Meinen Grosseltern,

J. & J. Neuwirth
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# ABBREVIATIONS

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<td>American Journal of International Law</td>
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<td>AB</td>
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<td>BIRPI</td>
<td>United International Bureau for the Protection of Intellectual Property</td>
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<td>CIFTA</td>
<td>Convention on Contracts for the International Sale of Goods</td>
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<td>CMOs</td>
<td>Collective Management Organizations (or Performing Rights</td>
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<td>Universal Postal Union</td>
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<td>US</td>
<td>United States of America</td>
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<td>USSR</td>
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<td>Va. J. Int'l L.</td>
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Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU
European University Institute
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ABSTRACT

In the universal history of mankind, the concepts “culture” and “trade” have long denominated two important trains of human aspirations and activities. Notwithstanding their great significance for human life in its entirety, they have been widely regarded as belonging to distinct spheres, which were deemed to be difficult, if not impossible, to reconcile. This perception was also widely reflected in the sphere of law, where their respective fields have been subject to separate regimes based on the logic of their mutual exclusivity and expressed in the concept of res extra commercium.

By contrast, the concept of “cultural industries”, which was originally derived from the term Kulturindustrie coined by protagonists of the Frankfurt School introduced a new category of cultural goods and services, which began to strongly challenge the traditional legal separation of cultural from economic considerations. Their novelty as well as their more subtle conceptual implications led to the controversy over the treatment of the dual, i.e. both cultural and economic, nature of such goods and services, which surfaced first during the bilateral trade negotiations between Canada and the United States and soon afterwards during the multilateral Uruguay Round negotiations. In the latter, it was the controversy over the exception culturelle that almost derailed the successful establishment of the World Trade Organization (WTO). Since then the problem remains unsolved, and reinforced by the decision of the WTO Panel in the Canada Periodicals Case, the quest for an appropriate conceptual approach allowing for the correct legal answer to the conundrum of culture and trade continues up to this day.

In this quest, the present thesis forms an attempt to cast some light on the culture and trade conundrum with a view to isolating options for an appropriate legal response of the multilateral trading system under the WTO. It follows the evolution of the concept of cultural industries, from its birth in the context of critical social theory across the field of political economy to its first appearance in the legal context with the 1988 Canada-United States Free Trade Agreement. After a short analysis of the cultural industries exemption in the North American context, its focus shifts to the GATT/WTO system of which the basic provisions are discussed in connection with the category of cultural goods and services known as the cultural industries. Their critical analysis yields the present imperfections inherent in the WTO system as a corollary of the fragmentation of the international legal order. Before some final conclusions are drawn, these imperfections are contrasted with the relevant experiences within the context of the process of European integration from the European Economic Community to the European Union.
INTRODUCTION

The flame knows no rest, for it lives in perpetual conflict between two opposite tendencies. On the one hand, it cleaves to its wick, drinking thirstily of the oil that fuels its existence. At the same time, it surges upward, seeking to tear free of its material tether.

Y. Tauber, *Beyond the Letter of the Law*

Chapter 1 THE CULTURAL INDUSTRIES IN INTERNATIONAL TRADE LAW

In the early 1990s, a controversial debate over the so-called “exception culturelle” marked the end of the Uruguay Round negotiations and almost derailed their successful conclusion hence threatening seriously the creation of the World Trade Organization (WTO). More precisely, the controversy saw numerous contracting parties of the General Agreement on Tariffs and Trade (GATT) but, in particular, Canada and the European Union (EU) on the one side and the United States of America (US) on the other, disagree as to how to frame, and hence how to answer, the principal question of whether certain categories of cultural goods and services are different from other, so-called “ordinary” products. Building upon this differentiation, the next controversial question is whether these cultural goods and services should receive treatment other than their “ordinary” counterparts. Such special treatment, which was discussed in form of the concept of a cultural exception, and later, in an attempt to find a compromise, in the form of a clause recognising their cultural specificity, in turn, raises the question of how such specific treatment would be implemented legally. Still on a broader level, the controversy also indicates divergent perceptions about not only the function, scope and nature of the multilateral trading regime and especially its ability and duty to reconcile the sphere of trade with the one of culture but also the existence or absence of a coherent international legal order.

The background of the controversy was rooted in a broader trend, led by Canada and followed by the EU Member States, to introduce into the sphere of free trade agreements, which proliferated at that time at the regional level, special clauses formally recognising diverse cultural elements inherent in certain categories of goods and services in particular and in the process of economic integration regimes in general. For its part, Canada had insisted on the adoption of an exemption for, what it termed “cultural industry”, in the negotiation of the bilateral Canada-United States Free Trade Agreement (CUSFTA) signed in 1988, whereas the European Union, one year later, adopted the so-called “Television without Frontiers Directive” which reserved, among other things, a certain part of the overall screen time to “European works”, before it adopted a general Treaty provision on culture during the Maastricht Treaty revision process in 1992. Both measures were primarily driven by concerns about manifold cultural identities in Canada and the EU, but, nonetheless, reinforced by the domination of their domestic markets of foreign cultural goods and services, first and foremost originating from the US. Therefore, these measures clearly appeared as a ‘thorn in the side’ of the US, as the world’s largest exporter of cultural products and holder of a dominant market share in the world as much as in these two markets, with market shares of specific industrial sectors reaching sometimes up to 96 per cent.

In terms of substantive arguments, the beginning of the debate consisted mainly in the exchange of polemics rather than a constructive dialogue backed by a sound line of argumentation. In abstract terms, these polemics reflected a tendency towards the traditional perspective, which viewed cultural and trade policies as being mutually exclusive and irreconcilable. In the present context, the traditional view has become transformed into a principal denial of, or, in other words, an exaggerated emphasis on, the economic attributes of the cultural industries on one side and a denial of their cultural attributes on the other, with various exceptions confirming the rule. For instance, both Canada and the EU defended their measures by charging the US with “cultural imperialism” / “cultural colonialism” and alluded to the quality of the products by comparing them to “intellectual terrorism”. The scope of choice and the grounds of legitimacy for the cultural policy objectives they pursued by their respective measures, are reflected in the phrase “C’était l’Etat ou les États-Unis”. In contrast to this view, the free trade policy aspect was emphasised by the US, which responded by remarking that there is no such a thing as “Canadian culture” or that the reason for their protectionism is purely economic. The US extended the same arguments to the European Union’s efforts to protect their existing culture and to create a new European culture. For instance, alluding to the weakness of the European film industry, and obviously to France in particular, Carla Hills, the then US trade representative and GATT negotiator, said: “Make films as good as your cheese and you will sell them!” Finally, the dominant view in the US was that there exists no specificity of cultural goods and services, famously or infamously, exemplified in the words of former FCC Chairman Mark Fowler, who equated television to a “toaster with pictures”. Such view reflects the common view of culture in the US which has been interpreted as “an enterprise which is capable of making money, by means of cultural industries, including publications, films, videos, music recordings, and radio and television broadcasting”.

In the end, the conflict over culture in the Uruguay Round negotiations was settled, or better postponed, by the so-called “agreement to disagree”. At the last moment, this provisional settlement allowed for the successful creation of the WTO. Nevertheless, the “armistice” did not last for long, since already one year after the WTO resumed its work in 1995, the US, which felt that it had “lost a battle but not the war”, filed a complaint against various Canadian policies aimed at its domestic

7 Compare L.L. Garrett, “Commerce versus Culture: The Battle Between the United States and the European Union Over Audiovisual Trade Policies” (1994) 19 N.C.J. Int’l Law & Com. Reg. 553 at 572-576, making observations that indicate that the European Union’s “protection of culture” is a facade for audiovisual trade barriers that primarily serve to protect its audiovisual market from further American dominance.
8 See Murray, supra note 4 at 209.
periodicals industry before the newly established WTO dispute settlement body.\textsuperscript{11} When the Panel issued the report in 1997, holding practically all the Canadian measures to be in violation of its obligations arising under the GATT, the culture and trade debate was formally renewed, because suddenly in all parts of the world the vulnerability of national cultural (and other) policies and, as a result, the unfettered exposition of domestic industries to American economic power was recognised and received a truly global dimension. As a direct consequence, both academic and political debate intensified addressing the question of the specific character of cultural goods and services, commonly referred to as “cultural industries”. Eventually, this discussion led to a search for ways to bring the broader culture and trade debate within the framework of the global governance debate, trying to address the major imperfections inherent in the current international legal order. A concrete initiative, which is still in its beginnings at the time of writing, pursues the adoption of a legally binding international instrument on cultural diversity.

However, throughout most epochs of the past 20\textsuperscript{th} century, the conceptual approach to the debate threatened to remain within a static interpretation of the traditional modes of dichotomous thinking, although, as will be shown, not without significant exceptions. Like the “flame” described in the introductory quote, the protagonists in the debate seemed torn apart between the seemingly opposite tendencies of “culture”, on the one hand, and “trade”, on the other, following in a sense the old legal adage expressio unius est exclusio alterius (the choice of one part of an alternative excludes the other).\textsuperscript{12}

It is submitted here that from such approach neither the cause of “culture” nor the one of “trade” could possibly exit as a victorious contestant. Therefore the approach applied throughout the following chapters, does not intend to challenge the overall utility of the common logic of framing a debate by tracing down and isolating two (or more) concepts, which appear to stand in direct contradiction. Instead, its main interest is rooted in the search for a more dynamic explanation of the usual tendency in human psychology to begin the process of understanding of any phenomenon by describing or defining it by way of its negation. A dynamic explanation means that it also tries to take into account possible ways for the reconciliation of the contradictions they may expose. Indeed, the entire domain of law suggests this sort of reasoning as exposed by the legal syllogism. However, just as legal proceedings before a court do not end with the presentation of the parties to the dispute before the jury, the search for a better understanding of the culture and trade debate with a view of possible amendments to the legal framework governing global trade relations must not stop with the mere presentation of various pros and cons. Especially, the legal solution proposed to the parties to the conflict, in this case the Members of the WTO and its respective populations, must not reflect this state but instead must provide the appropriate framework for the activities of all actors involved and which remains valid over a certain time period.

In this sense, the present thesis is interested in the path opened by the concept of “culture industry” and the technological innovation found in the invention of the “motion picture” which inspired its creation. Both, the concept and the medium film highlight the possibility that opposites do not automatically appear in contradiction anymore but instead may be regarded as being engaged over

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time in a causal process of mutual interaction. It is submitted that if the basics underlying this process are understood correctly, they allow for the establishment of a more coherent and thus more efficient regulatory framework improving the possibility to avoid the detrimental aspects of conflicts with a view to obtaining greater synergy effects necessary for a society’s sustainable development. This, in my conviction, is the principal role of law, namely to function as a mnemonic device, i.e. a constant reminder of past and painful experiences of former generations, guiding us with the least possible harm through the difficult transition from the immediate present to the future.

This belief, ultimately shaping the approach to the questions of how to classify cultural goods and services and what kind of legal treatment to convey on them, has been strongly inspired by a few important writings functioning as cornerstones in the method and structure applied in this thesis. A first source of inspiration was the reading of Ernst Mach’s explanations in his *Beiträge zur Analyse der Empfindungen* about the implications of the ‘law of associations’ for the human mind, stating that practically each time that two different concepts are evoked together, each one of them will automatically be remembered when the other is evoked. The law of associations raises important questions about the effect of the concept “culture industry”, as it was first coined by Theodor W. Adorno and Max Horkheimer as a deliberate contradiction in terms. From their writings, and particularly also Walter Benjamin’s preparatory work, we gain important insights into the conceptual challenges that the great variety of effects that the invention of the more recent various new technologies, from the cinematograph via television and radio to digital technology, underlying the cultural industries, bore and continue to bear for the peaceful organisation of not only trade relations but of the entirety of world affairs relevant to the international community. Decades afterwards, these originally conceptual challenges were transformed into real legal challenges when the concept was introduced in the trade context by way of its incorporation in the CUSFTA.

It is the special characteristics of the cultural industries that underlie the challenges for both the predominant conceptual and legal framework. First, concerning the conceptual framework, the challenge was rooted in the deliberate conjunction of the seemingly contradictory terms of “culture” and “industry” in the form of an oxymoron; and second, with regard to the legal framework, it consisted in the treatment of a novel series of goods and services, which henceforward would drastically alter the means of humanity to perceive itself and its environment based on the various new technical means introduced by the cinematograph and carried further by the following innovations in the field of communications technology. The principal question in the broader culture and trade debate consists in how to correctly decipher the conceptual code hidden in the term “cultural industries” and subsequently how to translate it successfully into an appropriate global legal framework, taking into account the potentials and dangers of a cultural, political and economic kind intrinsic to these goods and services.

Another important inspiration came from the discussion of the term “koan” in the writings by Daisetz T. Suzuki. It is interesting to briefly note that the term “koan”, not only describes a means

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Introduction

for contemplating conceptual problems with a view of dissolving their inherent contradictions but also denotes a “public matter for thought” or “public document setting up a standard of judgment”, as derived from its etymological origin of “a legal precedent”.15

Following this short introduction, Part I outlines the basic definitional and methodological considerations underlying this thesis by following the evolution of the concept from “culture industry” in the writings of the Frankfurt School to the gradual transformation into “cultural industry” and “cultural industries” in the sphere of political economy and media studies before it was finally – influenced by the relevant work in UNESCO – adopted in a legal context, namely in the Canada-United States Free Trade Agreement (CUSFTA). Part II traces the history and examines more closely the definition and scope of the exemption of the cultural industries within the context of the transition of North American economic integration from the CUSFTA to the North American Free Trade Agreement (NAFTA). It also briefly evaluates the exemption’s value in legal terms. As the centre of this thesis, Part III deals with the legal framework of international trade established under the auspices of the World Trade Organization. In this analysis, the concept of the cultural industries is used as the golden thread in the search for better ways to deal with and encompass cultural aspects. For this purpose, and given the strong need for teleological interpretation of the GATT provisions, this part starts from the origins of the WTO in the GATT 1947, resulting from the failure of the International Trade Organization to materialise, and traces subsequent amendments to the scope and structure of the international trading system but not without due consideration of the wider framework of public international law as it is governed by the United Nations (UN) system. Before closing Part III, an analysis of the Canada Periodicals Case, as the decisive moment for the formal inauguration of the global culture and trade debate is presented and followed by an outlook into the future of culture in the WTO. In Part IV, a similar analysis is conducted with regard to European Union law, which due to its comprehensive nature and advanced degree of integration provides useful insights into the dynamics governing international economic integration regimes in general and the relationship between cultural and economic forces in particular. Part V concludes the thesis with a summary of the main insights gained from the previous parts and formulates some recommendations for future actions in the field of international law in general, and international trade law, in particular.


15 Ibid.
PART I

THE CULTURE INDUSTRY AND THE ‘CULTURE AND TRADE DEBATE’

In this first and introductory Part, the basic definitional and methodological considerations underlying this thesis are outlined and followed by a presentation of the principal problems centred around the culture and trade debate. To this end, it follows the transformation of the concept of “culture industry”, as it was first coined by Members of the Frankfurt School, to the one of “cultural industries”, as elaborated on in the context of sociology, economics and related work of UNESCO.

Chapter 2  PRELIMINARY METHODOLOGICAL CONSIDERATIONS

§ 2.1. Preliminary Remarks on the Trade and Culture Debate

§§ 2.1.1. Elements of the Trade and Culture Debate

2.1.1.1. Background Considerations

A closer look at the history of trade and commerce reveals its close entwinement with the ups and downs in the cultural development of humanity in its steady process called evolution. The interrelationship between culture and trade is manifest, on the one hand, in the development of trade law, which was significantly coined by various cultural influences in terms of customs and usages.16 On the other hand, one of the richest repertories for trade history is found in the universal history of civilisations (or cultures) (universelle Kulturgeschichte).17 A broad historical view on the subject provides sufficient evidence for the assumption of a sensitive, regularly or cyclically recurrent interplay between phenomena that we usually classify as falling within one or the other concept. The problem with such an assumption is that, while fairly reasonable, it does not give accurate guidance in the organisation of contemporary affairs. In each present moment, as short as it can be, that requires the making of decisions, the interplay between the concepts of culture and trade appears more as a zero-sum game between competing interests to the human being, which underlines the comparison with a “flickering flame” torn between opposite tendencies. Thus, rare are the moments, as well as their respective testimonies, in which the larger dynamics governing their interaction surface and can be deciphered.

Clearly, the gain of insights is rendered more difficult by the limitations language imposes on the human mind. For most written account is static, but the meaning attached to concepts changes over time across space and so does the delimitation to familiar concepts or synonyms as much as their relation to newly introduced concepts. This is particularly true for broad, and therefore also elastic, concepts such as trade and culture. Herein lies the major challenge that the culture and trade debate poses in the sphere of law and notably the regulation of international trade law. Before turning to

16 See K. Schmidt, Handelsrecht, 4th ed., (Köln: Carl Heymanns Verlag, 1994) at 36, 40 et seq. on the significance of trade history; see also K. Polanyi, The Great Transformation: The Political and Economic Origins of Our Time (Boston: Beacon Press, 2001) at 71, writing that “[A]s a rule, the economic system was absorbed in the social system, and whatever principle of behaviour predominated in the economy, the presence of the market pattern was found to be compatible with it”.

these specific legal challenges, it is, however, useful to cast some light on the etymological origins of the two concepts and to clarify their use in the present context.

2.1.1.2. Excursus on the Etymological Origins of the Concepts of Trade and Culture

A. The Concept of Trade

For trade, its usage varies largely according to the context. Initially, it denominated the act or the business of the exchange of commodities through barter or through buying and selling for money. This difference usually marks the transition from a “natural” to a “money” economy. It also describes an occupation pursued as a business for livelihood or for profit, and last but not least means a mechanical employment as distinguished from agriculture, the learned professions or the liberal arts. This broad meaning is generally shared with the notion of commerce. Commerce is also used in varying contexts and languages (commerce, commercio) and not only includes the exchange of goods, productions or property of any kind, but also describes the transport of persons or property by land, water and air. Etymologically, trade goes back to the Latin verb tradere (transdare) which means to hand over, or deliver, similar to the German Handel (commerce, trade) which hints to the manual act behind it (Hand oder handeln). Commerce, on the other hand, goes back to the Latin commercium, which comprises all sorts of commercial or mercantile activities, such as trade, commercial intercourse, traffic, or just commerce but puts more emphasis on the commodities, goods, merchandises or wares (from merc, -cis) traded than the act of delivery itself. Additionally, trade and commerce are not only used interchangeable as synonyms but also in juxtaposition, which then results in a considerable broadening of the meaning. The element of active input behind trade and commerce also appears in the Latin word negotium (business, employment, occupation, affair, and even pain and labour) whose definition as quod non sit otium is a mere negation of otium describing leisure and vacant time. From the etymological analysis derives the clear picture of trade and commerce as both describing the manual activity (trade) of exchanging and the productions that are exchanged (commerce).

B. The Concept of Culture

From an etymological perspective, the concept of culture derives from the Latin verb colere (to cultivate, take care of) and the noun cultus (cultivation, care, labour) respectively. The meaning of cultivation was first applied to gods and the earth (cultus deorum or cultura agri). This initial meaning gradually developed into the medieval use of the cultivation of the mind (cultura mentis) from which developed “the dual concepts of geistige und materielle Kultur”. All subsequent meanings of the

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19 See e.g. West’s Law & Commercial Dictionary (Bologna: Zanichelli/West, 1988).
22 See e.g. West’s Law & Commercial Dictionary, supra note 19, stating that: “The words “trade” and “commerce,” when used in juxtaposition impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit and into which the elements of bargain and sale, barter, exchange, or traffic, enter”.
23 See e.g. Lewis, supra note 21 at 1199 and 1285.
24 Compare solo (solus, cultum), and cultus, as m. in Lewis, supra note 21 at 369, 370, and 488.
26 Ibid.
term culture were more or less influenced by the use in the German language, although probably antedated by the use in the French language. 27 In German culture makes its first appearance as Cultur (not yet Kultur) in a dictionary of 1793, whose author is deemed to have been Johann Christoph Adelung. The definition reads as follows:

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\text{Cultur – die Veredlung oder Verfeinerung der gesamten Geistes-} \ \text{und Leibeskräfte eines Menschen oder eines Volkes, so dass dieses Wort sowohl die Anklaerung, die Veredlung des Verständes durch Befreung von Vorurteilen, aber auch die Politur, die Veredlung und Verfeinerung der Sitten unter sich begreift. 28}
\]

The meaning of culture expressed in Adelung’s definition, emphasising a process of improvement, paved the path for its usage not only in the German language but also many other languages including Spanish, Italian, Russian, Dutch, the Slavonic and the Scandinavian languages as well as American English. For the Dutch language, for instance, Jan Huizinga describes the gradual displacement of the Dutch term beschaving, literally shaving or polishing in the sense of cultivation, by the term culture. 29 Adelung also came to note the important fact of the semantic proximity of culture and civilisation. 30 The concept of civilisation, equally deriving from a family of Latin words, such as civilis (civil, civilian), civis (citizen), civitas (self-governing municipality) and civilitas (citizenship, its rights and duties, from the Roman Republic onwards), denotes a sense similar to culture. 31 Civilisation also bears the intrinsic meaning of improvement, refinement, polishing manners or is called an “advancement or a state of social culture”. 32 Moreover, in French the term was confronted in competition with the terms police or policié (policed). 33 The precise delineation of the meaning of culture from civilisation is often characterised by controversy, 34 tautology and inconsistency. 35 These difficulties find their major cause in an important feature of culture, namely its foundation in language. Despite similar etymological roots, there exist enormous differences between languages and their respective social and geographical context. For example, the initial resistance that the concept of culture met in France and England is to a large extent explained by the frequent use of the concept of civilisation. 36 The use of civilisation was underpinned by colonialism and imperialism

27 See Fn 3 in Kroeber & Kluckhohn, supra note 25 at 12, citing Émile Tonnellat saying that the German Kultur is “certainement un calque direct du français culture” (L. Febvre et al., Civilisation: Le Mot et l’Idée (Paris: La Renaissance du Livre, 1930) at 61).
28 Culture: the improvement [ennoblement] or refining of the total mental and bodily forces of a person or a people; so that the world includes not only the enlightening or improving of understanding through liberation from prejudices, but also polishing, namely [increased] improvement and refinement, of customs and manners; cf. Kroeber & Kluckhohn, supra note 25 at 12.
29 Ibid. at 12, 13, 18, and 19.
30 Ibid. at 12.
31 See Rundell & Mennell, supra note 25 at 6 et seq.
32 See Kroeber & Kluckhohn, supra note 25 at 16 and 19.
33 See Rundell & Mennell, supra note 25 at 6 et seq.
34 The controversy is reflected in diverging statements that either put culture as referring “to the sway of man over nature” and civilisation “to his sway over himself” or vice versa; Kroeber & Kluckhohn, supra note 25 at 27.
35 Compare the definition by Folsom which reads: “Culture is not any part of man or his inborn equipment. It is the sum total of all that man has produced: tools, symbols, most organizations, common activities, attitudes, and beliefs. It includes both physical products and immaterial products. It is everything of relatively permanent character that we call artificial, everything which is passed down from one generation to the next rather than acquired by each generation for itself: it is, in short, civilisation”; ibid. at 125.
36 Inconsistency surfaces, for example, when a description or definition is based on implicit or explicit value judgement, such as the German use of Kultur for German and Civilisation for non-German matters; see Rundell & Mennell, supra note 25 at 7.
37 See also the chapters “We are Going as Civilisers: Empire and Public Opinion, 1815-80” and “The Mission of our Race: Britain and the ‘New Imperialism’, 1880-1902” in L. James, The Rise and Fall of the British Empire (London: Abacus, 1994) at 184 216.
which made the two countries more “indifferent [or resistant] to the intellectual significance of cultural differences” compared to the more heterogeneous backgrounds found at the time in Germany and America.\(^\text{38}\)

However, the difficulties described above may also exist due to the proximity of the concept of culture and civilisation which treats them often as mere synonyms. This is precisely the case for the American context as it can be seen in the definition rendered by the E.B. Tylor in his book *Primitive Culture* dated 1871. It reads as follows:

Culture, or civilisation, ... is that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.\(^\text{39}\)

In his definition of culture, Tylor brings to the fore another important element inherent in the term culture, namely the aspiration for a holistic scope, which is nonetheless sensitive towards differences.

### 2.1.3. Clarifications on the Concepts Use in the Present Context

One of the principal tasks attributed to law is to repeatedly provide guidance and thereby secure certainty, stability and predictability in the organisation of human relations, be they of commercial or cultural nature. Any just law, in order to be considered as such, is dependent on its repeated application over a certain time period and transcending the boundaries of a one-time, mere casuistic applicability.\(^\text{40}\) The striving of law to meet these requirements may be severely obstructed by the elasticity of the concepts is makes use of. Already within the sphere of law, the concepts of trade and commerce refer to different subcategories of legal science and accordingly may trigger different approaches and associations. Under the broader term of international economic law, trade law can refer to either commercial law, as of private origin and usually found in a country’s commercial code,\(^\text{41}\) to international trade law as of public origin, which is found in national or supranational customs regulation or international trade agreements such as those administered by the WTO,\(^\text{42}\) or to the mixed category of transnational trade law or the so-called “new law merchant” (or *lex mercatoria*)\(^\text{43}\). Similarly, in law the concept of culture raises different associations within the sphere of

\(^{38}\) See Krober & Kluckhohn, *supra* note 25 at 68.  
\(^{39}\) *Ibid.* at 11 and 81.  
\(^{40}\) See also R. Koselleck, *Zeitschichten: Studien zur Historik* (Frankfurt a. M.: Suhrkamp, 2000) at 352 et sqq., stating that “Recht ist, um Recht zu sein, auf seine wiederholte Anwendbarkeit angewiesen. [...] Theoretisch ist also festzuhalten, daß die Geschichte des Rechtes, auch aller einzelnen Rechtsbestimmungen, unter Wiederholungszwang stehend auf wiederholte Anwendung angewiesen ist und damit längere Fristen bzw. relative Dauer thematisiert, wenn man so will, Strukturen und nicht Ereignisse”.  
\(^{41}\) Such codes are e.g. the French *Code de Commerce* 1808, the Spanish *Código de Comercio* (1829), the Portuguese *Código Comercial* (1833), the Dutch *Wetboek van koophandel* (1838) and the German *Handelsgesetzbuch* (1900) which entered into force together with the *Bürgerlichen Gesetzbuch* (BGB).  
legal theory, (international) human rights, private international, criminal, or precisely international trade law, which will be the subject of this thesis.

It is normal that different associations will result in different meanings and ultimately in different definitions attributed to the identical concept in accordance with its respective context. However, it was said that law, in its prime purpose and scope, is aimed at a universal and repeated application. Therefore, in this context, the concepts of culture and trade are taken in their broadest possible meanings, without the need felt to actually define their precise meaning. This approach is based on the belief in the need for the availability of general concepts that are broad and elastic enough to encompass new developments and hereby to provide a common basis for the discussion of their future regulation. In this sense, “culture” and “trade” are concepts that reach out beyond the “letter of the law”, i.e. the boundaries of the existing regulatory framework. It is precisely their dynamic nature, which is manifest in the reliance of trade on customs and usages and of culture on the aspiration for refinement that is used as a basis for the contemplation on possible amendments to the present international legal framework.

Nonetheless, it must be emphasised that, as a point of departure, the present thesis focuses mainly on the regulation of international trade law as a part of the second category of trade law, i.e. a part of public international law, at least to the extent that this traditional categorisation proves still apt to address changes in the present reality. Following this reasoning and for the purpose of this thesis, the law of the European Union will be considered a part of public international law. At the same time, as far as culture is concerned, it starts from various legal precedents and definitions found in the current legal framework without intending to provide a general definition of culture. Instead, the thesis will rely on the legal definition of the concept of cultural industries, as defined in the Canada-United States Free Trade Agreement. This approach is based on the belief that in the sphere of law there is a valuable need for the availability of dynamic or “open” concepts, which better correspond to the uncertainty of human affairs. Corresponding to that the primary goal of this thesis is to gain insights into the basic structures underlying the process of their mutual interaction, the understanding of which is deemed to be crucial for the adoption of just laws and their efficient application to future challenges.


46 See e.g. E. Jayme, “Identité culturelle et intégration: le droit international privé” (1995) 251 Rec. des Cours 33.

§§ 2.1.2. Culture and Trade

2.1.2.1. Framing the Culture and Trade Debate

Since the beginning of the past century, especially due to the particular political organisation of the international legal order after World War II and in light of the beginning of its fragmentation after the failure of the ITO to crystallise, the trade and culture debate must be seen as a debate that addressed the significance of culture or cultural policy objectives within the international trading order. The debate, *stricto sensu*, is therefore not a general one between the broader fields of trade and culture but instead a specific debate about the role of cultural aspects within the organisation of international trade and commerce, as administered first and foremost by the GATT 1947 and its successor the WTO.

Nonetheless, the trade and culture debate is part of the broader so-called “trade and …” or “trade linkage” debate, which is centred around questions concerning the overall compatibility of objectives set forth by the global trade agenda with a wider range of values that denote important issues other than trade with usually a wider set of implications for life. Famous pairs of this linkage debate are those of the “trade and environment”, “trade and human rights”, “trade and development”, “trade and social, or labour standards”, “trade and security”, as well as “trade and migration”. For this reason, it is possible to argue that due to the dynamism, elasticity and holistic aspiration inherent in the concept of culture, this debate may also be characterised as the synopsis of all separate “trade and …” pairs, since it focuses on the refinement of the trade order as a whole. Such perceiving is backed by the implicit or explicit cultural arguments that occasionally surface in connection with concerns about greater coherence in constitutional debates. In other words, one commentator, who looked at the culture and trade debate as being symptomatic of a wider range of problems, stated that:

[U]nless trade people can deal with the cultural issue, how do you expect them to deal with environmental issues, labor issues, or social standards?

