

CHRONIQUE 6

AUDIOVISUAL SERVICES SUBSIDIES WITHIN THE FRAMEWORK OF THE GATS: THE CURRENT SITUATION AND IMPACT OF NEGOTIATIONS

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To varying degrees, most countries subsidize their audiovisual services. In developed countries particularly, audiovisual services subsidies are prominent at nearly every stage of the production and distribution process. This is the case for the film industry (and largely for television, as well), where subsidy programs exist for project development, scripting, production, marketing, distribution, dubbing and subtitling, festivals, international film events, co-production, etc. Among all service sectors, the audiovisual service sector is the most frequently cited as receiving subsidies, according to data collected during periodic reviews of WTO Member trade policies¹. This last observation has led us to question the legal status of subsidies in the GATS and the repercussions of the GATS (General Agreement on Trade in Services) negotiations now underway regarding subsidies to the audiovisual sector.

I. The current legal situation regarding subsidies within the GATS

The only provision explicitly addressing subsidies in the GATS is Article XV. This article does not contain any commitment that limits subsidies, apart from the commitment to hold negotiations aimed at developing the necessary multilateral disciplines to avoid possible trade-distortive effects of subsidies. A footnote to paragraph 1 of Article XV stipulates that “a future work program will determine how, and in what time frame, negotiations on such multilateral disciplines will be conducted.” However, as of July 2002, nothing had been

¹ See OMC, doc. S/WPGR/W/25 (26-01-98)

done to create such a work program. It should be pointed out that the *Guidelines and Procedures for the Negotiations on Trade in Services*, adopted on March 28, 2001 during the Special Session of the Council on Trade in Services, stipulates that "Members shall aim to complete negotiations under Articles VI:4, XIII and XV prior to the conclusion of negotiations on specific commitments."² However, for the moment, and until specific disciplines concerning subsidies are formally adopted, members remain theoretically free to subsidize their audiovisual services as they see fit. We shall later examine the evolution of these negotiations regarding Article XV.

Two other provisions in the GATS somewhat limit the scope of this apparent freedom granted to members to subsidize their audiovisual services as they see fit, even if they do not refer to subsidies as such. The first of these provisions is Article II, which concerns the commitment of Members to accord "to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country," in other words, the obligation to grant most-favored-nation treatment. This commitment, found in Part II of the GATS (General Obligations and Disciplines), applies to all Members and services, including audiovisual services. However, under paragraph 2 of Article II, a member may maintain a measure that is inconsistent with the commitment in question, provided that such measure is listed in, and meet the conditions of, the Annex on Article II exemptions. This annex applies solely to exemptions applied for before the date of entry into force of the Agreement. Any new exemptions applied for after the date of entry into force of the WTO Agreement come under paragraph 3 of Article IX of that agreement, which allows a Member to be exempt from its obligations only if three-quarters of the members approve. In addition, any exemptions granted for a period of more than five years are reviewed no more than five years after the date of entry into force of the WTO Agreement. The annex also stipulates that, "in principle", an exemption of a Member from its obligations under paragraph 1 of Article II should not exceed a period of ten years. This last statement, however, is not devoid of ambiguity. Although Article II exemptions are clearly envisioned in the Annex as temporary, the possibility that they may last for more than ten years is not discarded, as though such an extension in certain sectors was viewed as inevitable.

² OMC, Report of the Working Group on GATS Rules Chairperson, doc. S/WPGR/10, 30 June 2003

Judging by the facts, this could certainly be the case for the audiovisual sector. According to a study by the WTO, it is precisely in this sector that the largest number of most-favoured-nation treatment exemptions was made. If we consider the European Community as a single entity, at least 33 applications for such an exemption have been made in that sector.³ Many of these concern co-production agreements in the film and television sectors and, to a lesser degree, regional funding agreements for the film and television industry. Such agreements, concluded for reasons essentially linked to the preservation of national and regional cultural identities, are in clear non-compliance with most-favored-nation treatment by providing access to existing national subsidy programs in these sectors solely to signatories. It is particularly interesting to note that exemptions concerning co-production agreements are often presented as having an unspecified duration, as though the ten-year duration did not exist. Moreover, these exemptions are generally interpreted as covering agreements made both before and after the date of entry into force of the WTO, which has led the beneficiaries of these exemptions to happily continue signing new co-production agreements in spite of the time limit in question.⁴ It remains to be seen, however, to what extent such a development can be challenged within the framework of the current GATS negotiations. For those WTO Members that did not apply for an exemption concerning co-production agreements, it goes without saying that they no longer have the option to sign such agreements.

