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Content regulation in the audio-visual sector and the WTO

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Introduction

Though the question of content regulation was not on the agenda of the GATS negotiations that led to the Annex on Telecommunications and the Fourth Protocol,[1] it is quite clear that the next steps in the gradual opening of national markets to foreign telecom service suppliers will touch directly or indirectly upon that question. The US–Mexico DBS Protocol of November 1996, annexed to the US–Mexico Satellite Agreement[2] signed earlier in April 1996, as well as the US–Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services[3] of 5 June 1998, can be seen as a prototype of things to come. Significantly, the two Protocols, according to the US Federal Communications Commission (FCC), limit domestic content restrictions either

* The discussion on pp. 222–33 below is based on Ivan Bernier, 'Trade and Culture', in Arthur Appleton, ed., *The Kluwer Companion to the WTO* (forthcoming).

[1] Measures affecting the cable or broadcast distribution of radio or television programming were excluded under Paragraph 2(b) of the GATS Annex on Telecommunications. A number of states, in their commitments under the Fourth Protocol, have clearly indicated that commitments in their schedule did not cover the economic activity consisting of content provision which require telecommunications services for its transport: see European Union, GATS/SC/31/Suppl.3 (4 November 1997); see also Chile, GATS/SC/18Supp.12 (4 November 1997).

[2] Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Service Users in the United States of America and the United Mexican States, signed 28 April 1996, and Protocol Concerning the Transmission and Reception from Satellites for the Provision of Direct-to-Home Satellites Services in the United States of America and the United Mexican States, signed 8 November 1996.

[3] Federal Communications Commission (FCC), Report No. IN 98-27, 'International Bureau Announces Conclusion of US–Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services', 5 June 1998.

side can place on satellite programming to only a 'modicum' of total programming, 'thereby increasing opportunities for US programme content producers'.[4] Technological development, convergence and the globalisation of the economy, more than anything else, are at the root of this movement towards the opening of national telecommunication and communication markets and, as shown by the incredible development of the Internet, it will be difficult to stop that movement. But, at the same time, there are issues behind content regulation which are very real public concerns and often go beyond the parameters of trade. Content regulation, among other things, is an important part of cultural policy in many countries. To predict the disappearance of content regulation in the audio-visual sector from that point of view may be somewhat premature.

In order to get a better understanding of how content regulation in the audio-visual sector may be affected by the changes brought about by trade liberalisation in telecommunication and communication services and by convergence, it may be useful to begin by considering the type of use that is made of content regulation in that sector. Subsequently, we shall examine how content regulation is presently treated in the WTO context, distinguishing between what the texts themselves have to say and the actual practice of states. Finally, we shall consider the pressure that the new environment exerts on existing rules and suggest some plausible outcomes for the future.

Content regulation in the audio-visual sector

Content regulation is of interest to the WTO insofar as it entails some form of restriction on the international circulation of goods or services. From that point of view, the concept of content regulation is close to two other concepts frequently used in international trade practice to describe such situations which are those of 'content requirement' and 'content restriction'. Although often considered more or less as synonymous, these two concepts differ in the way in which they operate, the first one acting by way of affirmative obligations and the second one by way of prohibitions. Content requirement thus refers to regulations that usually prescribe a given percentage of local content in film and television programmes or a given percentage of television and radio programmes in the national language or languages; they are commonly referred to in such cases as local content requirements. The expression also covers obligations to provide a balance of viewpoints. The usual justification for regulations of that nature

[4] *Ibid.*

is that they are essential to preserve and promote cultural and linguistic diversity as well as freedom of expression and pluralism. The concept of content restriction for its part refers to regulations that exclude certain types of content (so-called illicit material) or allow them subject to certain conditions (unsuitable material); the regulations in question concern the protection of minors, the protection of human dignity and of public morals and the protection of consumers. But the concept of 'content regulation', being somewhat broader than those of 'content requirement' and 'content restriction', also encompasses a third type of intervention that intends to stimulate the development of local content, such as direct subsidies for the production of local programmes or an 'investment quota' obliging television operators to devote a percentage of their annual earnings on films deemed national or produced in the national language.[5] These three types of regulations, as we shall see now, raise different levels of concern in practice.

The type of content regulation that appears to raise most concern in trade practice so far is the one that imposes local content requirements. This does not come entirely as a surprise because local content requirements are assimilated to quotas which are generally viewed as more prejudicial than subsidies from an economic point of view.[6] In the 2002 National Trade Estimate Report on Foreign Trade Barriers, published by the United States Trade Representative, for instance, some 30 states, including the Member States of the European Union, are identified as trade partners of the United States which maintain local content restrictions in the audio-visual sector.[7] An earlier study in 1998 by Solon Consultants for the EU Commission, entitled 'Audio-visual Industry; Trade and Investment Barriers in Third Country Markets States', already pointed out that '[a]s a rule, audio-visual suppliers commonly encounter non-tariff measures in the form of law and practice barriers, such as quotas

[5] A discussion paper commissioned by the Asia-Pacific Broadcasting Union and entitled 'Trade Liberalisation in the Audio-visual Services Sector and Safeguarding Cultural Diversity' (1999) affirms in this regard: 'Content regulation can also foster the development of domestic production industries which create local programs' (*ibid.*, p. 7). See www.aba.gov.au/radio/research/projects/trade.htm.

[6] For a more elaborate and balanced view on the subject, see Martin Richardson, 'Cultural Quotas in Broadcasting: Local Content Requirements, Advertising Limits and Public Radio', University of Otago, Dunedin, New Zealand (2002), www.economics.utoronto.ca/roberts/quotas.pdf.

[7] See United States Trade Representative, '2002 National Trade Estimate Report on Foreign Trade Barriers'. Apart from the Member States of the European Union, those identified included Argentina, Australia, Brazil, Bulgaria, Canada, China, Egypt, Hungary, Malaysia, Mexico, Poland, Romania, South Korea, Ukraine and Venezuela.

that affect the theatrical distribution of films; [and] the broadcasting of foreign-made productions.'[8] Authors who have considered the question also come to similar conclusions. According to Gareth Grainger: 'Regulations for domestic content quotas for the television industries have been adopted by the majority of western countries. Noteworthy exceptions to this general pattern are the US and New Zealand. The mechanisms relied on are broadly similar in those nations with quota systems.'[9]

Concrete examples of local content requirements in national practice will help to explain how they operate. In most cases, the local content requirement is expressed in terms of national content. Thus, in Canada, the federal broadcasting regulator, the Canadian Radio, Television and Telecommunications Commission (CRTC), requires that for Canadian conventional, over-the-air broadcasters, Canadian programmes make up 60 per cent of television broadcast time overall and 50 per cent during evening hours (6 p.m. to midnight). It also requires that 35 per cent of popular musical selections broadcast on radio should qualify as 'Canadian' under a Canadian government-determined points system. For cable TV and direct-to-home (DTH) broadcast services, a preponderance (more than 50 per cent) of the channels received by subscribers must be Canadian programming services. For other services, such as specialty television and pay audio services, the required percentage of Canadian content varies according to the nature of the service.[10] A similar approach is used in the European Union where the Television Without Frontiers Directive requires that 'Member States shall ensure where practicable and by appropriate means that broadcasters reserve for European works . . . a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping.'[11] The Directive also allows Member States to apply stricter

[8] Solon Consultants, 'Audio-visual Industry: Trade and Investment Barriers in Third Country Markets', Final Report prepared for the DG 1 Market Access Unit of the European Commission, November 1998, www.obs.coe.int/online_publication/reports/00002413.pdf.

