



REPORT

WTO Rules in the Audio-Visual Sector

Americo Beviglia Zampetti

HWWA-Report

229

Hamburgisches Welt-Wirtschafts-Archiv (HWWA)
Hamburg Institute of International Economics
2003

The HWWA is a member of:

- Wissenschaftsgemeinschaft Gottfried Wilhelm Leibniz (WGL)
- Arbeitsgemeinschaft deutscher wirtschaftswissenschaftlicher Forschungsinstitute (ARGE)
- Association d'Instituts Européens de Conjoncture Economique (AIECE)

WTO Rules in the Audio-visual Sector

Americo Beviglia Zampetti

This paper has been prepared within the Research Programme „Trade and Development“ of HWWA. It is a contribution to the Research Project „Competition, Cultural Variety and Global Governance: The Case of the Global Audio-Visual System.“ The Project is jointly conducted by HWWA and the Institute of International Affairs (IAI), Rome, and it is sponsored by Volkswagen Foundation.

An earlier version of the paper was presented at the International Conference „Competition, Cultural Variety and Global Governance: The Case of the Global Audio-Visual System“ organized by HWWA and IAI in Hamburg, October 31 and November 1, 2002.

HWWA REPORT

Editorial Board:

Prof. Dr. Thomas Straubhaar
Prof. Dr. Hans-Eckart Scharrer
PD Dr. Carsten Hefeker
Dr. Konrad Lammers
Dr. Eckhardt Wohlers

Hamburgisches Welt-Wirtschafts-Archiv (HWWA)
Hamburg Institute of International Economics
Öffentlichkeitsarbeit
Neuer Jungfernstieg 21 • 20347 Hamburg
Telefon: 040/428 34 355
Telefax: 040/428 34 451
e-mail: hwwa@hwwa.de
Internet: <http://www.hwwa.de/>

Americo Beviglia Zampetti
Via Gargano 11
00141 Roma, Italy
Phone: +4122 917 6179
Fax: +4122 917 0194
e-mail: Americo.Beviglia-Zampetti@unctad.org

Content

Introduction	2
1. The GATS	3
2. The GATT 1994	15
3. Other WTO Agreements	17
4. The TRIPS Agreement	19
5. Conclusion	25

Introduction

The audiovisual sector and the policies applied to it have contours that are difficult to define, particularly in light of recent technological development. WTO rules that apply to this fast-moving and technologically sophisticated sector are somewhat lagging behind as the legislative sessions of the WTO, the negotiating rounds, only convene after long intervals. Nonetheless, WTO rules and obligations play a significant role in shaping domestic policies and regulations and as such need to be considered in some detail.

The audiovisual sector, which covers programme production and distribution ("software"), to which equipment manufacturing ("hardware") can be added, has both a notable economic importance and an unquestionable cultural significance. From this latter perspective, it is clearly the software side that exhibits paramount relevance.¹ Hence, for the purpose of this paper the audiovisual sector is considered as including audiovisual services that are delivered internationally through TV and radio broadcasting, cinemas, and video sales and rentals, as well as multimedia products. Nonetheless, the definition remains controversial and the dividing line between services and goods at times uncertain.

The purpose of this paper is to review existing WTO rules that affect the audiovisual sector and have an impact on the conduct of national audiovisual policies. There are two main agreements that regulate trade in audiovisual services: first, the General Agreement on Trade in Services (GATS) which aims at liberalizing and thus increasing international trade in audiovisual services. This is the main focus of the paper and is reviewed in section one; second, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), reviewed in section four, which provides the audiovisual sector with the necessary protection of content and authors and that, as such, is also key to the development of the sector, both domestically and internationally. Furthermore, the GATT and a series of other WTO Agreements have a potential bearing on the sector and these are also briefly reviewed in section two and three.

¹ For a review of the special economic characteristics of cultural goods that shape their relationship to trade disciplines, see for instance, P. Sauvé and K. Steinfatt, "Towards multilateral rules on trade and culture:

1. *The GATS*

The GATS is the first multilateral agreement covering trade in service sectors, including audiovisual services. It is generally predicated upon the notion that secure access to markets and progressive liberalization can stimulate the growth of services trade in the same way as the GATT has done since 1947 for trade in goods. On the other hand, the GATS allows for the possibility of exercising domestic regulatory and policy autonomy through various avenues: an issue of key relevance in the case of a sector, such as the audio-visual one, which carries particular importance for the culture and identity of WTO Members.

Article I:2 of the GATS defines “trade in services” as encompassing four modes of supply: (1) *cross border supply* (covering services supplied from a supplier in one country to a consumer in another, e.g. direct broadcasting of TV programmes abroad); (2) *consumption abroad* (such as when a consumer is receiving a service in another country, a tourist watching a film abroad, likely not to be very relevant for the audiovisual sector); (3) *commercial presence* (by means of temporary or permanent establishment through investment abroad, e.g. co-producing a motion picture abroad); (4) *presence of natural persons* (where people move to a foreign country on a non-permanent basis to supply a service, e.g. a foreign film crew is making a film for a local film studio).

The audiovisual sector constitutes one of the sub-sectors of “Communication Services”, under the GATS Services Sectoral Classification List.² The audiovisual services sub-sector further comprises various sub-categories. The six sub-categories listed, and their associated listing under the United Nations "Provisional Central Product Classification" (CPC) are as follows; a. Motion picture and video tape production and distribution services (CPC 9611); b. Motion picture projection service (CPC 9612); c. Radio and television services (CPC 9613); d. Radio and television transmission services (CPC 7524); e. Sound

protective regulation or efficient protection?”, in Productivity Commission and Australian National University, *Achieving Better Regulation of Services*, Conference Proceedings, 2000, Canberra, pp. 323-346.

² See WTO doc. MTN.GNS/W/120.

recording (CPC n.a.); and f. Other (no CPC categories specified, but could cover, for example, the contents of multimedia products).³

Especially for the sub-category of Radio and television transmission services (CPC 7524), it sometimes becomes difficult to determine exactly the boundary between services classified under telecommunications and those classified under audiovisual services. As a general rule of thumb, however, it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications. Furthermore, ownership of cinemas could fall under “Recreational, cultural and sporting services” and ownership of video rental outlets under “Retailing services”.

