

CHRONIQUE 5

FOR BETTER ACCESS TO THE DIVERSITY OF FOREIGN FILM OFFERINGS

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Anyone with the slightest interest in statistics on international trade in the film sector cannot have failed to notice the major imbalance that exists in this sector. This imbalance involves not only the trade of developing countries, but also that of developed countries. Developing countries, confronted largely by a domestic market with limited resources, most often find themselves dependent on foreign films for the majority of their consumption. According to a global study by UNESCO in September 1999, Africa, with an average as low as 42 local productions, imported more than 2,811 films per year, and in Arabic countries, cinemas showed ten times more foreign than domestic films¹. In Latin America, the imbalance was just as flagrant, as for example in Chile and Costa Rica where Hollywood films represent more than 95% of the domestic market². These few statistics are already enough to show the scope of the trade imbalance regarding developing countries.

The situation is not very different in the case of developed countries except that the share of local produced films on the domestic market is overall higher than that of developing countries. Nevertheless, it is always surprising to note that local production even in their case rarely occupies more than 20% of the domestic market and often falls below 5%. In 2002, for example, the 5% to 20% category included Denmark and Sweden, each with 17%, Great Britain with 15.4%, Spain with 14%, Germany with 11.9%, the Netherlands with 10.5%, Norway with 6%, and Australia with 5.1%³. Below 5% local content were Switzerland with 3.4%, Iceland with 2%, Belgium with 1.4%, and Canada with 1.4%. Among the few developed countries with a local content of more than 20% in 2002 were

¹ See http://www.unesco.org/culture/industries/cinema/html_fr/survey.shtml

² Idem

³ Data provided herein is taken from *Focus 2003, World Film Market Trends*, a publication of the *European Audiovisual Observatory* available at: http://www.obs.coe.int/online_publication/reports/focus2003.pdf.en

France with 34%, Japan and Denmark with 27%, and Italy with 21.8%. Finally, in a category of its own because foreign content is almost totally absent on their domestic market, the United States has a local content of 94%.

But the international trade imbalance in the film industry does not solely concern the ratio of domestic production to foreign production on the domestic market. As André Lange stressed in the introduction of *Focus 2002, World Film Market Trends* "in any reflection on the imbalance of such exchanges, it is also pertinent to mention one of the lesser-known characteristics of the global market: the relative closure of the two principal Western markets (the North American and the European Union market) to films from other parts of the world. In the United States, the market share for films other than American or European varies according to the year between 1.5% and 3%. In the European Union, the market share of non-European, non-American films varies between 1% and 3.6%." In further support of his commentary, Lange references a study by the *European Audiovisual Observatory* carried out on the occasion of The European Cinematographic and Audiovisual Industry and Third-party Countries conference organized by the Spanish Presidency of the European Union (Madrid, 18-19 April 2002). The study analyses the admission of films from three geographical regions enjoying "privileged" economic and cultural relations with the European Union, specifically countries from Central and Eastern Europe, non-EU members in the Mediterranean basin, and countries from Latin America. He draws from this study that between 1996 and 2001, films from Central and Eastern Europe won only 0.054% of the EU market, those from the Mediterranean basin 0.084%, and those from Latin America 0.14%.

The only thing to add here is that developing countries themselves, although more open to the diversity of foreign film offerings than developed countries, are nonetheless not safe from any critique in this regard. They are more open specifically to film production from other developing countries. This can be explained by the fact that a number of developing countries with a large or medium film production output profit from a traditional peripheral market defined by geographic proximity or by a common cultural or linguistic identity, and thus are major players in this market. This is the case in Asia where exporting countries such as India and Hong Kong are able to occupy more than a third of neighbouring markets: Indian films for example represent 35% of feature films in Bangladesh, while

Hong Kong produces 38% of films shown in Pakistan⁴. But the only thing that changes in such cases is that films imported from one or more developing countries are added to films imported from one or more developed countries. The rest of the world remains largely excluded.

There is thus, as one can see, a serious problem regarding access to the diversity of foreign film offerings in international trade that has yet perhaps to draw much attention, as André Lange has stressed, but that also has not gone completely unnoticed, as two recent initiatives demonstrate, one on the international level and the other on the national level, both of which we will now address.