[9] Gareth Grainger, 'Globalisation and Cultural Diversity: The Challenge to the Audio-visual Media', see also Franco Papandrea, 'Cultural Regulation of Australian Television Programs', Occasional Paper No. 114, Australia, Bureau of Transport and Communications Economics, 1997, Appendix II, p. 233.

[10] See the website of the Canadian Radio Television and Communications Commission, www.crtc.gc.ca/eng/INFO_SHT/G11.htm. For a condensed presentation of the subject, see Commonwealth of Australia, Productivity Commission, 'Broadcasting', Report No. 11, AusInfo, Canberra, Appendix F (2000).

[11] The Television Without Frontiers Directive 89/552/EEC was adopted on 3 October 1989 by the Council, and amended on 30 June 1997 by European Parliament and Council Directive 97/36/EC.

provisions where they are deemed necessary for national and cultural (notably linguistic) reasons, which a number of them have done. In France, for instance, terrestrial television must allocate 40 per cent of time to original French-language works. Similar requirements are also in use in a number of states for radio programming.[12]

Characteristic of this type of approach is the need to define what constitutes national content. Canadian content status is determined on the basis of a 10 point scale. Programmes are awarded points for each key creative person who is a Canadian citizen at the rate of two points each for the director and screenwriter and one point each for the highest and second highest paid actor, the head of the art department, the director of photography, the music composer and the picture editor. Programmes must be produced by a Canadian and have at least six points to be considered Canadian. To qualify for financial assistance, programmes must attain 10 points.[13] In Australia, the determination of what is an Australian programme follows a very similar procedure consisting of determining whether the programme in question is produced under the creative control of Australians.[14] Sometimes, the local content requirement is expressed in terms of a limit to foreign participation in the national audio-visual market. Thus, in Korea, local content in the free TV sector is favoured by limiting the percentage of monthly broadcasting time (not to exceed 20 per cent) that may be devoted to imported programmes. Annual quotas also limit, at a maximum of 75 per cent, 58 per cent and 40 per cent respectively, broadcast motion pictures, animation and popular music. Korea also restricts foreign participation in the cable TV sector by limiting per channel air time for most foreign programming to 50 per cent. Annual quotas are set at 70 per cent for broadcast motion pictures and at 60 per cent for animation.

State interventions to stimulate the production of local content in the audio-visual sector do not appear to generate the same level of concern, even if, as a 1998 WTO Secretariat study on audio-visual services noted,

[12] In France, a radio broadcast quota (40 per cent of songs on almost all French private and public radio stations must be Francophone) took effect on 1 January 1996: see Loi 9488 of 1 February 1994, Article 12. In Canada, all radio stations must ensure that 35% of their popular musical selections each week is Canadian, and French-language radio stations must ensure that at least 65 per cent of popular vocal music selections each week is in the French language: see note 10 above.

[13] See note 10 above.

[14] The detailed procedure is described on the website of the Australian Broadcasting Authority, www.aba.gov.au/tv/content/ozcont/std/index.htm#3.

'substantial subsidies are granted in a number of WTO members'.[15] More often than not, those subsidies are granted on condition that they contribute to the production of local programmes. In Germany, for instance, financial support for a full-length film requires that the film in question be identifiable to Germany, whether through the compulsory use of the German language, through requirements concerning the origin of the persons or enterprises involved in the production of the film or requirements concerning the location of the shooting itself.[16] As early as 1970, in the Tokyo Round catalogue of non-tariff barriers the United States had complained about the subsidies employed by twenty-one countries in order to support their cinema and television industries.[17] During the Uruguay Round, the uncertainty concerning the treatment of subsidies in the audio-visual sector was taken seriously enough to prompt the European Economic Community to include, in its last minute attempt to have a cultural clause included in the GATS, a provision guaranteeing the right of Member States to subsidise their audio-visual industry.[18] Since then, however, complaints regarding subsidies to producers of local programmes have been rare. It is interesting to note in that regard that in both the 2002 National Trade Estimate Report on Foreign Trade Barriers, and the Solon Communications study prepared for the European Commission, there is no reference to state interventions to stimulate the production of local programmes. But a particular case must be made in this respect of indirect subsidies which take the form of investment quotas obliging television operators to devote a percentage of their annual earnings on films deemed national or produced in the national language. Such interventions remain identified, both in US National Trade Estimate Report on Foreign Trade Barriers and the Solon study as trade barriers in the audio-visual sector. An example of such a type of intervention which operates as an

[15] See WTO Doc. S/C/W/40, 15 June 1998, p. 6, www.wto.org/english/tratop_e/serv_e/w40.doc.

[16] On this see Michel Gyory, 'Making and Distributing Films in Europe: The Problem of Nationality', www.obs.coe.int/online_publication/reports/natfilm.html, study carried out in cooperation with and commissioned by the European Audio-visual Observatory (January 2000).

[17] See GATT, Doc. MTN/3B1.

[18] See www.wto.org/english/tratop_e/serv_e/w40.doc. The attempt failed by only a small margin, because, according to Karl F. Falkenberg, the Community presented its position late in the negotiations: see 'The Audio-visual Sector', in Jacques H. J. Bourgeois, Frédérique Berrod and Eric Gippini Fournier, ed. The Uruguay Round Results: A European Lawyer's Perspective (Brussels: European Interuniversity Press/College of Europe, 1995), p. 432.

indirect subsidy is the legislation adopted in 1999 by the Spanish Parliament which obliges television operators to devote 5 per cent of their annual earnings to finance European feature-length films and films for European television. This investment quota was further defined in July 2001 in new legislation (60 per cent of the investment quota must be spent on audio-visual works in one of Spain's official languages).[19] Similarly, Australia's Broadcasting Services Amendment Act requires pay television channels which include more than 50 per cent drama programmes in their schedules, to spend 10 per cent of their programming budget on new Australian drama programmes.[20]

Rarely identified as a trade barrier until recently, content regulations regarding illicit and unsuitable material have become, in recent years, a subject of growing concern particularly in the context of the Internet. This type of regulation has been traditionally considered as falling within the category of measures that are necessary to protect public morals and the public order which is recognised as a general exception in Article XIV of the GATS.[21] The few references to such measures to be found in the US 2002 National Trade Estimate Report on Foreign Trade Barriers concern cases where the scope of the measures in question appears excessively broad or where they are applied in an inconsistent and subjective way.[22] Interestingly, the only case of cultural barriers in the form of censorship mentioned in the Solon report concern the United States where the interventions originate not from the government but from the industry[23]. More recently, however, the problem has taken a new dimension with the attempt of the French judiciary to affirm its jurisdiction to apply local regulations censoring certain types of information in a case involving foreign-based sites.[24] This case raises in broader terms the problem of the impact of new communication technology and the Internet on content regulation, which will be examined in more detail below.

