

**Council for Trade in Services
Special Session**

AUDIOVISUAL SERVICES

Information Note by the Secretariat¹

I. INTRODUCTION²

1. Delegations generally recognized that audiovisual services have both commercial and cultural components. Several Members do not see any contradiction between progressive liberalization in this sector and the achievement of cultural objectives and consider that the GATS provided appropriate flexibility in this respect. Some delegations said that a key motivation was to preserve their ability to promote and implement cultural policies. In the light of the low number of Members with commitments in the sector and the high number of MFN exemptions, the need to inject fresh thinking and to move beyond the "all or nothing" approach has also been underscored.

II. CLASSIFICATION ISSUES

2. Classification issues were mostly raised during the initial phase of negotiating proposals.³ One proposal stressed that the audiovisual sector had changed significantly since the Uruguay Round. New technologies had given consumers worldwide access to a multitude of services; digital compression was providing less expensive means of creating audiovisual works, while broadband capacity was opening opportunities for lower-cost distribution. The sector now included an international array of content producers and programme packagers using, for example, not only traditional single channel broadcasting, but new media such as cable, direct-to-home satellite, and digital networks to distribute content locally and internationally.

3. According to this proposal, Members should review the different activities constituting the audiovisual sector to develop a clear, accurate and comprehensive understanding of where the different facets of the sector were classified in the Services Sectoral Classification List (MTN.GNS/W/120). Any review had to respect the principle of technological neutrality. The existing classification used by many Members in scheduling their commitments might not cover some activities or might create some uncertainties as to which services were covered. In other cases, two or more existing sub-categories might extend to the same service. The proposal contained a list of activities relating to the audiovisual sector, without implying that they should be classified as audiovisual services in W/120. This list was not an official classification of audiovisual services and

¹ This note has been prepared upon a request by Members at the meeting of the Special Session of the Council for Trade in Services held on 1 July 2005. Its aim is to assist delegations and capital-based officials in their assessment and consideration of sector- and mode-specific issues raised in the negotiations. It has been agreed that the scope of the note should exclude analysis of existing commitments and of offers submitted in current negotiations, nor should it contain additional information from external sources or from the Secretariat. The content should not be used in dispute settlement proceedings.

The document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

² The delegation of Brazil recently noted that aspects of their earlier negotiating proposal in this area might have been overtaken by later developments.

³ The delegation of the United States said that its views on classification issues had evolved since the circulation of its negotiating proposal in this sector and were best reflected in its offer and the requests it made to other Members.

was not intended to be comprehensive. Among the activities that appeared either not to be covered by the existing GATS classification or to be covered by more than one sub-sector were: transmission services by direct-to-home satellite services, multichannel multipoint distribution (wireless) cable systems, or "converged" transmission services which also transmit other forms of data, voice or other communication services; delivery of motion pictures to theatres via specialized truck delivery services or via satellite or digital networks; and exhibition of films/operation of cinemas.⁴

4. Another negotiating proposal suggested that technological developments might lead Members to revisit the present classification. Convergence had blurred the boundary between the telecommunication and audiovisual sector; new services were emerging that raised questions as to their relevance for telecommunication, audiovisual and cultural policies.⁵

5. Several delegations agreed that the sector had undergone significant change and expressed interest in the discussion of classification issues, though some others were more reluctant. While it supported the concept of technological neutrality, a delegation considered that a distinction had to be made between "carriage" and "content" services. Under this approach, an audiovisual content service would not need to be reclassified because it was delivered in a different way, for example through the internet.⁶ The relevance of the on-going debate on digital deliveries to classification issues was also noted.⁷

6. More recently, classification issues in the sector were raised in informal discussion in the Committee on Specific Commitments. A delegation said that the sector had evolved further since its negotiating proposal had been circulated in 2000, and indicated that the classification used in its offer helped to reflect commercial realities and improve certainty. That delegation proposed that classification issues be the subject of further discussion in the Committee on Specific Commitments.⁸