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57 See also infra Subsection §§ 5.2.4.

Thus, within the broader trade and culture debate there can be distinguished two closely interrelated aspects:

The first aspect focuses on the more specific questions of certain trade aspects and their cultural implications. In this category belong the famous “hard” cases that seem to involve a clear conflict between global commercial freedom and the protection of national cultural identity and diversity. In particular, these cases raise the question of whether certain categories of goods and services are better dealt with in the realm of trade or of cultural policy objectives. A famous legal precedent outlining the structure of this “perennial” conflict is found in the concept of *res extra commercium* or *res quarum commercium non est*, which denotes a special category of goods which is prevented from forming the subject of commercial transactions based on manifold reasons, among which concerns for cultural policy or cultural identity are prominent.59 More recent examples are the attempts to exempt certain categories of domestic and imported goods and services, such as spaghetti (Italy),60 wine (UK),61 beer (Germany),62 rice and alcoholic beverages (Japan),63 meat (Israel and the EC),64 periodicals (France and Canada),65 and more generally audiovisual goods and services,66 or the so-called “cultural industries”,67 from the process of trade liberalisation.

The second aspect is of a more general nature and addresses the broader constitutional issues underlying the international trading regime. The scope of this debate is centred around the view, as reproduced in a statement by Jamieson, that:

> Trade is not an end in itself, but the means to a broader objective – a better society. The significance of cultural works is also social and political as well as economic. The pursuit of national cultural objectives is just as important as foreign and trade policy objectives. Cultural goods and services are not like other forms of merchandise. Cultural diversity is preferable to homogeneity. Governments have an important role to play in promoting and preserving cultural diversity.68

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59 See *infra* note 724 et seq.
64 See Article 8 [Special Exception for Kashruth] *Israel-United States Free Trade Area Agreement*, (1985) 24 I.L.M. 657, which stipulates that “This Agreement shall not preclude the adoption or enforcement by either Party of measures relating to prohibitions on religious or ritual grounds provided that they are applied in accordance with the principle of national treatment”; see also Annex 4.1. (Exceptions to Article 4.1. National Treatment) Section B para. 1 lit. c) *Free Trade Agreement between Canada and Israel*, See also European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS48/AB/R (January 16, 1998) (Appellate Body Report) [hereinafter *Hormones Case*].
66 See e.g. Article IV GATT; see also J.-M. Warêgne, “Le GATT et l’audiovisuel” (1994) 1449-1450 *Courrier Hebdomadaire* 1.
67 See e.g. Article 2106 NAFTA.
Such constitutional debate is only to a lesser extent concerned with the treatment of specific goods and services but more with the acceptable degree of national sovereignty, as expressed in cultural diversity as opposed to global regulatory harmonisation.\(^{69}\)

It is clear that both aspects are interdependent and if one aspect is analysed it will inevitably lead to the other and vice versa. Their entwinement appears in the enormous complexity the debate entails and which has been summed up in a UNESCO publication on *Culture, Trade and Globalization (2000)* as follows:

The issue of ‘culture and trade’ has now acquired prime strategic significance. Cultural goods and services convey and construct cultural values, produce and reproduce cultural identity and contribute to social cohesion; at the same time they constitute a key free factor of production in the new knowledge economy. This makes negotiations in the cultural field extremely controversial and difficult. As several experts point out, no other industry has generated so much debate on the political, economic and institutional limits of the regional and global integration processes or their legitimacy. When culture is put on the table, it often prompts complex discussions on the relationship between the economic and non-economic value of things, that is, the value attributed to those things that do not have an assigned price (such as identity, beauty, or the meaning of life).\(^{70}\)

As common to both aspects of the trade and culture debate and the trade linkage debate as a whole, appears the necessity to cope with the challenge of the degree of complexity that the knowledge of our world has attained and to tackle successfully the consequences flowing from it. At this stage, it cannot be excluded that success in this matter will depend largely on our ability to better adapt our current thinking to our current deeds or, in other words, the existing laws to the present reality.

### 2.1.2.2. The Culture and Trade Debate: Parallels to the Present Challenges in Legal Science

Most of the past legal discourse surrounding the concepts of culture and trade was based on their perception as opposite or, occasionally, even mutually exclusive terms. In principle, traces of this view can still be isolated in present legal documents. As such one can speak of continuity between the approach of Roman law and the more recent debate about the exception culturelle. Nonetheless, there exist numerous records of legal and non-legal sources from different legal traditions and scientific disciplines that have tried to address the limitations of a merely static perception of justice and to help to better fulfill the main function of law as the provider of a system of guidance that evolves with the society it serves.\(^{71}\)

Only gradually legal science is about to transcend the Cartesian borders and to acknowledge more seriously the dynamism inherent in law, and expressed in remarks such as “law as a process” and “*le flou de droit*”. Still there is reluctance in accepting new forms of regulation, as Delmas-Marty shows by

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pointing at the difference between the archaic remnants in penal law and the comparably recent codifications of human rights:

Mais le droit n’est pas flou, direz-vous, pensant peut-être aux codes, rigoureuses tables de vérité qui séparent le vrai du faux, le bien du mal, le permis de l’interdit et qui nomment: « légal » ou « illégal », « coupable » ou « non coupable ».

Et s’il est flou, il n’est plus droit, ajoutez-vous à l’idée de ces encombrants droits de l’homme qui se répandent dans notre vie comme par l’effet d’une mode, au détriment de toute rigueur juridique.72

Perhaps, the reluctance seems justified as long as we have not developed the right instruments to present and implement the new forms of regulation properly, meaning in a way that strikes an efficient balance between the need for both legal flexibility and legal certainty, efficiency as well as predictability. However, critics must keep in mind that if we do not adapt the laws to the changes in the perception of environment, the environment will – like a coup de grâce – impose its changes on the perception of our life.

In fact, the latter appears already to be the case, as many new phenomena, brought about by the increasing pace of technological development, suggest. Part of this development is the new environment, and in particular its complexity, which already forces us to vest new phenomena with new names which often take the form of an oxymoron, i.e. a figure of speech in which “apparently contradictory terms appear in conjunction”.73 As examples, one can think of legal concepts like, soft law74, transnational law explained by George Scelle’s dédoublement fonctionnel,75 competition law, intellectual property, (intangible) cultural property, non-discriminatory mutual recognition,76 or broader terms such as soft power77, “fragmegration”78, “glocalisation”79, or even “European Union”80. These, and many other concepts, suggest the gradual transition from a static to a more dynamic world view, and perhaps even a change of paradigm.81

The, from the perspective of the trade and culture debate, most comprehensive oxymoron, however, is found in the concept “culture industry” or “cultural industries”, which forms the subject of the present analysis.

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73 See The Canadian Oxford Dictionary, supra note 14 at 1040.
75 Cf. Jessup, supra note 43 at 21-23.
78 See B. Hetne, “The International Political Economy of Transformation” in B. Hetne, ed., International Political Economy – Understanding Global Disorder (Halifax: Fernwood Books, 1995) 1 at 22, using the concept of “fragmegration” to describe two movements pressing in opposite direction, namely, toward fragmentation, on the one hand, and toward integration, on the other hand; cf. Karl Polanyi’s “double movement”, i.e. the dynamics of modern society governed by the continuous expansion of the market and a countermovement checking the expansion in definite directions in Polanyi, supra note 16 mainly at 136 and 223; see also J.N. Rosenau, Turbulence in World Politics: A Theory of Change and Continuity (Princeton: Princeton University Press, 1990).
80 On the EU and Discordia concors, see infra Section § 11.1.
81 On such transition and, particularly, the one of Aristotelian logic and its binary foundation to their gradual transcendence through a dialectic process, see F. Ost & M van der Kercheve, De la pyramide au réseaut Pour une théorie dialectique du droit (Bruxelles: Facultés universitaires Saint-Louis, 2002) mainly at 11-39; see also G. Teubner, Law as an Autopoietic System (Oxford: Blackwell, 1993).
§§ 2.1.3. The Cultural Industry: A Metaphor for the Culture and Trade Debate?

2.1.3.1. The Oxymoron: A Lex Specialis to the Legi Generali of the Trade and Culture Debate

The concept of cultural industry (or cultural industries) illustrates very well the conflicts underlying the broader trade and culture debate. This is for two main reasons: with its first appearance in the context of the 1988 Canada-United States Free Trade Agreement (CUSFTA) the concept of culture industry has been defined with sufficient legal precision. Article 2012 CUSFTA states:

For purposes of this Chapter:

cultural industry means an enterprise engaged in any of the following activities:

a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing,

b) the production, distribution, sale or exhibition of film or video recordings,

c) the production, distribution, sale or exhibition of audio or video music recordings,

d) the publication, distribution, or sale of music in print or machine readable form, or

e) radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.82

At the present moment, this definition is deemed to be at the same time precise enough to narrow down the width of the trade and culture debate induced by the elasticity of each concept, and broad enough to encompass dynamic changes in the various sectors, generally described by their convergence.

The second reason, however, is that the evolution of the concept from its origin among the protagonists of the Frankfurt School to the adoption in a document of international trade forms a new paradigm, a public matter for thought (koan), that accounts for many developments that occurred during the 20th century and eventually beyond. This second aspect requires some further thought, before the traces of its evolution will be outlined in Chapter 3.

2.1.3.2. Transcending the Meaning of the Legal Definition of “Cultural Industries”

It has been said that law generally evolved with society through shifts in the structure, or in the words of Thomas Kuhn “revolutions”,83 while, nevertheless, maintaining by and large its dichotomous structure. This holds true for most of the trade and culture debate. The perception of the interplay between commercial and cultural aspects seems to have changed only with the invention of the motion picture at the end of the 19th century, although in total building largely on former revolutionary inventions from book printing to the transmission of radio signals.84 The importance of this invention and the implications of the new paradigm it entailed for the perception of reality and the subsequent path of science is not to be underestimated.85 The shift from motionless paintings and photographs to pictures in motion in connection with text, sound and coloured images had and continues to have a strong impact on the perception and, hence, on the further path of humanity.

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82 Please note that the definition of Article 2012 of CUSFTA has been carried over with minor changes to the NAFTA; cf. infra Subsection §§ 4.1.3.


84 See also infra note 459.

85 See Kuhn, *infra* note 83 at 125, asking whether perception itself is linked to a paradigm.
A literary account for the emerging new perception of the interplay between trade and culture can be found in Stefan Zweig’s historical miniatures *Sternstunden der Menschheit*, where he writes:

No artist is unceasingly an artist during the entire twenty-four hours of his daily life; every substantial, lasting success that he achieves always comes into being only in those few rare moments of inspiration. Similarly, history, in which we admire the greatest poet and actor of all time, is by no means ceaselessly creative. Even in this “mysterious workshop of God,” as Goethe reverently called history, a vast number of insignificant and mundane things occur. Even here, as everywhere in art and life, the sublime, unforgettable moments are rare. Usually, as an annalist history indifferently and persistently does nothing but add link to link in that enormous chain that stretches through the millennia, adding fact to fact, for all excitement needs time for preparation, and every real event must undergo development. Millions of people within a nation are always necessary for one genius to come into being; millions of idle human hours must always pass before a truly historical, decisive moment in history makes its appearance.86

In this short paragraph he may be interpreted as addressing the culture and trade debate when forging the “artistic” or creative aspects of a human being with the “mundane” things that occur in 24 hours of her/his life, of which the apparent contradiction he then dissolves by referring to the temporal process of evolution, which, regarded *ex post*, we name history. In allegiance to Zweig’s statement, when applied to the present trade and culture debate, this would mean that by trying to explain the field of international trade law by mere reference to trade terms, thus neglecting various cultural, social and political aspects, we are missing essential aspects for the regulation of global trade.

The concept of culture industry, as originally coined, therefore is more than a mere well-defined legal category of goods and services bearing both cultural and economic traits. It forces us to consider the cultural and the economic aspects synchronically, even though we perceive them at first as opposite and mutually exclusive. In this force of binding together opposites lies the prime significance of an oxymoron, eventually leading to a better understanding of reality. The philosophical aspect is mirrored in the practical importance of the cultural industries as a special category of goods and services, which are overwhelmingly transmitters of information through words, pictures and sounds. The information they impart, has an impact on our perception of reality, and the way we organise the international exchange of information via trade regulation determines the quality and quantity of that information.87 Ultimately, both aspects will have an impact on the way we design future laws regulating international trade and disseminating information and cultural values.

2.1.3.3. Résumé of the Background of the Analysis

Finally, to resume this brief introductory section, it is necessary to point out shortly the basic framework and premises for the following analysis. The present thesis follows Werner Heisenberg, the father of the *Unschärferelation* (uncertainty principle) in his philosophical suggestions, presumably made on the basis of his observations of another sort of perceptive problem in the subatomic world, that:

It is probably true quite generally that in the history of human thinking the most fruitful developments frequently take place at those points where two different lines of thought meet. These lines may have their roots in quite different parts of human culture, in different times or different cultural environments or different religious traditions; hence if they actually meet, that is, if they are at least so much related to


87 See also J.D. Aronson, “The consequences of free trade in information flows” (1996) 72 International Affairs 311.
each other that a real interaction can take place, then one may hope that interesting developments will follow.\textsuperscript{88}

It is believed here that the coining of the oxymoronic concept of “culture industry” the so-called “perennial conflict” between trade and culture reached a stage which paved the way for a “real interaction” between cultural and commercial aspects linked to international trade. These real interaction being in place now for some considerable time period, it is necessary not only to bring the legal framework in line with the present requirement due to past developments and innovations but also to find new approaches that help to ensure a harmonious development of international trade in light of broader, so-called non-trade related, considerations. For instance, David Throsby has characterised the challenge that the global culture and trade debate entails today as follows:

\textit{[T]he current period could therefore be characterised as one searching for a holistic model wherein both cultural and economic considerations can be properly represented and policies can be developed which balance the multiple economic, cultural, social, environmental and other objectives [...], and which assert a role for local cultural differentiation in a globalising international economy.}\textsuperscript{89}

Before the background of such search based on the evolution of the concept of cultural industry can be outlined and its contours be drawn using the respective contexts of the NAFTA, the WTO and the EU, it is considered useful to comment on their commonalities in light of the special characteristics that underlie each of the respective legal regimes.

\textsuperscript{89} D. Throsby, \textit{Economics and Culture} (Cambridge: Cambridge University Press, 2001) at 126.
§ 2.2. On the Commensurability of the NAFTA, the WTO and the EU

§§ 2.2.1. General Introductory Remarks

A comparison between the NAFTA, the WTO and the EU with regard to the legal treatment of the cultural industries calls for some preliminary remarks and a great portion of caution. Between the three entities, it is true that objectively there exist numerous contact points and even enough overlap can be detected in order to justify their comparison. For instance, the European Communities – in parallel to its Member States – have become an original Member of the WTO and therefore exercise an important role in WTO decision making.\(^90\) The NAFTA, negotiated partly in parallel with the WTO Agreement, has literally adopted GATT language and provides specific guidance for their respective relation and provides a choice for the settlement of disputes in either forum.\(^91\) The choice of forum became crucial in the Canada – Periodicals Case. A further link between the WTO and both the EU and NAFTA is provided by virtue of Article XXIV GATT explicitly recognising the role of regional trade agreements in the process of the removal of barriers to trade. Horizontally, the EU and the NAFTA are increasingly linked via various cooperation agreements or even a free trade agreement, concluded between the EC on the one side and NAFTA countries on the other.\(^92\) From the perspective of the EU, the ECJ was called a few times to render an opinion on the validity and scope of WTO law within the EU.\(^93\) Notwithstanding the obvious linkages, scholarship is divided over the issue. For instance, in the wider context of a possible convergence of international trade law, Weiler compares the relationship of the GATT (WTO) and the EU to the one of Cain and Abel by highlighting that they are “born roughly in the same period, committed to similar beliefs in the virtues of liberalized trade and open markets, sharing in many instances a common legal vocabulary”.\(^94\) Snyder compares the EU and the WTO by writing that “Europeanisation and Globalisation are complementary, partly overlapping, mutually reinforcing, but also competing processes”.\(^95\) Similarly, although both entities are primarily concerned with similar goals, such as the promotion of trade between states, they nonetheless pursue them in radically different ways.\(^96\) On the other hand, de Mestral, in the introduction to a comprehensive comparative analysis of NAFTA explains his thesis according to which:

A number of distinct levels of international economic integration can be distinguished in contemporary international relations. Each level of integration has its own logic, its own potential and its own limits. In

\(^90\) See Articles XI and IX WTO Agreement.
\(^91\) See e.g. Articles 103 (Relation to Other Agreements), 2101 (General Exceptions) and 2005 (GATT Dispute Settlement) NAFTA.
The Culture Industry and the ‘Culture and Trade Debate’

§ 2.2

particular, the deep structure of the international and intergovernmental models differ radically from the supranational and even more the federal models. What is possible on one level is not necessarily possible at another and the logic of one should not be confused with the others and cannot be easily transposed into them. Furthermore, the intergovernmental and international model of economic integration is inherently less certain and complete than the supranational or the federal models, since they are not based on self-sustaining rules and institutions.97

Equally, Ortino sees the WTO and the EU as two different legal and political realities far apart from each other but justifies his comparative approach by the belief in the comparative method as a means for the attainment of knowledge.98 Moreover, strictly spoken, all “inter-national” law, hence even bilateral and a fortiori multilateral treaties, fall within the domain of comparative law.99 Or more precisely, all law bears a comparative element and the reluctance of some to accept the comparative paradigm including the concept of legal diversity must be seen as an obsolete way of thinking rooted in the western, rational tradition.100 Moreover, Glenn showed also the utility of the comparative approach by way of its “persuasive authority” and the fact that it is practised perhaps not openly or consciously, but behind the scenes.101

Based on these observations, the NAFTA, the WTO and the EU can be compared, in doing so, however, extreme caution is demanded with regards to the method applied. A method of critical comparison implies mainly a careful consideration of the initial expectations, the objectives pursued and the conclusions drawn from the comparative endeavour. In the case to the contrary, the risk is high that the comparison is guided by the initial expectations and the results are not value-neutral and in the end merely reflect a pre-established opinion.

§§ 2.2.2. Specific Differences for Consideration in the Context of the Cultural Industries

Before clarifying the method applied in this comparison, it is necessary to point out the few main differences between the NAFTA, the WTO and the EU.

First and foremost, the WTO is a multilateral agreement of universal vocation, whereas the NAFTA and the EU qualify as regional agreements. In Balassa’s terminology, the WTO must be located on the level of mere international cooperation, while the NAFTA is a free trade agreement, and the EU – considering current “constitutional” developments – is situated somewhere between a common market and the stage of so-called “complete economic integration”.102 In accordance with their nature, the means by which they pursue their respective goals differ. In the case of the WTO and the NAFTA, their institutional raison d’être is found in trade liberalisation or, in other words, in the removal of trade barriers through negative integration.103 The EU, on the other hand, by way of its...

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99 See also R. David & J.E.C. Brierley, Major Legal Systems in the World Today, 3rd ed. (London: Stevens & Sons, 1985) at 1 et seq. writing that “The comparison of laws itself, at least in their geographical diversity, is as old as the science of law itself”.
102 See B. Balassa, The Theory of Economic Integration (London: George Allen & Unwin Ltd, 1962) at 6-7 [hereinafter The Theory of Economic Integration].
103 Cf. Article 101 NAFTA; Preambles of GATT 1947 and the WTO Agreement (“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”).
predecessor the European Economic Community (EEC), pursued from the beginning a parallel process of negative and positive integration.104

Thus, if each of the economic integration projects differs in terms of the objectives and degree of economic integration they are all still subject to the constant need to re-adjust their respective goals in light of ongoing developments, which have changed the faces of the respective agreements over time as the evolution of the GATT to the WTO, of the CUSFTA to the NAFTA and the EEC to the EU indicates.

Notwithstanding the shared pressure for adjustment, the differences in the objectives pursued by each agreement have equally important implications for the respective approach to cultural aspects. With regard to legal instruments balancing commercial and cultural aspects of international trade, the realities differ equally and have changed during time. The WTO, since the GATT 1947 until today, knows no specific provision dealing with cultural aspects, except for Article IV GATT concerning cinematograph films and an exemption for cultural property. NAFTA, likes CUSFTA, contains an exception for the cultural industries and an identical exemption for cultural property. The forerunner of the EU started with the same exemption for cultural property as the GATT, but has in the meantime been complemented with various provisions mentioning explicitly cultural aspects.

The substantive differences and the varying pace and degree of integration are also reflected in the institutional structure of each agreement. As a last important element, it is necessary to mention the relative financial autonomy the EU possesses in comparison to the WTO and the NAFTA. The financial autonomy is relevant here, since it gives the organisation involved in the process of trade liberalisation the possibility to make up for the immediate and long-term negative consequences that freer trade necessary implies.

Finally, therefore, the NAFTA, the WTO and the EU share a continuous process of cooperation and coordination, which was set free by the founding treaties between their respective Members. Such process is also contained in the so-called “bicycle theory of economic integration”, which usually entails an ongoing process characterised by the dialectics between various competing forces, such as those of positive and negative integration and of a widening and deepening of their scope. In this sense, and considering their various contact points, the three regimes can be said to be currently engaged in a process termed the “convergence of international trade law”.105 Nonetheless, given their distinct goals and different backgrounds, they diverge in many aspects, and, particularly, in their legal approaches to cultural goods and services.

§§ 2.2.3. The Comparison’s Underlying Path and Objective

Focusing on the overarching problem of how to balance trade and culture, in particular with respect to the future regulation of the cultural industries in international trade, the present thesis looks for legal inspiration in the respective legal regimes of the NAFTA, the WTO and the EU. Before that the evolution of the concept from its origin amidst members of the Frankfurt School through

104 See the Preamble of the Treaty Establishing the European Economic Community [Treaty of Rome] (“DETERMINED to lay the foundations for an ever closer union among the peoples of Europe”, “RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition”).

105 See “Cain and Abel”, supra note 94 at 201.
various subsequent uses in other scientific contexts is shortly circumscribed. Only then, the cultural industries, as a specific category of cultural goods and services, are subject to an analysis in the legal frameworks of the NAFTA, the WTO and the EU. In connection with each regime, those elements, which are deemed to be the most relevant ones, are outlined and discussed. As such, the present thesis accounts less for a comparative work in a strict sense but more as a parallel discussion of a single phenomenon in various contexts, which nonetheless are closely interrelated. The goal may also be understood as a comparative test of each regime’s legal consistency in accordance with its respective degree of integration, which, I believe, may be of great help in the search for the appropriate legal instrument that is capable of ensuring the maintenance through laws of the equilibrium between culture and trade in the future.

In this analysis each regime possesses its specific merits. First, the CUSFTA/NAFTA is of great value because it not only marks the beginning of the legal use of the concept but is also links Canada, a country with a long and great tradition of multiculturalism, and the US, the world’s largest exporter of the cultural industries. The WTO merits are first of all its universal vocation with a present membership of 148 countries and numerous others awaiting accession and its broad, truly global, geographical scope linking countries through trade on five continents. The EU, on the other hand, stands out for the degree of cooperation and integration that was developed in the past half a century. The Member States of the EU have carried the process of integration far beyond solely economic matters and, therefore, provide a useful example for the specific constraints, problems and challenges as well as a rich repertory of legal instruments to tackle them.

By no means does the present thesis, by way of its scope, intend to reflect a European, or Western view of international trade. Instead, it aims at paving the way for a broader and deeper discussion of the global issue of cultural diversity within the realm of international trade law. The present thesis must be taken as an expression of my belief that a true discussion of common and, thus, universal problems in international trade law requires the full recognition of the differences of all actors involved. Only based on such recognition is it possible to realise that a debate is centred around the identical problem, i.e. how to balance cultural and commercial aspects of trade in goods and services. This allows for a better understanding of the dynamics that govern the interaction not only between each individual and the numerous collective entities it is part of, or between the peoples inhabiting this planet, but also between culture and trade in general.
Chapter 3  THE CONCEPT OF THE CULTURAL INDUSTRIES

§ 3.1.  A Short Survey

During the past two decades, the usage of the concept of cultural industries has gained wider acceptance in the context of trade law as denoting a special category of cultural goods and services. As quoted before, the first authentic legal definition was found in CUSFTA, which defined cultural industry as an enterprise engaged in the sectors of books, magazines, periodicals or newspapers, film or video recordings, music recordings or radio communications. As a more recent example, the 2001 UNESCO Universal Declaration on Cultural Diversity understands the cultural industries as industries producing cultural goods and services and refers to them as “commodities of a unique kind” and “vectors of identity, values and meaning”. As a more general description of the term, UNESCO explains the term “cultural industries” as follows:

It is generally agreed that this term applies to those industries that combine the creation, production and commercialisation of contents which are intangible and cultural in nature. These contents are typically protected by copyright and they can take the form of goods or services.

Depending on the context, cultural industries may also be referred to as “creative industries”, sunrise or “future oriented industries” in the economic jargon, or content industries in the technological jargon. The notion of cultural industries generally includes printing, publishing and multimedia, audio-visual, phonographic and cinematographic productions, as well as crafts and design. For some countries, this concept also embraces architecture, visual and performing arts, sports, manufacturing of musical instruments, advertising and cultural tourism.

Cultural industries add value to contents and generate values for individuals and societies. They are knowledge and labour-intensive, create employment and wealth, nurture creativity – the “raw material” they are made from –, and foster innovation in production and commercialisation processes. At the same time, cultural industries are central in promoting and maintaining cultural diversity and in ensuring democratic access to culture. This twofold nature – both cultural and economic – builds up a distinctive profile for cultural industries. During the 90s they grew exponentially, both in terms of employment creation and contribution to GNP. Today, globalisation offers new challenges and opportunities for their development.

To briefly resume the concept’s current usage, it can be regarded as embracing a specific category of goods and services, which in itself is part of a specific focus within a broader debate concerned with the future scope and direction of the international trading order. In this context, the concept bears the potential for framing the debate with a view of achieving a broader terminological consensus and eventually introducing a constructive and fruitful dialogue.

This characterisation corresponds, in principle, to the meaning attached to the concept in legal discourse, which this thesis tries to contribute to. Notwithstanding this positive characterisation, it must not be forgotten that the meaning attached to the cultural industries has changed during time, as also its gradual transformation from “culture industry” to the “cultural industries” shows. This is why these generally positive attributes found in such pragmatic characterisation cannot deceive about occasional trains of divergent philosophical, political or even ideological considerations associated with the concept. In order to strengthen the constructive side of the concept, the following sections, therefore, provide a short survey of the concept’s different stages and distinct associations from its

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origin as a more derogatory term in the context of the Frankfurt School until its greater acceptance through the adoption in an international legal text.
§ 3.2. The Frankfurter Schule and the Social Theory of ‘Culture Industry’

§§ 3.2.1. The Origin of the “Culture Industry” in the Context of the Frankfurt School

A decisive moment for the broader culture and trade debate is the June 22, 1924, the formal date of the opening of the Institute of Social Research at Frankfurt University. Work done by the members, as well as formal or informal associates of the said institute, laid the foundations for a paradigm in social science, which later became known as the Frankfurt School (Frankfurter Schule) and/or Critical Theory. Most of all, the date must be qualified as decisive because the inauguration of the Institute paved the way for a life long lasting co-operation between two of its principal members, Theodor W. Adorno and Max Horkheimer. Their work can be described not only as a major contribution to social research through, for instance, their unifying force on the social sciences, but also as a sublimation of the considerations underlying the problems encountered in the mutual relation between culture and trade. This last point is reflected in their common contribution to a joint publication, which widely conferred upon them the status of the original authors of the notion of “culture industry” (Kulturindustrie). Adorno himself writes:

The term culture industry was perhaps used for the first time in the book Dialectic of Enlightenment, which Horkheimer and I published in Amsterdam in 1947. In our drafts we spoke of ‘mass culture’. We replaced that expression with ‘culture industry’ in order to exclude from the outset the interpretation agreeable to its advocates: that it is a matter of something like a culture that arises spontaneously from the masses themselves, the contemporary form of popular art.