[19] '2001 Country Reports on Economic Policy and Trade Practices', released by the Bureau of Economic and Business Affairs, US Department of State, February 2002 (under 'Spain'): see www.state.gov/documents/organization/8235.pdf.

[20] See Office of the United States Trade Representative, '2002 National Trade Estimate Report on Foreign Trade Barriers', under 'Australia'.

[21] See also, by analogy, Article XX(a) of the GATT 1994.

[22] The states concerned are China, the Gulf Cooperation Council, India and Singapore.

[23] See the discussion on this at pp. 229–30 below.

[24] *Tribunal de grande instance* of Paris, 20 November 2000, in *Association 'Union des Etudiants Juifs de France'*, la '*Ligue contre le Racisme et l'Antisémitisme*', le '*MRAP*' (*intervenant volontaire*) v. *Yahoo! Inc. et Yahoo France*. See also the decision handed down in the United States in *Yahoo! Inc.* v. *Ligue contre le Racisme et l'Antisémitisme*, US District Court for the Northern District of California, Case No. C-00-21275JF, 7 November 2001.

The present treatment of content regulation in the WTO

The three basic types of content regulation that we have identified in the audio-visual sector raise distinct legal problems in the context of the WTO and therefore must be examined separately. Although they are examined first and foremost under the GATS, since the audio-visual sector is generally considered as a service sector, the impact of other WTO agreements such as the GATT 1994 will be considered. This raises an issue that is not yet resolved and of which a word must be said at the outset.

To say that certain agreements are applicable to goods as opposed to services implies that there is a clear distinction between goods and services. Unfortunately, that is not always the case. Thus, although films are specifically mentioned in Articles III and IV of the GATT 1994 and duty concessions have been made in relation to films, cinema has been considered as a service in the GATS, in the OECD's Code on Invisible Current Transactions and in the United Nations Central Products Classification.[25] The same ambivalence is reflected in dispute settlement procedures. In 'Turkey – Taxation of Foreign Film Revenues',[26] the US complaint against Turkey was based on Article III of the GATT, but in 'Canada – Measures Affecting Film Distribution Services',[27] the EC complaint against Canada was based on Articles II and III of the GATS.

The possibility of conflict in the application of the GATT and the GATS raises a fundamental problem that was first examined in the WTO decision of June 1997 in 'Canada – Certain Measures Relating to Periodicals.' The finding of the Panel 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 not override the other' was supported by the Appellate Body.[28] Specifically with respect to periodicals, the Appellate Body went as far as to say that 'a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical

[25] United Nations Central Products Classification, version 1.0, Code 96, Doc. ST/ESA/STAT/Ser.M/77/Ver. 1.0.

[26] Doc. WT/DS43 (1996).

[27] See 'Canada – Measures Affecting Film Distribution Services', WT/DS117/1 (1998).

[28] Doc. WT/DS31/AB/R, 30 June 1997, section 4. Canada was arguing in that case that the provision of the Excise Tax Act challenged by the United States was not a measure regulating trade in goods but rather a measure regulating trade in services (access to the advertising market).

product – the periodical itself',.[29] Needless to say, this last statement, interpreted literally, could have far-reaching consequences.

Barely two months later, in 'European Communities – Regime for the Importation, Sale and Distribution of Bananas,' the Appellate Body attempted to explain more fully its view on the subject of potential conflicts between trade agreements. It wrote:

> 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. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or of the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.[30]

But this still leaves open the possibility that the exercise of a right under one agreement becomes the negation of a right under the other. This is what would have happened, for example, if India's limitations on film distribution in its specific commitments under the GATS, although in full conformity with the agreement and accepted by all the parties to it, had been successfully challenged under the GATT as a restriction on the import of a good.[31] Unless a line is traced somewhere between what

[29] *Ibid.*

[30] Report of the Appellate Body, 'European Communities – Regime for the Importation, Distribution and Sale of Bananas', AB-1997-3, WT/DS27/AB/R (1997), paras. 221–2. In 1998, in 'Indonesia – Certain Measures Affecting the Automobile Industry', the same reasoning was extended to a situation which involved an apparent conflict between the Agreement on Subsidies and Countervailing Measures and the Agreement on Trade-Related Investment Measures. WT/DS54/R, WT/DS55/R, WTDS59/R, WT/DS64/R, 2 July 1998, paras. 14.52–14.53.

[31] For the Indian exceptions in the film distribution sector, see GATS/SC/42, p. 8. Most of these limitations, however, have subsequently been dropped by India.

pertains to trade in services and what pertains to trade in goods, conflicts of this nature appear inevitable.

Content requirements

Interestingly, the best known and most explicit provision regarding content requirements is not to be found in the GATS but in the GATT 1994. It takes the form of an exception to the obligation of national treatment of Article III which is developed in Article IV. It provides that a Member may maintain or establish screen quotas 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, are subject to negotiations for their limitation, liberalisation or elimination. In its Communication on Audio-visual and Related Services of 18 December 2000, to the WTO Council for Trade in Services, the United States explains the *raison d'être* of that provision as follows:

> GATT Article IV provides a special, and unique, exception for cinematographic films to GATT national treatment rules. 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 authorised continuation of existing screen-time quotas.[32]

This explanation, however, appears quite recently and contradicts the one that was given by the main proponents of the exception during the negotiations of the GATT (the United Kingdom, Norway and Czechoslovakia) who advocated that in the case of films, important cultural considerations entered into consideration, which was not the case for other goods.[33] This last explanation is also taken up by John Jackson in his seminal work on the GATT[34] and is the one offered in the historical review of Article IV prepared by the GATT Secretariat in 1990 for the Uruguay Round Working Group on Audio-visual Services.[35] Interestingly, the United States, in its Communication on Audio-visual and Related Services of 18 December 2000, explicitly mentions Article IV of the GATT

[32] See WTO, Council for Trade in Services, Communication from the United States, Audio-visual and Related Services, 18 December 2000, Doc. S/CSS/W/21, para 8.

[33] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Development (Geneva, 1947), Doc. EPCT/TAC/SR/10.

[34] John H. Jackson, World Trade and the Law of the GATT: *A Legal Analysis of the General Agreement on Tariffs and Trade* (Indianapolis: Bobbs-Merrill, 1969), p. 293.

[35] GATT Doc. MTN.GNS/AUD/W/1, 4 October 1990.

