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MATTERS RELATING TO TRADE IN AUDIOVISUAL SERVICES

Note by the Secretariat

1. This background note has been prepared in response to a request made by the Working Group on Audiovisual Services at its first meeting in August (MTN.GNS/AUD/1) and contains three sections: first, a brief drafting history of GATT Article IV on special provisions relating to cinematograph films; second, a preliminary examination of the applicability to, and implications for, the audiovisual sector of certain concepts, principles and rules under discussion in the GNS; and third, an overview of relevant international agreements existing in this sector.

I. Drafting history of GATT Article IV

2. The only subject matter relating to trade in services to be directly addressed in the original thirty five articles of the GATT is that of cinema film quotas. Article IV of GATT specifically allows the establishment and maintenance of film screen quotas to guarantee that a minimum percentage of total screen time will be allotted to the exhibition of films of national origin, although it also subjects screen quotas to negotiation. This exception to the general principle of non-discrimination is also recognised explicitly in Article III (10), the national treatment provision.

3. At the time of the drafting of the national treatment obligations, it was recognised that the application of these provisions to film screening could cause difficulties. A number of countries held the view that tariffs were not an effective way of protecting a domestic cinematographic film industry, and found it necessary to resort to quotas on screen time. In particular, European quotas on imported films had been a contentious issue in the 1930s which led to some pressure in the early post-war period to find a solution. As a result in the Havana Charter for an International Trade Organization (ITO), all forms of internal quantitative discrimination were prohibited except one: members of the ITO would be permitted to reserve a fixed share of playing time on domestic screens for films

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produced domestically¹. Thus in the drafting of the GATT, motion pictures were also exempted from the national treatment obligation because of the objections made by nations which had domestic film quotas in place, and who argued that the regulation of the film industry was more related to domestic cultural policies than to economic considerations such as and trade².

4. In 1961 the United States raised the question of introducing new language into GATT that addressed restrictions by a number of countries on trade in television programming. The United States proposal was that barriers to trade in television programming were technically a violation of GATT rules, but that some of the principles of Article IV might well apply to them³. No action has been taken on this proposal to date.

¹See Article 19 of Chapter IV, Commercial Policy, of the Havana Charter. As the text of the article makes clear, what amounted to a restriction on a traded service was described in terms of a restriction on a traded good: "internal quantitative regulations relating to exposed cinematograph films". For an interpretation see Clair Wilcox, A Charter for World Trade, Macmillan, New York, pp.76-77.

²The United Kingdom, in particular, supported the maintenance of quotas for cultural reasons while the Havana Charter and then the GATT were being drafted. See, for example, the following U.K. intervention in a U.N. debate of the time:

"In the case of films it is not merely an economic and not even material question; it brings in a very important cultural consideration such as does not come in the case of other commodities. We think it is quite clear that countries will not allow their own film production which affects their own culture and ideas, to be swamped by imported films simply because the latter happen to be better organised commercially. Some perfectly reliable method of safeguarding domestic film production is needed and will in fact be insisted on by a great many countries. The method of the screen quota is much the most effective, perhaps the only effective method of attaining this desired object. We must therefore preserve our right to use this method". Extract from the summary record of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Commission A, 6 June 1947 contained in U.N. document E/PC/T/A/SR/10.

See also the Summary Analysis of the ITO Charter, Dept. of State Pub. No.3731 (1950), which notes that motion pictures are distinguishable because "their value is not in the film itself, but in its earning power".

³The CONTRACTING PARTIES set up a Working Party to examine the issue but reached no final conclusion. See Report of the Working Party, Application of GATT to International Trade in Television Programmes, in GATT Document L/1741 of 13 March 1962. See also the useful commentary by John Jackson in World Trade and the Law of the GATT, The Bobbs-Merrill Company, Inc. p.294.

II. Considerations relating to the application of certain concepts and principles to audiovisual services trade

(a) Transparency

5. Laws, regulations and administrative guidelines affecting the provision of audiovisual services are varied and wide-ranging in scope. Transparency could apply to import and screen-time quotas, subsidies, certain forms of taxation, standards for protecting public morality, customs valuation and procedures for protecting authors' rights, as well as measures motivated by cultural considerations. In addition, the application of transparency to establishment-trade in audiovisual services could imply that regulations relating to foreign investment in the sector be made public. Given the close linkage between the provision of certain audiovisual services and access to telecommunications networks, transparency provisions might also need to extend to measures governing such access.

