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CINEMA, CULTURAL DIVERSITY AND THE GLOBALIZATION PROCESS



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INTRODUCTION

Film making is an industry, but also an art¹. As such, it expresses values, contents and ways of life which are part of a cultural identity. It also reflects the diversity of creativity through different countries and societies. This creativity needs to be supported because of the threat of a world becoming more and more standardized. The support of diversity in cinema is for example realized through subsidies given to original works that would otherwise not exist without such a financial aid.

The globalization process being undertaken by the World Trade Organization aims at the elimination by the States of economical barriers through a free trade of all production factors². The Uruguay Round, started in 1986, wanted to liberalize the international trade of services in the same way that it had been done with goods. Film is an audiovisual service. At the end of the Uruguay Round, the General Agreement on Trade in Services was established. Nevertheless, the European Union expressed concern that enforcement of the General Agreement on Tariffs and Trade principles - in particular Most-Favoured-Nation and National Treatment rules – on services as well as on copyright protected products would undermine their unique cultural status, in favour of their commercial aspects.

The notion of cultural exception appeared during the GATS negotiations: European Member States did not offer to liberalize services in certain cultural sectors and included a series of MFN exceptions to the agreement, five of them in the audiovisual field³.

Indeed, the European film industry (and in particular the French one) survives due to import restrictions and other support mechanisms facilitated by certain public institutions. If subject only to commercial considerations, many local industries would be quickly replaced by those with greater financial muscle due to their multinational presence and monopoly position. Indeed, audiovisual services are the second domain of exportation of the United States (after aeronautics) and nobody can contest the fact that American films control our screens (in 1994, American cross-border exports including affiliated trade of audiovisual services, were about \$16.120 million, while imports only \$136 million⁴).

¹ Famous citation of André MALRAUX “Le cinéma est un art, c’est aussi une industrie”, in *Esquisse d’une psychologie du cinéma*, 1940, Paris, Gallimard, 1946 [republication in *La nouvelle revue française*, mai 1996, pp. 4 - 19]

² Preamble of the Marrakesh Agreement establishing the WTO, para 3 and 4.

³ Trade in Services - European Communities and Their Member States - Final List of Article II (MFN) Exemptions. GATS/EL/31. 94-1115. 15 April 1994.

⁴ Study on International Flows of Cultural Goods, 1980-98, Paris, UNESCO, 2000.

The growing importance of cultural goods has to be emphasized. In 2000, UNESCO studied the growth rate of the international trade of culture goods and services: *“Trade in cultural goods has grown exponentially over the last two decades. Between 1980 and 1998, annual world trade of printed matter, literature, music, visual arts, cinema, photography, radio, television, games and sporting goods surged from US\$ 95.340 to 387.927 million. Yet most of that trade was between a relatively small number of countries. In 1990, Japan, USA, Germany and UK were the biggest exporters, with 55,4% of total exports. Imports were also highly concentrated within the United States of America, Germany, United Kingdom and France accounting for 47% of total imports. There are, however, new players in the scenario: by 1998, China was the third most important exporter, and the new “big five” were the source of 53% of cultural exports and 57% of the imports”*⁵.

The notion of “cultural exception” sounds slightly negative because of the term “exception”, which is not adapted to the idea of a world full of diverse creativity. Furthermore, the “cultural exception” was known to be a “French exception”, which a lot of Members of the European Union did not appreciate. That is why it turned into the notion of “cultural diversity”, which is a more powerful and positive concept, and one which is adapted to the international context. Diversity means that all cultures are equal, and that there is no dominant culture. The French ex- Minister of Culture, Jean-Jacques AILLAGON, considers that cultural diversity “represent a principle, a conviction that we have to share with other countries in Europe, but also with the rest of the world. The cultural diversity must become a common attitude, it guarantees the diversity and the abundance of cultural expressions.”⁶

First of all, the history of “cultural exception” is a clash between two concepts of cinema. For the United States, films are pure entertainment. For the European Union, cinema also has a cultural dimension. But currently, this clash concerns all countries which want to keep alive the expression of their culture through the cinema. These countries are numerous: India and Korea for example, having a very important national film industry which has a great success to the local population. African as well as South American films have great artistic potential that needs to be supported in order to give them a chance to exist and to last. All these cultural identities won’t exist anymore if they become part of the globalization process. Therefore, all countries have to unite and support the protection of cultural diversity in cinema.

The subject area under consideration is rather extensive. For that reason, a limited but refined scope is proposed. The concept of “globalization” regarding services will mostly deal with GATS, even if the Multilateral Agreement on Investment (MAI) will also be shortly discussed. Otherwise,

⁵ Study on International Flows of Cultural Goods, 1980-98, Paris, UNESCO, 2000.

the importance of “international copyright” regarding films will mostly deal with the recent issues in copyright. Nevertheless, we will also refer to some relevant international treaties in copyright.

The general objective of the proposed research is to examine the future of the cultural diversity of cinema through the GATS and the TRIPS Agreement, that is to say as a service and as a work protected by copyright.

The specific objectives of the research are to:

- a) Digest the history of audiovisual services in the WTO system through the “cultural exception”
- b) Demonstrate the role of South Africa in the future of cinema, in relation to the globalization process
- c) Examine the legal framework of the WTO regarding films
- d) Critically analyze the arguments for and against the admission of audiovisual services in the GATS
- e) Investigate the importance of international copyright concerning cultural diversity in cinema
- f) Make recommendations for the conservation of cultural diversity in cinema, that is to say in order to keep a freedom of cultural expression.

Consequently, this paper will present the history of the whole issue of cultural diversity in films (Chapter I) and will explain the legal framework of the WTO regarding audiovisual services (Chapter II). Then, it will set out two different cinema industries: the European one (Chapter III) and the South African one (Chapter IV), in order to emphasize the role of South Africa in the globalization process. And finally, the new stakes of cultural diversity will be exposed (Chapter V), these mostly concern the importance of copyright in the protection of cultural diversity.

The implication of cinema in the process of globalization concerns every country valuing the importance of cultural diversity. In light of the above, the issue meriting investigation is whether the propagation of globalization in the cinema is going to be positive regarding the diversity of national cultures in films.

⁶ ZERBIB (D.), interview with J.J. AILLAGON, *L'Humanité*, 18 janvier 2002.

CHAPTER 1. The origins of “cultural diversity”

1. The opening of negotiations on services

The General Agreement of 1947 was not to be an international organization but an Agreement on Tariffs and Trade⁷. It was concluded after the end of the Second World War, in the context of a liberalized international legal order already based on free trade principles.

The GATT 1947 has different sources⁸ and took form progressively, starting from the meeting between Roosevelt and Churchill in August 1941, and subsequently from the Atlantic Charter that expressed the principle of “equal access to trade and raw materials”⁹ and the famous Mutual Aid Agreement of February 1942. In the terms of this last Agreement, the United States accepted to support the war effort of Great Britain promptly and in return, Great Britain made commitments regarding the liberalization of international trade. The objective consisted already in “the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers”¹⁰.

Those stages should have led to the creation of the International Trade Organization as they led to the creation of the International Monetary Fund and the World Bank, as part of the Bretton-Woods conference of July 1944¹¹. The statutes of the ITO were established through the adoption of the Havana Charter in 1948¹². But this treaty, which aimed to create the third pillar of the neoliberal order beside the monetary and the banking pillars, never came into being. Indeed, the United States found the provisions of the treaty not enough free trade oriented¹³.

In the meantime, the GATT had been concluded in Geneva in 1947. The establishment of Trade Rounds since 1957 aims to complete the sphere of competence of the GATT which was initially very small. The Rounds first dealt with tariffs, and then, from the Kennedy Round (1963-1967), they tried to extend the free trade philosophy to other domains. The Round that generated the notion of “cultural exception” was the eighth Round. It opened in Punta del Este in 1986 and was called Uruguay Round. The Uruguay Round resulted in an overall Agreement which was signed in

⁷ JACKSON, JH. (1998). *The World Trading System - Law and Policy of International Economic Relations*. 2nd Edition. Massachusetts. p. 38.

⁸ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 12.

⁹ Atlantic Charter, para 4. <http://usinfo.state.gov/usa/infousa/facts/democrac/53.htm>

¹⁰ Mutual Aid Agreement, Article 7. <http://www.ibiblio.org/pha/policy/1942/420223b.html>

¹¹ JACKSON, JH. *op cit.* p. 36

¹² JACKSON, JH. *op cit.* p. 37.

¹³ REGOURD, *op. cit.* p. 13

Marrakech on the 15th April 1994, to which are attached four Annexes. The Annex 1B contain the General Agreement on Trade in Services (GATS)¹⁴.

The Uruguay Round was particularly innovative since it engaged for the first time negotiations about services¹⁵. From the seventies, the United States militated in favour of the introduction of services in the future negotiations because of their economy, which is mostly composed by service companies. A study made by the Coalition of Services Industries considered that the developed countries were at the dawn of a very important mutation and showed that the exchange of services would become more and more important in the trade flows¹⁶.

This study strengthened the United States position in the idea that a negotiation about services was necessary. Nevertheless, some industrialized countries like Japan, Canada and the European Union did not immediately agree with such negotiations. They argued that services have a very complex nature which could not lead to a homogeneous agreement, and that specialized international organizations seemed more appropriate to manage the liberalization of free trade in services¹⁷.

However, it was the developing countries that were the most reluctant to negotiate. In fact, the trade of services was dominating in developing countries: it represented 60 to 70% of their GDP and used more than 50% of the active workforce¹⁸. The idea of negotiating in services was too premature and the information was not clear enough. Some areas, excluded from the GATT and very important for developing countries (textile and agriculture for example), were still in abeyance. This negotiation on services could be a risk and put important files in a secondary position.

Thus, during the Ministerial conference of the GATT in 1982, the European Union and the developing countries refused United States propositions. After bitter clashes, the developed countries readjusted their position and so did the developing countries¹⁹.

Nevertheless, negotiations on services were only possible through the adjustment of the General Agreement. The General Agreement of 1947 was meant for goods and not for services. Consequently, the participants of the negotiations asked themselves if the fundamental principles of the General Agreement applied to services as well, that is to say, the MFN principle, the National

¹⁴ The WTO Secretariat. *Guide to the Uruguay Round Agreements*. (1999). Kluwer Law International, World Trade Organization. p. 161.

¹⁵ The WTO Secretariat. *op. cit.* p. 161.

¹⁶ AMIEL, F. (1999). *L'exemption culturelle*. Thèse de l'Université Pierre-Mendès France Grenoble II. p. 260.

¹⁷ Ministerial Declaration of 20 September 1986 at Punta del Este, reprinted in *GATT Activities* 1986, 15.

¹⁸ CARREAU, D. and JUILLARD, P. (1998). *Droit international économique*. LGDJ. 4th Edition. p. 314.

¹⁹ AMIEL, F. *op. cit.* p. 261.

Treatment principle and the Transparency principle²⁰. But first of all, the countries searched for a definition of services.

The developing countries and the developed countries clashed with the question to define or not the notion of “service” before negotiating on the modalities of its trade²¹. Service concerns a lot of activities. It can be transports, as well as banking services, tourism, telecommunications or cultural services²².

First the OECD bypassed this annoyance by establishing lists and did not define the concept of service. This lists were limited and needed a constant updating in order to avoid that new services face a legal gap. But services were evolving too fast, that is why this system has been abandoned²³.

The adaptation of the GATT principles to services was very difficult. The MFN principle sets up the basis of the multilateral system as far as goods are concerned. Therefore, it was at the height of the negotiations. A lot of countries did not agree about the fact that this principle should be unconditional, because of the risk of a phenomenon of “free ride”²⁴. It was proposed that the MFN principle should only be applied to the countries that joined the Agreement on services. But this condition went against the Non-Discrimination principle established by the GATT²⁵.

An adaptation of the National Treatment principle for services could diminish the importance of the MFN principle. Indeed, “the National Treatment principle sets up the natural complement of the MFN principle in order to give effect to the fundamental principle of Non-Discrimination, which has to govern in national trade”²⁶. Developing countries were really hostile to this provision because of the different levels of development. To apply the same rules to foreign companies in their own country could have had disastrous consequences²⁷.

Finally, the Transparency principle is inapplicable to services, because of their particular nature. Services are imperceptible and subject to invisible subsidies and non-tariffs barriers. The lack of transparency is a principle in services, and that can be very harmful for trade. Facing this problem, the States proposed that “the governments should be authorized to comment on the legal modifications made by the member States”²⁸.

²⁰ JACKSON, JH. (1998). *The World Trading System - Law and Policy of International Economic Relations*. 2nd Edition. Massachusetts. p. 307.

²¹ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 13.

²² GATT Uruguay Round Document MTN.GNS/W/120 of 10 July 1991, including a Services Sectoral Classification list of approximately 122 or more sectors.

²³ AMIEL, F. (1999). *L'exemption culturelle*. Thèse de l'Université Pierre-Mendès France Grenoble II. p. 261.

²⁴ LUDEMA, RC. MAYDA, AM. (December 2004). *Do Countries Free Ride on MFN*. Georgetown University. p. 2 : <http://www.georgetown.edu/faculty/wgj/LudemaMayda04.pdf>

²⁵ REGOURD, S. op. cit. p. 14.

²⁶ CARREAU, D. and JUILLARD, P. (1998). *Droit international économique*. LGDJ. 4th Edition. p. 235.

²⁷ CARREAU, D. and JUILLARD, P. op. cit. p. 235.

²⁸ AMIEL, F. op. cit. p. 276.

Thus, the adaptation of those three fundamental principles to services demonstrated the first divergence of opinion between countries, especially between the developing and the developed countries.

2. The general frame of the GATS

The Uruguay Round succeeded in developing The GATS, which concerns the entire landscape of services trade. The GATS embraced the traditional GATT concepts²⁹, but had to adapt those concepts for the new domain of services.

Besides, the GATS “leaves a great deal open: one can argue that there should be at least fifty years of ongoing negotiations about service concessions, and some of these negotiations will probably never end”³⁰.

Three parts are really important in the GATS: First, *Part II*, which lists a series of fifteen “General obligations and disciplines”, such as the MFN and the transparency principles and a number of exceptions such as safeguards, unfair trade or national security. Then, *Part III* is entitled “Specific commitments” and establishes the framework for a schedule of commitments from each member. Finally, *Part IV* deals with “Progressive liberalization” the organization of the negotiations on future commitments.



The general obligations are only applicable if the Member States have subscribed to specific commitments on liberalization: this core of the GATS only applies to the offers of liberalization proposed by each Member. Thus, the area of offers defines the material impact of the “General obligations” for trade in services³¹. These specific commitments are sector-based authorizations that allow the Members to reach national markets. The lists of specific engagements³² established by the Members show us the degree of commitment of the Members and consequently the reality of the GATS as well. The negotiations about audiovisual services were quite tough and lead to a clash mostly between the European Union and the United States.

GATS applies to “any service in any sector except services supplied in the exercise of governmental authority”³³. Therefore, it also applies to audiovisual services but only if the Members make a specific commitment in this sector.

²⁹ MFN, National Treatment...