All WTO Members have established specific commitments in the respective schedules under the GATS in relation to the four modes of supply and by sectors (the so called ‘positive list’ approach). In the absence of specifications to the contrary, Members guarantee both the right of market access (Article XVI) and the right to national treatment (Article XVII) in scheduled sectors. More specifically, a schedule must indicate under each mode of supply whether a Member intends to grant full market access and/or national treatment, no market access and/or national treatment, or conditioned market access and/or national treatment. Article XVI contains a list of six types of measures which a Member, if bound by market access, must *not* maintain unless the measure is inscribed in that Member's schedule. For example, limitations may be imposed on the number of service suppliers, service operations or employees in a sector, the value of transactions, the legal form of the service supplier, or the participation of foreign capital.

With regard to national treatment, in any sector included in its schedule of specific commitments, a WTO Member is obliged to grant foreign services and service suppliers

³ Under the Provisional Central Product Classification, CPC 9611 is further divided into: Promotion or advertising services (CPC 96111); Motion picture or video tape production services (CPC 96112); Motion picture or video tape distribution services (CPC 96113); and Other services in connection with motion picture and video tape production and distribution (CPC 96114). CPC 9612 is subdivided into: Motion picture projection services (CPC 96121); and Video tape projection services (CPC 96122). CPC 9613 is subdivided into: Radio services (CPC 96131); Television services (CPC 96132); and Combined programme making and broadcasting services (CPC 96133). CPC 7524 is divided into: Television broadcast transmission services (CPC 75241); and Radio broadcast transmission services (CPC 75242). See *Audiovisual Services. Background Note by the Secretariat*, WTO doc. S/C/W/40 of 15 June 1998.

treatment no less favourable than that extended to its own like services and service suppliers, subject to the terms and conditions specified in its schedule.⁴ On the other hand, limitations on national treatment may encompass any type of measure, as indicated in a Member's schedule.

The main types of cultural policies and instruments currently in place in different jurisdictions potentially fall within the meaning of market access or national treatment as defined in GATS.⁵ In the area of market access restrictions, there are widespread measures that control access to film markets, including screen quotas for cinemas (as in Mexico, South Korea and Spain); prohibitions of dubbing of foreign films (Mexico); dubbing licences (e.g. in Spain, film distributors can only receive a dubbing licence for foreign films when they contract to distribute a certain number of national films) and quantitative restrictions, as was the case in India, which used to restrict the import of film titles to 100 per year; as well as foreign investment and ownership restrictions, including divestiture policies, for example, in the broadcasting industry and news media in Australia, Canada, the United Kingdom and the United States.

In the area of national treatment many countries use domestic content requirements, especially measures regulating radio and television broadcasting content. For example, the European Communities, Australia, Canada, and France use domestic broadcast content to control access to their television broadcast and film markets; as well as discriminatory regulatory/licensing restrictions, especially measures that control access to radio or television broadcasting through regulatory or licensing restrictions (Canada). Furthermore,

⁴ The notion of likeness for audiovisual services as for any cultural goods is likely to be controversial. For instance, in the area of cultural goods the Appellate Body (essentially on the basis of admissions by Canada that English-language consumer magazines faced significant competition from US magazines in Canada) found that imported split-run periodicals and domestic non-split-run periodicals were directly competitive or substitutable products, in so far as they were part of the same segment of the Canadian market for periodicals. It then went on to address the question of whether periodicals could be distinguished on the basis of their intellectual content, as argued by Canada, as follows: "Our conclusion that imported split-run periodicals and domestic non-split-run periodicals are 'directly competitive or substitutable' does not mean that all periodicals belong to the same relevant market. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine. But newsmagazines, like Time, Time Canada and Maclean's, are directly competitive or substitutable in spite of the "Canadian" content of Maclean's." See WTO Doc. WT/DS31/AB/R, June 30, 1997, p. 28.

⁵ For a review of the most frequently-used policies and instruments, see M.E. Footer, and C.B. Graber, "Trade liberalisation and cultural policy", *Journal of International Economic Law*, vol. 3, no. 1, 2000, pp. 122-26.

many national and regional audiovisual policies rely on discriminatory subsidies, involving the provision of grants, loans and tax preferences for the production or co-production of cultural works, most notably audiovisual products. For example, Eurimages, an initiative by the Council of Europe, provides subsidies for the co-production of European audiovisual works. The Media II program of the European Communities, while excluding the support of production, focuses on training for professionals, the development of attractive projects and the transnational distribution of audiovisual programs and films. National programs providing subsidies to the domestic film industry exist in France, Germany, the United Kingdom, Canada, the United States and Switzerland.

In practice, few States have made market-opening commitments in the audiovisual sector, and a number of those who did, included various types of limitations to their undertakings. At the conclusion of the Uruguay Round thirteen countries made such commitments in audiovisual. The number has only slightly increased since. In addition to the United States, Israel and Mexico most of the countries to have made commitments are from Asia (including Japan) and they cover the following activities: motion picture and video tape production and distribution, motion picture projection services, radio and television broadcasting (including cable TV) and sound recording and distribution.⁶

The services schedule of the European Union does not contain any commitments on audiovisual, meaning there are no liberalization obligations in this sector arising from the Uruguay Round.⁷ Hence, for instance, television quotas and policies regarding subsidization of cinema production remain untouched by the GATS. By preserving the freedom as to whether to make commitments or not, the GATS thus allows ample room to pursue specific domestic policies and regulation. Canada, the other main champion of cultural diversity, has also not scheduled any industry-specific commitments for audiovisual services.

⁶ For a brief description of the schedules of commitments, see WTO, *Audiovisual Services Background Note by the Secretariat*, doc. S/C/W/40, 1998.

⁷ See European Communities and their Member States. Schedule of Specific Commitments, WTO doc. GATS/SC/31 of 15 April 1994. In this context the schedules of Austria, Finland and Sweden, which at the conclusion of the Uruguay Round had not yet acceded to the EC are also relevant.

