

The "cultural exception" in the World Trade Organisation (WTO): The basis of the audiovisual policy in Catalonia

Ramon Torrent

- *First, the article explains what the World Trade Organization (WTO) is, what the so called "cultural exception" consists of and the treatment the WTO gives to the audiovisual sector. Second, an analysis is made of the European Community and the Spanish State participation in the WTO, as well as the role played by Catalonia in this organization. The author, then, puts forward a reinterpretation or revision of the agreements and a strategy to follow. Finally, the most important matters are summed up.*

Introduction

The term "cultural exception" concerns the regulation governing audiovisual policies in the international trade liberalisation agreements adopted by the World Trade Organisation (WTO). Among other things, it comprises a temporary exemption to particular obligations on trade liberalisation in the sector (hence its name).

"Cultural exception" has made it possible to maintain promotional and protectionist activities involving local languages and cultures from non-mercenary points of view. "Cultural exception" is therefore the basis of projects formed to shore up the European and Catalan audiovisual sectors against the invasion of North American audiovisual content. Policies such as the European Community's MEDIA Prog-

ram, or the establishment of European film, television and song quotas are illustrative examples. These policies have made it possible to create and/or consolidate a Euro-pean audiovisual industry that transmits the region's own values.

Partly because of these measures, European demand for audiovisual content has evolved positively over recent years. Television fiction broadcast in the main European countries (Germany, France, the United Kingdom, Italy and Spain) has changed from being mainly US in origin to largely home-grown. In Catalonia, an example of changing preferences was the replacement of US series *Dallas*, broadcast during the early years of TV3 to attract mass audiences, with locally produced sitcom *Plats Bruts*. The cultural differences this change involves are more than considerable.

1. Introduction to WTO. Features that comprise "cultural exception" and the treatment the audiovisual industry receives in WTO.

1.1. WTO.

The World Trade Organisation (WTO) is an international organisation that emerged from the round of negotiations begun in 1986 in Uruguay, within the framework of GATT (the General Agreement on Tariffs and Trade). As well as WTO and a new GATT, the Uruguay Round (1986-1993/94) also led to other agreements, such as GATS (the General Agreement on Trade in Services).

1.2. GATT.

GATT was created in 1945-47 as an instrument for preventing the trade wars between capitalist blocks that had created the breeding ground for World War II and aggravated the Great Depression of the 1930s. These trade

Ramon Torrent

Chair professor of Political Economics at the University of Barcelona

Director of the Observatory of Globalisation

torrent@eco.ub.es

wars were fought with two types of measures:

- Monetary (restrictions on international payments and competitive devaluations).
- Directly trade-based (restrictions on imports and subsidies for exports).

The International Monetary Fund and its exchange-rate system endeavoured to set a framework and limit the use of the first type of measure, while GATT aimed at doing the same with the second.

GATT established two basic principles in order to meet its aims:

- Multilateralism
- Progressive liberalisation, including a series of exceptions.

Multilateralism referred to the "architecture" of the international trade system and endeavoured to overcome the "block capitalism" that had characterised the world from 1870 to 1945. Until World War II, the big European powers (followed by the United States and Japan) had set out their own areas of influence, with a clear risk of conflict among them.

To prevent a return to that situation, GATT was dedicated to the principle of multilateralism under the notion of the "most-favoured-nation clause". This clause makes it possible to restrict importing foreign products, but all foreign products must be treated in the same way, regardless of their origin. For example, if Spain applies particular measures (favourable or otherwise) to importing coffee from Colombia, it is in principle obliged to apply the same measures to any other WTO Member State for that product. In other words, it cannot discriminate between foreigners (although it does not have to treat foreigners the same as Spaniards).

Liberalisation of international trade is treated in GATT on the basis of the principle of progressive deregulation. This is aimed more at preventing deregulation from slowing down than promoting it. In effect, what is guaranteed is that the degree of liberalisation that each country accepts is "consolidated" within a schedule of commitments. Each State can apply a more deregulated system than the one set out in the schedule, but not a less deregulated one. This is to prevent the use of the increasingly more protectionist measures and countermeasures that characterized the trade wars of the period between the two World Wars. On

the other hand, advances in liberalisation are left to successive rounds of negotiations, the results of which are not negatively impacted.