The second GATS provision likely to limit the apparent freedom enjoyed by WTO Members to subsidize their audiovisual services is Article XVII. If a Member voluntarily makes commitments concerning national treatment in a given service sector, as provided for in Article XVII, it may not deprive foreign audiovisual service providers on its territory of the benefit of domestic subsidy programs unless it has included a reservation specifically limiting subsidy programs in this sector to its nationals. Thus, the United States, in its list of specific commitments in the audiovisual sector, included a reservation concerning

³ WTO, Council on Services, Audiovisual Services, Background Note by the Secretariat, par. 29, Doc. S/C/W/40, 15 June 1998, par. 31: http://www.wto.org/english/tratop_e/serv_e/w40.doc,

⁴ For examples of members whose exemptions explicitly refer to existing and future co-production agreements, see : for the European Community (GATS/EL/31), for Chile (GATS/EL/18) and for the Czech Republic (GATS/EL/26).

subsidies granted by the National Endowment of the Arts solely to American citizens and permanent residents.⁵ New Zealand did the same with subsidies for films made in New Zealand⁶, as did Israel regarding subsidies for Israeli films.⁷ Even China, at the time of its recent accession to the WTO, in its horizontal commitments regarding all sectors on its list, included a reservation concerning “subsidies currently granted to national service providers in the audiovisual, aviation, and medical service sectors”.⁸

II: Negotiation proposals likely to modify the current situation

As we can see, very little has been legally settled with regards to the right of Members to freely subsidize their audiovisual services. In such a context, it was inevitable that a number of proposals drawn up by members during the current negotiations on services would directly or indirectly challenge the current legal situation concerning subsidies within the GATS. This has led to proposals calling for the elimination of all most-favored-nation treatment exemptions, including those regarding co-production agreements, and others suggesting outright the establishment of a specific regime for subsidies in the audiovisual sector.

Three countries in particular, Japan, Mexico, and Korea, have insisted that existing most-favored-nation treatment exemptions be eliminated. As of May 2001, Japan had proposed that all exemptions listed in the Annex as exemptions from Article II obligations be eliminated by the end of 2004.⁹ In November 2001, Korea, as Mexico had done shortly before, stated that “the fundamental principle of MFN (most-favored-nation) should be reinforced in GATS (General Agreement on Trade in Services) at the earliest possible date” and that it “would like to urge Members to eliminate and/or reduce MFN inconsistent measures before the end of the 10-year period, considering the 10-year period as a maximum period.”¹⁰ However, this point of view, which, if it were to prevail, would definitively end the practice of film co-production agreements, does not yet appear to have

⁵ OMC, doc. GATS/SC/90, p. 46.

⁶ OMC, doc. GATS/SC/62, p. 13

⁷ OMC, doc. GATS/SC/44, p. 9

⁸ OMC, doc. WT/ACC/CHN/49/Add.2, 1^{er} October, 2001.

⁹ OMC, doc.S/CSS/W/42/Suppl.1, 14 May 2001 : “MFN Exemption: Analysis and Proposal”

¹⁰ OMC, doc. S/CSS/W/127, 30 November 2001

rallied decisive support, at least in the audiovisual sector. It is important to note here that co-production agreements are quite commonplace not only in developed countries, but in developing countries as well, and that they clearly involve a transfer of financial resources and technology from the former to the latter. Thus, the incentive to put an end to such agreements is not strong. Nevertheless, we will have to wait until the end of the GATS negotiations to see what the future holds for them.

The general ambiguity surrounding the issue of subsidy treatment within the framework of the GATS has also led to proposals aimed at creating a specific subsidies regime for the audiovisual sector. Three countries in particular, Brazil, Switzerland and the United States, have shown themselves open to such an approach. Brazil has adopted a perspective on the issue that is meant to reflect the concerns of developing countries. After asserting that the GATS offers the possibility for the liberalization of trade in the audiovisual sector without depriving members of the autonomy necessary to promote their cultural policy objectives, Brazil goes on to say:

However, in view of the sensitivities associated with this sector, consideration should be given to additional instruments, particularly in the area of motion picture production and distribution. There is merit in considering mechanisms for subsidies in the audiovisual sector aimed at achieving cultural policy objectives. This could be addressed in the ongoing negotiations on subsidies under Article XV of the GATS in the framework of possible multilateral disciplines or by scheduling National Treatment limitations for those subsidies in Members' schedules of specific commitments. In any event, it would be important to ensure that they have the least trade distortive effect, given the disparities in Members' capacity to subsidize. Special needs of developing countries must be appropriately addressed in this regard.¹¹