The GATS also embodies a framework of rules establishing the context in which the schedules of specific commitments must be read. Some of these rules are of general application, while others apply only in the situation where a Member has assumed a specific sectoral commitment. The most important rule of general application is most-favoured-nation treatment (MFN). MFN provides that the best treatment given to the supply of a service from any nation, whether that nation is a WTO Member or not, must be given to all WTO members. Anything detracting from this risks undermining the essence of the GATS, so the various ‘carve-outs’ are strictly conditioned. Initially an MFN ‘carve-out’ was permitted under the GATS “Annex on Article II Exemptions”. These “MFN Exemptions” are in principle to last for only ten years (until the end of 2004) and about 70 countries listed nearly 400 measures. The scope and time frame of MFN Exemptions are not always clearly defined. Some of the MFN Exemptions listed in Members’ schedules are drafted as if they are intended to continue longer than ten years. An exemption has the effect of ‘grandfathering’ a situation, which could discriminate against new entrants. MFN Exemptions permit more favourable treatment to be given, in the situations specified, to selected Members. They often relate to bilateral agreements between neighbouring countries, or for the reciprocal recognition of qualifications, standards and so on.

When they relate to sensitive cultural and social matters, the wording in the schedules seems to imply that they will be indefinite in duration. However, as mentioned, the GATS specifies that these exemptions should in principle not exceed a period of ten years and that, at any rate, they shall be subject to negotiation in subsequent rounds. In particular, no fewer than 27 States, including the EC and its Member States, Canada, many Latin American and Arabic countries, have asked to have cinema and television subsidized co-production and co-distribution agreements inscribed as MFN Exemptions for motives having to do essentially with the preservation of national and regional cultural identities. The Council for Trade in Services held a first review of the exceptions in 2000 and decided that a further review should take place no later than June 2004.

The European Union and several of its member states listed MFN exemptions with respect to audiovisual services.⁸ Exemptions listed by the EC itself are more general in nature than

⁸ See European Communities and their Member States, Final List of Article II (MFN) Exemptions, WTO doc. GATS/EL/31 of 15 April 1994. In this context the schedules of Austria, Finland and Sweden, which at the conclusion of the Uruguay Round had not yet acceded to the EC are also relevant.

those of many Member States. One exemption applies to all audiovisual services. The actual measures accompanying the exemption are not identified explicitly, but they are intended to “prevent, correct, or counterbalance adverse, unfair, or unreasonable conditions or actions affecting EC [EU] audiovisual services, products or service providers.” Conditions for imposing the exemption indicate a “need to protect” the EC and its Member States from “adverse, unfair, or unreasonable unilateral actions.” Another exemption, which applies to the distribution of audiovisual works, indicates that redressive duties may be imposed in response to “unfair pricing practices,” which may cause “serious disruption” to the distribution of European works. The EC grants national treatment only to audiovisual service providers from countries that participate in the 1989 Council of Europe Convention on Transfrontier Television⁹ and other European countries based on linguistic and European origin criteria. With respect to distributing and funding audiovisual products, the European Union also reserves the right to accord national treatment only to “countries with which cultural cooperation is desirable.” The EC has concluded agreements with a number of countries in all regions. The criteria are designed to be very flexible to accommodate a wide number of cultural links between EC Member States and third countries. Nordic countries extend additional support to audiovisual works produced in Finland, Sweden, Norway, Denmark, and Iceland. Italy requires reciprocity to allow over 49 percent foreign ownership in broadcasting companies in order to ensure equivalent treatment for Italian companies. Spain may waive its licencing requirements for the distribution of certain dubbed children’s films if the service is from another European country. Typically, the stated intent of these MFN exemptions is to promote regional identity, cultural values, and linguistic objectives. As a result of the broad MFN exceptions and the absence of commitments concerning National Treatment and Market Access for the audiovisual sector, the ‘GATS Community *acquis*’ allows to the EC and its Member States freedom for action in the field of audiovisual policy.

Canada has also inscribed in its schedule broad MFN exceptions. It reserved the right to accord preferential treatment to firms or individuals from countries with which the central government or the Province of Quebec have concluded co-production agreements. The stated intent of the exemptions is to preserve Canadian and Quebecois cultures. As a result

⁹ Text available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>

Canada may maintain and impose measures that are inconsistent with market access and national treatment, as well as grant preferential treatment to firms from certain countries.

The GATS (as the GATT) provides with Article V (*Economic Integration*) an MFN ‘carve-out’ for groups of countries which decide to proceed with higher levels of liberalisation among themselves, without granting the results to all WTO members. This Article allows for a derogation from the GATS disciplines where Members enter “into an agreement liberalising trade in services ... provided that such an agreement: has substantial sectoral coverage” [“in terms of number of sectors, volume of trade affected and modes of supply” and no “a priori exclusion of any mode of supply” (footnote 1)] and “provides for the absence or elimination of substantially all discrimination in the sense of Article XVII” (i.e. National Treatment). Such agreements are referred to as Regional Trade Agreements (RTAs). As in the case of the similar wording of GATT Art. XXIV, the meaning “substantial sectoral coverage” and “substantially all discrimination” remains controversial. The parties to a RTA can thus engage in regional audiovisual policies, including co-production agreements, which discriminate against non-RTAs countries. The flexibility built in the notion of substantial sectoral coverage would probably allow for the exclusion of the audiovisual sector from the regional liberalisation, thus allowing individual parties to an RTA to pursue a national audiovisual policy which discriminates against other parties to the same agreement. The legality of such exclusion will have to be judged in the context of the overall level of liberalisation achieved within the specific RTA.

Certain transparency obligations are also of a general nature. This means that WTO Members are under an obligation to inform each other of the policies they implement in the audiovisual sector (as well as all other sectors) and to publish relevant regulations. Many other provisions of the GATS, covering such matters as domestic regulation, monopolies and exclusive service suppliers, payments and transfers, and balance-of-payments measures are only relevant in the context of specific commitments. In particular, when governments schedule commitments for audiovisual services, or for any service sector, they have the flexibility to make full or partial commitments, and they may continue to regulate services covered by commitments, so long as the regulation is not

administered in a way that represents an unreasonable trade barrier.¹⁰ For WTO Members as the EU and its Member States that have not scheduled specific commitments, these obligations are not currently relevant.

