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Expert Meeting on Audiovisual Services:

Improving Participation of Developing Countries

Geneva, 13–15 November 2002

**AUDIOVISUAL SERVICES: IMPROVING
PARTICIPATION OF DEVELOPING COUNTRIES**

Note by the UNCTAD secretariat

Executive summary

Audiovisual services are at the heart of globalization, and at the same time they are important carriers of individual cultures. The dominance of a few integrated producers of audiovisual products at the global level makes it difficult even for successful producers of films and TV programmes from developing countries to compete in world markets and even in their domestic markets. The tension between culture and trade, as is the case with health and trade, is re-emerging again as countries engage in the GATS negotiations. To achieve progress in the multilateral negotiations, a balanced solution must be found to address this conflict. For this, a sector-specific solution such as an annex, protocol or similar specific instrument could be developed. Such a sectoral instrument could establish a link with other international instruments on culture that may be developed outside the WTO. Experts may wish to consider the best trade and development strategies in the audiovisual sector for developing countries to ensure that cultural concerns do not come into conflict with trade considerations; the conditions under which developing countries can benefit from progressive liberalization in this sector; and how regional integration can contribute to strengthening the trade and ensuring the balanced development of the developing countries.

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INTRODUCTION

1. The Commission on Trade in Goods and Services, and Commodities, at its sixth session on 4–8 February 2002, decided, in accordance with the Bangkok Plan of Action, to convene an Expert Meeting on Audiovisual Services: Improving Participation of Developing Countries. UNCTAD and UNESCO have joined efforts in the preparations for this Expert Meeting, aimed at ensuring that trade and culture-related issues receive adequate treatment and consideration. The focus of this note is on services that are at the core of the audiovisual industry and which are delivered internationally through TV and radio broadcasting, cinemas, and video sales and rentals, as well as multimedia products. The importance of intellectual property rights in each of these areas is recognized, but issues related to TRIPS would require specific consideration by specialists and for this reason are not addressed in greater detail here.

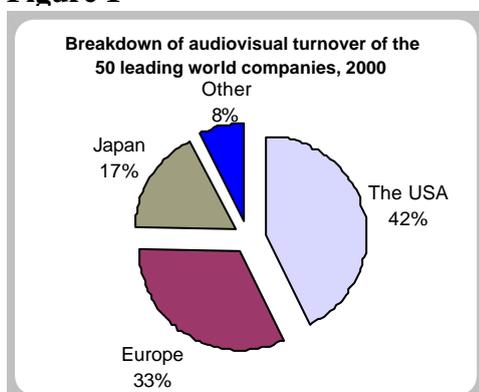
2. The issues note examines the existing structure of global markets for audiovisual products and identifies the main features of trade in audiovisual services and the prospects for effective participation of developing countries in audiovisual services trade. UNESCO has been pioneering work on cultural goods, but it is recognized that internationally comparable statistical data on trade in services are not available yet, so the data presented here, which have been compiled from different sources, are solely for illustrative purposes.

I. THE AUDIOVISUAL SERVICES MARKET

3. By the year 2000, 92 per cent of worldwide revenues from audiovisual services were accruing to audiovisual firms originating in the United States, the European Union and Japan. Media conglomerates took a major qualitative leap in the 1990s, recording amazing growth rates that allowed them to establish themselves as gigantic audiovisual empires. Major media companies increased their penetration in TV markets worldwide, both by operating private TV channels directly and through the sale of their products to national private and public stations.

4. In addition to the nine media giants, there is a second tier of 60–70 powerful national or regional media firms with annual sales of over US\$ 1 billion. Media conglomerates can

Figure 1



also be found in developing countries, where they maintain a particularly strong market position. Media conglomerates from both developed and developing countries are increasingly striving to establish operations in different markets, especially in nations that speak the same language.

5. The supply capacity of audiovisual services is affected by the following factors: (a) incidence of high fixed costs and sunk costs and low marginal costs which give an advantage to countries with large domestic markets allowing them to benefit from scale and scope economies; (b) endowment of talent and creative skills; (c) market failures in terms

of spillover effects, cultural externalities and protection of intellectual property rights; (d) the importance of digital technological development for various segments of the industry; (e) uncertainty of demand and associated risks, in particular for new audiovisual products and services; and (f) the regulatory framework and cultural policies.

A. Structural characteristics of film and television markets

6. Broadcasters and cinema operators normally pay a license fee for the right to broadcast a particular film or television programme for a limited number of times or period in a specified market. Alternatively, a broadcaster can choose to co-finance a programme and thus participate in the sale of rights to other broadcasters. The sale of related merchandise is increasingly important, especially for certain mega pictures. The broadcasting landscape has changed dramatically in the last decade, with the sector being seen as one of the pillars of the new economy. With technological innovation bringing about convergence of telecom, Internet and audiovisual services and opening up new opportunities for mergers and joint ventures, public and private companies have raced to adopt new media services.

7. In the Internet and telecom sectors, the excessive over-investment in infrastructure services has had major consequences for some broadcasting companies. After a period of big media companies becoming ever bigger by investing in connecting content with distribution, the fallout from Vivendi may lead to a cycle of disaggregation among the same mega media companies.