³⁰ JACKSON, JH. (1998). *The World Trading System - Law and Policy of International Economic Relations*. 2nd Edition. Massachusetts. p. 307.

³¹ CARREAU, D. and JUILLARD, P. (1998). *Droit international économique*. LGDJ. 4th Edition. p. 348.

³² Article XX

³³ Art I. 3. (b).

France defended the “cultural exception”, that is to say that audiovisual services should not be part of the negotiations. On the contrary, the United States wanted audiovisual services to be part of the GATS, not in order to make the European subsidies disappear, but in order to benefit from them in accordance with the application of the fundamental principles³⁴.

Nevertheless, France did not have the power to sign the agreement, because of being part of the European Union. Thus, France had to convince the other Members of the European Union about the concept of “cultural exception”. Unfortunately, a lot of countries, like Italy, Spain or Germany, no longer had a national cinema industry and did not understand the significance of the French theory, because they were already overwhelmed by American film...

During the negotiations, it appeared that the concept of “cultural exception” was far from being accepted by all the Members of the European Union. In fact, the United Kingdom and the Netherlands were opposed to it³⁵. The negotiator of the European Commission, Lord BRITAN, was clearly in favour of the integration of services in the GATS. According to Serge REGOURD, audiovisual services appeared as an “exchange currency”: the European Union is the first exporting country and its refusal to integrate audiovisual services could imply a refusal of some of its partners to liberalize other sectors...³⁶

In the beginning of the Uruguay Round, the position of the European Union was clear. It wanted the integration of audiovisual services in the GATT, but with an annex that would consider the particular status of the audiovisual field. Nevertheless, when A. DUNKELL presented the project of the final agreement in 1991, no annex figured in the text³⁷. At that time, some Members proposed that audiovisual services be covered by a cultural exception that could come within the scope of the Article XIV of the GATT related to the rule of non-discrimination³⁸. But this idea was not shared by all Members, that is why the negotiations within the European Union remained stuck until 1993.

The GATS is based on the principle of exceptions according to the rules³⁹. That means that exceptions to the principles of the GATS can be possible, as soon as they concern the public order, moral, public health or the preservation of national treasures⁴⁰. It was just about adding the culture to this list of exceptions. However, a lot of difficulties appeared: should one distinguish between the audiovisual products that have a cultural character or not?

³⁴ AMIEL, F. (1999). *L'exemption culturelle*. Thèse de l'Université Pierre-Mendès France Grenoble II , p. 276.

³⁵ REGOURD, S. (November 1993). « *L'audiovisuel et le GATT : pour un questionnement juridique de l'exception culturelle* ». *Légipresse*, n° 106 II. p. 106.

³⁶ REGOURD, S. *op. cit.* p. 106.

³⁷ REGOURD, S. *op. cit.* p. 107.

³⁸ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 21.

³⁹ AMIEL, F. (1999). *op. cit.* p. 276.

⁴⁰ Article XIV GATS.

On the 5th of October 1993, the European Minister responsible for Audiovisual met in Mons⁴¹ in order to determine the legal content of the “cultural exception”. Six objectives were adopted:

1. Adoption of an *ad hoc* exemption to the MFN principle, meaning the maintenance of privileged relations between third countries and the European Union without being bounded by Agreements of economic integration.

2. Maintenance and development of the public aids and subsidies.

3. Preservation of the power to regulate the modes of transmission and the new technologies

4. Freedom to develop every subsidy policy in the sector of audiovisual

5. No submission of the Audiovisual sector to the principle of progressive liberalization (Part IV of the GATS)

6. Maintenance of the European established privileges, in particular the “Television without Frontiers” directive⁴².

Unfortunately, these six points did not achieve enough legal protection. Indeed, the second point did not prevent the United States from benefitting from the European subsidies, and the maintenance of the quotas of the “TSF” directive would only have been possible through a formal reservation of the Agreement, because it was contrary to the National Treatment. However, these points proved the belated but common will of the European Union to preserve the Audiovisual sector.



The end of the clash resulted in the exclusion of audiovisual services in the negotiations. However, this exclusion did not mean that the audiovisual is not submitted to the general provisions of the GATS. The exclusion just meant that the European Union did not take a specific commitment in this field. Thus, the European Union could continue to develop its audiovisual policy and was not subject to any obligation of liberalization. Mickey KANTOR, the U.S. Trade Representative, stated at a joint press conference with his E.U. counterpart, Sir Leon BRITAN: “We have agreed to disagree but our differences remain.”⁴³

This solution of cultural exception was taken in a movement of hurry and under the pressure of the professionals of the audiovisual sectors, who referred to the cultural exemption that Canada obtained from the United States during the negotiations of the North American Free Trade Agreement (NAFTA). The Canadian negotiators introduced the doctrine of the “cultural exception”

⁴¹ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 32.

⁴² Directive 97/36/CE, "Television without Frontiers" adopted on 30 June 1997 by the European Parliament and the Council. See p. 25.

⁴³ ELLIOTT, L. LUCE, E. (15th of December 1993). “U.S. and Europe Clear Obstacles to GATT Deal”, Guardian. in CAHN, S. SCHIMMEL, D. (1997). *The cultural exception: does it exist in GATT and GATS frameworks? How does it affect or is it affected by the Agreement on TRIPS?* Cardozo Arts and Entertainment Law Journal. § 298.

in the Canada-US Free Trade Agreement⁴⁴. Canada obtained that the cultural sector (audiovisual and publishing) be submitted to a clause of cultural exception and that the liberalization of the whole sector should be impossible⁴⁵. Five years later, the idea of excluding certain cultural industries was readopted in the NAFTA⁴⁶.

Since then, this non-liberalization allows the European Union to retain its national and European policies of broadcasting quotas (on television and radio) and financial aid (for production and distribution) in particular to protect its film industry⁴⁷. But this is just a temporary solution. Indeed “in the context of globalization, that became an economic and a technical reality, it would be illusory to pretend withdrawing behind barriers that will anyway become more and more fragile”⁴⁸.

3. Cinema: art or entertainment?

The United States considers the cinema as a good, while the European Union considers cinema as an art form which is part of a culture. But what is culture? According to the dictionary, it is “*the customs and beliefs, art, way of life and social organization of a particular country or group*”⁴⁹. Summarized, it is a “way of thinking” that is shared by a specific group. Every country has its own culture, its own traditions, its own convictions and those are all reflected through arts like architecture, literature or film.



Because of its economical influence, the culture of the United States has become a part of the culture of every country. It is what is called “mass culture”⁵⁰. The American film industry knows how to please the whole population and nobody can blame them for it. The only problem is that a great part of its success is linked to the economical power of the United States. Without their control of the mass media, would they have such a cultural radiance?

The American cinema is also powerful because its whole system rests on methods of work that are very efficient: profit is the first objective, creativity is secondary⁵¹. The extended exploitation of

⁴⁴ In article 2005 of the Canada-U.S. Free-Trade Agreement, Canada exempted all cultural industries. But Canada provided transparency to this exemption by listing in article 2012 of the agreement those activities it considered to be cultural, such as books, magazines, video, music, print, and radio communications.

⁴⁵ GALT, FS. (2004). The life, death and rebirth of the « cultural exception » in the multilateral trading system : an evolutionary analysis of cultural protection and intervention in the face of American pop culture’s hegemony. *Washington University Global Studies Law Review*. § 913.

⁴⁶ Annex 2106 of NAFTA.

⁴⁷ LALUMIÈRE, C. (January 2000). “The battle of cultural diversity”. *Label France*. N° 38. p. 2.

⁴⁸ DERIEUX, E. (19th of November 1999). De « l’exemption culturelle » à la « diversité culturelle ». *Les Petites Affiches*, n° 231. p. 14.

⁴⁹ HORNBY, A. S. Oxford Advanced Learner’s Dictionary of current English. 6th Edition. Oxford University Press. 2000.

⁵⁰ The mass culture is “the culture that is widely disseminated via the mass media”.

⁵¹ It is important to specify that the criticism of this work heads towards the so called “mainstream” American films, that has to be distinguish from the independent American film production.

films through merchandising (video games, toys, books...) represent the concept of the film not only as entertainment, but also as a medium to spread the “American way of life”.

In 2002, the market share of the American films in Europe was 83% in Germany, 66% in Spain, and 71% in United Kingdom. Summarized, the market share of the European films in Europe was 1,5% and about 71% for American films, while the market share of foreign films in the United States was only 4,4%⁵²!

Like most of the national film industries of the world, French cinema does not have the economical capacity to export itself like the American one. Furthermore, its creative appeal is turned towards different audiences, that is to say that few films are universal like the American movies. In order to protect this diversity, French cinema supports itself through different subsidies, that can be judged as protectionist.

That is why France justified its system through the concept of “cultural exception”. This concept was first introduced by Jack LANG, at that time the French Minister of Culture, within the United Nations Educational Scientific and Cultural Organization (UNESCO)⁵³. This vision of cultural diversity in cinema was adopted by the majority of the French politicians, and then by many European politicians. Through this concept, they reject a unique “way of thinking” cinema.

4. “Cultural exception” or “cultural diversity”?



The concept of “cultural exception” came first, but the UNESCO recommended to change this concept to “cultural diversity”. According to Nathalie MALLET POUJOL⁵⁴, it is better to employ the notion of diversity; but “cultural diversity” does not have any legal meaning: “cultural diversity” is a purpose, while “cultural exception” is the mean by which to reach this diversity⁵⁵.

Nathalie MALLET POUJOL makes an inventory of all the meanings of “cultural exception” that she found through different texts. Eight different meanings seem to exist⁵⁶:

- 1) “Cultural exception” means a “cultural exclusion”, that is to say to exclude, in a general manner, the sector of audiovisual from the control of the WTO (originally, that was the position of France but Lord BRITAN rejected it⁵⁷). All things considered, it is not a

⁵² Statistics of the Centre National de la Cinématographie: http://www.cnc.fr/d_stat/fr_d.htm

⁵³ UNESCO, Intergovernmental Conference on Cultural Policies for Development, the 27th of July 1982, Mexico.

⁵⁴ MALLET POUJOL, N. (2004). « Marchandisation et Audiovisuel II », in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 96.

⁵⁵ MALLET POUJOL, N. *op. cit.* p. 10. p 96.

⁵⁶ MALLET POUJOL, N. *op. cit.* p. 10. p 98.

⁵⁷ See p. 5.

question anymore. Article I of GATS applies to all services in all sectors. This solution would have led to a result similar to the “cultural exemption” of Canada⁵⁸.

- 2) “Cultural exception” as an “exception to article XIV”, would consist in making the audiovisual sector benefit from the exceptions attached to the cultural sector (Article XX GATT or Article XIV GATS). The European Community first argued for a “cultural exception” that could be added to the list of general exceptions, but the United States firmly refused this proposition⁵⁹. On the one hand, this proposition would have been quite safe legally because article XIV came first, on the other hand, such an exception would have been subject to examination by the panels, which could have been dangerous because of the different interpretations inherent in the Preamble of Article XIV.
- 3) “Cultural exception” could also be an exception to the MFN principle. The European Community registered a list of exceptions to the MFN principle that protects all preferential agreements (for example co-production agreements) from an extension to all Members of the GATT. This list allows for preferential treatment of some countries. But this exception to Article II of GATS is temporary and not sufficient in the sector of audiovisual because some principles like the National Treatment of the equal access to the market last. The principle of progressive liberalization is registered in Part IV of GATS, that is why such a list remains valid just for a limited period.
- 4) The “cultural exception” could also be seen as a “cultural specificity”, that consists in integrating Audiovisual services in the Agreement in return for limits or exceptions, that is to say with specific status. This is what the European Minister tried to develop during the Conference of Mons in 1993⁶⁰. However, as said before, the problem was not the maintenance of public subsidies, but the fact that they are reserved to the national industry and therefore violate the National Treatment principle.
- 5) The fifth solution would be based on Article VI of GATS. It would permit a right to regulate, that would protect the production’s subsidies policies, in the name of cultural specificity. Three measures would be taken: modify Article XIX and Article XV, and make a footnote to the Annex on the exceptions to the MFN principle⁶¹, that would permit to extend the length of these exemptions to more than ten years or for an unlimited length, for co-production agreements.

⁵⁸ See p. 6.

⁵⁹ PLUCHET, A. (15 December 1994). *Rapport Sénat*, n° 158. p. 69.

⁶⁰ See p. 6.

⁶¹ Annex on Article II Exemptions

- 6) Otherwise, one could make a “sector-based annex”, like the Commission asked at the beginning of the negotiations. This annex would concern audiovisual services in order to make them escape the common law of the general agreement⁶². The Americans had accepted this proposition with the creation of a work group on audiovisual. But at the end of 1993, the European Parliament abandoned this special clause for the concept of “cultural exception”⁶³.
- 7) Christoph BEAT GRABER proposed a “cultural negotiation”, that is to say “to negotiate, within the WTO, exceptions to free trade for the low cost productions, doesn’t matter whether they are American, European or Indian”⁶⁴.
- 8) The last solution is the actual exclusion *de facto* of the audiovisual sector. It is a temporary regime, adopted in a hurry and because of a lack of agreement. Two mechanisms lead to this solution in December 1993: the lack of liberalization’s offer and the registration of a list of exceptions to the MFN provision. The audiovisual sector was not registered in the list of specific commitments⁶⁵.



⁶² See p. 5.

⁶³ MALLET POUJOL, N. (2004). « Marchandisation et Audiovisuel II », in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 98.

⁶⁴ BEAT GRABER, Ch. (2000). « Exception culturelle, une revendication dépassée », 55 *Courrier de la Planète*, p. 46.

⁶⁵ MALLET POUJOL, N. op. cit. p. 98.

CHAPTER 2. THE LEGAL FRAMEWORK OF THE “CULTURAL DIVERSITY”

1. The globalization principles of the GATS

In 1947, the Article IV of the GATT recognized the particular nature of films and the possibility to establish or maintain “internal quantitative regulations related to exposed cinematograph films” that “shall take the form of screen quotas”⁶⁶.

In 1947, the drafters of GATT strongly believed that, because of their unique capacity to diffuse political values, cinematographic films should be treated specially. Indeed, films can constitute an excellent medium for propaganda on the personal attitudes and political choices of the audience⁶⁷. Besides, at that time, non-U.S. governments were concerned with Hollywood's growing domination of the world motion picture market. Hollywood began to dominate the world cinema market in the 1920s by producing films with broad appeal. Non-U.S. governments wanted to limit the harmful effects of "American cultural imperialism" by limiting the quantity of imported U.S.-made films⁶⁸. The adaptation of this article for services through the GATS was refused by the United States⁶⁹.

The motto of the GATS is a “progressive liberalization” (Part IV GATS), that is to say that the Agreement is not achieved, contrary to most of the commercial agreements. The content of the GATS is only a step in the process of globalization. The final stage would be the total opening of trade in all countries and in all sectors. It is on the basis of this principle that the negotiations go on, within the Ministerial Conference that meets every two years in Geneva⁷⁰.

