of the broadcasting law which provide for obligations to transmit or re-transmit certain programmes.¹¹⁸

¹¹⁴ At the level of the EC, the last attempt was made in summer 2000. For an overview on regulatory instruments for combating media concentration existing in the EC Member States and corresponding unsuccessful initiatives of the EC Commission, see ALISON HARCOURT, «The European Commission and Regulation of the Media Industry» (1998) 16 *Cardozo Arts & Entertainment Law Journal*, 425-449, and DOYLE, *supra*, note 96, at 468-472.

¹¹⁵ See MARTIN STOCK, «Konzentrationskontrolle in Deutschland nach der Neufassung des Rundfunkstaatsvertrags (1996)» in STOCK/RÖPER/HOLZNAGEL, Eds., *Medienmarkt und Meinungsmacht. Zur Neuregelung der Konzentrationskontrolle in Deutschland und Grossbritannien*, Berlin: Springer 1997, at 1-70; FRANZ HOFFET/THOMAS HOEHN, «Zusammenschlusskontrolle im Medienbereich, Anmerkungen zur bisherigen Praxis der Schweizerischen Wettbewerbskommission» (1999) *sic!*, at 232 ff.

¹¹⁶ GIBBONS, *supra*, note 96, at 489-500; BERND HOLZNAGEL/ANDREAS GRÜNWARD, «Britisches Medienkonzentrationsrecht im Wandel» in STOCK/RÖPER/HOLZNAGEL, *supra*, note 115, at 109-159.

¹¹⁷ See COTTIER, *supra*, note 44, at 752.

¹¹⁸ For a detailed assessment of duties to transmit and retransmit under US-American, British and Canadian law, see WOLFGANG HOFFMANN-RIEM, *Regulating Media. The Licensing and Supervision of Broadcasting in Six Countries*, New York/London: Guilford Press 1996, at 49 f., 76, 211 f., 295.

In order to give an example we take a closer look at the Swiss Broadcasting Act (Radio- und Fernsehgesetz, RTVG). Based on Article 47 RTVG, cable operators may be obliged by the Federal Office of Communication (OFCOM) to transmit certain Swiss programmes. A licensed operator whose programmes are not being transmitted wirelessly and who wishes its programme to be distributed by the means of the cable network is asked to submit a request to OFCOM. The agency may oblige the cable operator to make transmission capacity available (Article 47 Paragraph 1 Letter b RTVG) provided that the cable network does not dispose of sufficient capacity for all applicants and the operator's programme contributes to the cultural policy mandate enshrined in Article 3 RTVG. In accordance with Article 47 Paragraph 2 RTVG, the OFCOM may, by way of exception, allow the cable operator to interrupt the retransmission of a foreign programme.

The regulation according to Article 47 Paragraph 2 RTVG raises the question of a possible conflict with the WTO principle of non-discrimination. The OFCOM takes the view that this regulation does not have a discriminatory effect in practice, since there are no economic incentives for a cable operator to turn off an attractive foreign programme in favour of a Swiss programme. However, this measure, at least formally, is not free of discrimination and might be objected to in the ongoing negotiations for liberalisation of the GATS.

In addition to the above-mentioned transmission duties, Article 42 Paragraph 2 RTVG obliges cable operators to include certain programmes of licensed operators in their retransmission supply. This duty to retransmit is also called must-carry rule.¹¹⁹ In accordance with Article 42 Paragraph 4 RTVG, cable operators are not allowed to collect a fee for the retransmission of non-encrypted programmes of Swiss operators. Foreign operators may not enjoy this privilege, unless the corresponding foreign State grants reciprocal rights (Article 42 Paragraph 5 RTVG).

The latter requirement for reciprocity contradicts the idea of National Treatment. The OFCOM argues that the term «Swiss» in this context only means that the operator must be licensed under Swiss law. Article 111 Paragraph 3 RTVG provides that the Swiss Federal Council, under certain conditions, may grant a licence to foreign natural persons or legal persons controlled by foreigners. Again, the objection against this argument would be

¹¹⁹ See MARTIN DUMERMUTH, «Rundfunkrecht» in KOLLER, et al., Eds., *Schweizerisches Bundesverwaltungsrecht, Informations- und Kommunikationsrecht*, volume 4, Basel and Frankfurt am Main: Helbing & Lichtenhahn 1996, at paragraph 395.

that conditions of reciprocity are attached to such licensing and thus the potential cause for conflict with the law of WTO remains.