(b) Market Access

6. Market access in audiovisual services is very closely linked to the modes in which such services may be provided. As with many other services sectors, market access in audiovisual services may be granted with respect to cross-border transactions or transactions which are performed through an established or temporary presence of an audiovisual firm in the importing market. Practice has shown that audiovisual services provided across borders prevail over those provided through some form of establishment or commercial presence. This reflects, to differing degrees, the nature of transactions in the sector and the widespread incidence of barriers on forms of trade implying long-standing commitments in the market of the so-called "host" or importing country.

7. The cross-border provision of audio-visual services may take place through the import/export of audiovisual works recorded on a physical medium or through international transmissions by cable and radiowaves. In the case of cross-border movement of audiovisual works, access to a particular market may hinge on traditional trade policy instruments applied by the importing country. Similarly to goods trade, trade in audiovisual works may be subject to special tariffs or non-tariff barriers which are applied for various reasons, including conformity with national laws and regulations alongside concerns of a cultural, moral and public nature. Market access commitments could therefore relate to the reduction and/or elimination of such barriers. Since quantitative restrictions on imports are common in some countries, market access commitments could relate to measures such as import and/or screen quotas affecting both cinema or television.

8. The policy issues concerning increased market access by means of cable and radiowaves are very closely linked to those associated with information technology and services. Access to a particular market for certain audiovisual services may only be possible through access to the national

telecommunication network of the importing country. The importance of the linkage between networks and certain audiovisual services is underscored by the fact that even in the presence of liberal regulatory frameworks applying to the audiovisual services sector, the provision of certain audiovisual services across national borders may be hindered by restrictive measures relating to network access and the provision of certain telecommunication services. The existence of national monopolies may be relevant in that respect. Issues relating to direct broadcast satellites are also relevant in the context of market access commitments in audiovisual services. Access gained through satellites often escapes control by authorities of the receiving country, especially in cases where television broadcasts are picked up through privately-owned satellite dishes. New techniques of distribution, re-transmission or reception may therefore deserve careful consideration in the context of market access. More broadly, new technological developments and consumer patterns might play an increasingly prominent role as factors determining the nature of market access in the audiovisual services sector.

9. Notwithstanding the lesser importance of delivery through establishment in world audiovisual services trade, the consideration of market access may take into account the various forms of commercial presence relevant in the sector. That applies to firms involved in the production, import/export, processing or distribution of audiovisual works. In production, for example, market access might be conditioned by "buy national" procurement policies or domestic subsidies aimed at promoting the national industry. Market access may be especially restrictive for foreign-controlled enterprises in regard to the setting up of production studios and processing laboratories, a situation which is often aggravated by regulations requiring the use of national studios and laboratories for national productions. Finally, market access commitments could have a significant impact on the establishment of foreign television institutions which are often barred from markets where public monopolies govern all or some of television broadcasting.

(c) National Treatment

10. The application of national treatment to audiovisual services trade may imply different situations for the different sub-sectors of the audiovisual industry. In the case of cross-border trade through physical means (e.g. films, magnetic bands, disks, etc.), the concept could have similar implications for trade in audiovisual tangible products as for goods trade - i.e. avoiding the nullification of benefits acquired at the border, or rather, the impairment of the access obtained into a particular market. As mentioned above, Article IV of the GATT provides a illustrative delineation of national treatment obligations with respect to cinematographic films which cross borders. In the case of the cross-border transmission of audiovisual works through satellites, the implications deriving from the granting of national treatment may not differ much from those deriving from the granting of market access. Granting treatment no less favourable to foreign providers in that context implies the granting to foreign firms of the same access to telecommunication networks available for nationals to foreign firms. The notions of national treatment and

market access therefore become interchangeable since they both hinge on access to a country's network.

11. Application of national treatment could have wide implications on a variety of measures instituted by countries in order to promote their national audiovisual industries. Such measures may affect competition in both cross-border and establishment trade insofar as they discriminate in favour of national firms. The application of national treatment to foreign firms established in a particular market, for example, may do much to reconstitute or improve the market access available to such firms by affecting such discriminatory measures as "buy national" procurement policies, aids and subsidies. The existence of national monopolies (e.g. in TV broadcasting) may also be affected by national treatment. While such measures are in most cases aimed at strengthening national firms, the impact of the application of national treatment may be different across countries depending on the definition of "national firm" in each particular segment of the national audiovisual industry (i.e. production, processing, finishing, distribution and exhibition).

