

# Audiovisual Services in the Doha Round

## *“Dialogue de Sourds, The Sequel”?*

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### I. INTRODUCTION

Audiovisual services proved so divisive during the Uruguay Round of multilateral trade negotiations that disagreements on the treatment of this issue threatened the successful completion of the negotiating Round and, more specifically, the creation of the General Agreement on Trade in Services (GATS). Discussions at that time often took the form of an “all-or-nothing” debate, characterized by extreme and opposite views: a feeling that audiovisual services, because of their cultural aspect, should not be subject to international trade rules versus the idea that culture, when raised in trade fora, was a mere cloak for protectionism.

The stakes in the audiovisual negotiations do not seem as high this time around; the context has changed. Audiovisual services are already covered by the GATS, and thus the question of whether they, or “cultural services”, should be excluded from the Agreement’s coverage does not arise. Further, judging from discussions so far in the World Trade Organization, it appears that other issues, such as agriculture, will be more determinant with respect to a successful completion of the Doha Round. In addition, the industry and negotiators are more focused on international efforts to fight piracy and strengthen enforcement of intellectual property rights. The context also differs because many developing countries now have significant export interest in audiovisual services, which makes it less likely that the issue will be shaped solely by bilateral United States–European Union confrontation. Moreover, economic, trade and technological developments in the sector carry policy implications that might contribute to modify certain negotiating stances. Negotiators are also confronted with issues arising from discussions at the United Nations Educational, Scientific and Cultural Organization (UNESCO) on a Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions. This has already had an indirect impact, by focusing to some extent the attention of relevant government officials away from efforts centred on audiovisual negotiations. Finally, key exporting countries, especially the United States, have found that substantive outcomes on audiovisual services can be rapidly achieved through bilateral free trade agreements.

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Despite this different context, many important issues will confront negotiators, mostly left-overs from the Uruguay Round. Indeed, the outcome from those negotiations arguably left few delegations satisfied, although for different reasons. On the one hand, the number of market-access commitments in the sector was quite low and the number of most-favoured-nation (MFN) exemptions quite high. On the other hand, no special provisions reflecting cultural aspects or particular features of the sector were included in the text of the Agreement. Much can be achieved this time around, although it is also possible that the *dialogue de sourds* (or “all-or-nothing” approach) which characterized the previous discussions will take hold again and prevent progress of even an incremental nature in addressing to some extent the gap between the economic and trade importance of the sector and the application of trade rules to it.

While the audiovisual sector is not excluded from the scope of the Agreement (a cultural exception as such does not exist despite popular belief to the contrary), only a small proportion of the WTO membership (26 out of 148 Members) have undertaken specific commitments in the sector. The broad non-applicability of such key trade disciplines is troublesome given the sector’s economic importance (more than US\$ 400 billion), including for innovation, e-commerce, trade and development. Indeed, in the current situation, most Members, despite the importance of the sector for trade and development, have the unlimited capacity to take any quantitative restriction or discriminatory measure towards audiovisual services and service suppliers of other Members.

This article does not focus on more general debates about whether trade openness is necessarily beneficial to cultural diversity or cultural objectives. For example, on one side, many believe that openness to other cultures ensures greater dynamism for one’s own culture and that exposure to foreign content is the best way to ensure that domestic “cultural industries” flourish. On the other side, others would likely argue, for example, that full openness would lead to uniformity of content or that cultural expressions of smaller nations (i.e. smaller markets) could hardly compete, even within one’s own market, with cultural industries from bigger markets, despite domestic preference for products with a local flavour. This article does not attempt to resolve such debates but, rather, adopts a more pragmatic view, based on the general assumption that openness, in addition to being essential to attain economic objectives in the audiovisual sector, is a key element in achieving any country’s cultural objectives; at the same time, it recognizes that sensitivities exist and that some countries might want to maintain or impose certain restrictions.

This article looks at how the GATS can help further the panoply of objectives that governments typically harbour in the context of audiovisual services. It is based on the assumption that the GATS, by encouraging openness, providing for predictable trading conditions, encouraging the use of optimal policy tools and discouraging that of the most economically harmful practices, can contribute to growth in the sector—and bring

about the related benefits—while taking into account cultural objectives and permitting particular sensitivities to be addressed.<sup>1</sup>

The article is structured as follows. The next Section provides a short overview of the treatment of audiovisual issues in the Uruguay Round and afterwards. The third Section then looks at the starting point for the current negotiations and highlights some of the characteristics of existing commitments. Section IV assesses current trade flows on the basis of existing statistics and highlights the economic importance of the sector, including for developing countries, and the changes arising as a result of technological developments. Section V then discusses key barriers that exist in the sector and considers some issues that might confront negotiators during the negotiations such as scheduling and classification. The article then concludes by discussing possible negotiating approaches to best address key barriers and sensitivities in the sector.

## II. OVERVIEW OF THE TREATMENT OF AUDIOVISUAL ISSUES IN THE MULTILATERAL TRADING SYSTEM

### A. *THE URUGUAY ROUND*

During the services negotiations of the Uruguay Round, some Members felt that the cultural content and social value of such issues meant that trade rules and the liberalization principles of the GATS should not apply and that no commitments should be undertaken. Other Members opposed these views, either because they did not see why the sector warranted treatment different from that of other services sectors or because they thought that the GATS' structure permitted any particular sectoral sensitivities to be addressed.

During the negotiations, some Members had first called for the sector to be excluded from GATS obligations (Canada was a vocal proponent), but participants at the Montreal Ministerial Meeting of 1988 reaffirmed their intention not to exclude any sector from the coverage of the GATS. In 1990, various delegations favoured the inclusion in the Agreement of a general exception concerning cultural values, which would have allowed Members to deviate from their obligations under the GATS in order to achieve cultural objectives.<sup>2</sup> This was modelled on the general exception in the General Agreement on Tariffs and Trade (GATT) (which has a parallel in the GATS) that allowed a Member, under certain conditions, to derogate from its obligations in order to adopt or enforce measures necessary to protect public morals or necessary to protect human, animal or plant life or health.<sup>3</sup>

A difficult issue seemed to have been how to define “cultural reasons” or “cultural

<sup>1</sup> Intellectual property rights issues and, more specifically, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights are not addressed in this article, even if they are of obvious relevance for this sector. Neither does this article focus on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions, which has recently been adopted by the UNESCO General Conference but has not yet entered into force.

<sup>2</sup> GATT Uruguay Round Doc. MTN.GNS/AUD/1, 1990. Canada supported the idea of a general exception, as did, to different degrees, India and some developing countries.

<sup>3</sup> See GATT (1947) Article XX; and GATS Article XIV.

policies". Some feared that too broad a definition (or too much discretion left for each Member to define what measures would be needed to protect cultural policy) would have almost amounted to a carve-out of the sector from GATS disciplines, while others may have found it difficult to achieve a commonly agreed definition of the concept of culture or of measures necessary to protect culture (and leaving to WTO dispute settlement panels the task of determining what would be appropriate "cultural measures").<sup>4</sup> Accordingly, Members with such different positions on the issue as the European Communities and the United States both rejected the idea of a general exception.<sup>5</sup>

The European Communities pursued an approach where the "cultural specificities" of audiovisual services would be spelled out through sectoral annotations. This approach involved undertaking commitments under the GATS in the audiovisual sector that would reflect the current regulatory regime in place and, thus, provide assurance to other trading partners that access would not be reduced in the future. The EC also wanted to develop special provisions or annotations for the sector that would qualify the principles of MFN treatment, national treatment and market access so as to take into account the cultural and linguistic specificities of the sector. Certain Members expressed some support for the approach, although some, such as Canada, still preferred a general exception. Others, such as the United States and Japan, considered that the proposed qualifications to MFN treatment, national treatment or market access obligations in the sectoral annotations effectively amounted to carving out the audiovisual sector from the Agreement's coverage. While the EC stressed that the annotations would relate solely to audiovisual services having a cultural content, the United States thought that what constituted national cultural content was hard to define and thus that such provisions could be used to protect inefficient industries from competition.<sup>6</sup> The proposal to develop sectoral annotations on the basis of the cultural specificities of audiovisual services did not result in consensus either.

Bilateral negotiations between the United States and the EC at the highest levels, up until the end of 1993, could not resolve the differences, as no agreement was reached with respect to the content of possible market-access commitments by the EC in the sector (in particular with respect to new or future technologies) as well as the insertion of language on the cultural specificity of the sector in relation to the provisions on progressive liberalization (Article XIX), subsidies (Article xv) and the Annex on Article II exemptions.<sup>7</sup>

<sup>4</sup> Karl F. Falkenberg, *The Audiovisual Sector*, in Jacques Bourgeois, Frédérique Berrod and Eric Gippini Fournier (eds.), *The Uruguay Round Results: A European Lawyers' Perspective*, Intereuropean University Press, Brussels, 1995; GATT Uruguay Round Docs. MTN.GNS/AUD/W/1 and MTN.GNS/AUD/1, 1990; Jean-Marie Waregne, *Le GATT et l'audiovisuel*, Courrier hebdomadaire, Centre de recherche et d'information socio-politique, Brussels, 1994; Jonas M. Grant, 'Jurassic' Trade Dispute: *The Exclusion of the Audiovisual Sector from the GATT*, *Indiana Law Journal*, Vol. 70, Fall 1995. Another factor influencing the EC position may have been reticence to encourage the creation of an exception in the WTO while no similar exception existed in the Common Market.

<sup>5</sup> GATT Doc. MTN.GNS/AUD/1, 1990.

<sup>6</sup> *Ibid.*; Falkenberg, *supra*, footnote 4.

<sup>7</sup> GATT Doc. MTN.GNS/49, p. 4; Falkenberg, *ibid.*, p. 432; Mary E. Footer and Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, *J. Int'l Econ. L.*, 2000, pp. 119-122. See also Moynihan *Urges Clinton to Resist Cultural Exemption in GATT Deal*, *Inside U.S. Trade*, 8 October 1993; *EC Spells Out its Goals for Uruguay Round Audiovisual Talks*, *Inside U.S. Trade*, 15 October 1993; *EU Wins Final Fight with Exclusion of Audiovisual Sector from GATT*, *Inside U.S. Trade*, 17 December 1993.