This brief introduction involves an important political conclusion: all evaluation made about GATT and the process of international trade liberalisation (either positive or negative) *necessarily* has to be combined with an analysis of GATT's ability to:

- Limit unilateral actions by the "big powers"
- Limit the risks of "block capitalism" and trade wars
- Provide legal transparency and security to the system of international goods trade.

Any (possibly critical) view of GATT that left out this second analysis would clearly be incorrect or at the very least unbalanced.

1.3. WTO Agreement on Services: GATS.

The Uruguay Round developed negotiations not only within the sphere of goods trade (GATT) but also trade in services (GATS). GATS has a broader scope than GATT (which only deals with export and import goods) as it involves both trade and service providers if the provider is foreign or controlled by foreigners.

For example, not only can GATS regulate international trade in computer software, it can also determine the legal conditions of a US firm's subsidiaries selling software abroad (as a service provider controlled by foreigners).

As well as the general obligations subject to exemptions, the States that signed GATS agreed to observe specific obligations. The main two were:

- Liberalisation of access to domestic markets and
- Obligation to give national treatment to companies or service providers from other States once they had entered the domestic market.

Continuing with the example used earlier, if a WTO Member State has accepted specific obligations in the computer industry,

- It cannot discriminate between a US software firm and a domestic one
- It has to guarantee free access to the domestic market
- Once the foreign software firm has entered the domestic market, it has to receive the same treatment that a company in the same sector that was owned or run by nationals would receive.

1.4. The audiovisual industry within GATS. Results of the Uruguay Round.

The broad scope of the GATS agreement, welcomed by developed countries, ran up against peculiarities in a number of particular sectors. The most important example (and therefore extremely relevant) was the air-transport industry, a sector that is strongly regulated from the point of view of internal regulation and the object of a network of bilateral agreements between States that runs totally against the principle of multilateralism. This sector was excluded from the scope of application of the GATS agreement and so, in applying what we could call the "Air Exception", the US continued to have its own internal legislation that limited foreign stakeholdings in airline companies to 25%.

It became clear during negotiations in the Uruguay Round that the audiovisual industry and cultural sector in general was another problem area that required a particular treatment within the framework of GATS. At least, that was the position of the European Community and its Member States, led by France and a number of other countries (Belgium, in particular, where issues relating to language have great political and legal/constitutional importance).

The request for particular treatment was obviously based on political arguments, i.e., the role of culture as a sector where strictly economic considerations should be subordinated to other political and social considerations. These arguments were backed up by others based on the unforeseeable effects of technological change in the sector, which made it wise to act with caution when it came to accepting international obligations that may have to be applied to a future reality impossible to predict (arguments which also supported prudence in the telecommunications sector, where deregulation negotiations were only to be concluded later, in 1997).

There were two theories about the way to obtain this particular system of treatment:

- one based on cultural **exception**
- the other based on cultural **specificity**

Cultural exception was defended by France and based on excluding culture from the scope of application of the GATS agreement. One way would be to introduce a section referring to culture into Article XIV ("General Exceptions") as per references to public morals and public order, human,

animal or plant life and health or the effectiveness of tax imposition. Another way would be to include an article specifically authorizing the adoption of cultural policy measures even if they contravened the agreement, in the same way that Article XIV ii) did with regard to security. A third way would be to include a specific annex in the GATS agreement, as per the formula used in the case of the air-transport industry mentioned previously.

Cultural specificity was defended mainly by the European Commission and the Commissioner responsible for Negotiations, the UK's Leon Brittan. He essentially argued that leaving the audiovisual industry out of GATS would be to abandon it to "the law of the fittest" without multilateral regulations to restrict it. He upheld that it was better for the cultural sector to remain within the scope of application of GATS as long as it was guaranteed "specific" treatment recognizing its particular features. However, details on what this specific treatment would involve were never made clear.