In this general framework, the second principle is the principle of transparency⁷¹. The governments have the obligation to inform the Secretary of the WTO and the other State Members about the evolution of their national legislation and regulation, that could have an impact of exchanges and trade. This principle plays the role of a reminder that checks the conformity of the national legal provisions to the WTO rules.

⁶⁶ Article IV, § 1. GATT 1947.

⁶⁷ CAHN, S. SCHIMMEL, D. (1997). *The cultural exception: does it exist in GATT and GATS frameworks? How does it affect or is it affected by the Agreement on TRIPS?* Cardozo Arts and Entertainment Law Journal. § 287.

⁶⁸ CAHN, S. SCHIMMEL, D. *op. cit.* § 287.

⁶⁹ REGOURD, S. (November 1993). « L’audiovisuel et le GATT : pour un questionnement juridique de l’exception culturelle ». *Légipresse*. N° 106 II. p. 103.

⁷⁰ Article 4 Marrakech Agreement establishing the WTO. 15/04/1994.

⁷¹ Article III GATS

But these two principles (progressive liberalization and transparency) are just procedure obligations. The most important rules are the content obligations, and they are much more restricting: it is the MFN principle and the National Treatment principle.

According to the MFN principle:

“Each Member shall accord immediately and unconditionally to services and services suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country”⁷².

Summarized, every advantage that is granted to a country should be granted to every Member States. In the sector of film production, the application of such a principle would mean, for example, that the advantages granted by France to African countries in the frame of public policies for the French language, would be invalidated, except if they are granted to other Member States for their like products⁷³.

An important limit to this principle are the regional economic unions or the common markets, like the European Union, which rest on the creation of a favoured exchange area. Their legitimacy is recognized by the Agreement⁷⁴. This means that an advanced integration could allow these economic area to stand in for their Member States in the negotiations of agreements. Such a position could be difficult for the Member States that are not ready to give up their national policies in some sectors. That was the case of France regarding audiovisual services within the European Union...

The National Treatment principle could by itself, summarized the philosophy of the WTO:

“Each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers”⁷⁵.

Summarized, the Member States shall treat the foreign products and their producer as their own national products and their national producers. This principle is totally opposed to the whole system that regulates the European cinema. The system of quotas⁷⁶ is opposed to the National Treatment principle. Public funding is not prohibited but would be of no sense if foreign film productions

⁷² Article II GATS

⁷³ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 65.

⁷⁴ Article V GATS.

⁷⁵ Article XVII GATS.

⁷⁶ Directive 97/36/CE, "Television without Frontiers" adopted on 30 June 1997 by the European Parliament and the Council.

could benefit from it! For example, the special account of the French public revenue department would be giving most of its money to American producers⁷⁷.

Besides, the system of quotas is also opposed to another principle of the GATS: the Market Access principle, whose purpose is to eliminate all quantitative restrictions to the export or import of foreign productions⁷⁸. The modalities of funding of French cinema could be considered as dumping modalities, that are prohibited as soon as such a public funding settles on an advantage that allows to sell a product at a lower price than its real cost price⁷⁹.

The services concerned by GATS can be supplied through four distinct modes, and the State Members can choose not to open all the supply modes⁸⁰. The first mode concerns the service supply that comes from a Member State territory to another Member State territory. This is the case for the principle of free reception of television programs coming from the operator of a Member State, as well as for the broadcast of American films in France. The second mode concerns the service supply on the territory of a Member State for a consumer of another Member State. This mode is not a problem in the audiovisual sector, every consumer can access an audiovisual program, whatever his nationality is.

The third mode concerns the commercial presence of a Member State on the territory of another Member State, speaking in terms of foreign investment. This presence can exist through a participation to the capital of a national company or through a subsidiary company that is 100% owned by a foreign holding. The European regulation could be damaged very badly on this mode because a lot of subsidies are based on the nationality of the producers, or require a limited participation of foreign companies to the capital of national or European companies⁸¹.

The fourth mode concerns the presence of persons that are coming from a Member State on another Member State territory. That is to say, it concerns the importation by a company of the staff that is necessary for the service supply. This mode could pose a problem regarding the different social rights that exist. In France for example, the people which work for the audiovisual sector have a particular status because of their irregular employment (they have a six months contract and are unemployed, waiting for the next contract...)⁸². The liberalization of this mode would have an important impact on the status of these people.

⁷⁷ This special account settles on the takings of the ticket entrance in all French cinemas.

⁷⁸ Article XVI GATS.

⁷⁹ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 66.

⁸⁰ REGOURD, S, *op. cit.* p. 66.

⁸¹ For example, the film "A very long engagement" from JP JEUNET did not obtain a subsidy from the CNC because its film production company (2003 Productions) has been considered as controlled by Warner Bros.

⁸² It concerns the actors and technicians of the audiovisual sector which are called the "intermittents du spectacle".

2. The failure of the MAI

The system of “cultural exception” was adopted in a hurry and did not satisfy the United States. Therefore, they counterattacked through the OECD during the negotiations of the MAI⁸³. This Agreement wants to promote the development of foreign investment in the Member States of the OECD but also in every country that wants to participate. The purpose is to eliminate every protectionist barrier that prevents free trade. The only exceptions that were considered were internal and international security.

The International Labour Organization (ILO), the United Nations Conference on Trade and Development (UNCTAD), and the World Bank adopted codes and mechanisms of dispute resolution in order to regulate conflicts within international investments. Many countries concluded bilateral agreements on investment, based on the MFN principle and the National Treatment principle. The initiative to negotiate investment treaties began with a bilateral treaty between Germany and Pakistan in 1959. By 1991, Germany led the world in negotiating investment treaties with seventy-seven, followed by Switzerland, France, the United Kingdom, and the Netherlands. As of 1996, there were some 1600 investment treaties in force worldwide, the majority being between European and developing countries⁸⁴. A multilateral global agreement was therefore necessary.

The negotiations remained deeply secret. The American executive denied the MAI project until December 1997⁸⁵. The negotiations moved from the WTO to the OECD because of the will to escape from an external control⁸⁶:

- 1) of developing countries like India or South Africa that maintain measures of control of foreign investments on their territories and which could have disturbed a consensus within the group of negotiations
- 2) of public opinion. The OECD remains a much more discreet frame to conduct negotiations.

This discretion was justified by the radical aspects of the MAI project. The MAI should have different sections⁸⁷ and be based on two definitions: the definition of investor and the definition of investment.

⁸³ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 88.

⁸⁴ CANNER, S.J. (1998). “The Multilateral Agreement on Investment”. *Symposium The International Regulation of Foreign Direct Investment: Obstacles & Evolution Environmental and Labor Standards for Foreign Investors: Whose Standards*. Cornell International Law Journal. § 660.

⁸⁵ REGOURD, S. *op. cit.* p. 89.

⁸⁶ REGOURD, S. *op. cit.* p. 66.

⁸⁷ Scope and Definitions (Section II), Treatment of investors and investments (Section III), Investment protection (Section IV), Dispute Settlement (Section V), Country specific exceptions (Section IX): <http://www.oecd.org/dataoecd/46/40/1895712.pdf>

The principles of the GATT (MFN and National Treatment) should govern those investors and investments, that is to say that every party to the MAI should give others party investors and investments the same treatment that it gives to another party or to its own investors and investments. The definition of investment concerning the audiovisual sector and the European subsidy system was obviously an obstruction to foreign investment. The European system would consequently have been in danger if the European Union had accepted the MAI.

The danger was that, contrary to the GATS, the MAI contained no specific commitments, no list of exceptions. Its principles should have applied in every sector except security and public order⁸⁸. The MAI should also have its own jurisdictional system in case of a dispute, a kind of ad hoc jurisdictional control in which provisions were particularly obscure. Above all, the MAI, contrary to the GATS, provided financial sanctions for recalcitrant nations⁸⁹. The American delegation wanted no exception to the audiovisual sector regarding the MAI⁹⁰. Its aim was that American enterprises could benefit from the national and European subsidies and from the co-production agreements. It also wanted that the system of quotas be suppressed. Because they were afraid of an exclusion of the cultural sector, the United States adopted a reserve in order to apply all procedures to this sector⁹¹.

The United Kingdom, Denmark, and Germany, were interested in the offer of the Americans: they offered to abolish the Helms - Burton Act if all the legislations related to investment in cinema and audiovisual would be submitted to the National Treatment principle⁹². Consequently, France lost some Allies but found another one: Canada. They both asked that a clause of “cultural exception” be included in the MAI in order to exclude the cultural products which are supported by a policy of cultural and linguistic diversity⁹³.

Because no consensus was found on “cultural exception” within the MAI negotiations, France withdrew from the negotiations on the 14th of October 1998. The planned meeting at the head office of the OECD the 20th and 21st of October just lasted one day without a plan for the continuation of the negotiations. The official confirmation of the withdrawal of France on the 3rd December 1998 lead to the abandoning of the MAI project⁹⁴.

⁸⁸ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 90.

⁸⁹ FRAU-MEIGS, D. (2003). “*Cultural exception*” - *national policies and globalisation: imperatives in democratisation and promotion of contemporary culture*, Quaderns del CAC: Issue 14. p. 5.

⁹⁰ CANNER, SJ. (1998). “The Multilateral Agreement on Investment”. *Symposium The International Regulation of Foreign Direct Investment: Obstacles & Evolution Environmental and Labor Standards for Foreign Investors: Whose Standards*. Cornell International Law Journal. § 651.

⁹¹ AMIEL, F. (1999). *L'exemption culturelle*. Thèse de l'Université Pierre-Mendès France Grenoble II. p. 395.

⁹² CANNER, SJ. *op. cit.* § 668.

⁹³ CANNER, SJ. (1998). “The Multilateral Agreement on Investment”. *Symposium The International Regulation of Foreign Direct Investment: Obstacles & Evolution Environmental and Labor Standards for Foreign Investors: Whose Standards*. Cornell International Law Journal. § 671.

⁹⁴ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 94.

3. Seattle and Doha

The anti-globalization movement that started at the time of the discovery of the MAI negotiations grew fast and hindered the summit of Seattle that should have opened the Millennium Round. The WTO conference that was organized in Seattle only indirectly concerns the “cultural exception”: the Round of negotiations within the WTO is in accordance with the progressive liberalization process.

The Millennium Round saw an American offensive regarding liberalization in the new audiovisual services, for example, those to do with the Internet and E-commerce, etc⁹⁵. The situation of protest prevented the United States and the WTO secretary from presenting a proposition of agreement. The impact of the anti-globalization mobilization led to the cancellation of the opening ceremony of the conference. On the 3rd of December 1999, the summit in Seattle was suspended without having reached any agreement⁹⁶.

In February 2000, the negotiations started again and a new negotiation on GATS was scheduled. In November 2001, a new ministerial conference was organized in Doha. The ministerial declaration adopted on the 14th of November 2001 fixed an extensive agenda. The results of the conference were considered as positive by most of the participants. The declaration planned that future negotiations would particularly concern the developing countries⁹⁷. Agriculture would be one of the most important subjects and for the first time, an environmental aspect would be taken into account.

Regarding the sector of services, multilateral negotiations started again the 1st of January 2000, in accordance with the Article XIX of GATS. The first step of negotiations on the 29th of March 2001 achieved the adoption of directive lines and procedure for future negotiations. No service and no mode of supply will be *a priori* excluded. The audiovisual sector is therefore *de facto* integrated in the future negotiations⁹⁸.

Initial offers would be handed in before the end of March 2003 and negotiations should have been achieved on the 1st of January 2005. Currently, the negotiations are still going on⁹⁹.

Until then, three proposals were made in the audiovisual sector, the most recent is from July 2001¹⁰⁰. The proposal from the United States aimed at the establishment of a frame for future

⁹⁵ LALUMIÈRE, C. (January 2000). “The battle of cultural diversity”. *Label France*. N° 38. p.3.

⁹⁶ REGOURD, S. (2002). *L'exception culturelle*. Coll. Que sais-je ?. PUF. Paris. p. 95.

⁹⁷ Doha Ministerial Declaration adopted on 14 November 2001. WT/MIN(01)/DEC/1. 20 November 2001. § 3.

⁹⁸ Doha Ministerial Declaration adopted on 14 November 2001. WT/MIN(01)/DEC/1. 20 November 2001. § 15.

⁹⁹ See the WTO website regarding the Doha negotiations: <http://www.wto.org>

¹⁰⁰ All these proposals figure in the website of the WTO: “Proposals for the new negotiations in services”: http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

negotiations and was very liberal, even if it says it wishes “to contribute to the continued growth of this sector by ensuring an open and predictable environment that recognizes public concern for the preservation and promotion of cultural values and identity”¹⁰¹. The United States recognized the evolution of the audiovisual sector through the development of the new technologies, which implied – according to the United States – new negotiations in this sector, because of the old fashioned aspect of the “all-or-nothing” game¹⁰².

The proposal specified that the argument of a “special sector” was not valid because every sector has its own particular aspects. Besides, the high costs of the audiovisual sector needed an access to the foreign markets in order to make the products profitable. The proposal contained three elements¹⁰³:

- 1) It wanted to examine the different activities that made up the audiovisual sector’s evolution in order to define the rules that should apply.
- 2) Then, it wanted to negotiate the commitments that would establish clear, reliable and foreseeable rules that will take the particularity of the sector into account.
- 3) Finally, its asked that the negotiations be engaged on the question of subsidies. No mention of “cultural diversity” was made.

The two other proposals came from Switzerland¹⁰⁴ and from Brazil¹⁰⁵. They have much more nuance and are in line with the concept of “cultural diversity”. Each of them considered that the harsh debates that took place during the Uruguay Round had to end in order to find a solution to the audiovisual question in the framework of GATS. The theory of “cultural exception” as well as the total liberalization of the sector were rejected.

For Switzerland, “the issue of public service is central to a solution of the audio-visual question under GATS and therefore deserves to be thoroughly discussed” (Part IV, § 13). Brazil and Switzerland didn’t think that subsidies should be prohibited because of their link with the protection of “cultural diversity”. Nevertheless, Switzerland was not favourable to the system of quotas. The

¹⁰¹ Council for Trade in Services - Special Session - Communication from the United States - Audiovisual and Related Services. 18/12/2000. S/CSS/W/21. Document 00-5551.

¹⁰² The “all-or-nothing” game is a reference to the debates between the United States and the European Union during the Uruguay Round.

¹⁰³ Council for Trade in Services - Special Session - Communication from the United States - Audiovisual and Related Services. 18/12/2000. S/CSS/W/21. Document 00-5551.

¹⁰⁴ Council for Trade in Services - Special Session - Communication from Switzerland - GATS 2000: Audiovisual Services. 04/05/2001. S/CSS/W/74. Document 01-2361.

¹⁰⁵ Council for Trade in Services - Special Session - Communication from Brazil - Audiovisual Services. 09/07/2001. S/CSS/W/99. Document 01-3408.

Swiss submission, however, did not specify what exactly the notions of “cultural diversity” and “cultural identity” mean¹⁰⁶.

Thus, the concept of “cultural exception” seems to be rejected because of its rigidity. Nevertheless the idea of “cultural diversity” is accepted and defended. The two proposals of Brazil and Switzerland showed the growing importance of these two definitions.