In the five fragmentary chapters of Dialectic of Enlightenment, Adorno and Horkheimer provide a far-reaching critique of the concept of enlightenment by explaining the link between the significance of mythology and of enlightenment in the history of the human being. Mythology is construed as having ‘itself set off the unending process of enlightenment’ in which enlightenment itself becomes ‘wholesale deception of the masses’. The general value that can be deduced from their dialectical approach in a Hegelian sense to enlightenment is the use of a critical method that aims at the parallel evaluation of the consequences that a process launched by human endeavour might have in its application in reality. This method is comparable to both what engineers call ‘reverse engineering’, i.e. the disassembly of an object designed and constructed in order to improve the understanding and the discovery of eventual flaws in the planning process. This stand is, for instance, reflected in the following sentence:

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109 Please note that, since it was not chosen by group members themselves, the denomination “Frankfurt School” is disputed in terms of its members, sphere of action, effects or time frame and, thus, remains open to different interpretations; see e.g. J. Habermas, “Drei Thesen zur Wirkungsgeschichte der Frankfurter Schule” in A. Honneth & A. Wellmer, Die Frankfurter Schule und die Folgen (Berlin: Walter de Gruyter, 1986) 8 [hereinafter “Drei Thesen”] and G. Therborn, “The Frankfurt School” in J. Marcus & Z. Tar, Foundations of the Frankfurt School of Social Research (New Brunswick: Transaction Books, 1984) 343.
112 The chapters are: (1) The Concept of Enlightenment; (2) Excursus I: Odysseus or Myth and Enlightenment; (3) Excursus II: Juliette or Enlightenment and Morality; (4) The Culture Industry: Enlightenment as Mass Deception; and (5) Elements of Anti-Semitism: Limits of Enlightenment; see Th.W. Adorno & M. Horkheimer, Dialectic of Enlightenment (New York: Verso, 1997).
113 Ibid. at 11 and 42.
The doctrine of the equivalence of action and reaction asserted the power over reality, long after men had renounced the illusion that by repetition they could identify themselves with the repeated reality and thus escape its power.\(^\text{114}\)

The same principle appears in relation to the role of the individual and the collective in a society characterised by division of labour which is put in the following way:

Through the division of labour imposed on them, the power of all the members of society – for whom as such there is no other course – amounts over and over again to the realization of the whole, whose rationality is reproduced in this way. What is done to all by the few, always occurs as the subjection of individuals by the many: social repression always exhibits the masks of repression by a collective.\(^\text{115}\)

The discussion of antinomies or the juxtaposition of contradictory notions is thus the central element of their discourse. Foregoing reference to Hegel seems thus appropriate because – despite account for Horkheimer’s self-characterisation –\(^\text{116}\) their dialectic bears clear marks of Hegelian dialectic. Hegel saw in the dialectic the accomplishment of thinking itself to resolve contradictions of thinking, and the “insight that the very nature of thinking is the dialectic, that, as understanding, it must fall into the negative of itself, into contradictions, is an importance in the logic”.\(^\text{117}\) To the difference of Plato and Socrates therefore dialectic was for Hegel not an ‘art of conversation’, hence not a dialogue either between two thinkers or between a thinker and his subject-matter, but rather an autonomous self-criticism and self-development of the subject-matter, such as a concept.\(^\text{118}\) For Hegel the logical has three sides consisting of three stages: (1) The side of abstraction or of the understanding; (2) the dialectical or negatively rational side; and (3) the speculative or positively rational side.\(^\text{119}\) Corresponding to this classification, a concept is fixed and defined in the first stage. In the second stage, the more one ponders on the said concept one or more contradictions emerge in them. In the third and final stage, the concept results in a higher category, which embraces the earlier categories and resolves the contradiction involved in them. For Hegel this higher category consists of a ‘unity of opposites’.\(^\text{120}\)

The meaning of the ‘unity of opposites’ and, particularly, the question to what extent the deliberate juxtaposition of the concepts “Kultur” (culture) and “Industrie” (industry) may result in a so-called higher category fostering understanding, is of special interest for the criticism of the culture industry. In the words of John Sinclair’s summary, the concept ‘culture industry’ was for Adorno’s and Horkheimer’s a deliberate contradiction in terms which stood for their intent:

> to set up a critical contrast between the exploitative, repetitive mode of industrial mass production under capitalism and the associations of transformative power and aesthetico-moral transcendence that the concept of culture carried in the 1940s, when it still meant “high” culture.\(^\text{121}\)

The critical contrast, mentioned by Sinclair, obviously refers to the tension between industrial mass production, of which increased international trade became an important by-product, and the former

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\(^\text{114}\) Ibid. at 12.

\(^\text{115}\) Ibid. at 23.

\(^\text{116}\) “Horkheimer saw himself as a defender of Marxist theory – in the sense that his position was a continuation of a line leading from Kant and the French Enlightenment through Hegel and Marx”; see Wiggershaus, \textit{supra} note 108 at 24.

\(^\text{117}\) G.W.F. Hegel, \textit{The Encyclopaedia of Logic} (Indianapolis: Hackett, 1991) at 35.


\(^\text{119}\) Hegel, \textit{supra} note 117 at 125.

\(^\text{120}\) See Inwood, \textit{supra} note 118 at 81-82.

aesthetic perceptions about art, which were summed up under the term “high culture”. For the relation between culture and trade as such, the original concept “Kulturindustrie” (“culture industry”) can be placed at the second, i.e. negative, stage in the sense of Hegelian dialectics. The gradual ascent to the third stage towards the attainment of a higher category of understanding was only initiated in later developments of which the consequences – in my opinion – are still not fully recognised to this day. The gradual transition from the second to the third stage is marked by the concept’s change from “culture industry” to “cultural industry” and “cultural industries” respectively. Thus the original concept marks a clash of two nouns “culture” and “industry”, which can be taken as synonyms for the relation between culture and trade. In both cases we can speak of them as truly fulfilling the criteria for their qualification as an oxymoron, i.e. “a figure of speech in which apparently contradictory terms appear in conjunction”\(^\text{122}\). By contrast, the later use of “cultural industry” as well as “cultural industries”, by which the noun “culture” became replaced by the adjective “cultural”, has lost some of the initial oxymoronic rigor and can be taken as the concept’s ascent towards the third and final stage.

The path, which the transformation of the concept from “culture industry”, as formulated for the first time by Adorno and Horkheimer in the single chapter of *Dialectic of Enlightenment*, titled “The Culture Industry: Enlightenment as Mass Deception”, to “cultural industry”, as drawn up in the Canada-United States Free Trade Agreement and inaugurating the common use of “cultural industries” in the present, has followed, will be outlined in the following subsections.

\[\text{§§ 3.2.2. Some Elements for a Critique of The Culture Industry: La reproduction interdite?}^{22}\]

Although Adorno, as a composer, a critic of music and literature, has apparently contributed to the issue of the culture industry with a comprehensive collection of texts, the overall contextual environment must not be underestimated. Even long before the notion “culture industry” was coined, the shifting character and role of art through new modes of production, caused by the ever-changing industrial environment, preoccupied numerous minds with distinct professional backgrounds in the beginning of the 20th century. These new techniques opened new possibilities for the reproduction and distribution of art which began to challenge the former perception of art as coined during the Renaissance period and expressed by Leonardo Da Vinci’s who, based on paintings, defined artistic works as being impossible to copy or to imitate and described copies as “lacking excellence”.\(^\text{124}\) Taking the fine arts as an example, the gradual conceptual challenge introduced by changing methods of reproduction in the beginning of the 20th century is also reflected visibly in the work of the painter René (François Ghislain) Magritte (1898-1967). Though not affiliated with the Frankfurt School, his painting *De Verboden afbeelding* (1937), which inspired the title of this chapter, can be considered representative for an important aspect of his entire oeuvre, namely the interest in the difficulty to handle the perceptive challenges deriving from the simultaneous combination of sound, picture and text.\(^\text{125}\) In literature, it is Walter Benjamin who gives

\(^{122}\) See *The Canadian Oxford Dictionary*, supra note 14 at 1040.

\(^{123}\) See generally the title and painting of René Magritte, *La reproduction interdite*, 1937, Museum Boymans-Van Beuningen, Rotterdam.


\(^{125}\) See generally G. Ollinger-Zinque, “La culture des idées. «Ce qui est invisible ne peut être caché à notre regards” and F. Leen, “Un rasoir est un rasoir: Le mot et l'image dans certaines peintures de René Magritte” and R. Wangermée,
an interesting account of this shift and with his ideas he indirectly contributed to the formation of the notion of the culture industry. Being another contemporary of the Frankfurt School, his precise relation to the Frankfurt School is unclear and has been further obstructed by his early death. It is clear, however, that Benjamin’s influence on Adorno and the School was strong although he has never formally joined the said Institute of Social Research. The strong influence of Benjamin on Adorno’s is due to his article “Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit” (“The work of Art in the Age of Mechanical Reproduction”) published in 1936 in the Zeitschrift für Sozialforschung (Journal of Social Research). Therein, he highlights the novelty that new technologies, notably the film, brought to art in comparison with former technological inventions. In his introduction to the subject, he states:

In principle a work of art has always been reproducible. Manmade artifacts could always be imitated by men. Replicas were made by pupils in practice of their craft, by masters for diffusing their works, and, finally, by third parties in the pursuit of gain. Mechanical reproduction of a work of art, however, represents something new. Historically, it advanced intermittently and in leaps at long intervals, but with accelerated intensity.

Thus, Benjamin not only describes the uniqueness of the changing pattern in the process of the creation of a piece of art in his time but also puts it in a wider historical context by referring to various stages in which new inventions, such as those of woodcut, (book-) print, copperplate engraving, etching, lithography, photography, and sound film, emerged and consequently altered drastically the societal setting. According to him, the principal changes that derive from the technical reproduction of a piece of art are the loss of its authenticity by shattering the time-space relationship, the destruction of its aura, the deprivation of its embeddedness in a tradition, the separation of the functional basis of a work of art, its service to (religious) rites and cults. From these changes, Benjamin deduces several elements with a direct impact for the human being in a collective. The first element consists in a change of perception during greater historical time periods which in turn changes the relation of the mass to art and the function of the latter. For instance, the art form of film as distinct from painting is capable of being the subject of a simultaneous collective reception. The second element is the distinction between a ‘work of art’ (Kunstwerk), such as a painting, and a ‘service of art’ (Kunstleistung), such as the effort of a conductor, where the reproduced lacks the true characteristic of an artistic object. Furthermore, Benjamin extracts several characteristics in the mechanically reproduced work of art which the various sectors of the culture industry have in common. Finally, he combines his analytical findings and links them to the spheres of politics and of economics. For politics, this means that there is a direct link between the crisis of democracy and the


129 “What is aura actually? A strange weave of space and time: the unique appearance or semblance of distance, no matter how close the object may be”; Benjamin, supra note 128 at 438, 440, and 441.

130 Ibid. at 439, 444, 448-9, and 459.

131 Ibid. at 448-449.
way the politician is presented.  

For economics, Benjamin distinguishes the cult value and the exhibition value of a work of art. He already points out some distinct characteristics of the products of the culture industry, or works of art mechanically reproduced, in a capitalist economy. This specific analysis will become subject of economic analysis from the 1960s onwards. Finally, it must be stated here that this classification is oversimplified and does not reproduce the full picture that Benjamin was able to draw by linking various different findings. This is exemplified not only in a mentioning of the dynamic of the star system and its exploitation, or the special need for (risk) capital (differentiated product), the inter-sectoral dependency of different industrial branches, such as the film on the electricity industry, but also in a sequence of findings that put into context the average cost of film production with the potential reach of audience, the setback of international distribution based on national interest proclaimed by Fascist movements which coincided with differences in language with the invention of the sound film (a problem which was soon minimised by synchronisation) and the occurrence of a global depression. Last but not least, Benjamin concludes his findings by linking them on a larger scale to insights into mass behaviour drawn from the possibilities of mass reproduction. Finally, Benjamin concludes by referring to the link between mass media and the behaviour of the masses:

Mass reproduction is aided especially by the reproduction of masses. In big parades and monster rallies, in sports events, and in war, all of which nowadays are captured by camera and sound recording, the masses are brought face to face with themselves. This process, whose significance need not be stressed, is intimately connected with the development of the techniques of reproduction and photography. Mass movements are usually discerned more clearly by a camera than by the naked eye. A bird's-eye view best captures gatherings of hundreds of thousands. And even though such a view may be as accessible to the human eye as it is to the camera, the image received by the eye cannot be enlarged the way a negative is enlarged. This means that mass movements, including war, constitute a form of human behaviour which particularly favours mechanical equipment.

In many ways, Benjamin has thus either anticipated, or perhaps inspired, but definitely contributed to some of the findings that Horkheimer and Adorno came to detect and to name the “culture industry” a decade later. However, in alliance to Benjamin, Adorno contributed to the discussion of the culture industry in various articles, such as *inter alia* “On the Fetish Character in Music and the Regression of Listening”, “The Schema of Mass Culture”, “Culture and Administration”, “How to look at Television”, and “Transparencies on Film”. In these and other articles, Adorno develops a comprehensive critique of various aspects of the culture industry and mainly emphasises its potential negative implications for the individual, and society as a whole. Beginning with the concept of culture he points at its changing role, the alienation of its very character through its increasing transformation into a commodity, the commodification or ‘merchandising’ of culture. For instance, culture is capable of falling prey to administration and planning. He asserts the difficulty of

132 “Democracies exhibit a member of government directly and personally before the nation’s representatives. Parliament is his public. Since the innovations of camera and recording equipment make it possible for the orator to become audible and visible to an unlimited number of persons, the presentation of the man of politics before camera and recording equipment becomes paramount”; *Ibid.* at 454.

133 See Subsection §§ 3.3.3 (“Economics of Culture or Cultural Economics”).

134 “Ibid.”

135 See * supra* note 128 at 442-443.

136 See *infra* 467.

purporting a cultural policy by stating that the essence of culture itself is negated when subjected to
administration and planning because culture is particularly nurtured by concepts such as autonomy,
spontaneity and criticism.\textsuperscript{138} The commodification of culture, however, is even more nefarious in
the case of the culture industry and the mass media.\textsuperscript{139}

Despite the fragmentary character of his description of the dynamics of the culture industry Adorno
is capable of covering a wide area of problems linked to the culture industry. To begin with the
structure of the culture industry, he explains how former differences between the different sectors of
the culture industry, such as books, music, radio, film, television, have a tendency to merge and to
make up a system as a whole, resulting in the “assembly-line character” of the culture industry.\textsuperscript{140}
From its inception onwards, the technique of the culture industry is one of distribution of
mechanical reproduction.\textsuperscript{141} In \textit{Dialectic} it reads: “[...] culture now impresses the same stamp on
everything. Films, radio and magazines make up a system which is uniform as a whole and in every
part.”\textsuperscript{142} This line of thought is continued in his evaluation of the market forces which are marked by
a strong trend towards monopolisation, driven by the profit motive and made possible by technical
capabilities as well as by administrative and economic concentration.\textsuperscript{143} The effects on politics are
analysed in the potential control the culture industry can give on the psychology of the masses which
may result in the decline of the individual.\textsuperscript{144} For the level of the individual, this control through
standardisation and commodification of culture means the necessity to either conform or to be
rendered powerless, economically and also spiritually.\textsuperscript{145} The degradation of the individual is felt also
in the sphere of language, as the principal vehicle of communication, whose words become devoid
of quality reduced to ‘trade-marks which are finally all the more firmly linked to the things they
denote, the less their sense is grasped’.\textsuperscript{146} The same fate is shared by the concept of taste ‘which is
itself outmoded’ and consequently supported by the power of advertisement the ‘familiarity with the
piece is a surrogate for the quality ascribed to it’.\textsuperscript{147}

The few elements chosen here out of the many different texts covering a wide scope of phenomena
are aimed to present the essence of the criticism of the culture industry as produced mainly by
Benjamin, Adorno and Horkheimer and are by far not exhaustive. Whatever the merit of their
criticism may be, the fragments of the many and diverse aspects raised in it, can be understood as a
contribution to the sketch of a more complete view of the processes underlying a complex
democratic society. Adorno himself has summed up this aspect in the following words:

The total effect of the culture industry is one of anti-enlightenment, in which, as Horkheimer and I have
noted, enlightenment, that is the progressive technical domination of nature, becomes mass deception

(London: Routledge, 1991) 107 at 123.


\textsuperscript{140} See Adorno & Horkheimer, supra note 112 at 163.

\textsuperscript{141} “Culture Industry Reconsidered”, supra note 139 at 101.

\textsuperscript{142} See Adorno & Horkheimer, supra note 112 at 120.

\textsuperscript{143} See e.g. “The Schema of Mass Culture”, supra note 137 at 76, 78, 79.

\textsuperscript{144} See e.g. “Freudian Theory and the Pattern of Fascist Propaganda” in Th.W. Adorno, \textit{The Culture Industry: Selected Essays

\textsuperscript{145} Cf. Adorno & Horkheimer, supra note 112 at 133 and “Culture Industry Reconsidered”, supra note 139 at 104.

\textsuperscript{146} See Adorno & Horkheimer, supra note 112 at 166.

and is turned into a means for fettering consciousness. It impedes the development of autonomous, independent individuals who judge and decide consciously for themselves. These, however, would be the precondition for a democratic society which needs adults who have come of age in order to sustain itself and develop.\footnote{“Culture Industry Reconsidered”, supra note 139 at 106.}

Finally, it must be acknowledged here that the exact attribution of specific points of criticism to one particular writer is difficult and must not only be read in the context of the Frankfurt School but requires an inquiry in the overall historical and political context.

\section*{§§ 3.2.3. The Frankfurt School’s Merits in Later Developments}

As was indicated above, the concept of Frankfurt School is in itself disputed and unclear in terms of its precise membership, sphere of action, effects in time or in space.\footnote{See supra note 109.} Accordingly, their input in the present use of the concept of cultural industries remains open to speculations. In this respect an important distinction must be drawn between their merits generally and specifically with respect to the concept of cultural industries. From a more general viewpoint, the merits consist in the work of the group members, representative also for the experiences or the fate of a whole generation. The more specific approach addresses the coining of and elaboration of the concept “culture industry” with a view of its later evolution to the present use of the term “cultural industries”.

With regard to the first approach, the Frankfurt School can be said to have successfully made the attempt to combine directly or indirectly in a fruitful collaboration not only a group of people but also various scientific disciplines – most notably philosophy, sociology, psychology, history, economics, and law. The combination of people and scientific disciplines is reflected in a string of important names beginning with Theodor W. Adorno (1903-69) and Max Horkheimer (1895-1973), Walter Benjamin (1892-1940), Erich Fromm (1900-80), Herbert Marcuse (1898-1979), Friedrich Pollock (1894-1970), Franz Neumann (1900-1954), Otto Kirchheimer (1905-1965) and further contemporaries who left an imprint on their work.\footnote{In his inaugurating speech as a director of the Institute of Social Research on January 24, 1931, Horkheimer pointed out the “plan to set up, along with my associates, at least on a very small scale, a regime of planned work on the juxtaposition of philosophical construct and empiricism in social theory” and that this includes “organizing inquiries, on the basis of current philosophical questions, in which philosophers, sociologists, economists, historians and psychologists can unite in lasting co-operation”; see Wiggershaus, supra note 108 at 38, 39 and 178.} Jürgen Habermas attributes these merits of the School and, more generally, the prevalence of critical theory to the fact that the effects of the protagonists work made themselves felt on different levels and that the history of their developments offers numerous links for their pursuit in a great many heterogeneous fields.\footnote{“Drei Thesen”, supra note 109 at 9 et seq.} In other words, the multidisciplinarity of their work plus their foundation in an abstract or dialectical method of criticism secured its value not only for a multitude of the challenges that the early 20th century saw, but also for a continuation until and, most likely, beyond the present times. This circumstance can also be explained by the circumstances that determined the lives and working conditions of the members or colleagues of the Institute. Gathered around the core members Adorno and Horkheimer, their fates reflect the struggle of a whole generation for freedom, if not in life than at least in thought, as it is well-documented in their writings as well as their deeds.\footnote{For instance, Walter Benjamin, like many of his contemporaries, paid his price with his own life. He is recorded to have either committed suicide or to have been killed on his flight from the Nazis at the Spanish border in 1940; Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU European University Institute DOI: 10.2870/50465}
Wiggershaus provides a good account of the historical context of the ideas of the Frankfurt School’s members, which can be resumed briefly as having passed the following stages: Born around the turn of the 19th to the 20th century, they experienced drastic changes in the course of their life. First they were exposed to the aftermath of the enlightenment era together with the effects of the industrial revolution and fast technological progress and simultaneously torn asunder between capitalism, Marxism and socialism. Their lives were threatened, or lost, by Nazism and fascism as expressed in anti-Semitism or stereotyped thinking. Forced into exile, they crossed not only state borders but also those of science, culture, politics and traditions, altogether witnessing an increasing human domination of nature not matched by a sufficient degree of domination of human nature itself. They thought to detect the reasons in a degeneration of high art into popular art, which they traced to various circumstances, such as the division of labour and fragmentation of the sciences, which all lead to a growing tendency of alienation. Ultimately, they got involved in the mental reconstruction of a divided Germany in the post-war period and faced the division of the world in the West and the East, the North and the South during the time of the Cold War. Such involvement earned them the accusation of inciting terrorism in a rebellion against, what can be termed, a repetition of history taking place at that time in Vietnam.

There is no doubt that these experiences, and the embeddedness in a specific historical context left also an imprint on the members of the Frankfurt School, who in their works preserved them for later generations. From this general viewpoint, they fit seamlessly in the history of science and philosophy. Such continuity was presented by one author who used the phlegm different writers or poets felt “in the wake of a failed revolution” and detects in this sentiment continuity between the Early British Romanticism, the Frankfurt School and French Post-structuralism. Another example for the significance of the historical context is provided by their contemporary writer George Orwell (1903-50), who, in his novel Nineteen Eighty-Four uses a literary form of criticism for a (fictitious or real) future society, which contains strikingly similar findings presented also in a dialectic style he called “doublethink.” As much as Orwell’s work, their work had and continues to have relevance for later generations and, as such, must still be considered a fertile ground for present discussions.

In contrast to their general contribution to social research and philosophy, it is their work in relation with the concept of culture industry that Horkheimer and Adorno coined. From this specific viewpoint relating to the culture industry, the main role within the circle of what was termed the Frankfurt School can be attributed, first and foremost, to Adorno. It was Adorno who was interested most in the relation of art and society and the specific consequences deriving from technological innovations in the culture industry. His interest is preserved in a series of writings dedicated to the various aspects of the culture industry. In this context, however, the next to be

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compare Wiggershaus, supra note 108 at 310, with St. Jeffries, “Did Stalin’s killers liquidate Walter Benjamin?: The renowned German writer and critic may not have died at his own hands” The Observer (July 8, 2001) 23.

153 Wiggershaus, supra note 108.


155 Findings contained in statements such as: “The invention of print, however, made it easier to manipulate public opinion, and the film and the radio carried the process further”; G. Orwell, Nineteen Eighty-Four (London: Penguin Books, 2000).

156 For a general overview, see A. Honneth & A. Wellmer, Die Frankfurter Schule und die Folgen (Berlin: Walter de Gruyter, 1986).
mentioned is Walter Benjamin who must be considered a pioneer in the field and, hence, a rich source of inspiration as well as a challenge for Adorno. Benjamin also resumes an important place in the context of the culture industry, regardless of the unclear position he held in the Frankfurt School, which was clearly obstructed by his early death. Only in the third place comes Horkheimer, whose main contributions were, in the words of Habermas, the combined qualities of a “clever director and scientific manager” to gather gifted people around the Institute and of an “original social philosopher”. These two qualities undoubtedly paved the way for their leading role in the field of culture industry as established by the original coining of the term in their common publication, the *Dialectic of Enlightenment*.

Both viewpoints, the more general and the specific, taken together, allow for the final assumption that the core of the Frankfurt School, which had an immediate role in the coining of the concept “culture industry”, ceased to exist with the death of first Adorno in the year 1969 and then Horkheimer in the year 1973. The important part that Benjamin played in the field, unfortunately, had ended already long before with his early death in the year 1940.

Genuinely spoken, the Frankfurt School’s theory of a culture industry ceased to exist with the death of Adorno and Horkheimer. Nonetheless, their work contained enough originality for future developments to take place. Thus there is continuity and discontinuity at the same time. First, there is continuity because their work is still a rich source of inspiration for today’s developments. This is first of all due to the multidisciplinary character of their research, their international experiences between the American and European continent and the inclusive tension of an oxymoron. There is however, discontinuity in terms of the methodological approach and especially the research environment favourable to a unitary approach to science. Immediately after the concept has been coined and left the sphere of the Frankfurt School, it was in accordance with the ongoing

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157 “Drei Thesen”, supra note 109 at 8.
158 See Lubasz, supra note 126 at 83.
159 See also the mainly historical approach to the concept in the work by Heinz Steinert, published for the 100th anniversary of Adorno in 2003; H. Steinert, *Culture Industry* (Cambridge: Polity Press, 2003).
160 See also T. Bottomore, *The Frankfurt School and Its Critics* (London: Routledge, 1984) at 55, writing in the chapter titled “Decline and Renewal” that: “With the deaths of Adorno and Horkheimer, and the decline of the radical student movement in the early 1970s, a major phase in the history of the Frankfurt School came to an end. In a sense the school then ceased to exist, certainly as a form of Marxist thought, for its relation to Marxism had become exceedingly tenuous, and it no longer had any connection with political movements. But in another sense it survived, for some of the central ideas of critical theory have continued to influence social thought; with the difference, however, that in the past decade they have been expounded and developed in the works of individual thinkers (above all by Jürgen Habermas, but also, in diverse ways, by Albrecht Wellmer, Alfred Schmidt, and Claus Offe) rather than as part of the research programme of a clearly defined school”.
fragmentation of or specialisation in the sciences that the idea underlying the concept of culture industry continued to be used in different scientific branches and along the strict lines of national boundaries but had initially lost much of the unitary and international character.

First, taken up by sociologists, the concept of culture industry also began to inspire economists and all those that felt unease with the strict traditional boundaries drawn for their respective scientific disciplines. The process of how the concept “culture industry” became gradually transformed into the one of “cultural industries” and more frequently used in other disciplines will be the subject of the following sections.
§ 3.3. The Reception of the Concept of Cultural Industries in Economics

§§ 3.3.1. The Convergence of Politics and Economics

The next stage in the evolution of the concept of the culture industry is marked by its transformation into “cultural industries” during its gradual entry into the world of economics. As a matter of fact the environment of the Frankfurt School, in which Adorno and Horkheimer coined the notion of the culture industry, provided a fertile ground for economic considerations too. Their interdisciplinary approach critically met some requirements for a more coherent approach to a wide array of problems resulting from the traditional separation of politics from business prevalent until the beginning of the 20th century and implied the urge for political organisations to keep pace with economic developments as mentioned before.161 The predestination of the culture industry for its consideration in political economy is first induced by its oxymoronic character, i.e. a pair of vibrant opposites combined under the notion of culture industry that resembles the juxtaposition of the two previously separate notions of economics and politics. The traditional separation of politics and economics and the resulting ambivalence of their juxtaposition contribute to the fact that political economy is often referred to as “one of the more complex and contested concepts in social science”.162

Increased interaction between the market and state, nationally as well as internationally, were supportive to arguments that regarded the distinction between economics and politics as well as domestic and international as artificial and obsolete.163 Finally, the common consideration of politics and economics, on both the national as well as international level, in the context of the notion of an international political economy has been described as follows:

International political economy is the study of the interplay of economics and politics in the world arena. In the most general sense, the economy can be defined as the system of producing, distributing and using wealth; politics is the set of institutions and rules by which social and economic interactions are governed. Political economy has a variety of meanings. For some, it refers primarily to the study of the political basis of economic actions, the ways in which government policies affect market operations. For others, the principal occupation is the economic basis of political action, the ways in which economics forces mold government policies. The two focuses are in a sense complementary, for politics and markets are in a constant state of mutual interaction.164

The tensions as well as complementarities in the mutual interaction between politics and economics, as expressed in this quote, also help to explain the links between the field of political economy and the cultural industry as presented in the following subsections.

§§ 3.3.2. A Political Economy of the Cultural Industries: The Work of Nicholas Garnham

Despite the early international outreach of the work by the Frankfurt School’s representatives, due to their forced emigration from Germany to France, Switzerland, the UK and the US until their ultimate return to Germany, the concern for the cultural industries still remained mainly focused on a national level. For instance, the term “culture industry” was picked up by French sociologists

161 See the comments to notes 327 and 327.
162 See Hettne, supra note 78 at 1.
163 Ibid.
beginning with the 1960s converting it into the plural term “cultural industries”. The move of the Frankfurt School’s work on the culture industry to the international level occurred first only slowly but then accelerated due to an increase in international cooperation and particularly by the technological advances in the media sector, such as satellite broadcasting. The first international think-tank taking up the work of the Frankfurt School and trying to meet the new challenges was provided by the journal *Media, Culture and Society* which was founded in 1979. The first volumes still reflected the different national, mainly British but also French and American approaches to the phenomenon of the media. In the work of one of the journal’s editors, Nicholas Garnham, the evolution of the concept of the cultural industries in the realm of political economy is found exemplified. In the first volume, Garnham presented his “Contribution to a Political Economy of Mass Communication” which became complemented by numerous articles that highlight a wide array of aspects of the cultural industries.

Although Garnham must be categorised as a sociologist, he called for a political economy approach to the mass media in order to understand better the structure, production, consumption and reproduction of culture particularly in light of the immense complexity of advanced capitalist societies. This ambiguity may be considered a necessary side-effect of the multidisciplinary environment in which the protagonists of the Frankfurt School understood the term, or else a deliberate choice to highlight the complexity of the forces, both economic and political, or economic and cultural, underlying the concept of the cultural industries.

As a matter of fact, Garnham sees the principal task for a political economy approach to communications and culture in the study of the form of a set of institutionalised cultural processes within capitalist social formations; processes which through the development of specialised technologically based institutional forms and practices extended the process of cultural interaction through time and space beyond face-to-face interaction. The central questions arising from this development can be distilled to one asking what determines access to or control of these scarce material and cultural resources and what effect does that structured access and control have upon social structure and process in general. As opposed to separation of culture from economic activity proclaimed by Raymond Williams, the problem mainly consists of bringing together the political sphere of public cultural policy with the economic sphere of material production.