Discussions about the treatment of the audiovisual sector within GATS went on almost to the end of the round of talks, until December 1993. The definitive solution ended up being neither "cultural exception" or specificity, which both required the inclusion into GATS of a specific provision with regard to culture. The situation was solved in two ways:

- On the one hand, the European Community and Member States would not adhere to specific liberalisation obligations in terms of market access and national treatment. They did not commit to giving free general access to foreign audiovisual companies and reserved the right to discriminate in favour of companies from countries that spoke the same language and had similar cultures (e.g., French-speaking countries in France, Spanish-speaking countries in Spain).

- They would include sector-related measures in the list of exemptions to the most-favoured-nation clause. This measure would be regulated by Article II of GATS, which imposed non-discrimination among foreigners, except in cases where an exemption agreement had been reached. The official Spanish version of the agreement reads that it is possible "to maintain an incompatible measure as long as that measure is listed in the agreement concerning Exemptions to the Obligations of Article II and meets the conditions established in it". This list of exemptions effectively includes culture and, as such, the audiovisual

sector. But the Annex to the GATS agreement that regulates these exemptions (**and this is the main point**) establishes that it refers to temporary exemptions. Point 6 of the Annex says: "In principle, these exemptions should not exceed a period of 10 years. In any case, they shall be subject to negotiation in subsequent rounds of trade liberalisation".

In summary:

- GATS provisions on liberalising trade in services apply to culture and the audiovisual industry in the same way as any other service sector.

- The so-called "cultural exception" therefore does not exist.

- There can thus be no new protectionist measures in the audiovisual sector that discriminate between non-EC foreigners (favouring, for example, third countries with a same language or similar culture). On the other hand, measures that already exist should not "in principle" exceed 10 years and, in any case, be subject to future negotiation.

- What this means for the future is that no member of WTO will be able to refuse to negotiate the liberalisation of the audiovisual industry. The sector is already included in the GATS agreement and no member can oppose the US, for example, from making it a point to raise in future negotiations. It is important to remember that the audiovisual sector is the second-biggest industry in terms of export volume in the United States.

1.5. The audiovisual industry in GATS. The perspective from 2004.

The results of the Uruguay Round made it possible to "preserve" the legislation of the Community and Member States in terms of the audiovisual industry. However, the "defensive" result failed to constitute a victory for the supporters of either "cultural exception" or specificity. Rather, because the idea behind GATS (in which it coincides with GATT) is not so much that of immediately forcing profound liberalisation (the process has been under way in GATT for more than 50 years and is still not finished), but creating a framework for making headway progressively. From that point of view, there is no doubt that it was the US that imposed its ideas on the Uruguay Round – the audiovisual sector should be included in future deregulation processes as per any other sector.

It is in terms of the future that the US's victory can be most

clearly appreciated:

- At the very least, the inclusion of the audiovisual industry in GATS gives the US an extraordinarily valuable weapon to use against countries or regional blocks interested in maintaining protectionist measures in the cultural sphere. In effect, every time a deregulation demand is made in other sectors where the US upholds protectionist policies (from anti-dumping through to the system of airline ownership), the US could respond, "What about your protectionist measures in the audiovisual industry?". This argument would not be possible if there truly was a "cultural exception"

- It opens the way for the US to continue to promote a strictly "mercantile" view of the audiovisual sector without other countries being able to respond that this sector is "specific".

It is also worth pointing out that the 10-year term established under GATS for cultural exemptions is set to end "in principle" in 2004. At that time, we will enter the really decisive phase of the negotiations that began in Doha (Qatar) in 2001, with the expectation that the Ministerial Conference of Cancun (Mexico) will reconfirm the agenda in the second half of 2003.

In 2004, the United States will have very solid arguments for retaking the offensive for dismantling European policies protecting the audiovisual sector. To begin with, it could demand that its productions and producers receive the same treatment as those of any other non-EC country. This equality of treatment would herald the end of preferential measures for third countries with the same language (e.g., from Spain to other Spanish-speaking countries, or from France to French-speaking countries) or a similar culture (e.g., the measures agreed to among all the countries of the Council of Europe, regardless of whether they belong to the European Union).

It is therefore clear that the audiovisual industry is set to constitute a key issue of negotiation within WTO.