So far the (few) commitments entered into by WTO Members in the audiovisual area have not given rise to dispute settlement proceedings. In 1998 the EC and its Member States started consultations with Canada with regard to the Canadian 1987 Policy Decision on film distribution and its application to European companies, as, in the EC's view, European companies were treated less favourably than US competitors. The EC alleged that these measures contravened Articles II (*Most-favoured-nation treatment*) and III (*Transparency*) of the GATS, in particular since Canada had not taken a MFN exemption for measures affecting film distribution services.¹¹ The complaint was later dropped as the main European company affected by the Canadian measure was taken over by a Canadian one.

Moving to the area of exceptions, it is important to stress that there is no cultural exception clause or other specific reference in the GATS to audiovisual services. Despite strong pressure from a number of quarters during the Uruguay Round, no clause was inserted which provides for a "cultural exception".¹² However, under Article XIV of GATS, Members are not prevented by any of their GATS obligations from taking the necessary measures to protect public morals and human health, maintain public order, etc. In particular, the general exception for measures necessary to protect public morals (GATS Article XIV(a)) provides the possibility to Members apply regulations, for instance in the area of audiovisual content, intended to preserve public morality.

Furthermore, in its current form, the GATS does not prevent governments from funding audiovisual services, a sensitive issue for many Members where local theatrical film production, for example, is dependent on government support. While the GATS provides

¹⁰ See GATS Art. VI (*Domestic Regulation*), which sets out rather elaborate requirements in this area.

¹¹ *Canada - Measures Affecting Film Distribution Services*, Request for Consultations by the European Communities, WTO doc. WT/DS117/1 of 22 January 1998.

¹² The most well known example of such a clause is the one contained in the North American Free Trade Agreement (NAFTA). This clause stipulates that cultural industries are exempt from the provisions of the Agreement, except for certain limited exceptions; yet this exemption is only a partial one in that resorting to it opens the possibility of retaliatory measures of equivalent commercial effect. On the discussions regarding a possible cultural exception during the Uruguay Round, see K. Falkenberg, "The Audiovisual Sector", in J. Bourgeois, F. Berrod and E. Gippini Fournier, eds., *The Uruguay Round Results. A European Lawyers' Perspective*, Brussels, 1995, pp. 429-434.

for future negotiations to develop disciplines on subsidies that distort trade in services, there is no presupposition as to what those provisions will contain. The only provision of GATS specifically dealing with subsidies is Art. XV. It recognises that “in certain circumstances, subsidies may have distortive effects on trade in services”, and negotiations have begun with the aim of developing “the necessary multilateral disciplines to avoid such trade-distortive effects.” The negotiations are also supposed to address the appropriateness of countervailing procedures. The Working Party on GATS Rules deals with this negotiation but without much success to date, leading to the extension of the deadline. Clearly, any rules on distortive subsidies would inherently have to be very complex, and would present severe practical enforcement difficulties.

As it stands, the GATS does not contain any definition of subsidy. Pursuant to GATS Art. XV, if any Member “considers that it is adversely affected by a subsidy” it can request consultations which “shall be accorded sympathetic consideration.” The GATS thus permits subsidies as such, including subsidies contingent upon the export of services and other investment incentives. However, the MFN obligation applies to subsidies because they are covered by the definition of ‘measure’. National treatment commitments also apply, unless subsidies are specifically excluded. In the services sectors for which commitments have been taken, and subject to any conditions or qualification set out in its Schedule, a Member must therefore administer its subsidy schemes in a manner that accords the services and service supplier of other Members treatment no less favourable than that accorded to its own like services and service suppliers.¹³

As the EC and its Member States have not scheduled commitments in the audiovisual sector, such obligations do not apply. Only in as far as commitments may be made in the course of the current round of negotiations, eventual disciplines in the area of subsidies will become relevant. Article X of the GATS also mandated negotiations on “emergency safeguard measures” based on the principle of non-discrimination. Negotiations in this area have not been completed to date. In light of the difficulty of assessing ‘likeness’ for

¹³ For instance, the United States, in one of its few limitations on specific commitments in audiovisual services, has explicitly mentioned grants from the National Endowment for the Arts are only available for individuals with US citizenship or permanent resident alien status. See WTO doc. GATS/SC/90 of 15 April 1994, p. 46.

audiovisual services, it is doubtful that the agreement on a safeguard clause could be of particular relevance for the sector.¹⁴

Like the GATT, the GATS is a framework designed to permit the progressive liberalization of trade in services through further negotiations. Article XIX contains a commitment to continue to negotiate liberalization through successive rounds of negotiations. Also in this respect, there is no juridical recognition of the "cultural specificity" of audiovisual services, which would allow for special treatment for the sector in the process of progressive liberalization.¹⁵ The GATS does not specify the speed and extent of liberalization but recognizes that it shall take place with due respect for national policy objectives, although there is no specific mention of the preservation of cultural identity.

As agreed in the Uruguay Round, new services negotiations started in January 2000. So far only three new proposals have been made in the area of audiovisual services. These include a suggestion by Switzerland¹⁶ to draft a sectoral annex, a Brazilian proposal¹⁷ on competition issues, and a US proposal¹⁸ to develop a sectoral understanding on subsidies. These proposals have so far elicited a limited debate. Starting in June 2002, WTO members are engaged in the process of making bilateral requests for access into their trading partners' services markets. The audiovisual services sector has also been included in the lists of requests of a number of WTO members. By the end March 2003, initial offers in reply to these requests will have to be tabled by WTO members.

¹⁴ An interesting precedent is contained in the Agreement on the importation of educational, scientific and cultural materials, adopted by the General Conference of UNESCO at its fifth session, in Florence, on June 17, 1950 (Florence Agreement). The Agreement is designed to remove customs tariffs and other obstacles that impede exchanges of several categories cultural products, including a number of audiovisual materials. A protocol annexed to the Florence Agreement incorporates a mechanism authorising recourse to a form of safeguard measures in the event of an increase in imports and serious harm to national producers of similar products or products competing directly with the imported products.