4. The Universal Declaration on Cultural Diversity

The development of an International Instrument on Cultural Diversity (IICD) by the International Network on Cultural Policy (INCP)¹⁰⁷ provided a legal mechanism to balance the threat to cultural diversity posed by trade negotiations¹⁰⁸. Canadian minister Sheila COPPS was the first person that organized a movement for “cultural diversity”. She invited the culture ministers of the five continents to create the INCP, whose first objective was to “promote cultural and linguistic diversity as fundamental elements to global thinking on development, access, governance and identity issues”¹⁰⁹.

This international strategy took concrete shape through the Universal Declaration on Cultural Diversity of the UNESCO in October 2001. This Declaration set up the first formalization of the content and the means of the “cultural diversity” concept. The Declaration asserted the following principles¹¹⁰:

- 1) The concept of “cultural diversity” leads to the “common heritage of humanity”. It is as important as biodiversity is for the human race (Article 1).
- 2) The defence of “cultural diversity” is “an ethical imperative, inseparable from respect for human dignity”, which implies a commitment to respect human rights and fundamental freedoms (Article 4).
- 3) “Cultural Rights are an integral part of human rights” (Article 5).
- 4) Cultural goods and services are “commodities of a unique kind” and “must not be treated as mere commodities or consumer goods” (Article 8)

¹⁰⁶ BEAT GRABER, C. *Audiovisual Policy: The Stumbling Block of Trade Liberalisation?* in GÉRADIN/LUFF (eds.), *The WTO and Global Convergence in Telecommunications and Audiovisual Services*, Oxford University Press 2003. p. 4.

¹⁰⁷ A conference of national culture Minister.

¹⁰⁸ READ, M. (2003). *Cultural Diversity in the Face of Global Trade in Cultural Services*. California Research Bureau. *California State Library*. Auckland. p. 1.

¹⁰⁹ Website of the International Network on Cultural Policy: http://206.191.7.19/about/index_e.shtml

¹¹⁰ Universal Declaration on Cultural Diversity of the UNESCO: unesdoc.unesco.org/images/0012/001271/127160m.pdf

- 5) Finally, “it is for each State, with due regard to its international obligations, to define its cultural policy and to implement it through the means it considers fit, whether by operational support or appropriate regulations” (Article 9)

This Declaration has no legal force, but its adoption was an important step. It is an evolution towards the construction of an international substantive law¹¹¹. However, the Declaration was supported by an Action Plan for the implementation of the Declaration.

In February 2003, during a meeting that took place in Paris, the culture minister of the INCP asked the Director General of the UNESCO to start the work needed to realize, practically, this legal instrument. By the 17th October 2003, the General Assembly of the UNESCO decided to begin the work that would lead to the adoption of an international legal instrument on cultural diversity¹¹².

An international instrument on cultural diversity is needed. It should recognize the uniqueness of cultural goods and services and to ensure the legal security of current and future policies that are taken by States in order to preserve their heritage and the development of their cultural expressions¹¹³.

Nevertheless, such an instrument would not consider that every State initiative is *a priori* legitimate¹¹⁴! For example, Japan could not obtain the protection for rice that was produced in accordance with traditional methods¹¹⁵. Besides, some measures are not compatible with human rights. For example, during the UN World Summit on Sustainable Development in Johannesburg in September 2002, some feminist organizations were opposed to an ambiguous paragraph that could have legitimized some practices like excision in the name of cultural diversity¹¹⁶.

Otherwise, there is no diversity without exchange¹¹⁷. An international instrument should not only deal with legal security; it should also promote cultural exchanges through the world. That means that national measures that would establish national quotas at a level of 70% of national product would not benefit from the protection of the international community.

Although it is not legally binding, the Declaration will certainly help a great deal in defining a common global understanding of cultural diversity¹¹⁸. According to Jean-Michel BAER¹¹⁹, the future international instrument should have three dimensions if it wants to be credible facing the WTO: the

¹¹¹ BAER, J-M. (October 2003). *L'exception culturelle – Une règle en quête de contenus*. En temps réel. Cahier 11. p. 21.

¹¹² BAER, J-M. *op. cit.* p. 21.

¹¹³ WAGNER, M-A. (27th of November 2001). *GATS and Cultural Diversity*, Diffusion EBU 2002/1. WTO. p. 2.

¹¹⁴ BAER, J-M. *op. cit.* p. 24.

¹¹⁵ BAER, J-M. *op. cit.* p. 24.

¹¹⁶ BAER, J-M. *op. cit.* p. 24.

¹¹⁷ WAGNER, M-A. *op. cit.* p. 2.

¹¹⁸ WAGNER, M-A. *op. cit.* p. 2.

¹¹⁹ BAER, J-M. *op. cit.* p. 24.

assertion of cultural rights, the regulation of diversity and the development of well-balanced cultural exchanges. The regulation of cultural policies needs a first step: the creation of an international observatory that would express recommendations based on indicators of cultural diversity.

In order to align the International Convention on cultural diversity with the commercial agreements of the WTO, the observatory would have to make a classification of the measures which have an impact on trade. Finally, in order to respect the objective of cultural exchange, particular attention should fall on the cultural exchange between previous colonies and their former colonial rulers. Indeed, many cooperation policies are based on policies of cultural influence, that try to maintain the power of the former colonial countries. Policies in favour of the development of local cultural expressions would have to appear¹²⁰.



¹²⁰ BAER, J-M. *op. cit.* p. 24.

CHAPTER 3 : The European system: an example of “cultural diversity”?

1. The content of the European policies

An innovation of 1990's was the intervention of European federal bodies in cultural policies. The European measures sought to implement at a practical level the lessons drawn from American domination of the production and broadcasting market. This domination can be explained by Hollywood's industrial style productions and also by the low costs in the export market which are due to a domestic market counting 260 million consumers. Film benefits from an international distribution network, constructed just after the Second World War, when Europe was still in a process of recovery and lost control over image flows¹²¹.

The directive “Television without Frontiers” was the first legal instrument in the audiovisual field on a European level¹²². It had a double purpose: to assure the free reception and retransmission of programs between Members of the European Union and to encourage the development of the European audiovisual industry. The main mechanism of this objective is a quotas policy: there are production quotas as well as broadcasting quotas.

The Articles 4 and 5 of the directive establish the system of quotas: *“Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters”*¹²³.

According to Article 6, “European works” is defined as:

- a) *“ works originating from Member States ”*
- b) *“works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2”*
- c) *“works originating from other European third countries and fulfilling the conditions of paragraph 3”*.

¹²¹ FRAU-MEIGS, D. (2003). “Cultural exception” - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. Quaderns del CAC: Issue 14. p. 9.

¹²² Directive 97/36/CE, "Television without Frontiers" adopted on 30 June 1997 by the European Parliament and the Council.

¹²³ Article 5 TSF Directive.

It seems clear that the defining characteristic of "European work" was European control¹²⁴. In order for a co-produced program to qualify as a European work, the European producers must make a "preponderant" contribution to the total costs of production, and the production must not be "controlled" by non-European producers¹²⁵.

Finally, according to Article 3, "*Member States shall remain free to require television broadcasters under their jurisdiction to comply with more detailed or stricter rules in the areas covered by this Directive*". For example, the French legislation is more restricting than the quotas established by the TSF directive¹²⁶.

The European Union renewed its "Television without Frontiers" directive in 1997, maintaining quotas, while its revision in 2002 legitimised them once again, in spite of internal disagreements¹²⁷. Federal audiovisual bodies have also been established in order to protect cultural pluralism and diversity: since 1988, the EURIMAGES program has constituted a support fund for the making of co-produced European films, with the condition that at least three countries are involved. Since 1990, the MEDIA program¹²⁸ has been concerned with providing financial aid to distributors in order to facilitate the circulation of national works throughout the European community: aid in dubbing, printing, copying, advertising... After two initial phases (MEDIA I, 1991-1995 and MEDIA II, 1996-2000) it is now in its third phase (MEDIA III, 2001-2005).

Public aid to the European industry increased by approximately 13% between 2000 and 2001. Between 1997 and 2001 the amount of aid increased by 45%. France is the only country to have contributed more than a third of total aid and the five principal markets (Germany, United Kingdom, France, Italy and Spain) contributed approximately 80% of aid distributed¹²⁹.

¹²⁴ FILIPEK, J. (Spring 1992). "Culture Quotas": The Trade controversy over the European Community's Broadcasting Directive. *Stanford Journal of International Law*. § 333.

¹²⁵ Article 6. 2. c)

¹²⁶ See Chapter III. 2.

¹²⁷ Viviane REDING Member of the European Commission responsible for Education and Culture European Voice Conference on "Television without Frontiers" European Voice Conference on "Television without Frontiers" Brussels, 21 March 2002 Reference: SPEECH/02/120 Date: 21/03/2002:
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/120&format=HTML&aged=0&language=FR&guiLanguage=en>

¹²⁸ Encourages the development, distribution and promotion of European audiovisual works:
http://europa.eu.int/comm/avpolicy/media/index_en.html

¹²⁹ FRAU-MEIGS, D. (2003). "Cultural exception" - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. *Quaderns del CAC*: Issue 14. p. 10.

2. The strength and weaknesses of the French system

The French film industry is the most successful within Europe¹³⁰, in spite of its exportation problems¹³¹. Its success rests on powerful aid policies. A brief explanation of their history is needed in order to understand the strength and weaknesses of this system.

Just after the Second World War, France needed to support its film industry in the face of American hegemony. A system of automatic support was invented based on industrial considerations. After 1959, the cultural aspect reappeared: France completed its automatic support with selective support¹³². Both being administered by the Centre National de la Cinématographie (CNC)¹³³.

The broadcasting of films would be limited by periods, in order to counterattack the growing power of the television. A film can be for rent only six months after it was in the cinemas, nine months for the “pay per view”, twelve months for pay-TV, and two (in case of a co-production) or three years for a normal channel.

Finally, a huge investment was required from the television channels: 36% of the 5% deducted on the net revenue of the channels to be redistributed to the film industry, while the TV channels have to invest at least 3,2% of their net revenues in the production of European films¹³⁴. These investments take the form of co-productions or pre-acquisition of the broadcasting rights of films. Lastly, these obligations were strengthened for “Canal Plus”¹³⁵ which had to spend 20% of its net revenues in the acquisition of rights¹³⁶.

A last advantage was granted to financing companies¹³⁷ which can benefit from important tax reliefs¹³⁸.

French aid policies also try to protect world cinema: an example being French financing of foreign films having no requirements as to language. Besides, the creative control is left to the

¹³⁰ FRAU-MEIGS, D. (2003). “Cultural exception” - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. *Quaderns del CAC*: Issue 14. p. 10.

¹³¹ Centre National de la Cinématographie : website : http://www.cnc.fr/d_stat/fr_d.htm

¹³² This support is called « Avance sur Recettes » which means “advances on takings”.

¹³³ The State Institution that distributes the financial support.

¹³⁴ BENHAMOU, F. (May 2004). *L’exception culturelle – Exploration d’une impasse*. Revue Esprit. Paris. p. 11.

¹³⁵ Pay-TV

¹³⁶ BENHAMOU, F. *op. cit.* p. 11

¹³⁷ They are called « SOFICA ».

¹³⁸ Article 40. Law n° 85-695 of the 11th of July 1985, J.O.R.F of the 12th of July 1985. p. 7855.

director. Directors like David Lynch, Pedro Almodovar, Akira Kurosawa or Federico Fellini benefited from the French system, even though they are not French¹³⁹.

Thus, the resources of the CNC relied on:

- 1) a direct debit of tax on the entrance tickets to cinemas. Meaning that American blockbusters are financing the French cinema!
- 2) A tax on video (and now on DVD)
- 3) The above-mentioned obligations of TV channels

Nevertheless, despite a well-organized system, French film is threatened. Indeed, Canal Plus is the first major support of French cinema: it makes a pre-acquisition of 80% of French film productions¹⁴⁰. However, cable and satellite televisions and DVD are now important competition for Canal Plus, because of their ability to speed up the broadcast of films. As explained before, a film will be available on DVD six months after being in the cinemas, nine months after for pay-per-view (cable and satellite televisions) and twelve months later for Canal Plus (pay-TV). Canal Plus is therefore making a lot of investments but without obtaining a better position for broadcasting...

The Convention that binded Canal Plus with French film production ended in December 2004. The entire industry was very worried due to the position of Jean-Marie MESSIER towards French film¹⁴¹, and also because of the financial difficulties within Canal Plus that wanted to reduce its investments in film production. Fortunately, the new Convention did not reduce the obligations of Canal Plus to the industry¹⁴².

Finally, “cultural diversity” is not protected by Canal Plus. Indeed, Canal Plus did not respect its commitments to “cultural diversity”¹⁴³: Euros 6,1 millions are missing in order to finance films that cost less than Euros 5,34 millions, which represents seven or eight films¹⁴⁴. In fact, Canal Plus invests above all in big film productions that will have guaranteed success, and takes less and less risk with smaller independant productions. Therefore, maybe the Canal Plus’s obligations regarding low budget productions should be extended to all channels in order to balance rights and obligations...

¹³⁹ CARRIERE J-C. (2004). « Marchandisation et Audiovisuel I », in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 84.

¹⁴⁰ VULSER, N. (17th of May 2002). « Le cinéma français au bord de l’implosion ». *Le Monde*.

¹⁴¹ He was the President of Vivendi Universal which owns Canal Plus. During a conference in New York, the 17th of December 2001, he declared: “The French cultural exception is dead (...) it is a French archaism”.

¹⁴² Article 24 of the Additional Clause n° 6 signed the 6th January 2005 (*JO N° 71-25/03/05*): http://www.csa.fr/infos/textes/textes_detail.php?id=8559

¹⁴³ Article 11 of the Decree n° 95-668 of the 9th of May 1995:

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MICT9500016D>

¹⁴⁴ VULSER, N. (23rd of May 2002). « Quand le monstre est malade il est moins amical ». *Le Monde*.

3. The American perspective

Tyler COWEN, an American economist who is against European cultural policies, explains in its last work¹⁴⁵ that the trade of culture promotes diversity inside countries as well as between countries. Cultural trade benefits diversity through an extension of its potential market. According to Cowen, diversity and “cultural exception” are contradictory and cultural protectionism weakens the quality of films¹⁴⁶.

Contrary to popular opinion, the United States encourages a mixture of public and private financial support: the tax benefits combined with foundations or donations are public aids disguised through tax relief or exemption¹⁴⁷. The “ independent film” survived through this system until the end of tax benefits in the 1980’s. Founded in 1965, the National Endowment for the Arts finances cinema slightly but does not exclude it from aid granted¹⁴⁸. Today, financial support for cultural projects exists but it is decentralised and not really measurable. The municipalities (Los Angeles, New York, Denver, Philadelphia, Chicago...) are the most active in cultural support¹⁴⁹.