At the conclusion of the negotiations, the GATS did apply to audiovisual services just as to any other services sector and the Agreement did not contain any special provisions or exceptions relating to cultural policy or to audiovisual services.<sup>8</sup> Hence, audiovisual services are subject to those GATS obligations that apply to all services and to all WTO Members (i.e. unconditional or general obligations), such as some transparency provisions (Article III), certain provisions relating to domestic regulation (Article VI) or the MFN obligation. The Agreement is inherently flexible in that two key obligations, the ones pertaining to the level of openness of the domestic market to international competition—market access (Article XVI) and national treatment (Article XVII)—only apply to sectors or sub-sectors that Members decide to include in their respective schedules of specific commitments.<sup>9</sup>

The application of market access and national treatment to these listed sectors are then subject to the limitations that each Member lists for each mode of supply of a service. Hence, while the GATS encourages liberalization and provides legal certainty and predictability to international trade in services, it does not entail automatic full liberalization. In addition, even the undertaking of full commitments—that is, undertaking to comply fully with Articles XVI and XVII without limitations—does not forego the right to regulate and to introduce new regulations in order to meet national policy objectives, which is recognized in the Preamble of the Agreement. In addition, the GATS, unlike the GATT, permits exemptions to the MFN obligation (Article II).

At the end of the Uruguay Round, the EC, Canada and many other Members chose to not undertake specific commitments in audiovisual services and to take various MFN exemptions relating to this sector. Eighteen Members had undertaken some commitments in audiovisual services,<sup>10</sup> most of them developing economies. None of these 18 Members are European countries. A greater number of Members (35) had taken MFN exemptions. It was during these negotiations that, at the request of Members, the GATT Secretariat developed the services sectoral classification list (W/120),<sup>11</sup> which is an optional tool used by Members when undertaking specific commitments. The list includes audiovisual services as part of the communications sector and disaggregates it further into six sub-sectors, of which four are defined with the use of a reference number

<sup>8</sup> The only services excluded from the scope of the Agreement are services provided in the “exercise of governmental authority” (Article I) and certain air transport services pursuant to the Annex on Air Transport Services.

<sup>9</sup> This is commonly referred to as a “bottom-up” or “positive-list approach”, as opposed to a “top-down” or “negative-list approach”, whereby all sectors are subject to the disciplines except those specifically excluded. GATS Article XVI (Market Access) prohibits, for sectors included in schedules and unless otherwise specified, six types of measures: limitations on the number of suppliers; limitations on the total value of service transactions; limitations on the total number of service operations; limitations on the total number of natural persons employed; restrictions on the type of legal entity; and limitations on foreign capital participation. Article XVII (National Treatment) prohibits, for sectors included in schedules and unless otherwise specified, measures which accord to services and service suppliers of any other Member treatment less favourable than that accorded to one’s own like services and service suppliers.

<sup>10</sup> These are Central African Republic, Dominican Republic, El Salvador, Gambia, Hong Kong China, India, Israel, Japan, Kenya, South Korea, Lesotho, Malaysia, Mexico, New Zealand, Nicaragua, Singapore, Thailand and the United States.

<sup>11</sup> GATT Uruguay Round Doc. MTN.GNS/W/120.

of the Provisional Central Product Classification (CPC) of the United Nations.<sup>12</sup> These are: motion picture and video tape production and distribution services (CPC 9611); motion picture projection services (CPC 9612); radio and television services (CPC 9613); radio and television transmission services (CPC 7524); sound recording (CPC n.a.); and other (no CPC identified).<sup>13</sup> While the use of the classification list and the corresponding CPC numbers is not a legal obligation, most Members tend to follow it most of the time so as to clarify the scope of their respective specific commitments.

#### B. AFTER THE CREATION OF THE WTO<sup>14</sup>

A significant development—and sometimes a key matter of contention—on audiovisual services after the Uruguay Round negotiations concerned the accession to the WTO of new Members, particularly Eastern European countries. As part of accession negotiations, the candidate countries have to negotiate with other WTO Members a schedule of specific commitments and a list of MFN exemptions under the GATS. Audiovisual services often proved a difficult issue in these negotiations, pitting the interests of countries such as the United States in obtaining market access commitments in audiovisual services, a key area of export interest, against those of the EC, which preferred—especially in the case of candidates to EU membership in the light of the *acquis communautaire*—that such countries abstain from undertaking commitments in audiovisual services and take MFN exemptions modelled on the exemptions listed by the EC.<sup>15</sup>

<sup>12</sup> Audiovisual Services in the Services Sectoral Classification List (and Corresponding CPC numbers) are the following:

2.D. Audiovisual services:

- 2.D.a. Motion picture and video tape production and distribution services (CPC 9611), containing CPC 96111 (promotion or advertising services), CPC 96112 (motion picture or video tape production services), CPC 96113 (motion picture or video tape distribution services) and CPC 96114 (other services in connection with motion picture and video tape production and distribution);
- 2.D.b. Motion picture projection services (CPC 9612), containing CPC 96121 (motion picture projection services) and CPC 96122 (video tape projection services);
- 2.D.c. Radio and television services (CPC 9613), containing CPC 96131 (radio services), CPC 96132 (television services) and CPC 96133 (combined programme making and broadcasting services);
- 2.D.d. Radio and television transmission services (CPC 7524), containing CPC 75241 (television broadcast transmission services) and CPC 75242 (radio broadcast transmission services);
- 2.D.e. Sound recording;
- 2.D.f. Other.

<sup>13</sup> For further details, see WTO, *Audiovisual Services: Background Note from the Secretariat*, WTO Doc. S/C/W/40, Geneva, 1998.

<sup>14</sup> Audiovisual issues had been raised various times both before and after the creation of the WTO, for example in relation to the negotiation of Article IV of the GATT (Special Provisions relating to Cinematograph Films) and its subsequent application (or not) to television programmes; Keith Acheson and Christopher Maule, *Much Ado about Culture: North American Trade Disputes*, University of Michigan Press, Ann Arbor, Michigan, 2001; GATT Doc. MTN/GNS/AUD/W/1, 1990; Americo Beviglia Zampetti, *WTO Rules in the Audio-Visual Sector*, Hamburg Institute of International Economics, 2003; and GATT Docs. L/1908; L/2120; L/1615; SR.19/5, pp. 65–66; SR.19/9, pp. 148–151; and L/1686.

<sup>15</sup> See *EU Defeats US in Fight Over Audiovisual Market Access in Latvia*, Inside U.S. Trade, 28 August 1998; *Paris bloque l'adhésion de la Croatie à l'OMC au nom de "l'exception culturelle"*, Le Monde, 9 October 1999; *Latvia completes WTO entry talks*, Journal of Commerce Special, 1 October 1998. Also, regarding accession negotiations, a Fact Sheet of the Embassy of Croatia in Washington, D.C. (available at: [www.croatiaemb.org/politics/fsheets/wto.htm](http://www.croatiaemb.org/politics/fsheets/wto.htm), last accessed 18 May 2005) says: "... the only remaining issue, audiovisual services commitments, impeded the conclusion of the negotiations. Because of opposite concepts between the US and the European Union in the field of audiovisual services, Croatian accession to the WTO was blocked for the last seven months."

The accessions process had a notable impact on the overall number and quality of GATS commitments in audiovisual services. Indeed, the number of Members with commitments in the sector went from 18 to 26 (an increase of 44 per cent) as a result of the accessions process. While only 18 Members out of 128 Members (14 per cent) took commitments in this sector at the end of the Uruguay Round negotiations, 8 of the 20 Members that went through the WTO accessions process (40 per cent) undertook such commitments.<sup>16</sup> While the level of commitments of WTO Members across all services sectors tends to reflect their level of economic development (developed countries generally have specific commitments in more sectors than developing countries, who themselves tend to have more than least developed countries), acceding Members—developing economies and least developed countries—are the exception, as the number of specific commitments included in their schedules is close to that of developed economies.<sup>17</sup> This can be attributed to the particular characteristics of the negotiating process for accessions, where, unlike in the Uruguay or the current Round, each Member negotiates alone with all other interested Members. The candidate to accession has to make commitments that convince all others that it is “worthy” of receiving the benefits of membership but, unlike in the current negotiations, it is not in a position to make demands on other Members and extract additional concessions.

It needs to be emphasized that many of those Members that tended to be more advanced in the process of integration into the European Union or geographically closer to its borders (Albania, Bulgaria, Croatia, Estonia, the Former Yugoslav Republic of Macedonia, Lithuania, Latvia and Moldova) did not undertake commitments in the sector. While acceding countries, often as a result of conflicting pressures from, mostly, the United States and the EC either undertook specific commitments in audiovisual services or abstained from doing so, the reality is more nuanced. Albania, the Former Yugoslav Republic of Macedonia, Lithuania, Latvia, Estonia, Croatia, Moldova and Nepal did not undertake commitments in the audiovisual sector but included “cinema theatre operation services” in their schedule of commitments as a new sub-sector within the sector of “Recreational, Cultural and Sporting Services” of the services classification list (W/120). While there is no specific CPC definition of such a service, one assumes that it at least includes motion picture projection services (CPC 96121), which is included within the audiovisual sector of the W/120. As well, some Members that did not undertake commitments in audiovisual services undertook commitments in the “other rental/leasing services without operator” sub-sector, which includes leasing or rental services of sound cassettes and compact discs (CPC 83201) and/or of video tapes (CPC 83202). This sub-sector is found in the services sectoral classification list under “Business Services”. Twelve acceding Members, of which 8 had not undertaken commitments in audiovisual services, did undertake commitments regarding either CPC 83201 or CPC 83202.

<sup>16</sup> These are Armenia, China, Chinese Taipei, Georgia, Jordan, Kyrgyz Republic, Oman and Panama.

<sup>17</sup> Rolf Adlung and Martin Roy *Turning Hills into Mountains? Current Commitments under the GATS and Prospects for Change*, WTO Staff Working Paper ERSD-2005-01, WTO, Geneva, Switzerland, 2005.

Of the 20 acceding countries, 14 took MFN exemptions pertaining directly to the audiovisual services sector.<sup>18</sup> The six that did not were China, Chinese Taipei, the Former Yugoslav Republic of Macedonia, Kyrgyz Republic, Mongolia and Oman. This was again a key topic of accession negotiations, as the replication of some of the EC's MFN exemptions—such as those that permit discrimination relating to co-production agreements, the Convention on Transfrontier Television and support programmes such as MEDIA—was seen as an obligation for countries hoping to adhere to the European Union. Almost all European countries that acceded to the WTO took MFN exemptions pertaining to audiovisual services in these three key areas. The exceptions are Armenia (only co-production and support programmes) and Georgia (only an exemption for co-production agreements with France).