Switzerland, in turn, approaches subsidies as one issue among many that underlie the treatment of audiovisual services within the framework of the GATS. It suggests that all of these issues be discussed during a special session of the Council on Trade in Services and, if necessary, constitute a special annex on audiovisual services or any other instrument deemed appropriate. Regarding subsidies in particular, however, it asserts the following:

General subsidy rules under GATS Article XV are yet to be developed. It is a matter of fact that most WTO Members do subsidize with different intensities the production and distribution of audio-visual products, at least as regards motion pictures. Therefore, in addition to the discussion on general subsidy rules, it would seem to be worth discussing subsidisation practices and their standing under disciplines to be agreed as part of the solution to the

¹¹ WTO, doc. S/CSS/W/99, 9 July 2001

audio-visual issue. A common understanding among Members about subsidies, the policy purpose justifying them, as well as their effect on trade, would represent a positive precondition both for the negotiation of specific commitments in the audio-visual sector as well as for the elaboration of general subsidy rules.¹²

Finally, the United States envisions the possibility of specific treatment of subsidies in the audiovisual sector tied to commitments made in this sector. However, the precise nature of this tie is not very clear. What the United States seems to assert, in fact, is that if a sufficient number of Members agree to make commitments in the audiovisual sector—we know that during the Uruguay Round of negotiations, very few agreed to do this—they will be receptive to negotiations for a special agreement on subsidies in this sector. The American proposal is as follows:

In conjunction with negotiated commitments for audiovisual services, Members may also want to consider developing an understanding on subsidies that will respect each nation's need to foster its cultural identity by creating an environment to nurture local culture. To this end, many Members subsidize theatrical film production. There is a precedent in the WTO for devising rules, which recognize the use of carefully circumscribed subsidies for specifically defined purposes, all the while ensuring that the potential for trade distortive effects is effectively contained or significantly neutralized.¹³

However, it should be pointed out that the precedent the United States' proposal refers to has not been in force since January 1, 2000, since members did not extend the application of the rules in question as required.¹⁴ Moreover, we should note that the proposal in question easily goes well beyond the current regime by suggesting measures that would recognize subsidies that are “carefully limited to specifically defined purposes” and cause the fewest possible trade-distortive effects.

To date, no real action has been taken concerning either of these proposals. In general, services negotiations have been progressing rather slowly with regards to concession offers and, after the Cancun failure, the least one can say is that issues such as a specific regime for audiovisual services subsidies, and the elimination of all most-favored-nation treatment exemptions, including those concerning co-production agreements, are not priorities. Barring a major development in negotiations—in both general and services

¹² WTO, doc. S/CSS/W/74, 4 May 2001

¹³ WTO, doc. S/CSS/W/21, 18 December 2000

negotiations—it's conceivable that the only new restrictions to members freely subsidizing their audiovisual sectors would stem from specific commitments they would have wanted to make in the audiovisual sector. However, since members are committed by the *Guidelines and Procedures for the Negotiations on Trade in Services* to “conclude negotiations on Articles VI:4, XIII and XV before negotiations concerning specific commitments are completed¹⁵, it seems an appropriate time to examine what is happening with regards to negotiations on Article XV.

III. Negotiations underway on Article XV regarding a possible legal regime for subsidies

To say the least, the negotiations in question are not progressing very quickly. In the last report by the Working Group on GATS Rules, dated June 30, 2003, the chairperson of the Group stated in its conclusion that “in general terms, work on subsidies is affected by the “chicken and the egg” syndrome and very limited progress has been made on technical issues.¹⁶

It is not due to a lack of institutional support that the negotiations haven't progressed. As the Report notes, since 1996, when this subject was first put on the agenda of the Working Party on GATS Rules, negotiations on subsidies have benefited from the following written input:

- 7 formal and 6 informal contributions from Members;
- a number of notes from the Chairpersons aimed at structuring the debate, the most notable one being the Checklist on subsidies, recently revised in JOB(03)/57;
- 9 formal and 4 informal notes by the Secretariat.

However, if one disregards the notes of the Working Group Chairperson and the Secretariat and only takes the contribution of members into consideration, one sees that apart from the European Communities, who submitted an informal document on the

¹⁴ The rules in question are found in Article 8.2 of the *Agreement on Subsidies and Countervailing Measures*. Article 31 of this agreement stipulates that these rules shall only be applicable for a period of five years, after which they must be extended to remain in force.

¹⁵ See *supra*, note 2.

communities' regime for state subsidies in the service sector, only six members, Chile, Norway, New Zealand, Hong Kong/China, Poland and Argentina, submitted formal and informal documents. At this stage, one certainly cannot talk about a major interest by Members regarding the issue of subsidies. It remains to be seen which issues are discussed and what place subsidies in the audiovisual sector are given within the framework of these negotiations.