Entertainment industries are part of the American political economy. A commercial argument is hiding behind their rejection of the “cultural exception”: film is the United States’ second highest export and constitutes a sensitive point for both Republicans and Democrats. It was during Bill Clinton’s administration that the crisis of “cultural exception” took place and it was during his term that the 1996 Telecommunications Act was voted in¹⁵⁰. This act aimed to facilitate convergence between media and information technology corporations, in order to favour international competition. Its most recent consequences have been the convergence between multinationals and control of the entire entertainment industry by five big groups: AOL-Time Warner, Disney, Microsoft, General Electric and Westinghouse¹⁵¹.

¹⁴⁵ COWEN, T. (2002). *Creative destruction. How Globalization is changing the World’s Cultures*. Princeton: Princeton University Press. in BENHAMOU, F. (May 2004). *L’exception culturelle – Exploration d’une impasse*. Revue Esprit. Paris. p. 24.

¹⁴⁶ COWEN, T. *op. cit.* p. 24.

¹⁴⁷ FRAU-MEIGS, D. (2003). “Cultural exception” - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. *Quaderns del CAC: Issue 14*. p. 11.

¹⁴⁸ GALT, FS. (2004). The life, death and rebirth of the « cultural exception » in the multilateral trading system : an evolutionary analysis of cultural protection and intervention in the face of American pop culture’s hegemony. *Washington University Global Studies Law Review*. § 919.

¹⁴⁹ FRAU-MEIGS, D. *op. cit.* p. 11.

¹⁵⁰ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996):

<http://www.fcc.gov/telecom.html>

¹⁵¹ FRAU-MEIGS, D. *op. cit.* p. 12.

But why does “Hollywood rule the World”¹⁵²? Some figures may explain American domination in the audiovisual sector...

This table illustrates the differences between Western Europe cinema and American cinema¹⁵³:

	<u>United States</u>	<u>Western Europe</u>
<u>Population</u>	272 million	366 million
<u>Cinema tickets sold</u>	1.48 billion	805 million
<u>Number of screens</u>	37.165	23.168
<u>Frequency of film-viewing</u>	5.37 times a year	2.2 times a year

Thus, the United States has the largest single domestic market for cinema (after India), which is of course a big advantage. Nevertheless, American domination cannot be purely explained through such numbers. The low share of European films in their home markets is quite a factor: In the mid-sixties, American films accounted for 35% of box-office revenue in Continental Europe, today, they represent between 80 and 90% of all box-office revenue¹⁵⁴.

According to Frederick Scott GALT, the doctrine of “cultural exception” is based on the “erroneous assumption” that a state cultural identity is an exhaustible resource, and the “paternalistic” policies that follow from this doctrine interfere with the idea of cultural diversity by restricting choice, “damaging consumer sovereignty and creating a deadweight loss in the audiovisual markets”¹⁵⁵.



According to Tyler COWEN¹⁵⁶, the collapse of the European export market is based on various elements. First, the television hit the American market first. Therefore, American moviemakers responded to this attack by making risky investments in marketing, glamour and special effects. As the television hit the European market, the moviemakers found themselves unable to compete. The success American films had, made them easier to finance, market, and export.

Secondly, there is a demographic problem: people over thirty-five generally prefer television to moviegoing, and most European countries have an older population than the United States.

¹⁵² COWEN, T. *Why Hollywood Rules the World (and Should We Care?)*. in *Correspondence - an International Revue of Culture and Society* - Issue N° 8 Summer/Fall 2001. An International Project of the Committee on Intellectual Correspondence, Published by the Council on Foreign Relations. p. 6.

¹⁵³ *Correspondence - an International Revue of Culture and Society* - Issue N° 8 Summer/Fall 2001 An International Project of the Committee on Intellectual Correspondence, Published by the Council on Foreign Relations. p. 6.

¹⁵⁴ COWEN, T. *Why Hollywood Rules the World (and Should We Care?)*. in *Correspondence - an International Revue of Culture and Society* - Issue N° 8 Summer/Fall 2001. An International Project of the Committee on Intellectual Correspondence, Published by the Council on Foreign Relations. p. 6.

¹⁵⁵ GALT, FS. (2004). The life, death and rebirth of the « cultural exception » in the multilateral trading system : an evolutionary analysis of cultural protection and intervention in the face of American pop culture’s hegemony. *Washington University Global Studies Law Review*.§ 917 to 919.

¹⁵⁶ COWEN, T. *op. cit.* p. 6.

Thirdly, Tyler COWEN accuses the European aid policies, and in particular the French one. According to him, a “vicious circle”¹⁵⁷ has been created: The more European producers fail in global markets, the more they rely on television revenues and subsidies. The more they rely on television and subsidies, the more they fail in global markets.

At the end of his article, Tyler COWEN condemns the European system as a danger for artistic creativity. According to him¹⁵⁸, the European directors that survive tend to have longstanding political connections and today’s mainstream European cinema appears less creative than it was between the fifties and the sixties. His conclusion is that the two non-Hollywood industries that have lately enjoyed the most export success – India and Hong Kong – are run on an explicitly commercial basis.



¹⁵⁷ COWEN, T. *Why Hollywood Rules the World (and Should We Care?)*. in *Correspondence - an International Revue of Culture and Society* - Issue N° 8 Summer/Fall 2001. An International Project of the Committee on Intellectual Correspondence, Published by the Council on Foreign Relations. p. 6.

¹⁵⁸ COWEN, T. *op. cit.* p. 6.

4. The doubtful success of the European system

Regarding European legislation, the legality of the quota system could be called into question¹⁵⁹. Indeed, the European Convention for the Protection of Human Rights and Fundamental Freedoms declares the freedom of expression¹⁶⁰. Thus, the system of quotas violates the Article 10 § 1 of the Convention, which recognizes the right “to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. Nevertheless, this argument seems to have been abandoned in that it does not feature in any recent article.

According to Frederick Scott GALT, while Europe fears cultural homogeneity, the European Union organizes the harmonization and the uniformity of its laws and its regulations: “the delicate balance of protecting national identities while promoting some nebulous brand of “European culture” will make the cultural exception all the more difficult to articulate”¹⁶¹.

Also, the directive contains some problems in definition. The definition of European work is not clear: a work is every audiovisual program except “news, sports events, games, advertising, teletext services and teleshopping”¹⁶². Meaning that variety shows (on set or not) are included, that is to say that for example, reality shows like *Big Brother*¹⁶³ are included in the European quotas! Reality shows are not a good example of cultural diversity: the concept is the same everywhere and does not reflect a specific culture.

The Article 6 of the directive determines the European character of the work: “European works means the following: (a) works originating from Member States; (b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 2; (c) works originating from other European third countries, made exclusively or in co-production with producers established in one or more Member States by producers established in one or more European third countries with which the Community has concluded agreements relating to the audiovisual sector, if those works are mainly made with authors and workers residing in one or more European States.”

¹⁵⁹ WAELBROECK, D. (1996). « La révision de la directive Télévision sans Frontières, le régime des quotas », in DOUTRELEPONT, C. (sous la direction de), *Actualité du droit de l’audiovisuel européen*, Bruylant Bruxelles, coll. de la Faculté de droit de l’Université libre de Bruxelles. p. 14.

¹⁶⁰ European Convention Article 10 § 1.

¹⁶¹ GALT, FS. (2004). The life, death and rebirth of the « cultural exception » in the multilateral trading system : an evolutionary analysis of cultural protection and intervention in the face of American pop culture’s hegemony. *Washington University Global Studies Law Review*. § 935.

¹⁶² Article 4 TSF Directive.

¹⁶³ *Big Brother* is a concept of the Dutch company “Endemol”.

Furthermore, a condition of establishment is necessary for the producers, which is quite insecure. Indeed, branches of non-European companies fulfil this condition¹⁶⁴.

Finally, the system of quotas is not restricting. This was one of the arguments of the European Union in response to the United States: Community officials argued that the Directive was not a legally binding contract between the Member States. Rather, it was merely a political commitment with no legally binding effect¹⁶⁵. The language “where practicable and by appropriate means” in Article 4 § 1 of the Directive vested the Member States with considerable flexibility in promulgating regulations and implementing the Directive. Article 4 § 1 declares that “Member States shall ensure where practical and by appropriate means that broadcasters reserve for European works a majority proportion of their transmission time”. The legal force of the system of quotas is therefore questionable.

However, a communication of the Commission of the European Communities made an assessment of the efficiency of the quotas system¹⁶⁶. Generally, the assessment is good. The average broadcasting of European works varies between 81,7% and 53,3%. Only Portugal is below the average (43%) while the channel from Luxemburg (RTL Tele Lëtzeburg) broadcasted 100% of European works in 1997 and 1998! The quotas of production are widely respected: the German, Italian and French channels broadcasted 70% of European works coming from independent productions. Finally, the Communication notes that most of the countries used the opportunity to have stricter national rulings than those of the directive.

The main problem of European works is distribution. Indeed, European circulation (both television fiction or cinematographic works) between European countries has remained weak, almost non-existent. The success of game formats like *Big Brother* (flux programs) does not help the circulation of fictional formats, which are becoming a real problem. The distribution of works from central and eastern Europe practically does not exist. The real issue in this context is thus content pluralism, a struggle against a potential homogenization of formats and formulas¹⁶⁷. Indeed, television and film screens are an integral part of individual socialization.

Free-traders feel that the expansion of Internet in Europe will anyway make the quota system completely obsolete: according to them, Europeans won't need to go to the cinema to see their

¹⁶⁴ Article 6 § 2 TSF Directive.

¹⁶⁵ KAPLAN, LGC. (Spring 1994). *The European Community's "Television without Frontiers" Directive: Stimulating Europe to regulate culture*. Comment. Emory International Law Review. § 330.

¹⁶⁶ Commission of the European Communities, Brussels, 17.07.2000 COM (2000) 442 final Fourth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers" for the period 1997-1998:

http://europa.eu.int/comm/avpolicy/regul/twf/art45/4com_en.pdf

¹⁶⁷ FRAU-MEIGS, D. (2003). “Cultural exception” - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. *Quaderns del CAC*: Issue 14. p. 11.

films; they will download them on specialized sites. However, cinema survived the television, and it will probably also survived the Internet: the charm of cinema is the dark room and the big screen that give us the feeling of being in another world.

European policy needs the support of all Member States and necessitates a common front for all those defending diversity in Europe and in other regions of the world. The position of the new Member States is not in favour of the quota system. Therefore, the Commission wants to limit the aid policies that could be violate the free competition within Europe. In 2003, the discussions on the European Constitution were an opportunity for some countries (United Kingdom, Germany and Finland¹⁶⁸) to declare their fear of seeing the commercial European policies being threatened by reprisals of its culture policy.

The new Member States of the European Union don't have a powerful audiovisual industry to defend. They are rather hostile or neutral to the question of quotas: the American films represent 65% of the tickets sold in Poland, 71% in Hungary, 76% in Czech Republic and Slovenia, 78% in Estonia, 79% in Leetonia, 82% in Lithuania and 93% in Cyprus¹⁶⁹.

Finally, the European Commission is constantly threatening European aid policies regarding competition law. In September 2001, it announced that public support to film can never, except for very innovative projects, exceed 50% of their production costs. Otherwise, if the producer obtained French support, he could only spend 20% of his production's budget outside France¹⁷⁰. In December 2003, the Commission announced that this percentage would be widened in the next years¹⁷¹.

The system of quotas is consequently always threatened by different factors and is definitely not clearly established for the future.

¹⁶⁸ FERENCZI, T. (27th of June 2003). "Comment préserver l'exception culturelle". *Le Monde*.

¹⁶⁹ LANGE, A. (2003). *Film Market Trends in the New Member States of the European Union*. European Audiovisual Observatory : http://www.obs.coe.int/oea_publ/market/filmmarket_newstates.pdf

¹⁷⁰ Every country, in exchange of financial support, wants economical effects within its territory. Many dispositions of agreement require that an important part of the budget of the film production shall be invested in the supporting country.

¹⁷¹ BENHAMOU, F. (May 2004). *L'exception culturelle – Exploration d'une impasse*. Revue Esprit. Paris. p. 17.

CHAPTER 4 : The situation in the South African film

1. The history of the South African film industry

The story of the South African film industry begins with the establishment of African Film Productions and the production of the first fiction film made in South Africa, “The Great Kimberley Diamond Robbery” in 1910¹⁷². The first Afrikaans (Dutch) film was “De Voortrekkers” (1916). African Film Productions (AFP), made some 43 films, some of them epic in scope, between 1916 and 1922¹⁷³.

Isidore William SHLESINGER was the “ father ” of film in South Africa¹⁷⁴. He owned African Film Productions, a distribution company called African Consolidated Films (AFC) and exhibition venues under the name African Consolidated theatres. In 1913, SCHLESINGER's company began the newsreel, African Mirror, and in 1915 built Killarney Films Studios in Johannesburg. In 1956, 20th Century Fox bought out SCHLESINGER's interests: therefore US companies acquired a market share in South Africa¹⁷⁵.

Forty-three movies were made between 1913 and 1956 by African Film Productions. Thirty-seven of these were made during the period 1913-1922 when, due to World War One it became too expensive to import American productions into the country.¹⁷⁶ After the war, however, production declined rapidly and during the period 1930-1950 very few South African films were made .

This changed when Jamie UYS established a relationship with the South African government¹⁷⁷. As the ACTAG report states, Jamie UYS succeeded “in attracting Afrikaner dominated capital to establish independent production”. He persuaded the government to provide “a subsidy for the making of local films”. Nevertheless, the subsidy scheme mostly aimed “to foster conservative populist themes.”¹⁷⁸

Despite the subsidy scheme, South Africa has never had a coherent approach to the film industry. Films only had to be registered with the Department of Home Affairs and comply with the

¹⁷² Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 38:

<http://www.dac.gov.za/reports/reports.htm>

¹⁷³ <http://www.nfvf.co.za/>

¹⁷⁴ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 38.

¹⁷⁵ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 39.

¹⁷⁶ TOMISELLI, K.G. (1998). South African Cinema: Before and Beyond Apartheid. *in The International Movie Industry.* edited by Goran KINDEM), Southern Illinois University Press, 1998, Southern Illinois. p. 2.

¹⁷⁷ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 39.

copyright legislation of the time. These films were predominantly Afrikaans and pretty conservative. During the period 1956-1984 only 16 out of the 604 movies produced were sold outside of South Africa.¹⁷⁹

The first film made by an African was “Joanie and Gemma” by Lionel NGAKANE¹⁸⁰. A secondary funding scheme was introduced in 1974 that assisted the production of films made by whites for black audiences. This was called the subsidy B scheme (the subsidy A scheme was for white Afrikaner produced films) and its aim was to create funding for “African” films in a black language. Based on the principle of “separate but equal development”, a number of “black” films were produced under this scheme.¹⁸¹

In 1975 Jamie UYS received the Golden Globe award for the best documentary film, “Beautiful People”, and followed this with another successful production, “The Gods must be Crazy” (1980). UYS's film, “Funny People”, based on a candid camera format started a wave picked up in the 1980's by Leon SCHUSTER¹⁸².