b) Reservation of Transmission Capacity

In the process of convergence of telecommunications and broadcasting, frequencies are used for both broadcasting and telecommunication services. Owing to the competition between broadcasting and telecommunications brought about by this convergence and the greater «purchasing power» of the telecommunications industry, governments may decide because of cultural policy reasons to reserve certain transmission capacities in the terrestrial frequency spectrum and in the cable network for broadcasting activities. The Swiss draft of a new Broadcasting Act provides for such compensating measures through Article 38.¹²⁰ In order to avoid conflicts with the WTO law, attention has to be drawn to the fact that these measures are implemented in a non-discriminatory manner.¹²¹

5. Provisions of WTO Law Providing for Flexibility towards Measures of National Cultural Policy

5.1. Screen Quotas (Article IV GATT)

After World War I, many countries introduced import quotas and screen quotas as a reaction against a world-wide dominance of Hollywood films. This induced a long-lasting conflict with the United States which could only be resolved in 1947, establishing a compromise under the new GATT. While Article XI GATT prohibits quantitative restrictions of imports including import quotas,¹²² Article III Paragraph 10 GATT provides for an exception from the obligation of National Treatment for cinematograph films under conditions which are specified in Article IV GATT. The latter allows screen quotas as the only means for protecting domestic film industries. Paragraph 1, first sentence, states that internal quantitative regulations shall take the form of screen quotas, making clear that import restrictions are not allowed. Further requirements are defined in Letters a) to d): According to Letter a) screen

¹²⁰ See the Federal Council's explanations to the draft for a new radio and television act of December 2000, at 65 ff, at: www.bakom.ch (15.10.2001).

¹²¹ See Section 6.2 *infra*.

¹²² See *supra*, Section 4.2.1.

quotas have to be computed on the basis of screen time per theatre per year. If a theatre exhibits movies during 1500 hours a year, a screen quota of 50 per cent means that 750 hours are reserved for national films. Letter b) provides that screen quotas may only discriminate between foreign and national films: i.e., it is prohibited to accord preferential treatment to certain foreign films. Letter c) states an exception to b) in the sense of a grandfather clause, and finally Letter d) requests the Contracting Parties to envisage negotiations for the limitation, liberalisation or elimination of screen quotas. Negotiations to this effect did not start until today.

Screen quotas have been in operation, for example, in South Korea where since 1996 cinema operators have been obliged to exhibit Korean films for a certain number of days per year. Actually these screen quotas are enshrined in Article 16 of the Korean Movie Act of 1995¹²³ and in a Presidential Decree of 1997.¹²⁴ Article 16 of the Movie Act provides that «The person who operates a public performance place where the motion pictures are screened (...) shall screen the Korean motion pictures for more than such number of days as determined by the Presidential Decree». Article 19 of the Presidential Decree reads as follows:

«(1) Any manager of a theatre who screens motion pictures as prescribed in Article 16 of the Act, shall exhibit Korean motion pictures for no less than two fifths of the annual screening days.

(2) If it is deemed particularly necessary to do so in consideration of the supply and demand situation of Korean motion pictures, the Minister of Culture and Tourism may, notwithstanding the provision of Paragraph (1) of this Article, reduce the number of the annual screening days of Korean motion pictures (...).».

According to the current system, the Korean cinema operators are obliged to devote a minimum of 146 days a year to the exhibition of domestic films. On certain conditions, reducing this number to 106 days is left to the discretion of

¹²³ Promotion of the Motion Picture Industry Act, 30 December 1995, Korea Legislation Research Institute, Statutes of the Republic of Korea 861, according to: CAROLYN HYUN-KYUNG KIM, «Building the Korean Film Industry's Competitiveness: Abolish The Screen Quota and Subsidise the Film Industry» (2000) 9 *Pacific Rim Law & Policy Journal*, 353, at 356.

¹²⁴ Enforcement Decree of the Promotion of the Motion Pictures Industry Act, Presidential Decree No. 15085 of 29 June 1996, Korea Legislation Research Institute, Statutes of the Republic of Korea 861, according to: HYUN-KYUNG KIM, *supra*, note 123, at 356.

the Korean Minister of Culture.¹²⁵ Cinemas infringing upon these regulations have to face the withdrawal of their business authorisation.

The Korean screen quotas are a thorn in the flesh of the US entertainment industry. Although the US government is trying hard to get rid of these quotas, it has refrained from formal proceedings up to now because these quotas are in accordance with Article IV GATT. The requirement for Korean films to be exhibited for a period of at least two fifths of the total annual screenplay complies with the main condition set forth in Article IV Letter a) GATT requiring that screen quotas shall take the form of a quota computed on an annual basis. Since the Korean quotas admittedly accord preferential treatment to domestic films, but draw no distinctions between foreign films, they are also compatible with Article IV Letter b), reserving the MFN principle. As Korea accepted National Treatment commitments in its GATS list of specific commitments including the distribution of audiovisual services,¹²⁶ alleging a violation of the GATS might be a strategy worth checking. To such a strategy Korea could try to object that Article IV GATT settles the matter of screen quotas explicitly and comprehensively with the consequence that a parallel application of the GATS should be excluded.