I. The question of access to a greater diversity of cultural offerings in the works of *the International Network on Cultural Policy*

The International Network on Cultural Policy (INCP), created in June 1998, is an unofficial international forum where member states' national culture ministers can explore and exchange ideas on the new challenges of cultural policy and develop promotional strategies for cultural diversity. Very rapidly, these ministers were confronted with examining the problem of preserving cultural diversity in the face of the trade liberalization and globalization phenomena. A *Working Group on Cultural Diversity and Globalization* was established in this context, which, after a few meetings, suggested in 1999 that the INCP ministers focus on the development of an international instrument that would be at the same time feasible, effective, and binding, and would respond to concerns and problems regarding cultural diversity. In 2000, INCP ministers, who had agreed that an international instrument on cultural diversity was the best way to meet the challenge of preserving cultural diversity, entrusted the working group with the task of further developing the framework and scope of such an instrument. It is within this framework that the question of improving access to the diversity of foreign cultural products was identified as a serious problem requiring an immediate response.

⁴ Supra, Note 1

In an initial version of an international convention on cultural diversity submitted to the INCP culture ministers at a meeting in South Africa in October 2002, there is a clause that reads as follows:

Article 23: Improving access to the diversity of foreign cultural products

1. Each Member agrees, to the extent possible, to facilitate the circulation of foreign cultural products and producers.
2. In order to facilitate access to a broad range of foreign cultural products, Members may take measures they deem appropriate, such as fiscal incentives to distributors of these foreign products, financial aid for the translation or dubbing of foreign works, and creation of special outlets.⁵

During this meeting the cultural ministers, having examined the draft instrument, agreed in their Final Declaration that the instrument presented provided an appropriate basis for supporting the development of a binding agreement to preserve and promote cultural diversity and gave the Working Group a mandate to intensify and accelerate their deliberations on the instrument, so an improved text would be ready for the Ministers to examine in 2003. The text in question, which is now completed, is to be examined by INCP culture ministers during the next scheduled meeting in October 2003 in Croatia.

The preoccupation with improving access to the diversity of foreign cultural products resurfaces in Article 11 titled "Availability of Cultural Content" which, although somewhat different from Article 23.2 of the 2002 text, does not lose any of the essential idea. The clause in question reads as follows: "The Parties shall consult among themselves so as to identify measures and best practices to facilitate the availability, in the territory of Parties, of cultural content from as many other Parties as possible."⁶

Provided that the INCP culture ministers approve the project in question, it seems logical that they would refer UNESCO to it as soon as possible, especially if UNESCO decides "that the question of cultural diversity as regards the protection of the diversity of cultural

⁵ See the INCP site: http://206.191.7.19/meetings/2002/instrument_f.shtml

⁶ See the INCP site: http://206.191.7.19/iicd/draft_f.pdf

contents and artistic expressions must be regulated by an international convention”⁷ during the 32nd session of the General Conference scheduled for October 2003.

II. **Measures aiming to promote diversity of film offerings in the new Swiss federal law on culture and film production**

Even before the December 14, 2000, adoption of its new *Federal Law on Culture and Film Production*⁸, Switzerland was already encouraging the diversity of film offerings with aid for the distribution of fiction and documentary films from not just Switzerland, but also from Europe and elsewhere in the world⁹. But the new law clearly goes farther by making the encouragement of the diversity of film offerings a priority objective (a special chapter of the Law is dedicated to this), which is one of its most important innovations. Considering the increasingly common concerns at the international level about preserving cultural diversity, as well as the interest shown by the INCP in improving access to the diversity of foreign cultural products, as was just demonstrated, this is clearly a development that deserves to be more closely examined.

Chapter 3 of the Law is titled “Provisions regulating the encouragement of the diversity of publicly shown films.” It is a response to a worrying report on the distribution and projection of films in Switzerland:

The oligopoly in distribution makes it difficult, if not impossible, for independent films to have access to the market: The major international distributors firmly control the best release times. Independent films, that do not have the advantage of high levels of global publicity, nor of a large number of copies, never achieve the same market access, no matter their quality or market potential. This is the case for Swiss films, as well as films from other countries that have small independent production.¹⁰

⁷ As suggested in the Draft Resolution on this issue submitted to the General Conference. See UNESCO, DESIRABILITY OF DRAWING UP AN INTERNATIONAL STANDARD-SETTING INSTRUMENT ON CULTURAL DIVERSITY: <http://unesdoc.unesco.org/images/0013/001307/130798e.pdf>

⁸ To view the Law’s text, see: http://www.culture-suisse.admin.ch/film/files/f_filmgesetz.pdf