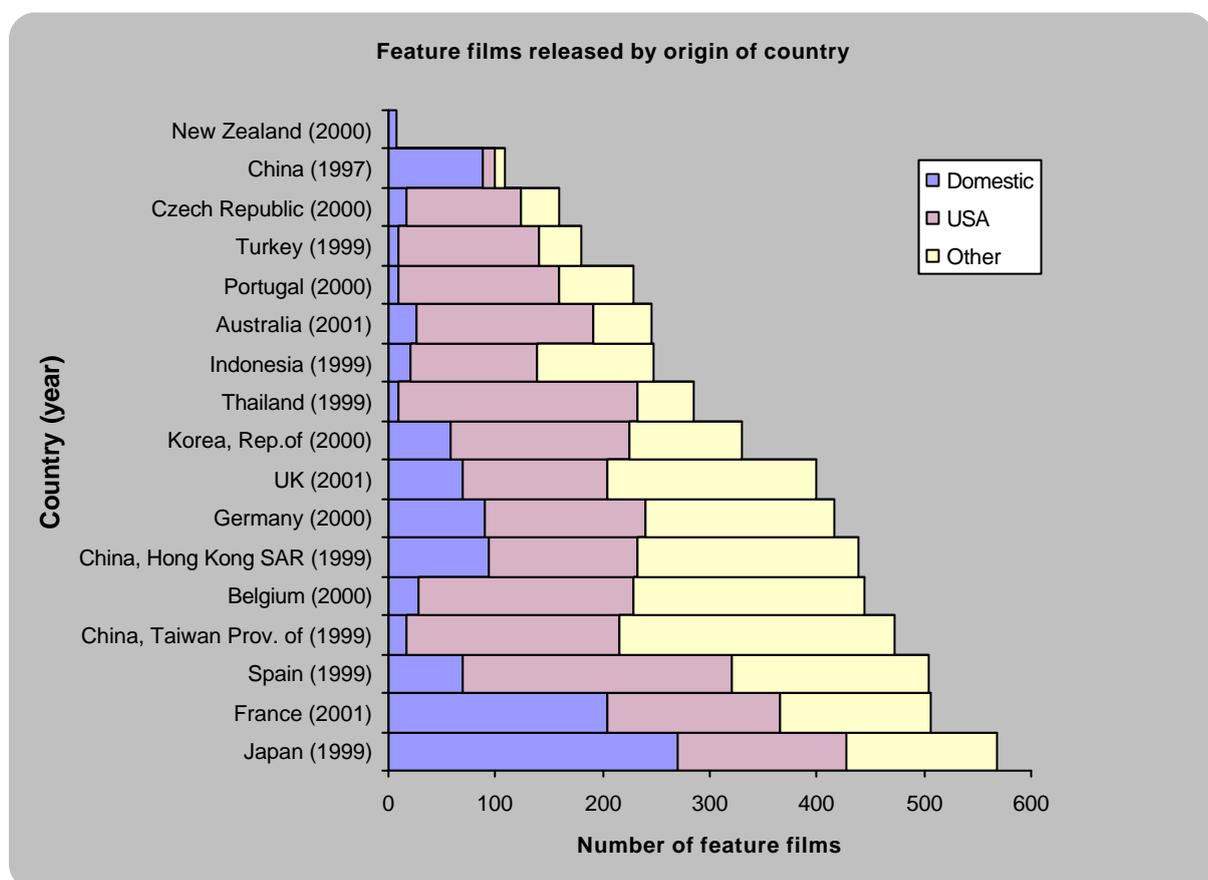
8. The average investment for a cinematic feature film in the United States considerably exceeds any European film budget. Owing to the size of the US domestic market in terms of recouping investment, US pictures will be still more cost-competitive in other markets. The same goes for television programmes, where production costs can also be covered in the domestic market. As a result, US films and TV programmes are sold to other countries at prices which are several times lower than those necessary to produce original local TV programmes.

9. Global film production¹ stood at 3,540 films in 2000, with production growing by 21 per cent in the United States, remaining steady at 93 films in South America, rising by 2 per cent in Eastern Asia, and going up by 12 per cent in India as a result of government measures to open up the industry to new private investment. The United Kingdom and France accounted for 61 per cent of European film production investment. Co-productions represented 8 per cent of all film production around the world, with Europe displaying the highest proportion of co-productions at 30 per cent. The United States is maintaining its undisputed dominance in the feature film market across the world's markets, with few exceptions. As shown in figure 2, in many markets US films and TV programmes account for more than half of the total market. The rare exceptions include, for example, India, Hong Kong (China) and Nigeria, which have been able to nurture their domestic markets and, because of the size of their markets, have been able to ensure cost competitiveness with US products domestically.

¹ <http://www.screendigest.com/>.

10. During the year 2000, it was estimated that less than 2 per cent of Africans saw an African film, not surprising for a region that in the last nine decades has produced barely more than 600 feature films.² South Africa is currently producing two feature films per year and is the biggest producer in the region. US films have a 70 per cent share of the African market, while African films have a 3 per cent share in their own market. Least developed countries, despite their concerted efforts to promote local production and broadcasting of motion pictures for TV and video, face major funding problems. As one of their priorities, LDCs aim to ensure nationwide coverage of TV broadcasts to the extent technology and associated investment can be obtained. In a number of developing countries, TV is dominated by state broadcasting, and only recently have many of these countries started to consider or implement the privatization of television broadcasting.