2. Participation by the European Community and the Spanish State in WTO. The role of Catalonia.

2.1. WTO: an organisation and agreements based on negotiation.

In order to establish a future strategy for the audiovisual

system in the context of WTO and to correctly identify the parties involved, the first important step is to put paid to the idea that WTO is an organization that unilaterally imposes obligations on its Member States.

Three essential facts should always be borne in mind:

- WTO agreements, including GATS and the treatment the audiovisual industry receives, came about from a round of negotiations carried out over seven years (i.e., therefore not "surprising developments") and were ratified by parliaments (the European Parliament in terms of the European Community and the Spanish Parliament in terms of Spain) and therefore have an indisputable democratic legitimacy.

- The organizations that made these decisions within the framework of WTO were composed of representatives of democratically elected governments, including the Spanish Government. In many cases these decisions had to be ratified by parliaments and in other cases they did not (e.g., the entry of new Members, such as China), but in any case it was the representatives of the governments and not the bureaucrats of WTO itself that made the decisions.

- WTO has a nature and a working mechanism very different from those of other international organizations (e.g., the International Monetary Fund (IMF)). Two very important differences are:

- While in the IMF the Members' voting rights depend on their stake in the capital (and only the United States has more than the 15% needed to block the most important decisions), each Member State in WTO has one vote and therefore, at least from the legal point of view, India, Brazil or China are just as important as the United States.

- In the IMF, the organization's bureaucracy has a great deal of autonomy and *de facto* power. That is not the case with WTO, which is much more members-driven and where the staff of the Secretariat have much less power and are limited to more "secretarial" functions.

2.2. Participation of the European Community and its fifteen Member States in WTO.

The European Union is not a member of WTO, but the European Community and its 15 Member States are, according to their respective authorities. The European Community ensures the obligations imposed under WTO agreements in the areas in which it has authority are met (e.g., the MEDIA program). In the other areas, it is the

Member States who take responsibility for these obligations.

The Nice Treaty modified the delimitation of authority between the Community and its Member States, but upheld the authority of the Member States in the specific sector of the audiovisual industry. In effect, the new section 6 of Article 133 of the Treaty establishing the European Community explicitly states: *"Notwithstanding the matters set out in the first paragraph of section 5, agreements in the area of cultural and audiovisual services...shall be the shared authority of the Community and its Member States. As such, negotiation of these agreements shall require....the common agreement of the Member States as well as a Community decision. Agreements negotiated this way shall be jointly celebrated by the EC Community and the Member States"*.

In short, despite what is commonly thought, negotiations with WTO are not "an exclusive issue for Brussels" but also an issue for Spain. The Spanish State is still a Member of WTO, it still takes responsibility for some of its obligations (in particular, in terms of services), it will continue to have authority in future negotiations and, in the long term, will have to approve (also on its own authority) new agreements that result from negotiations if, as expected, these agreements deal with issues (in particular in terms of audiovisual services) where Spain continues to have authority.

2.3. The role of Catalonia in WTO.

Cases such as that of Hong Kong, an independent customs territory although not a sovereign State, have shown that sub-central levels of government cannot participate in their own right in WTO. However, this absence of participation should not be confused with the completely different issue of States being able to accept the obligations that arise from WTO agreements differently according to their different levels of government.

It should therefore be no surprise that States with a long-running federal tradition, such as the US or Canada, take advantage of this possibility of differentiating between states, regions and provinces (sub-central levels of government) with regard to the commitments undertaken by their State (federal) governments.

In the specific example of the audiovisual industry, the list of exemptions under Article II of GATS is especially signifi-

cant in Canada where, as well as exemptions valid for the whole country, there are provisions that refer only to Quebec. These provisions make it possible to apply a more favourable treatment to productions from French-speaking countries over ones from other countries. Quebec therefore has a specific system within the framework of the GATS agreement.

The conclusion to draw from these provisions is clear: there is no legal obstacle stopping the Spanish State (or the European Community in the sphere of its own authority) from giving differential treatment to Catalonia with regard to particular aspects of GATS, such as the audiovisual industry.