Since legal remedies seem to be burdened with uncertainty, the US-government is putting political pressure on South Korea and recently made the abolition of the quotas a prerequisite for intensified trade relations. Firstly, the US government postponed the conclusion of bilateral negotiations on a US-South Korean Bilateral Investment Treaty until the screen quotas are eliminated. Secondly, in the run-up to the Seattle ministerial conference of the WTO, the US Trade Representative (USTR) put strong pressure on the South Korean government to repeal these quotas.¹²⁷ In response, South Korean film directors went on hunger-strike and organised mass demonstrations intending to force their own government to withstand the US power play.¹²⁸ Simultaneously the Motion Picture Association of America (MPAA) followed a different strategy: It made an offer to the Korean State to invest 500 million USD into Korean film industry, provided that Korea gives up its screen quotas. The MPAA's argument was that consumers must be the «ultimate arbiters of

¹²⁵ Loc. cit., at 357.

¹²⁶ See the entries in the GATS commitment list of Korea concerning market access and national treatment, GATS/SC/48.

¹²⁷ CHRISTOPHER ALFORD, «Goliath Balks at David's Quotas» *Variety* of 9 August 1999, at 34; CHRISTOPHER ALFORD, «S. Korea's Cultural Yen» *Variety* of 10 July 2000, at 46; SCOTT ROSENBERG, «Koreans Push Quota Issue» *Variety* of 31 July 2000, at 49.

¹²⁸ See HYUN-KYUNG KIM, *supra*, note 123, at 362.

the market place» and that after repealing the screen quotas the South Korean film would become more significant.¹²⁹

Apart from the Korean example, screen quotas have lost much of the importance they had until the 1950s. Nonetheless Art. IV GATT is of methodological interest because it can be interpreted as a proof of an old tradition in world trade law to treat cultural issues in a specific way.

5.2. General Exceptions

Articles XX GATT and XIV GATS provide for an exception to the non-discrimination obligations of world trade law. The only provision specifically referring to cultural products is Article XX Letter f) exempting measures which are imposed for the protection of national treasures of artistic, historic or archaeological value.¹³⁰ Although this provision obviously cannot be alleged when trade in audiovisual media is concerned,¹³¹ it shows that already the GATT of 1947 recognized the relationship between trade in cultural objects and national identity.¹³² The question is whether the provisions of Article XX Letter a) GATT and Article XIV Letter a) GATS, providing for an exemption for public morals, could be more helpful. This seems unlikely because conflicts in the area of trade in audiovisual media are about the legitimacy of cultural policy measures and there is no disagreement that national measures (e.g., of penal law) protecting public morals are legitimate under the WTO law.

¹²⁹ See *supra*, note 123, at 363. As to this, it may be interesting to add that the South Korean film has been enjoying increasingly high standing throughout the world, and that numerous prizes of important international cinematographic festivals went to Korean directors. See PETER RIST, «An Introduction to Korean Cinema» at: www.cinekorea.com/kc.html (26 March 2001). Translation of an article published in *Séquences* of September/October 1998).

¹³⁰ As a consequence of the *double test* which is generally requested by both Articles XX GATT and XIV GATS, such measures must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction of international trade. See WTO Appellate Body Reports, United States – Gasoline, WT/DS2/AB/R (29 April 1996), at 22, and United States - Import of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, (12 October 1998), at paragraphs 118 ff.

¹³¹ COTTIER, *supra*, note 44, at 751 f.

¹³² See BERNIER, *supra*, note 77, at 114.

5.3. GATS Schedules

It may seem surprising that GATS schedules in this study are dealt with under the title of norms providing for flexibility for national policies, but, as already emphasized, GATS schedules of specific commitments and MFN exemptions are an expression of the flexible liberalisation method in the services sector, and thus their analysis is fitting.

5.3.1. *Specific Commitments*

The meaning of Article XVII GATS is that a Member is only obliged to apply the principle of National Treatment to those sub-sectors and divisions of sub-sectors which are included in its individual list. If a certain sub-sector or division is covered, the Member then has to specify any limitation of this commitment in its list. If the example of India's list of specific commitments (see following table) is examined, it follows that India included only one division of the audiovisual sector: the distribution of motion pictures or video tapes.