1994 as an example of the flexibility of the WTO system in answer to the argument that trade rules in the audio-visual sector are too rigid to take into consideration the special cultural qualities of the sector.[36]

In 1961, the question of the extension of the language of Article IV, which refers exclusively to cinematographic films, to cover television programmes recorded in video format was raised by the United States. It stated then that 'restrictions against the showing of television programs were technically a violation of the principles of Article III:4, but that some of the principles of Article IV might apply to them'.[37] Canada for its part took the position that Article IV covered the issue, even though the Article did not mention television programmes as such, because this was a development that could not have been foreseen in 1947. Unfortunately, the working group set up to examine the question was unable to reach a consensus on the subject.[38]

To the extent that films or video films are covered by the GATT 1994, the further question arises of whether other provisions could apply to content requirements. The immediate answer that comes to mind, in view of the fact that they are assimilated to quotas, is obviously Article XI. But it would appear (to say the least) awkward that measures that are protected by Article IV could be challenged under Article XI. The situation is different if the protection of Article IV does not apply. In 1991, a request for consultations with the European Community was addressed to the GATT by the United States concerning restrictions on the showing of non-European programmes in the Television Without Frontiers Directive; the United States, while recognising the existence of the Article IV exception, pointed out that it applied exclusively to cinematographic films and argued that such restrictions were incompatible with Article XI.[39] The matter was later dropped to become part of a wider debate in the context of the Uruguay Round negotiations on services. It was still unresolved

[36] This does not mean that film quotas are accepted in practice. In 1998–9, a vigorous debate emerged in South Korea following the decision of the government to gradually phase out the local screen quota which the US government, in the context of ongoing Seoul–Washington investment negotiations, had described as a protectionist policy and the elimination of which it had made a condition for the signature of a bilateral investment agreement. See 'Korean Film Industry's Plea for Screen Quota Turns Emotional', *Korea Herald*, 18 June 1999. The debate was still going on in early 2002 as evidenced by an article published in the *Korea Herald* entitled 'Film Industry Leaders Protest Gov't Bid to Ease Screen Quota Regulations', 29 January, 2002.

[37] See GATT Analytical Index 1994, p. 192.

[38] *Ibid.*

[39] *Ibid.*

at the end of these negotiations and, since then, neither the quotas of the Television Without Frontiers Directive nor other existing quotas, including the radio quotas maintained by France and Canada, have been challenged.

Another provision that could apply is Article I, which imposes the most-favoured nation (MFN) treatment. Thus, content requirements that would apply to certain Members of the WTO and not to others could be challenged. But Article IV does include an exception to the MFN treatment in the case of measures 'which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas',[40] the exception in question apparently concerning countries that shared the same language.

The situation of content requirements under the GATS is quite different. National treatment and market access obligations are determined by the specific commitments of the Members under Articles XVI and XVII of the GATS. Those Members that have not included the audio-visual sector in their specific commitments have no obligations in that respect and remain free to adopt or maintain content requirements. Those Members that have included the audio-visual sector in their commitments are bound by Articles XVI and XVII, subject to the terms, limitations and conditions agreed and specified in their schedule of commitments. In practice, few Members have made commitments in the audio-visual sector. A WTO document mentions in this respect that only nineteen Members (thirteen at the conclusion of the Uruguay Round negotiations, six more as a result of accession) have made market-opening commitments in the audio-visual sector, including four developed countries (the United States, Japan, New Zealand and Israel) and fifteen developing countries, and that many of these commitments include various types of limitations.[41] Clearly, there is some reluctance on the part of GATS Members to undertake obligations in this area.[42] The fact is that, once a Member

[40] Article IV(c) of the GATT 1994.

[41] WTO Council for Trade in Services,'Audio-visual Services', Background Note by the Secretariat, S/C/W/40, 15 June 1998, paras. 24–6 and Table 9.

[42] Christopher Arup, in *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property* (Cambridge: Cambridge University Press), 2000. p. 301, writes in this regard: 'The GATS has added to the pressure on those national measures which were designed to ensure that less powerful and mainstream voices, particularly local ones, enjoyed access to distribution channels. Nevertheless, for the time being, many countries have availed themselves of the opportunities inherent in the GATS itself to maintain limitations on their exposure to the open-trade and free-market norms of the WTO.'

has made a commitment with regard to a particular category of services, it cannot easily withdraw the commitment.[43] New Zealand, which had committed in 1993 not to have recourse to quantitative restrictions in the audio-visual sector, was reminded of this fact in no uncertain terms following its government's pledge in 2001 to introduce format-specific quotas for local content for radio and broadcast television.[44] The United States Trade Representative, in its National Trade Estimate Report on Foreign Trade Barriers 2001, pointed out that such an action would violate New Zealand's commitments under the GATS.[45]

Content requirements in the audio-visual sector could also be challenged, whether specific commitments have been made or not, if they violate the MFN obligation of Article II of the GATS, which provides for the granting of most-favoured nation treatment to all services and service suppliers of all Members. However, under paragraph 2 of that same Article, a 'Member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions'. The conditions in question provide that all exemptions granted for a period of more than five years should be reviewed and that in principle exemptions should not exceed a period of ten years. A large number of MFN exemptions have been taken in regard to audio-visual services. Counting the European Community as a single entity, a total of thirty-three MFN exemptions[46] specifically applying to the audio-visual sector are in place, most of which concern cinema and television co-production agreements inscribed in the Annex on Article II, for reasons having to do essentially with national and regional cultural

[43] Article XXI admittedly provides for modification or withdrawal of any commitment in a Member's schedule but subject to compensation.

[44] New Zealand, Ministry for Culture and Heritage, Department Forecast Report 2001, p. 9, www.mch.govt.nz/publications/dfr2001/.

[45] Office of the United States Trade Representative, 'National Trade Estimate Report on Foreign Trade Barriers 2001', under 'New Zealand'.

[46] The thirty-three exemptions covering audio-visual services are by Australia, Austria, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Cuba, Cyprus, the Czech Republic, Ecuador, Egypt, the European Community, Finland, Hungary, Iceland, India, Israel, Liechtenstein, New Zealand, Norway, Panama, Poland, Singapore, the Slovak Republic, Slovenia, Sweden, Switzerland, Tunisia, the United States and Venezuela. The eight general MFN exemptions potentially impacting audio-visual services are by El Salvador, Malaysia, Peru, the Philippines, Sierra Leone, Thailand, Turkey and the United Arab Emirates. WTO, Council on Trade in Services, Audio-visual Services, Background Note by the Secretariat, Doc. S/C/W/40, 15 June 1998, www.wto.org/english/tratop_e/serv_e/w40.doc, para. 29.

identity.[47] One such exemption that can be considered as covering a content requirement is that of the European Communities regarding measures which define works of European origin in such a way as to extend national treatment to audio-visual works which meet certain linguistic and origin criteria regarding access to broadcasting or similar forms of transmission.[48]

Content restrictions

Content restrictions that apply to illicit or questionable content, whether they take the form of a total prohibition or of conditional access, cannot easily be challenged as a violation of the GATS national treatment provision to the extent that they are normally applied without discrimination to national services and services providers and to foreign services and services providers. From that point of view they differ from content requirements which, by definition, discriminate between national and foreign services and services providers. To have a chance to succeed, a challenge under Article XVII of the GATS would require, first, a demonstration that a commitment regarding the audio-visual sector has been taken without reservations concerning national treatment, and, secondly, a demonstration that the complainant Member is not treated as favourably as the respondent Member. A more appropriate way of challenging content restrictions before the GATS would be to resort to Article XVI which deals with market access, provided once again that market access commitments regarding audio-visual services have been made without reservations. In both cases, however, the Member State author of the measure incriminated could always argue that the measure in question was authorised by Article XIV(a) of the GATS, which provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order...