7. Potentially relevant issues:

- (a) Due to technological developments, audiovisual content can increasingly be transmitted through a variety of means. It has also been argued that technological developments have led to the emergence of new services. How can the classification of the sector best reflect market realities, including technological advances and policy approaches?
- (b) While the W/120 includes "radio and television transmission services" as part of sector 2.D, Audiovisual Services, some have suggested to classify such types of services in other parts of sector 2, Communication services. In such a scenario, do delegations have sufficient clarity regarding the scheduling of domestic content quotas?
- (c) Should the activities relating to television be more clearly described? For example, television via cable (CPC 7530) or DTH satellite services does not appear to fall within the CPC categories relating to audiovisual services in the W/120 (i.e., within CPC 7524). Further, is the sale of TV advertising time most appropriately captured by the W/120 classification? Finally, while W/120 refers to the production of TV programmes (CPC 96132) and the transmission of TV signals (CPC 7524), are the services of programme and channel packagers adequately described?

⁴ S/CSS/W/21; S/CSS/M/9, para. 199; S/CSS/M/13, para. 213; S/CSS/M/10, para. 218.

⁵ S/CSS/W/74; S/CSS/M/9, para. 197.

⁶ S/CSS/M/10, para. 221.

⁷ S/CSS/M/13, para. 214.

⁸ Summary by the Chairman, Informal Discussion of Classification Issues on 11 February 2005, Committee on Specific Commitments, 12 May 2005.

- (d) The sub-sector entitled "sound recording" in W/120 does not have a CPC number attached to it. In that context, how might the services best be defined? Can subsequent versions of the CPC be informative in that regard? Where may on-line music services fall?

III. SCHEDULING ISSUES

8. No scheduling issue specific to audiovisual services has been raised.

IV. ISSUES RELATING TO ARTICLES XVI AND XVII

A. SECTOR FOCUS, LEVEL OF COMMITMENT, KEY BARRIERS

9. Several delegations generally felt that the "all-or-nothing" debate that had permeated past discussions needed to be overcome. Governments' economic and cultural objectives could be reconciled in the GATS, in particular given the flexibility at the time of scheduling commitments; and progressive liberalization through GATS commitments was not incompatible with the promotion of cultural diversity.⁹ Some delegations emphasized that market access commitments in the sector benefited the domestic industry by introducing new technologies, which increased network use and encouraged investment in digital networks. It was also remarked that the creation and maintenance of advanced telecommunication infrastructures benefited the development and distribution of local culture, and that liberalization of trade in audiovisual services promoted cultural exchange.¹⁰ While a delegation believed that progressive liberalization compatible with cultural diversity objectives would contribute to increasing the participation of developing countries in trade in services in the light of Article IV:1, another said that despite its export interests in the sector it also had concerns about the impact of technological developments on developing countries' capacity to compete.¹¹

10. Delegations calling for further liberalization lamented the low number of Members with commitments in the sector (26). A delegation called for commitments on modes 1 to 3 that reflected the level of *de facto* openness currently granted.¹² Others emphasized that quantitative limitations and deviations from national treatment should be addressed, for example discriminatory taxes targeting foreign films or restrictions on distribution.¹³ In terms of sector focus, while one delegation said that it sought more commitments in particular with respect to the production, distribution and projection of motion pictures/videos, another considered that special attention should be given to audiovisual services in which developing countries had greater potential, such as television services (CPC 96132).¹⁴

11. A delegation thought that market access and national treatment restrictions found in the sector-such as content quotas, economic needs tests, ownership restrictions or nationality-residency requirements- could be left to bilateral request-offer negotiations. However, there would be merit in discussing them with a view to reaching a common understanding of their effects in terms of the regulatory objective pursued, as well as their effects on trade. This could facilitate request-offer negotiations.¹⁵ Another delegation urged Members to undertake a substantive discussion on whether and how measures taken in pursuit of cultural diversity objectives could be accommodated under the

⁹ S/CSS/W/21; S/CSS/W/99; S/CSS/W/42; TN/S/W/49; relevant sections of S/CSS/M/9, S/CSS/M/10, S/CSS/M/13; and TN/S/M/7, para. 84-85.