Figure 2



Source: UNESCO and Screen Digest, <http://www.screendigest.com/>.

11. Certain business practices of operators in film and TV programme markets give rise to concern about possible anti-competitive behaviour. The economic impact of the measures listed below should be studied further:

² A. Joffe and N. Jacklin, "SME development and employment in the cultural sector in the SADC region: The film and TV industries in the SADC region", report prepared for the ILO, November 2001.

- The “window” distribution system, which enables the sequential release of films, videos and television programmes in a staged process (windows) so that the product can be re-sold to different markets over time at little additional cost.
- Price discrimination, which has sometimes been likened to dumping because the initial costs of production have largely been recovered in the home market and the price charged in foreign markets bears little relation to actual production costs.
- Parallel import restrictions on films, videos and television programmes intended to enforce distribution windows, which also underpin the financing structures of most television and film projects and the valuation of distribution rights.
- Restrictive trade practices in international programme distribution. For example, many countries provide a limited antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales.
- Minimum exhibition period requirements set by distributors for films, which may force smaller exhibitors to forego particular titles and thereby diminish their commercial viability.
- Output deals, whereby a distributor requires a cinema operator or broadcaster to purchase all or some of the future output of a distributor or producer rather than purchasing programmes individually as they are released.
- Block booking or bundling of films and TV programmes by international distributors whereby less popular products are tied with those that are sought after.
- “No share” periods imposed by major distributors which prevent a cinema from showing different titles at different times of the day/week and which are particularly onerous for small independent exhibitors.
- Refusals to supply and exclusivity clauses in film contracts, whereby a distributor may refuse to supply first run prints for potential blockbuster films to two competing cinemas unless the additional audience generated is sufficient to outweigh both the loss of rentals through shared receipts and the additional cost of the print. In such cases, independent distributors often lose out because by the time they hire the film for exhibition, demand may have waned.

B. Music industry

12. The music industry encompasses the production, reproduction and dissemination of recordings, live performances, broadcasts, rentals, transmission via cable or satellite, and so on. It involves composers, songwriters and

Figure 3

Region or country	Music market dominance by major corporations as percentage share, 1995
Europe	80
USA	72
Latin America	66
Japan	56
South-East Asia	34
China	20

Source: The music industry in the New Economy, Report of the Asia-Europe seminar, Lyon 25-28 October 2001, Institute d'Etudes Politiques de Lyon.

musical performers, as well as agents, managers, promoters, music publishers, record companies, copyright collection societies and a variety of other service providers such as studio owners, as well as users of music and individual consumers. In recent years, world music sales have remained static at the mid-1990s level of around US\$ 40 billion, with 80 per cent of the world market controlled by the leading transnational corporations, as shown in figure 3, from the United States, Europe and

Japan.³ The global music industry is currently faced with a series of pressures that are radically re-shaping the ways in which the production, distribution and consumption of music are carried out. The main contributing factors are the changing patterns of demand; the structure of the recording industry, which over many years has witnessed the continuing dominance of the major corporations, creating a climate in which independent record producers find it increasingly difficult to remain viable; piracy and the enforcement of copyright; and also the impact of e-commerce and the new digital environment, which can also offer the music industry opportunities for commercial gain. Recent market trends reflect slowing growth in the mature markets and more rapid growth in Eastern Europe, Latin America, Asia, Africa and the Middle East. The growing spending on music is linked directly to the growing income of the population. However, the expansion of music markets in developing countries has come mainly on account of growing demand for American and European music. Though performers from developing countries have achieved measured success and recognition in international markets, commercialization of such success is not reflected in positive trade balances in developing countries.

II. MAIN FEATURES OF TRADE IN AUDIOVISUAL SERVICES

13. International trade in audiovisual services extends to the production (including processing and finishing), distribution (including broadcasting) and exhibition of motion pictures, TV and radio programmes, and music records. It also includes the sale of advertising time by all operators.

14. In trade, the audiovisual services sector differs from all infrastructure services and is more similar to a transmission network, with differences on the content side. Audiovisual services create numerous externalities, namely educational impacts, linkages to goods markets, and promotion of certain exports, in particular tourism. In this context, the United States has succeeded in establishing its leadership in global markets and now has companies of a quality and size not to be found anywhere else in the world. By expanding further and sharing risks through control of distribution networks, these companies are becoming even more important in convergent markets, and this has also reinforced the dominance of the US position. Economies of scale enabled the United States to become the most competitive supplier, offering inexpensive and attractive products. Since cultural, economic, social and political aspects become inextricably intertwined in trade in audiovisual products, the rest of the world felt challenged by this success and the impact that export of culture might have on their societies. A number of countries responded by adopting policy measures which define trade policy in this area today and which are discussed below.

A. Overview of the barriers to trade

15. Each stage of trade may generate a number of barriers to foreign audiovisual products. Typical barriers at the *production stage* include the requirement to print film locally for it to be shown in the country, as well as local dubbing and subtitling obligations. In addition, a number of countries require foreign filmmakers to recruit at least part of the cast and crew from among local professionals.