[47] For examples of specific exemptions, see GATS/EL/82 and GATS/EL/33 for Sweden and Finland, and GATS/EL/92 for Venezuela.

[48] GATS/EL/31, European Communities and their Member States, Final List of Article II (MFN) Exemptions, www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

A footnote annexed to sub-paragraph (a) specifies that 'the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.

In practice, although certain types of content restrictions in the audio-visual sector have been described as trade barriers,[49] and at least in one case have even given rise to an actual dispute,[50] no formal complaints have to this day been lodged before the WTO regarding the legality of such interventions.[51] But the possibility of having recourse to Article XIV(a) does exist and could find application in the audio-visual sector in the case of regulations intended to preserve public morality. The United States, in their Communication on Audio-visual and Related Services of 18 December 2000 to the WTO Council for Trade in Services, argued as further evidence of the flexibility of the WTO system in the audio-visual sector that 'in both the GATS (Article XIV(a)) and GATT (Article XX(a)), the general exception for measures necessary to protect public morals provides further reassurance for Members concerned that commitments relating to content mean that they will not be able to apply regulations intended to preserve public morality'.[52]

If a measure of that nature was to be effectively challenged before the WTO, the question would immediately arise of how to interpret the expression 'public morals', since standards of public morals may differ among participating states. It has been pointed out in that regard that only a case-by-case approach at the judicial level and strict compliance with the rules of the Vienna Convention on the Law of Treaties could provide predictability with respect to the 'public morals' exception.[53] Another question could also arise regarding the responsibility of the state due to the fact that content restrictions are not always implemented through government regulation but sometimes also through codes of ethics developed and applied by the private sector. In such a case, a distinction might have to be made between those interventions which are directly or indirectly mandated by the state and those where the private sector acts entirely on

[49] See notes 22 and 23 above.

[50] The dispute concerned import prohibitions on pornographic products. See Christoph T. Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation', *Minnesota Journal of Global Law* 7 (1998): 75.

[51] A similar measure to be found in Article XX(a) of the GATT 1947 never came before a GATT panel.

[52] See note 32 above.

[53] See Feddersen, 'Focusing on Substantive Law'.

its own. In the first instance, GATT and WTO decisions regarding government involvement in general suggest that, where the implementation of a code of ethics is dependent on government action or intervention,[54] it would be open to Members to challenge the code in question if it restricts imports and the conditions of Article XIV(a) are not met. Thus, in Canada, where adherence to a code of ethics is a condition of the licence for conventional or specialty television programming as well as for pay television and pay-per-view programming, such a challenge would be possible.[55] In the second instance, where the private sector acts independently of the government, the state cannot be held responsible. Thus, the Motion Picture Association of America's classification code for films,[56] the application of which is totally independent of government, would not be open to a challenge before the WTO even if it was established that the classification of foreign films was discriminatory.

Content production

Content regulation, as explained above, is also used to foster the development of domestic production industries which create local programmes. This is done primarily through various types of subsidy programmes that act as an incentive to create local programmes. Such an approach, contrary to content requirements, is often described as a less intrusive way of ensuring local content. According to the European Commission, support mechanisms for audio-visual programmes are effectively needed due to market failure.[57] Article XV of the GATS, in that respect, simply recognises that, in certain circumstances, subsidies may have distortive effects on trade in services, and asks that Members enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such distortive effects. According to Mario Kakabadse of the WTO Secretariat, '[t]here is no presupposition as to what the [disciplines] will contain or how different they will be from rules on subsidies in the goods area. Like all GATT/WTO negotiations, they will take place on the basis of consensus and it would seem unlikely that governments would abandon their

[54] See 'Japan – Trade in Semi-conductors', May 1988, BISD 35S/116, paras. 104–9.

[55] See Canadian Radio-Television and Telecommunication Commission, Public Notice CRTC 1996-135, 4 October 1996 and Public Notice CRTC 1994-155, 21 December 1994.

[56] See www.mpaa.org/movieratings/.

[57] See 'Regulating Audio-visual Content in the Digital Age', European Commission, Directorate-General for Education and Culture, Audio-visual Policy, http://europa.eu.int/comm/avpolicy/intro/show.pdf.

explicit right to support film production.'[58] In view of the substantial financial support given by many governments to their cultural industries, these negotiations should obviously be followed with care.[59] However, because of the inherent complexity of developing guidelines in this area, the negotiations in question have progressed very slowly since their beginning, in 1995, in the context of the Working Party on GATS Rules.[60] It remains unclear for the moment to what extent there is a real consensus on the need for such guidelines.

Even though there are currently no multilateral disciplines on subsidies as such in the GATS, subsidies are not totally beyond the reach of the GATS. The GATS does apply, for instance, in a situation where access to domestic subsidies is granted to certain states and not to others. A concrete example of this in the cultural sector is that of cinema and television co-production agreements which provide preferential access to funding: but for the exemption regime of Article II:2 of GATS, those agreements would clearly be in violation of the MFN obligation of Article II:1. Thus, in its list of Article II exemptions, the European Communities mention '[m]easures granting the benefit of any support programmes (such as Action Plan for Advanced Television Services, MEDIA or EURIMAGES) to audio-visual works, and suppliers of such works, meeting certain European origin criteria'.[61] The GATS also applies to subsidies when members list a

[58] Mario A. Kakabadse, 'The WTO and the Commodification of Cultural Products: Implications for Asia', Media Asia 22(2) (1995): 71–7. In its Communication on Audio-visual and Related Services of 18 December 2000 to the WTO Council for Trade in Services, the United States writes in this respect: '*Finally, in its current form, the GATS does not prevent governments from funding audio-visual services, a sensitive issue for many Members where local theatrical film production, for example, is dependent on government support. While the GATS provides for future negotiations to develop disciplines on subsidies that distort trade in services, there is no presupposition as to what those provisions will contain.*' See note 32 above.

[59] In a 1998 Background Note prepared by the Secretariat for the Working Party on GATS Rules which analyses, on the basis of information provided in the Trade Policy Reviews, subsidies for services sectors, aids to the audio-visual industries are the most frequently mentioned type of subsidy: see Doc. S/WPGR/W/25 (26 January 1998).

[60] See the note on conceptual issues relating to subsidies prepared by the Secretariat, Doc. S/WPGR/W9. For the most recent report of the Working Party on GATS Rules, dated 5 November 2002, see Doc. S/WPGR/8. See also Gilles Gauthier, with Erin O'Brien and Susan Spencer, 'Déjà Vu or New Beginning for Safeguards and Subsidies Rules in Services Trade', in Pierre Sauvé and Robert M. Stern, eds., *GATS 2000: New Directions in Services Trades Liberalization* (Cambridge, MA, and Washington, DC: Center for Business and Government, Harvard University, and Brookings Institution Press, 2000), p. 165 at pp. 176–81.