⁹ See *La nouvelle loi fédérale suisse sur la culture et la production cinématographique*. N Zufferey et P. Aubry, janvier 2003, p. 11 : http://www.obs.coe.int/online_publication/reports/zuffereyaubry.pdf.en. Measures to aid the promotion of foreign films with limited distribution can also be found elsewhere. For example, see Québec’s *Société de développement des entreprises culturelles* program that aims to financially support commercial and other cinema operators who regularly show foreign films with limited distribution: http://www.sodec.gouv.qc.ca/domaines/cinema/cine_promo/f_cinepromo.htm

In response to this problem, an initial section of Chapter 3 brings a series of measures to the forefront aiming to promote the diversity of film offerings. The basic principle in this respect is expressed in Article 17 of the Law which sets forth that it is first and foremost the responsibility of the distributors and cinemas owners to contribute to the diversity of offerings with their commercial policies and concerted efforts in the film industry. “Concerted efforts” is specifically understood to mean agreements by which the companies concerned, or the associations that represent them, commit to ensure the diversity and quality of the programming in a given region. This approach, which leaves a great deal to good faith, is supported by the film industry’s August 2000 public declaration, announced during the consultations preceding adoption of a new law on cinema, that it was committed to taking measures to promote the diversity of offerings. The film industry and the government had agreed then that the objectives of the law were to be met in principle by the industry’s own measures, the introduction of an incentive tax being considered only if these freely consented measures revealed themselves to be inadequate¹¹.

Under the terms of Article 18 of the Law, “the diversity of offerings is ensured in a given region if, the number of screens and the size of the region considered, the films shown originate from a sufficient number of different countries and include diverse genres and styles.” According to the message from the Federal Council, the film industry itself recognizes that distributors pose a threat to this diversity when, in a certain locality, the same linguistic version of a film is shown on too many screens or in too many cinemas in relation to the total number of screens or cinemas available, when it is prohibited to add other films to the programming, or when a single distributor holds more than one fourth of the screens or seats on a yearly average. The industry also deems it harmful for the diversity of offerings if a cinema operator runs the same linguistic version of the same film simultaneously on too many screens¹².

¹⁰ Message concerning the Federal Law on Culture and Film Production, 18 septembre 2000, p. 5024 : <http://www.admin.ch/ch/f/ff/2000/5019.pdf>

¹¹ *Ibid.*, pp. 5042-5043. See also Zufferey et Aubry, *supra*, note 9, p. 13.

¹² Message from the Federal Council, *supra* note 10, p. 5043

In order to facilitate the implementation of the Law's objectives concerning the promotion of the diversity of film offerings, Article 20 establishes a monitoring procedure laid out in the following steps:

1. The qualified office periodically evaluates, based on data targeted in Art. 24, the impact of the activities and measures targeted in Art. 17. It publishes the evaluation results and gives the industry, and in particular the organizations that made agreements in accordance with Art. 17, sec. 3, the opportunity to respond.
2. If during an evaluation the office notices that offerings are not diverse enough in a region, it asks the distributors and cinemas concerned to take corrective measures within a reasonable time period.
3. The implementation of a mandate according to Art. 17, sec. 3, entrusted to the distributors and cinemas owners is incumbent upon the responsible organization. This organization acts independently in taking the necessary measures to re-establish the diversity of offerings within a reasonable time period.

The second section of the Law establishes an incentive tax whose aim is to promote the diversity of film offerings. As Dufferey and Aubry explain, if it indeed appears that the diversity of offerings has not increased in a decisive manner within the given time period, the Federal Office for Culture may ask the Federal Department of the Interior to impose a tax aiming to promote the diversity of film offerings (Article 21, section 1). Tax proceeds are allocated towards the encouragement of cinema (Article 15, section 2) and proceeds must be reinvested for the purpose of promoting the distribution and projection of films absent from the market in question. In other words, the funds collected must be used to support the diversity of offerings in the region where the tax was imposed (Article 21, section 3).

Thus, as one can see, Chapter 3 of Switzerland's *Federal Law on Culture and Film Production* proposes a dynamic and totally innovative approach regarding improvement of the diversity of film offerings on a national level. However, this approach does raise certain problems on the international level since, by attacking certain domestic market imperfections, it does interfere with the functioning of the international market. Not surprisingly, in 2002, the U.S. Trade Representative included in its Annual Report on Foreign Trade Barriers the following comment under "Switzerland":

Switzerland has no limitations on the amount of non-Swiss or non-European origin programming that can be broadcast. Under new legislation, film distributors and cinema companies must maintain, through self-regulatory solutions, an appropriate diversity (not yet defined) in the products offered within a region. After a two-year observation period, the government may levy a nominal "development tax" on a region's movie theater tickets if the

appropriate diversity is not present. The “development tax” receipts would be used to finance new theaters that would offer greater diversity in the films being shown within a region.