³ Alonso Guiomar, Arizpe Lourdes. 'Culture, globalization and international trade'. Background papers, Vol. I Human Development Report 1999.

16. In the area of the *distribution of films*, foreign ownership is often restricted or even prohibited altogether. Quotas or import licenses are also used to limit the number of foreign films imported annually, and annual ceilings can be imposed on remittances by all foreign films. In the case of specific review and approval of foreign films, as well as pre-censorship quality checks and associated fees, these can discriminate in favour of national production. For example, Canada prohibits foreign acquisition of nationally owned film distribution firms and attaches conditions to foreign investment, e.g. by allowing companies to market only their own proprietary products or requiring them to reinvest a portion of their Canadian earnings. However, the most effective barrier to competition at the global level is the vertical integration of the production and distribution chain by the US-based major studios, leading to control of resources and market access.

17. For *video sales and rentals*, local content requirements may be imposed in connection with the operation of video rental establishments in terms of a percentage of total inventories. In addition, a special rating system, as in the case of indexing by the German Youth Protection Authority of DVDs, may necessitate local reproduction and distribution as opposed to more cost-efficient regional distribution of products.

18. *Television programming* in the majority of countries on all continents limits programmes that do not originate in local production companies. In some cases, a company is defined as local only when owned by a national. Quotas may be used to require that a certain percentage of programming be reserved for local or regional production and apply indiscriminately to all TV operators. More stringent quotas may apply specifically during prime time hours, and they may be different for motion pictures, animation and popular music. The quota for local programmes may vary with the type of TV operator; for example specialty TV, cable operators and direct-to-home broadcasts may face quotas in respect of the number of foreign programmes per channel or in terms of a ceiling on the number of such channels in the total number; satellite retransmission of foreign broadcasts may be limited to a certain share of the total number of operating channels, etc. In Australia, pay TV channels, where drama programmes account for more than 50 per cent of the schedules, are obligated to

Figure 4

Local content in TV programming in the SADC region, 2001

Country	Angola	Bots- wana	Lesotho	Malawi	Mozam- bique	Namibia	South Africa	Swazi- land	Tanzania	Zambia	Zimbabwe
Percentage of local content	63	60	N/A	8-25	60	30	35-55	N/A	75-90	N/A	50
Hours of broadcasting/day	17.5	3	1	24	N/A	24	24	24	N/A	7	18

Source: A. Joffe and N. Jacklin, SME development and employment in the cultural sector in the SADC region, 2001.

spend 10 per cent of their programme budget on new Australian drama programmes. In addition to TV screen time limits, foreign investment in terrestrial broadcast networks and operations may be limited or prohibited. Many countries maintain limitations on foreign ownership in respect of all network operators or specifically cable TV-related operators and

programme providers and satellite broadcasters. For example, foreign ownership of TV broadcasting in the United States is limited to 25 per cent.

19. Similarly, in radio broadcasting, local content requirements are imposed, for example, in France and Canada, where such requirements may differ for private or public, pay audio or cable broadcasting.

20. In the case of cinemas, a theatre screen quota is often applied. The quota may require showing local films for a fixed number of days per year or in a certain proportion to the foreign films shown, or it may involve allocating a percentage of seats and screens to local or regional productions, as is the case in Italy. The issue of concentration of ownership in movie theatres and their vertical integration with film distribution has been recognized as a problem in certain European countries. To address this, preferences are sometimes accorded to those distributors that prioritize the delivery of EU-made films to theatres.

B. Culture and trade

21. The above discussion reflects a reality whereby most countries apply measures in the audiovisual sector aimed at protecting their cultural identity, and it demonstrates that cultural and trade policy objectives often conflict with each other. Audiovisual services are seen as a carrier of social, political, economic and trade considerations but also as a vehicle for ensuring other values of society, such as pluralism and democracy. The dual nature of these services makes understanding the benefits of progressive liberalization a particularly important task. It is unlikely that countries will be willing to engage in further multilateral negotiations in the audiovisual sector if they are not convinced that their specific commitments could accommodate non-trade concerns. Trade should accommodate the need to act in support of domestic content and cultural diversity.

C. Importance of audiovisual trade in developing countries

22. A great number of developing countries from all regions of the world have established themselves as regional and global exporters of motion pictures and TV programmes. However, historically developing countries are newcomers to global trade in this sector and their potential benefits are often limited, since they face the established global market structure and regulatory provisions at national levels, which resulted mainly from trade tensions between the United States and the European countries. On the other hand, the vast majority of people in the less developed countries live their daily lives with minimal impact from the audiovisual sector. They need to be supported by their Governments and need to have opportunities to produce culture and to sustain their cultural lives. Why then is trade in audiovisual services important for developing countries if it affects only a small segment of their community? Experience has demonstrated that where, for example, the commercial music industry is prospering and it is owned in the local community, money will go to the grassroots and will support further development of cultural products. The starting point for commercialization of local music could often be based on the infrastructure created for imported music. However, at some point, entry of foreign products may cease to provide benefits to a country's own culture and may produce a displacement effect. To mitigate such effects, policy instruments should be put in place at the national level and possibly the international level.