¹⁰ S/CSS/W/21; S/CSS/W/42; TN/S/W/49.

¹¹ S/CSS/M/10, para. 217; S/CSS/W/99; S/CSS/M/10, para. 208.

¹² TN/S/20, para. 36-37.

¹³ S/CSS/M/13, para. 212; S/CSS/W/42.

¹⁴ S/CSS/W/99.

¹⁵ S/CSS/W/74.

existing GATS framework and, where appropriate, identify any new trade rules required to accommodate the national policy objectives of governments.¹⁶

12. A delegation recalled that its initial GATS negotiating proposal stated that it would not make commitments restricting its ability to achieve cultural policy objectives until a new international instrument could be established that was designed specifically to safeguard the right of countries to promote and preserve cultural diversity. Such concerns extended beyond audiovisual services.¹⁷ Another delegation, recognizing that no sector should be excluded *a priori* from negotiations, said that its objective was to guarantee the possibility of Members to preserve and develop their capacity to defend and implement policies for preserving cultural values.¹⁸ In contrast, a number of delegations complained about efforts by certain Members to create an *a priori* exclusion for the sector. These delegations reiterated the importance of complying with the negotiating guidelines and recalled the flexibility of the GATS in taking into account cultural objectives.¹⁹ A delegation suggested exploring ways to ensure an open dialogue between culture and trade officials so as to facilitate analysis and discussion on trade in audiovisual services and its relationship to cultural diversity.²⁰

13. Potentially relevant issues:

- (a) How can the scheduling flexibility of the GATS best be used to provide certain guarantees of access consistent with cultural policy objectives?
- (b) Can cultural diversity objectives be achieved in certain ways that are less restrictive of trade than others? What is the effect of restrictions such as economic needs tests, foreign equity limitations, content restrictions, discriminatory subsidies or discriminatory taxes on both trade flows and the pursuit of cultural objectives?
- (c) What objectives may be achieved by foreign ownership requirements or other limitations on the operation of broadcasters, distributors or other carriers in situations where these are subject to restrictions on the content they can carry? How do technological advances, allowing, for example, to carry greater quantities of content, affect the effectiveness of certain content quotas?

B. SUBSIDIES²¹

14. In its negotiating proposal, a delegation underlined that the GATS did not prevent governments from funding audiovisual services and suggested that Members consider developing an understanding on subsidies that would respect each nation's need to foster its cultural identity by creating an environment to nurture local culture. Governments should be able to use subsidies that had little potential for trade distortive effects, to address legitimate concerns regarding cultural identity.²²

¹⁶ TN/S/M/5, para. 90; Also see TN/S/M/5, para. 101, 105, 112.

¹⁷ S/CSS/M/10, para. 219; TN/S/M/5, para. 104; S/CSS/W/46, para. 9.

¹⁸ S/CSS/M/10, para. 209.

¹⁹ TN/S/W/49; S/CSS/M/8, para. 86; TN/S/M/5, para. 90, 101, 105, 112; TN/S/M/6, para. 156, 166, 168; TN/S/M/7, para. 87, 91, TN/S/M/14, para. para. 243-247.

²⁰ TN/S/M/7, para. 84-85, 158.

²¹ In the discussion on subsidies in the sector, distinctions were not always made between discriminatory and non-discriminatory subsidies. Nevertheless, all subsidy-related statements are covered by this Part of the Note.

²² S/CSS/W/21; S/CSS/M/9, para. 199, 209; S/CSS/M/10, para. 218.