It can also be noted that some of the acceding Members that did take MFN exemptions for audiovisual services, such as Armenia, Georgia, Jordan and Panama, also have specific commitments in the same sector. While this is not in itself inconsistent, it may be recalled that the level of treatment inscribed in schedules is the minimum level of treatment that a Member has to grant to all other WTO Members. MFN exemptions permit to provide more favourable treatment to some Members compared with the treatment granted to others, but this cannot be done by undermining the level of treatment guaranteed in schedules.<sup>19</sup>

### III. THE CONTEXT FOR THE NEGOTIATIONS: STARTING POINT AND CURRENT STATE OF PLAY

#### A. MANDATE AND EARLY NEGOTIATING PROPOSALS

In addition to Article XIX of the GATS, as well as the guidance provided in the Doha Declaration and in the July Package,<sup>20</sup> the parameters for the services negotiations are essentially provided for in the *Guidelines and Procedures for the Negotiations on Trade in Services*, which WTO Members adopted on 28 March 2001.<sup>21</sup> A key aspect of the current GATS negotiations, from which Members agreed no services sector is *a priori* excluded, consists in the offering of improvements to existing schedules of specific commitments. The *Guidelines* recognize the right of Members to regulate, and to introduce new regulations, on the supply of services. They also confirm that the process of liberalization is to take place with due respect for national policy objectives and recognize the right of each Member to choose the sectors in which it wishes to undertake new commitments.

<sup>18</sup> These are Albania, Armenia, Bulgaria, Cambodia, Croatia, Ecuador, Estonia, Georgia, Jordan, Latvia, Lithuania, Moldova, Nepal and Panama.

<sup>19</sup> WTO Doc. S/L/92, p. 7. Further, Article v of the GATS permits WTO Members, under certain conditions, to grant more preferential treatment to other parties to an economic integration agreement.

<sup>20</sup> WTO General Council, Decision on the Doha Agenda Work Programme, adopted 1 August 2004; available at: [www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm).

<sup>21</sup> WTO Doc. S/L/93.

Discussions in the Council for Trade in Services since the start of the new services negotiations in 2000 have touched upon both the commercial and cultural importance of audiovisual services. The presentation of sector-specific negotiating proposals on audiovisual services in 2000 and 2001 by Brazil, Switzerland, Japan and the United States, and the ensuing exchange among Members, reinforced this point.<sup>22</sup> The proposals, while stressing the economic impact of trade restrictions, recognized governments' need to preserve and protect cultural identity and values. The Brazilian proposal stressed that, instead of denying either the economic importance of audiovisual services or their role in the transmission of cultural values and ideas, Members needed to consider how to "promote the progressive liberalisation of the sector in a way that creates opportunities of effective market access for exports of developing countries in this sector without affecting the margin of flexibility of governments to achieve their cultural policy objectives". The U.S. proposal suggested that Members consider developing an understanding on subsidies that would respect each nation's need to foster its cultural identity. It also remarked that the GATS had proved flexible in accommodating concerns relating to the fulfilment of non-economic policy objectives in other sectors, for example through the Annex on Financial Services where substantial discretion was provided to regulators for prudential measures. The U.S. proposal stressed the need to review the existing classification of the sector as provided by the services sectoral classification list (W/120) so as to better reflect business practices and technological developments.

The Swiss proposal explicitly aimed at helping to overcome the previous "all-or-nothing" debate that had permeated negotiations in the past and at identifying possible practical avenues to reconcile both the commercial and cultural aspects and sensitivities of the sector within the structure of the GATS in order to provide a "solution" to the current situation. It wondered how to increase the level of commitments in the audiovisual sector while ensuring that the notion of cultural diversity was sufficiently taken into account. The proposal suggested that Members debate whether this could be done by identifying the measures needed to preserve cultural diversity so as to guarantee that their implementation remained possible and/or by elaborating an enabling clause subject to proper circumscription so as to avoid abuse. It also stressed the importance of discussing the various policies that most Members typically had in place with respect to public-service operators, relating for example to funding, access to communication infrastructure, and prescriptions on content.

The importance of discussing competition issues in the audiovisual context was stressed by both the Swiss and Brazilian proposals. The Brazilian proposal also emphasized, among other things, the export interests of some developing economies in this sector.<sup>23</sup>

<sup>22</sup> The proposals are contained in WTO Docs. S/CSS/W/21, S/CSS/W/74 and S/CSS/W/99. Japan's proposal, which was not specific to audiovisual services, is found in WTO Doc. S/CSS/W/42.

<sup>23</sup> Ibid. Overviews of the discussion of these proposals by delegations can be found in WTO Docs. S/CSS/M/8, S/CSS/M/9, S/CSS/M/10, S/CSS/M/13 and TN/S/M/1. Neither Brazil nor Switzerland has formally raised issues relating to its negotiating proposals in more recent years.

During discussion of these proposals in meetings of the Council for Trade in Services, most Members that expressed views on this topic seemed to consider that the GATS permitted the promotion of progressive liberalization, increase in competition and predictability of trade flows in the sector while allowing governments to regulate and to pursue cultural policy objectives.<sup>24</sup> At the same time, the sensitivity of the sector was stressed. The EC said that its objective in the sector was to guarantee the possibility for Members to preserve and develop their capacity to defend and implement cultural policies to preserve cultural diversity. Canada said that it would not undertake commitments that could limit its ability to achieve cultural objectives until a new international instrument on cultural diversity was established.<sup>25</sup> More recently, a group of Members (Hong Kong China, Japan, Mexico, Chinese Taipei and the United States) presented a joint statement in which they highlighted the benefits they saw in greater commitments in audiovisual services and expressed concerns over efforts by some key participants in the negotiations to create an *a priori* exclusion for the sector.<sup>26</sup>

#### B. REQUESTS AND OFFERS: WHERE ARE WE STARTING FROM?

While the services negotiations touch upon various aspects, including the possible development of new rules—such as on subsidies, government procurement, domestic regulation or emergency safeguard measures—their core is the achievement of a progressively higher level of liberalization through the negotiation of improvements to existing schedules of specific commitments.<sup>27</sup> Such improvements are negotiated through a process of requests and offers. Each Member bilaterally informs other trade partners of the improvements it would wish them to make to their schedule (requests) and presents to all Members a new draft schedule of commitments, where improvements over existing commitments are highlighted (offers). While the bilateral process of exchange of requests started on 30 June 2002, the presentation of initial offers commenced on 31 March 2003. As of 31 October 2005, 69 initial offers had been submitted, as well as 29 revised offers.<sup>28</sup> Seven of these 69 offers either improve existing specific commitments and/or include new specific commitments in audiovisual services. Six of the seven Members that have made offers in relation to the sector are of the few WTO Members that already had some commitments in that sector.<sup>29</sup>

As indicated above, as a result of the Uruguay Round negotiations and subsequent accessions to the WTO, the number of Members with commitments in audiovisual

<sup>24</sup> For discussions on the sector, see, in particular, WTO Doc. S/CSS/M/9, paras. 197–209; WTO Doc. S/CSS/M/10, paras. 208–226; WTO Doc. S/CSS/M/13, paras. 211–217; and WTO Doc. TN/S/M/1, paras. 315–318.

<sup>25</sup> WTO Doc. S/CSS/W/46.

<sup>26</sup> WTO Doc. TN/S/W/49. See also the Annex to WTO Doc. TN/S/20.

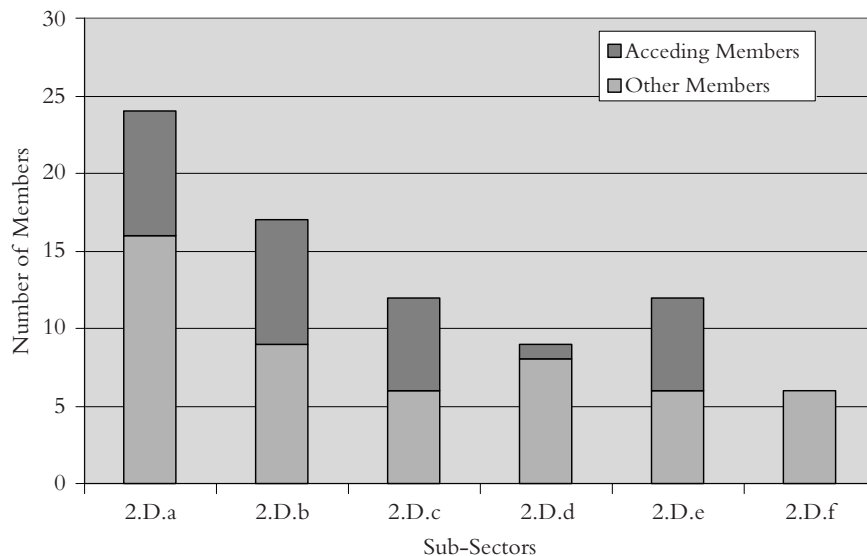
<sup>27</sup> Each Member identifies, in its Schedule of Commitment, the minimum level of treatment that it guarantees, for selected sectors, to all other WTO Members with respect to the obligations of market access (Article XVI), national treatment (Article XVII) and, if it so wishes, additional commitments (Article XVIII).

<sup>28</sup> Counting the offer of the EC as one.

<sup>29</sup> For a more detailed look at the offers over all, see Adlung and Roy, *supra*, footnote 17.

services totals 26. This number is small compared to other services sectors. In contrast, 72 Members made commitments in legal services, 105 did so in telecommunications and 108 with respect to insurance and insurance-related services.<sup>30</sup> However, given the structure of the GATS, looking only at the number of Members that have made commitments in the sector only tells part of the story. A closer look at the commitments reveals that many of the 26 Members undertook commitments only in a few of the six sub-sectors of audiovisual services as defined in W/120 (see *Figure 1*). Only 10 of the 26 Members with commitments in the sector undertook specific commitments in four or more of the six sub-sectors. Twenty-four Members took commitments in motion picture and video tape production and distribution, 17 in motion picture projection services, 12 in radio and television services, 9 in radio and television transmission services, 12 in sound recording and 6 in other audiovisual services. In other words, it is striking that only 15 WTO Members have taken some commitments in either of the two sub-sectors that relate to radio and television (CPC 9613 and CPC 7524). It is also surprising that sound recording, a sector where government regulations and trade restrictions would seem much less prevalent than in other sub-sectors, has attracted commitments from only 12 Members. In addition, many Members have opted not to use the CPC definitions suggested by W/120 in full (as they are free to do) but rather to commit only on part of a given sub-sector or to use their own sectoral definitions, such as the provision of sound track or dubbing services.