(d) M.f.n./Non-discrimination

12. As with other services sectors, the application of m.f.n./non-discrimination to audiovisual services trade, to the extent that it implies a multilateralization of concessions granted, would require clarification with respect to existing bilateral agreements affecting the international audiovisual industry. Regional and/or preferential agreements might limit the application of the m.f.n./non-discrimination principle insofar as concessions exchanged are usually reserved to the parties of such agreements. There are also multilateral agreements touching on aspects of relevance to audiovisual services trade such as the OECD Code of Liberalization of Current Invisible Operations which covers filmed entertainment in its Annex A and provides for the possibility of parties to lodge reservations with respect to certain aspects of audiovisual services trade.

(e) Increasing Participation of Developing Countries

13. In many respects, the issue of increased participation of developing countries in audiovisual services trade mirrors related concerns common to other services sectors. In this sector, as in others, the strengthening of domestic capacities is intimately related to access to technology, training of personnel, decreased level of barriers in exporting markets, and financing issues. Technology is especially important in this sector since access to a market and its distribution networks can in many cases be determined by technological capacity. The transmission of audiovisual works by cable and radiowaves, for example, depends on the existence of telecommunications infrastructures which apply very sophisticated technologies. Cable and direct broadcast satellite systems are non-existent in many developing countries and these countries lack the capacity to make use of existing systems in countries to which they could potentially export their works. Distribution channels, the access to which was recognized in the Montreal text as a crucial element in the

strengthening of domestic capacities, play a key role in this sector. A related matter is the concentration of distribution firms in developed countries which may result in a lesser exposure for developing country audiovisual works than might otherwise be the case.

14. Other elements relevant for consideration under this concept include the following: the role of preferential arrangements of a regional and/or language-based nature; the positive effects resulting from local personnel, training and ownership in the various audiovisual sub-sectors (e.g. production, processing, distribution, exhibition); the role of financial assistance in promoting cultural values and the international competitiveness of indigenous audiovisual firms; the role of co-productions; the role of the State in ensuring the quality and kinds of services available in the market.

(f) Safeguards and Exceptions

15. As with many other services sectors, safeguard measures relating to audiovisual services trade may relate to balance of payments problems and/or disturbances deriving from an unforeseen surge of imports. In the latter case, the application of safeguard measures might be difficult to contemplate with respect to trade through telecommunication systems for which a precise notion of the overall level of cross-border flows is often not available. The opposite is often true for audiovisual services trade through physical media (e.g. magnetic tape, videocassette, videodisc), and the need for the application of safeguard measures when the need arises. Regarding exceptions, relevant aspects may relate to the protection of public morals and order, safety, health and environment. In the view of some countries, given the nature and cultural content of audiovisual works, the need for an exceptions clause on audiovisual services trade might derive from the sanctioning of the adoption or enforcement of measures regarded as necessary to preserve cultural values and identity.

(g) Other Concepts

16. Other concepts which could be of relevance to trade in audiovisual services include subsidies. Subsidies to production of audiovisual works are quite common in many countries alongside other forms of financial support such as exemptions from income tax, loans and state guarantees for loans. In most cases such subsidies are reserved for national productions, though the accepted foreign content of a national production varies widely across countries. The granting of subsidies may be conditioned on a prohibition against their exhibition in certain media for a pre-determined period (e.g. cinema films on television). Subsidies to distribution and exhibition may also be conditioned on the diffusion of quality and/or national audiovisual works. A provision on subsidies could therefore have wide-ranging implications for the current practice obtaining in the sector around the world if it were to provide for a commitment towards the reduction and/or elimination of such measures. The effect of the application of a provision on subsidies to audiovisual services would depend on which individual measures might be affected - e.g. according to

whether they do or do not significantly distort competition in export markets.

III. Overview of existing international arrangements

(a) Co-production agreements

17. Official international co-production agreements are generally made under the terms of a treaty or an arrangement of less than treaty status between countries or an appropriate authority of the countries involved. In broad terms film and television co-production agreements or joint ventures involves a balance of responsibilities and local elements in terms of pre-production, in which the package (financing, director, cast, script, etc.) is put together; of production, i.e. the shooting of the film; and of post-production, comprising editing, sound mixing and printing of the film. In countries where producers lack the resources to make large budget productions, co-production and co-financing agreements among two or more countries are becoming a significant means of realising ambitious projects whilst undermining traditional notions of national content.