¹⁵ In December 1993, on the eve of the conclusion of Uruguay Round negotiations, the European Community made public a draft "cultural specificity" clause which, firstly, stipulated that the specific needs of member States regarding the preservation of national cultural values would be fully recognized in future service negotiations. However, the proposal was rejected. See K. Falkenberg, cit.

¹⁶ See Communication from Switzerland, WTO document S/CSS/W74 of 4 May 2001.

¹⁷ See Communication from Brazil, WTO document S/CSS/W/99 of 9 July 2001.

¹⁸ See Communication from the United States, WTO document S/CSS/W/21 of 18 December 2000.

While the negotiations in the area of audiovisual are still at an early stage, it is interesting to note some themes that emerge from the three submissions mentioned above.¹⁹ The Swiss paper is of a more general nature and calls for both a 'cultural diversity safeguard' and an Annex to the GATS on audio-visual issues. The US paper, while arguing for the importance of proceeding with the liberalisation of the sector, also recognises the "special cultural characteristics" of audio-visual media, and acknowledges the validity of subsidies in pursuing cultural objectives. Indeed this remains a key issue as subsidies and more generally "public funding and the regulation (including licensing) of audiovisual services are probably the main instruments of audiovisual policy today."²⁰ The Brazilian submission also stresses the importance of discussing subsidy issues.

In addition, the US paper calls for a review of the classification of the audio-visual sector, arguing that the existing classifications are either too general or not up-to-date given continuing technological convergence and the development of new media platforms (for example the digital supply of films directly). The issue will become increasingly important for the ability to pursue 'cultural' policies beyond the traditional media sector. For instance if a narrower definition prevails, limiting the scope of the sector to traditional and especially terrestrial broadcasting, new audiovisual services such as music-on-demand and video-on demand could be viewed as electronic commerce and thus subjected to different and at present more liberal trade rules.²¹

Further uncertainties relate to the classification of a small number of products made available on the Internet, as to whether or not they are services or goods. This disagreement relates to products such as books, films and software. Whereas a printed

¹⁹ For a critical account of the current negotiations, see D. Freedman, "Trade Versus Culture: An Evaluation of the Impact of Current GATS Negotiations on Audio-visual Industries", mimeo, 2001.

²⁰ Michael A. Wagner, "GATS and Cultural Diversity", in *Diffusion*, 2002/1, p 34.

²¹ The second World Trade Organisation Ministerial Conference adopted a Declaration on Electronic Commerce which required the General Council to establish, by its September 1998 meeting, a comprehensive work programme to examine all trade-related issues relating to global electronic commerce. The purpose of this initiative is to reflect within the relevant WTO bodies, the implications of electronic commerce for the existing Agreements in place within WTO: GATT, GATS and TRIPS notably. Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. The relevant WTO bodies – the Council for Trade in Services, the Council for Trade in Goods, the Council for Trade-related Aspects of Intellectual Property Rights, the Committee on Trade and Development and the Committee on Government Procurement - are currently implementing this work programme. In November 2001 in Doha the WTO Ministerial meeting agreed to continue the Work Programme on Electronic Commerce as well as the current practice of not imposing customs duties on electronic transmissions.

book delivered through conventional means is classified as a good, there are Member Governments of the WTO who hold the view that the digital version of the text of such a book is a service which should be covered by the GATS. Other Member Governments hold the view that such a product remains a good which is subject to customs duties and other provisions of the GATT. There are also those who think that such a product constitutes a third category of products which are neither goods nor services and for which special provisions need to be devised.²² Again whether a product is considered a service or a good has important consequences in terms of the applicable legal regime.²³

Finally, Brazil in its submission stresses the importance of elaborating rules in the areas of trade defence, safeguard and competition in order to address the issues, such as the ‘dumping’ of already cost-recovered audio-visual goods at prices that will undermine domestic and regional production. This shows that systemic issues, such as classifications and rules, are going to be very important for the conduct of the negotiation and that some developing countries are becoming increasingly interested as they develop significant regional audiovisual export interests.²⁴

While not directly related to the audiovisual sector, the GATS Annex on Telecommunications, the Ministerial Decision on Basic Telecommunications and the Fourth Protocol with its commitments in basic telecommunications have also an impact on the audiovisual sector. Under the Annex on Telecommunications, hosts governments undertake to provide foreign companies with access to, and the use of, public telecommunications network and services on reasonable and non-discriminatory terms for the provision of scheduled services such as banking services, computer services, and enhanced telecommunications. Most telecommunications commitments contained in the

²² These issues are part of the on-going discussion in the context of the e-commerce work programme.

²³ A different way of approaching the issue was proposed by P. Hill who suggested to consider a third category of products: intangible goods. “The distinction between goods and services has become erroneously and unnecessarily confused with quite a different one, namely that between tangible and intangible products. There is now an extremely important and fast growing class of intangible products in the form of entities that are recorded and stored on media such as paper, films, tapes or disks. Advances in computer, communications and audio-visual technology have greatly enhanced the economic importance of these intangibles. On closer analysis, it emerges that they have all the salient economic characteristics of goods and nothing in common with services. In the global economy their production and distribution are organized in patently different ways from services. Treating them as services not only obscures the real nature and economic significance of intangibles but also causes confusion about the true characteristics of services.” See P. Hill, “Tangibles, intangibles and services: a new taxonomy for the classification of output”, in *Canadian Journal of Economics*, Vol. 32, No. 2 April 1999, p. 426.

country schedules agreed at the end of the Uruguay Round covered “value-added” services rather than “basic” services, as negotiations on the latter, according to the Decision on Negotiations on Basic Telecommunications, were to continue up to April 1996.²⁵ Measures affecting the cable or broadcast distribution of radio or television programming were excluded under paragraph 2(b) of the Annex.