15. Some delegations expressed their willingness to engage in a discussion relating to the proposed understanding on subsidies, although some delegations wondered at the same time about the appropriateness of a sectoral approach. The latter delegations referred to the negotiations under Article XV or expressed concerns about the implications for developing countries given their more limited capacity to use such tools.²³

V. REGULATORY ISSUES (INCL. PROPOSALS RELATING TO ARTICLE XVIII)

A. COMPETITION AND RELATED ISSUES

16. A delegation considered that competition aspects deserved discussion because anti-competitive behaviour, such as the abuse of dominant positions, might impact not only on the functioning of the audiovisual market *per se*, but also induce homogenisation of contents.²⁴

17. Another delegation considered that the oligopolistic character of the market for production and distribution of motion pictures might call for the development of appropriate trade defense mechanisms, e.g., specific antidumping disciplines. Competition disciplines, building on Article IX of the GATS, could also be considered and the development of an emergency safeguard mechanism under Article X could play a role. High levels of concentration in the sector made it more difficult for service suppliers of developing countries to have access to foreign as well as domestic distribution channels. Further, audiovisual products were often sold at "dumping" levels in foreign markets since most of the cost of production had already been recouped in the home market. This had crowding out effects on the production of motion pictures for projection in theatres or other means of delivery. MFN exemptions had been taken with regard to unfair trade practices. The delegation proposed that the Special Session discuss trade defense and/or competition provisions necessary to address unfair trade and restrictive business practices in the sector.²⁵

18. Some delegations had doubts about the relevance of anti-dumping rules and safeguards, including their value in promoting cultural diversity and in encouraging commitments in the sector.²⁶ More specifically, a delegation wondered whether anti-dumping disciplines would be an appropriate remedy if the problem to be addressed was the domination of the global market by a few major companies and doubted that relevant concepts could readily be applied to audiovisual services.²⁷

19. Potentially relevant issue:

Have Members experienced problems as a result of anti-competitive practices in the sector? Are these problems specific to the sector? What might be appropriate responses?

B. OTHER REGULATORY ISSUES

20. A negotiating proposal referred to concerns that Members might have in the regulation of the sector and suggested that these be taken as a starting point in addressing the question of how to treat audiovisual services in a trade policy context. The proposal contained a non-exhaustive list of regulatory issues with a view to finding suitable approaches. The first issue was how to ensure that the notion of cultural diversity was sufficiently taken into account when undertaking commitments.²⁸

²³ S/CSS/W/74; S/CSS/M8, para. 96; relevant sections of S/CSS/M/9 and S/CSS/M/10; TN/S/M/5, para. 105.

²⁴ S/CSS/W/74.

²⁵ S/CSS/W/99; S/CSS/M/9, para. 198; S/CSS/M/10, para. 208; S/CSS/M/13, para. 214; TN/S/M/1, para. 316.

²⁶ S/CSS/M/10, para. 210, 220.

²⁷ JOB(01)/96/Add.15, Part I.D.

²⁸ On this issue, see also Part IV.A of this Note.

This could be done implicitly by identifying the instruments put in place by governments to preserve cultural diversity and ensuring that their implementation remained possible. Alternatively, or in addition, this could also be done explicitly through the introduction of a general enabling clause to the same effect; provisions would need to be developed to avoid abuse.

21. The proposal also considered that the issue of public service was central to a solution of the audiovisual question. Most Members had established public service organizations and provided them with the necessary funding and access to communication infrastructures. Prescriptions usually identified the contents that such public operators were expected to provide to the public. The proposal also stressed the importance of regulations regarding illicit content and the protection of minors and wondered whether such regulatory concerns were sufficiently covered by the notion of public morals contained in GATS Article XIV(a). Other regulatory issues that could be discussed included the regulation of publicity and sponsoring, the independence of the regulator, specific transparency requirements for the sector, and the application of fair and equitable procedures. Discussion should permit to distinguish regulatory issues that lent themselves to the elaboration of common provisions (e.g., Annex to the GATS or additional of specific provisions) from measures that constituted market access and national treatment restrictions. Finding the right answers to questions relating to the regulatory framework in this sector was needed before undertaking commitments.²⁹ Some delegations expressed doubts about the concepts of cultural diversity safeguards or enabling clauses, and wondered what these implied.³⁰

22. Potentially relevant issues:

- (a) Taking account of Article I:3, do Members have concerns regarding how certain public service functions in the sector (e.g., funding, prescriptions regarding content, access to communication infrastructure) might be affected by GATS disciplines?
- (b) Do Members have concerns regarding how trade obligations might affect their regulations in relation to illicit content? If so, what are these regulations and what obligations of the GATS cause concern?