*Figure 1*  
NUMBER OF WTO MEMBERS WITH COMMITMENTS IN PARTICULAR SUB-SECTORS UNDER AUDIOVISUAL SERVICES



Source: Author's original.

<sup>30</sup> Counting EC Member States individually.

Further, under the GATS, including a sector or sub-sector in one's list of specific commitments does not automatically entail an obligation of full compliance with the national treatment and market-access obligations for all modes of supply. Members indeed choose, for each mode of supply, whether they want to undertake full commitments (without any limitation to market access or national treatment), partial commitments (i.e. inscribing in their schedules measures inconsistent with Articles XVI or XVII that they wish to maintain or adopt in the future) or no commitment at all (i.e. remaining free to maintain or adopt any measure inconsistent with Articles XVI and/or XVII with respect to a given mode of supply). What is striking with respect to audiovisual services is the very small number of sector-specific limitations listed. For modes 1 to 3—cross-border trade, consumption abroad and commercial presence<sup>31</sup>—in the six sub-sectors, 79 per cent of the modal entries are full commitments while 9 per cent are partial commitments and 13 per cent are unbound (i.e. there is an absence of any commitment).<sup>32</sup>

Table 1 shows the levels of commitments in the sector by mode of supply. It highlights a high proportion of full commitments across the three modes, although more so under mode 2. Mode 3 is where most partial commitments are found. These often consist of limitations on foreign capital participation and restrictions on the form of legal entity or requirements of joint venture. There are few limitations that pertain to content restrictions. One such example is found in Chinese Taipei's commitment on radio and television services, which contains a limitation that requires 70 per cent of wireless radio and television programmes and 20 per cent of cable television programmes to be domestically produced.

TABLE 1: NUMBER AND PERCENTAGE OF FULL, PARTIAL AND NON-BINDINGS FOR SUB-SECTORAL ENTRIES IN AUDIOVISUAL SERVICES (MODES 1 TO 3)

<i>Level of commitment in market access and national treatment columns</i>	<i>Mode 1</i>	<i>Mode 2</i>	<i>Mode 3</i>
Full Commitments	118 (74%)	145 (91%)	114 (71%)
Partial Commitments	14 (9%)	0 (0%)	28 (18%)
No Commitments	28 (18%)	15 (9%)	18 (11%)

*Note:* This does not take into account possible horizontal limitations or exclusions from sectoral coverage.

*Source:* Author's original.

The relatively small number of commitments with sector-specific limitations suggests that Members that made commitments tended to have few restrictions in place with regard to the relevant audiovisual services. Unlike in other sectors, such as financial

<sup>31</sup> Mode 4 commitments are almost always partial commitments. Typically, commitments for this mode, which are governed in the horizontal section of the schedule and apply to all sectors listed, are limited to certain types of movement (e.g. intra-corporate transferees) and certain types of personnel (e.g. managers or specialists).

<sup>32</sup> This does not take into account the limitations found in the horizontal section of schedules, which apply to all sectors included in one's schedule, e.g. concerning subsidies. Neither does it take into account entries in the sector column of the schedule, e.g. whether the commitments cover an entire sub-sector of W/120 or only part of it.

services or telecommunications, Members with restrictions in force did not seem to be willing to take a commitment guaranteeing a given level of openness, either by binding the regime in place or even by guaranteeing a lesser level of openness than the one being provided in practice. Neither have Members generally tended to bind or reduce the use of the most distortive types of measures while retaining the ability to use more freely less economically distortive types of measures.

In other words, Members tended to refrain from using the scheduling flexibility provided by the Agreement, which permits them to undertake various types of commitments aside from either full liberalization or absence of commitments.<sup>33</sup> The relatively limited use of the Agreement's flexibility at the time of taking commitments may result from the lack of substantive discussions (between WTO Members but also maybe within national governments) about the level of trade distortion or trade restrictiveness associated with different types of market-access or national treatment limitations in the sector. Indeed, commitments in the sector could limit or reduce certain types of restrictions while giving more leeway with respect to other types of measures. It is worth stressing that an important aspect of the GATS, aside from encouraging liberalization, is to provide for greater transparency and predictability; that is, committing to a given level of restrictions in a certain sub-sector ensures market operators and other governments that restrictions are not going to rise above a given level. This issue is addressed at greater length in Sections IV and V of this article.

As indicated above when referring to the accessions process, some services—associated with distribution services, rental/leasing services (within the business services sector) and entertainment services—are not classified as audiovisual services in the W/120 but are nevertheless closely related. With respect to other rental/leasing services, 19 Members have made commitments with respect to either rental/leasing of sound cassettes and compact discs (CPC 83201) or rental/leasing of video tapes (CPC 83202).<sup>34</sup>

In distribution services, relevant sub-sectors are wholesale trade services and retailing services of records, audio and video tapes, as defined in CPC 62244 and CPC 63234. Fifty-nine Members<sup>35</sup> have specific commitments covering at least one of these two sub-sectors. Also, as noted above, eight Members, all of which went through the accessions process, undertook commitments in cinema theatre operation services, which are included within the entertainment services sub-sector. *Figure 2* highlights the contribution of acceding countries to the overall commitments in these sectors.

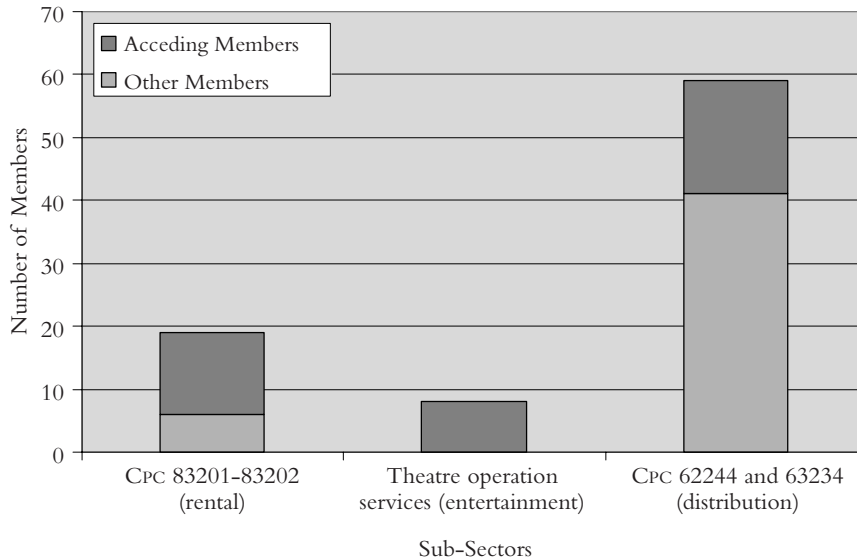
With respect to MFN exemptions, which are also subject to negotiations in the current round of negotiations, 44 Members have taken a total of 102 MFN exemptions in

<sup>33</sup> See *Guidelines for the Scheduling of Specific Commitments*, WTO Doc. S/L/92.

<sup>34</sup> Members with commitments regarding leasing/rental of both types of products are Albania, Chinese Taipei, Croatia, Estonia, Gambia, Hungary, Iceland, Japan, Kyrgyz Republic, Latvia, Lithuania, Moldova and the United States. Those with commitments with respect to CPC 83201 only are China, Mexico and Uruguay; and those with commitments with respect to CPC 83202 only are Georgia, Former Yugoslav Republic of Macedonia and Nepal.

<sup>35</sup> Counting EC-12 Members individually.

Figure 2  
NUMBER OF WTO MEMBERS WITH COMMITMENTS IN SELECTED SECTORS



Source: Author's original.

the audiovisual services sector.<sup>36</sup> Most of these Members (37) do not have any commitments in audiovisual services. As noted in a 2001 study carried out by the Organisation for Economic Co-operation and Development (OECD), the audiovisual sector accounts for a significant share of the total number of MFN exemptions.<sup>37</sup> Many of the Members with MFN exemptions in audiovisual services are European (25 of the 44 Members). They typically relate to co-production agreements, support programmes or the Council of Europe Convention on Transfrontier Television, or reserve a right to retaliate against unfair conditions abroad. The latter type of exemption reflects the tensions that existed during the Uruguay Round on audiovisual services, as—assuming a Member does not have commitments in the sector—it allows such a Member to impose any kind of restrictions on the supply of audiovisual services by certain foreign suppliers but not others.

#### IV. KEY ECONOMIC AND TRADE DEVELOPMENTS IN AUDIOVISUAL SERVICES

The context for the negotiations is also influenced by economic and trade trends in the sector, which has experienced dynamic growth in the last years and is intensive in both human capital and technology. On the trade side, balance-of-payments (BOP) data, even if it significantly underestimates total trade in this sector, makes it possible to highlight some key trends. For one, trade in audiovisual services has grown quite rapidly

<sup>36</sup> Counting EC-12 Members as one and only those MFN exemptions identified by Members as pertaining to audiovisual services, thus excluding MFN exemptions that apply to all sectors.

<sup>37</sup> OECD, *Trade in Services: A Roadmap to GATS MFN Exemptions*, OECD, Paris, 2001.

in recent years. Exports of audiovisual and related services, according to BOP statistics, stood at US\$ 16 billion in 2003, an estimated growth of 63 per cent over five years. In contrast, world exports of commercial services grew by 31 per cent over the same period. The United States is by far the biggest exporter, with 45 per cent of world exports. It is followed by Canada (10.2 per cent), the United Kingdom (9.8 per cent), France (7.9 per cent) and Germany (5.2 per cent). Exports of developing countries in this sector in 2002 amounted to 4.7 per cent of total exports. In contrast, in 1995, exports of such countries totaled less than 1 per cent of world exports.<sup>38</sup>

In light of limitations of official statistics, the European Audiovisual Observatory has collected data estimating that U.S. cross-border exports of audiovisual services (defined here to include receipts for television transmission, video and film distribution rights) to the EU totaled US\$ 9 billion in 2000 (almost half of exports relating to the television market), while exports of the EU to the United States reached US\$ 827 million, thus amounting to a US\$ 8.2 billion bilateral surplus for the United States. Western Europe is estimated to represent more than half of foreign revenues for the U.S. audiovisual industry.