Since the beginning, in 1996, particular attention has been paid to the necessity and the possible content of a definition of subsidies in the service sector, as well as the need for an exchange of information on subsidies in the service sector. With regards to the issue of a definition, some Members have suggested that it be based on that given in the Agreement on Subsidies and Countervailing Measures, while others have asserted that this model, which applies exclusively to merchandise, is not particularly useful in defining subsidies in the service sector since the characteristics of the two sectors are different.

In 1997, the Working Group approved a questionnaire to facilitate the exchange of information regarding subsidies. From 1997 to 1999, delegations continued their technical analysis of subsidies and examined conceptual and legal issues. In 2000, the Working Group addressed the necessity and possible scope of disciplines for subsidies likely to have trade-distortive effects. That same year, the Chairperson, at the request of the Working Group, distributed a list of issues concerning subsidies to enable members to address questions relevant to this agenda item in a more systematic way.¹⁷ In 2001, Members continued their work on the basis of this list, addressing one item at each meeting. In 2002, discussions once again focused on the need for further information on services subsidies in general, with only four Members having responded to the

¹⁶ OMC, doc. S/WPGR/10, 30 June 2003, paragraph 19.

¹⁷ Five issues concerning the following subjects were identified: 1) A definition of a subsidy in the service sector, including the relevance of the definition given in the Agreement on Subsidies and Countervailing Measures, and the need for and possible means of categorizing services subsidies; 2) An examination of any proof of the existence of subsidies likely to have trade-distortive effects (including subsidies for production, distribution, consumption and export); 3) Relevant knowledge for determining which subsidies should be considered as having trade-distortive effects, including the specificity, general policy objectives, nature of the subsidies, authorized subsidies and those for which no action is being taken; 4) To what extent WTO rules, particularly the GATS and the disciplines it sets forth regarding national treatment and most-favored-nation treatment, already regulate services subsidies or offers other measures to do so; 5) A larger role for subsidies, including the completion of general policy objectives and the role of subsidies in development, and the need for flexibility for developing country Members.

questionnaire drawn up in 1997. Finally, on March 17, 2003, the Chairperson presented a revised version of the questionnaire concerning subsidies distributed in 2000. It is not surprising to learn that during all those years, specific treatment for audiovisual services subsidies was never an issue.

Two explanations have been put forth to explain the lack of progress made in negotiations on subsidies. The first blames the inherent complexity of the treatment of subsidies in the service sector. Admittedly, the creation of multilateral disciplines to avoid distortive effects in the services sector is not a simple task in itself, as the questionnaire drawn up by the Working Group Chairperson demonstrates. However, it is difficult to find in this explanation the primary cause for the difficulties that have been encountered and it is not the explanation most often found in the Working Group Chairperson's Annual Reports. A second, more persuasive explanation concerns the behavior of the Members. Very early in their discussions, Members asserted the need to adopt a prudent and systematic approach to the issue. This warning was obviously taken seriously as it wasn't until 2002 that the work program provided for in the annex to paragraph 1 of Article XV was finally adopted. What is truly striking, however, as we mentioned above, is the lack of eagerness on the part of the Members to respond to the questionnaires and become actively involved in the negotiations. This is attested by the following statement of the Working Group Chairperson's in 2003: "I would advise Members to engage actively in discussions to determine what elements can be used to move forward. I would also like to encourage Members to submit new proposals - formal or informal - taking into account the specificities of the GATS."

In this context, the negotiation of a specific regime for subsidies granted in the cultural sector within the framework of the negotiations on Article XV does not appear very realistic, at least for the moment. However, we must not lose sight of the fact that the negotiations on subsidies are mandated by Article XV of the GATS and could, therefore, continue after the Doha negotiations if necessary to achieve a result.

Conclusion

As we can see, if the right of WTO Members to freely subsidize their audiovisual services does not appear to be seriously challenged at the moment, this is largely due to the fact that the negotiations underway are not progressing as planned. However, there is no guarantee that at the end of the current negotiations, or at the end of other negotiations, a legal regime creating the multilateral disciplines necessary to avoid trade-distortive effects from the use of subsidies will be not be established.

In the meantime, Members are required to make specific commitments in the audiovisual sector that, if they aren't careful, could result in any subsidy granted to their national producers and distributors having to also be granted to foreign producers and distributors on their territory.

Until an international instrument on cultural diversity is established, whose objectives include providing a forum for discussing cultural policies and establishing global surveillance of the state of cultural diversity in the world, it clearly seems preferable to avoid making such commitments.