During the middle of the eighties, a “loophole” was found in the Income Tax Act, which was aimed at stimulating exports¹⁸³. Through the Income Tax Act, an exporter could deduct marketing expenses against tax. The loophole discovered allowed exporters to deduct between 50% to 100% of those expenses again. This allowed foreign moviemakers to make movies in South Africa and attract domestic investors to pay for the local production costs. They could take advantage of the double deduction, as the movie could be seen as an export. Consequently, many producers got involved in the industry and movies were made that no one viewed simply to make money from the tax incentive¹⁸⁴.

Little of the money from the subsidy and tax incentive schemes was invested in developing a sustainable industry. Government money was used to make a few individuals rich. Allegations of corruption in the allocation of the funding, the funding of “ghost” movies that never got produced and movies that never got distributed or exhibited have been made. The scheme also operated in

¹⁷⁸ Chapter 9, The ACTAG report page 289

¹⁷⁹ BLIGNAUT & BOTHA (1992). *Movies, Moguls and Mavericks - South African Cinema 1979-1991*. Showdata. Johannesburg. p. 112.

¹⁸⁰ Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 38:

<http://www.dac.gov.za/reports/reports.htm>

¹⁸¹ DE BARROS, L. *An assessment of the emerging independent filmmaking in the Gauteng region*. Downloaded from the Showdata Website

¹⁸² <http://www.nfvf.co.za/>

¹⁸³ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 38.

¹⁸⁴ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 39.

tandem with the censorship legislation and movies were not subsidised which challenged the political and social *status quo*¹⁸⁵.

Although apartheid was officially still in place during the making of films such as *Mapantsula*, *Jobman*, *On the Wire* and *The Stick*, these features, together with numerous community and resistance videos became vital instruments in the anti-apartheid struggle¹⁸⁶.

During 1987/1988 the scenario changed with the production of movies such as “Mapantsula”, “The Stick” and “Place of Weeping”. This occurred because independent producers had graduated from documentary production and because reputable international producers became interested in the South African industry.¹⁸⁷

With the scrapping of the film subsidy scheme, the industry found itself in a crisis. The scheme lacked key elements for the development of a film and television industry. These key elements include the development of markets, the development of talent and a distribution and exhibition pipeline¹⁸⁸. Funding was simply used as an extra income source rather than as a way of creating a sustainable industry and did not create an audience for South African movies.

According to Martin P. BOTHA, the developments in the new South African cinema of the 1980s as well as recent proposals within the industry for new structures are definite indicators that a democratic, indigenous South African aesthetic reflecting positive cultural elements is within the capacity of South African directors¹⁸⁹. The success of recent South African films like the Oscar nomination of *Yesterday* or the Golden Bear for *U-Carmen Ekayelisha* during the Film Festival of Berlin confirms the opinion of M. BOTHA and is a very good sign for the future of the South African film industry.

As a conclusion, Martin P. BOTHA quotes Keyan TOMASELLI: “*For the first time in our history, the social, economic and political conditions which sparked progressive film movements in other countries, are present in South Africa. We need to seize this moment and pilot the film industry as a whole to its full potential as an accelerator, rather than as a brake, to the future which has deluded us for so long.*”¹⁹⁰

¹⁸⁵ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 39.

¹⁸⁶ BOTHA, MP. *The South African Film Industry: Fragmentation, Identity Crisis and Unification*. p. 8 : <http://www.kinema.uwaterloo.ca/botha951.htm>

¹⁸⁷ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 40.

¹⁸⁸ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 40.

¹⁸⁹ BOTHA, MP. *op. cit.* p. 10.

¹⁹⁰ TOMASELLI, K.G. (1990). Cultural reconstruction in South African Cinema. In: BLIGNAUT, J. & METZ, C. (eds.) *Showdata Bulletin*, Vol. 5 Johannesburg: Showdata, p. 4.

2. The financing of the South African film industry

The Department of Trade and Industry (DTI) as well as the Department of Arts and Culture (DAC) are linked to the South African Film Industry. The most important institution regarding the Film Industry remains the National Film and Video Foundation (NFVF) and it is linked to the DAC¹⁹¹. The NFVF coordinates the numerous sectors of the Film Industry like funding, skills development through training, cooperation with overseas institutions etc. It is because the state acknowledges the social importance of the industry as well as the problem of attracting investors that it gets involved in funding the industry in other countries.

The NFVF is a juristic body established in terms of the National Film and Video Foundation Act¹⁹². It has been established by Parliament to promote the growth and development of the film and television industry in South Africa¹⁹³ and is considered as a Foundation by the Act of 1997¹⁹⁴.

The objects of the Foundation are¹⁹⁵:

(a) to develop and promote the film and video industry;

(b) to provide and encourage the provision of opportunities for persons, especially from disadvantaged communities, to get involved in the film and video industry;

(c) to encourage the development and distribution of local film and video products;

(d) to support the nurturing and development of and access to the film and video industry and in respect of the film and video industry, to address historical imbalances in the infrastructure and distribution of skills and resources.

The NFVF wants to establish a South African Film and Video Industry that is “representative of the nation, is commercially viable and encourages development”¹⁹⁶. The role of the NFVF is also to conduct research into any field of the film and video industry as well as connect with individuals, institutions and other governments in order to promote the South African Film and Video Industry¹⁹⁷. The NFVF shall also find strategies for the industry, advise government on policy relating to the industry, and coordinate relationships between government, the film industry and regulatory bodies¹⁹⁸.

¹⁹¹ Interview with M. Izidore CODRON. Producer at the Imaginarium. Cape Town, the 9th of May 2005.

¹⁹² National Film and Video Foundation Act N° 73 of 1997. Government Gazette. 3 December 1997. N° 18489.

¹⁹³ <http://www.nfvf.co.za/>

¹⁹⁴ Act N° 73 of 1997. Article 1. vi).

¹⁹⁵ Act N° 73 of 1997. Article 3.

¹⁹⁶ <http://www.nfvf.co.za/>

¹⁹⁷ Act N° 73 of 1997. Article 4. 1. d).

¹⁹⁸ Act N° 73 of 1997. Article 4. 1. i), k).

The NFVF is an important vehicle for government assistance to the film and television industry. The functions of the Foundation are divided in two parts through the Article 4 of the Act. According to Article 4. 1. the Foundation “may” achieve its objectives through fifteen means, and according to Article 4. 2. it “shall” achieve its objectives through eight different means. Therefore, there is a different level of obligation, which differs according to the difficulty of the objective. The Foundation has to try to achieve the goals of Article 4. 1, while the Foundation has to achieve the goals mentioned in Article 4. 2..

Among the numerous objectives of the Foundation, it has to¹⁹⁹:

- determine which field of the film and video industry should have preference in regard to support (Article 4. 1. b)
- make bursaries and loans available to students for local and overseas studies (Article 4. 1. f)
- distribute funds at national and provincial level (Article 4. 1. g)
- enter into agreements with any person, organisation or institution (Article 4. 1. k)
- in conjunction with the Departments of Trade and Industry and of Education, investigate the viability of establishing a national film school; (Article 4. 2. e)
- promote the distribution and showing of local films and videos throughout the Republic and the showing of local films and videos on television (Article 4. 2. f)

Consequently, the NFVF is the most important institution for the film industry in South Africa. It takes care of financing aspects, as well as training and development aspects. Nevertheless, the gaps in the South African financing system remain numerous. The industry represents a very high risk, which often scares potential investors. The South African industry is certainly no exception to this and is in fact confronted by more difficulties in getting potential investors.

There are generally four funding providers for filmmaking²⁰⁰:

- Distributors of films
- Public Funds
- Broadcasters
- The private sector

Film distributors may invest in a production or give an upfront guarantee that the movie will be distributed theatrically. An upfront guarantee allows the producer to seek funding from investors

¹⁹⁹ National Film and Video Foundation Act N° 73 of 1997. Government Gazette. 3 December 1997. N° 18489.

²⁰⁰ Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 38:
<http://www.dac.gov.za/reports/reports.htm>

and at least guarantee them that the film will indeed be screened²⁰¹. This is an important guarantee because many investors all over the world have been left with no returns after investing in a movie which was never distributed. A common complaint by film producers is that the film distributors have no interest in investing in South African films. “Without the distributors involvement, the private sector is even more reluctant to invest because the delivery agents that are crucial to generating income are not taking the risks”²⁰². In 1997, Ster-Kinekor introduced a deal for local filmmakers. This deal guarantees local producers a theatrical release for their production of at least one print (that means at least one theatre will show the movie). This contract is signed before the film or even the script has been produced.

Before the NFVF, the public sector finance was restricted to R10 million per annum through an interim fund that had been introduced by DACST in 1995²⁰³. Local broadcasters are mainly involved in the commissioning of dramas, documentaries and sitcoms²⁰⁴. By 1997, M-Net had financed a few feature films and the SABC had never funded feature films unlike broadcasters in many other countries²⁰⁵.

According to the Imaginarium²⁰⁶, there are five different sources of financing for the South African film production²⁰⁷. The Industrial Development Corporation (IDC) of South Africa provides financing in exchange for certain exploitation rights (1). The Section 24F of the Income Tax Act allows for tax deferrals of investments in film by South African entities and individuals (2). The South African Film and Finance Corporation (SAFFCO) provides financing through a variety of sources, including tax deferred investments (3). Development and production grants are also available through the DACST for projects shot in South Africa (4). Finally, other financing is generated through facilities deals, pre-sales and deferrals (5)²⁰⁸.

In conclusion, there is a lack of investor confidence in the South African film industry. Consequently, most of the capital required to make feature films has been obtained abroad. Sources include foreign television stations such as America’s Showtime and HBO, minimal ad hoc donations from foreigners, co-productions, and film funds from Europe and Canada²⁰⁹.

²⁰¹ Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 74:

<http://www.dac.gov.za/reports/reports.htm>

²⁰² Interview Indra DE LANEROLLE, in Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 74

²⁰³ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 74.

²⁰⁴ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 74.

²⁰⁵ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 74.

²⁰⁶ Film production company based in Cape Town.

²⁰⁷ South African Production Infrastructure Overview. Prepared by the Imaginarium. May 2003. p. 13.

²⁰⁸ South African Production Infrastructure Overview. p. 13.

²⁰⁹ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 74.

3. Opportunities within the South African film industry

Co-production is a general term that covers a variety of production arrangements between two or more production companies undertaking a television or film or other video project. International co-production refers to the situation of two or more production enterprises from different countries undertaking such projects²¹⁰.

The lack of capital is a major impediment to the growth of the South African film industry. Therefore, co-productions are extremely important in overcoming the financial shortfall. Many States have a system whereby the government contributes a certain amount of national revenue towards the film industry²¹¹.

The South African Government has signed an Audiovisual Co-Production Agreement with the Government of Canada, on 5 November 1997²¹². That means that a film that is made in South Africa can qualify for Canadian tax breaks. That is, depending on the local content requirements of the partner country, the production can be considered both as a South African film and a Canadian film. In this manner, South African films can benefit from the Canadian Film Fund²¹³. South Africa also signed Co-production Treaties with Germany and Italy and is about to sign one with the United Kingdom next November. According to Izidore CODRON, this future agreement will create a real boom in the South African film industry²¹⁴.

Consequently, co-production agreements provide important opportunities for local filmmakers to access bigger budgets, develop their skill through interaction with foreign film makers and access wider distribution networks. The main advantage of a contract of co-production is to enable producers to join together in order to provide the financing of a film, with lower costs because of numerous financial resources. The contract will usually lay down how the Intellectual Property Rights should be shared between the co-producers. Another essential advantage of international co-productions is that each of the co-producers brings access to his domestic market.

However, it is often difficult for local producers to find international partners. The NFVF assists by helping to partner local and foreign producers, particularly in cases where South Africa has

²¹⁰ <http://www.nfvf.co.za/>

²¹¹ <http://www.nfvf.co.za/>

²¹² <http://www.nfvf.co.za/>

²¹³ Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 75:

<http://www.dac.gov.za/reports/reports.htm>

²¹⁴ Interview with M. Izidore CODRON. Producer at the Imaginarium. Cape Town, the 9th of May 2005.

signed co-production treatise with other countries (as is the case presently between South Africa and Canada)²¹⁵.

Regarding the signing of co-production agreements, South Africa and France are still in discussions and South Africa and Australia have started initial co-production negotiations²¹⁶.

A Report to the DAC in 1998 draws up an assessment of the benefits and disadvantages of co-productions²¹⁷:

The benefits include:

- pooling of financial resources
- access to partner government incentives and subsidies
- access to partner's market
- access to partner's knowledge of other markets they have exported productions to.
- access to new locations
- access to cheaper inputs
- learning opportunities from partners.

However, the disadvantages include:

- increased shooting costs if shooting occurs in both countries
- increased co-ordination costs between the two partners in different countries.
- loss of control and cultural specificity - a certain level of compromise will be expected between the partners.
- increased levels of negotiations with local and international broadcasters and exhibitors. For example, the television production "Molo Fish" was a co-production between Canada and South Africa. The producers had to negotiate hard to convince the Canadian broadcaster to screen the production during prime time.

However, co-productions do provide an important mechanism for accessing more funding. Co-productions with a number of African partners could also help to stimulate the Southern African region although they will not generate great amounts of money for local producers²¹⁸.

Finally, the productions costs in South Africa are a big attraction for foreign productions. Generally, production costs in South Africa are 35% to 50% below North America and Europe²¹⁹. This is primarily due to lower labour costs, no fringe benefits, and substantially lower art

²¹⁵ <http://www.nfvf.co.za/>

²¹⁶ Report to the Department of Arts, Culture, Science and Technology. (1998). Cultural Industries Growth Strategy (CIGS). The South African Film and Television Industry Report. p. 76:

<http://www.dac.gov.za/reports/reports.htm>

²¹⁷ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 77.

²¹⁸ Report to the Department of Arts, Culture, Science and Technology. *op. cit.* p. 77.

department costs, as much of the materials used in the art department are produced in South Africa. South Africa's locations are another major reason for international producers choosing South Africa as a film location. This advantage could help South Africa to get a real exchange of knowledge. Thus, the Imaginarium recommend that "the foreign coordinators work with local coordinators to pass along their knowledge and expertise"²²⁰.

4. The position of South Africa towards the "cultural diversity"

According to documents that are available on the WTO website, South Africa did neither take any specific commitments nor exemptions towards audiovisual services²²¹. The only three countries that made propositions concerning audiovisual services are Brazil, the United States and Switzerland²²².

Nevertheless, two opposite views are growing concerning South Africa's position regarding audiovisual services. The first view seems in favour of the globalization process and is adopted by the Coalition of Service Industries:

In 2002, Robert VASTINE, President of the Coalition of Service Industries, wrote about the US Free Trade Agreement with Southern Africa:



"With regard to audiovisual services, the agreement should include:

- Full market access and national treatment for production, distribution, and projection services (including cinema theatre ownership and management) for motion pictures and sound recordings.
- Full market access and national treatment for radio and television services and transmission services.
- Customs valuation on the basis of the carrier medium for goods needed in the conduct of AV services.
- Tariff reductions on audiovisual line items, including production equipment and final products, and zero duties on DVDs and other digital products"²²³.

²¹⁹ South African Production Infrastructure Overview. Prepared by the Imaginarium. May 2003. p. 13.

²²⁰ South African Production Infrastructure Overview. p. 14.