SECTOR-SPECIFIC COMMITMENTS India (GATS/SC/42)

Modes of Supply: 1) Cross-border supply 2) Consumption abroad
3) Commercial presence 4) Presence of natural persons

Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments	Notes
2. Communication Services				
D. Audiovisual Services				
a) Motion picture or video tape distribution services (CPC 96113)	<ol style="list-style-type: none"> 1) Unbound 2) Unbound 3) i) Only through representative offices which will be allowed to function as branches of companies incorporated outside India ii) Import of titles restricted to 100 per year 	<ol style="list-style-type: none"> 1) Unbound 2) Unbound 3) Subject to the prescribed authority having certified that the motion picture has: <ol style="list-style-type: none"> a. won an award in any of the international film festivals notified by the Ministry of Information & Broadcasting, Government of India; or b. participated in any of the official sections of the notified international film festivals; or c. received good reviews in prestigious film journals notified by the Ministry of Information & Broadcasting, Government of India. 4) Unbound except as indicated in the horizontal section 		

Limitations on market access are specified in column 2. Paragraphs 1 to 4 correspond to the 4 possible modes of supply for services as defined in Article 1 GATS. «Unbound» for the first two modes of supply means that India did not commit herself to any obligations with regard to these. Next to mode of supply 3 (commercial presence), India listed some limitations. This means that there is a commitment with regard to this mode of supply with the exception of the limitations specified in Paragraph 3. As an example, the listing in the column Market Access legitimates measures which restrict the import of foreign films to 100 per year. According to the listings in the column National Treatment, foreign films are treated like domestic films (e.g. with regard to distribution licenses) only if the Indian film authority certifies that the film won an award, or participated in an international film festival or received good reviews in prestigious film journals.

5.3.2. MFN exemptions

Article II GATS obliges Members of the WTO to Most-Favoured Nation Treatment (MFN). Paragraph 1 states that with respect to any measure covered by the GATS each Member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than it accords to like services and service suppliers of any other country (not only WTO Members). However, Paragraph 2 opens the possibility to WTO Members to exempt certain measures from the MFN obligation, provided that in the moment of the entry into force of the WTO Agreement this measure was listed in the Member's list of exemptions.

Until October 2001, 49 countries have listed MFN exemptions. Typically scheduled exceptions relate to co-production agreements, tax benefits, or simplified entry procedures for natural persons. To get a more concrete idea of the structure of such a list, it seems useful to take a closer look at Switzerland's list of MFN exemptions.

LIST OF ARTICLE II MFN EXEMPTIONS

Switzerland (GATS/EL/83)

Sector or Sub-Sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Audiovisual services	To confer national treatment to audiovisual works covered by bilateral or plurilateral agreements on coproduction in the field of audiovisual works, in particular in relation to access to funding and to distribution	All countries with whom cultural cooperation may be desirable (at present agreements exist with member countries of the Council of Europe and with Canada)	Indefinite	Promotion of common cultural objectives
	Measures granting the benefit of support programmes, such as MEDIA and EURIMAGES, and measures relating to the allocation of screen time which implement arrangements such as the Council of Europe Convention on Transfrontier Television and confer national treatment, to audiovisual works and/or to suppliers of audiovisual services meeting specific European origin criteria	European countries	Indefinite	Promotion of cultural objectives based on long-standing cultural links
Audiovisual services	Concessions for the operation of radio or television broadcast stations may be granted, normally on the basis of bilateral agreements, to persons of countries other than Switzerland	All countries with whom cultural cooperation may be desirable	Indefinite	Promotion of common cultural objectives, and to regulate access to a market limited in scale (given the size of Switzerland) in order to preserve diversity of supply

Column 2 describes the measures of audiovisual policy and their inconsistency with the MFN principle. While column 3 lists the countries to which preferential treatment is granted, column 5 explains the conditions creating the need for the exemption. In column 4 carrying the title «intended duration», Switzerland listed «indefinite». That raises the question whether this entry conflicts with the GATS Annex to Article II Exemptions providing that such exemptions are in principle limited until 2005.

Among other measures, column 2 exempts bilateral agreements on co-production of movies and the European Convention on Cinematographic Co-production (ECCC) from the MFN obligation. The aim of the ECCC is to promote the development of European cinematographic co-productions (Article 1). Following this scope, Article 16 states that European countries exclusively can be signatories to the convention. It applies to co-productions involving at least three co-producers, established in three different parties to the convention. Provided that this requirement is fulfilled, one or more non-European co-producers are admitted under the condition that their total contributions do not exceed 30 percent of the total costs of the production (Article 2 Paragraph 2 Letter b) ECCC). In all cases, the ECCC only applies under the condition that the co-produced work meets the definition of a European cinematographic work as set in appendix II. According to that, a cinematographic work qualifies as European if it achieves at least 15 points out of a possible total of 19, according to the schedule of European elements set out below.