In the elaboration of such an approach, important elements are found in previous work from Adam Smith via David Ricardo to Marx, particularly the superstructure/base (*Basis*/Überbau) dichotomy expressed in the distinction between “the material transformations of the economic conditions of

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166 The journal’s focus is described as follows: “Media, Culture & Society provides a major international forum for the presentation of research and discussion concerning the media, including the newer information and communication technologies, within their political, economic, cultural and historical contexts”; available online [https://www.sagepub.com/journal.aspx?pid=208](https://www.sagepub.com/journal.aspx?pid=208) (date accessed: March 18, 2005).
168 See “Political Economy of Mass Communication”, supra note 167 at 24, 44.
170 Ibid. at 10.
production, which can be determined with the precision of natural science, and the legal, political, aesthetic or philosophic – in short – ideological forms in which men become conscious of this conflict and fight it out”. Other influential works drawn upon is the analysis by the Frankfurt School of the capitalist mode of cultural production termed the industrialisation of culture and Pierre Bourdieu’s sociological theory of cultural appropriation (taste) and cultural reproduction (creativity). Core problems Bourdieu points out are the characteristic tendency of sociology which studies its own society and within which the observer is himself or herself also a participant as well as the fact that all human actors are confronted with uncertainty due to the dependence of their own actions on actions of other actors. As a regulating mechanism to cope with this uncertainty, he offers the habitus operating according to a coherent logic and being shaped primarily in early childhood. Another observation concerns the class division inherent in historical materialism and the resulting problem of reproduction expressed in the need to convert cultural capital into economic capital with the aim of reproducing and possibly augmenting the capital. Again another point of departure for his criticism is found in the theory of the public sphere, as formulated primarily by Jürgen Habermas.

These general observations are complemented by detailed discussions of various sectors pertaining to the cultural industries, such as the film industry, broadcasting and video. Their separate consideration in turn contributes to fruitful insights in the concept as a whole (pars pro toto). The main insights gained from each of the individual sectors can be summarised as follows:

(i) Film Industry: In a theoretical approach to the film industry, Garnham criticises the separate consideration of film and media studies by playing down the importance of film vis-à-vis other media and notably television. In a practical approach he tries to shed light on the reasons for the dominance of the US film industry in the world which developed from the 1920s and extracts some of the main features of its organisational structure in order to formulate possible policy answers by the (then) European Community and the Council of Europe. As a first reason he, of course, mentions the size of the American domestic market which practically also includes Canada. Already domestically, the market of the film industry is dominated by the control of a small group of production and distribution companies, the so-called “majors”, which has further diminished significantly over the years due to mergers or take-overs. The same holds generally true for the world market where US domination is reflected in large sums of revenues. As for the reasons of the oligopolistic concentration of control in the hands of a few majors he lists the following economic specifics of film products: The high investment costs in production relative to the cost of the ticket bought ultimately by the consumer, the heterogeneity and highly perishable character of the product

174 Ibid. at 73-74.
175 Ibid. at 78-79.
176 See N. Garnham, “Film and Media Studies: Reconstructing the Subject” in N. Garnham, Capitalism and Communication: Global Culture and the Economics of Information (London: SAGE, 1990) 56 at 56 et seq.
178 N. Garnham, “Film and Media Studies: Reconstructing the Subject” in N. Garnham, Capitalism and Communication: Global Culture and the Economics of Information (London: SAGE, 1990) 169 at 171-3, 175, 177-9, 180-6 [hereinafter “Economics of the US Motion Picture Industry”].

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for which demand of the single consumer is uncertain. Once a film is produced these risks are compensated by the possibility of a huge increase in revenues through the relatively easy and fast distribution selling the product to a maximum of consumers which together form the audience.

The two factors, the high initial risk and the pressure of audience maximisation due to an easy distribution, explain the tendency towards oligopolistic market control. With the intention to minimise risk the oligopolistic structure in the US market has led to business structures and practices which also caught the attention of antitrust enforcement authorities. These structures reflect a high degree of vertical integration which allowed for the efficient control of the product's path from its production, via distribution to its final consumption in exhibition theatres. Concerning the distribution practices, particularly those of zoning, block booking and blind booking have been outlawed by competition authorities. Despite the antitrust actions by the US Justice Department against the five majors, which resulted in a divorce of the production/distribution companies from the exhibitors, concentration could not be halted. Another important element in the increasing dominance is the found in the rise of television which not only opened new markets (TV series) but also additional revenues from the sale of films (old and new) to television networks. Therefore, television and the gradual transformation of the major film companies into multi-media conglomerates helped to create synergy effects based on advertising which helped to boost sales of a single product across a wide range of sectors covering *inter alia* films, TV series, books, sound tracks, toys and computer games.

(ii) Broadcasting: For the broadcasting sector political aspects, such as the role of television in British election campaigns, prevail in Garnham's presentation. Television is without doubt of outstanding importance for the formation and influence of public opinion and therefore a powerful medium in the process of attribution of political power to political actors. The historical experience with the media, and especially television, thus seems to have confirmed the many observations about mass media made by Walter Benjamin as cited above. Benjamin's analysis is underpinned by Garnham's description of the situation and new trends in Britain such as an increased electoral volatility, the expansion of the media's influence to set their own issue agenda during and between election campaign partly mediated through so-called “news values” and the neglect of the audience needs and values. These factors contribute to the role of television as “the basic structure by which politicians communicate with media”. Another important point in the influence media exercise on the audience is the view of the world they deliver to the home, namely one of a “distant, strange and threatening world out there which one confronts as an isolated and powerless individual”.

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179 Ibid. at 183.
180 Ibid. at 185.
181 Ibid. at 188 et seq.
182 Some of these practices are explained in A. Dorion, “Le Déclin de l'empire américaine? Première partie ou Les divergences du droit de la concurrence avec celui de la propriété intellectuelle dans un domaine qui incarne cette dichotomie: le cinéma” (1997) 9 C.P.I. 233 at 256-257.
183 See “Economics of the US Motion Picture Industry”, supra note 178 at 195-7.
184 Ibid. at 201-4.
185 See supra note 470.
188 Ibid. at 93-4.
As another important feature of television, Garnham addresses the question whether the prevalent form of media organisation should be in the hands of the state or the hands of the market, expressed either in the traditional form of public service broadcasting (PSB) or the ongoing tendency to move to greater private market control. He warns that information but also culture changes from a public good to a private commodity and public interest becomes corporate interest. Such shift endangers the public sphere built upon the universality of public service broadcasting within a given country. Most of all, Garnham finds the historical origins of broadcasting in the form of public service broadcasting not induced by frequency scarcity or technical but by social and economic reasons. Accordingly, Garnham identifies some major risks linked to the displacement of the PSB monopoly by the introduction by of private, advertising-financed stations and network. These risks comprise of the alienation of the audience from its living environment through a lack of cultural sensitivity in the expansion of such networks to the international market; less consumer sovereignty; an increase in choice for those who can afford it and a loss of quality for those who cannot; the physically limited consumption time; the depoliticization of society and the placement of information under oligopolistic control.

(iii) Video: For the case of video, Garnham considers the actual benefits as fairly disappointing given the great expectations that were linked to the advent of a relatively cheap, light-weight and portable filming and presentation equipment with an immediate replay possibility, such as notably the possibility for enhanced democratic participation in television and for the democratisation of society at large. In his opinion, limited access to the broadcasting institutions, the general low definition quality of video recordings plus the need for special skills and the therefore deterrent effect that professional models, especially the rivalry of film transmitted via television, exercise on amateur users neutralise the potential positive effects of video. Altogether video is, thus, of very limited use for the great goals of a democratisation of society. Instead, as he notes in the context of the development of the world-wide US dominance of the motion picture industry, video has boomed in its passive form, the rental of videocassettes, as the huge increase (almost 500%) in additional revenues from videocassettes recorded between 1983 and 1988 brought to the film industry. Nonetheless, video technology has numerous facets, which foster the overall convergence between the different sectors of the cultural industries.

Notwithstanding his separate consideration of the economic dynamics inherent in film, broadcasting or video, Garnham suggests that these various media sectors must be considered and treated like a single problem. Therefore, for their common consideration, looked at from a historical and politically sensitive perspective, the notion of the cultural industries imposes itself. He summarises the definition of the cultural industries as follows:

190 Ibid. at 115-135.
191 Ibid.
193 The total figure of US domestic and foreign revenues from videocassettes shows an increase from $ 750 million in 1983 to $ 3.725 million in 1988; see “Economics of the US Motion Picture Industry”, supra note 178 at 205.
195 See “Public Policy”, supra note 171 at 167.
§ 3.3

Thus, as a descriptive term, ‘cultural industries’ refers to those institutions in our society which employ the characteristic modes of production and organization of industrial corporations to produce and disseminate symbols in the form of cultural goods and services, generally, although not exclusively, as commodities.

As a key point he sees the cultural sector as operating as an integrated economic whole because industries and companies within it compete for a limited pool of disposable consumer income, a limited pool of advertising revenue, a limited amount of consumption time and for skilled labour.\(^{196}\)

§§ 3.3.3. Economics of Culture or Cultural Economics

The second approach, a primarily economic approach to culture was born out of an interest in the particular relationship between the arts and economics. A stream of studies in the field was initiated by William J. Baumol’s and William G. Bowen’s book *Performing Arts – The Economic Dilemma* published in 1966.\(^{197}\) The dilemma referred to, otherwise known as Baumol’s cost disease, states that the technology of artistic performance is fixed and cannot be subject to productivity improvements. Therefore, with rising costs, particularly payments to labour, the living arts become more expensive, notably as the richer a society becomes.\(^{198}\) It reflects the initial period in which specific sectors and target groups, such as the performing arts, theatres, museum or singers, composers and writers were the focus of the interest in arts-and-economics studies. Since then the focus gradually widened from arts economics to ‘cultural economics’ or ‘economics of culture’. At the present, cultural economics comprises a wide array of issues reaching from the arts, cultural heritage, intellectual property and subsidy issues to cultural policy, international trade policy, sustainable development, tourism and last but not least the cultural industries.

Before examining more closely the notion of the cultural industries, it is necessary to point out the main problems encountered in the framework set by culture and economics. Naturally there seems to be no complete consensus about the scope and meaning of economics. For concept of culture there is likewise no consensus due to its extreme elasticity, which further aggravates any analytical approach to an economic analysis of “culture”. However, based on empirical observations about the relevance of both culture and economics for the existence of human beings, one can proceed to the formulation of a few principal characteristics. The economist David Throsby, for example, in his book *Culture and Economics* arrives at a dual working definition for the notion of culture: The first definition is of wider scope in an anthropological or sociological framework to describe a set of beliefs, mores, customs, values and practices which are common or shared by any group and expressed in form of signs, symbols, texts, language, artefacts, or oral and written tradition; the second definition is based on a more functional approach and comprises activities undertaken by people, and the products of those activities, which have to do with the intellectual, moral and artistic aspects of human life.\(^{199}\) He goes on and suggests three main characteristics for these activities, namely the involvement of creativity, the generation and communication of symbolic meaning and

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196 Ibid. at 158.
197 For a short survey of the history of economics of culture and a list of relevant publications, see B.S. Frey, *Arts & Economics: Analysis & Cultural Policy* (Berlin: Springer, 2000) at 1-5.
198 Cf. ibid. at 3 and see also R. Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001) at 3.
199 Throsby, supra note 89 at 3-4.
the fact that their output embodies some form of intellectual property. Nevertheless, despite these characteristics, reasonable doubts about the scope of the concept remain such as whether culture must be considered as a “thing or a process”, embraces both “high” and low or popular culture, and where lines of distinction between social and cultural issues can be drawn.

This initial definitional problem leads to further difficulties in the sphere of economics. This becomes obvious in the attempt at evaluating culture in economic terms. The problem of an economic evaluation of the elastic concept of culture is aggravated by the insufficient availability of or the availability of insufficiently commensurable statistical data about specific markets of cultural goods and services.

Despite these difficulties there exists enough incentive for a common consideration of culture and economics. One peculiar commonality is found in value. In economics and culture, value plays a crucial role and can also mutually influence each other. From economic studies on value, very useful criteria for the more accurate description and consequently the fixation of the concept of culture could be arrived at. The economic distinctions between use and exchange value, natural value (a set of prices determined by production and cost conditions) and absolute or intrinsic value (a measure which could be attached to a unit of a commodity independently of any exchange through buying and selling and which would be invariant over time and space) as well as utility theory (a value theory based individual consumer behaviour can be contrasted with aesthetic, spiritual, social, historical, symbolic or authenticity value of cultural goods or services). Their mutual influence is close to a fact but the exact correlation between the economic value expressed in price and the cultural worth expressed in the willingness to pay is more difficult to prove. Another link between culture and economics is found in the concept of cultural capital complements the established interpretations of capital within the field of economics. Besides physical, human, and natural capital, cultural capital – defined by Throsby as “an asset which embodies, stores or provides cultural value in addition to whatever economic value it may possess” – gives rise to an interesting dynamism. The dynamism derives from the distinction of stocks, i.e. the quantity of such capital in existence at a given time and the flows of services that result from the first. Moreover, cultural capital can be divided into a tangible and an intangible form, such as buildings, location sites, or artworks and ideas, practices, beliefs or values respectively. The flow of services deriving from tangible capital either enters final consumption directly, or can be reinvested in maintenance as well as the expansion of production. For intangible cultural capital which cannot be traded economically as such but only in form of rights, exists the protection of intellectual property rights. With the help of this empirically representative example, Throsby illustrates the causal connection between economic and cultural

200 Ibid.
201 Ibid. at 6-7.
202 See also F. Benhamou, *L’économie de la culture* (Paris: La Découverte, 2001) at 3, citing Alfred Marshall writing in 1891 that “Il est impossible d’évaluer des objets tels que des tableaux de maitre ou des monnaies rares, puisqu’ils sont uniques dans leur genre, n’ayant ni équivalent ni concurrent”.
203 The difficulty is most acute in the sphere of the cultural industries and partly due to private enterprise and the absence of state-controlled levy of data and partly due to definitional problems; see e.g. “Economics of the US Motion Picture Industry”, supra note 178 at 170-171, Towse, supra note 198 at 30 and 33, and Throsby, supra note 89 at 114.
204 Ibid. mainly at 20-31.
205 Ibid. at 51-34.
206 Ibid. at 46.
207 Ibid.
value. Nonetheless, the example reveals more. It also reflects similarities to the dynamism that has helped to shape to the present day the international trade regime during the major negotiation rounds with its expansion from trade in goods, across services and investment to intellectual property. Cultural capital also gives rise to a wider range of topics worth of consideration, notably sustainable development, inter- as much as intragenerational equity, the importance of cultural diversity for the maintenance of cultural systems and the precautionary principle.

The major example for a close entwinement of culture and economics, however, is provided by the concept of the cultural industries as used in the field of economics. There exists considerable doubt about the exact scope of the notion of the cultural industries, such as whether they comprise solely of broadcasting, publishing, music records and films, or include the newspapers and magazines on the one hand and possibly advertising and the ‘high arts’ on the other. Other proposals try to encompass tourism and architectural services as well. Similar doubts exist about the inclusion of the supporting industries, notably the hardware providers such as the manufacturers of television sets, HI-FI equipment, cameras, sound or video recorders. The same problem of delimitation exists in the context of the labour market where distinctions are made between the creative artist and the supporting personnel (e.g. electricians, sound technicians) who assist in one way or the other the performance of the artwork. The reasons for these problems usually derive from different methodological approaches to single phenomena intrinsic in the cultural industries, which also give rise to considerable disparities in the terminology used, such as the various synonyms for the cultural industries ranging from ‘creative industries’, ‘copyright industries’, ‘sunrise’ or ‘future oriented industries’ to ‘content industries’ show. Other reasons lie in the different cultural background of the observer, which is reflected in the American use of ‘entertainment industries’ as opposed to their equivalent in the Canadian context (which will be discussed in the next subchapter). Together these problems appear also at the level of statistics, which may impede the collection of reliable and commensurable international statistics of the cultural industries.

Despite these terminological uncertainties, the dual nature of the numerous cultural goods and services contained in the concept of the cultural industries is widely recognised as reflected in the following definition given by Throsby:

The term ‘cultural industry’ in contemporary usage does indeed carry with it a sense of the economic potential of cultural production to generate output, employment and revenue and to satisfy the demands of consumers, whatever other nobler purpose may be served by the activities of artists and by the exercise of the tastes of connoisseurs.

This recognition is underpinned by the importance given to the cultural industries in their economic impact on urban regeneration, regional growth, and national and international development. In addition, Françoise Benhamou names as three more factors that contributed to this recognition their

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208 Ibid. at 47.
209 Ibid. at 52-58.
210 See Towse, supra note 198 at 25.
211 Throsby, supra note 89 at 113.
212 See especially Culture, Trade and Globalization, supra note 70 at 12 and see also Throsby, supra note 89 at 112.
213 Throsby, supra note 89 at 111.
214 Ibid. at 124-130; see also Benhamou, supra note 202 at 7-23 and “Public Policy”, supra note 171.
ability to generate a flow of revenues or employment, the necessity to evaluate cultural decisions and, from a theoretical point of view, the development of a political economy vis-à-vis new fields.²¹⁵

There is also wide conformity in the analysis of the cultural industries' specific economic features. The principal feature is the high risk that producers face with regard to consumer's demands. The high risk has led to various business practices that try to minimise the risk and to confront the volatile nature of the cultural product cycle. The star system and the companies' inclination to maintain a high level of overproduction on the production side aim at the reduction of the consumer's risk in light of the impossibility of an ex ante evaluation of the quality adherent to the cultural product. The use of so-called "prototypes", i.e. models for the production of other similar products across the various sectors of cultural products create synergy effects and help in reducing the (high) advertising costs.²¹⁶ Vertical integration and a high degree of concentration among the companies follow the same lines of reasoning. In the film industry, block booking or zoning also aim at the same time at the maximisation of revenues while minimising the risks from uncertainty of demand often at the financial expense of exhibitors. The music industry has successfully made use of Alfred Marshall's law stating that "the more good music a man [or woman] hears, the stronger is his taste for it likely to become" in the institution of payola which refers to the granting of side payments to disc jockeys in exchange for the repeated promotion of certain records.²¹⁷ Other such practices are the so-called "tying-in arrangements", ranging from to the pre-sale of season tickets, across licit or illicit forms of premium selling, to the "book-of-the-month formula".²¹⁸

Other features express the paradox of cultural products as compared to usual industrial products that frequent use does not decrease their use value which results in the interest of companies to increase the turnover time at the expense of a cultural product's longevity. In turn, consumers are in strong demand of novelty and within this context falls the rapid course of technological innovation with its impact on the development of new products but also on their consumption as well as their content.²¹⁹ New technologies, in particular the advent of digital technology, equally show an impact on the production side, particularly the tendency for distinct industrial sectors to converge.²²⁰

Finally, these economic particularities inherent in the cultural industries, in turn, give rise to a number of open questions as regards the respective policies and regulations, notably in the sphere of cultural or trade policy making and more related areas. These questions resulting from economic analysis hereby contribute to the closure of the circle opened by the political economy approach.

²¹⁵ See Benhamou, ibid. at 5.
²¹⁷ Ibid. 40 at 48.
²¹⁸ Ibid.
²¹⁹ See e.g. Benhamou, supra note 202 at 83 and Throsby, supra note 89 at 118-9.
²²⁰ See Benhamou, supra note 202 at 82-89.
§ 3.4. The Concept's Itinerary from Philosophy to International Law

§§ 3.4.1. From the Frankfurt School to the Canada-United States Free Trade Agreement

The preceding sections have traced important stages in the gradual transformation of “culture industry”, as a primarily philosophical concept,\(^{221}\) to the one of “cultural industries”, extending its relevance to the fields of sociology, political economy, and economics. In accordance with the expansive use of the concept, it was only a matter of time until the concept would appear in the legal sphere. Although, generally, the path of ideas knows hardly any limits in terms of geography or time, the time span from the year 1947, when the concept “culture industry” was first coined by Horkheimer and Adorno, until 1988, when the concept “cultural industries” was received in the sphere of international trade law through the adoption of the CUSFTA, still allows for some speculation about the continuance of a golden thread.

At a first look, the initial reception of the concept “cultural industry” in the CUSFTA can be described as “accidental”, which means that was in no direct correlation with the work of the Frankfurt School. The main reason for the recourse to the concept was rooted in a pragmatic desire during the negotiations to correctly define and embrace a certain category of cultural goods and services within the framework of international trade, which, on behalf of the Canadian side, was considered to be vital in the preservation of its cultural identity. This desire can be traced back to the Canadian domestic policies dominant during that decade and especially the constitutional and legal context. For example, the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution Act of 1982, states in section 27 that: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”.\(^{222}\) The multicultural heritage of Canadians is also mentioned, and further elaborated on, in the *Canadian Multiculturalism Act*, which was adopted in July 1988, i.e. the same year the CUSFTA was signed.\(^{223}\) Notwithstanding the fact that the Multiculturalism Act does not mention the cultural industries, it nevertheless makes clear that they play an important role in the Act’s telos. For instance, in section 3, the Act declares *inter alia* to be the policy of the Government of Canada to:

\( (a) \) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;

\( (b) \) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada’s future;

\( (c) \) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation; \((d)-(j)\).\(^{224}\)


\(^{223}\) See *Canadian Multiculturalism Act*, R.S., 1985, c. 24 (4th Supp.).

\(^{224}\) Ibid.
In sum, these domestic legal developments reflect Canada’s longstanding tradition in, and particular sensitivity for, cultural pluralism and multiculturalism. This tradition is inextricably linked to prominent scholars who are preserving and further developing the conceptual and philosophical framework of multiculturalism. One such prominent scholar is Charles Taylor who is not only familiar with the works of the Frankfurt School but is also named a friend by the School’s ‘child prodigy’ Jürgen Habermas. Other personal contacts must also have played a role in another context linking the Frankfurt School directly or indirectly to the policy developments around the CUSFTA. Such link is provided by several contacts between Max Horkheimer in person and the staff or experts working for UNESCO. It is recorded that Max Horkheimer gave a speech on “The Lessons of Fascism” at an academic conference on “Tensions that Cause Wars/Tensions affecting international understanding” organised by UNESCO in Paris and planned to have a UNESCO Institute of Sociology established in the same building as the Institute of Social Research, which reopened in Germany on November 14, 1951. UNESCO’s activity in the field of the cultural industries also provides for a closer geographic and temporal overlap with important Canadian policy developments around the Canadian Charter. In 1980, a meeting of specialists in the social sciences and culture was held in Montreal, which was organised in collaboration with the Canadian National Commission for UNESCO of which the various contributions were published by UNESCO in 1982 under the title Cultural industries: A challenge for the future of culture. In addition to great variety of perspectives on the cultural industries, this publication also contains a single contribution dealing explicitly with the philosophical background of the concept of cultural industries. In sum, the specific meeting on cultural industries must be considered part of a long-lasting broader activity of UNESCO in the field of international communications and media policy with a view of the establishment of a New International Information Order (NIIO). Last but not least, UNESCO’s involvement in the cultural industries, as visible in personal contacts with Max Horkheimer, also corresponds to the spirit of its predecessor, the International Committee for Intellectual Cooperation (ICIC).

For these reasons, before turning to the background of the CUSFTA, it is useful to review the role of UNESCO as the “missing link” between the philosophical origin of an idea and its wider dissemination within international policy circles until its final reception in the sphere of international trade law.
§§ 3.4.2. The Role of UNESCO in the Dissemination of the Cultural Industries

3.4.2.1. An Overview

UNESCO’s role in the dissemination of the concept of cultural industries derives, first and foremost, from the heritage of its predecessor, the International Committee for Intellectual Cooperation (ICIC), which was created in 1922 by the League of Nations and four years later transformed into the International Institute of Intellectual Cooperation (IICI).\(^{233}\) The IICI was created to confront the challenges that occurred with relation to the new mass media, especially films and broadcasting. In accordance with this mandate, the IICI was involved in the drafting of two relevant conventions. The first convention is the 1933 *Convention for Facilitating the International Circulation of Films of an Educational Character*\(^{234}\). It was designed to contribute to international peace and security through the exemption of all customs duties and accessory charges for films which, based on didactic methods, have eminently international educational aims in order to encourage moral disarmament and to ensure physical, intellectual and moral progress.\(^{235}\) The second convention is the 1936 *International Convention Concerning the Use of Broadcasting in the Cause of Peace*, which established a set of common rules, designed, on the one hand, to prevent broadcasting from being used in a manner prejudicial to good international understanding, and, on the other, to utilise the possibilities offered by this medium of intercommunication for a better mutual understanding between peoples.\(^{236}\)

In many respects, the IICI has thus influenced and paved the way for later activities of the international community undertaken within the framework of UNESCO. UNESCO was created in 1945 and became operational in the year 1946.\(^{237}\) Generally, the constitutional mandate of UNESCO, enshrined in Article I par. (1), calls on the organisation to:

> contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.\(^{238}\)

Subsequently, paragraph 2 further stipulates that for the realisation of this purpose UNESCO will

> inter alia:

(a) Collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image; […]

(c) Maintain, increase and diffuse knowledge: […]

By encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;

\(^{233}\) See generally H. Bonnet, “L’œuvre de l’institut international de coopération intellectuelle” (1937) 61 Rec. des Cours 457.

\(^{234}\) *Convention for Facilitating the International Circulation of Films of an Educational Character*, signed at Geneva, October 11, 1933, 1 L.N.T.S. 333 (entry into force: January 15, 1935) [hereinafter *Film Convention (1933)*].

\(^{235}\) Preamble and Art. 1; *ibid*.

\(^{236}\) *International Convention concerning the Use of Broadcasting in the Cause of Peace*, signed in Geneva, September 23, 1936, 186 L.N.T.S. 301 (entry into force: April 2, 1938) [hereinafter *Broadcasting Convention (1936)*].


\(^{238}\) Article 1 para. 1; *ibid*; see also R. Papini & G. Cortese, “A propos de cinquante années de coopération intellectuelle internationale” (1974) 1 R.D.I. 116.
By initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.239

Based on this mandate, UNESCO has produced from its inception to the adoption of the concept of cultural industries in the CUSFTA and further on until the present day numerous legally binding and non-binding documents, directly and indirectly, related to the cultural industries.

3.4.2.2. UNESCO Documents Related to the Cultural Industries

An early expression of UNESCO’s efforts related to the “free flow of ideas by word and image” in connection with the various cultural goods and services comprised under the concept of the cultural industries, UNESCO prepared a list of conventions. The first significant project was the preparation of the text of an agreement taking into account new developments in the media sector. The agreement’s principal objective consisted of the removal of increasing economic obstacles to the free flow of ideas.240 The outcome was the 1948 UNESCO Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (‘Beirut Agreement’).241 The agreement covered materials in use at the time of drafting and its non-exhaustive list includes materials such as films, filmstrips and microfilms, sound recordings and glass slides, models, wall charts, maps and posters.242 From the background of a world-wide increased demand of new techniques of teaching in the form of auditory and visual materials whose exchange was still restricted through continuing economic restrictions on their international circulation, the agreement purports to provide relief through an exemption from all customs duties and quantitative restrictions, a waiver of import licenses, an exemption from all internal fees or other charges and treatment no less favourable than that accorded to like products of the importing country, in respect of all internal laws, regulations or requirements affecting its sale, transportation or distribution.243 To benefit from the exemptions under the agreement the materials considered for import must be previously certified in the exporting country.244

Until the Convention entered into force in 1954, the continuing rapid technological process and societal evolution had continued and with it new economic obstacles to the free circulation of ideas were put in place. These developments underpinned the drafters’ intent to extend the field of the scope of application of the former agreement. The intent was transformed into deeds with a new draft prepared by the UNESCO Secretariat, which was also submitted to a meeting of the contracting parties to the General Agreement of Tariffs and Trade (GATT) where it was revised.245 After a series of meetings, the text was submitted to the General Conference, held in Florence in July 1950, where it was unanimously adopted as the 1950 Agreement on the Importation of Educational, Scientific

239 Article 1 para. 2 lit. a) & c) UNESCO Constitution, supra note 237.
242 Art. II Beirut Agreement, ibid.
243 Art. III Beirut Agreement, ibid.
244 Art. IV Beirut Agreement, ibid.
and Cultural Materials ("Florence Agreement"). Having a purpose similar to the Beirut Agreement, its regulatory scope is extended to a great variety of goods belonging either to books, publications, documents, to works of art and collectors’ pieces of an educational, scientific or cultural character, to visual and auditory materials of an educational, scientific or cultural character, to scientific instruments or apparatus, and to articles for the blind. The Florence Agreement was again broadened in scope, by extending the benefits it offers to additional objects and by granting further benefits to a number of materials, through the 1976 Protocol to the Agreement on the Importation of Educational, Scientific and Cultural Materials.

Besides adding definitions to the categories listed in the Florence Agreement, the newly added categories comprise sports equipment, musical instruments and other musical equipment, and material and machines used for the production of books, publications and documents. As a third project, complementing the scope of UNESCO's activities in the field of facilitating the international circulation of goods and services belonging to the cultural industries, the 1958 Convention concerning the International Exchange of Publications must be mentioned. According to Article 1, the said convention encourages the “exchange of publications between both governmental bodies and non-governmental institutions of an educational, scientific and technical, or cultural nature, which are non-profit-making in character”.

Another series of conventions, which will be discussed below, addresses various intellectual property aspects related to technological innovations affecting certain cultural goods and services.