The negotiations on basic telecommunications, after an extension of the April 1996 deadline aimed at reaching a ‘critical mass’ of offers from key telecom markets, eventually led to the tabling, in February 1997, of 55 offers covering 69 governments,²⁶ thus reaching that critical mass necessary (in particular in the US’ appreciation) to conclude the negotiation. These commitments are annexed to the Fourth Protocol on basic telecommunications, which entered into force on 5 February 1998, although in some cases commitments for particular services have longer phasing-in deadlines as specified in the national schedules. The commitments on telecom do not affect content, but they have an impact on a number of services that increasingly carry the content. In this respect existing and future commitments, for instance with regard to investment controls and ownership in the telecommunication sector, may have an impact on the audiovisual sector and the policies applied to it.

2. *The GATT 1994*

The audiovisual sector is the only services sector covered in the original GATT. Indeed, Article IV provides a special, and unique, exception for cinematic films to GATT national treatment rules and duty concessions have been made in relation to films. In 1947, in recognition of the difficulty that domestic film producers faced in finding adequate screen time to exhibit their films in the immediate post-World War II period, GATT founders authorized continuation of existing screen-time quotas.²⁷ This was the only case where the application of quantitative restrictions was allowed under the GATT MFN provision and

²⁴ See UNCTAD, *Audiovisual Services: Improving Participation of Developing Countries*, TD/B/COM.1/EM.20/1 of 20 September 2002.

²⁵ See WTO *Decision on negotiations on basic telecommunications*, 1994, Article 5.

²⁶ The EC and its Member States offer counting as one.

²⁷ Already in the 1920s European countries, following the First World War, began resorting to screen quotas in order to protect their film industry from a sudden influx of American films that was perceived as a threat

was recognized in terms of national treatment under GATT Article III (10). The special regime provided that a Contracting Party may maintain or establish quantitative regulations requiring the exhibition of films of national origin during a specified minimum portion of the total screen time in the commercial exhibition of all films of whatever origin; such screen quotas, however, were to be subject to negotiations for their limitation, liberalization or elimination. This GATT exception applied only to cinematic film quotas and seemed not to extend to television, radio and other segments of the audiovisual services sector.

However, the importance of GATT obligation for the cinematic sector is exemplified by the recent complaint by US against Turkey. The US alleged in 1997 that Turkey imposed a twenty-five per cent municipality tax on box office receipts generated from the showing of foreign-origin films, but imposed no such tax on box office receipts generated from the showing of domestic-origin films.²⁸ As a result, Turkey's municipality tax regime appeared to be inconsistent with Turkey's obligations under the GATT 1994, including Article III of the GATT 1994.²⁹ The matter was resolved as Turkey agreed to equalize the tax.³⁰

The link between GATT and GATS remains important in light of the uncertainties of classification outlined above and of the fact that, while the audiovisual industry is increasingly based on service content, all of these services involve and depend in one way or another on trade in goods. This possibility of conflict in the application of GATT and GATS was examined in the WTO decision of June 1997 in *Canada - Certain Measures Relating to Periodicals*, the first decision to deal with cultural products as such. The Panel affirmed, supported by the Appellate Body, that "[t]he ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that the obligations under GATT 1994 and GATS can co-exist and that one does

to their cultural expression. Austria, Czechoslovakia, Denmark, France, Germany, Hungary, Italy and the United Kingdom among other countries adopted film quotas.

²⁸ See *Turkey - Taxation of Foreign Film Revenues, Request for Consultations by the United States*, WTO doc. WT/DS43/2, 17 June 1996.

²⁹ Article III of GATT 1994 prohibits WTO Members from imposing internal taxes or other internal charges of any kind on imported products in excess of those applied, directly or indirectly, to like domestic products. Article III also prohibits the application of internal taxes or other internal charges to imported products so as to afford protection to domestic production.

³⁰ See *Turkey - Taxation of Foreign Film Revenues, Notification of Mutually Agreed Solution*, WTO doc. WT/DS43/324 July 1997.

not override the other.”³¹ The same issue was addressed by the Appellate Body in *Bananas*, where it stated that: “Given the respective scope of the two agreements, they may or may not overlap, depending on the measure at issue. Certain measures could be found to fall exclusively within the scope of GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS.”³²

3. Other WTO Agreements

Again depending on whether films are considered goods or services the Agreement on Subsidies and Countervailing Duties, the Agreement on Implementation of Article VI of GATT 1994 (the antidumping agreement) and the Agreement on Safeguards could become applicable. While this possibility appears remote, it has to be remembered, in particular in the area of subsidies, where the disciplines in the area of goods are rather stringent as opposed to the situation in the GATS and in light of the large use of public support measures in many audiovisual industries.

Another agreement of potential application is the Agreement on Trade-Related Investment Measures (the TRIMs Agreement). The TRIMs Agreement prohibits the application of certain investment measures related to trade in goods to enterprises operating within the territory of a Member. It should be noted that the TRIMs Agreement is concerned with discriminatory treatment of imported and exported goods and is not concerned with the treatment of foreign legal or natural persons or of services. Thus, the basic substantive provision in Article 2 of the TRIMs Agreement prohibits the application of any trade-related investment measure that is inconsistent with the GATT’s provisions on national treatment or the elimination of quantitative restrictions. In particular, an Illustrative List

³¹ Doc. WT/DS31/AB/R, June 30, 1997, p. 19.

³² See *European Communities - Regime for the importation, distribution and sale of bananas*, Appellate Body Report no. AB-1997-3, WTO doc. WT/DS27/AB/R of September 9, 1997, para. 221.

annexed to the Agreement identifies certain measures that are inconsistent with Article III(4) or Article XI(1) of GATT 1994. These cover essentially the following types of measures: local content requirements, trade-balancing requirements, foreign exchange balancing requirements and restrictions on exportation.

Performance requirements of this kind are “to be found, for instance, in the *Investment Canada Act* and the *Investment Canada Regulations*. An investment subject to review under the *Investment Canada Act* may not be implemented unless the Minister responsible advises the applicant that the investment is likely to be of net benefit to Canada; among the factors to be taken into consideration for that purpose are ‘the effect of the investment on the level and nature of economic activity in Canada, including the effect on employment, on the utilization of parts, components and services in Canada and exports from Canada.’”³³ To the extent that they affect investment (in the audiovisual sector) and create a restriction to trade, such requirements, and in particular domestic content requirements, could be challenged under the TRIMs Agreement.