European Elements	Weighting Points
Director	3
Script writer	3
Composer	1
First role	3
Second role	2
Third role	1
Cameraman	1
Sound recordist	1
Editor	1
Art director	1
Studio or shooting location	1
Post-production location	1

The ECCC makes no statement concerning the question whether, for instance, a director who was born in Europe but lives in the United States still qualifies as a European author, or vice versa, whether an American actor living in Europe counts as European. These questions appear to be left to the discretion of the competent authorities of each party.¹³³ If the work reaches less than the normally required 15 points, the competent authorities may nonetheless grant co-production status to this film if they consider that, with regard to the demands of the screenplay, the film reflects «the European identity». Since there is no definition of «European identity» this provision is a rather elastic one.

Why is this co-production status so important? It is the logic of this convention that the parties involved in a co-production accord national treatment to films having received this co-production status by the competent national authorities. National treatment in the sense of the Convention means that such a film may benefit from the advantages granted to national films by the legislative and regulatory provisions in force in each of the parties to the convention.

Where is the conflict with the MFN principle? As already made clear, non-European films and producers are treated less favourably than equivalent services and service suppliers established in contracting Parties to the ECCC. In the realm of the ongoing services negotiations the MFN exemptions are expected to be subject to requests and offers of progressive liberalisation. Thereby the parties to the ECCC could come under pressure.

6. Concluding Observations Concerning Some Open Questions

The analysis undertaken in Section 4 revealed the existence of a great variety of governmental measures protecting cultural goals in the area of audiovisual media. As demonstrated in Section 5, existing WTO law provides for some flexibility towards the various instruments of cultural policy. While at the end of the Uruguay Round a provisional compromise was accepted by net exporters and net importers of audiovisual media, it was not possible, however, to reconcile the conflict between liberal trade and cultural policy. With a view to the proposals submitted in the realm of the ongoing trade negotiations, a number of open questions appear on the horizon, which will be highlighted in this final section.

¹³³ GRABER, *supra*, note 4, at 870.

6.1. Disciplines concerning Subsidies for Audiovisual Services

Several countries made proposals to developing disciplines concerning subsidies for audiovisual services.¹³⁴ As the United States suggests, these disciplines may follow the example of the Agreement on Subsidies and Countervailing Duties (SCM). The SCM Agreement applies to subsidies for goods exclusively. With regard to subsidies for services, the obligations up to now are limited to specific GATS commitments accepted by Members in their respective lists and general obligations such as MFN, although Article XV GATS requests Members to enter into negotiations with a view to developing additional disciplines. The SCM Agreement draws a distinction between prohibited and permissible subsidies. Prohibited ones are export subsidies.¹³⁵ The category of permissible subsidies is subdivided into non-actionable and actionable ones.¹³⁶ If this normative framework were transposed to the proposed new disciplines for audiovisual services, all measures of public funding discussed in Section 4.1 would most probably fall into the category of actionable subsidies.¹³⁷ In view of the fact that funding for public service broadcasters in many countries derives from licence fees, the question is salient whether such funds have to be regarded as a subsidy. While EC institutions on several occasions decided that licence fees do not involve State aid,¹³⁸ because of a broader definition of subsidies operated in the realm of the

¹³⁴ According to the WTO Secretariat, the audiovisual sector belongs to the most subsidised ones. See WTO Council for Trade in Services, Subsidies for Services Sector, Background Note by the Secretariat, Information Contained in WTO Trade Policy Reviews, S/WPGR/W/25 (26 January 1998), at 4.

¹³⁵ See WTO Appellate Body Report, United States - Tax Treatment for Foreign Sales Corporations, WT/DS108/AB/R (adopted 4 February 2002).

¹³⁶ For detailed information concerning the functioning of the SCM Agreement, see THOMAS COTTIER/ CHRISTOPHE GERMANN, «The WTO and EU Distributive Policy: the Case of Regional Promotion and Assistance» in DE BURCA/SCOTT, Eds., *The EU and the WTO. Legal and Constitutional Issues*, Oxford/Portland, Oregon: Hart 2001, at 185, at 198 ff.

¹³⁷ A Member challenging actionable subsidies has to demonstrate that these have adverse effects on its economy. In view of the United States' 80 to 90 percent share of the world market in audiovisual services, it is unlikely that the US government could prove this. See COTTIER, *supra*, note 44, at 754.

¹³⁸ See Communication from the Commission on the application of State aid rules to public service broadcasting, OJ C 320/04, 15.11.2001; Commission Decision of 22 May 2002 approving State funding to BBC digital television and radio channels, European Commission Press Releases IP/02/737; ECJ Case C-379/98, *PreussenElektra AG v. Schleswag AG*, (2001) E.C.R. I-2099; ECJ Case C-53/00, *Ferring SA v. Agence centrale des organismes de sécurité sociale (ACOSS)*, (2001) E.C.R. I-9067.