²²¹ South Africa - Schedule of Specific Commitments, GATS/SC/78, 15/04/1994.

South Africa - Final List of Article II (MFN) Exemptions, GATS/EL/78, 15/04/1994.

²²² See p. 21.

²²³ Statement of Robert VASTINE President, Coalition of Service Industries on the Southern Africa Free Trade Agreement before the Trade Policy Staff Committee Office of the United States Trade Representative December 16, 2002:

<http://www.uscsi.org/publications/papers/Southern.pdf>

The second view is adopted by numerous people who work in the domain of Arts and Culture as well as by academics and researchers. It seems to represent the Ministerial position regarding cultural diversity²²⁴.

The Fifth Annual Ministerial Meeting of the International Network on Cultural Policy (INCP) was held in Cape Town, South Africa, from October 14 to 16, 2002. Dr. Ben NGUBANE, the South African Minister of Arts and Culture chaired the discussions²²⁵. It was entitled “Fostering Cultural Diversity and Development: Local, National and Global Strategies”, and the conference gathered artists, activists and cultural organizations from more than 30 countries to debate the INCD’s draft Convention on Cultural Diversity and its relationship to sustainable development policies²²⁶.

The discussions focused on the issues and challenges facing developing and developed countries with respect to cultural diversity. The participants also discussed the draft of the International Instrument on Cultural Diversity (IICD), issues related to tangible and intangible heritage, the role of the media in promoting culture and emerging cultural policy issues²²⁷.

The results of a research made by South Africa settled on the basis of the discussions²²⁸. This research highlights the cultural development priorities of Southern countries, the state of their cultural sectors, and the importance of developing cultural policies. This document also examined the implications of the Instrument to developing countries as well as making recommendations about its form and content.



As a conclusion to this meeting, all Ministers including Dr. Ben NGUBANE agreed that it was necessary to expedite the work on the Instrument as a matter of priority both at national and international levels²²⁹. Thus, South Africa seem to care about the “cultural diversity” of its country and try to cooperate with other countries in order to give a legal or institutional framework for the protection of this diversity.

²²⁴ *La diversité culturelle dans les pays en développement; les défis de la mondialisation*. Étude déposée par le gouvernement Sud-africain à la réunion du Réseau International sur la politique culturelle au Cap. p. 26 :

http://agence.francophonie.org/diversiteculturelle/fichiers/afriquesud_cap.pdf

²²⁵ International Network on Cultural Policy. Fifth Annual Ministerial Meeting. Cape Town. South Africa. October 14-16, 2002:

<http://www.dac.gov.za/news/speeches/AT021927.htm>

²²⁶ International Network on Cultural Policy. *op. cit.*

²²⁷ International Network on Cultural Policy. *op. cit.*

²²⁸ *La diversité culturelle dans les pays en développement; les défis de la mondialisation*. *op. cit.* p. 28.

²²⁹ International Network on Cultural Policy. *op. cit.*

CHAPTER 5 : The new stakes of “cultural diversity” in the film industry

1. From « cultural diversity » to « new technologies »

Free-traders consider that Internet expansion sound the death knell for the “cultural exception” and that it will render the quota system completely obsolete²³⁰. Indeed, why would people go to the cinema if films are available on the Internet? That is why a new struggle took place within the negotiations on electronic commerce (e-commerce). The United States has a very restrictive concept of services: film on the Internet should be considered as a “virtual good” and not as a service²³¹. Thus, the GATT would apply and not the GATS. According to Catherine TRAUTMANN, “the mode of transfer of a service does not alter its nature”²³².

The new stake for the liberalization of audiovisual service is new technology. According to Béatrice MARRE, the United States “focus their efforts to obtain that “cultural exception” be limited to the traditional media, while an absolute liberalization will apply to the new media”²³³. Thus, the debates related to e-commerce within the WTO include audiovisual aspects.

Regarding the programme on e-commerce, the WTO website emphasizes the new problems that brought with the electronic mode of delivery: *“A difference of views has emerged with respect to whether certain products (e.g. software and books) when delivered electronically should be classified as goods or services. Such products, until relatively recently, had been delivered through conventional means whereby they were contained in a physical carrier and classified and regulated as goods. The question now arises as to whether such products, when delivered electronically, should still be treated as goods and therefore subject to the rules of the GATT or, should they be classified as services and be subject to the framework of the GATS. In either case, members of the WTO would need to take a decision with respect to these products”*²³⁴.

Films are, of course, as much concerned by this problem as books or software. Therefore, negotiations on e-commerce within the WTO have to be specific and the Member States should not forget the impact of such negotiations on film.

²³⁰ FRAU-MEIGS, D. (2003). “Cultural exception” - national policies and globalisation: imperatives in democratisation and promotion of contemporary culture. *Quaderns del CAC*: Issue 14. p. 13.

²³¹

²³² TRAUTMAN, C. (11th October 1999). « L’exception culturelle n’est pas négociable ». *Le Monde*.

²³³ MARRE, B. (30 November – 3 December 1999). « De la mondialisation subie au développement du contrôle. Les enjeux de la conférence de Seattle ». *Assemblée Nationale, Rapport d’information*. N° 1824. p. 139.

²³⁴ WTO website :

http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief18_e.htm

2. The “Americanization” of international copyright

For a long time, the United States played a minor role in international copyright: until 1989, they were not a Member of the most important Convention on copyright, the Berne Convention for the Protection of Literary and Artistic Works of 1886 (amended in 1979)²³⁵. In 1952, the Universal Copyright Convention²³⁶ was adopted in order to accommodate international protection for the needs of the United States and of some other states that were not ready to be part of the high level of protection of the Berne Convention²³⁷.

It is only during the eighties that the United States discovered the importance of international intellectual property for their industries. Indeed, a lot of studies prove that the “copyright industry” had a more important economic impact than was presumed. Consequently, the United States reinforced international protection in favour of American works. The United States had an interest in international copyright only in order to improve the American trade industry!²³⁸

This instrumentation took place within the frame of a multilateral system through the WTO. Silke VON LEWINSKI considered that many provisions of the international copyright system could be seen as a *lex americana*: the exclusion of moral rights and the controversial rental rights show us the influence of the American copyright system in the establishment of international copyright protection²³⁹.

The only exception to adherence of the Berne Convention in the TRIPS was the consequence of an objection raised by the United States to Article 6bis of the Convention, which obliges members to protect the moral rights of authors²⁴⁰.

The United States also tried to bring together copyright and related rights during negotiations on treaties of the World Intellectual Property Organization. The United States wanted to include protection for phonograms as a possible protocol to the Berne Convention. Their argument was that different kinds of work should be treated the same way because all the objects of intellectual property can be exploited through digitalization. If this proposition had been accepted, that would

²³⁵ Berne Convention for the Protection of Literary and Artistic Works. Paris Act of July 24, 1971, as amended on September 28, 1979:

http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf

²³⁶ Universal Copyright Convention as revised at Paris on 24 July 1971:

<http://www.unesco.org/culture/laws/copyright/images/copyrightconvention.rtf>

²³⁷ VON LEWINSKY, S. (2004). « Américanisation ». in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 15.

²³⁸ VON LEWINSKY, S. op. cit. p. 16.

²³⁹ VON LEWINSKY, S. op. cit. p. 17.

²⁴⁰ WATAL, J. (2001). *Intellectual Property Rights in the WTO and developing countries*. Kluwer Law International. The Hague. p. 211.

have brought together the protection of copyright with related rights (phonograms). This proposition was an important step for the introduction of the copyright system in the international area²⁴¹. Fortunately, many countries realized the conflict of interest and rejected this approach. Nevertheless, the protection of phonograms is now organized through the the WIPO Performances and Phonograms Treaty (WPPT)²⁴². South Africa and most countries of the European Union signed this Treaty²⁴³. In US law, the Treaties of the WIPO are gathered in the Digital Millenium Copyright Act²⁴⁴.

Furthermore, regarding the negotiations of the Rome Convention, the United States were strongly in favour of the exclusion of the protection of performers in the audiovisual sector. Therefore, Article 19 denies the performer economic rights once he has “*consented to the incorporation of his performance in a visual or audio–visual fixation*”²⁴⁵. In spite of this provision, the United States never signed the Rome Convention...

During the WIPO Diplomatic Conference on the protection of audiovisual performances in 2000, the most controversial issue was the transfer of rights by the artists to the producers. The basic proposal contained four possibilities²⁴⁶:

1. The contracting parties have the choice to legislate or not on this issue. No consensus was found: the European Union agreed with this provision but the United States did not.

2. 3. Those two possibilities were rejected as well. Alternative 2. provided “for a rebuttable presumption of transfer of the performer's exclusive rights of authorization to the producer of the audiovisual fixation”. Alternative F is similar in its effect but is phrased as a presumption of entitlement. The producer would be expressly and properly “entitled to exercise the exclusive rights of authorization provided for in this Treaty.”

4. The main function of the last alternative would be to “guarantee the recognition of different arrangements for the transfer of rights that are in use in different Contracting Parties”. A transfer to

²⁴¹ VON LEWINSKY, S. (2004). « Américanisation ». in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 21.

²⁴² The WIPO Performances and Phonograms Treaty adopted in Geneva on December 20, 1996:

<http://www.wipo.int/about-ip/en/iprm/pdf/ch5.pdf#wppt>

²⁴³ http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=20

²⁴⁴ VON LEWINSKY, S. op. cit. p. 21.

²⁴⁵ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Rome 26th of October 1961 :

http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P152_16149

²⁴⁶ Diplomatic Conference on the protection of audiovisual performances. Geneva, December 7 to 20, 2000. Basic proposal for the substantive provision of an instrument on the protection of audiovisual performances to be considered by the diplomatic conference. Document IAVP/DC/3 :

http://www.wipo.int/documents/en/document/iavp/pdf/iavp_dc3.pdf

the producer of an audiovisual performance shall be governed by the law of the country most closely connected with the particular audiovisual presentation.

According to this alternative, the country most closely connected with a particular audiovisual project shall be:

- “(i) the Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or*
- (ii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of performers are nationals; or*
- (iii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, and where there is no single Contracting Party of which a majority of the performers are nationals, the principal Contracting Party in which the photography takes place.”*

This provision would have implied the application of the US law, including the system of “work made for hire”²⁴⁷. Indeed, this provision would have authorized a state to apply its national rules concerning transfer of rights for the exploitation of its films in the whole world! This alternative has been rejected and there is still no consensus on the essential question of transfer of rights²⁴⁸.

Finally, it is to say that the United States have an important influence on many countries, due to their economic power. For example, during the diplomatic conference of 2000, some countries of Latin America took position against their own law system. Their position could only be explained by the strong lobbying activities of the United States in those countries²⁴⁹. For example, their position on the moral rights of performers was meaningless regarding the provisions of their laws concerning the right of integrity of the work²⁵⁰. Thus, the influence of the United States in international copyright is becoming more and more important. An international copyright that would be totally based on the principles of “copyright” and not of “author’s rights” would have a considerable impact on creativity regarding films. The transfer of rights to the producer and the moral rights of authors and performers are necessary to let the artists free of the use of their creativity. The system of copyright clearly protects the producers and considers performers,

²⁴⁷ VON LEWINSKY, S. (2004). « Américanisation ». in *Propriété intellectuelle et mondialisation – La propriété intellectuelle est-elle une marchandise ?*. Dalloz. Paris. p. 27.

²⁴⁸ VON LEWINSKY, S. op. cit. p. 28.

²⁴⁹ Amendment to Article 5 of the basic proposal for the substantive provisions of instrument on the protection of audiovisual performances to be considered by the diplomatic conference. *Proposal by the Delegation of Peru with the support of the Delegations of Argentina, Brazil, Chile, Dominican Republic, Ecuador, El Salvador, Jamaica, Mexico, Panama and Uruguay*. (December 13, 2000). Document IAVP/DC/19. : http://www.wipo.int/documents/en/document/iavp/pdf/iavp_dc19.pdf

²⁵⁰ VON LEWINSKY, S. op. cit. p. 29.

directors, scriptwriters as technicians that do not make an act of creation. The system of “work made for hire” is an incarnation of this concept.

3. Rental rights and film piracy

In recent years, the control of piracy of copyrighted works is becoming a more and more pressing issue, particularly with the advancement of technologies that facilitate an easy and cheap dissemination of the works. Thus, it was the impact of piracy that set off the demand for worldwide protection of Intellectual Property Rights (IPRs) in GATT by the United States and the European Union²⁵¹. These advances in the reproduction technologies have increased pressure from copyright owners for enactment of rental rights²⁵².

Copyright only gives the authors the right to authorize or prohibit use or reproduction of the protected work. Generally, there is no right to prevent the use of the work once it has been legitimately placed on the market. The principle of exhaustion of IPRs authorizes the commercialization of the work. Rental rights are an exception to the principle of exhaustion. It is the right of authors to authorize or prohibit rentals of their work. This concept was first a response to the copying of computer programmes and sound recordings where a single act of rental could lead to several copies of the work²⁵³.



The United States demanded rental rights for all copyrighted works as early as 1987 while the European Union and Japan did not ask for them²⁵⁴. In 1990, the United States, Japan and the European Union had all coordinated their positions and asked for rental rights²⁵⁵. But submission by the European Union and Japan included a grant of rental rights for cinematographic works too. The problem was that such rights had been specifically disallowed by the United States²⁵⁶.

The European Union and Japan did not have a bigger film export industry than the United States. Therefore, their position was clearly a negotiating tactic: they wanted to “retain the option of an equitable remuneration in lieu of the exclusive rental right”²⁵⁷. This would have prevented the

²⁵¹ WATAL, J. (2001). *Intellectual Property Rights in the WTO and developing countries*. Kluwer Law International. The Hague. p. 209.

²⁵² GOLDSTEIN, P. (2001). *International Copyright – Principles, Law, and Practice*. Oxford University Press. New York. p. 256.

²⁵³ GOLDSTEIN, P. *op. cit.* p. 256.

²⁵⁴ Documents MTN.GNG/NG11/W/14 (20th October 1987) and MTN.GNG/NG11/W/17 (23th November 1987). *in* WATAL, J. *op. cit.* p. 221.

²⁵⁵ Submission W/70 *in* WATAL, J. *op. cit.* p. 221.

²⁵⁶ WATAL, J. *op. cit.* p. 222.

²⁵⁷ WATAL, J. *op. cit.* p. 222.

owner of the copyright to deny a rental on his work but it would also have allowed him an equitable payment for it. The United States did not agree since their own law does not allow it²⁵⁸.

Finally, the Article 11 of the TRIPS provides²⁵⁹:

“In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental”.

In the case of works for which a few hours rental of one copy can lead to several unauthorized copies, copyright owners will typically use the rental right to entirely prohibit rental of copies. In case where illicit copying is less likely, copyright owners will use their rental right as a source of revenues²⁶⁰.

The low level of rental rights for films has been attributed to the fact that rented films are less frequently copied than phonograms or computer programmes. Unfortunately, this is not the case anymore. Film piracy is becoming a major problem. In the American copyright system, because of the concept of “work made for hire”, the authors (directors, performers, scriptwriters...) of a cinematographic work are just protected through labour law and collective agreements²⁶¹. Thus, an equitable remuneration would have been quite a problem for the American copyright system.