[61] WTO Doc. GATS/EL/31 (15 April 1994)

sector in their schedule of commitments without any limitation concerning national treatment. National treatment then requires governments providing subsidies to domestic services suppliers to make equivalent subsidies available to foreign services providers operating in the country. This explains why the United States, in one of its few limitations on specific commitments in audio-visual services, explicitly mentioned grants from the National Endowment for the Arts that are only available for individuals with US citizenship or permanent resident alien status, a clear indication that in its view such grants, in the absence of a limitation, would be incompatible with national treatment.[62] New Zealand has similarly indicated in its list that assistance to the film industry through the New Zealand Film Commission is limited to New Zealand films as defined in section 18 of the New Zealand Film Commission Act 1978.[63] In practice, the majority of members have included limitations to their national treatment commitments that apply to all subsidy practices.[64]

The treatment of content regulation fostering the development of local programmes through subsidies has been examined so far exclusively under the GATS. There remains to consider the possibility that a subsidy programme intended to stimulate the creation of local content might be investigated under one of the multilateral agreements on trade in goods of the WTO. Such a possibility is not to be excluded. It will be remembered in that respect that the United States complained in the 1970 GATT Catalogue of Non-Tariff Barriers about the subsidies granted by various states to their national film industries.[65]

The GATT provisions on subsidies having turned out to be largely ineffective, they have been completed by those of the Agreement on Subsidies and Countervailing Measures (SCM) which is much more constraining in that regard. Article 1:1 of the SCM Agreement contains a detailed definition of the term 'subsidy' that leaves very few financial contributions by a government or public body outside of the scope of the Agreement, provided that they are, in law or in fact, specific and a benefit is thereby conferred.[66] Subsidies subject to the Agreement fall into one of three

[62] GATS/SC/90, p. 46.
[63] GATS/SC/62, under audio-visual services.
[64] See Gauthier, O'Brien and Spencer, 'Déjà Vu', p. 177.
[65] GATT Doc. MTN/3B1. The countries in question were Argentina, Austria, Belgium, Brazil, Canada, Chile, Denmark, Egypt, France, Germany, Greece, Indonesia, Israel, Italy, Japan, the Netherlands, Norway, Pakistan, Portugal and the United Kingdom.
[66] The term 'specificity' is defined in Article 2 of the SCM Agreement, and essentially means that the subsidy is restricted, in law or in fact, to a limited number of enterprises or to a particular region of the country.

categories: prohibited subsidies (export subsidies and subsidies contingent upon the use of domestic over imported goods), non-actionable subsidies (subsidies that are not specific or which relate to research, regional development and environmental requirements and which meet certain criteria specified in the Agreement),[67] and actionable subsidies, which are not prohibited but can be challenged in the WTO dispute settlement system if they have an adverse effect on the interests of another Member (basically, all other subsidies).

Three types of adverse effect are envisaged in the category of actionable subsidies. First, injury to a domestic industry caused by subsidised imports in the territory of the complaining Member. Secondly, serious prejudice, which usually arises as a result of adverse effects (e.g. export displacement) in the market of the subsidising Member or in a third country market. Finally, nullification or impairment of benefits accruing under the GATT 1994, which arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidisation.

In practice, a challenge to a subsidy programme for the development of local content could be mounted in the WTO under Part III (actionable subsidies) of the SCM Agreement, or under a domestic countervailing law (which must comply with Part V (countervailing measures) of the SCM Agreement). In both instances, it would be necessary to demonstrate that the subsidised products and the affected products are 'like products', which is not particularly obvious in the case of cultural products.[68] According to Article 15:1, footnote 46, the expression 'like product' is to be interpreted throughout the SCM Agreement to mean a product that is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'.

Content regulation in the new round of multilateral trade negotiations

There is manifestly a great deal of ambivalence in the way the present WTO legal regime deals with content regulations. However, as new

[67] The category of non-actionable subsidies no longer exists, since the relevant provision in the Agreement had a five-year term which was not renewed.

[68] See Articles 6:3 and 15:1 of the SCM Agreement.

communication technologies and convergence are forcing a re-evaluation of national approaches to content regulation at the national level, they are also challenging the present tolerance for content regulation in the context of the WTO. Two distinct arguments are made in that regard. The first argument is that, since the large number of available channels (due to the digitalisation and compression of the signal) and the tendency towards audience specialisation raise in more flexible terms the problem of compliance with positive (such as the programmes content and mix) and negative (such as the prohibition of specific materials) requirements, there is a growing and justifiable demand for less intrusive regulation, the technology and market characteristics of convergent services making such regulation less necessary.[69] The second argument is that traditional solutions regarding content regulation do not provide an adequate response to the legal problems raised by the trans-frontier nature of the new form of communication so well epitomised by the Internet.[70] Both arguments have significant implications for the present multilateral trade negotiations that must be considered.

The implications of the first argument are clearly articulated in the following presentation made by the Motion Picture Association of America (MPAA) before the US Congress in May 2001, a presentation which also reflects in essence the point of view of the US government. It starts with a recitation of the basic line of reasoning:

> Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programmes that reflect their history, their cultures, and their languages. In the past, when their towns might have had only one local cinema and received only one or two TV broadcast signals, the motivation for foreign governments to set aside some time for local entertainment products was understandable. In today's world, with multiplex cinemas and multi-channel television, the justification for local content quotas is much diminished. And, in the e-commerce world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no 'shelf-space' problem on the net.[71]

[69] See François de Brabant, 'Some Comments on the Preparatory Document 'Working Group III' for the Birmingham Conference', http://europa.eu.int/eac/papers/de-brabant3_en.html.

[70] As affirmed in the European Parliament's Resolution on the Commission Green Paper on the Protection of Minors and Human Dignity in Audio-visual and Information Services' (COM(96)483 – C4-0621/96), www.gilc.org/speech/eu/ep-minors-resolution-1097.html.

[71] 'Impediments to Digital Trade', Testimony of Bonnie J. K. Richardson, Vice President, Trade and Federal Affairs, Motion Picture Association of America, before the House Commerce

Then the MPAA goes on to explain to Congress the significance of this development for the ongoing trade negotiations:

> Fortunately, to date, we haven't seen any country adopt this form of market-closing measure for digitally delivered content. We hope this market will remain unfettered – and hope we can count on your support as we work with our international trade partners to keep digital networks free of cultural protectionism. Congressional authorization of Trade Promotion Authority will also be very helpful in empowering the Administration to negotiate these commitments in the WTO and other trade agreements.

The argument of the MPAA ends with a plea that the United States should ensure that digital goods retain the level of protection they currently enjoy under the GATT rules since it would be completely unacceptable if products that are currently classified as goods – motion pictures, magnetic tapes, DVDs, etc. – lost trade benefits through a reclassification process.

What attracts the attention at the outset in this argument is the demarcation that is made between the past and the future: if local content quotas were largely justified in the past and therefore tolerated, the situation has changed now with the development of new technologies, and they should either be negotiated away or, in the Internet and e-commerce world where the scarcity problem does not exist, purely and simply prohibited.

But before accepting this last conclusion, it may be useful to question the assumption that the justification for local content requirements is much diminished. This is all the more important since the pressure to have local content quotas gradually eliminated is already very much part of the present multilateral trade negotiations. The United States, in their specific requests to other countries to lower their trade barriers in audio-visual services, have asked that they schedule commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services.[72] Japan has also indicated in its general communication entitled 'The

Committee Subcommittee on Commerce, Trade and Consumer Protection, 22 May 2001, www.mpaa.org/legislation/. This viewpoint is also the one developed by the U.S. in their Communication to the WTO Council for Trade in Services, note **32** above.