The enumerated conventions touching upon the cultural industries are further complemented by a set of UNESCO declarations, recommendations or resolutions. Among those, it is worth noting the 1966 Declaration of the Principles of International Cultural Co-operation, which among other principles sets forth the equality of, and respect for, all cultures. More specifically related to the field of the cultural industries is the 1972 Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange, which was controversial in terms of the balance it strikes between the free flow of information, on the one hand, and state


251 Ibid.


sovereignty, on the other.\textsuperscript{254} Article IX of the Declaration introduced the so-called “prior consent” principle in satellite broadcasting, which states that “it is necessary that States, taking into account the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission”. Less concerned with the technological implications of new means for the mass distribution of media but more with the content these carry is another important document, which may be regarded as a tribute to Horkheimer and Adorno’s studies on culture industry and on anti-Semitism. The document in question is the Declaration of Guiding Principles on the Use of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, apartheid and incitement to war, which emphasises the leading contribution of mass media may have in the strengthening of peace and international understanding, the promotion of human rights and the countering of racialism, apartheid and incitement to war based on a free flow and a wider and better balanced dissemination of information (Art. I).\textsuperscript{255} The Declaration equally highlights the great necessity for a “diversity of the sources and means of information”, or in other words, “media pluralism” (Art. II para. 2).

Another relevant branch of work done by UNESCO regards the statistical aspects of the various sectors comprised under the cultural industries. In a series of recommendations, UNESCO called on the contracting parties to standardise the statistics with regard to the production of books, newspapers and periodicals, as well as the statistics on radio and television.\textsuperscript{256} Work on the standardization of statistics in these sectors was conducted by the conviction on the desirability of the availability of internationally comparable statistics. The value of the existence of internationally comparable statistics must not be underestimated, not only in economics, as mentioned above,\textsuperscript{257} but also in light of trade talks aimed at lowering tariffs. Clearly, as long as negotiation partners do not talk about the same categories of goods or services, it is difficult to reach an agreement. Standardized statistics also assist the terminological development of the concept of cultural industries, which can be termed an “umbrella concept”, \textit{i.e.} uniting various more specific subcategories of cultural goods and services. UNESCO’s work in this field has since then gained even greater relevance, particularly in light of the increasing convergence between the various subcategories comprised in the concept “cultural industries”.

\textsuperscript{254} Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange, proclaimed on November 15, 1972, General Conference Seventeenth Session, 1972; for useful background information, see Breunig, supra note 231 at 72-77.


\textsuperscript{257} See also the problems mentioned in the context of economics, supra note 203.
Finally, to complete the survey of the role of UNESCO in the international dissemination of the concept of cultural industries prior to the adoption of CUSFTA, it remains to mention a few explicit references to the concept.

3.4.2.3. UNESCO Documents Explicitly Referring to the Cultural Industries

A first explicit reference to the cultural industries is found in the 1976 Recommendation on participation by the people at large in cultural life and their contribution to it, which is inter alia based on the consideration:

that culture is an integral part of social life and that a policy for culture must therefore be seen in the broad context of general State policy, and that culture is, in its very essence, a social phenomenon resulting from individuals joining and co-operating in creative activities.258

In this context, the Declaration defines “access to culture” as “the concrete opportunities available to everyone, in particular through the creation of the appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property”.259 Such definition reflects the economic aspects of the cultural industries and, particularly, the link between culture and trade in general. Furthermore, it anticipates many aspects of the present trade linkage debate, by highlighting the entwinement of free cultural participation with development, social, science and technology, and communication policies.260 Against this background, the said recommendation recommends under a separate subheading, entitled “Cultural Industries”, that:

Member States or the appropriate authorities should make sure that the criterion of profit-making does not exert a decisive influence on cultural activities, and, in drawing up cultural policies, provide for machinery for negotiating with private cultural industries, as well as for supplementary or alternative initiatives.261

In this reference to the cultural industries, the term is used in a merely categorical way, namely to refer to the cultural activities offered by the private sector as opposed to those by the state authorities. A different meaning, transcending and extending the public/private distinction, was given to the cultural industries four years later during 1980 General conference in a resolution preparing the Medium-Term Plan for 1984-1989, which set as a goal the exploration in greater depth of the relationship between the cultural heritage and cultural identity. Therein, under point 7, it reads:

National cultural industries should be regarded as one of the most important factors in endogenous cultural development. Cultural industries may represent a threat, but at the same time they represent a vast potential.262

In this context, the sociological legacy inherent in the cultural industries comes to the fore, not only alluding implicitly to their dual economic and cultural nature but also highlighting their ambiguous

259 Ibid. at 31.
260 Ibid. at 32.
261 Ibid. at 36.
potential for an inter-cultural dialogue, on the one hand, and for an incitement to hate and war, on the other.

In the same year the cultural industries were mentioned in another context, which has shifted the focus from the industry back to the central persons behind the industry. In the Recommendation concerning the Status of the Artist, UNESCO expressed concern for the status of artists in the changing cultural, technological, economic, social and political development of society.263 Under Subsection VI, the Recommendation addresses the employment as well as working and living conditions of the artist and invites Member States to take measures appropriate to compensate artists for possible damages arising from the “technical development of new communication and reproduction media, and of cultural industries”.264 The problems underlying the recommendation are obviously the changing working and living conditions of artists in the changed production and distribution methods in the sphere of cultural goods and services, as contained in warnings, particularly, by Walter Benjamin. As possible remedies, the recommendation invites States to look for and take appropriate measures that may compensate eventual losses of artists’ incomes, such as reinforced intellectual property rights protection, assistance for and dissemination of their works, and the provision of new employment opportunities.265

In 1982, following the expert meeting held in Montreal, various UNESCO activities undertaken under the title “Culture and the future” highlight the increasing interest in, and attention and significance attributed to, the cultural industries.266 Focal points of such activities for the period between 1984-89 in connection with the cultural industries were, for example, taken under the subprogramme title “Cultural identity and intercultural relations”, which aimed at:

promoting, at one and the same time, the creative affirmation of identities and the mutual enrichment of cultures […] by encouraging research into the impact of technological development-in particular the impact of the structures of the cultural industries-on cultural identities, including manifestations of culture specific to youth […].267

This was a general trend in the activities of UNESCO, which continued until the adoption of the CUSFTA.268 The decade from the late 1970s to the late 1980 can be considered crucial for the

264 Section VI (1) lit. b)-d); ibid. at 151.
265 Ibid.
266 See e.g. Consideration of the Draft Medium-Term Plan (1984-1989) (“to emphasize the importance of cultural industries”) at 12; Presentation by the Director-General of the Draft Medium-Term Plan for 1984-1989 (“The improvement of national or local production capabilities will lead to the establishment of national cultural industries and make it possible to increase the production of books, records, cassettes, films, etc. and hence of original national works”; “especially the influence of cultural industries which bring about substantial changes in the conditions governing creative work and the forms in which creativity expresses itself”) at 22 and 27; The Director-General’s Reply to the Discussion on the Draft Medium-Term Plan for 1984-1989 (“it might indeed be useful to consider possible modifications to be made at the subprogramme level so as to place greater emphasis on cultural industries in Major Programme XI”) at 58, reprinted in Decisions adopted by the Executive Board at its 115th session, Paris, September 8 to October 7, 1982, 115 EX/Decisions.
268 See e.g. Programme XI.4 “Cultural development and cultural policies” of the Major Programme XI “Culture in the future”, pt. 11.1. par 2 lit. d) (ii), 61 at 62, in UNESCO Records of the General Conference, 23rd
cultural industries within UNESCO and generally may be considered as having established the basis for present activities in this field, such as notably the 2000 Declaration on Cultural Diversity and the ongoing negotiations for a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions.269

§ 3.4.3. A Short Summary

Given the personal contacts of Max Horkheimer with UNESCO, the international resonance of the work of the Frankfurt School in general, and the works of Adorno, Benjamin and Horkheimer on the culture industry in particular, it is no surprise that the term has been used, and further elaborated on, by joint efforts of the scientific community and different policy networks. Especially UNESCO played a crucial role in the international dissemination of the concept, which ultimately led to its reception in the sphere of international trade law during the negotiations for the CUSFTA. As the terminological transformation from “culture industry” to “cultural industries” shows, the concept has lost some of its negative meaning that was attributed to it by its “coining fathers”. On the other hand, in the decades following its mention in the Dialectic of Enlightenment, it has also become enriched by several new aspects caused by the numerous innovations that affected the phenomenon that was originally described by it.

From the above, it becomes clear that the reception of the concept in the sphere of international trade cannot be considered “purely accidental”. However, it is not entirely clear to what extent the concept’s use in the CUSFTA must be considered related to the original use by Adorno and Horkheimer. Perhaps, this question must be addressed in a different way, namely that, first and foremost, the legal definitions of “cultural industry” and “cultural industries”, as found in the CUSFTA and NAFTA respectively, reflect a pragmatic and descriptive approach, which consists in the denomination of different activities or enterprises related to certain categories of goods and services. In trade law, thus, the cultural industries serve, first and foremost, the purpose of exempting a well-defined category of goods and services from the regime of free trade. The first impression may be that the legal use stands in contrast to most writings about the cultural industries in philosophy, sociology or economics, which focus on the consequences of the process of commodification of culture. This paradox, however, is only apparent and does not withstand a critical look at the concept’s meaning in, and implications for, a wider context. Even by legal standards, there was already a rich repertory of legal and scientific documents available prior to the use in the CUSFTA, which are substantial for hermeneutic endeavours investigating its precise meaning. At its best it withstands such look from a mere de lege lata but by no means a de lege ferenda approach. Considering a wider context, it is precisely, the possible threat of a commodification of

269 See UNESCO Universal Declaration on Cultural Diversity, supra note 106 and UNESCO, Report of Commission IV, UNESCO General Conference, 32nd session, Paris 2003, 32 C/74 (October 16, 2003) at 13-26 and 27 [hereinafter Report of Commission IV], writing that the General Conference “Decides that the question of cultural diversity as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention”.

Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU
European University Institute
DOI: 10.2870/50465
culture that provides the motivation for those advocating a legal exemption for the covered industries from free trade. Therefore, the true commonality in the two approaches consists in the combined search for new ways to organise not only the functioning of global trade but of the global community as a whole. In this context, the concept is attractive for many disciplines because of the oxymoronic tension between the words “cultural” and “industries” that is capable of paving the way for a fruitful debate on the future. The basis for such global debate was provided by the negotiations for the CUSFTA, to which we will now turn.
PART II

NAFTA AND THE EVOLUTION OF THE CULTURAL INDUSTRIES’ EXEMPTION

The North American Free Trade Agreement, which has in part superseded the Canada-United States Free Trade Agreement, was the first international trade agreement to explicitly mention the concept of the cultural industries. In this Part II, its definition will be analysed in the context of the negotiation history and its significance for the following dispute before the WTO in the Canada Periodicals Case critically evaluated. In subsequent parts, the concept of the cultural industries forms the basis for an analysis of the various problems with regard to the culture and trade quandary in international trade law.

Chapter 4 THE SETTING OF AN IMPORTANT LEGAL PRECEDENT

§ 4.1. NAFTA’s Exemption of the Cultural Industries: A Negotiation History

§§ 4.1.1. The Codification of the “Cultural Industries”

The final stage of the evolution of the concept of the cultural industries and, at the same time, the initial stage of the concept underlying the present thesis is its express transformation into a legal concept. This historical moment dates back to January 2, 1988, the day the bilateral free trade agreement between the Government of Canada and the Government of the United States, the so-called “Canada-United States Free Trade Agreement” (‘CUSFTA’), was signed.270 The explicit legal reference to the concept can be considered the culmination of almost a century of philosophical, sociological, anthropological and economic debate and discussion about various phenomena encompassed by the concept of the cultural industries.

In general terms, it also highlights the universal role that law ultimately performs in the governance of a society’s diverse constituent elements. More precisely, it can be said to have set a further precedent in the relation between culture and international trade launched by the GATT 1947 and the Havana Charter respectively. The original negotiators of the GATT 1947 were well aware of the privileged role culture or cultural issues play in any country’s national context. Both Article XX (f) relating to the protection of national treasures and Article IV GATT relating to cinematograph films reflect this awareness. Particularly the latter was designed to render due consideration to the specific power that was seen to dwell within films, the then most important medium of communication for nations’ political and economic concerns. While other provisions of the original GATT have been carried further and developed into sometimes separate agreements under the WTO Agreement, Art. IV GATT was not modified at all.271 Only in the 1960s, based on a United States initiative, a working group was set up to investigate in the possible relation between Art. IV and domestic


271 See the agreements listed in Annex 1A of the WTO Agreement, such as e.g. the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; WTO Agreement, supra note 42.
television quota but no final agreement was reached.272 During the 1979 Tokyo Round attention was paid to the problem of piracy.273 Therefore, the CUSFTA, which was negotiated partly in parallel to the Uruguay Round and became later incorporated in the NAFTA, can be regarded as a further milestone in the continuous debate about the treatment of culture within the international trading regime.

Another important point is the fact that the notion of cultural industries was used instead of a sectoral approach. This choice can be regarded as paying tribute to the evolution of the technology underlying the various sectors and is equally relevant in the historical interpretation of Article IV GATT as in any future approach.

The significance of the CUSFTA goes even further than that. It is also a bilateral agreement that establishes a free trade area between the two parties, through the elimination of barriers to trade and services, the facilitation of conditions for fair competition, the liberalisation of investment, the establishment of effective procedures for the agreement’s joint administration, and the prospect of a further expansion of the agreement.274 Moreover, the agreement includes, South of the border, the United States, the world’s largest exporter of cultural goods and services. North of the border instead, Canada, as the second participant, is the country that has not only invented the term “multiculturalism” but has also made it an official policy and implemented it in form of a statute.275 The internal legal constraints in Canada must be considered as having borne an influence on the Canadian approach in the negotiation of a free trade agreement since the potential increase in imports of cultural goods and services may affect negatively the sensitive domestic multicultural ‘mosaic’ of Canadian society and hereby impede the attainment of the goals set forth in the Canadian Charter of freedoms and rights as well as the Multiculturalism Act.276 In short, national preferences in international trade negotiations are often determined by the domestic legal, socio-economic and cultural preferences of a country.

For these and many more reasons, the agreement was also highly representative of the arguments, problems, and concerns that were raised in the framework of the subsequent multilateral trade negotiations. Canada’s position found support in countries such as Australia, India, Egypt, Brazil, and the European Union.

As a last point, I would like to repeat the importance of the availability of an authentic legal definition of the concept in view of the enormous difficulties as regards the supply of internationally

273 See K. Acheson & Ch. Maule, International Agreements and the Cultural Industries (Ottawa: Centre for Trade Policy and Law, 1996) at 3 [hereinafter International Agreements and the Cultural Industries].
274 Article 102 (“Objectives”) CUSFTA.
275 See J. Raz, “Multiculturalism”(1998) 11 Ratio Juris 193 at 197, writing that “the term [multiculturalism] was used first in, and applied to, Canada” and defines it as “among other things – the coexistence within the same political society of a number of sizeable cultural groups wishing and in principle able to maintain their distinct identity”; see also Canadian Multiculturalism Act, R.S., 1985, c. 24 (4th Supp.), which states inter alia that
3. (1) It is hereby declared to be the policy of the Government of Canada to
   (a) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;
   (b) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada’s future [...].
276 See supra notes 222 and 223.
commensurable data.\textsuperscript{277} An authentic legal definition of the cultural industries is most likely to lead to greater international conformity in their statistical classification. Greater conformity is of great significance notably in light of trade negotiation rounds, where the availability of internationally commensurable statistical data paves the way for smooth and constructive negotiations and their successful conclusion.

\textsection{} 4.1.2. A Short Negotiation History

Canada and the United States are both linked and separated by the world’s longest borderline. Hardly as long as their border is the history of their bilateral trading relation, from the 1854 Reciprocity Treaty via several bilateral treaties such as the 1965 Auto Pact (providing for the duty free trade in products in and related to the car sector) to the initiation of formal bilateral talks for a Canada-United States Free Trade Agreement in 1986.\textsuperscript{278} The initiative for the negotiation of a free trade agreement came from the Canadian side.\textsuperscript{279} The Canadian’s major concern was an increasingly protectionist attitude in the United States, its largest export market. The protectionism on the American side reflected growing concerns over the exploding trade deficit with Canada, stemming from decreasing exports to and increasing imports from Canada.\textsuperscript{280} Based on the great proportional volume of Canadian exports destined for the US of approximately 75\%, the dependence for such an agreement on lowering tariffs and barriers to trade was greater on the Canadian side.\textsuperscript{281}

After the announcement by President Ronald Reagan and Prime Minister Brian Mulroney in 1985 to co-operate in the elaboration of a free trade agreement, Canadian public opinion was alarmed. Fears about the loss of Canadian cultural cohesion and sovereignty due to the ongoing “Americanisation” of Canadian lifestyle and accelerated through freer trade were expressed. Already cultural products with provenance from the US flooded the market. Statistics show the following situation before the negotiation:

- over 70 percent of television viewed by Anglo-Canadians is from outside Canada, primarily the United States.
- Seventy-five percent of the books purchased by Canadians are published elsewhere, mostly in the United States. A slightly larger percent of all periodicals bought by Canadians from newsstands come from outside Canada, again mostly from the United States. The sound-recording industry in Canada is dominated by eight large, foreign-owned, vertically integrated multinational corporations, five of which are American. Canadian movie theaters show Canadian films less than 4 percent of the time, and most of the films shown are American.\textsuperscript{282}

On the other side of the border, the negotiations aroused less public controversy. However, the US critically observed various Canadian policies designed to oppose American influence. The policies consisted in practices that focused less on the restriction of the inflow of US cultural products or

\textsuperscript{277} On the international commensurability of statistics related to the cultural industries, see the relevant Recommendations by UNESCO, supra note 256.
\textsuperscript{278} For a short overview of the US and Canada’s bilateral trade history, see M.J. Trebilcock & R. Howse, The Regulation of International Trade (London: Routledge, 1995) at 39 et seq. [hereinafter The Regulation of International Trade].
\textsuperscript{280} See Baker Fox, ibid. at 2.
\textsuperscript{281} See ibid. at 2; see also The Regulation of International Trade, supra note 278 at 39 et seq.
\textsuperscript{282} See Baker Fox, supra note 279 at 2.
services, but more on the guarantee for the existence of a viable Canadian market and offer.\textsuperscript{283} Hence, the measures used are less tariff but rather non-tariff measures like government subsidies, government regulation on television and radio, ownership control, tax advantages, Canadian content rules and alike.\textsuperscript{284} The US, instead, subsidised the performing and visual arts and restricts ownership of television and radio stations to American citizens. Another concern expressed by the US related to a disparity in the legislation in force aimed at protecting intellectual property rights, notably as far as the Canadian rebroadcast of signals transmitted via a US satellite was concerned. From an American point of view, the Canadian practice was considered as “piracy” because of the loss of royalties for the US copyright holders. Other hindrances in the US view were found in Canadian policies relating to the publishing sector: One such measure was a Canadian policy, known as the \textit{Baie Comeau’s} policy, according to which indirect acquisitions by foreign owners of publishing firms are required to be divested to a Canadian purchaser or one approved by the government, or the government provides compensation at a fair market price; another was the requirement for magazines to be typeset and printed in Canada in order to be eligible for tax deductions for advertising revenues.\textsuperscript{285}

The cultural industries were not the only stumbling blocks on the way to the successful conclusion of the agreement. Internal political hindrances, such as the eventual expiry of fast track authority for the US President, or the said Canadian public concern for the sale of its cultural sovereignty meddling with divergent interests and interpretations on the external side. Energy, agriculture, the automotive sector, timber, beer and sugar were issues that were part of specific concern for either side.\textsuperscript{286} In the end, the common interests in this “unique and enduring friendship” (Preamble), prevailed and solutions to each of the problems were found. A particular solution was found for the sector of the cultural goods and services by way of Article 2005 CUSFTA. Entitled “Cultural Industries”, Article 2005 stipulates:

\textbf{Article 2005: Cultural Industries}

1. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.

2. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

Hence, by way of exempting the cultural industries, this last obstacle in the negotiations was removed and the agreement was finally signed and, subsequently, entered into force on January 1, 1989.

The exemption of the cultural industry in the CUSFTA, however, did not appease criticism. While for some the exemption of the cultural industry in CUSFTA did not really matter because of the already strong presence of American cultural products and services on the Canadian market, others

\textsuperscript{283} Ibid. at 3.
\textsuperscript{284} See e.g. K. Acheson & Ch. Maule, \textit{The Culture of Protection and the Protection of Culture – A Canadian Perspective in 1998} (Ottawa: Carlton Industrial Organization Research Unit, 1998) at 1.
\textsuperscript{285} See \textit{International Agreements and the Cultural Industries}, supra note 273 at 5.
\textsuperscript{286} See Baker Fox, \textit{supra} note 279 at 15-16.
feared the accelerated erosion of Canadian culture. On the American side, the exemption led to concerns about the possible loss of the existing US dominance in the Canadian market. Most of all, they did not share the Canadian approach to the cultural industry which sees them as a part of culture but instead characterise them as a business like any other.

Only one year later, the issue of the cultural industry arose anew under the negotiation for a North American free trade agreement including Canada, the US and Mexico. New and old polemic arguments showed once more the cleavage that existed over the issue of culture. Moreover, the negotiations for NAFTA coincided with the ongoing Uruguay Round negotiations where following the adoption of the European “Television without Frontiers” Directive the audiovisual sector developed into a thorny issue. In contradiction to the context of the GATT, where the later conclusion of the Uruguay Round did not achieve any respectable results in the audiovisual or other sectors related to the cultural industries, NAFTA found a solution. As a compromise between the North American partners, the cultural industry’s exemption from CUSFTA was changed into “cultural industries” and carried over to NAFTA by way of incorporation but designed to unfold its effect only between Canada and the US as well as Canada and Mexico but not between Mexico and the US. Unlike Canada, Mexico saw itself sufficiently protected against the inflow of products from the American “entertainment industries” through language and in turn rather saw a possibility to export its Spanish language products to the growing Spanish market in the US. Finally, the text of NAFTA was signed on December 8-17, 1992 in the three capitals, and entered into force on January 1, 1994.

§§ 4.1.3. The Definition of “Cultural Industry”

By way of Article 2005 CUSFTA and Article 2106 NAFTA, both agreements contain an exemption for the various cultural goods and services summed up under the term “cultural industry” and “cultural industries” respectively. In order to determine the exact scope of the exemption, Articles 2012 CUSFTA and 2107 NAFTA give a definition of the term. The definition of the culture industry, as it was adopted in the CUSFTA was slightly changed and extended when it was carried over to the NAFTA. Instead of “cultural industry”, the relevant article in NAFTA uses the plural term “cultural industries”. Moreover, the scope of the cultural industries exempted was extended

[288] Ibid. at 140.
[289] For the history of the conclusion of NAFTA, see e.g. de Mestral, supra note 97 at 252 et seq.
[294] For the definition contained in CUSFTA, see supra note 82; for a comparison of the two articles, see I. Bernier & A. Malépart, “Les dispositions de l’accord de libre-échange nord-américain relatives à la propriété intellectuelle et la clause d’exemption culturelle” (1994) 6 C.P.I. 139 mainly at 144-155.
from “any enterprise” to “persons”, i.e. covering individuals and companies alike. As a result, the final version currently applied, is contained in Article 2107 NAFTA, which reads as follows:

[cultural industries means persons engaged in any of the following activities:

(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
(b) the production, distribution, sale or exhibition of film or video recordings;
(c) the production, distribution, sale or exhibition of audio or video music recordings;
(d) the publication, distribution or sale of music in print or machine readable form; or
(e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

The list thus comprises of the most important industries producing goods and services with broad cultural and economic implications, i.e. the book and print media industry, across the film, video, and music industry plus all forms of broadcasting undertakings. The special drafting style, namely the single enumeration of the various sectors which together make the notion “cultural industries” is important to note. This definition, however, makes no reference to activities of what is usually referred to as “high arts”, including works of arts such as paintings, or sculptures, or other related fields such as tourism or architectural services. For the so-called “national treasures of artistic, historic or archaeological value”, the general exception of the GATT (Art. XX f.) was incorporated into NAFTA by way of reference.

§§ 4.1.4. The Significance of the Exemption

The value of Article 2107 for merely definitional purposes is beyond doubt. There exists considerably more doubt about the overall utility of the said exemption for Canada’s long tradition of practices and policies aimed at protecting, ensuring or developing a vibrant Canadian offer of goods and services pertaining to the cultural industries. To shed some light on the arguments it is helpful to have a closer look at the context and scope of Article 2106 NAFTA.

The first problem that appears is the confusion that derives from the fact that NAFTA incorporates the relevant provisions of CUSFTA by virtue of Article 2106 and Annex 2106. This means that the provisions relating to the cultural industries in CUSFTA continue to be valid between Canada and the US. For Mexico the provisions only apply in relation with Canada but not the US where the NAFTA provisions apply. Paradoxically, this means that Mexico has to apply provisions of an agreement it has not been a party to. This incorporation has as a second result that – to the detriment of transparency – the Canadian policies applicable to the cultural industries, which were in place before the negotiation of the CUSFTA, are equally grandfathered under NAFTA.

The application of the CUSFTA provisions in NAFTA also includes the specific exceptions to the basic exemption of the cultural industries from the terms of the agreement. Article 2005 CUSFTA lists the following exceptions to the exemption: (1) The exemption does not relate to tariffs so that

295 Compare the introduction of Article 2012 CUSFTA with Article 2107 NAFTA.
296 Article 2101 NAFTA.
298 Ibid. at 474.
the elimination of tariffs also applies to products relating to the cultural industries (Art. 401); (2) the exemption does not cover the obligation of the Canadian Government to purchase a business from a US investor at a fair and open market value in circumstances in which Canada requires the divestiture of a business enterprise in a cultural industry (Art. 1607 par. 4); (3) the requirement of the protection of copyright holders of television programming in respect of retransmission rights is equally not exempted (Art. 2006); (4) finally, the Canadian requirement for magazines and newspapers to be printed and typeset in order to be eligible for certain tax benefits (Income Tax Act) must be eliminated (Art. 2007).²⁹⁹

Another problem is found in the divergent interpretations of the CUSFTA exemption of cultural industries by the two parties. The discord applies mainly to the right for each country to respond to the introduction of new measures affecting trade to the cultural industries as laid down in article 2005 paragraph 2 CUSFTA (“Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph 1”). According to the Canadian reading of the relevant articles, the US right to retaliate is limited to measures inconsistent with the FTA and not NAFTA and restricted to the sector of the cultural industries.³⁰⁰ The United States, on the other hand, sees its right to retaliate unlimited by sectors. In the end, there remains considerable room for uncertainty in the procedure, functioning and scope of the exemption with an outreach into the far future.³⁰¹

In addition to the partial opacity coming from the partial overlap of CUSFTA and NAFTA, there exists considerable overlap between each of the two in relation to the multilateral framework under the GATT and since 1995 under the WTO. The temporal overlap in the negotiations of CUSFTA and NAFTA respectively with those leading to the WTO during the Uruguay Round and their semantic proximity did not only have positive effects but also left considerable interpretative problems with regard to the agreements’ provisions’ scope and their mutual relation.³⁰² For instance, such interpretative problems entail questions about the prevalence of provisions within each single agreement (e.g. between goods and services) as well as between the said agreements (e.g. which agreement prevails and which dispute settlement system can be invoked).³⁰³ These particular problems point to a serious risk in the governance of global affairs, which consists in the possibility of increasing inconsistencies between two or more trade agreements as well as between trade and non-trade (or at least trade-related) agreements.³⁰⁴

Another aspect of the significance of the cultural industries exemption of NAFTA is found in its potential impact on, or persuasive authority for, other trade agreements. In the past, Canada has

²⁹⁹ See also Johnson & Schachter, supra note 287 at 141 and The North American Free Trade Agreement, supra note 297 at 470-472.
³⁰⁰ See International Agreements and the Cultural Industries, supra note 273 at 7-9 and Johnson & Schachter, supra note 287 at 145-147.
³⁰¹ See e.g. the quote from B. Appleton, Navigating NAFTA: A concise user’s guide to the North American Free Trade Agreement (Scarborough: Carswell, 1994) at 191, reproduced in International Agreements and the Cultural Industries, supra note 273 at 9, see generally, D. Browne, The Culture/Trade Quandary: Canada’s Policy Options (Ottawa: Centre for Trade Policy and Law; 1998).
³⁰³ Cf. Articles 103, 1112 and 2005 NAFTA.
³⁰⁴ See generally infra Subsection §§ 5.2.4.
made it a consistent practice in the negotiation of bilateral free trade agreements to include the cultural industries’ provision.\footnote{For example, the Canada-Costa Rica Free Trade Agreement (CCRFTA), the Canada-Chile Free Trade Agreement (CCFTA), Canada-Israel Free Trade Agreement (CIFTA); available online at: \url{http://www.dfait-maeci.gc.ca/tna-nac/reg-en.asp} (last modified: January 31, 2005).} The overall impact of the use of the exemption as a model for the negotiation of bilateral and regional agreements will have to be evaluated at the moment of the conclusion of future negotiations, such as the ongoing negotiations for a Canada-Singapore Free Trade Agreement, or for a Free Trade Area of the Americas (FTAA).\footnote{For an update on the negotiations, see e.g. the Homepage of the Canadian Department of Foreign Affairs and International Trade (DFAIT), online: \url{http://www.dfait-maeci.gc.ca/tna-nac/singapore-en.asp} (last modified: January 31, 2005).} For the WTO, the new negotiation round launched in Doha (Qatar) in November 2001, the Canadian thrust in the realm of culture, as first expressed internationally in a 1999 report by the Cultural Industries Sectoral Advisory Group on International Trade (“SAGIT Report”) and the ongoing efforts towards the adoption of an \textit{Constitution on the Protection of the Diversity of Cultural Contents and Artistic Expressions}, are among the first such signs.\footnote{See the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), \textit{Canadian Culture in a Global World: New Strategies for Culture and Trade}, online: Homepage of the Department of Foreign Affairs and International Trade \url{http://dfait-maeci.gc.ca/tna-nac/canculture-e.asp} (date accessed: May 11, 2001) [hereinafter \textit{Canadian Culture in a Global World}] and the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT), \textit{An International Agreement on Cultural Diversity – A Model for Discussion} September 2002; online: Homepage of the Department of Foreign Affairs and International Trade \url{http://www.dfait-maeci.gc.ca/tna-nac/SAGIT_eg.pdf} (date accessed: October 24, 2002) [hereinafter \textit{An International Agreement on Cultural Diversity}] and the Report of Commission IV, supra note 269.}

To summarise, the overall significance of the cultural industries exemption, first and foremost in terms of legal certainty in the framework of US-Canada trade relations and furthermore in the global debate about the relation between culture and trade within the context of the multilateral regulation of trade relations, can be described best by reference to the presently most important case in the context of the cultural industries, the so-called \textit{Canada – Periodicals Case}.\footnote{See especially Subsection §§ 9.1.3.} Although the case arose in a bilateral context between Canada and the US, it was finally decided under the aegis of the WTO dispute settlement system. For this reason, a detailed discussion of the merits of the case will be presented in Chapter 9 (“The \textit{Canada Periodical Case. A Case Study}”) following the analysis of the law of the World Trade Organisation. Therefore, it suffices to anticipate this discussion here by observing that in the course of the proceedings before the WTO dispute settlement system, several Canadian policy measure in the field of the periodical industry were held to be in violation of Canada’s obligations under international trade law. Consequently, the \textit{Canada – Periodicals Case} not only carried great importance as a test case for the significance of the cultural industries exemption.
under NAFTA but also as an important legal precedent for the global culture and trade debate under the aegis of the World Trade Organization, which will be discussed in the following Part III.
PART III

THE CULTURAL INDUSTRIES IN THE LAW OF THE WORLD TRADE ORGANIZATION

Part III outlines the legal framework regulating international trade under the auspices of the World Trade Organization (WTO) from the perspective of its relevance for the cultural industries. Following a short historical introduction, the analysis proceeds to the relevant legal norms, especially focusing on the GATT, the GATS and the TRIPS, and explores different ways for possible changes to the WTO system as a whole that would allow it to be more apt to address recent technological challenges affecting both the patterns of trade and the perception of culture.