D. Investment in the audiovisual sector

23. Within the general framework of attracting investment, a number of countries pursue sector-specific policies in the area of audiovisuals. Investment in audiovisual services in pluralistic societies in general is promoted under conditions that safeguard pluralism and prevent media concentration while preserving a niche for independent producers and their products. With respect to foreign investment, different strategies in different countries have produced similar outcomes. Canada has successfully protected its industry and adopted a cautious approach in allowing foreign investment, seeking to ensure that some investment in the audiovisual industry is Canadian. This is not the case in Germany, which maintains an open framework for investment, but where two main national operators, Bertelsmann and the Kirsch Group, until its recent bankruptcy, controlled 90 per cent of the TV market without witnessing any new competition from foreign investors.

24. With foreign investment scarce in the audiovisual market, the majority of developing countries have to identify other options to finance their way into international markets. The major problems that they need to overcome relate to the dissemination of their products and identifying funding. Based on the experience of Senegal, one way is for their musicians to resort to co-production agreements with internationally known singers from the United States or EU countries. This can give them knowledge about access to distributions channels, help establish their names internationally, and sell their own records. In addition, local banks become more willing to extend their lending to musicians, since they no longer consider them to be in a high-risk sector.

E. Movement of people

25. Artists are among the few professions that enjoy relatively free movement across national borders of many countries. However, trade-related movement of natural persons goes beyond engaging foreign directors, actors or similar professionals. It is important to ensure market access for all members of a crew involved in filming at a foreign location. Though countries usually give preferential treatment and exemptions from the normal application of immigration laws, it appears that no international mechanism has been put in place to ensure the unhindered movement of people in the creative audiovisual industries. Negotiations in the WTO have brought only limited success so far in obtaining commitments from developed countries in the area of movement of all categories of personnel involved in the delivery of services.

F. The size of the market

26. The success of the US film industry is partially attributable to its size and the ability to recoup production costs domestically. These structural differences enable it to offer products at prices that no other international producers can match at present. There appears to be little linkage between production costs and the value of distribution. For producers in third countries competing in the same market with US producers and who need revenue from sales in international markets to cover their investments, such a situation creates an uneven playing field. Even in the music industry, musicians in developing countries may produce their records locally, but they need to earn money abroad to pay for their investments, as domestic markets are too small in terms of purchasing power. The size of the market may determine

the ability of a country to develop its audiovisual industry, including its export potential. It is in the interest of all countries to maintain space for local production aimed at delivering national/local cultural products. Measures at the national and possibly international levels may be necessary to ensure that space is preserved for local production. The challenge is to ensure that these measures do not turn into protectionism and that promoting local production under such conditions in fact contributes to preservation of national culture.

G. Government support

27. The European model is well known for its subsidies and the importance many

Country	Public funding, 2001
South Africa	US\$ 1.5 mln
Zimbabwe	US\$ 600 000
Namibia	US\$ 500 000
Public funding, 1996	
Argentina	US\$ 53.4 mln
Chile	US\$ 900 000
Colombia	US\$ 110 000
Mexico	US\$ 2.5 mln
Venezuela	US\$ 5.3 mln

European countries attach to public broadcasting. The European Union Media Plus funding programme, aimed at providing training and development, distribution and promotion of European cinema and audiovisual productions to the industry, provides a budget of 400 million euros over the period 2001-2005. It is supported by new financial instruments from the European Commission and the European Investment Bank, which offer the industry financial assistance and

more general support. The latter is earmarked to finance medium- and long-term investment, strengthen equity and provide guarantees for small and medium-size enterprises. Over 500 million euros will go towards private and public infrastructure needs. However, the importance of subsidies in comparison to the budgets that go into TV programmes and filmmaking in the United States appears to be less relevant from the trade perspective than it may seem from the attention that the issue is receiving. These subsidies are important but not in terms of directly undermining trade competitiveness. Their use for training purposes will be important, and the same may be true for many developing countries. Subsidies aim to promote creativity, develop necessary skills, including management, and ensure the availability of a variety of cultural products. Subsidies for the audiovisual production and distribution process are mainly aimed at supporting small European companies, which would not otherwise have the means to market their own products appropriately. This in fact demonstrates the responsibility that public institutions should assume in those developing countries that are trying to promote their own industry. However, as a main tool for development, subsidies have their limitations, especially since many developing countries first need access to new technology, where subsidization may be less effective. Other instruments, such as taxes and tariffs, do not seem to have played any important role so far. It would therefore appear that regulations remain more important in creating space for the domestic industry than subsidies. In this respect, funding for public TV broadcasting may retain its validity. Public broadcasting is not to be understood as state broadcasting, which could become a constraint for development. In fact, with the growing role of satellite television, a pluralistic product will reach out to all viewers, and there will no longer be any place for state broadcasting. At the same time, privatization of TV broadcasting does not exclude the need to maintain public television, as in most European countries, where public TV broadcasting remains the backbone. Developing countries should not simply replace public broadcasting by private television, but should work to improve it through regional cooperation and support for regional production.