[72] Office of the United States Trade Representative, Press Release 02-63, 1 July 2002, www.ustr.gov/releases/2002/07/02-63.htm.

Negotiations on Trade in Services' its desire to have issues such as quantitative limitations discussed in the audio-visual sector.[73]

But the claim that the justification for local content quotas for films and television programmes is much diminished in today's world appears at first sight at variance with statistics indicating that the degree of penetration of foreign audio-visual products in relation to local productions remains extremely high in many countries. Thus, regarding cinema, over one-third of all countries have practically no cinematographic image to reflect their own culture, and 'a characteristic feature of the situation in the 40 countries that do have a stable film production of between 10 and 200 films is dependence on direct government financing coupled with a high degree of legal protection which is even more important than public funding'.[74] In the case of television, the figures regarding local content are somewhat more favourable, but nevertheless remain problematic in many countries considering the importance of television as a means of social communication.[75]

Even among those countries that have a relatively acceptable level of production of films and television programmes of their own, there is no indication that the claim that content requirements are no longer justified in the new communications environment has led to a change of attitude concerning content requirements. A typical example of a country that has a relatively stable audio-visual production is Canada, with its well-developed subsidy programmes for films and television producers and its television and radio content requirements. Far from considering the new communication environment as a valid justification for doing away with content requirements, Canada has sought to respond in a timely and more open fashion to the development of new delivery technologies while still retaining a place for Canadian content across the

[73] Communications from Japan to the Council for Trade in Services, 'The Negotiations on Trade in Services', para. 37, 22 December 2000, www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm.

[74] See Luis Artigas de Quadras, 'Cultural Diversity in National Cinema', in UNESCO, *World Culture Report 2000* (Paris: UNESCO, 2000), p. 89. The affirmations are based on data taken from a survey of national cinema conducted by the Culture section of UNESCO which were published in May 2000; see www.unesco.org/culture/industries/cinema/html_eng/survey. shtml. See also Table 4 of the *World Culture Report* 2000.

[75] In many developing countries, consumption of locally produced television programmes is still marginal. As for developed countries, a certain number of them stand at the lower end of what would appear as a minimum requirement; see note 78 below.

broadcasting system.[76] Similarly, the European Commission, while recognising in its Communication of 1999 entitled 'Principles and Guidelines for the Community's Audio-visual Policy in the Digital Age' that the digital environment seemed to call for a wider approach at both national and Community level, has clearly reaffirmed that Europe's cultural and linguistic diversity had to be assured and, as such, had to be considered as a component of the development of the Information Society.[77] The only exception is New Zealand which, as indicated previously, committed in the Uruguay Round of negotiations not to have recourse to quantitative restrictions in the audio-visual sector, only to regret it later.[78] A recent study conducted in New Zealand has shown in that respect that the proportion of local content relative to total schedule time had diminished in recent years and that when compared with ten other countries New Zealand stood at the bottom end of the spectrum with a local content percentage of 24 per cent.[79]

All this seems to indicate that the problem of preserving, and *a fortiori* developing, a 'shelf-space' for national and regional cultures will remain a serious preoccupation for many countries in the foreseeable future. At the present time, it is difficult to predict how the divergence of view between those Members of the WTO who consider that local content requirements are no longer justified in the new communications environment and those Members who consider that they still remain justified will be resolved in the present negotiations. One scenario, suggested by the MPAA presentation to Congress, is that less pressure will be put in the present GATS negotiations on the elimination of existing content requirements in the traditional broadcasting framework and a great deal more on the pressure will be put prohibition of new content requirements in the digital networks.

Recent developments at the multilateral and bilateral level effectively tend to indicate that this is precisely the scenario adopted by the United States. Thus, in the GATS negotiations on services, the United States,

[76] As described by B. Goldsmith, J. Thomas, T. O'Regan and S. Cunningham 'Cultural and Social Policy Objectives for Broadcasting in Converging Media Systems', Australian Broadcasting Authority and Australian Key Centre for Cultural and Media Policy (KCCMP), May 2001, p. 73, www.aba.gov.au/tv/research/projects/pdfrtf/CMP_report.rtf.

[77] Commission of the European Communities, Brussels, 14 December 1999, Doc. COM(1999)657 final, p. 19.

[78] See notes 44 and 45 above.

[79] New Zealand On Air, 'Broadcasting and Cultural Issues at the Start of the New Millennium', www.nzonair.govt.nz/media/policyandresearch/otherpublications/issues.pdf.

while limiting themselves in their proposals for liberalising trade in audio-visual services to a request that countries schedule 'commitments that reflect current levels of market access in areas such as motion picture and home video entertainment production and distribution services, radio and television production services, and sound recording services',[80] strongly insist on the need to keep free of barriers trade in electronically delivered audio-visual products. This scenario finds further confirmation in the bilateral free trade agreements that they have signed[81] with Chile and Singapore in 2003 and more recently with Central American states and Australia. The agreements include a chapter on electronic commerce which has been described as 'a breakthrough in achieving certainty and predictability in ensuring access for products such as computer programs, video images, sound recordings and other products that are digitally encoded';[82] they establish a clear link between a pro-competitive and fully liberalised telecommunications sector and the development of electronic commerce, and assert, as one of their basic principles, that trade barriers to the free flow of content in digital products do not exist today and should not be created in the future. But, at the same time, they open the door in their service Chapter to cultural reservations with regard to conventional television, a possibility that has effectively been used. Thus, in the Chile–US Free Trade Agreement, Chile lists five cultural reservations in Annex I (existing measures that do not conform with obligations imposed) and Annex II (specific sectors for which a party may maintain existing, or adopt new or more restrictive, measures that do not conform with

[80] See United States Mission – Geneva, Press Release, 'US Proposals for Liberalizing Trade in Services', www.us-mission.ch/press2002/0702liberalizingtrade.html.

[81] For the text of the Chile–US Free Trade Agreement, see www.chileusafta.com or www.ustr.gov/new/fta/Chile/text/index.htm; and for the text of the US–Singapore Free Trade Agreement, see www.ustr.gov/new/fta/Singapore/final.htm or www.mti.gov.sg/public/PDF/CMT/FTA_USSFTA_Agreement_Final.pdf. For the Central American Free Trade Agreement, see www.ustr.gov/new/fta/Cafta/text/index.htm. In their chapters on electronic commerce, these agreements provide in essence: (1) that the supply of a service using electronic means (defined as means using computer processing) is covered by obligations set forth in the service chapter (MFN treatment, national treatment and market access) subject to reservations; (2) that the parties do not apply customs duties on digital products transmitted electronically (digital products being defined as 'computer programs, text, videos, sound recordings and other products that are digitally encoded and transmitted electronically, regardless of whether a party treats such products as a good or a service under its domestic law'); and (3) that trade in such digital products benefit from MFN treatment and national treatment.