SCM Agreement, the question may be answered differently by the WTO institutions. According to the SCM Agreement a subsidy is defined by three elements: 1) a cost arising to the public body which does not necessarily consist in the payment of money but may be, for example, the consequence of tax credits, fiscal incentives or any other form of income or price support (Article 1, Paragraph 1 Letter a SCM), 2) a benefit hereby conferred, which 3) is specific to certain enterprises or industries (Article 2, Paragraph 1 SCM). If this definition is to be integrated into the discussed new regime it seems likely that funding of public service broadcasters from licence fees would meet all of the above-mentioned three conditions.

6.2. Classification Issues

In their submissions made in the area of audiovisual services, several countries criticised the present classification system. Indeed, as a consequence of technological development the GATS/UN Central Product Classification system does not correspond with reality anymore. Digital revolution modified ways in which audiovisual programmes are created, produced and distributed. On the national level there is a trend towards a technology-neutral regulation of audiovisual services.¹³⁹ This leads to the consequence that infrastructures necessary for the transmission of audiovisual content such as cable networks or radio frequencies which used to be regulated under broadcasting law, eventually are regulated exclusively within a framework of telecommunications law.¹⁴⁰ As already pointed out, the market values the

¹³⁹ Technological neutrality is now an underlying principle of the European Union regulatory framework of electronic communications networks and services adopted recently. The new package consists of one Framework Directive, Directive 2002/21/EC (OJ L 108/33), and four specific ones - Authorisation Directive 2002/20/EC (OJ L 108/21); Access Directive 2002/19/EC (OJ L 108/7); Universal Service Directive 2002/22/EC (OJ L 108/51), and the Personal Data and Protection of Privacy Directive 97/66/EC (OJ L 24/1). The Framework Directive explicitly puts a general requirement for the Member States to ensure that in carrying out their tasks national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral (Article 8). The principle of technological neutrality is further elaborated upon in the specific Directives.

¹⁴⁰ The new regulatory framework of electronic communications networks and services builds upon the concepts developed in the 1999 Communications Review (The 1999 Communications Review. Towards a new framework for Electronic Communications infrastructure and associated services. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(1999) 539, 10.11.1999), as well as on the basic suggestions made by the Green Paper on Convergence of the Telecommunications,

electronic delivery of telecommunication services to be more profitable than the delivery of broadcasts. To counterbalance the advantages of telecommunications on the market and to assure the accomplishment of cultural policy objectives, governments may wish to reserve capacity in terrestrial frequencies and cable networks for public service broadcasting (including radio).¹⁴¹ Conflicts with the principles of the WTO law may arise if governments do not implement such trade-restrictive measures in a transparent, non-discriminative and proportional manner. A different question arises with regard to the classification of video games. Since computer games can be played in groups linked to interactive digital TV services, it is not easy to draw the distinction between software and broadcasting.¹⁴² Furthermore, the classification of «knowledge and content management services» such as electronic programming guides (EPG) is disputed. While the information technology industry claims that such services be fully liberalised under the GATS, public service broadcasters reject this view arguing that EPGs are important content-related services. Although they are built into a television set-top-box they decide on the extent to which users have access to audiovisual content. As technology is developing so rapidly and without a predictable end it is important to recall in this context the Preamble of the GATS which recognizes the right of Members to regulate and to introduce new regulations within their territories if this is necessary in order to meet national policy objectives.

A further point of conflict is the classification of a number of new services associated with electronic commerce.¹⁴³ With regard to the question whether electronically delivered media are goods or services two different views are

Media and Information technology Sectors, and the Implications for regulation, COM(1997) 623. It is based on a clear separation between networks and content, and regulates only upon the former. The separation is quite technical and is likely to cause problems in terms of the accelerating process of convergence where content and infrastructure come together and cannot be treated as separate entities. For expressed criticism on the latter issue, see: European Communications at the Crossroads, Report of the CEPS Working Party on Electronic Communications, Executive Summary at: www.ceps.be/pubs/2001/Eu-Com.pdf/ (12.05.2002).

¹⁴¹ See Section 4.8.3. *supra*. Governments want to assure to public service broadcasters terrestrial frequencies or cable capacities needed for the transmission of programmes.

¹⁴² See MICHAEL KÖNIG, «Was bringt eine neue GATS-Runde für die audiovisuellen Medien?» (2002) *Zeitschrift für Urheber- und Medienrecht*, 271-283, at 274.