Chapter 5  THE EVOLVING TRADING REGIME FROM THE GATT TO THE WORLD TRADE ORGANIZATION

§ 5.1. General Introductory Remarks

§§ 5.1.1. An Overview of the Status Quo

For a closer legal analysis of the concept of the cultural industries in the present world trade and economic order, the World Trade Organization (WTO) holds a privileged position. Already the number of 125 countries participating in the Uruguay Round of Multilateral Trade Negotiations (1986-93) that led to the establishment of the WTO underlines its unique position as a provider of a global institutional framework for the conduct of trade relations among its Members. Additionally, since the entry into force of the WTO on January 1, 1995, the number of the 125 original signatories has risen to the 148 Members (as of January 1, 2005), among them the recent successful accession of China. With Russia (and other countries holding observer status) another important trading partner is awaiting accession. To the present day, nevertheless, numerous states – important not only in terms of their trade volume and geographical size, but also in terms of their political, social, and economic structure, as well as notably their conception of culture – remain outside the multilateral trading system established under the auspices of the WTO.

The great number of WTO Members, however, is not the only point of reference to culture. It was during the Uruguay Round that an animated debate, often articulated in harsh tones, about the treatment of cultural issues under the future free trade regime, was revived. The culture versus trade debate eventually continued, and only two year after the establishment of the WTO more fuel
was added to the flames, when on June 30, 1997, the WTO’s Appellate Body issued its final report on the Canada Periodicals Case.313 The findings in the report were immediately followed by a bulk of critical comments.314 It would also be interesting to know its precise impact on already existing resentments that led to the events that occurred during the Ministerial Conference in Seattle in 1999.315

The role that the WTO plays in the organisation of international trade is not itself the prime focus here. Nonetheless, the attempt to subsume cultural issues under the relevant trade provisions assembled under the WTO will require often recourse to systematic, logical and even supplementary means of interpretation. This need is due to the elasticity of the concept of culture, and even more so in case of the complex – even oxymoronic – character of the cultural industries. These hermeneutic circumstances require due reflections on the WTO’s broader role in the international economic order. Of equal importance, in the course of the subsumption of the cultural industries under the WTO legal framework, is the historical element. That is, because in the recent history the WTO was born out of eight negotiations rounds subsequent to the signing of the General Agreement on Tariffs and Trade (GATT) in 1947.316 During the last of the rounds, the Uruguay Round, cultural concerns expressed over the treatment of the audiovisual sector, next to agriculture and textiles, were a major stumbling block and, in the very last minute, not only derailed some of the negotiators’ language, but also almost the successful conclusion of the negotiations as a whole. In earlier history, the General Agreement on Tariffs and Trade (GATT), which preceded the WTO’s, was itself born out of a broader project laid down in the draft Havana Charter.317 Hence, the GATT was originally designed as a provisional agreement, signed only to bridge the time period prior to the entry into force of the Havana Charter. The Havana Charter was a comprehensive agreement, which foresaw the creation of the International Trade Organization (ITO) and a special dispute settlement procedure.318 The ITO, however, never came into existence due to the United States’ failure to ratify the text of the Havana Charter.319

Depending on the authority of the precedent, the eminent issue is to what extent the creation of the WTO is in line with the spirit guiding the creation of the post-war international order and the aspirations to establish a comprehensive constitution for international trade under the aegis of the

311 See Canada Periodicals Case (AB), supra note 65.
313 See e.g. Eberschlag, supra note 1258, Ch.R. Ezetah, “Canadian Periodicals: Canada – Certain Measures Concerning Periodicals” (1998) 9 E.J.LL. 182 (available online at: http://www.ejil.org/journal/Vol9/No1/ (last modified: October 14, 2003)), Matheny, supra note 1258, Scow, supra note 1258, and Tawfiq, supra note 272; see also supra Section § 9.1.
316 General Agreement on Tariffs and Trade, signed at Geneva on October 30, 1947, 55 U.N.T.S. 187 (Applied provisionally as from January 1, 1948 pursuant to the Protocol of Provisional Application) [GATT 1947].
318 Chapter VII, Articles 71-91 and Chapter VIII, Articles 92-97 Havana Charter.
ITO, from which finally the General Agreement on Tariffs and Trade (GATT) emerged. In other terms, the question – as Robert W. Cox put it – is whether there is continuity between the ITO and the WTO, or whether the two institutions must be seen as fundamentally different.320 Linked to that question are considerations about the, both institutional and substantial, role and scope of the WTO in the international legal order. The same considerations touch upon the problem of where to draw the line between so-called trade and non-trade related issues.321

As will be shown below, these questions are still of great importance, since many of the WTO provisions, among them those of direct relevance for the cultural industries, such as Article IV GATT on cinematograph films, owe their existence from the Havana Charter. Moreover, an outlook of the past aspirations underlying the ITO assists in enhancing the understanding of the precise legal character and hence the present and future role attributed to the WTO.


321 It is interesting to note that even a merely economic analysis of the role the GATT/WTO played in the creation of trade, concepts which are not directly related to trade, such as history, culture and geography, are evoked; see A.K. Rose, “Do We Really Know that the WTO Increases Trade?”, Centre for Economic Policy Research (CEPR) Discussion Paper Series No. 3538, September 2002, at 3 and 13, arguing that the GATT/WTO had no dramatic effect on the enhancement of trade; see also the comments in “Weighing up the WTO” The Economist (November 23, 2002) 72.
§ 5.2. From the Havana Charter to the World Trade Organization

§§ 5.2.1. The Early Period: From the Havana Charter to the GATT

The project for the creation of an international trade organisation itself built largely on previous experiences gained in the tradition of multilateral trade cooperation work. Important preparatory steps were undertaken in the framework of the League of Nations, or Société des Nations (1920-1946), which was established in Geneva by the Covenant on the League of Nations as a first supranational political organisation claiming universal aims. Article 24 of the Covenant laid down the League’s task to serve as an umbrella, under which a more orderly management of all world affairs, political, economic, financial and cultural, would develop. Under this umbrella, Article 23 listed various elements, which (might) have laid the foundations for an international economic order on a universalist treaty basis. As a part of this task the League also looked for ways to combine consideration of the, at that time, separate fields of trade and politics. The absence of a regulatory framework for trade was mentioned among the main causes that led to the Great War (1914-18). Even if the precise causal link between trade and politics could not be established, the view crystallised that the “world’s political organisations must keep pace with its economic organisations”.

Similar to the League of Nations’ failure to prevent and survive World War II (1939-45), the ITO never became a reality. Instead, on January 1, 1948, the GATT, which was negotiated in parallel to the Havana Charter as a provisional agreement for the time period until the completion of the ratification process of the former, was complemented with provisions on trade policy contained in Chapter IV of the Havana Charter, entered into force. In comparison with the regulatory scope of the Havana Charter, which was planned to be able to rely on the institutional support of the ITO, the GATT then appeared as a skeletal body focusing primarily on the mere reduction of tariffs. In the words of John H. Jackson, the failure of the ITO to crystallise, however, had severe repercussions on the GATT, with the result that:

A pragmatic and sometimes groping attitude towards constitutional and legal structures was thus forced upon GATT, which found itself without an adequate legal and constitutional base and required to fill a vacuum created by the failure of the ITO.

The reasons are that the ITO was not only confined to the exclusive free trade principle, but also bore elements of a more comprehensive approach taking into account both economic and social policy objectives. More precisely, the text of the Havana Charter not only contained classical provisions on commercial policy (Chapter IV), such as those concerning the reduction of tariffs and  

322 See World Trade and the Law of GATT, supra note 319 at 35 et seq.
326 See Northedge, supra note 324 at 19.
327 See e.g. L. Baudin, Free Trade and Peace (Paris: International Institute of Intellectual Co-operation, 1939) at 77-79.
329 See World Trade and the Law of GATT, supra note 319 at 51.
330 See Graz, supra note 320 at XV, XXII.
elimination of preferences or quantitative restrictions, but also listed further provisions having a wider outreach such as rules on employment and economic activity (e.g., avoidance of unemployment or underemployment, fair labour standards), economic development and reconstruction (e.g., productive use of the world’s human and material resources, promotion of agreements designed to facilitate an equitable distribution of skills, arts, technology, materials and equipment, with due regard to the needs of all Members), monetary questions (e.g., cooperation with IMF), and restrictive business practices (e.g., competition rules). Additionally, chapter VIII foresaw a procedure for the settlement of differences.

With the coupled institutional and substantial loss, the GATT found itself also in a legal vacuum in the newly established international framework under the United Nations Charter. In line with the spirit of the UN Charter, the ITO was planned to establish a relationship as a specialised agency of the UN in order to guarantee for:

- the effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations, and for co-operation in furthering the maintenance or restoration of international peace and security.  

Unlike the ITO, the GATT, however, did not fulfil the strict requirements laid down in Article 57 of the UN Charter, which are necessary to obtain the status of a specialised agency. Hereupon, the only direct reference to a coordination of trade policy found in the GATT relates to the jurisdiction of the IMF. Notwithstanding this institutional deficiency, it must be added that retrospectively the mere contractual character of the GATT from the time of its origin until the creation of the World Trade Organization can also be regarded as having borne some strengths. Notwithstanding this strength, it is noteworthy that, at present, such risk of “unnecessary duplication” in the activities of international organisations persists. It persists not only generally with regard to the activities of the WTO in relation to those of other international organizations but, more precisely, with regard to the WTO’s particular instruments (e.g., the GATS) in the relation to a possible international standard setting instrument on cultural diversity.

There are a few elements in the evolution from the GATT to the WTO that deserve mention due to their relevance for a de lege ferenda approach to the issue of the cultural industries and cultural diversity. The relevance is of that kind that it relates to possible lacunae in the regulation of trade in cultural goods and services which are due to deficiencies which are induced by historical developments. Thus, in order to avoid the possible negative effects of such path dependency and to increase the awareness of the elements that may have caused and may continue to cause friction in the treatment of the cultural industries, it is therefore deemed useful to shortly point out the historical evolution of the international trading regime from the GATT to the WTO.

331 Compare the articles 2, 3, 7, 8, 11, 24, 46 Havana Charter, supra note 317.
332 Charter of the United Nations, June 26, 1945, T.S. 993, (entry into force: October 24, 1945) [UN Charter].
333 Articles 86 and 87 Havana Charter, supra note 317.
334 See W. Meng on Article 57 UN Charter in B. Simma, ed., The Charter of the United Nations: A Commentary (Oxford: Oxford University Press, 1994) 796 at 798-9, writing that “Art. 57 requires an organization in the proper sense, i.e. more than an international treaty about substantive rights and duties with periodic conferences. This requires an independent body with organs of its own and with proper tasks conferred by a founding treaty under public international law”.
335 Article XV GATT (“Exchange Agreements”).
§§ 5.2.2. The Evolution of the GATT until the Creation of the World Trade Organization

A first important reference point in the history of the GATT is that it entered into force based merely on a provisional agreement and the will of its contracting parties.\(^{337}\) As a result, from the early years on, the institutional support came from the Secretariat borrowed from the Interim Commission for the ITO (ICITO), which was faded out only with the establishment of the WTO.\(^{338}\) In substantive terms, the changes that occurred during the years between 1948 and the final creation of the WTO in 1994, were introduced by way of eight subsequent trade rounds.\(^{339}\) These rounds focused first and foremost on the reduction of tariffs but later constantly added new areas of competence to the GATT. From the 1970s onwards, these areas were often included by way of conclusion of different specific agreements, known under the name of “codes”.\(^{340}\) The downside of such “codes”, however, was that it brought about a GATT \(à \text{la carte}\), meaning that only those countries that committed themselves to the codes were bound by them, which threatened to erode the MFN principle.\(^{341}\) In order to halt such erosion, the Contracting Parties reaffirmed “their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate”.\(^{342}\) No visible results came out of this expression of intent and instead further erosion took place through the fragmentation caused by a growing number of regional integration movements.\(^{343}\)

A first turning point in this tendency came with the launch of the Uruguay Round in Punta-del-Este, on September 20, 1986.\(^{344}\) Already the planned scope for the negotiations, as laid down in the WTO/GATT Ministerial Declaration on the Uruguay Round, left no doubts regarding the significance of the negotiations’ future impact on issues beyond the classical sphere of trade. For instance, already in the Preamble of the Declaration, the Contracting Parties emphasise their determination to “develop a more open, viable and durable multilateral trading system”.\(^{345}\) Important also for the relation between cultural and economic aspects inherent in the cultural industries, the Declaration also lists among its objectives the aim to “bring about further liberalisation and expansion of world trade to the benefit of all countries”, to enhance the “relationship of the GATT with the relevant international organisations” and to foster “concurrent co-operative action at the national and international levels to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development”. Last but not least, the outcome of the negotiations shall be treated as parts of a “single undertaking”, or “single package” (principe de globalité).

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\(^{337}\) Article XXIX GATT.
\(^{338}\) See generally Hudec, \textit{supra} note 336 at 68, Fn 1.
\(^{341}\) See “The Metarmophoses of the GATT”, \textit{supra} note 339 at 128 et seq.
\(^{343}\) See “The Metarmophoses of the GATT”, \textit{supra} note 339 at 131-3.
\(^{344}\) See \textit{supra} note 309.
\(^{345}\) The Preamble of the \textit{Ministerial Declaration on the Uruguay Round}, \textit{supra} note 309.

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At least in terms of the substantial questions pertaining to the trading regime within the GATT, the objectives and general principles laid down in the Declaration can be interpreted as a partial return to the spirit underlying the Havana Charter. During the seven years of negotiations, the most significant result that crystallised and which revived the spirit of the ITO/Havana Charter was the final creation of an international organisation for trade, named the “World Trade Organisation”.

The Agreement establishing the WTO created an institutional framework for the “conduct of trade relations among its members” and made all the agreements and associated legal instruments an integral part of its regulatory scope, i.e. a “single undertaking”. The single undertaking approach is backed by strong institutional support coming from the Ministerial Conference, the General Council, the Secretariat, and Councils for Trade in Goods, in Services and for Trade-Related Aspects of Intellectual Property Rights and Trade Policy Review Body, as well as a Dispute Settlement Body.

The rules governing the work of the Dispute Settlement Body are laid down in the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), which underlines the central role of the dispute settlement system in providing security and predictability to the multilateral trading system. To this end, the Members recognise that the dispute settlement system:

> serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law

The reference to public international law reflects perhaps the former desire of the drafters of the ITO to ensure greater coherence, i.e. the avoidance of unnecessary duplication of activities between the various existing international organisations. It may also be due to a feeling of the necessity for a regulatory framework that better takes into account the complex entwinement of global trade matters with other, so-called “trade-related”, areas, such as culture.

§§ 5.2.3. Parallels between the Institutional Setting of the ITO and the WTO

For the future of the trade linkage debate and, in particular, the cultural industries, it is of interest to compare shortly the past with the present institutional framework of international trade. To begin with the case of the ITO, the plan was to become a specialised agency under the auspices of the UN Charter providing expertise in the field of trade and economic policymaking together with the IMF and the World Bank (i.e. the International Bank for Reconstruction and Development (IBRD)).

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346 See, for example, Karl Polanyi’s “double movement”, explained by Robert W. Cox as “the initial movement towards dominance of the self-regulating market countered by a second movement arising within society to correct the socially disruptive effects of the market through government regulation”, and John Ruggie’s concept of “embedded liberalism” to show that “the United States eventually promoted an international order that entailed important restrictions to market mechanisms so as to preserve the necessary national autonomy to implement various policies related to the development of the welfare state”; see Graz, supra note 320 at XIII and XXVII-XVIII.

347 WTO Agreement, supra note 42.

348 Article II:1 and 2 WTO Agreement. Note that paragraph 3 stipulates that the Plurilateral Trade Agreements (Annex IV) are also part of the Agreement but are only binding for those Members that have accepted them.

349 Article IV and VI WTO Agreement.


351 Ibid.


353 The World Bank Group consists of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), International Finance Corporation (IFC), the Multilateral Investment

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such the ITO would have been embedded in a wide network of agencies and programmes specialised in a great variety of fields under the roof of the UN Charter, which is believed to hold a special legal position due to its “status as a constitution for the world community” derived from its structurally homogenous nature, comparable to that of constitutional law.354 This special position is further underscored by the prevalence of Member States’ obligations arising from the UN Charter over obligations under any other international agreement.355 Under the umbrella of the UN Charter, by means of its principal institutions, the ITO would have been directly linked with the expertise provided by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Labour Organization (ILO), the World Intellectual Property Organization (WIPO), United Nations Development Programme (UNDP), United Nations Conference on Trade and Development (UNCTAD),356 the United Nations Environment Programme (UNEP) and many more.357 It is interesting to note that this short selection of specialised agencies and programmes reflects precisely the agenda of the present “trade linkage debate”, characterised by many “trade and ...” problems, such as how to combine trade with related issues such as development, human rights, environment (and health), labour standards, security, migration and, last but not least, culture.358

The Havana Charter, however, remained just paper and ink in the archives. Instead the GATT, owing its existence to a provisional protocol, never obtained the status of a specialised agency.359 Therefore, the GATT retained its autonomy and remained, by and large, outside the UN Charter’s direct institutional reach.360 The WTO followed this tradition and saw no grounds for formal institutional links between the WTO and the United Nations, although it underscored the need for the establishment of cooperative ties between the two organisations.361 The same position was reiterated in the General Council’s decision to continue to apply the arrangements governing the

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355 Article 103 UN Charter.
356 Please note that special ties exist between the WTO and UNCTAD through the International Trade Centre (ITC); see the ITC Mission Statement, online: ITC Homepage http://www.intracen.org/, describing the ITC as “the focal point in the United Nations system for technical cooperation with developing countries in trade promotion. ITC was created by the General Agreement on Tariffs and Trade (GATT) in 1964 and since 1968 has been operated jointly by GATT (now by the World Trade Organization, or WTO) and the UN, the latter acting through the United Nations Conference on Trade and Development (UNCTAD). As an executing agency of the United Nations Development Programme (UNDP), ITC is directly responsible for implementing UNDP-financed projects in developing countries and economies in transition related to trade promotion”; see also Memorandum of Understanding between the World Trade Organization and the United Nations Conference on Trade and Development, signed in Geneva on April 16, 2003 [hereinafter Memorandum WTO/UNCTAD]; see also Memorandum of Understanding between the World Trade Organization and the United Nations Conference on Trade and Development, WTO Press/338 (April 16, 2003).
357 See the UN organisational Chart of which an interactive version is available online: United Nations Homepage http://www.un.org/aboutun/chart.html (date accessed: October 20, 2003).
358 See generally “Trade and ... Problems”, supra note 49; for specific surveys see e.g. Fijalkowski & Cameron, supra note 50; S. Bal, supra note 51; Balasubramanyam, supra note 52; Bhala, supra note 53; Alben, supra note 53; Faini & de Melo & Zimmermann, supra note 55; Schloemann & Ohlhoff, supra note 54, Footer & Graber, supra note 48, and Culture, Trade and Globalization, supra note 70.
359 See supra note 334.
360 But see Relations of the General Agreement on Tariffs and Trade with the United Nations, UNGA-Doc. A/AC. 179/5 of March 9, 1976.
361 Arrangement for Effective Cooperation with other Intergovernmental Organizations, Relations Between the WTO and the United Nations, Communication from the Director-General, WTO Doc. WT/GC/W/10 of November 3, 1995 [hereinafter Arrangement for Effective Cooperation].
conditions of service applicable to the staff of the WTO when it noted that the WTO is a “sui generis organization established outside the United Nations system.” Notwithstanding this autonomy vis-à-vis the UN system, the WTO emphasised the need for the WTO to contribute to the achievement of greater coherence in global economic policymaking. It goes without saying that coherence in global economic policymaking first and foremost means cooperation between the WTO and the Bretton Woods Institutions, the IMF and the World Bank. The goal of closer ties with the IMF and the World Bank, however, does not preclude the possibility of cooperation with other international organisations. It is rather the contrary, as already the Ministerial Declaration of Punta-del-Este points out among the negotiations principal aims to:

increase the responsiveness of the GATT system to the evolving international economic environment, through facilitating necessary structural adjustment, enhancing the relationship of the GATT with the relevant international organizations and taking account of changes in trade patterns and prospects, including the importance of trade in high technology products, serious difficulties in commodity markets and the importance of an improved trading environment providing, inter alia, for the ability of indebted countries to meet their financial obligations.

The Declaration on coherence points in the same direction and underscores the undeniable fact that successful cooperation in each area of economic policy contributes to progress in other areas. As a matter of fact, the same reasoning applies to policy issues outside the traditional sphere of trade and it is hard to reject the empirical argument that a lack of progress in an area other than mainly economic areas, such as questions of international security, are likely to have a negative impact on global economic performance and policymaking. In the future, following practical considerations, the exact meaning of a “relevant organisation” must therefore be accorded to the circumstances of changes in trade patterns and prospects. Thus in an increasingly complex and interdependent world economy, coupled with various international security issues, the need for coherence and consistency in international lawmaking and law-applying will gain further momentum. These questions concern inter alia issues such as the interpretation of WTO rules and their relation to public international law; the status of the UN Charter; and the scope of coherence within and beyond global economic policymaking, and ultimately, in other words, where to draw a line between trade and

362 Decision of the General Council on Conditions of Service applicable to the Staff of the WTO Secretariat of 7, 8 and 13 November 1996, WTO Doc. WT/L/197 of November 18, 1996 [emphasis in the original].
365 Ministerial Declaration on the Uruguay Round, supra note 309. Compare also the mandate for the Functioning of the GATT system (FOGS) Working Group; ibid.
366 See Paragraph 2, Declaration on Greater Coherence, supra note 363.
367 See e.g. A.F. Perez, “WTO and U.N. Law: Institutional Comity in National Security” (1998) 23 Yale J. Int’l L. 301, asking whether security is too important to be left to the politico-military community, or is economic welfare too important to be left to the business community.
non-trade, or trade-related, values. Ultimately, it is clear that the responsibility to address these questions is not solely with the WTO but instead with the entire international community.

§§ 5.2.4. The Way Forward: Coherence or Conflict?

5.2.4.1. The Point of Departure: The Doha Round

Coherence, understood as the avoidance of unnecessary duplication in the activities of international organisations, stood thus at the beginning of the GATT and also appears to remain a keyword for the WTO system’s functioning in the future. In positive terms, “coherence” may be understood as a form of enhanced international cooperation based on the promotion of complementarity and mutual supportiveness of policies. This was the central message contained in a Communication from the EC to the WTO in preparation for the 1999 Seattle Ministerial Conference, entitled the “Addressing the Challenges of Globalization: The Role of the WTO in Cooperation with Other International Organizations”. Canada has submitted a similar document, which restates that “there is growing recognition that coherence among a range of trade, financial, economic and social policies – good economic governance – is critical to the effectiveness of efforts to strengthen markets and to promote economic growth and development”. As the Canadian example shows, coherence is also mentioned either in the context of, or synonymously with, “governance”. For instance, Mortensen, writes that: “Contradictions and incoherence have come to dominate the relationship between different sites and levels of global economic governance”.

Seen from the angle of the unity of the international legal order threatened by a constant proliferation of international bodies, Cesare P.R. Romano defined coherence by describing an “international order based on justice, an order where all participants (sovereign states, individuals, multinational corporations, etc.) can be held accountable for their actions or seek redress through an impartial, independent, objective, and law-based judicial institution”. In academic writing, the problems related to coherence are also addressed under the terms “constitutionalism” or

The University of Chicago Press, 1998) 271 at 277 “close institutional cooperation will be required, well beyond the WTO, IMF, and World Bank, to ensure greater coherence in global policymaking”.


374 See Communication from Canada (The WTO and International Economic Policy Coherence), WT/GC/W/360 (October 12, 1999) at 2.


“constitutionalisation”.377 For instance, Joel P. Trachtman, when examining the trade and problems from an institutional perspective, states that a “constitutional moment” would be required in order to allow regulatory competition to develop a stable, and efficient, equilibrium, a structure must be developed, inter alia, that can reduce interjurisdictional externalities”.378

Coherence, or mutual supportiveness between international policies and/or international organisations, also concerns the relation between culture and trade. Since culture and trade have traditionally been qualified as belonging to two different fields and, as a result, are dealt with at the international level by two different organisations, the UNESCO and the WTO, it is likely that greater coherence between them will have an impact also on the treatment of the cultural industries, which combine elements of both cultural and economic aspects. In connection with greater coherence, an occasion has been created by the Doha Negotiation Round, which was launched in November 2001 in Doha (Qatar).379 The principles guiding the aim and scope of the negotiations for the so-called “Doha Round” are laid down in the relevant Ministerial Declaration. The text of the declaration reaffirms the principles and objectives set out in the Marrakesh Agreement and reiterates the importance to “maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development”.380 Comparable to the comprehensive spirit that governed the ITO negotiations, the Doha Declaration explicitly recognises that in a rapidly changing international environment imminent challenges from poverty alleviation, the protection of the environment, the promotion of sustainable development, the protection of human, animal or plant life or health, to labour standards as well as the social dimension of globalisation cannot be addressed through measures taken in the trade field alone.381 It equally establishes a multifaceted work programme comprising issues and concerns related inter alia to implementation, agriculture, market access, trade-related aspects of intellectual property rights, trade-related investment measures, the interaction of trade and competition policy, electronic commerce and services. It also puts emphasis on the seriousness of the concerns of least-developed countries,


379 Ministerial Declaration, Ministerial Conference Fourth Session, Doha, November 9-14, 2001, WT/MIN(01)/DEC/W/1 (November 14, 2001) [hereinafter Doha Declaration].

380 Ibid.

381 See Doha Declaration, ibid.; see also the 2002 Human Development Report; United Nations Development Programme, *Human Development Report 2002 – Deepening Democracy in a Fragmented World* (New York: OUP, 2002), stating that “this Human Development Report is first and foremost about the idea that politics is as important to successful development as economics”.

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which is a logical extension of the recognition of the “the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates”. 382

As such the Doha Declaration paves the way for a broad reconsideration of various trade-related and non-trade-related issues alike. There is, however, no explicit mention of either general cultural concerns (e.g. cultural diversity) or specific cultural issues (e.g. the audiovisual sector, or cultural industries). This lacuna is, intentional or not, an interesting point, because either WTO Members showed no concern for cultural issues or none of them dared to reopen Pandora’s box to the culture and trade war that was waged towards the end of the Uruguay Round negotiations. At this point, it means that there are no open efforts made to achieving greater policy or institutional coherence in the context of the relation between culture and trade as relevant for the cultural industries. It is therefore possible that the future years will be characterised by an increasing number of conflicts between international organisations, on the one hand, and, international policy-making, on the other. The potential for such conflicts is real and some of its basic elements will therefore be outlined.

5.2.4.2. The Future: Potentials for Conflict

Clearly, the unnecessary duplication in the activities of international organisations is bad but even worse is a conflict between them. Conflict may take different forms, such as an open clash or an incompatibility of varying degree, but usually may be considered as little desirable and detrimental to the relevant situation in which they arise. It is interesting to investigate into the reasons for such conflicts which may be found in certain trends that developed since the beginning of the past century. These trends are first characterised by the centrifugal forces that the drastic changes in the regulatory environment impose. In legal terms, conflicts are often an expression of a lack of unity in the legal order and surface in the form of conflicts, i.e. incompatibilities between different treaties. 383 Such conflicts may appear between substantive norms, between organisations and their respective jurisdictions or in form of forum shopping, which are all posing an equal threat to common standards of legal predictability and certainty.