This summary description of the mechanism implemented by Switzerland to promote greater diversity of publicly shown films clearly demonstrates that Switzerland is being seriously watched in this respect. The same mention, indeed, is found in the 2003 U.S. Trade Representative Report on Foreign Trade Barriers. However, conscious of the questions that could be raised regarding the mechanism’s compatibility with Switzerland’s WTO commitments, the Federal Council, in its message regarding the *Federal Law on Culture and Film production* offers its own analysis of the compatibility of the Law with the requirements of the WTO’s General Agreement on Trade and Services (GATS). After laying out the basic principles of the GATS and recalling that Switzerland, following the example of the European Union and a number of other GATS member countries, had not made any commitments regarding national treatment or market access in the audiovisual sector, the message concludes that the incentive tax does not infringe on current WTO law¹³. As further support, just in case the first argument was not considered convincing enough, the message supplies the following argument:

In addition, the tax is collected identically for every film (no matter its origin) that falls under the criteria laid out in the comment of Chap. 3 of the Law (see Ch. 2 of the message). The tax is thus imposed in a non-discriminatory manner. In the government bill, the tax is collected based on the criterion of locality. Consequently, a tax is imposed as a last resort only when elements laid out in Art. 21 are present and a diversity of offerings is absent in a specified locality. The tax is thus limited to major and medium-sized cities and does not, therefore, apply only to films from certain countries: Any film, no matter its origin, may fall under the tax’s range of application if all the stated criteria are present. The incentive tax does not have, either *de jure* or *de facto*, a discriminatory purpose. Consequently, the tax is compatible with WTO law.¹⁴

In response to this second argument, the United States might respond that the concrete effect of the incentive tax is to make room for the film production of some countries to the detriment of the film production of other countries (in this case the United States), which would infringe on the most favoured nation treatment, a general obligation applicable to all services in the GATS. In actual fact, it is doubtful that a complaint would be filed with the WTO’s Dispute Settlement Body as long as the tax in question has not actually been applied. If in the end the U.S. decided to proceed with a lawsuit, this would only emphasize

¹³ Supra note 10, pp. 5053-5054

¹⁴ Ibid., p. 5054

the urgent need for an international instrument on cultural diversity that could set forth a specifically cultural view point on issues such as those addressed in Chapter 3 of the *Federal Law on Culture and Film Production* that are not exclusively a matter of commercial policy.¹⁵

Conclusion

The imbalance of international trade in the film sector has until now primarily been addressed from the perspective of a massive presence of foreign films on the domestic markets of most countries, which leaves little space for domestic films in the same market. In recent years, however, there has been a rising interest in another aspect of that problem of imbalance: the little space available, in so far as national imports of films are concerned, for the large diversity of foreign film offerings, with only a limited number of countries having the benefit of these imports. Two recent initiatives aimed at addressing this issue have been the subject of attention here: one of international relevance, the other of national relevance. These two initiatives, albeit very distinct, are not disconnected. Even if it is clear that the search for a solution to this problem passes first and foremost through individual states, as the example of Switzerland's initiative clearly shows, it is also clear that this will not suffice when the time comes to advance national objectives that are essentially cultural in the face of international regulations of a fundamentally commercial nature. This is where the INCP's project for an international instrument on cultural diversity comes into play. To the extent that the INCP's initiative aims to develop consensus on the international level on ways to preserve and promote cultural diversity, and to establish an ongoing forum to discuss these issues, such intervention can only support and facilitate the actions of individual states in favour of a better access to the diversity of foreign film offerings.

¹⁵ The United States would probably also hesitate to file a suit to the extent that the Swiss incentive tax addresses two issues that it would not necessarily want to see raised: possible abuse of its dominant position in the film industry, and dumping of films on foreign markets. On this topic, see Brazil's communication to the WTO's Council for Trade in Services in July 2001 regarding audiovisual services, in which Brazil states that "the global market is generally characterized by an oligopolistic structure, dominated by a few major companies. There is also the question of transfer pricing resulting from marketing in the dominant market. Audiovisual products are often placed at "dumping" levels in foreign markets, since most of the cost of production has already been recouped in the home market of the producing country. This creates a situation of unfair competition with the effect of "crowding out" domestic production both from theatres and other means of delivery (network TV, cable TV, home video, electronic means)." See: OMC, doc. S/CSS/W/99, paragraphe 10. On the argument regarding abuse of its dominant position, see Christophe Germann,