Globally, the audiovisual sector has seen significant growth recently. The world audiovisual market is estimated at US\$ 480 billion in 2004 and grew by 24 per cent between 2000 and 2004. The most rapidly growing markets include China, Russia, Turkey, Central Europe, South Africa, Pakistan, Indonesia, India and Malaysia. The television and film segments have seen strongest growth.<sup>39</sup> The global market for recorded music, which had been in decline in the last years as the industry was coping with piracy issues and changing business models (sales of recorded singles, now easily available online, declined by 40 per cent in 2001),<sup>40</sup> has expanded in 2004 thanks to developments in digital distribution and mobile music. More can be gleaned by looking at the abundance of studies on the importance of copyright industries in respective national economies, of which audiovisual services form a key subset (other components of core copyright industries include software, press and literature). The value added to the economy by core copyright industries amounted to an estimated 6 per cent of gross domestic product (GDP) in 2002 for the United States, 4 per cent of GDP for the EU-15, 7.5 per cent for Japan and 2.4 per cent for Canada in 2000, and 4.8 per cent for Brazil in 1998. The core copyright industries employed 5.5 million people in the United States and 5.2 million people in the EU-15. Such industries have been growing at a faster pace than the rest of the economy.<sup>41</sup>

<sup>38</sup> Although the basket of developing countries reporting such data in 1995 was smaller.

<sup>39</sup> PriceWaterhouseCoopers, *Global Entertainment and Media Outlook 2005-2009*, 2005, "Global Overview", p. 27. This includes filmed entertainment; television networks, broadcast and cable; television distribution, station, cable and satellite; recorded music; radio; and out-of-home advertising.

<sup>40</sup> Ibid.; *Music Industry Crushed by 1.1 billion Fake CDs*, The Guardian, 11 July 2003.

<sup>41</sup> Stephen Siwek, *Copyright Industries in the US Economy; The 2004 Report*, 2004, prepared for the International Intellectual Property Alliance; Media Group, Turku School of Economics and Business Administration, *The Contribution of Copyright and Related Rights to the European Economy*, 2003, report prepared for the European Commission; World Intellectual Property Organization and State University of Campinas, *Study on the Economic Importance of Industries and Activities Protected by Copyright and Related Rights in the MERCOSUR Countries and Chile*, WIPO Study No. 889, Geneva, Switzerland, 2002; WIPO, *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*, Geneva, Switzerland, 2003.

As suggested by BOP statistics, developing countries are playing a bigger role in the global audiovisual market and some have become regional and even global exporters of audiovisual products. Both the United Nations Conference on Trade and Development (UNCTAD) and the OECD have identified audiovisual services as a key sector of export interest for developing countries.<sup>42</sup> For example, India's film industry, the world's biggest in terms of films produced, gets a significant share of its earnings from foreign sales, with film exports to 95 countries. The Indian film industry provides direct employment to 1 million people and indirect employment to another 4 million. India is also a growing producer of television and musical content, producing 40,000 hours of television programming and 5,000 music titles.<sup>43</sup> Hong Kong China's export earnings from audiovisual production and related services amounted to US\$ 62 million in 2002, a significant share of exports going to regional Asian markets. Hong Kong tops the world in terms of per capita film production, and over half of Hong Kong's film income is generated from foreign sales.<sup>44</sup> Regarding television content, countries such as Egypt are regional exporters and, in Latin America, "telenovelas" are a successful programming export, with companies such as Televisa (Mexico), TeleFe (Argentina), Venevision and RCTV (Venezuela) or TV Globo (Brazil) exporting in the region but also to Spain, Italy, Russia, Singapore and Malaysia as well as to the United States through Hispanic broadcast channels such as Univision or Telemundo.<sup>45</sup>

In addition, the export potential and the economic importance of the music industry in developing countries has been highlighted by a number of recent studies which have highlighted its contribution to development, innovation and e-commerce in such regions as Africa or the Caribbean.<sup>46</sup> Characteristics of music recordings—their relatively lower entry costs, the links to the tourism industry, the prevalence of regional preferences (and hence the potential of regional markets as springboards), their universality (language and cultural barriers are lesser than for movies or television programmes), and the fact that their transmission through digital means is easier (or

<sup>42</sup> UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries*, Note by the UNCTAD Secretariat, Geneva, Switzerland, 27 September 2002; OECD, *Services Liberalisation: Identifying Opportunities & Gains: Part One: Examples of Developing Country Services Exports*, OECD, Paris, 2003.

<sup>43</sup> OECD, *ibid.*, pp. 18–19; Arpita Mukherjee, *India's Trade Potential in Audiovisual Services and the GATS*, Working Paper No. 81, India Council for Research on International Economic Relations, New Delhi, 2002; *idem*, *Audiovisual Policies and International Trade: The Case of India*, Report 227, Hamburg Institute of International Economics, 2003.

<sup>44</sup> Hong Kong Trade Development Council, <www.tdctrade.com>.

<sup>45</sup> OECD, *supra*, footnote 42, p. 24.

<sup>46</sup> David Throsby, *The Music Industry in the New Millennium: Global and Local Perspectives*, paper prepared for the Global Alliance for Cultural Diversity and the UNESCO, 2002; Frank J. Penna, Monique Thormann and J. Michael Finger, *The Africa Music Project*, in J. Michael Finger and Philip Schuler (eds.), *Poor People's Knowledge: Helping Poor People to Earn from Their Knowledge*, World Bank and Oxford University Press, 2003; UNCTAD, *Electronic Commerce and Music Business Development in Jamaica: A Portal to the New Economy?* Geneva, Switzerland, 2002; B. Andersen, Z. Kozul-Wright and R. Kozul-Wright, *Copyrights, Competition and Development: The Case of the Music Industry*, UNCTAD Discussion Paper No. 145, Geneva, Switzerland, 2000; Z. Kozul-Wright and L. Standbury, *Becoming a Global Player: The Case of the Music Industry in Jamaica*, UNCTAD Discussion Paper No. 138, Geneva, Switzerland, 1998; Vanus James, *The Caribbean Music Industry Database (CMID)*, report prepared for UNCTAD and WIPO, 2001; Roger Wallis, *Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries*, WIPO-UNCTAD Report, 2001; WIPO, *supra*, footnote 41; Verena Wiedemann, *Promoting Creative Industries: Public Policies in Support of Film, Music and Broadcasting in Developing Economies*, Study prepared for UNCTAD XI, 2004.

technically less demanding) than for other audiovisual products—combine to make this a key area of potential growth in these countries.

Technological advances have many implications for the type and quantity of services that can be produced and their delivery in foreign markets, as well as for policy-makers, who need to assess whether policy objectives and the ways to attain them—such as current regulations—need to be modified in the face of a changing environment. For one, technological developments make it easier (in terms of both cost and user-friendliness) to transport audiovisual products across distance and allow for greater amounts of content to be made available to consumers, with increasing shelf space for audiovisual products presenting market opportunities for foreign providers of such services. With respect to television, for example, digitalization and the growth of new delivery platform systems such as cable or satellite have increased the number of channels that can be received by consumers in comparison with free-to-air broadcasting.

Developments in bandwidth and in storage capacity is further transforming the audiovisual market by permitting greater offering of products, enabling increasingly interactive and more customized services and the increasing use of the computer (or, more likely, the computerization of the television so as to, for example, allow for two-way communication, e.g. set-top box, digital video recorder or electronic programme guides) and the Internet for the consumption of audiovisual products. These developments have given a greater say to audiences, who are now offered more to choose from (in face of a trend towards an almost limitless channel universe or shelf space), have greater options regarding how they want to consume products (movies can be seen by going to the theatre, renting to watch at home or by video-on-demand through the television set) and when they want to watch them. This will gradually alter the traditional notions of “prime time” and further foster the phenomenon of audience fragmentation, as consumers’ ability to decide to watch what is of special interest to them increases, and will encourage greater specialization of content producers.<sup>47</sup>

With respect to the music industry, technological advances, in particular digitalization, which already have had significant impacts by facilitating piracy, are now provoking the emergence of new business models and services. From close to nothing not long ago, legitimate online music services are growing fast (in 2004, the digital catalogue on the biggest online services doubled from 500,000 to 1 million), and it is estimated that digital sales could rise to as much as 25 per cent of total sales in five years.

<sup>47</sup> See OECD, *Content as New Growth Industry*, OECD, Paris, 1998; European Commission, *Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age*, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Brussels, 1999; OECD, *Regulation and Competition Issues in Broadcasting in the Light of Convergence*, OECD, Paris, 1999; Canada, *Our Cultural Heritage: The Second Century of Canadian Broadcasting*, Report of the Standing Committee on Canadian Heritage, House of Commons, June 2003, Ottawa; EC, *Green Paper on the Convergence of the Telecommunications, Media, and Information Technology Sectors, and the Implications for Regulation towards an Information Society Approach*, Brussels, 1997. See also U.K. Department of Trade and Industry and Department for Culture, Media and Sports, *A New Future for Communications; Communications White Paper*, London, 2000.

Major brands have adopted new business models including pay-per-download (tracks can generally be transferred to portable devices and burned onto a disk) or subscription services (providing wide access for a monthly fee with option to purchase). Digital music is not only growing online but also through mobile phones; in Japan and South Korea, mobile music sales have outsold online downloads.<sup>48</sup>

Other important consequences of these technological developments are that restrictions affecting competition between carriers/distributors of content, by raising prices and discouraging investment and innovation, will limit the development of networks and technology and hence reduce the amount of content that can be accessed (i.e. shelf space). Such restrictions on carriers of content thus have implications for cultural objectives in addition to economic ones. Similarly, restrictions on the type of content that can be distributed or produced can also limit the development of carrier technology and networks, since audiovisual products are key market drivers that make investment in such areas attractive. Finally, technological advances, in particular developments in electronic commerce, make profitable transactions that previously were not. By overcoming limitations of geography and scale, they encourage the development of niche markets and encourage consumers to explore beyond mainstream tastes. Expanding “electronic” shelf space means that distributors are no longer incited to focus on best-selling products so as to not use scarce space for products which may have limited appeal for their local clientele. Reduction of barriers to entry in distribution means that it may now be more profitable to supply, say, Indian or Thai music and movies through the Internet to consumers across North America than might otherwise have been the case.<sup>49</sup> Such developments have clear implications with respect to measures that should be taken in the pursuit of cultural objectives.