Finally, the Ministerial Declaration on Trade in Information Technology Products (also known as the Information Technology Agreement or ITA)³⁴ should be mentioned as it plays an important and positive role for the development of the audiovisual sector. The ITA aims to expand world trade in information technology products because of the key role this trade plays in development of information-based industries, such as the audiovisual sector. The declaration was adopted by 14 WTO Members, including the USA, Canada, Japan, the EC, Singapore and Hong Kong representing about 80% of the trade in IT products. The agreement became effective once the number of participating countries represented 90% of the trade in information technology products. Other WTO Members could opt to join the agreement at a later stage. The objective of the Agreement is to bring down tariffs on IT items in stages to zero by a specified year, 2000 in principle and no later than 2005 for those developing countries that have requested a longer staging period. The first staged reduction in tariffs began on 1 July 1997.

³³ See I. Bernier, “Cultural goods and services in international trade law”, in D. Browne, ed., *The Culture/Trade Quandary: Canada’s Policy Options*, Centre for Trade Policy and Law, Ottawa, 1998.

³⁴ See WTO doc. WT/MIN(96)/16 of 13 December 1996.

4. The TRIPS Agreement

The other key cultural issue addressed in the Uruguay Round, beyond the liberalization of trade in audiovisual products like films and television programmes, was how to ensure better protection of intellectual property rights of such products. In this latter area the Round resulted in the TRIPs Agreement. Under the Agreement each WTO Member is required to accord in its territory the protection required by the TRIPS Agreement to the intellectual property of the nationals of other WTO Members. In particular, WTO Members are required to give both national treatment and MFN treatment. The Agreement covers all the main areas of intellectual property rights - copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and undisclosed information or trade secrets. In respect of these areas the Agreement contains two main sets of substantive obligations.

First, it lays down minimum standards of substantive protection for each category of rights that must be available in the national law of each Member. The starting points are the relevant WIPO Conventions. As some areas are not covered by these conventions and, in some cases, the standards of protection prescribed were thought inadequate, the TRIPS Agreement adds a significant number of new or higher standards.

The second major characteristic of the Agreement is that it specifies in some detail the procedures and remedies that each Member must provide within its national law so that the nationals of other Members can effectively enforce their intellectual property rights - whether through the normal judicial process, through customs action against imports of counterfeit and pirated goods or through criminal procedures in respect of wilful counterfeiting and piracy on a commercial scale. While developing countries enjoyed a four-year transition period, least-developed countries were granted a longer transition period of a total of eleven years (until 1 January 2006), with the possibility of an extension.

The provisions on minimum standards for the protection of intellectual property, domestic enforcement procedures and international dispute settlement are directly relevant to the

legal environment affecting the audiovisual sector, in particular with regard to the rules on copyright and related rights. The main purpose of copyright and neighbouring rights protection is to encourage and reward creative work, ensuring that creators are remunerated for the product of their work- a key ingredient for the successful development of cultural industries. Copyright and neighbouring rights (i.e. the rights of performers, producers of sound recordings and broadcasting organisations) thus constitute a fundamental element for the audio-visual sector of the products and services (CDs, films, CD-ROMs, etc.). They provide the creators, the artists and the content industry with the basic intellectual property rights allowing them to be remunerated and to invest into more creation and revenues.

The effectiveness of such protection is particularly important for the major audiovisual exporters as illegal reproduction of works or retransmission of signals still represents a major problem for audiovisual trade, amounting to hundreds of millions of dollars in lost revenues. The popularisation of reproduction equipment and, more recently, the advent of digital technology has largely contributed to increasing piracy (non-authorized reproduction of protected works) damaging cultural industries' sales. Piracy is equally detrimental to authors, whose royalties on sales are diminished accordingly. The publishing industry and phonogram, audiovisual and software producers are the sectors most severely harmed by piracy. Copyright and neighbouring rights also contribute to ensuring the existence of reliable and secure conditions, leading to investment for creation and innovation and to the development of the so-called Information Society.

Copyright protection grants authors the exclusive right to freely exploit their work on a commercial/non-commercial basis. Copyright rules are complemented by the so-called neighbouring rights, which protect performers (e.g. actors, singers, and musicians) phonogram producers (e.g. sound recordings) and broadcasting organizations.³⁵ The author's rights over their literary and artistic works (e.g. books and other written works, musical compositions, paintings, sculptures, software and cinematographic works) are generally protected under copyright for a minimum period of 50 years after their death. Under neighbouring rights, performers have the exclusive right to authorise reproduction

³⁵ The personal nature of performers' rights is made clear by granting the rights to each performer in respect of every performance he or she makes. Thus, for example, each member of a large choir has individual rights

and public communication of their performances. Phonogram producers enjoy the exclusive right to authorise reproduction, distribution and public communication of their phonograms, and broadcasting organisations are granted the exclusive right to authorise broadcast, satellite retransmission, recording and public communication of their own broadcasts.

Collecting societies are organisations created by authors and other copyright and neighbouring right-holders, specifically mandated to authorise on their behalf the economic exploitation of their works. Collecting societies are responsible for collecting and distributing benefits obtained from the commercial exploitation (reproduction and public communication) of protected works, whenever the rights cannot reasonably be exercised by the right-holder, due to their complexity. Collecting societies were originally created in the area of music and theatre but nowadays operate in fields such as cinema, audiovisual, reprography, multimedia and, more recently, digital copying and electronic transmission. Collective administration of rights is crucial for copyright enforcement and constitutes a useful tool too for users, by simplifying rights clearance.

In the copyright area the TRIPS Agreement consolidates the disciplines of the *Berne Convention* (literary and artistic works),³⁶ the *Geneva Convention* (phonograms)³⁷ and the *Rome Convention* (neighbouring rights)³⁸ into a single undertaking, backed up by enforceable dispute settlement measures. Members are free to determine the appropriate method of implementing the TRIPS Agreement within their own legal system but they must give to the nationals of other members the national treatment required in the Paris, Berne and Rome conventions, subject to the national treatment exceptions contained in these same treaties.³⁹

in his or her performance as part of the overall choral work; and he or she has rights in each performance no matter how many times the performance may be repeated and no matter how similar those performances are.