2.4. Who is the spokesperson for the European Community and the Spanish State in WTO?

To refine the strategy to use in future negotiations in WTO, it is important to know the roles played by the European Community and Spain. In practice, following the line of not defining authority, all matters are treated as if they were covered by the authority of a hypothetical "European Union" which is a member of WTO and to which both the Community and Member States are subject. All sixteen representations (the Community and 15 Member States) are gathered together under a single spokesperson: the highest-ranking Commissioner or EC bureaucrat present. In principle, the Commissioner and Directorate-General of Trade are responsible for all negotiations and not the different commissioners or sector-based General Directorates (e.g., for Culture, in relation to the audiovisual industry). The key person today in the Commission for all WTO-related matters, including audiovisual issues, is the Commissioner for Trade, France's Pascal Lamy, interviewed in this issue.

However, the fact that the European Commission is the only spokesperson for the Community and Member States in WTO does not subtract from the importance and decision-making responsibility of the States or the Community itself, as these will be the organizations that finally have to approve (or reject) any new agreements that could be reached in the future. The Spanish Government therefore continues to be responsible for WTO-related matters (in particular relating to the audiovisual industry) in two senses:

- As a member of the Council of the European Union,

which has to approve (or reject) future agreements negotiated in the name of the Community,

- In its own right, in that the Spanish State still has authority over audiovisual matters.

Similarly, it will be the Spanish Parliament that will have to ratify any future agreement.

3. Future proposals

3.1. WTO agreements have to reinterpreted or reviewed.

Since the agreements from the Uruguay Round have begun to apply, an important number of developing countries (DCs) have made increasingly strident calls for the need to review the content of the agreements, which come down greatly in favour of the interests of developed countries. In formulating these calls, DCs often openly recognize that the very complexity and technical difficulty of the agreements led to mistakes being made with regard to content and implications, which were only discovered later.

In the discussions prior to the opening of the new round of negotiations at Doha (Qatar), it appeared there would be a clear division between developed and developing countries on the issue of reinterpreting or reviewing WTO agreements. However, that was not the case, at least in terms of the audiovisual industry. In their initial positions at least, developed countries like France and Belgium uphold the need to recognize the specificity of the sector and be able to establish a review of GATS or at least a reinterpretation of some of its provisions. In particular, they are expected to defend that the expression of paragraph 6 of the Annex on Exemptions to the Obligations of Article II (*"in principle, these exemptions should not exceed a time period of 10 years"*) does not mean that, in principle, the protection offered by these exemptions should disappear at the end of ten years.

This situation clearly has positive implications: a discussion in WTO would not have to involve a general showdown between developed and developing countries. With regard to the audiovisual sector, the so-called "cultural exception" could find supporters in countries such as India or Egypt, which are sensitive to these issues. It is therefore important to think that the arguments for defending the

specificity of the audiovisual sector are similar to the ones used to defend the education sector (also covered by GATS); and, at the end of the day, involve a certain vision of the relationship between political and market powers that could be applied to many other economic sectors.

These arguments could furthermore be justified by the fact there is an air-based exception (and, in part a sea-based exception). If the parties concerned find these exceptions reasonable, why should a "cultural exception" be any different?

3.2. Towards orientating a strategy.

It seems clear that, if we want to review the audiovisual system within GATS in line with a greater recognition of its specificity, it is important to move both in the direction of social movements and public opinion (which, in general, would be receptive to the idea) as well as that of the politicians involved.

With regard to the political sphere, it is essential to begin with what we have closest to hand within the framework of the Spanish constitutional legal system: the institutions of the Generalitat of Catalonia on one hand, and local authorities and universities on the other. A first target to reach would be getting the most unanimous position possible within Catalan society in favour of WTO agreements not imposing obstacles on the definition and execution of public policies in the audiovisual sector in Catalonia. The Catalonia Broadcasting Council has used facts and figures before to show how important the audiovisual sector is in our country. It could use this to get both the Spanish State and the European Community to take up this position.

There is a happy convergence of activities that involve public opinion. As indicated previously, GATS has provisions for certain protectionist measures involving cultural identities which (in principle) will disappear in 2004, when the first World Forum of Cultures is due to be held in Barcelona. The Catalonia Broadcasting Council therefore presented a proposal to the Forum aimed at debating the conditions necessary for cultural diversity in the audiovisual sector with guarantees for all the peoples of the world. To that end, the Council proposed organizing an international conference supported by all the organizations that regulate audiovisual industries. The proposal was accepted and

presented to the Parliament of Catalonia last May when the Council appeared before the current Control Commission for CRTVC and associated companies.