## V. SOME KEY ISSUES IN THE NEGOTIATIONS

Services negotiations so far have generally been more about bindings than about liberalization: commitments have tended to be more about reflecting in schedules the current level of market-access and national treatment restrictions (or often a higher level of restrictions than is actually applied in practice) than about agreeing to reduce restrictions in place. A key step in the negotiations might thus entail having a greater number of Members undertake various forms of bindings regarding different audiovisual sub-sectors. Indeed, absence of commitment in a given sector, while it remains an option, means that a Member can, at any time, take whatever market-access or national treatment limitation—such as caps on the value, time or amount of foreign films, programmes or music that can be accessed by consumers, limitations on

<sup>48</sup> International Federation of the Phonographic Industry (IFPI), *Digital Music Report*, London, 2005.

<sup>49</sup> Chris Anderson, *The Long Tail*, Wired Magazine, October 2004; *Profiting from Obscurity*, The Economist, 7 May 2005, p. 73; Patrick Messerlin, *Comments on the Contribution by P. Sawé and K. Steinfatt*, in *Achieving Better Regulation of Services*, Conference Proceedings, Productivity Commission and Australian National University, Canberra, 2000.

competition through caps on the total number of distributors of content or prohibitions on the entry of natural persons such as actors, directors or technicians going abroad to shoot in a foreign production. This absence of any guarantee of openness stands in stark contrast to the economic and trade importance of the sector (and in particular its intensive use of technology and creativity) as well as the importance of the predictability and stability given by commitments—that is, the certainty that certain restrictions won't be maintained or introduced in the future—for business planning and investments.

We have also seen, however, that limitations are relatively few for those commitments that do figure in schedules. This suggests that Members tended to refrain from undertaking bindings where restrictions existed, thus not taking advantage of the scheduling flexibility of the Agreement. Members might benefit, in assessing and developing requests and offers, from identifying key barriers and impediments to trade, assessing the most effective and less trade-distortive means of attaining cultural and other policy objectives in the light of new technological developments, and identifying the measures inconsistent with Articles XVI and/or XVII that should be maintained. Doing such an assessment could also provide necessary insights for negotiators or groups of negotiators to provide some common guidance on types of commitments that might be undertaken. These can, for example, take the form of checklists or model schedules which would take into account particularities of relevant sub-sectors and make suggestions in regards to types of commitments to take, such as prioritization of restrictions (which ones might be listed, which ones should not), how to best schedule and classify commitments in the sector, additional commitments, etc. This Section of the article first reviews and discusses some key types of trade barriers in the sector. It then considers some possible scheduling and classification issues that might be of relevance.

#### A. RESTRICTIONS ON TRADE IN SERVICES<sup>50</sup>

##### 1. QUANTITATIVE RESTRICTIONS EITHER OF A DISCRIMINATORY OR NON-DISCRIMINATORY NATURE

###### (a). *Content Restrictions*

Discriminatory content quotas that limit either broadcast time, radio playtime or cinema projection time for non-national services are relatively widespread, especially as regards television. In some cases, such quotas discriminate between different foreign

<sup>50</sup> It is not presumed that all these measures are necessarily inconsistent with the obligations of market access and national treatment (GATS Articles XVI and XVII). See, for example, Solon Consultants, *Audiovisual Industry; Trade and Investment Barriers in Third Country Markets*, Final Report to DG1 Market Access Unit, European Commission, London, 1998; Asia-Pacific Broadcasting Union, *Trade Liberalisation in the Audiovisual Services Sector and Safeguarding Cultural Diversity*, discussion paper commissioned by the Asia-Pacific Broadcasting Union, Sydney, Australia, 1999; Mukherjee, 2003, *supra*, footnote 43; Mukherjee, 2002, *supra*, footnote 43; IFPI, *Response to the EC Consultation Document on the GATS 2000/WTO Negotiations Concerning Audiovisual Services (Music and Recreational Software) and Cultural Services*, London, 2001; Productivity Commission, *Broadcasting*, Report No. 11, AusInfo, Canberra, Australia, 2000, Appendix F (Content regulation in other countries).

origins. With respect to cinema projection, the use of screen quotas still occurs, but the absence of such quotas is the rule rather than the exception. Similar quotas that secure a share of air time for domestic content remains significant in television. The enforcement of quotas necessitates defining domestic content, which is not always an easy task given the growing internationalization of production. Definition varies across countries and involves a combination of factors such as national ownership and control of the company producing the content as well as the nationality of the director, the crew (or percentage thereof) or the authors. As noted above, the effectiveness of quotas, which were originally designed in a context where diffusion of television content was limited, remains to be seen in the face of a move towards access to greater quantities of content.

Most countries have local-content regulations in place for television—especially for free-to-air channels—with the notable exception of such countries as Mexico, the United States and Japan, where large domestic markets are combined with strong consumer preferences for local programmes.<sup>51</sup> Quotas also exist in some countries regarding the proportion or minimum number of domestic channels that need to be offered by content carriers such as cable operators or direct-to-home service providers. Some other countries have in place economic needs tests whereby authorization for certain channels to be offered to the public and carried by aggregators is granted on the basis of criteria such as whether similar channels already are or can be provided by local suppliers. The trade-restrictiveness of such quotas might depend on the type of definition of local content adopted, such as whether they relate to creators and producers of content rather than to owners of capital.

Quotas on content could also have such consequences if too restrictive, for example if all channels in a multi-channel universe were to be required to provide some local content. Indeed, quotas used in the context of a more limited channel universe would need to be adapted: 80 per cent of domestic channels in a context where households get 20 channels is not the same as for situations where households have access to 100 channels; the former would likely limit the expansion of shelf space. More generally, given the expansion of such shelf space and the increased capacity of consumers to choose—that is, the reduced efficiency of prime-time quotas—the focus of policy-makers might best shift to ensuring that certain domestic content, such as that meant to fulfill relevant public-policy objectives, is produced and not discriminated against by those controlling access to distribution platforms—that is, that domestic content be readily available to consumers. Governments (trade commitments could help support that objective) might thus prefer such interventions as appropriate “must carry” provisions designed to achieve defined public-interest objectives and to ensure fair, reasonable and non-discriminatory access to networks—such as through electronic programme guides—rather than prohibitive quotas such as limits on broadcast time,

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<sup>51</sup> Productivity Commission, *ibid.*, p. 151.

which are not as effective in this new environment. Indeed, the capacity of consumers to evade content quotas is reinforced by the fact that audiovisual products, such as movies, television programmes or music, are increasingly available through a variety of means such as mobile devices and computers.

Further, since economists generally agree that price-based measures such as taxes and subsidies are less economically harmful than other forms of protection such as quotas, why wouldn't it be preferable to use such measures to achieve objectives that restrictions on broadcast time might be seeking to achieve? This economic principle is reflected in rules governing goods trade but not in the GATS, where no hierarchy of tools of protection is established or suggested. Viewed from that perspective, the provision of incentives (or even disincentives) might be preferable to the imposition of prohibitions on the basis of the national origin. In addition to being more transparent in their effects and costs, such price-based measures as taxes can also be revenue generating. Moreover, the use of such incentives might vary on the basis of certain market developments or other circumstances. Such support mechanisms, which possess more inherent flexibility, might better be used to respond to market failures, as opposed to quotas which tend not to vary according to circumstances in the market.

(b). *Other Quantitative Restrictions*

Quotas limiting the proportion of air time for advertising produced abroad also exist in some countries. Governments might also often have in place policies limiting the capacity of foreign channels distributed by a local operator to sell advertising time in the domestic market. Some countries also impose entry restrictions on content packagers and carriers, for example by limiting the total number of licences for broadcasters of free-to-air television. The restriction on competition yielded by a ban on new entrants is sometimes justified as a trade-off for the obligations to purchase domestic content that are placed on licensees. However, other industries are not typically provided with entry restrictions to compensate for having to meet public obligations. Restrictions on new entrants are indeed generally perceived as the worst type of restrictions, implying higher prices, lower quality and reduced choices. Entry restrictions also are likely to tilt market power towards television networks in dealing with content producers and advertisers. Competition is also limited by the imposition of restrictions on the number of providers of pay-television services, such as by satellite or cable. A key question is whether quantitative restrictions on the number of content carriers and distributors, as opposed to content regulations, are useful in reaching non-economic objectives, given their economic costs. Limiting competition between distributors would reduce the overall amount of content that can be delivered to and accessed by consumers, for example in television by limiting the number or type of channels or by limiting competition between different platforms.

## 2. LIMITATIONS ON FOREIGN CAPITAL PARTICIPATION

This type of restriction remains in place in various segments of the industry. Foreign ownership is often restricted in certain television or radio activities, such as broadcasters. Such restrictions are also sometimes imposed in the distribution of audiovisual products, such as a requirement that importers of films be domestically owned, as well as with respect to cinema theatres or chains. They are also commonly encountered in the sound recording industry.<sup>52</sup> As for any other sector, foreign ownership limitations eliminate potential buyers, restrict competition from other suppliers and may raise the cost of capital, which makes investments in infrastructure and technology more difficult. Important issues to be addressed in many countries include whether telecommunications operators and broadcasters, which can both carry audiovisual content, should be treated differently in terms of foreign ownership restrictions. Also, since foreign ownership restrictions are in many countries combined with restrictions on the amount of foreign audiovisual content that can be aired, one wonders whether foreign ownership restrictions need to be imposed on both content providers and the carriers (or packagers) of content such as broadcasters or cable television companies. In other words, when content quotas are in place, to what extent does the nationality of the content carrier make a difference in the attainment of cultural objectives? Also, to what extent do foreign ownership restrictions imposed on content carriers restrict competition and growth in the telecommunications market and hence, incidentally, in the overall capacity to distribute greater quantities and better quality of content, whether domestic or foreign?<sup>53</sup>

## 3. SUBSIDIES AND PERFORMANCE REQUIREMENTS

Subsidies in various forms represent, in some markets, a significant share of the value of production of audiovisual products. While the GATS does not have disciplines on certain types of subsidies that might have trade-distortive effects akin to what exists on the goods side, such as import substitution subsidies or export subsidies, the MFN and national treatment obligations of the Agreement apply to subsidies as to other government measures.<sup>54</sup> Thus, while discriminatory subsidies need to be inscribed as a limitation in schedules in order to be used, non-discriminatory subsidies are not affected by specific commitments.

Subsidies are a key feature of the film industry around the world, both in developed and developing economies, although the amount of subsidies is much higher in OECD

<sup>52</sup> IFPI, *supra*, footnote 50.