Hopefully, it will be considered that today, the rental of films “has led to widespread copying of such works which is materially impairing the exclusive right of reproduction”. Indeed, the rental right could be a revenue for the authors of the work, and therefore help and support creation and cultural diversity.

²⁵⁸ WATAL, J. op. cit. p. 222.

²⁵⁹ Agreement on Trade Related Aspects of Intellectual Property Rights:
http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm#1

²⁶⁰ GOLDSTEIN, P. (2001). *International Copyright – Principles, Law, and Practice*. Oxford University Press. New York. p. 256.

²⁶¹ KEREVER, A. « Droit d’auteur et mondialisation ». Robic Website :
<http://www.robic.ca/cpi/Cahiers/10-1/02KereverW97.html>

4. TMC = SPA = TMC

In a very relevant article, Christophe GERMANN brings up a very innovative solution concerning the conservation of cultural diversity in film²⁶². According to him, one should establish a new balance in IPRs. Hollywood blockbusters are protected by copyright and trade marks and the majority of countries condemn film piracy: an excessive level of IPRs protection should be denounced through this formula: $TMC = SPA = TMC$ ²⁶³.

The Articles 6 to 8 of the TRIPS Agreement guarantee a flexibility that allows the Member States to limit the protection of IPRs in order to realize policies that are not simply economical. The access to drugs is an important issue concerning these provisions. Thus, in 1997, the South African government passed the Medicines and Related Substance Control Amendment Act²⁶⁴. This legislation intended to enable the government to make medicines more affordable. In February 1998, the Pharmaceutical Manufacturers Association of South Africa (PMA) and numerous pharmaceutical companies began legal proceedings against the government to block the law, alleging that several of its provisions were in violation of the South African Constitution and of TRIPS²⁶⁵. On 19 April 2001, 39 transnational pharmaceutical companies bowed to worldwide condemnation and pressure, and completely abandoned their court action against the South African government²⁶⁶.

South Africa wanted to make the drugs more affordable because the population could not afford them due to patent rights protection that raises the price of drugs. According to Christophe GERMANN, an analogy should be made in order to conclude that too much protection in the film industry regarding copyright and trade marks annihilates healthy competition and the cultural diversity²⁶⁷. Thus, the Article 6 of the TRIPS gave the Member States the ability to legislate on the type of exhaustion of rights (national, regional or international). An international exhaustion of the copyright protection for films is recommended by Christophe GERMANN, except for films with a

²⁶² GERMANN, C. (2003). Diversité Culturelle et Cinéma : Une vision pour un pays en voie de développement. CG Draft 08 06 03 Final. p. 24 :

http://robert.gujski.free.fr/002/blockbusters/Beilage_A_zur_Replik_vom_26_07_03.pdf

²⁶³ Trade Mark & Copyright = Stars, Print & Advertisement = Total Mono Culture. in GERMANN, C. op. cit. p. 24.

²⁶⁴ <http://www.doh.gov.za/docs/legislation/acts/1997/act90.pdf>

²⁶⁵ “Victory in South Africa but the Struggle continues” :

<http://www.aidslaw.ca/Maincontent/issues/cts/updateSA.htm>

²⁶⁶ “Victory in South Africa but the Struggle continues” :

<http://www.aidslaw.ca/Maincontent/issues/cts/updateSA.htm>

²⁶⁷ GERMANN, C. op. cit. p. 25.

small budget²⁶⁸, which would just require a national exhaustion of rights²⁶⁹. The expenses due to protection of IPRs are not justified when they ruin cultural diversity!

In order to preserve the cultural diversity in film through the regulation of power of the Major film companies (the Majors), Christophe GERMANN proposed applying two new principles: the principle of “Cultural Treatment” and the “Most Favourite Culture” principle. Of course, these principles are linked to the WTO principles: the objective of the WTO principles are a free international trade while these principles want to achieve a cultural diversity in cinema²⁷⁰.

In order to present his conception of these principles more clearly, Christophe GERMANN expressed his ideas in this board²⁷¹:

Sphere of application	International Trade	International Culture
Organization	WTO	UNESCO or creation of a World Culture Organization
Addressees	States	States and Companies
Principles	National Treatment and MFN principle	Cultural Treatment and Most Favourite Culture principle
Object of the principles	Prohibition of an economical discrimination that ruins the competition in international trade	Prohibition of a cultural discrimination in the cultural international exchanges that would ruin creativity and cultural diversity
Dynamic effect	Economic integration	Cultural integration
Sanctions in case of violation	Commercial sanctions	Refusal to apply IPRs protection
Dispute settlement	Dispute Settlement Body	Dispute Settlement Body of the UNESCO or of the World Culture Organization

²⁶⁸ Budgets that are less than 300.000 euros.

²⁶⁹ GERMANN, C. op. cit. p. 25.

²⁷⁰ GERMANN, C. (2003). Diversité Culturelle et Cinéma : Une vision pour un pays en voie de développement. CG Draft 08 06 03 Final. p. 24 :

http://robert.gujski.free.fr/002/blockbusters/Beilage_A_zur_Replik_vom_26_07_03.pdf

²⁷¹ GERMANN, C. op. cit. p. 26.

Thus, the countries that want to support cultural diversity could refuse to apply copyright and trade marks on their territories for films of the “ Majors ” as long as the “ Majors ” apply cultural discrimination. This would oblige the Majors to share their infrastructure of marketing and distribution. In practical terms, the exchange could consist of foreign direct investments coming from the “ Majors ” to local production and access to marketing facilities²⁷².

Nevertheless, Christophe GERMANN clarifies that his position is not against copyright, and that he only supports the idea that too much copyright and trade marks cause a form of private censorship exerted by the companies that have a dominant position on the market²⁷³. Therefore, a new balance between IPRs and cultural diversity has to be found.

As a conclusion, Christophe GERMANN refers to film piracy. According to him, film piracy could be a solution against a total mono culture²⁷⁴. Indeed, this total mono culture is the result of crazy expenses in marketing and distribution (“Stars, Print, and Advertisement), while film piracy fights against the formula “TMC = SPA = TMC”. Indeed, film piracy dissuades the investors to finance the marketing of blockbusters because of the lack of protection of investment. Thus, in the absence of a new legal order, film piracy could bring beneficial aspects to cultural diversity despite its illegality!



²⁷² GERMANN, C. (2003). Diversité Culturelle et Cinéma : Une vision pour un pays en voie de développement. CG Draft 08 06 03 Final. p. 28 :

http://robert.gujski.free.fr/002/blockbusters/Beilage_A_zur_Replik_vom_26_07_03.pdf

²⁷³ GERMANN, C. *op. cit.* p. 29.

²⁷⁴ In case of the refusal by the States of the proposed system explained above.

RECOMMENDATIONS AND CONCLUSION

In the beginning of the GATS negotiations, the whole debate on cultural diversity in film was unfortunately a “French exception”. The debate evolved and began to touch other countries like Egypt, India, or South Africa, which realized the importance of film-making in their cultural heritage as a mean to express identity, history and tradition. Cultural diversity in film touches deep issues of identity that are precious to every country. This discussion should not lead to protectionism through a limited influence of national cinema. On the contrary, an exchange needs to take form and to be developed. The objective of this debate is to realize a real exchange of cultural identity though all the screens in the world, in order to give people the opportunity to discover other cultures and ways of thinking.

Several recommendations can be made in order to protect cultural diversity in cinema. The first one is the formula $TMC = SPA = TMC$, detailed above. Otherwise, according to Christophe GERMANN, competition law, marketing taxes or human rights could be potential means to reach a certain level of protection.

$$\underline{TMC = SPA = TMC}^{275}.$$



On the basis of statistical data from motion pictures released in the United States and Canada, the economist DE VANY comes to the conclusion that: “The movie-going audience cannot be manipulated and a movie will be a hit only if it engages a positive word-of-mouth information cascade”²⁷⁶. This conclusion is based on the production costs, stars, number of opening screens, sequels, genre and rating. However, the authors did not include advertising expenses! Thus, the conclusion according to which “movie-goers are able to break the information cascade when they share their private information through word-of-month information and review”²⁷⁷ may be accurate only for the motion pictures that enjoyed comparable investments regarding their marketing. Indeed, films that have not sufficient star, print and advertisement power rarely have a glorious opening night.

²⁷⁵ See p. 53.

²⁷⁶ DE VANY, A. (2004). *Hollywood Economics. How extreme uncertainty shapes the film industry*. London / New York: Routledge. p. 129.

²⁷⁷ DE VANY, A. *op. cit.* p. 131.

Marketing Tax:

According to Christophe GERMANN, regulators could consider introducing a “marketing tax” in order to avoid excessive marketing expenses²⁷⁸. Such a tax could have a deterrent effect towards blockbusters and, discipline the behaviour of market dominating companies. It would also contribute to make marketing mechanisms more transparent. Furthermore, it would contribute to stopping predatory competition induced by the blockbuster strategy.

Monies raised by this tax could be redistributed to motion pictures of any cultural origin that do not enjoy reasonable advertisement budgets. In this way the marketing tax would not be discriminatory and, accordingly, it would be considered as compliant with WTO principles²⁷⁹. If the “Stars, Print & Advertisement” expenses would have to support a tax of 10%, each blockbuster would have to pay 5 billion US\$²⁸⁰ to an international fund that would be created²⁸¹.

Of course, it is essential to take measures regarding the insane budget of Hollywood regarding stars, print and advertising. Nevertheless, the recommendations of Christophe GERMANN²⁸² are brilliant but not realistic enough to be realized. The United States would never agree with such recommendations and the international community will never find the courage to force them to agree. Nevertheless, a compromise could be found, maybe through a natural way like the auto regulation of film piracy²⁸³ or maybe through an international agreement on a limited budget per movie on Stars, Print and Advertising.



Competition Law:

Another solution could be competition law. Competition law could be an instrument for the respect of cultural diversity. The inspiration would be the American law doctrine of “essential facilities” that “imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product of service that the second firm must obtain in order to compete with the first”²⁸⁴. According to Christophe GERMANN, the capacity of the Majors to attract investments in SPA and to control film distribution should be seen as an “essential facility”²⁸⁵.

²⁷⁸ GERMANN, C. (24. Mai 2004). *Content Industries and Cultural Diversity – The case of motion pictures*. Jusletter. P. 11: http://www.wti.org/res/documents/ArticleContentIndustriesJusletter240504_000.pdf

²⁷⁹ GERMANN, C. (2004). *op. cit.* p. 12.

²⁸⁰ The average of the SPA expenses per blockbuster is 50 million US\$.

²⁸¹ GERMANN, C. (2003). *Diversité Culturelle et Cinéma : Une vision pour un pays en voie de développement*. CG Draft 08 06 03 Final. p. 23 :

http://robert.gujski.free.fr/002/blockbusters/Beilage_A_zur_Replik_vom_26_07_03.pdf

²⁸² See p. 53.

²⁸³ See p. 54.

²⁸⁴ GERMANN, C. (2003). *op. cit.* p. 30.

²⁸⁵ GERMANN, C. (2003). *op. cit.* p. 31.

Human Rights:

Freedom of opinion only exists if the audience has a real choice between more than one single dominant vision or idea. Therefore, the state has an essential role in subsidizing local film production and regulating distribution and television broadcasting²⁸⁶. When local film production struggles to survive, states should be entitled to intervene in order to preserve the freedom of expression.

*“In 1996, the US human rights activist and Congressman Jesse JACKSON asked the executives of Hollywood Majors to explain why no Afro-American actors have ever received an Oscar in the entire history of the Hollywood film industry. Eventually, Denzel WASHINGTON was the first Afro-American to win this prize six years after Jesse Jackson’s intervention. In this context, we will recall that the Oscar is one of the US film industry’s most efficient marketing tools”*²⁸⁷.

Different means are possible in order to organize the respect of freedom of opinion. One could grant a right to claim more cultural diversity to individuals²⁸⁸. Governments could also elaborate on a system of actions through which individuals and NGOs could challenge the policies of corporations²⁸⁹. Also, one could be inspired from the experiences of other public fields such as the protection of the environment or of public health²⁹⁰.

It seems that the recommendation that concerns human rights could be very powerful and with a real international impact regarding the universal aspect of this argument. That is maybe the only realistic basis for an International Instrument on Cultural Diversity and it would be a very good basis.

At the same time, the whole debate on cultural diversity is also a money issue. One should not be naive and has to take the financial aspects of the industry in account. That is why the recommendations by Christophe GERMANN²⁹¹ seem to be a little bit too revolutionary regarding financial power of the United States. The US would certainly not bow down before such propositions. Thus, it seems that an institution like the UNESCO or (as proposed by GERMANN²⁹²) a World Culture Organization would be more appropriate to deal with the issue of cultural diversity in film.

²⁸⁶ GERMANN, C. (24. Mai 2004). *Content Industries and Cultural Diversity – The case of motion pictures*. Jusletter. P. 12: http://www.wti.org/res/documents/ArticleContentIndustriesJusletter240504_000.pdf

²⁸⁷ GERMANN, C. (2004). *op. cit.* p. 13.

²⁸⁸ GERMANN, C. (2004). *op. cit.* p. 13

²⁸⁹ And use punitive damages against private corporations responsible for undermining cultural diversity.

²⁹⁰ GERMANN, C. (2004). *op. cit.* p. 13

²⁹¹ See the recommendations p. 52 to 54.

²⁹² See the board p. 53.

Anyway, an institution needs power in order to be respected. The discussion lasted already too long and the practical issues of the protection of cultural diversity should not be ignored anymore. The work made by the International Network on Cultural Policy, in particular at the meeting of 2002 in Cape Town, has to be continued and reinforced. A real cooperation between institutions like the UNESCO and the INCP is also essential in order to harmonize positions and accelerate the creation of an International Instrument on Cultural Diversity.

In conclusion, one should hope that more and more countries will unite on the issue of cultural diversity in the audiovisual industry. Cultural diversity through the world's cinema is not dead, but it may become so unless we fight to keep it alive and to see it prosper.



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LIST OF ABBREVIATIONS

CNC: Centre National de la Cinématographie
DAC : Department of Arts and Culture
DTI: Department of Trade and Industry
DVD : Digital Versatile Disc
IMF: International Monetary Fund
ITO: International Trade Organization
GATS: General Agreement on Trade in Services
GATT: General Agreement on Tariffs and Trade
GDP: Gross Domestic Product
IICD: International Instrument on Cultural Diversity
ILO: International Labour Organization
INCP: The International Network on Cultural Policy
IPRs: Intellectual Property Rights
MFN: Most-Favoured Nation
NAFTA: North American Free Trade Agreement
NFVF: National Film and Video Foundation
OECD: Organization for Economic Cooperation and Development
TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights
TSF: Television without Frontiers
TV: Television
UN: United Nations
UNCTAD: United Nations Conference on Trade and Development
UNESCO: United Nations Educational Scientific and Cultural Organization
WTO: World Trade Organization