This International Conference of Regulatory Organisations in the Audiovisual Industry would also aim at collaborating in the spirit of the Forum and the values behind it, including cultural diversity. For that reason, we would like to propose a lively and participatory discussion of the "cultural exception" as one of the basic tenants of the new 21st century.

4. Summary – conclusions.

The audiovisual industry and WTO

- The "cultural exception" has made policies that promote and protect the European and Catalan audiovisual sectors against the invasion of North American audiovisual content possible. Policies such as the European Community's MEDIA program or the establishment of European cinema, television and song quotas have been possible thanks to the "cultural exception". These policies have allowed the creation and/or consolidation of a European audiovisual sector that transmits the region's own values.

- GATS is the World Trade Organization (WTO) agreement regulating international trade in services, including cultural services. The agreement, which was signed in 1994, does not establish that culture is an "exception" within the liberalisation commitments signed by the Member States of WTO.

- This means that, legally, and despite what is commonly believed, the "cultural exception" does not exist, because the provisions for deregulating trade in services as set out under GATS applies to culture and the audiovisual industry in the same way as any other service industry (finance, telecommunications, audits, etc.).

- For now, GATS makes it possible to continue to apply national and Community measures to protect and promote the audiovisual industry. However, measures that discriminate among non-EC foreigners (e.g., that favour productions from third countries with a same language or culture) will disappear, in principle, in 2004 (or will have to be extended to all countries, including the United States).

- In November 2001, WTO opened a new round of

negotiations, which will be activated in 2004, to negotiate international trade liberalisation. As the cultural sector is included within GATS, no member of WTO will be able to demand that negotiations not include the audiovisual industry.

- This means that countries interested in deregulating the audiovisual industry, such as the United States, will have very solid arguments for claiming that the preferential treatment the European Community reserves for European productions and producers be extended to their own audiovisual productions and producers. In other words, Europe will no longer be able to protect the sector.

- The application of WTO agreements would suggest that it is appropriate to reinterpret and review them. With regard to the audiovisual industry, this review could find supporters in countries such as India or Egypt, which are sensitive to this issue.

The European Community, the Spanish State and Catalonia in WTO

- Member States continue to be members of WTO, together with the European Community, according to their respective areas of authority.

- Within the framework of WTO, the organization responsible for decision-making is made up of representatives of governments, including the Spanish Government. The agreements and decisions taken usually have to be ratified by parliaments (the Spanish Parliament with regard to Spain, and the European Parliament with regard to the European Community). Decisions are never taken by the bureaucrats of WTO itself, but rather by government representatives.

- In the framework of WTO, the negotiator in the name of the European Community and its Member States is the European Commission. Within this, the parties directly responsible are the Commissioner for Trade, France's Pascal Lamy, and the Directorate-General of Trade.

- However, the fact that the European Commission is the only spokesperson for the Community and the Member States in WTO does not subtract from the importance of the decision-making ability and responsibility of the Member States and their Governments, whether in their own right or as members of the Council of the European Union.

- With regard to the role Catalonia could play in the

process, it is essential to know that the obligations that result from WTO agreements could be accepted by the States differently according to their different levels of government (central and autonomous).

- States with a long-running federal tradition, such as the United States or Canada, also take advantage of this possibility of differentiating between states, regions and provinces (sub-central levels of government) with regard to the commitments undertaken by their State (federal) governments.

- For example, Quebec enjoys a specific exemption provided for under GATS with regard to the audiovisual sector that allows it to have its own policy different from that of the other provinces of Canada, and different from the policy of Canada as a State.

- The conclusion to draw from these provisions is clear: there is no legal obstacle stopping the Spanish State (or the European Community in the sphere of its authority) from giving differential treatment to Catalonia in relation to particular aspects of GATS. Catalonia could enjoy a specific and differentiated treatment in relation to the commitments established in WTO.

Translated from Catalan by Lynda Trevitt