<sup>53</sup> For discussion of such issues, see Canada, *Our Cultural Sovereignty; The Second Century of Canadian Broadcasting*, Report of the Standing Committee of the House of Commons on Canadian Heritage, Ottawa, 2003; Canada, *Opening Canadian Communications to the World*, Report of the Standing Committee of the House of Commons on Industry, Science and Technology, Ottawa, 2003.

<sup>54</sup> Article XV of the Agreement says that Members "shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid ... trade-distortive effects" of subsidies.

countries. Significant subsidies are also provided in support of the production of other forms of audiovisual content, such as television programming.<sup>55</sup> For example, one study estimates at 39 per cent the protective effect of various Canadian government policies measured as a subsidy rate on tradable Canadian content.<sup>56</sup>

Subsidies may take different forms, from grants and tax incentives to financing at preferential rates. Such schemes as requirements for cable or satellite distributors to contribute to domestic production or taxes on televisions or cinema admissions to be channelled to support local production are also in place in various jurisdictions.<sup>57</sup> As in the case of quotas, subsidies are often only awarded when certain “nationality” requirements are met. Co-production agreements generally permit, on a reciprocal basis, certain productions to meet the necessary requirements for subsidies (or to qualify as local content for the purpose of air-time or screen-time quotas) despite foreign participation, and such agreements can raise MFN problems.

The effectiveness of such subsidies in relation to the goals set, however, remains an open question, as one can assume that the number of films or television programmes produced is not in itself an indicator of success. The “cultural” content of such productions (whether they rather encourage the production of high-cost commercial movies which, if successful, would bring the most profits) and the extent to which they are viewed by consumers have to be factored in, as well as the extent to which subsidies prevent further investments and realization of comparative advantage, for example the extent to which national subsidies in Europe hinder the development an integrated film market.<sup>58</sup>

It can also be noted that the number and value of special aids and subsidies provided to attract the shooting and production of movies or television programmes appears to be increasing.<sup>59</sup> Moreover, public funds are often provided to public broadcasters (sometimes from revenues collected from licence fees), although the level and relative importance of such funds in the broadcaster’s revenue stream varies from country to country. Export subsidies—which are not subject to special disciplines in the context of trade in services—are also provided by some countries.

<sup>55</sup> See, for example, Anna Herold, *Les aides publiques européennes au cinéma dans le cadre de l'OMC*, IRIS plus: observations juridiques de l'Observatoire européen de l'audiovisuel, Strasbourg, France, 2003; Patrick Messerlin, *Regulating Culture: Has it 'Gone with the Wind'?* The Australian National University, Achieving Better Regulation of Services, Conference Proceedings, Australian National University, Canberra, 26-27 June 2000.

<sup>56</sup> Keith Acheson and Christopher Maule, *Canada—Audiovisual Policies: Impact on Trade*, Hamburg Institute of International Economics, 2003.

<sup>57</sup> Christoph Beat Graber, *Audio-visual Policy: the Stumbling Block of Trade Liberalization?* in D. Gérardin and D. Luff, *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, Cambridge University Press, Cambridge, U.K., 2004, pp. 165–214.

<sup>58</sup> Commission of the European Communities, *Communication on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works*, Brussels, 2001; European Audiovisual Observatory, *Comparative Analysis of National Aid Mechanisms*, Council of Europe, Strasbourg, France, 1998; P.A. Messerlin and Emmanuel Cocq, *Preparing Negotiations in Services: EC Audiovisuals in the Millennium Round*, paper presented to the World Services Congress 1999.

<sup>59</sup> Obviously, these subsidies do not discriminate against foreign-owned suppliers. Segments of the U.S. movie industry have complained about movie production going to Canada.

#### 4. OTHER MEASURES WITH EFFECTS ON TRADE

The GATS does not prevent a WTO Member from applying its competition law so as to prevent anti-competitive behaviour by private actors, provided that this is done in a non-discriminatory manner and that such law is administered in a reasonable, objective and impartial manner (Article VI). Such measures thus do not need to be listed in schedules. With continuing expansion of content offerings and the growing importance of distribution platforms, such as cable television programming packages and video-on-demand platforms, regulators may need to expend greater efforts in ensuring that access to the distribution network by producers of content—channels, television programmes, movies—is not impeded by anti-competitive practices by major providers, which could affect modalities of participation.

Exclusivity arrangements are not anti-competitive *per se*, but, in television for example, inability of a pay-television operator (for example, by cable or satellite) to access premium pay-television content because a competitor has exclusive access may act as a barrier to entry. This would reduce competition in the supply of broadband services over these networks and delay or prevent investment in infrastructure.<sup>60</sup> Practices in the sector which may have anti-competitive implications include exemption of exporters from anti-trust laws and the bundling by distributors of popular programmes with less popular ones. Members may want to consider whether the introduction of certain pro-competition disciplines might be appropriate or useful in particular areas.<sup>61</sup>

Some WTO Members also have in place, in addition to competition law, (non-discriminatory) ownership limits designed to ensure that diversity or plurality in viewpoints is not unduly limited by a certain degree of concentration in the industry, even if such concentration does not reduce competition to such an extent as to trigger involvement of competition authorities.<sup>62</sup> For example, the United States decided to schedule a market-access limitation to its commitment in “radio and television transmission services” to the effect that “a single company or firm is prohibited from owning a combination of newspapers, radio and/or TV broadcast stations serving the same local market”.

Various other types of restrictions on audiovisual and related services are applied, for example discriminatory tax practices regarding royalties, requirements of local dubbing/sub-titling and restrictions on the type of legal form needed to operate. Some countries also maintain such non-discriminatory market-access barriers as restrictions on the possibility to offer sound recording services online or limits on the number of

<sup>60</sup> Australian Competition and Consumer Commission, *Report to the Minister for Communications, Information Technology and the Arts, on Emerging Structures in the Communications Sector*, June 2003; Productivity Commission, *supra*, footnote 50; OECD, 1999, *supra*, footnote 47.

<sup>61</sup> OECD, *ibid.*

<sup>62</sup> OECD, *Cross-Ownership and Convergence: Policy Issues*, OECD, Paris, 1998. Productivity Commission, *supra*, footnote 50, Chapter 10.

companies licensed to import and distribute sound recordings. Other restrictions affect the movement of natural persons, such as requirements to hire local crew, for example during the shooting of a movie abroad.

As pointed out earlier, a number of Members have taken MFN exemptions for this sector. Many of these exemptions provide for the granting of preferential treatment to suppliers or services of other Members, where treatment equal to that of nationals is granted with respect to such measures as subsidies or content quotas. MFN issues are more sensitive in Europe, where some programmes are in place (such as the Council of Europe) to facilitate co-operation between EU Members and non-EU European countries.

It should also be stressed that not all measures taken by governments, even if they have an impact on trade, are affected by specific commitments undertaken. Governments remain free to regulate and subsidize in a non-discriminatory manner. For example, policies to protect consumers or to prevent the diffusion of illicit content are widespread and are not in themselves inconsistent with GATS obligations.

#### B. SCHEDULING AND CLASSIFICATION ISSUES

Apart from trade restrictions, WTO Members may also want to address the classification of the sector. Building broad consensus on a classification can improve consistency among various schedules and leave fewer doubts as to the scope of sectoral commitments. By better reflecting market realities, improvements in classification can also facilitate greater commitments.

For many services sectors, rapid technological advances have made the categories of the provisional CPC, which were published in 1991, obsolete in some respects.<sup>63</sup> As mentioned by the United States in its sectoral proposal, the description of audiovisual services in the services classification list includes the projection of videotapes in private screening rooms, an activity that is illegal in most jurisdictions. It also does not include the distribution and production of DVDs. One also notes that the CPC category referring to movie and video tape distribution refers to the “sale or rental of movies or tapes to other industries”, even though what is normally sold to other industries are the rights and not the films *per se*. It is also unclear how the CPC would cover the online provision of films to consumers (not distribution to other industries nor projection in cinema theatres).

In addition, while CPC 96132 (television services) covers the production of television programmes and CPC 7524 (television broadcast transmission services) covers the transmission of television signals through networks, the services of programme packagers—such as a channel which will buy various programming and arrange it into a

<sup>63</sup> David Luff, *Telecommunications and Audio-Visual Services: Considerations for a Convergence Policy at the World Trade Organization Level*, 38 J.W.T. 6, December 2004, pp. 1059–1086.

schedule or a company which will sell a package of channels—are not explicitly mentioned in section 2.D of the W/120. However, radio and television services (CPC 9613) includes combined programme-making and transmission services (CPC 96133), which is not defined extensively. Moreover, direct-to-home satellite services, where television programme packages are sold directly to households, are excluded from CPC 7524 (television broadcast transmission services).<sup>64</sup> This CPC category also appears to exclude some cable services since “radio and television programming packages via cable” (both basic and pay-television services) are found in CPC 7530, a CPC category that is not explicitly listed in the W/120. Further, the selling of advertising by radio or television stations is not explicitly mentioned in CPC 7524 or CPC 9613, even though the *production* of programmes for promotion purposes is mentioned.<sup>65</sup>

WTO Members may also want to consider discussing a possible definition for “sound recording” services so as to provide for greater clarity. For example, the CPC version 1.0 includes a category covering sound engineering, studio recording services, mobile recording services and audio post-production services, which is associated to mixing studio services. In this subsequent version of the CPC,<sup>66</sup> sound recording services, alongside such services as that of performing arts services, are said to partly correspond to the “other entertainment services” category of the provisional CPC (Sector 10.E in the W/120). This could suggest that Members might also find it relevant to classify such services under entertainment services, along with live theatrical presentation services such as concerts.

Finally, a key question, although of a cross-cutting nature, relates to disagreements between Members as to whether certain products delivered electronically should be covered by disciplines of the GATT, the GATS or both. Disagreement arises specifically with respect to the online delivery of products that could previously be traded only by means of a physical carrier medium and, as such, have traditionally been addressed through the GATT, such as computer software, recorded music and recorded films. While some Members consider that such products are goods and should be subject to GATT rules, others think they are services and should be subject to GATS disciplines, and still others think they should be subject to both. This disagreement between Members therefore brings, unfortunately, some uncertainty as to whether, for example, music or movies delivered electronically are covered by the GATS, the GATT or both.<sup>67</sup>

Members might also find it useful to discuss scheduling issues, if only to provide clarity and consistency in scheduling techniques and reassurance to stakeholders. Relevant issues might include the status of language requirements, “must carry” rules,

<sup>64</sup> Some WTO Members have tailored commitments so as to cover this type of service.