Already in 1932 the issue of the compatibility of legal norms and international treaties was addressed extensively by Charles Rousseau and since then resumed a few times. 384 With the increasing juridicisation and codification of international law, the problem has gained in severity since then. 385 Even from the sphere of private international law, of which the main focus is on the problem of conflict of laws, derive critical comments speaking of an “international codification crisis”, caused by an “embarras de richesse”. 386 This phenomenon is a concomitant of an increasing shift of jurisdictional competence from the state to international organisation, reflected in the proliferation of international

382 See Doha Declaration, supra note 379 at pt. 2.
organisations. The growing number of international organisations bears negative side effects which are found in the increasing probability of conflicts between obligations resulting from either different treaties, or from membership in two or more international organisations. Especially, for multilateral treaties, administered by an international organisation, the problem of divergent membership may render efforts to resolve potential conflicts through efficient treaty interpretation more difficult.

Coherence and constitutionalism, and in a certain sense even aspects in the debate about culture, seem to aspire to bring relief from this increasing complexity in form of a concepts of elastic, comprehensive as well as inclusive character. They all have in common the desire of a greater unity, but not necessarily uniformity detriment to diversity and pluralism. In this context, the concept of unity specifically refers to the problem of logical consistency of the WTO’s legal regime, both internal and external. The lack of such consistency poses a threat of the pursuit of the goals it attempts to achieve. A different definition refers to the danger of negative or positive conflicts of jurisdiction, through either the accumulation (Normenhäufung) or absence (Normenmangel) of relevant norms. In other words, the so-called “trade linkage debate”, or “trade and …problems” can also be expressed in terms of jurisdicational conflicts.

So far, however, within the context of the WTO the issue of conflicts between treaties, or between treaty and customary law, has been addressed mainly in the context of the trade and environment debate, but not for culture. Nonetheless, the WTO DSB has taken the obligation arising from Article 3(2) DSU seriously, and recognised, in the first case the AB decided, that the general rule of interpretation has attained the status of a rule of customary or general international law, and concluded therefore that “the General Agreement is not to be read in clinical isolation from public international law”. The DSB’s clarification for the interpretation of the WTO texts in the context of public international law is an important step towards a more coherent application of their legal norms to a complex and changing environment. Notwithstanding the positive step, there remains enough room for conflicts, especially when considering the multifaceted nature of the cultural industries, i.e. their dual cultural and economic as well as goods and services characteristics.

In concrete terms, the culture and trade problem, as part of the broader coherence debate in the framework of the WTO, can also be translated into a matter of jurisdicational conflicts. Such potential for conflicts is real and may bear an internal and an external dimension. Additionally, this potential

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387 See e.g. Romano, supra note 376; see also D.L. Morgan, “Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Case” (2002) 43 Harv. Int’l L.J. 541.
391 See e.g. “Institutional Linkage”, supra note 378.
393 See Article 3(2) DSU, quoted supra note 351.
395 See e.g. Schiavello, supra note 388.
for conflicts may also arise due to the absence, or inadequacy, of conflict rules mitigating between such conflicting treaties or treaty rules.

5.2.4.3. Internal and External Coherence

Having in mind the cultural industries, thoughts about the WTO’s internal coherence evoke, first of all, associations with the relations between the three major multilateral agreements, the General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Services (GATS) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), which form an integral part of the WTO “single undertaking”. Each of these agreements touches upon important elements of the cultural industries. Principally, but not for the cultural industries in particular, the same associations extend to the plurilateral agreement for those WTO Members that signed up to them. The main problem with regard to the relation between the GATT 1994, the GATS and the TRIPS occurs in the process of the newly established and binding WTO dispute settlement mechanism, sometimes referred to as the WTO system’s fourth pillar. As the dispute over the categorisation of television foreshadowed during the Uruguay Round, in litigation, particularly the distinction between goods and services (i.e. the applicability of the GATT 1994 or the GATS) has posed and continues to pose severe problems. The goods/services distinction, due to rapid technological innovations, is likely to become more difficult to establish in the near future. This is particularly true for the cultural industries, where, in addition to the combined goods/service characteristics, also trade-related aspects of intellectual property rights are playing an important role, which means that a particular case might involve all the three pillars, the GATT, the GATS and the TRIPS.

External coherence, refers to the WTO’s relation to other international organisations or, in substantive terms, to the specific legal regime of each of the organisations. Principally, for international organisations, one must distinguish the relations to other international organisation dealing directly with trade or broader global economic policy making, such as UNCTAD, the IMF and the World Bank, and those that are not, such as inter alia UNESCO, UNEP, or the FAO. Moreover, the character of these relations can be based on granting observer status (e.g. the UN, OECD), on formal cooperation agreements (e.g. WTO and UNCTAD), or the mixed sharing of formal ties and substantial norms (e.g. WTO/TRIPS and WIPO).

396 Art. II:1 and 2 WTO Agreement.
398 (1) Agreement on Trade in Civil Aircraft, (2) Agreement on Government Procurement, (3) International Dairy Agreement and (4) International Bovine Meat Agreement; Art. II:3 WTO Agreement.
399 Art. III:3 WTO Agreement.
400 See see J.D. Donaldson, “’Television without Frontiers’: The Continuing Tension between Liberal Free Trade and European Cultural Integrity” (1996) 20 Fordham Int’l L.J. 90 mainly at 121-123.
401 See infra note 408.
403 For a complete list of the international organisations having observer status in the WTO General Council, see supra note 311.
404 See supra note 356.
405 See the Preamble of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which reads: “Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in
5.2.4.4. The Absence or Inadequacy of Conflict Rules

Conflicts arising from the absence or inadequacy of conflict rules may apply to conflicts of an external and an internal kind, in particular to conflicts of regulatory competence, such as those between goods and services (WTO internal) and trade and non-trade issues (WTO external).

To begin with the case of an internal conflict, the WTO Agreement itself provides some limited guidance for their solution. Article XVI:3 WTO Agreement lays down its supremacy vis-à-vis the various multilateral and plurilateral agreement administered by the WTO.406 Concerning the horizontal relation between the GATT 1994, the GATS and the TRIPS, no explicit provision is found. Concerning the TRIPS, it mainly lays down the relation to other international convention but not the GATT or the GATS.407 For the relation between the GATT 1994 and the GATS, the Canada Periodicals Case, provides some guidance over their mutual relation. According to the panel:

The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended [namely to avoid overlap between the GATT 1994 and the GATS], there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two.408

For trade in goods only, the General Interpretative Note to Annex 1A, mentioned by the Panel, stipulates that in the event of a conflict between the GATT 1994 and any other agreement listen in Annex 1A, the other agreement prevails over the GATT 1994 to the extent of the conflict (lex specialis derogat legi generali).409 The AB in EC – Bananas has specified the relation by introducing an important clarification on the distinction between goods and services, or the scope of the GATT vis-à-vis the GATS, when it states, based on the findings in the Periodicals Case, that:

Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis.410

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406 Article XVI:3 WTO Agreement reads: “In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict”.

407 See supra note 405.

408 Canada Periodicals Case (PR), supra note 65 at para. 5.17. This particular panel’s finding was later upheld by the Appellate Body, Canada Periodicals Case (AB), supra note 65 at 19.


However, the reference to a case-by-case basis does not seem to suffice the normal standards regarding legal certainty and predictability, which are necessary for the avoidance of conflicts arising from the different degree of commitments entered into under the GATT and the GATS. A more precise conflict-of-law rule, for example, is contained in Art. 2.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) which creates a legal presumption that:

Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).411

A legal presumption of this kind may help to solve interpretative problems arising between different agreements. Applied to a hypothetical example de lege ferenda, according to the previous rule, a certain cultural policy measure addressing the cultural industries, could be found in conformity with a provision addressing the cultural industries under the WTO, provided such a provision exists, once it has been submitted to a preliminary ruling by an international body dealing with culture, such as UNESCO.

Last but not least, in addition to conflicts between treaties, a difficult general problem of international law concerns conflicts deriving from the relation between treaty and customary law.412 Applied to the WTO, the issue of the compatibility of obligations resulting from the WTO Agreement with other bilateral or multilateral agreements, or customary international law therefore deserves special attention.413 Such incompatibilities could arise for instance between the GATT and various international instrument protecting human rights,414 such the Universal Declaration of Human Rights, which is said of having attained legally binding character through the achievement of the status of customary international law.415 A similar conflict may also arise once an international instrument on cultural diversity, explicitly referring to the cultural industries, is adopted, which – if not signed by all the WTO Members – may also be considered as codifying international customary law.

A special type of conflict may derive from the privileged status of the UN Charter. According to the 1969 Vienna Convention on the Law of Treaties (VCLT) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, both codifying customary international law, the UN Charter holds a superior rank within the architecture of international law.416 The superior rank of the Charter, also known under the term “world constitution”, is based on Article 103 which reads as follows:

\[ \text{[References]} \]

413 See Tartullo, supra note 371 at 172.
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.


Another case of potential conflict found in the internal sphere of the WTO architecture is regionalism.\footnote{But see K. Kwak & G. Marceau, “Overlaps and Conflicts of Jurisdiction between the WTO and RTAs”, Conference on Regional Trade Agreements, World Trade Organization, April 26, 2002, available online at http://www.wto.org, speaking of “the issue of horizontal allocation of judicial jurisdiction” between the respective dispute settlement systems of the WTO and RTAs, see also G. Marceau & C. Reiman, “When and How Is a Regional Trade Agreement Compatible with the WTO?” (2001) 28 L.I.E.I. 297.} In analogy with the UN Charter,\footnote{The UN Charter, which, as a model for a strong universal instrument, explicitly authorises for its key area the maintenance of international peace and security, the existence of regional arrangements or agencies provided that they are consistent with the “Purposes and Principles of the United Nations” (Articles 53-54 UN Charter).} under the broader concept of regionalism, the GATT allows under certain conditions for the formation of so called regional trade agreements (RTAs), in the form of either a customs union (CU), a free-trade area (FTA) or an interim agreement necessary for the formation of a customs union or of a free-trade area (Art. XXIV:5 GATT). The conclusion of RTAs can cause severe conflicts with the multilateral trading regime in both substantial and formal terms. Not even the insertion of conflict of law rules into RTAs can guarantee the avoidance of conflicts between norms of the multilateral and the regional trade agreement, which usually appear in the form of conflicts of judicial competence and the possibility of forum shopping. In addition to that, the existence of a similar or contrary provision in the multilateral agreement raises doubts as to the conformity and applicability of the relevant norm adopted on the regional level. Similar doubts exist in the case of the absence of an equivalent norm (lacuna) on the multilateral level. Questions of this sort are of specific interest for the issue of culture and have already appeared,
as will be shown, partly implicitly and partly explicitly, in the context of the *Canadian Periodicals*
case.423

5.2.4.5. Coherence or Conflict: The Implications

The short survey of various potential conflicts between trade and culture, which are mainly due to
the general imperfections of international law, or the “underdeveloped character” of the
international legal system,424 is relevant for the treatment of the cultural industries in the future.
Considerations of this kind are of great relevance, especially in a *de lege ferenda* approach to possible
ways of injecting greater cultural sensitivity in international trade rules. The relevance derives from
the greater policy interdependence as well as the growing trend of juridification of international law
accompanied by a proliferation of international organisations. The greater the interdependence, the
greater is the potential for conflict and, consequently, also the need for coherence. The cultural
industries, as a relatively young and converging industry, underline the need for greater coherence.
For future changes to the architecture of the international legal order, therefore, the various
implications of new legal instruments for the rest of the existing instruments must be duly taken into
account.

Consideration of the extent to which the trading system under the WTO is itself fragmented or
underdeveloped, will be subject of the following chapters.

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423 See the discussion of regionalism below, [*infra* Subsection §§ 9.1.1.]
424 See Weisburd, [*supra* note 412 at 2].
Chapter 6  TRADE IN GOODS: THE GENERAL AGREEMENT ON TARIFFS AND TRADE

§ 6.1. The General Agreement on Tariffs and Trade (GATT 1994)

Trade in goods stood at the beginning of the multilateral trading order as initiated by the GATT 1947. Notwithstanding the increasing importance of trade in services, the basic rules and procedures for trade in goods remain the cornerstone of the present multilateral trading regime covering now goods, services and intellectual property rights. In the past decades since the GATT’s inception, the rules on goods remained by and large unaltered and were only complemented by related agreements and relevant decisions. With the establishment of the WTO, the GATT 1947 was terminated and replaced by the legally distinct GATT 1994. Nonetheless, the GATT 1994 again incorporates the provisions of the GATT 1947, plus the provisions of the legal instruments that have entered into force under the GATT 1947, and replacing the term “contracting party” by “Member”. This terminological change also indicates the major institutional change introduced by the WTO.

§§ 6.1.1. The Constitutional Values of the WTO/GATT System: Comparative Advantage, Reciprocity, MFN Clause and NT Principle

6.1.1.1. Comparative Advantage

The constitutional values of the multilateral trading system are laid down in the various preambles of the multilateral agreements under the aegis of the WTO Agreement. The Preamble of the WTO Agreement, as the “constitution” for international trade, fleshes out the broader principles governing the multilateral trading system. Beginning with the first indent, the Preamble states that the parties’ to the agreement recognise that:

their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

This paragraph, particularly in its emphasis on wealth creation through the optimal use of the world’s resources, reflects the spirit of international trade theory. Generally, proponents of international trade theory advocate free trade, or the removal of barriers to trade as opposed to those of protectionism, or adherents of more restricted forms of trade. International trade theory – besides political objectives of preventing the occurrence of devastating military conflicts based on economic interests – has contributed to the formation of various models of economic integration. The prevalent theory of international trade is found in David Ricardo’s comparative advantage theory.

425 General Agreement on Tariffs and Trade 1994, Annex 1A, (1994) 33 I.L.M. 1154 [GATT 1994]. Note that in the following chapter when quoting articles of the GATT, GATT alone is used to denote both the 1947 and the 1994 version to the extent that their text is identical.

426 See also the first indent of the Preamble of the GATT 1947.

427 Compare the first indent of article 1 ITO Charter: “RECOGNIZING the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations”.

428 See e.g. The Regulation of International Trade, supra note 278 at 1-4.
Further elaborating on Adam Smith’s theory of absolute advantage, David Ricardo showed that international trade can still be mutually advantageous even if a country does not possess an absolute advantage over the rest of its trading partners. The key element is a country’s specialisation based on its comparative advantage(s) in the production of goods. This theory stands in direct opposition to earlier mercantilist theories, which aimed at preserving a continuing surplus in the balance of payments with trading partners, through the imposition of protectionist measures.\(^{429}\)

International trade theory, thus, aims at explaining the main incentives for countries to engage in international trade and to foster its liberalisation. In 1926, T.G. Williams describes these principal incentives of trade and commerce, as follows:

As variety is the spice of life, so is it the spring of commerce. The earth exhibits an endless diversity of climate and natural resources; the peoples possess an infinite number of aptitudes of mind and body, and in consequence countless varieties of interrelation have sprung up between the races of man and their physical environment. Differences in material wants supply the motives for exchange which we call commerce. Had nature given to every region in the world the same unvarying length of day and night, the same degree of heat and cold, the same constituents in the crust of earth and the same forms of vegetation upon its surface, commerce would have never developed, for there would then have been no advantage arising from an exchange of the productions of one region for those of another. Nor could there be any inducement for a community to create a surplus of commodities over and above its own requirements.\(^{430}\)

Despite these obvious natural incentives to engage in free trade, it is important to mention also its potential disadvantages and drawbacks. Common concerns linked to free trade, as given by Michael Trebilcock and Robert Howse, often address the issues of job displacement and wage depression, of a lowest common denominator effect on domestic social policies, of cultural homogenisation and the loss of domestic political sovereignty.\(^{431}\) More generally, criticism appears in the various so-called “trade and …” problems, notably the possible negative impact of free trade on the environment, development, social standards, and cultural diversity.\(^{432}\) However, in this controversy it is crucial to ask whether there is a causal link between free trade as such and these negative consequences, or whether it has to do with the way the rules purporting free trade are designed and applied. This distinction is of utter importance for the analysis of the relation between culture and trade throughout the following sections.

6.1.1.2. Reciprocity, Most-Favoured-Nation, National Treatment and Flexibility

The WTO system aims thus at the continuous implementation of a free trading regime reflecting the foregoing theoretical considerations. It does so through a set of basic constitutional principles, which are mentioned in the third indent of the Preamble of the WTO Agreement. These principles are based on experiences antedating the inception of the GATT, but were later introduced through

\(^{429}\) Note that the theory of comparative advantage has historically been centred around international trade in goods, and is less apt to explain phenomena like financial capital, technology, human capital, and people; \textit{ibid}, at 5. Moreover, the theory of comparative advantage has evolved an been elaborated on resulting in new theories of international trade, which introduce to a lesser extent new variables that function as an incentive for the cross-border exchange of goods, but rather extend the scope of assumptions that serve as the foundation of explanatory models; see G. Gandolfo, \textit{International Trade Theory and Policy} (Berlin: Springer, 1998) at 7-144.

\(^{430}\) See T.G. Williams, \textit{The History of Commerce} (London: Sir Isaac Pitman & Sons Ltd., 1926) at 1.

\(^{431}\) \textit{The Regulation of International Trade}, supra note 278 at 11-14.

\(^{432}\) See also on the problem of legitimacy of economic theories for a constitutional theory, Krajewski, \textit{supra} note 378 at 158-161.
references in the Havana Charter and the GATT 1947. In this tradition, Indent 3 of the WTO Agreement reads as follows:

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.

The first principle mentioned is reciprocity. The desire to enter into “reciprocal and mutually advantageous arrangements” is an expression of the nature of the GATT to contribute to the liberalisation of international trading relations through the negotiations of tariff concessions. However, the kind of reciprocity referred to is a sort of “global reciprocity” which does not mean strict reciprocal trade concessions in each single sector but for trade in goods as a whole. Such global reciprocity has also been circumscribed as an “all or nothing formula” which is said to have enabled contracting parties to overcome their sectorally divergent interests.

An important tool of the GATT to overcome the divergent sectoral interests for the sake of a mutually advantageous situation is the general most-favoured-nation treatment (MFN) principle enshrined in Article I GATT. MFN states that with respect of border measures that:

any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

MFN treatment thus means that the benefits of a concession negotiated between two or more Members and listed in the annex (Art. II GATT) are immediately and unconditionally extended to the rest of the Members. In order to establish a mutually advantageous situation, the principal problem linked to tariff concessions in connection with MFN treatment is how to evaluate in economic terms the specific value of concession entered into by a Member. Depending on the modes of calculations underlying the negotiations, reciprocity is divided into a formal, substantive and a sectoral category. In formal terms reciprocity means the duty to negotiate concessions on a reciprocal basis irrespective of the respective value attached to them. Beyond the formal requirement, there exists a substantive requirement, which refers to the economic equivalence of the concessions. The issue of substantive reciprocity faces severe problems due to the unpredictability of the effect of concessions and the lack of reliable statistical data due to disparities in the tariff nomenclatures. Substantive reciprocity, however, has been raised in connection with the distinction of developed and developing countries, high tariff and low tariff countries and tariff and non-tariff measures. Sectoral reciprocity refers to the bargaining process by sectoral commitments, as opposed to a selective product-by-product, or a linear mode of negotiations. The advantage of the sectoral approach lies in the more exact statistical data and therefore better commensurability of tariff concessions ultimately leading to greater substantive reciprocity.

433 See e.g. Article 23 (“Social and other Activities”) lit (e) “[The League] will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League”.
See also Art. 1 para. 4 ITO Charter, Indent 2 of the Preamble of GATT 1947.
434 For a survey of the negotiations of tariff concessions, see World Trade and the Law of GATT, supra note 319 at 201-248.
436 Article I GATT.
437 For useful references on the history of MFN, see World Trade and the Law of GATT, supra note 319 at 249, Fn 1.
438 Ibid. at 242-8.
439 On the various modes of conducting negotiations, see World Trade and the Law of GATT, supra note 319 at 224-9.
Further consolidating reciprocity and MFN, Article II declares the schedules of concession an integral part of the agreement and stipulates the Members obligation to “accord to the commerce of the other Member treatment no less favourable” than that provided for in their respective schedules. In connection with Article XXVIII, Art. II GATT also recognises the principle of reduction and binding of national tariffs through tariff negotiations directed to the substantial reduction of the general level of tariffs and other charges on imports and exports. In relation to the reduction of tariffs, the principle of freedom of transit (Art. V), transparency and multilateral review deserve to be mentioned. The latter principles are mainly laid down in Article X GATT concerning the publication and administration of trade regulations and with the creation of the WTO has been complemented by a Trade Policy Review Mechanism (TPRM) and the dispute settlement system. These final modifications have further contributed to the strengthening of the general principle of the rule of law.

The next basic principle is found in Article III GATT, which – following the Indent 3 of the Preamble (“elimination of discriminatory treatment”) – lays down the National Treatment principle (NT). The NT principle rounds up the provisions implementing the basic principles, and notably MFN, by extending the equal treatment obligation from the equal treatment of imported products from different countries of origin to equal treatment of imported and domestic products. The equal treatment is achieved through the prohibition to impose discriminatory measures, motivated by protectionist interests, in the form of international taxation and regulation, such as internal taxes and other internal charges, laws, regulations, requirements and internal quantitative restrictions (Art III:1 GATT). It thus puts imported products on an equal standing with like domestic products once they have crossed the border and obliges the Members to accord treatment no less favourable than that to domestic products (Art. III:4 GATT). There exist several difficulties in locating discriminatory treatment, which are related to the concept of “likeness”, the “no less favourable treatment” requirement and the criteria to establish a violation of Article III GATT. Moreover, the NT principle is crucial due to its direct impact on domestic regulation and politics. For this proximity to domestic regulation, it is also susceptible to the possibility of an excessive judicial review by the WTO dispute settlement system. To prevent such excess, the GATT/WTO system enshrines a considerable number of escape clauses and particular, as well as universal, exceptions which aim at ensuring the necessary degree of flexibility for the functioning and evolution of the multilateral trading system. Amidst these considerations, Art. III thus forms the cornerstone of the free trade regime.
trading regime and is one of the core concepts in charge of holding the balance between harmonisation and regulatory diversity.

By way of the general uncertainty pending over life and the potential conflicts that may arise from unforeseen developments with legal norms enshrined in static texts, flexibility assumes greater importance in any legal document and must therefore also been regarded as a constitutional principle of the GATT/WTO system.448

For the present purpose, however, Article III GATT is of special value because in Paragraph 10 – by way of reference to Article IV GATT – it announces the first direct reference to an issue related to the concept of the cultural industries, which will be discussed below.449

448 See also the quote by J.H. Jackson, infra note 650.
449 See infra Section § 6.2.
§ 6.2. Article IV GATT Relating to Cinematograph Films

§§ 6.2.1. The Regulatory Scope

As indicated in Article III:10 GATT, Article IV GATT leaves no doubt about its central role in the culture and trade debate. It is sometimes understood as the formal recognition of a cultural specificity in the international trading regime. This recognition is inherent in the special treatment accorded to films, an important subsector of the cultural industries. Looking at the structure of the GATT, it is surprising that right after Articles I to III GATT, enumerating guiding principles such as reciprocity, MFN, the schedules and NT, a provision dealing with the medium of cinematograph films, the at the time of the drafting dominant medium, was introduced. As already indicated in Article III:10, Article IV GATT exempts cinematograph films – provided that they meet certain conditions – from the strict national treatment requirement. The first sentence of Article IV GATT reads:

If any contracting party [Member] establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas.

The provision thus creates the obligation for Members, in case they wish to reserve a specified minimum proportion of the total screen time actually utilised for films of national origin, to have recourse to screen quotas. Hence, it outlaws first of all implicitly the use of quantitative restrictions (Art. XI GATT) and explicitly other internal quantitative measures, such as notably import licenses, to promote the exhibition of films of national origin to the effect that it limits the exhibition of films of foreign origin. The explicit insertion of an exemption for cinematograph films shows that without Article IV GATT screen quotas would constitute a clear violation of the national treatment principle.

With regard to the conditions referred to under which screen quotas may be established, Article IV GATT lists the obligation to specify the exact time period for the quotas and sets as the minimum time period for the calculation not less than one year. The method of computation shall be based on the screen time per theatre per year or the equivalent thereof. Moreover, with the exception of screen time reserved for films of national origin under a screen quota, the formal or effective allocation of screen time among sources of supply of screen time is prohibited. However, exceptionally a Member may maintain screen quotas which reserve a minimum proportion of screen time for films of a specified but foreign origin, provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947. Finally, it states that screen quotas shall be subject to negotiation for their limitation, liberalisation or elimination.

What Article IV GATT does not mention is that how much time must be at least reserved to the screening of foreign films. Therefore, theoretically, a Member could reserve the total of the available screening time to films of national origin with the effect of excluding foreign films totally from

450 See e.g. T. Cottier, “Die völkerrechtlichen Rahmenbedingungen der Filmförderung in der neuen Welthandelsorganisation WTO-GATT” (1994) 38 Z.U.M. 749 at 751 [hereinafter “Rahmenbedingungen der Filmförderung”].
451 Art. IV lit. a) GATT.
452 Art. IV lit. a) GATT.
453 Art. IV lit. b) GATT.
454 Art. IV lit. c) GATT.
455 Art. IV lit. d) GATT.

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exhibition in domestic films theatres. This possibility, however, must be deemed as highly hypothetical, since the political, economic and technological circumstances underlying the drafting of Article IV GATT have drastically changed, and, as a result may, diminished the importance of screen quotas altogether. In order to cast light on the precise scope, significance and importance of Article IV today, at first it is useful to turn to the historical background of its drafting.

§§ 6.2.2. The Historical Background and Regulatory Environment of Article IV GATT

The content of Article IV GATT first appeared in a slightly different textual form under Article 19 of the Havana Charter for an International Trade Organization (ITO). Similar to its successor in the GATT, Article 19 ITO Charter was situated in the first section of the chapter on commercial policy, directly following the articles laying down the basic principles of trade, the MFN clause, the reduction of tariffs and elimination of preferences, as well as NT. After its transposition from the Charter into the GATT, the text of Article IV has remained unchanged to date. The fact that the provision, albeit rapidly changing conditions in the media sector, remained the same for more than half a century explains the outstanding importance of the historical background for the interpretation of Article IV in the present context. In other words, perhaps no other provision in the GATT demonstrates so well the need for a due consideration of the article’s drafting history including its wider context in order to come to a proper understanding of the scope and meaning of Article IV today.

The first question relates to the telos for the original drafting of a special provision on cinematograph films. For this purpose it is necessary to cast some light on the time span between the invention of cinematograph films and its insertion in Article IV GATT. During the time-period of the formative years of Article IV, several, mutually intertwined, factors appear to have been influential and therefore deserve due consideration. These principal factors include: (1) the technological novelty and resulting impact of the new medium, and (2) the national and international regulatory responses.

6.2.2.1. Technological Novelty and the Resulting Impact of the New Medium

To begin with, the technological novelty of the medium appears as an influential factor, which must not be underestimated. From early history until the present days, technological revolution in general, and especially technological evolution in the framework of the cultural industries, has always created new problems and consequently aroused strong controversy over the appropriate regulatory approach. In this tradition, the invention of the motion picture, formally accomplished in 1895 with the Frères Lumières’ patent on the cinématographe (a motion-picture camera and projector in one),

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456 See infra Subsection §§ 6.2.4.
457 Havana Charter, supra note 317.
458 Cf. Chapter IV Section A, articles 16-19 ITO Charter. Chapter IV itself is preceded by the chapters I laying down the purpose and objectives, ch. II on employment and economic activity as well as ch. III on economic development and reconstruction.
459 For a literary account of the dramatic euphoria concomitant of the invention of the telegraph, see Stefan Zweig’s short miniature “Das erste Wort über den Ozean”, in Sternstunden der Menschheit, supra note 86 at 7 and 153. See especially, the invention of book printing (typographeum), see M. Giesecke, Der Buchdruck in der frühen Neuzeit – Eine historische Fallstudie über die Durchsetzung neuer Informations- und Kommunikationstechnologien (Frankfurt a. M.: Suhrkamp, 1991) at 63-64; for radio, and television, see supra Section § 1.1, and for the information age and subsequent revolutions, see e.g. A. Goonasakara, “Freedom of Expression in the Age of Global Communication”, Virtual Conference Article, online COMMposite Homepage http://commposite.uqam.ca/video/docs/angofr.html (date accessed: October 25, 2002).
as reflected in the wording of Article IV GATT, forms no exception.\footnote{For the history and the difficulty of contributing the invention of film to one inventor, see e.g. G. Sadoul, \textit{Histoire du cinéma mondial}, 9th ed. (Paris: Flammarion, 1949) mainly at 7-19; see also K. Thompson & D. Bordwell, \textit{Film History: An Introduction} (New York: McGraw-Hill, 1994) mainly at 4-12; see also T. Ramsaye, “The Motion Picture” (1926) 128 Annals Am. Acad. Pol. & Soc. Sci. 1 [hereinafter “The Motion Picture”] and two decades later “The Rise and Place of the Motion Picture” (1947) 254 Annals Am. Acad. Pol. & Soc. Sci. 1.} The main recurrent problem underlying each controversy related to technological novelty, lies in the \textit{a priori} ignorance about the exact nature, and deriving from that, insufficient knowledge about potential inherent dangers and thus the precise impact on, and its consequences for, life. The insufficient knowledge, in turn, may cause both scepticism and fear, which, in combination with subsequent experiences linked to the new invention, influence the regulatory outcome.