H. Regional cooperation

28. An interesting question is whether regional cooperation and integration could help in overcoming the constraint of the size of an individual market. The creation of a “European audiovisual area” has been a means used by the European Union to help the European audiovisual industry to develop and strengthen its international competitiveness. South Africa is in the process of creating the minimum necessary conditions for establishing itself in the Southern African Development Community (SADC) region, where audiovisual services have been earmarked as a priority sector for regional integration. It will become evident from this experience whether the EU approach could be a model for countries in SADC. However, the EU did not create a single market for culture. In some cases, European consumers may be more receptive to US-made audiovisual products than to those produced in other European countries. In the case of weaker developing countries, regional integration and cooperation may not suffice. International markets should be linked with those of the most vulnerable and least developed among the developing countries through partnerships and by creating distribution channels in developing countries. Regional integration may create the necessary space and area where products could be exchanged profitably and where other cooperative ventures and exchanges could be launched. However, reaching out to expatriate communities has not proved to be a commercially sustainable undertaking in a number of developing countries due to the additional costs involved, including costs relating to technological barriers, since no single standard exists, even in Europe.

I. Impact of new technologies and standards

29. The development of e-commerce and information and communication technologies has unquestionably contributed to trade growth. Exchange of audiovisual files over regional networks has provided the opportunity for creators to work in different places simultaneously and overnight, leading to more production sharing. However, countries would be left out of this chain of production if for some reason they did not have the satellite uplinks or did not have access to the latest PC software, etc. Niche markets are opening in domestic markets, for example specialty TV stations catering to small audiences, increasing access to radio stations, downloadable music – factors that seemingly lead to better opportunities for introducing products from developing countries into developed country markets. Technology is having different effects on different segments of the audiovisual market, and developing countries have different sensitivities in this respect as well. Interestingly enough, the introduction of new technologies has led to growing investment and expenditures on new devices and technology, leaving fewer resources for content development. In addition, Governments in developed and developing countries may have to help certain segments of their industry in adapting to the new digital environment. Technology also has an impact on regulations, making it more difficult to regulate and creating the need to identify the most appropriate instruments, especially in the converging environment of TV and the Internet. This also raises concerns over the difficulty for developing countries to control their audiovisual space to avoid situations where their policies in the area of TV programming are compromised. New broadband technologies may challenge the quota system in TV programming which is used in many countries. A new approach to promoting local content of audiovisual products may need to be adopted in the area of cultural regulation in a digital environment.

30. At the same time, new technologies are reinforcing the trend of introducing different standards. Even Europe has not achieved agreement over a single standard for audiovisual-related technology. Some technical standards have evolved historically, while some have been introduced with clear commercial interests in mind which in the end have led to market segmentation and become an important part of business strategies. Furthermore, new standards may necessitate the use of appropriate technology, which is often available, at least initially, in the standard setting and introducing country. On the other hand, differing standards are likely to influence supply capacity in markets segmented according to standards. The recent difficulties faced in the United States over the introduction of the new digital-technology-based standard in TV broadcasting have revealed the important role that Governments are expected to play in this area.

III. AUDIOVISUAL SERVICES IN THE WTO

A. Audiovisual services under the GATS

31. Audiovisual services are covered by the WTO Services Agreement under the GATS services classification GNS/W/120. The latter includes these services as a fourth subsector under sector 2, "Communication Services", as follows: "D. Audiovisual services: a. Motion picture and video tape production and distribution services (CPC 9611), including promotion and advertising services; b. Motion picture projection service (CPC 9612), including video tape projection; c. Radio and television services (CPC 9613), including combined programming; d. Radio and television transmission services (CPC 7524); e. Sound recording (CPC not available); f. Other." On the other hand, ownership of cinemas could fall under "Recreational, cultural and sporting services" and ownership of video rental outlets under "Retailing services".

32. During the Uruguay Round negotiations on services, GATS concepts were reviewed in terms of their applicability to audiovisual services. At that time, strong disagreement emerged concerning the proposal to introduce a "cultural exception" into the Services Agreement. The European Communities proposed a sectoral annex on audiovisual services aimed at ensuring that WTO members would maintain their right to differentiate among audiovisual products based on their origin, i.e. a derogation from the MFN principle; the annex would have allowed for quantitative, e.g. screen time, limitations, as well as for the application of local content requirements or the provision of subsidies to locally produced services. Developing countries supported in principle the drafting of an annex and recognized the need to have exceptions based on cultural values. They also recognized that market access and national treatment for their services in the context of GATS Article IV would depend on other elements, for example on their effective access to co-production agreements. Looking back at the history of the GATS, audiovisual services have probably been the most sensitive and most complex sector for negotiators. In fact, negotiations in this sector have been delaying for up to a year the accession of a number of the newest WTO members. At the end of the Uruguay Round, the above proposals by the EC for a "cultural exception" in the GATS Agreement provoked a major crisis. As the United States refused, the EU, Canada, India and many other countries simply invoked MFN exemptions on audiovisual services and did not schedule commitments in this sector; in fact, this sector is among those with the fewest commitments in the GATS schedules. Cultural exceptions appear in regional (e.g. NAFTA)

and bilateral (e.g. Canada-Chile) trade agreements. This outcome reflects the concern that many countries have in treating culture as a commodity and in a way demonstrates their willingness to defend their culture.