VI. OTHER RELEVANT ISSUES AND QUESTIONS RAISED IN NEGOTIATING PROPOSALS

23. In its negotiating proposal, a delegation expected the negotiations to contribute to the reduction of MFN exemptions, while another noted problems of discrimination among foreign producers in the sector.³¹ A delegation held the view that certain MFN exemptions provided flexibility to accommodate legitimate cultural concerns and considered that MFN exemptions taken for co-production agreements could be considered as one way for the GATS to accommodate legitimate cultural concerns.³²

24. Potentially relevant issues:

- (a) How do co-production agreements operate in practice and what measures flowing from such agreements are incompatible with the MFN obligation? How many Members have concluded co-production agreements, and are all such agreements considered MFN-inconsistent?

²⁹ S/CSS/W/74; S/CSS/M/9, para. 197, 208; S/CSS/M/10, para. 220

³⁰ See relevant sections of S/CSS/M/9 and S/CSS/M/10.

³¹ S/CSS/W/42; S/CSS/M/13, para. 211-212.

³² S/CSS/M/13, para. 213.

- (b) Certain MFN exemptions appear to be designed to respond to other Members' unfair/adverse unilateral actions or to unfair pricing practices. What types of practices and actions that have created the need for such exemptions? Are there other options under the GATS to address concerns about such unilateral actions and unfair practices? Have such MFN exemptions been used in practice? Are they related to cultural objectives?

ANNEX 1 – Main Documents Used

Negotiating Proposals on Audiovisual Services

- S/CSS/W/21, *Audiovisual and Related Services*, Communication from the United States, 18 December 2000.
- S/CSS/W/74, *GATS 2000; Audio-Visual Services*, Communication from Switzerland, 4 May 2001.
- S/CSS/W/99, *Audiovisual Services*, Communication from Brazil, 9 July 2001.
- TN/S/W/49, *Joint Statement on the Negotiations on Audiovisual Services*, 30 June 2005.

Negotiating Proposals on Various Sectors, Including Audiovisual Services

- S/CSS/W42, *The Negotiations on Trade in Services*, Communication from Japan, 22 December 2000.

Meeting Reports: Special Session

- S/CSS/M/9, Council for Trade in Services – Special Session, Report of the Meeting held on 14 to 17 May 2001, Note by the Secretariat, para. 197-209.
- S/CSS/M/10, Council for Trade in Services – Special Session, Report of the Meeting held on 9 to 12 July 2001, Note by the Secretariat, para. 208-226.
- S/CSS/M/13, Council for Trade in Services – Special Session, Report of the Meeting held on 3 to 6 December 2001, Note by the Secretariat, para. 211-217.
- TN/S/M/1, Council for Trade in Services – Special Session, Report of the Meeting held on 19 to 22 March 2002, Note by the Secretariat, para. 315-318.

Committee on Specific Commitments

- Summary by the Chairman, *Informal Discussion of Classification Issues on 11 February 2005*, Committee on Specific Commitments, 12 May 2005.

ANNEX 2

Directly Relevant Documents Prepared by Other International Organizations

- UNCTAD, *Audiovisual Services: Improving the Participation of Developing Countries*, Note by the Secretariat, TD/B/COM.1/EM.20/2, 30 September 2002.
 - UNCTAD, *Report of the Expert Meeting on Audiovisual Services: Improving the Participation of Developing Countries*, TD/B/COM.1/EM.20/3 , 4 December 2002
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