³⁶ The Berne Convention is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on 9 September 1886, and all acts, protocols, and revisions thereto.

³⁷ The Geneva Phonograms Convention is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, concluded at Geneva, Switzerland, on 29 October 1971.

³⁸ International Convention for The Protection of Performers, Producers of Phonograms and Broadcasting Organisations, concluded at Rome on October 26, 1961.

³⁹ For a description of the provisions of the TRIPS Agreement see M. Doane, "TRIPs and International Intellectual Property Protection in an Age of Advancing Technology", in *American University Journal of International Law and Policy*, 1994, p. 465 et seq.; J. H. Reichman, "Universal Minimum Standards of Intellectual Property Protection under the TRIPs Component of the WTO Agreement", in *The International Lawyer*, Summer 1995, pp. 345-388; M. O'Regan, "The Protection of Intellectual Property, International

Articles 3, 4 and 5 include the fundamental rules on national and most-favoured-nation treatment of foreign nationals, which are common to all categories of intellectual property covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement. While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the MFN treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under the TRIPS Agreement.

With regard to the specific copyright discipline, the point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. Economic rights, as defined therein, including the right to reproduce, adapt, perform publicly, and communicate publicly, are incorporated by reference. However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived therefrom.⁴⁰ The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights.

According to the general rule contained in Article 7(1) of the Berne Convention as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author, plus 50 years. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS

Trade and the European Community: The Impact of the TRIPs Agreement of the Uruguay Round of Multilateral Trade Negotiations”, in *Legal Issues of European Integration*, 1995/1, pp. 1-50; and http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

⁴⁰ On the different approaches of copyright and *droit d'auteur*, see J. Dufay, “Le droit des auteurs à l'échelle internationale”, in *International Business Law Journal*, No. 4, 1996.

Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

TRIPs Article 11 requires WTO Members to provide rental rights to owners of copyrighted cinematographic works. This provision is meant to ensure that authors receive a return when, for instance, videos are lent out, as this has the effect of reducing sales and provides opportunities for illegal home copying. These rental rights are not absolute, however. Members can exempt cinematographic works from this obligation by showing that commercial rental activity has not led to widespread copying that is “materially impairing the exclusive right of reproduction ... conferred on authors.”

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e.g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance. In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law.

Broadcasting organizations shall have, in accordance with Article 14.3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcast by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations (Article 14.5). Article 14.6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

The TRIPS Agreement has given rise to a number of disputes involving the audiovisual sector.⁴¹ In 1996 the US followed thereafter by the EC challenged Japan's copyright protection for sound recordings, alleging that Japanese law only granted protection to foreign sound recordings produced on or after January 1, 1971, the date on which Japan first provided specialized protection for sound recordings under its copyright law. The following year, both the US and the EC settled the matter with Japan, the latter having adopted amendments to its copyright law to provide protection to recordings produced between 1946 and 1971.⁴²

In 1997 the US also complained that Ireland appeared not to grant copyright and neighbouring rights in accordance with TRIPS obligations on a number of issues including the protection of producers and performers of sound recordings and ownership rights in films. This dispute has recently been resolved on the basis of a series of amendments that Ireland introduced to its copyright law.⁴³ In a further complaint the US alleged that a significant number of television stations in Greece regularly broadcast copyrighted motion pictures and television programs without the authorization of copyright owners.⁴⁴ The matter was resolved on the basis of a change in the enforcement system in Greece which now permits effective action against copyright infringement by television stations and constitutes a deterrent to further infringements. Greece passed legislation in 1998 which provides an additional enforcement remedy for copyright holders whose works were infringed by television stations operating in Greece as well as the immediate closure of television stations that infringe intellectual property.⁴⁵

⁴¹ See D. Williams, "Developing TRIPS Jurisprudence. The First Six Years and Beyond", in *The Journal of World Intellectual Property*, Vol. 4 No. 2, March 2001, pp. 177-209.

⁴² See *Japan – Measures Concerning Sound Recordings*, WT/DS/28/4 for the US complaint and WT/DS/42/4 for the EC.

⁴³ See WTO doc. WT/DS82/3 of 13 September 2002.

⁴⁴ See *European Communities - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Request for Consultations by the United States, WT/DS124/1 of 7 May 1998.

On its side, the EC complained against the US that sections of the so-called *Fairness in Music Licensing Law*, passed by the Congress and signed into law in late 1998, breached the Berne Convention and the TRIPS Agreement. A WTO panel eventually ruled that the US violated its obligations under the TRIPS Agreement in as far as its legislation allows public establishments like restaurants under a certain size not to pay royalty fees for music they play.⁴⁶ The US did not appeal the panel ruling and on 24 August 2000, announced that it intended to implement the rulings.⁴⁷

5. Conclusion

The foregoing review shows that the WTO regime provides a highly relevant and sophisticated framework for the audiovisual sector, both in the area of trade liberalisation and in that of protection of rights. As technology continues to develop at high speed, while many governments maintain a very active policy approach to the sectors, rules also need to adapt. The current round provides this opportunity. We have so far only witnessed the opening salvos in the discussion. But already very crucial issues, mainly technologically driven as in the case of the classification, or mainly policy driven as in the area of subsidies, have come to fore. Stay tuned, more to come at a theatre near you!

⁴⁵ See WTO doc. WT/DS124/2 of 26 March 2001.

⁴⁶ See *United States - Section 110(5) of the US Copyright Act*, WTO doc. WT/DS160/R of 15 June 2000.

⁴⁷ The United States has been engaged in discussions with the European Communities to find a mutually acceptable resolution of the dispute. In connection with those discussions, the US and the EC resorted to arbitration under Article 25 of the WTO Dispute Settlement Understanding in order to determine the level of nullification or impairment of benefits caused by Section 110(5)(B) of the US Copyright Act.