Box1
Key notions of the GATS

GATS is concerned with trade that takes place through four modes of supply: (1) *cross border supply* (services supplied from a supplier in one country to a consumer in another, e.g. direct broadcasting of TV programmes abroad); (2) *consumption abroad* (a consumer or his/her property is receiving a service in another country, e.g. filming abroad in a certain location); (3) *commercial presence* (temporary or permanent establishment through investment abroad, e.g. co-producing a motion picture abroad); (4) *presence of natural persons* (where people move to a foreign country on a non-permanent basis to supply a service, e.g. a foreign film crew is making a film for a local film studio). GATS aims at progressively eliminating barriers to trade in services for market access and national treatment in all modes of supply through successive rounds of negotiations. It is based on the principles of most favoured nation (MFN) treatment or non-discrimination and transparency, and aims to ensure the increasing participation of developing countries in services trade. One of the issues most pertinent to audiovisual services under the GATS relates to negotiations on specific commitments under national treatment (Article XVII). GATS does not explicitly define the types of limitations that countries may negotiate under that article. However, local content requirements and domestic support for local producers are typical examples of measures falling under national treatment.

B. Overlap between the GATS and the GATT

33. Audiovisual services constitute the only services sector mentioned under the original GATT in its Article IV, which made it possible to maintain film screen quotas and to reserve time for films of national origin. This was the only case where the application of quantitative restrictions was allowed under the GATT MFN framework and was recognized in terms of national treatment under GATT Article III (10). This GATT provision applied only to cinema film quotas and seemed not to extend to television, radio and other segments of audiovisual services. The importance of considering the link between goods and services agreements has gained new prominence, as has the need to preserve predictability and ensure certainty in the application of multilateral trade rules. The most recent cases in WTO dispute settlement, on periodicals, affecting Canada, and bananas, with its impact on the EU/ACP arrangement, have demonstrated that the same measure could be subject to disciplines under the two agreements, the GATT and the GATS. The audiovisual industry is increasingly based on service content, but since all of these services involve and depend on trade in goods, the potential application of GATS disciplines may have quite serious implications. As a result, the potential remains for disputes under the two agreements. Lack of predictability in the application of rules may subject the interpretation of national policies in this sensitive area to a decision taken by a WTO panel.

C. Ongoing negotiations on services

34. The GATS had a built-in mandate for the new negotiations on services, which began in January 2000. No services sector remained excluded from these negotiations, and three

new proposals were made in the area of audiovisual services by the United States,⁴ Brazil⁵ and Switzerland.⁶ These proposals were introduced into the multilateral discussions, but the ensuing exchange of views and positions remained rather limited and not very informative. The leading features of the three proposals are the suggestion by Switzerland to draft a sectoral annex, the Brazilian proposal on competition, and the US proposal to develop a sectoral understanding on subsidies. Starting in June 2002, WTO members engaged in the process of making bilateral requests for access into their trading partners' markets. The audiovisual services sector has also been included in the lists of requests of a number of WTO members. By the end March 2003, initial offers in reply to these requests will have to be tabled by WTO members, and the initial decision will have to be made on whether and how audiovisual services should be incorporated into the present GATS negotiations.

35. The proposals submitted in the GATS negotiations have identified important issues with regard to what minimum conditions are necessary to promote progressive trade liberalization in audiovisual services. However, these conditions may not be sufficient to accommodate the interests of the weaker players who have not been able to establish their position in global or regional audiovisual services markets. Competition-related issues are becoming increasingly important when trying to identify conditions required for the balanced distribution of benefits from trade liberalization at the sectoral level. It is important to start a debate in the area of services (or at the sector-specific level) on competition policies and on whether the existence of such disciplines by themselves would ensure a level playing field between small and large developed and developing countries. At the same time, the notion of technological neutrality, which was first brought up in the GATS negotiations on basic telecommunications, has been introduced in the context of audiovisual services. However, the relevance of technological neutrality in the audiovisual sector is questionable. In principle, technological neutrality suggests that sectoral regulations apply in a technology neutral fashion, i.e. do not depend on the carrier media, but it is difficult to understand this in the case of audiovisual services which, unlike telecommunications, are content-non-neutral industries. In the area of subsidies, it would be important to identify trade-distorting subsidies, as well as the "permitted" ones. The proposals seem to omit the first type of subsidies, which may have a particularly negative impact on trade outcomes. On the other hand, the "permitted" type of subsidies should be regarded with care so as not to undermine the use of public funding by developing countries for their future development needs. The Brazilian proposal makes a strong case for the need to consider the possibility of trade tensions in services and how the GATS rules may or may not accommodate a solution. Such instruments as anti-dumping measures come into place when trade tensions emerge, but they still would not provide the interface between culture and economic aspects. The role of policymakers is to ensure that the GATS is sufficiently flexible to balance cultural policies and trade objectives. Particular attention in this regard should be accorded to the work on strengthening the disciplines under the GATS on domestic regulation, since such regulation,

⁴ WTO document S/CSS/W/21.

⁵ WTO document S/CSS/W/99.