<sup>65</sup> On this issue, see WTO, *Advertising Services: Background Note by the Secretariat*, WTO Doc. S/C/W/47, 1998, p. 3.

<sup>66</sup> Issuance of subsequent CPC versions do not change GATS schedules, which, unless indicated otherwise, rely on the provisional CPC.

<sup>67</sup> See, for example, WTO Docs. WT/GC/W/497, WT/GC/W/493, WT/GC/W/509 and S/C/W/68. See also Gérardin and Luff, *supra*, footnote 57.

certain requirements placed on public-service operators and the scheduling of content requirements given that different commitments are taken on the transmission of content and on the production/distribution of content.<sup>68</sup>

## VI. A STEP FURTHER: POSSIBLE NEGOTIATING APPROACHES

### A. REFLECTING POLICY OBJECTIVES IN COMMITMENTS

In the light of their respective economic, commercial and other objectives and priorities, governments would, in the course of negotiations, decide not only where they want to undertake commitments but also what type of commitments. Individual governments would likely assess costs and benefits of relevant restrictions and policies—such as their effectiveness in achieving clear economic, cultural and social objectives, the extent to which they distort trade and competition and whether less trade-distortive measures can achieve the same objectives—as well as considering relevant scheduling/classification issues in order to best use the scheduling flexibility of the Agreement.

That flexibility can be used by deciding to take commitments in certain areas but not in others. Indeed, this might translate into governments focusing their efforts in the negotiations on the sub-sectors where fewer restrictions exist, i.e. in movie-related and music-related services, as opposed to television-related services. In both cases, the sectors are already quite internationalized and content restrictions are relatively few, unlike residency requirements, foreign ownership limitations or restrictions on the movement of natural persons providing services. Discriminatory subsidies remain prevalent in various countries, but certain flexibility for use of such tools could be scheduled. These services are also often linked to entertainment services, either because of the classification used by acceding countries (i.e. cinema theatre services) or because of commercial reality (i.e. the link between sound recording and theatrical services). Further, these services also have counterparts on the goods side which are already subject (and have been for a long time) to the stricter obligations of the GATT (with a limited exception for films). Such approach is reflected *de facto* in many regional trade agreements concluded in the last few years: services relating to movies and sound recording tended to attract more commitments and relatively more liberal commitments (although typical reservations related to subsidies and co-production agreements) than services relating to television or radio.<sup>69</sup>

<sup>68</sup> See the negotiating proposal by Switzerland, WTO Doc. S/CSS/W/74. See also Graber, *supra*, footnote 57, pp. 195–196.

<sup>69</sup> See, for example, the agreements negotiated (not all have been ratified) by the United States with some Central American countries (the US–CAFTA), the Dominican Republic, Chile, Singapore, Australia and Morocco (where the restrictions it maintains are mostly in relation to movie-related services). See also the New Zealand–Singapore agreement (which includes some commitments on certain movie-related services), the Japan–Singapore Agreement (which includes some commitments on certain services relating to movies and sound recording) and the agreement between China and Hong Kong China. Agreements signed by the EC or the European Free Trade Area with non-European countries (such as those with Mexico or Chile) are generally based on a positive-list approach and do not cover audiovisual services.

Flexibility can also be used through the type of bindings taken in respective sectors. WTO Members' commitments do not need to reflect the status quo—the restrictions actually being applied—but can guarantee a minimum level of treatment that is more restrictive than the one actually being applied. In crafting a commitment, Members also have the possibility to select the policy measures for which they want to maintain greater flexibility—such as “unbound for subsidies”, which provides complete discretion in the granting of subsidies—and those whose use they want to restrict—for example, quantitative restrictions on the number of suppliers, foreign ownership limitations, restrictions and the type of legal entity or nationality/residency requirements. For example, why impose foreign ownership requirements or other limitations on the expansion of broadcasters, distributors or other carriers if restrictions as to what they can carry, such as content requirements, are scheduled? Is ownership of capital determinant in defining the “nationality” of a television programme? Is it preferable to impose content quotas or to ensure that access to distribution platforms is granted to domestic productions on appropriate terms and that domestic content be readily available? Is it preferable to impose content quotas or to reserve the right to impose certain types of measures in response to pre-defined market failures, especially for newer digital and more interactive services such as video-on-demand.

The Australia–United States Free Trade Agreement innovates in this regard. Australia undertook a reservation in regard to interactive audio/video services allowing the Government to take certain measures to ensure that domestic content is not unreasonably denied to Australian consumers in the event that domestic content was not readily available to them.

Such policy preferences and objectives can be determined by each Member individually and then reflected in one's own schedule. Another approach involves a group of Members developing checklists or model schedules which would provide guidance on how to take commitments on the basis of such principles, for example what to schedule and how, the level of treatment to bind, the classification to use, additional commitments, etc. While such tools are suggestions and thus allow Members to follow them in whole, in part or not at all, such negotiating tools have been used, for example in maritime transport services, and proved useful in increasing the level of confidence and adjusting commitments to market realities and political sensitivities. For example, couldn't a model schedule or checklist be considered for sound recording services? It might, among other things, provide suggestions for better classification, help promote the development of online music services and encourage a discussion on the appropriateness and effects of restrictions in this area or on the need for additional provisions.

#### B. *CULTURAL OBJECTIVES*

Using the flexibility of the GATS, as hinted above or through other means, might well allow the provision of greater predictability and security to trade relations in the

sector and limit the potential use of most trade-distortive and harmful measures, while permitting the particular sensitivities of the sector to be addressed. Many would argue that this, in itself, would contribute to cultural diversity. Indeed, the strength of so-called cultural industries, like that of any other industry, cannot rely on protectionism and needs a business- and investment-friendly climate to grow and thrive. Restrictions on competition in order to achieve social/cultural objectives inhibit consumer choice, economic growth and innovation.

Appraising the extent to which benefits of relevant restrictions outweigh costs would seem to be warranted, meaning that governments may want to ensure that such policy tools are effective in achieving their social objectives and that these cannot be achieved using less restrictive measures. For, say, a regional music market to develop in Africa, barriers to trade must be reduced and, for investment to take place, some certainty that markets will remain open needs to be provided. Using the scheduling flexibility of the Agreement thus implies recognition that the audiovisual sector has an economic and commercial component that benefits from clear trade commitments. It also allows Members to maintain certain practices or to retain flexibility in regard to certain policy tools if considered necessary to the attainment of cultural or other objectives.

Of course, such an approach contrasts with that of a “cultural exception”, which was raised during the Uruguay Round. The problems with such an approach might remain today. A provision allowing Members to derogate from the Agreement’s obligations for cultural reasons might still be seen as providing too much discretion to governments and thus as essentially amounting to carving out the sector from the Agreement. This stems from the inherent subjectivity and lack of specificity of the term “culture” and, especially, from the lack of a clear pre-understanding of what may be circumstances that would make the imposition of restrictions necessary and what policy tools may be used. Accordingly, leaving it to governments to identify the policy measures needed to attain their cultural objectives might be, from that perspective, a valuable alternative. It also avoids the need to obtain consensus of all Members so as to introduce new provisions, such as an exception, to the Agreement.

UNESCO’s work towards the development of a Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions has caught the attention of those concerned with audiovisual services negotiations.<sup>70</sup> Indeed, since the original efforts to negotiate an international instrument on cultural diversity were associated with those that most resisted negotiations on audiovisual services during the Uruguay Round—for example, France and Canada—the work conducted at UNESCO

<sup>70</sup> On 20 October 2005, the General Conference of UNESCO approved (with two votes against, including the United States, and four abstentions) the Convention on the Protection and Promotion of the Diversity of Cultural Contents and Artistic Expressions. The Convention will enter into force when ratified by a sufficient number of Member States. Information about the Convention can be found on the Unesco Website, at: [portal.unesco.org/culture/en/ev.php-URL\\_ID=2309&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2309&URL_DO=DO_TOPIC&URL_SECTION=201.html). Information on the views of the United States on this topic can be found at: [www.amb-usa.fr/usunesco](http://www.amb-usa.fr/usunesco).

has sometimes been perceived, especially outside government circles, as an attempt to carve the sector out of the services negotiations. However, notwithstanding the type of obligations that it might contain, its possible use by some in the WTO negotiations to buttress certain positions or concerns that it might encourage trade-restrictive practices, such Convention would not in itself modify the legal obligations that WTO Members owe to each other, including the MFN obligation.<sup>71</sup> Rights and obligations under other international instruments cannot be enforced in the WTO. The effect of a convention as a source of influence in the legal interpretation of WTO provisions should also not be exaggerated; while other legal instruments can provide, in some circumstances, context in the interpretation of certain WTO provisions, it would not have the effect of introducing new obligations or new exceptions by itself. It remains unclear in relation to what provision a cultural convention would provide context, given the absence of a cultural exception in the GATS.<sup>72</sup> Further, limitations in services schedules that condition the extent of market access granted typically do not refer to cultural issues.

It remains to be seen whether, and the extent to which, this instrument could provide guidance to policy-makers on best practices such as what governmental measures to support cultural objectives would be most effective and less distortive of trade. Such reflection on best policy tools to attain both economic and cultural objectives in the sector might then allow to adequately use the scheduling flexibility of the GATS and contribute to bridge the gap between the economic importance of the sector and the application of trade rules to it. However, the *dialogue de sourds* (or “all-or-nothing” approach) of the past Round may persist—at least at the multilateral level—if, as evoked in the introduction to this article, some use cultural diversity as a way to avoid the undertaking of any commitments or if others simply perceive the issue as a cloak for protectionism.

<sup>71</sup> See, for example, Ivan Bernier and Hélène Ruiz-Fabri, *Evaluation de la faisabilité juridique d'un instrument international sur la diversité culturelle*, Groupe de travail franco-québécois sur la diversité culturelle, Montreal, Quebec, Canada, 2002.

<sup>72</sup> On this broader issue, see Mitsuo Matsushita, *Governance of International Trade under World Trade Organization Agreements—Relationships between World Trade Organization Agreements and other Trade Agreements*, 38 J.W.T. 2, April 2004 pp. 185–210; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 European J. Int'l L. 4, 2002, pp. 753–814; *idem*, *Conflicts of Norms and Conflicts of Jurisdictions—The Relationship between the WTO Agreement and MEAs and other Treaties*, 35 J.W.T. 6, December 2001, pp. 1081–1131.