(b) Trade-related agreements

(i) OECD

18. The motion picture industry is the only service sector included within the framework of both GATT and the OECD Invisibles Code. The Code of Liberalisation of Current Invisible Operations also contains a number of exceptions to the general principles of trade liberalisation for audiovisual works. Annex IV to Annex A, entitled "Audiovisual Works"⁴, acknowledges the cultural character of the audiovisual industry and permits screen quotas and subsidies provided the latter⁵ do not significantly distort international competition in export markets.

(ii) EEC

19. The European Community Council Directive of 3 October 1989 on television without frontiers deals with the coordination of certain provisions laid down by law, regulation or administrative action in member

⁴See the decision of the OECD Council updating the Invisibles Code by amending item E of Annex A and Annex IV to Annex A of the Code of Liberalisation of Current Invisible operations in C(88)110(Final), 21 July 1988.

⁵Based on the recognition that the development of a domestic film industry is a legitimate social objective, the OECD national treatment instrument also lists a number of exceptions relating to this industry.

states concerning the pursuit of television broadcasting activities⁶. The Directive regulates the areas of: screen quotas for broadcast television, advertising and the remuneration of certain types of copyright owners.

(iii) Council of Europe

20. The Council of Europe, which over the years has produced a number of important texts concerning the communication of audiovisual works, has also finalised a text containing the European Convention on Transfrontier Television which has been harmonised with that of the European Community. The overall aim of these texts is that by March 1991 the European television viewer will have access to more television stations and a wider range of programmes, films and advertising, half of which should be produced in Europe⁸.

(iv) Canada - United States Free Trade Agreement⁹

21. During the FTA negotiations, Canada was conscious of the need to protect its "cultural industries". While the issue was not directly dealt with in the services framework, article 2005 in Chapter 20 specifically exempted enterprises engaged in: (a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibit of audio or video music recordings; (d) the production, distribution, or sale of music in print or machine readable form; or (e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and

⁶For the full text see the Official Journal of the European Communities, No. L298/23 of 17 October 1989. See also the Communication from the Commission to the Council and Parliament on audiovisual policy in COM(90) 78 final, 21 February 1990.

⁷Council of Europe, European Treaty series No.132, 5 May 1989.

⁸In October 1989 the United States requested consultations with a number of European countries and with the European Community concerning the European Convention on Transfrontier Television and the EC Directive on Television without Frontiers claiming that certain provisions could obligate those countries to take action that would violate the GATT. These issues have not yet been fully addressed or clarified partly because in the view of some GATT contracting parties television programming is a service and not a good and, it has been argued, as services trade rules are being negotiated now as part of the Uruguay Round, any action regarding broadcasting should await the outcome of the Round.

⁹This section is largely based on the analysis contained in the chapter by Peter Burn, "Professional Services and the Uruguay Round: Lessons from the Canada-U.S. FTA", in Trade in Services: Sectoral Issues, UNCTAD, Geneva 1989, pp.405-406.

cable television broadcast undertakings, and all satellite programming and broadcast network services. While the cultural industries were generally exempted, the United States insisted that the two countries retain the right to impose retaliatory measures of "equivalent commercial effect" in response to restrictive actions undertaken with respect to those industries¹⁰.

(v) Other relevant agreements

22. There are several institutions involved in international cooperation in the area of audiovisual services. These include the work of UNESCO, which has facilitated the circulation of cultural works, and the World Intellectual Property Organisation (WIPO) where six international conventions also promote the protection of authors' rights and related rights including the Berne, Rome and Brussels Conventions. Important regional bodies are the European Broadcasting Union (EBU) which has set up the Eurovision network and the Asia-Pacific Broadcasting Union (ABU) and the Ibero-American Television Organisation (ITO). In addition there are a number of relevant technical institutions and arrangements such as the ITU (International Telecommunications Union), and INTELSAT (International Telecommunications Satellite Consortium).

¹⁰ Article 2005: Cultural Industries states:

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided [elsewhere].
2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

The Canada-U.S. Free Trade Agreement, The Dept. of External Affairs, Ottawa, Copy 10-12-87, pp.296-297.