¹⁴³ Paragraph 34 Doha Declaration (*supra*, note 5) instructs the General Council to continue the Work Programme on Electronic Commerce, and to report on further progress to the Fifth Session of the Ministerial Conference.

taken:¹⁴⁴ Some governments argue that movies, television programmes or music delivered via the Internet are virtual goods because they may have a tangible equivalent (e.g. DVD, Video Tape or CD) and consequently should be subject to the GATT. Others object that this is the case also for many other categories, and that such a view would unduly restrict coverage of the GATS. A possible solution could consist in a distinction between goods and services based on the economic purpose of the transaction. Hence, the economic purpose of electronic-on-demand delivery of, e.g., a movie would be to provide a service regulated exclusively by the GATS. However, shipping a DVD of the same movie would be subject to the GATT exclusively.¹⁴⁵

6.3. Structural Discussion Concerning «Domestic Regulation» (Article VI GATS)

The aim of Article VI GATS is to introduce an obligation for Members to ensure a minimal standard of rule of law while implementing national policy objectives. The provision wants to prevent national laws having the effect of technical barriers to trade.¹⁴⁶ Article VI GATS *inter alia* sets rules for technical standards and licensing procedures. Until now, Article VI GATS did not have yet much of an effect, but according to its Paragraph 4 a working group has been set up, mandated to develop «any necessary disciplines», especially a necessity test for national provisions. Since licensing procedures are frequently used to regulate broadcasting and cinema, further discussions

¹⁴⁴ For a detailed discussion see WILLIAM J. DRAKE/ KALYPSO NICOLAÏDIS, «Global Electronic Commerce and GATS: The Millennium Round and Beyond» in SAUVÉ/STERN, Eds., GATS 2000. New Directions in Services Trade Liberalization, Washington, DC: Brookings Institution Press 2000, at 399-437, at 407 ff.

¹⁴⁵ For a similar solution, see ECJ Case C-275/92, *Schindler*, (1994) E.C.R. I-1039, paragraphs 22-25. The case law of the ECJ generally favours a realistic approach and does not stick to the «residual» nature of services, but rather to the economic reality. The rule whereby the accessory follows the principal is an important guide to the Court's action. In *Sacchi* (Case 155/73, [1974] E.C.R. 409), the ECJ held that the transmission of television signals is dealt with under the freedom to provide services although the circulation of more tangible items, such as films and recording equipment falls with the free movement of goods. This reasoning of the Court was confirmed in *Debauve* (Case 52/79, [1980] E.C.R. 833) with regard to cable signals. But in the case of *Schindler*, the Court gave a judgement only on Article 49 EC and held that service activities having as an ancillary side-effect the circulation of goods should be altogether treated under the rules of services.

¹⁴⁶ Since technical barriers to trade usually have the effect of an indirect discrimination (prohibited under Art. XVII GATS), it is not yet clear, in this regard, if Art. VI GATS has an autonomous standing.

concerning Article VI GATS are highly relevant for the audiovisual sector. The same is true for the development of technical standards, such as those for the transmission of digital television signals. Due to an initiative of European market players co-operating in the Digital Video Broadcasting Group, the European Telecommunications Standardisation Institute developed such a standard eventually becoming an International Telecommunications Union recommendation. The EC Framework Directive provides that Member States may decide to make the implementation of such standards mandatory.¹⁴⁷ Mandatory standards obviously may be perceived as technical barriers to trade in television services whenever they are used for restricting market access of certain providers or services.

However, the question is not yet resolved, whether disciplines to be developed under Article VI Paragraph 4 GATS apply independently from an entry of a Member in its list of specific commitments. While some countries respond positively, the majority of the Members reject the idea. In my view, it would contradict the structure of the GATS if new commitments for National Treatment and Market Access were introduced following the indirect way of disciplines for domestic regulation. The structural choice of GATS was that such commitments are negotiable individually.

6.4. Competition Policy and Cultural Diversity Safeguard

The audiovisual sector is characterised by a growing horizontal and vertical integration. A few multinational enterprises¹⁴⁸ more and more dominate the production, distribution and exhibition of audiovisual content worldwide. This oligopolistic structure not only impacts on the functioning of the audiovisual media market per se, but also tends to induce a homogenisation of content.¹⁴⁹ Economies of scale and dysfunctions of the media market (externalities) work in favour of mainstream movies, but prove detrimental to art house films.¹⁵⁰ If the market has the decisive say, there is a real danger that, in the end, only mainstream products will survive. The same is true for high quality television

¹⁴⁷ Recital 30 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33 (24.04.2002), at 37.

¹⁴⁸ Consisting mainly of AOL/Time Warner, Vivendi/Universal, Walt Disney, Viacom, Bertelsmann and News Corporation.

¹⁴⁹ Communication from Switzerland, *supra*, note 12, at paragraph 15.

¹⁵⁰ See C. EDWIN BAKER, «An Economic Critique of Free Trade in Media Products» (2000) 78 *North Carolina Law Review*, 1357, at 1361.

programmes in the sense of public service broadcasting. Although the so-called digital revolution reduced technical constraints and led to a rapid growth of the number of television stations worldwide, a closer look at the output of these stations reveals that consumers do not have wider choice, but - on the contrary - are confronted with a higher turnout of the same mainstream food.