[82] United States Trade Representative, Summary of US–Chile FTA Electronic Commerce Chapter, www.ustr.gov/new/fta/Chile/summaries/Chile%20Ecommerce%20Summary.PDF.

obligations imposed) to the Agreement; and, in the US–Singapore Free Trade Agreement, Singapore lists two cultural reservations in Annex II to the Agreement. Similar reservations are to be found in the Central American Free Trade Agreement and the US–Australia Free Trade Agreement.

This brings us to the second argument that has been put forward to justify the elimination of content regulation. The advent of direct-to-home satellite television had already given an indication of the difficulty of controlling content in a situation where the service provider is out of the country but has direct access to the consumer. With the Internet, as it quickly appeared, the difficulty was compounded. As explained by a representative of the Australian Broadcasting Authority at a conference held in Sydney in 1997:

> We recognized that the Internet cannot be regulated in the same manner as traditional media as there is no central control and content can be provided from anywhere in the world. And, unlike traditional mass media, such as broadcasting, the operators of the infrastructure, such as on-line service providers, are usually not aware of, and are not in a position to be aware of, much of the content which is being accessed or provided by users of their service, unless it is specifically brought to their attention.[83]

States quickly realised that this difficulty of regulating the content of the Internet would have a serious impact on their efforts to control illicit content or content unsuitable for children in the audio-visual sector: from a problem that up until then had been resolved essentially at the national level, it had become one that had an important international component and which seemed to require for its effective solution some degree of international cooperation. In 1998, Goldberg, Prosser and Verhulst could already predict that 'the international nature of the Internet and of other forms of new media will mean that future controls will have to be international in nature or involve self-regulation by parts of the industry itself. New attempts at content regulation are thus likely to look very different from techniques adopted in the past.'[84]

[83] Kaaren Koomen, 'Emerging Trends: Content Regulation in Australia and Some International Developments' www.aba.gov.au/abanews/speeches/online_serv/pdfrtf/kkaic_97.pdf, p. 4.

[84] D. Goldberg, T. Prosser and S. Verhulst, *Regulating the Changing Media* (London: Clarendon Press 1998), p. 16 (quoted in Tallach McGonagle, 'Does the Existing Regulatory Framework for Television Apply to New Media?', *Iris Plus, Legal Observations of the European Audio-visual Observatory*, Issue 2001-6).

This has not prevented some states from attempting to impose existing content restrictions on national service providers as well as on foreign service providers. A recent example of this is the attempt of the French judiciary in *Association 'Union des Etudiants Juifs de France,' la 'Ligue contre le Racisme et l'Antisémitisme', le 'MRAP'* (*intervenant volontaire*) v. *Yahoo! Inc. et Yahoo France*, to affirm its jurisdiction and apply local regulations censoring certain types of content in a case involving service providers based in the United States.[85] Following a preliminary decision rendered in May 2000 which ordered Yahoo Inc. to take all appropriate measures in order to deter and prevent any Internet visit from electronic visitors in France to the web pages and auction site of Nazi items on Yahoo.com, a final decision confirming that order was subsequently rendered in November 2000, after consideration of the written reports of experts establishing that the prescribed line of action was technically possible, at least sufficiently to establish an acceptable level of compliance. This last decision was immediately attacked by Yahoo.com in the United States on the ground that the First Amendment precluded enforcement within the United States of a French order intended to regulate the content of its speech over the Internet. On 7 November 2001, a motion for summary judgment was granted by the United States Court for the Northern District of California confirming in essence that the French decision was unenforceable in the United States.[86] The respondents in this last case, *La Ligue contre le racisme et l'antisémitisme*, lodged an appeal on December 2001 with the Ninth Circuit Court of Appeals in San Francisco, the decision of which is expected sometime in 2003.[87]

This trans-Atlantic legal struggle, which is far from over, seems to confirm the inappropriateness of the traditional broadcasting framework as a regulatory framework for the practices of the new media but also suggest at the same time that an international commitment to keep digital networks totally free of market-closing measures, as requested by the MPAA, is not something that will be readily acceptable in the near future. The fact is that states are truly concerned with the issue of illegal content on the Internet and have adopted or are in the process of adopting strategies to ensure that online content continues to be regulated whether formally or informally.[88] In most states, the general approach to online services

[85] Note 24 above.
[86] Case No. C-00-21275JF, 7 November 2001.
[87] Case No. 01-17424.
[88] A totally different situation of course is that of authoritarian governments who try to limit their citizens' access to the Internet through such censorship techniques as surveillance

regulation is based on existing legislative regimes for content that deals with subjects like obscene publications and the protection of children. Some states have gone further and adopted legislation dealing specifically with online content. The new Australian Broadcasting Services Amendment (Online Services) Act 1999, for instance, grants the government the power to force removal of sexually explicit or violent material from Australian web content hosts, the Australian Broadcasting Authority aiming to apply the same standards to Internet content as those applied to books and movies.[89] Quite a number of States have also chosen to complement their existing or newly introduced legislation with incentives for service providers to develop and comply with a self regulatory framework.

These developments, it must be pointed out, have taken place without any serious questions being raised concerning their compatibility with WTO obligations and without any serious attempts to resolve them at the international level. Whether it is because the states involved considered that they were covered by the public morals and public order exception of GATS Article XIV(a), or because they had made no commitments concerning audio-visual services and had no intention to take any in the present negotiations, the fact is that the immediate preoccupations with the problem of controlling illegal content have taken precedence over the search for an international solution.

Conclusion

The picture that emerges from our investigation of the treatment of content regulation in the WTO is one that is (to say the least) blurred. Content regulations in the audio-visual sector, although quite frequent in practice and often trade-distorting in their effect, seem to have been largely tolerated so far. A number of reasons can explain that situation. It could be because it is unclear to what extent they come under the GATT, the GATS or both, or because they are covered by an exception – the public morals exception – whose scope also remains to be determined, or because, in the case of GATS, there are no applicable obligations – as in the case of content production subsidies – or because the Members have

of e-mail and message boards, blocking content based on keywords, blocking individuals from visiting proscribed websites (often without those individuals even knowing the sites have been blocked), blacklisting users seeking to visit proscribed websites, and wholesale denial of Internet access.

[89] For the text of the legislation, see: http://members.ozemail.com.au/~mbaker/amended.html.

taken no specific commitments regarding the audio-visual sector, or more simply because there is no will to challenge such content regulations, the justifications given for their existence being generally acceptable.

However, it is unclear to what extent this tolerance for content regulation will be allowed to continue in the future. New communication technologies and convergence are challenging in particular the 'scarcity' justification behind the use of local content requirements (the difficulty that domestic producers may have in finding adequate screen time to exhibit their films and television programmes); but at the same time, there is no evidence that these new technologies have significantly improved the situation of those states whose cinema and television are largely dominated by foreign products, with the result that such states have practically no image to reflect their own culture. More importantly, the transfrontier nature of the new forms of communication, so well epitomised by the Internet, have rendered the traditional solutions regarding content regulation inadequate. This has already forced a number of states to adjust their approach to content regulation with regard to the control of illegal content on the Internet. A similar process, characterised by an increasing recourse to subsidies, could take place with regard to local content requirements. Thus, for the moment, it seems that national attempts at content regulation are not about to disappear, but that they will nevertheless adjust with time to the particular conditions of the new telecommunication and communication environment.