⁶ WTO document S/CSS/W74.

including licensing of audiovisual services, remains probably the main instrument of audiovisual policy today.⁷

36. The agreement also has a built-in mandate for the negotiations on GATS rules, namely in respect of emergency safeguard measures, government procurement and subsidies. Multilateral disciplines have not been developed in any of these areas, despite the importance attached to some by developing countries. It is likely, however, that progress may be achieved in the area of subsidies if the audiovisual sector becomes an effective part of the specific commitments. Furthermore, negotiations on audiovisual services may also have positive implications for the negotiation of emergency safeguard measures, as recognized in the Brazilian proposal. A relevant precedent in this respect is documented in the Florence Agreement⁸ promoted by UNESCO and aimed at ensuring free circulation of cultural materials, including audiovisual materials. The Agreement and its protocol contain a reserve mechanism allowing countries to avoid imports that may prejudice the development of national cultural products, as under the existing WTO emergency safeguard mechanism. However, the products concerned here extend to films, videos, sound records, multimedia and other similar products provided for commercial purposes.

37. In past negotiations, members have chosen to seek sectoral solutions in respect of rules in priority areas, rather than developing horizontal disciplines, where progress seemed difficult to achieve. In the area of basic telecommunications, a reference paper was developed, instead of strengthening GATS provisions on competition. The negotiations on audiovisual services may also necessitate discussion and recognition of positive measures in favour of small economies due to their limited ability to develop export capacities and the challenges they face in trying to ensure a competitive supply of diverse audiovisual products domestically.

D. Other developments with potential relevance to the GATS negotiations

38. Promoting trade is one of the priorities in developing countries, but so is the promotion and protection of their cultures. GATS is a multilateral framework for ensuring progressive trade liberalization, but the question remains whether other international instruments are necessary to ensure the preservation of cultural diversity at the global level. The WTO Ministerial Conference in Doha made noticeable progress in balancing the TRIPS Agreement, more specifically with regard to access to essential medicines by poor people in developing countries. A precedent was established to the effect that health takes priority over trade. The same kind of issue arises in the discussion on cultural diversity and its apparent conflict with trade. UNESCO adopted the Universal Declaration on Cultural Diversity on 2 November 2001 proposing the first global definition of cultural diversity. However, legal rules on the understanding and treatment of cultural diversity are yet to be established. Furthermore, establishing an interface between the concept of cultural diversity and international trade agreements will pose an even greater challenge. The drafting of a new international instrument on cultural identity as a possible way of establishing a sustainable link between culture and trade has been under consideration by like-minded countries. Such

⁷ Michael A. Wagner, GATS and Cultural Diversity, Diffusion 2002/1, pp. 33- 35.

⁸ The Agreement was signed in 1950 and updated in 1976 with the adoption of the Nairobi protocol. By 2000, 94 contracting parties had ratified it.

an instrument would protect cultural diversity and associated domestic policies, since it is debatable whether the WTO framework is an adequate forum for discussing and resolving these issues.

IV. INTERESTS AND CONCERNS OF DEVELOPING COUNTRIES

39. The consideration of trade-related issues in audiovisual services is taking place against the background of the GATS negotiations and is thus timely in helping to identify the ways for developing countries to increase their participation in global trade. Taking advantage of the GATS process, experts may wish to evaluate further perspectives concerning the evolution of the treatment of audiovisual services in the trade context. What conditions are necessary to achieve progress in this area? Since audiovisual services in their trade dimension are among the principal preoccupations of many developing countries, how should the latter position themselves to take advantage of globalization and growing markets? All but a few countries are facing the same situation of market dominance by a few suppliers, against which they are adopting measures at the domestic level or promoting other initiatives at the international level, instead of seeking solutions through the multilateral trade framework. What options are available at the international level to developing countries to reconcile the apparent conflict between trade and cultural objectives?

40. In the context of progressive liberalization, developing countries may attach conditions to their market opening in line with GATS Article XIX. Specific measures to be identified and applied in this respect arise firstly from the concerns of developing countries with regard to the preservation of their national audiovisual industry as a means for disseminating national history and culture at the national level, independently of whether they are importers or exporters of these services. The role of regional cooperation and trade agreements has been gaining momentum in all the regions of the world. How could developing countries seek to establish synergies between the promotion of regional cultural exchanges and audiovisual trade through regional preferences?

41. Very few countries have implemented liberalization of their audiovisual markets, since in most countries this sector is considered “sensitive”, demonstrating the unwillingness to treat culture simply as a trade issue. How can developing countries benefit from trade in audiovisual services, and what are the possible implications of trade liberalization on their growth and development?

42. Countries have committed themselves to progressive liberalization negotiations under the GATS in all services sectors, including audiovisual services. The difficulty in achieving progress related to audiovisual services derives from the fact that the sector is *sui generis* and the GATS mechanism may not be sufficient to take care of its specificities. In order to achieve progress in the GATS negotiations, an outcome should be reached within the sector providing a mechanism to address concerns that countries have. The outcome of negotiations could result in a protocol that would establish rules for the use of subsidies, protect intellectual property rights, contain provisions on how to protect culture by way of linkages with relevant cultural agreements, and ensure the effective implementation of GATS Articles IV and XIX:2. Such a sectoral agreement could address the treatment of such issues as anti-competitive practices that act as barriers to effective market access for developing countries.

Special consideration of the developing countries' needs would create the necessary overall framework for the proactive participation of developing countries in global trade in audiovisual services.