In the realm of the WTO, a first response to media concentration and homogenisation may be the development of a multilateral competition policy being able to fight anti-competitive behaviours such as the abuse of dominant positions or export cartels. According to Paragraph 23 of the Doha Ministerial Declaration, Members agreed that negotiations on this issue take place after the Ministerial Conference in Mexico 2003, provided that an explicit consensus on modalities of negotiations is achieved. Paragraph 25 stresses that the Working Group on the Interaction between Trade and Competition Policy will, in the meantime, focus on the clarification of main principles of competition policy, including provisions on hardcore cartels. Recalling the strong opposition against any multilateral disciplines of competition policy demonstrated by the United States in the discussions of the Working Group since the Singapore Ministerial Conference,¹⁵¹ a special effort of all Members will be necessary to avoid a deadlock in 2003.

A second response may be the development of a cultural diversity safeguard legitimising governmental measures such as subsidies for art house films or for high quality television programmes. Although both the Brazilian and the Swiss proposals submitted in the realm of the ongoing services negotiations advocated such a safeguard, neither of the two offered a definition for cultural diversity or cultural identity. Without being able to discuss these complex issues in the required depth, I would nevertheless like to highlight some of their characteristics.

During the last couple of years, the concept of cultural diversity emerged as the supreme goal of cultural policy on the international level. This thesis is mainly backed by the Universal Declaration on Cultural Diversity adopted by UNESCO's General Conference on 2 November 2001.¹⁵² Article 1 of the Declaration stresses that cultural diversity «as a source of exchange, innovation and creativity», «is as necessary for humankind as biodiversity is

¹⁵¹ See, e.g., Report of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/4 (30 November 2000).

¹⁵² UNESCO Press Release No. 2001-120 of 2 November 2001, at: www.unesco.org/opi/eng/unescopress/2001/01-120e.shtml (10 December 2001).

for nature». The cultural diversity objective claims for a plurality of different media expressions without principally preferring domestic to foreign programmes. Hence, a country without having access to a variety of foreign cultural content would be considered lacking cultural diversity. Conversely, cultural diversity in audiovisual media could be assured by the existence of, and access to, a large variety of programmes differing in budget volume, style, and national origin.

Cultural diversity produces humus of creativity. It stimulates artists, authors, directors or other creative people to give expression to the identities of the societies in which they are living. Cultural identity of a plural State is the *unitas multiplex* of various self-descriptions of specific groups and societies belonging to its territory. Thus, the concept of cultural identity appears to be one methodologically depending on the larger concept of cultural diversity. Why is it legitimate for a State to support its cultural identities? Under the conditions of globalised market societies, individuals or groups face more complex conditions for creating their identities.¹⁵³ Assuring, at the same time, a peaceful cohabitation of groups with different identities becomes more difficult.¹⁵⁴ As a consequence of the emergence of «increasingly diverse societies, it is essential to ensure harmonious interaction among individuals and groups with plural, varied and dynamic cultural identities».¹⁵⁵ In order to keep peace and to guarantee social cohesion, governments therefore may decide to develop policies for the inclusion and participation of all citizens. Such a policy may consist in supporting the national audiovisual industries and public service broadcasting. The creation of high quality audiovisual media within a certain society may offer to individuals and groups means of helping them to find out who they are and will be, and the dissemination and reception of those programmes «borders of identities» may further a better mutual understanding.

In the ongoing negotiations, the essential question will be whether net exporting countries accept that any discussion concerning a further liberalisation of audiovisual services needs to take account of problems of market failure, economies of scale and lack of cultural diversity. In order to achieve a fair trade-off between economic and cultural interests it will be necessary that claims for market access, national treatment, disciplines for

¹⁵³ JÜRGEN HABERMAS, *Die postnationale Konstellation. Politische Essays*, Frankfurt am Main: Suhrkamp 1998, at 91-167.

¹⁵⁴ ALBERT O. HIRSCHMAN, *Propensity to Subversion*, Cambridge, MA and London: Harvard University Press 1995, at 231-248.

¹⁵⁵ Article 2 UNESCO Declaration.

subsidies etc. are linked with claims of competition policy. But rules against anti-competitive behaviours such as hardcore cartels and abuse of dominant positions are not sufficient. In addition, there must be an agreement on a cultural diversity safeguard, recognizing the legitimacy of domestic measures promoting high quality TV programmes and art house films produced and distributed with low budgets.¹⁵⁶

¹⁵⁶ For an elaborate defence of this thesis see CHRISTOPH BEAT GRABER, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, Berne: Stämpfli 2003.