Technological novelty also gave rise to the first important controversy about motion pictures and, especially, their dominant characterisation as pertaining to culture, or to trade and economics. In this sense, John H. Jackson mentions as the probable reasoning behind the adoption of Article IV GATT, the closer regulatory connection of films to domestic cultural policies rather than to economics and trade.\footnote{\textit{World Trade and the Law of GATT}, supra note 319 at 293.} From the beginning, however, the exact allocation to culture or trade and economics, as well as to art or industry, posed serious problems. This problem is reflected in André Malraux’s concluding statement in \textit{L’esquisse d’une psychologie du cinéma}, that “\textit{par ailleurs, le cinéma est une industrie}”.\footnote{A. Malraux, \textit{L’esquisse d’une psychologie du cinéma} (Paris: NRF Gallimard, 1939).} In the following, the consideration of films as being of dual nature, combining both economic and cultural (including artistic) elements, gradually crystallised, and became particularly exemplified in the coining of the notion of \textit{Kulturindustrie} (culture industry).\footnote{See Subsection § 1.1.} It is well recorded that already during the formative years of cinematography and the time prior to the drafting of Article IV, the multifaceted nature of the new medium was well known.\footnote{See e.g. the comprehensive scope of discussion in the special issues of 1926 and 1947 of the \textit{Annals of the American Academy of Political and Social Sciences}, titled \textit{The Motion Picture Industry and Its Economic and Social Aspects} (1926) 128 Annals Am. Acad. Pol. & Soc. Sci. 1-186, and \textit{The Motion Picture Industry} (1947) 254 Annals Am. Acad. Pol. & Soc. Sci. 1-222.} Notwithstanding the early awareness about the (at least) dual nature of films, and the cultural industries as a whole, the controversy persists until today.\footnote{Cf. e.g. the discussion of the \textit{Canada Periodicals Case}, supra Section §§ 9.1.3, and the respective recent case law in the European Union, infra Subsection 13.3.3.3.} It follows that a lack of clarity about the nature of a new medium, inevitably results in a lack of knowledge about its impact. Similarly, as it was difficult for Narcissus to foresee the consequences of gazing at his own reflection in the pool, it is equally difficult to understand the impressions, or so-called “positive afterimages” (\textit{i.e.} the eye’s retention of a visual image),\footnote{It is noteworthy that positive afterimages are also known under the term “stroboscopic movement” which is considered as the fundamental principle of motion pictures (\textit{i.e.} the spectator’s unawareness of the short intervals of the screening of static pictures of approximately 1/80 of a second). Nevertheless, the exact process and consequences of the perception of motion are still not well understood; see J. Hochberg, “Perception des films” in \textit{Le cerveau – un inconnu: dictionnaire encyclopédique} (Paris: Robert Laffont, 1993) 993 mainly at 994, 1000.} the screening of a movie must have left on the first moviegoers.\footnote{See also the contribution by F. Fearing, “Influence of Movies on Attitudes and Behaviour” (1947) 254 Annals Am. Acad. Pol. & Soc. Sci. 31 at 70.} Indeed, early experiences, as formulated by Frank Tichenor by reference to the Chinese proverb “one picture is worth a thousand words”, which applied to the motion picture means that:
no other way has been devised by man by means of which so many ideas could be so rapidly and so graphically presented to the human mind,\textsuperscript{468} have been widely confirmed. There is, therefore, no doubt that the film as a new communications medium opened new ways for perception. It is less known in which way the new device for perception influenced human behaviour, or to what extent there exists a causal link between human perception and human behaviour.\textsuperscript{469} Notwithstanding the affirmative answer that must be given to this question, it remains difficult to assess and to predict the precise impact of films on the individual mind, and how it affects individual behaviour, eventually changing collective behaviour and society as a whole.

As quoted before, Walter Benjamin described the same potential of movies for perception by reference to the masses.\textsuperscript{470} Another link could be established between a regime of unfettered liberalised trade and the political organisation of society. It was in 1948, i.e. the same year as the GATT entered into force, that Eric Arthur Blair (otherwise known as George Orwell (1903-50)), after the devastating and horrifying experience of two World Wars (1914-18 and 1939-45) and a personal injury in the Spanish Civil War (1936-39), published his last book titled \textit{Nineteen Eighty-Four}. In it he predicts an age of totalitarian dictatorship where freedom of thought will become a meaningless abstraction and critically examines the role of the media far beyond 1948, and, eventually, beyond the year 1984. Besides the account of the mood that governed the post-war period, he gives an interesting characterisation of the interdependence of the various media when he writes that:

\begin{quote}
The invention of print, however, made it easier to manipulate public opinion, and the film and the radio carried the process further. With the development of television, and the technical advance which made it possible to receive and transmit simultaneously on the same instrument, private life came to an end.\textsuperscript{471}
\end{quote}

In this statement reference is made to the use of the mass media for the manipulation of public opinion through propaganda, which forms a major concern in relation with the media and which endures until today.\textsuperscript{472}

Notwithstanding the powerful political role, the artistic novelty and cultural value of films, the new medium also proved to be of great economic value. The economic value, however, is manifest in a direct as well as an indirect form. First in direct terms, between the 1920s and the 1960s, the worldwide number of commercial cinemas (not encompassing smaller screens) more than tripled.\textsuperscript{473} This led to an ever growing source of income deriving from box office sales.\textsuperscript{474} Second, films also proved to be a major indirect income through its economic driving force for the curbing of sales of domestically produced goods and services.\textsuperscript{475} It is therefore logical that this quality inherent in films

\textsuperscript{468} F.A. Tichenor, “Motion Pictures as Trade Getters” (1926) 128 Annals Am. Acad. Pol. & Soc. Sci. 84 at 84.
\textsuperscript{469} See e.g. the comments in Ph.M. Taylor, \textit{Global Communications, International Affairs and the Media since 1945} (London: Routledge, 1997) at 6.
\textsuperscript{470} Benjamin, \textit{supra} note 128 at 467.
\textsuperscript{471} Orwell, \textit{supra} note 155 at 185.
\textsuperscript{472} For a short account of the early history of propaganda see e.g. N. Chomsky, \textit{Media Control: The Spectacular Achievements of Propaganda} (New York: Seven Stories Press, 1997); see also Taylor, \textit{supra} note 469 and the discussion in section § 1.1.
\textsuperscript{473} See Sadoul, \textit{supra} note 460 at 533.
\textsuperscript{474} Compare, for example, the numbers of box office receipts in the US for the year 1926 ($650,000,000) and 1947 ($1,660,000,000) in W.A. Johnston, “The Structure of the Motion Picture Industry” (1926) 128 Annals Am. Acad. Pol. & Soc. Sci. 20 at 20 [hereinafter “The Structure of the Motion Picture Industry”] and F.B. Odlum, “Financial Organization of the Motion Picture Industry” (1947) 254 Annals Am. Acad. Pol. & Soc. Sci. 18 at 18.
\textsuperscript{475} See \textit{International Agreements and the Cultural Industries}, \textit{supra} note 273 at 3.
not only applies to domestic but also to foreign goods. This is exemplified in the quote by Elmer Davis, who in 1947, on behalf of the United States as a major exporter of films, stated that:

The modern American motion picture, almost beyond any possible comparison with other items of export, combines considerations of economic, cultural, and political significance.476

This statement leads Davis to the question of the indirect effect of American motion pictures on the sale of American products and he concludes that:

There has never been a more effective salesman for American products in foreign countries than the American motion picture.477

Already in 1926, the motion picture has been described as “the latest form of silent salesman” and experiences with the impact of unconscious “trade propaganda” on the sales on other goods have given rise to the slogan “trade follows the film”.478 Since then, often under the Oberbegriff of the cultural industries, the impact of the film and other media on the human psyche and, consequently, on human economic behaviour has repeatedly become the subject of critical studies.479

This indirect economic power is in fact of great importance for the international trade in goods in general comprising of goods other than films. Moreover, films are also distinct from other goods in the way that – as John H. Jackson reports – “their value is not in the film itself, but in its earning power”.480 In economics, these qualities relate to the highly differentiated character of films, namely the initial high production costs of the first copy and the following low reproduction as well as distribution costs.481

6.2.2.2. National and International Regulatory Responses: The Blum-Byrnes Agreement

At the international level, early international codifications addressing the new media of films and broadcasting were – as mentioned above – the 1933 Convention for Facilitating the International Circulation of Films of an Educational Character and the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace, adopted in the framework of intellectual cooperation under the auspices of the International Institute of Intellectual Co-operation (IICI).482 The first of the two conventions aimed at fostering the potential of films of an educational character for the improvement of international relations by facilitating their circulation through the abolition of customs duties, whereas the second contained rules laying down a prohibition of the use of broadcasting in a way that is capable of inciting the population of any territory to acts detrimental for the internal order, or security, as well as those that constitute an incitement to go to war against another party.483


477 Mayer, ibid. at 34.

478 See J. Klein, “What are Motion Pictures doing for Industry” (1926) 128 Annals Am. Acad. Pol. & Soc. Sci. 79 at 79; see also Tichenor, supra note 468.


480 World Trade and the Law of GATT, supra note 319 at 293. See also van Harpen, supra note 1267 at 169, equally mentioning as the reasons for the introduction of Article IV GATT not only the cultural importance of film but also the economic importance of the film industry to domestic economies.

481 See supra Subsection §§ 3.3.2 and infra Subsection 6.3.3.2.

482 See the Film Convention (1933), supra note 234 and Broadcasting Convention (1936), supra note 236.

483 Articles 1 and 2 Broadcasting Convention (1936), supra note 236.
At the national level a contrary trend could be noted. Resulting from deepening insights in the nature and in the impact based on early experiences, governments became aware of the powerful character inherent in the new medium. The ability to manipulate mass behaviour fuelled concerns of nation states to lose grasp of their respective populations confined to their territory. To counter this tendency it was necessary to develop or restore a viable national industry after the Great War. Furthermore, the advent of sound films in the late 1920s increased the demand in national productions in local languages. As a result, national governments started to introduce legislation aimed at either subsidising national film production in combination with limiting the distribution of foreign films, or nationalising the film industry from the production to the distribution. Accordingly, Germany, in order to strengthen its film industry created the UFA (Universum Film Aktiengesellschaft) which vertically and horizontally integrated the film production and distribution process.\(^{484}\) Another way of supporting the domestic industry was the French Accord Marchandeu, which in 1930 introduced as an official policy the system of import licenses for foreign films.\(^{485}\) This practice is important for the adoption of Article IV GATT because it later formed the subject of the so-called Blum-Byrnes Agreement, which was signed between the United States of America and the Provisional Government of the French Republic at Washington on May 28, 1946.\(^{486}\) The Agreement contained an understanding for the final settlement of lend-lease and reciprocal aid, and other French financial obligations arising from the United States’ military supply programme that arose out of the conduct of the war. Most relevant for the adoption of Article IV GATT were the two governments’ discussions on commercial policy matters as expressed in the annexed Declaration on Commercial Policy and Related Matters.\(^{487}\) In the said Declaration the two Governments expressed their “full agreement on the general principles which they desire to see established to achieve the liberation and expansion of international trade, which they deem to be essential to the realization of world-wide prosperity and lasting peace”.\(^{488}\) Based on this agreement on the principles, the two Governments expressed their intention to “continue discussion between themselves and with other likeminded countries in order to give effect to these principles in the Charter of the proposed International Trade Organization”.\(^{489}\) For ITO’s successful creation, the US and the French provisional Government deemed necessary a substantial reduction of tariffs and other barriers to trade as well as a removal of discriminatory arrangements.\(^{490}\) In the context of the envisaged creation of an ITO, the French Government also informed the US Government about the measures it intends to take for the attainment of this objective as well as for the reconstruction and modernisation of the French economy. Among these measures was also the intention to definitely abandon the pre-war policy of protecting French producers with import quotas.\(^{491}\) The departure from import quotas also extended to the French policy of a contingent system for foreign films. In a


\(^{486}\) France Lend-Lease Settlement, signed on May 28, 1946, (1946) 418 U.S.T. LEXIS 1 [hereinafter Blum-Byrnes Agreement].

\(^{487}\) See the Declaration by the Government of the United States of America and the Provisional Government of the French Republic on Commercial Policy and Related Matters, in France Lend-Lease Settlement, signed on May 28, 1946, (1946) 418 U.S.T. LEXIS 1 at 67 et seq.

\(^{488}\) Ibid.

\(^{489}\) Ibid. at 68-69.

\(^{490}\) Ibid. at 69.

\(^{491}\) Ibid.
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91 separate Understanding part of the overall agreement, the US and the French Government “reexamined certain problems relating to the exhibition in France of dubbed American motion picture films”.492 The Understanding stipulated as follows:

Effective July 1, 1946, all previous provisions concerning the number of dubbed films permitted to be shown in France will be abandoned. On the same date, a “screen quota” system will be instituted, as a temporary protective measure, to assist the French motion picture industry to recover from the disorganization caused by enemy occupation of France. Under this system, motion picture exhibitors in France will be required to exhibit French films for a certain number of weeks per quarter. During the remaining weeks, French exhibitors will be allowed free choice of films, foreign or domestic.493

This means that from July 1, 1946 onwards, the French Government was bound to not only reduce the screen time reserved for French films from four to three weeks per quarter but also to refrain from introducing restrictions other than screen quotas on the exhibition of American films in France, except such restrictions are also applied to French films.494

In these provisions of the Blum-Byrnes Agreement, the later content of Article III:10 and Article IV GATT can already be detected. This is because the provisions in the Blum-Byrnes relevant for the movie industry in connection with the two Governments’ principal agreement on commercial matters including the proposal for the creation of an International Trade Organization (ITO) have led to the drafting of Article 19 of the ITO Charter, which was later transformed into Article IV GATT.

§§ 6.2.3. Cinematograph Films and Television Programming

6.2.3.1. Television: From Political Cooperation to International Trade Cooperation

Not long after the adoption of Article IV in the framework of the GATT, its regulatory content and scope became subject of a controversy that arose from subsequent technological advances in the field. The controversy was centred around the nature of films in their relation to the ascent of television on the international plane during the 1960s.495 Thus, its central element was the question whether television falls within the scope of Article IV GATT. This question implied a more general problem, namely, as to qualify television as a good or a service. The qualification mattered for the legal treatment of television under the GATT, namely whether it comes within or remains outside its regulatory scope. In this context, it is noteworthy to recall the present debate since the initial controversy anticipated some of the present problems and arguments, including those raised during the Uruguay Round negotiations.496

Characteristic for the controversy over television in the GATT was that the beginning steps were taken, first, in the sphere of international intellectual cooperation and, subsequently, in the framework of international political cooperation under the auspices of the UN, before they would

492 See Understanding between the Government of the United States of America and the Provisional Government of the French Republic with Respect to the Exhibition of American Motion Pictures in France of the Blum-Byrnes Agreement, in Blum-Byrnes Agreement, supra note 486 at 73 et seq.
493 Blum-Byrnes Agreement; ibid. at 74.
494 Ibid. at 76.
495 See e.g. the comprehensive list of dates of countries starting their national television services, http://www.terramedia.co.uk/themes/TV_service_starts.htm (date accessed: February 4, 2003); see also the survey about the activity of the British Broadcasting Corporation (BBC) in the United Kingdom from 1936-39 in R.W. Burns, Television an international history of the formative years (London: The Institution of Electrical Engineers, 1998) at 576-616.
496 See also the discussion of trade in services below, infra Subsection §§ 7.1.2.
enter the arena of international trade. As a matter of fact the historical development of both cinematograph films and television largely overlapped.\textsuperscript{497} It was not long after the successful commercialisation of cinematograph films that with television another medium, which allowed for the recording and screening of motion pictures, appeared. The overlap in time is explained by its identical functional objective found in the recording, storing and subsequent screening of pictures in motion. It must be noted that the historical temporal and functional overlap equally supports the presumption of the convergence of the various media united under the concept of the cultural industries. At the time, however, the overlap between cinematograph films and television introduced new aspects, which, in the following, would engender important regulatory challenges in international law. The early regulatory challenges were first felt in the sphere of intellectual cooperation as a part of an increasing international political cooperation during the 1930s, as it was already indicated by reference to the 1933 \textit{Convention for Facilitating the International Circulation of Films of an Educational Character} and the 1936 \textit{International Convention Concerning the Use of Broadcasting in the Cause of Peace}.\textsuperscript{498}

Before television could enter the debate within the framework of international trade in the 1960s, important technological developments had to take place. These technological developments related to the gradual entwinement of broadcasting (or communications) technology with space technology. To recall briefly, the rise of space technology, and the gradual conquest of space and outer space, was initiated by the launch of the first artificial satellite “Sputnik I” on October 4, 1957 by the Union of Soviet Socialist Republics (‘USSR’) and was followed shortly afterwards by the first (small) steps of a human being on the moon, on July 20, 1969, by the US astronaut Neil A. Armstrong. These innovations not only meant a major step for humanity, but also a serious challenge to terrestrial culture and laws. The sudden opening of a possible conquest of the sheer infinity of space not only posed serious problems for the intellect, but also raised numerous practical problems linked to state sovereignty based on the relevant criteria for the delimitation of space from outer space.\textsuperscript{499} In broad terms, general political concerns arose with respect to the peaceful use of outer space.

Based on the potential threat that space technology posed to international peace and security, it was no surprise that the first international organisation to address the issue was the UN. Hence, first concrete legal steps in international space law were taken (not on the moon, but instead) by the United Nations’ Committee on the Peaceful Uses of Outer Space (COPUOS), an international, intergovernmental body established by the General Assembly and concerned exclusively with issues related to outer space.\textsuperscript{500} The legal basis of the committee laid down the common interest of all mankind in the peaceful use of outer space and the necessity to avoid the extension of national rivalries, the so-called “space race”, into this new field.\textsuperscript{501} An early regulatory response was given with the \textit{Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space},

\begin{itemize}
  \item \textsuperscript{497} See generally Burns, supra note 495 mainly at 6.
  \item \textsuperscript{498} See supra Subsection 3.4.2.1.
  \item \textsuperscript{499} For a survey of the problem of the delimitation of air sovereignty, see J.F. McMahon, “Legal Aspects of Outer Space” (1962) 38 British Yearbook of International Law 339.
  \item \textsuperscript{500} Established on December 13, 1958 through United Nations General Assembly Resolution 1348 (XIII) and renewed by UN General Assembly Resolution No. 1472 (XIV) in 1959.
  \item \textsuperscript{501} Ibid.
\end{itemize}
Including the Moon and Other Celestial Bodies. This text is an important document, because it enshrines the principle that:

The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic and scientific development, and shall be the province of all mankind.

Within the atmosphere and particularly for trade in the cultural industries, however, the conquest of outer space paved the way for a further major revolution, namely the broadcast of television signals across state borders via direct satellite broadcasting. Direct satellite broadcasting means the transmission of signals from the satellite directly to individual home television sets. This new possibility of distributing programmes through electronic signals, i.e. without a tangible carrier crossing state borders, provided numerous new possibilities but also concerns for state and private actors alike. The possibility of space telecommunications opened new doors to the provision of information to remote places, within, or beyond, state territory. In this tradition of thinking, the UN General Assembly adopted in 1961 a Resolution on the International Co-operation in the Peaceful Uses of Outer Space which expressed the belief that “that communication by means of satellites should be available to the nations of the world as soon as practicable on a global and non-discriminatory basis” and the conviction of the “need to prepare the way for the establishment of effective operational satellite communication”. As a further regulatory step, in 1971, the International Telecommunications Satellite Organization (INTELSAT) was created and entrusted with the administration of the development of a telecommunications satellite system with the aim of achieving a single global commercial telecommunications satellite system.

For individual states in the international community, however, the possibility of space telecommunications caused not only serious concerns about a loss of their sovereignty in military terms but also a gradual erosion of government control over information. A subsequent legitimate reason for concern about a loss of government control related to the potential decline of important revenues from the cross-border tariffication of goods. For private individuals instead, the central problem was linked to the efficient protection of intellectual property rights.

Responding to these diverse fears, the UN General Assembly adopted a series of resolutions culminating in the 1982 Resolution on Principles Governing the Use by States of Artificial Earth Satellites for Direct Satellite Broadcasting. The resolution declared as its main purpose that:

Activities in the field of international direct television broadcasting by satellite should be carried out in a manner compatible with the sovereign rights of States, including the principle of non-intervention, as

503 First sentence of Article 1 Outer Space Treaty, supra note 502.
506 See e.g. the recent example of China and its struggle with the loss of control over the flow of information, discussed in H. Xiaoming, “Party Dominance vs. Cultural Imperialism: China’s Strategies to Regulate Satellite Broadcasting” (2000) 5 Comm. L. & Pol’y 155.
well as with the right of everyone to seek, receive and impart information and ideas as enshrined in the relevant United Nations instruments. 508

It further instituted the applicability of international law and restated the equal right of all states to conduct activities in the field of international direct television broadcasting by satellite by way of international cooperation and the peaceful settlement of disputes. 509 For the issue of copyright protection, it recommended the cooperation on a bilateral and multilateral basis. 510 With regard to the unavoidable overspill of the radiation of the satellite signal, the Resolution foresaw a notification and consultation procedure for the state concerned and stated the exclusive applicability of the relevant instruments of the International Telecommunication Union. 511 Notwithstanding this effort, these interrelated concerns endure until today and continue to cause international disputes. 512

6.2.3.2. The Controversy over Television in the Sphere of International Trade

Against the background of the growing concerns of the international community with the regulatory challenges arising from the fusion of broadcasting with space technology, it was only a matter of time until its implications would be felt in the sphere of international trade. For international trade, the beginning of the debate can be traced back to the early 1960s when the delegation of the United States Government instigated an investigation into the treatment of television programmes under the GATT. In concrete terms, the US Government communicated to the Contracting Parties (CPs) that:

The steady increase in the number of television receivers sets as well as television broadcasting facilities is in a constant rise. This tendency has led to the introduction into international trade of a new commodity-television programme, either recorded on video tape or photographed on film. 513

The communication continues in underlining that the imposition of restrictions on the use of imported television material, which is not equally applied to their domestic like products, constitutes an apparent violation of the less favourable treatment requirement laid down in Article III:4 GATT. In the evaluation of the situation in the 1960s, the communication restates the existence of national restrictions to the free trade in television programmes and, most of all, acknowledges the similarity to the regulation of the use of foreign cinematograph films. Given the absence of an international consensus on the issue, the US Government believes that special provisions related to Article IV GATT should be put in place, in order to provide for the applicability of the GATT to international trade in television programmes, so that:

exhibition time may be reserved for material of national origin while at the same time fair access may be assured the imported product. 514

At the same time the document recognises as a substantial difference between television programmes and cinematograph films the method of exhibiting. The difference is mainly found in the (at the time predominant) situation of property in the exhibiting business. While cinematograph films were mainly shown by private companies favouring commercial considerations, television

508 Ibid. at para. 1.
509 Ibid. at paras. 4-7.
510 Ibid. at para. 11.
511 Ibid. at paras. 13-15.
512 See infra Subsection 8.1.2.1, see also the overview over the various Canada-US disputes in K. Acheson & Ch. Maule, Much Ado about Culture: North American Trade Disputes (Ann Arbor: Michigan Press, 2001) at 185-328 [hereinafter Much Ado about Culture].
513 Application of GATT to International Trade in Television Programmes, L/1615 of November 16, 1961 at 1.
514 Ibid. at 1.
facilities in most countries were either government owned or controlled and used a system of licensing against the payment of a lump sum to provide themselves with the products they needed. From this difference arises the tendency to establish quotas at a less restrictive level for cinematograph films than for television programmes.

The US Government representative later continued the debate in a statement, which emphasised the general absence of competition within the television sector as opposed to the cinema sector. For television, it also recognised that in countries, where the television facilities are not state controlled, governments have quite properly taken a special interest in it, because of its importance as a cultural and information medium.  

Thus, the statement clearly recognises – next to the obvious commercial value of the new medium – the cultural and political value of television and, particularly, the significance of media pluralism. The statement clarifies that, in the eyes of the US Government, countries shall not be obliged to refrain from the adoption of standards of excellence, but instead there should be provisions available which prevent any arbitrary distinctions based on the sources of television programmes.  

Consequently a working group was established with the principal objective to examine the relation between the existing provisions of the GATT and measures affecting international trade in material for showing on television programmes. More precisely, the working group was called upon to consider whether these provisions adequately deal with the problem of access to markets and to report the relevant findings to the CPs. The report issued by the working party recalls the importance of international trade in television programmes, the great disparities in the existent national legislation concerning ownership of the television facilities, the importation of foreign television programmes. The overall goal of the working party, as voiced by the US delegation, was to recognise the importance of an international solution to the problem and to seek an solution that should aim at:

[S]atisfying as far as possible the commercial interests of the countries exporting recorded television material as well as the cultural and other interest of the importing countries.  

The report goes on reflecting the controversy of the application of GATT rules to television programmes. On the one hand, the United States delegation advocated the applicability of Article III GATT to television programmes. In this connection, the working party took note of the fact of the GATT provision relating to tariffs and quantitative restrictions, but concentrated its discussion largely on Articles III and IV GATT. In their relation, it is important to outline that Article IV relating to cinematograph films has been established as an exception to Article III, and notably the three basic rules laid down in Paragraphs 1, 4 and 5. On the other hand, a group of contracting parties, and notably France, expressed their doubts regarding the applicability of the GATT rules altogether. The report reads in parts as follows:

In particular it was contended by some delegations that in many respects television bore more resemblance to a service than to a trade in physical commodities. The representative of France

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515 Application of GATT to International Trade in Television Programmes, L/1646 of November 21, 1961 at 2.
516 Ibid. at 2 and 3.
517 Ibid. at 2.
520 Ibid. at 3.
considered that it seemed somewhat arbitrary to distinguish between live programmes and certain programmes which had been recorded for technological convenience.\footnote{Ibid. at 2.}

The French delegation also referred to the (at the time) unpredictable consequences that the prospect of the operation of communication satellites would be likely to have and recommended that steps in this direction should be made as soon as the “practical consequences of the new technical media which are expected to be introduced in few months’ time, are sufficiently known”.\footnote{See Annex II; \textit{ibid.} at 8.}

Some contracting parties, the working party noted, were prepared to accept that a resolution or recommendation of the contracting parties could be issued, which takes into account the obvious analogy between films and recorded television material and that the problem should be solved by recognising this analogy and by stating that the provisions in Article IV GATT should be applied 

mutatis mutandis.\footnote{Ibid. at 4.}

Especially, for the purpose of casting some light on the regulatory scope of Article IV GATT today, it is interesting to note that in the context of the analogy to cinematograph films, the report notes that at the moment of drafting international trade in television programmes was unimportant and that considerations had not therefore been given to the problem.\footnote{Ibid. at 4.}

In the following, the working party had prepared a Draft Recommendation, but – in absence of any agreement on the subject – concluded that given the early stage of development of television the working party decided to postpone the issue for consideration at a later moment.\footnote{Ibid. mainly at 5.}

In the following years, i.e. between 1962 and 1964, several draft recommendations were not adopted.\footnote{Cf. Application of GATT to International Trade in Television Programmes – Revised United States Draft Recommendation, L/1908 of November 10, 1962 and Application of GATT to International Trade in Television Programmes – Proposal by the Government of the United States, L/2120 of March 18, 1964.}

The disagreement over the legal treatment of motion pictures and television continued in other international fora. Like an omen for later developments within the GATT during the Uruguay Round, the disagreement over broader issues of the world communications order continued and eventually resulted in the withdrawal of the US and the UK from UNESCO.\footnote{See “An Economic Critique”, supra note 1274 at 1358.}

For its main reasons to quit, the US declared that within UNESCO, next to chronic mismanagement,

\begin{quote}
\end{quote}

With this lack of international consensus, further attempts for a solution to the problem of whether television must be regarded as a good or service was postponed until it emerged vividly again during the Uruguay Round negotiations, leading to the adoption of the GATS.\footnote{On the GATS negotiations in audiovisual services, see infra Subsection \S\S 7.1.2.}

During the negotiations for the GATS, the drafters agreed that all services shall be covered by the GATS and that it is impractical to define “services” because of the “continuous change in the description, content and

\footnotesize{Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU
European University Institute
DOI: 10.2870/50465}
characteristics of any given service due to constant technological advances". Instead, the only
definition found in the GATS is the definition of what constitutes “trade in services”.

It is noteworthy that from 1974 onwards the European Court of Justice developed a constant corpus
of case law, in which it qualified television as falling under the provisions on the freedom of
services. In a different way, the declaration on trade in services attached to the 1985 Israel-United
States Free Trade Area Agreement, defines services as encompassing, but not being limited to, *inter
alia* communications as well as motion pictures. The GATS *Services Sectoral Classification List* defines
audiovisual services in a non exhaustive way as comprising of Audiovisual services: motion picture
and video tape production and distribution services, motion picture projection service, radio and
television services and radio and television transmission services as well as sound recording.

Presently, in the GATT/WTO framework the view prevails that films, like books, periodicals, video
tapes, and music recordings qualify as goods, whereas broadcasting qualifies as a service. However,
this qualification is problematic due to the dual nature of audiovisuals, namely not only containing
elements of culture and commerce, but also of both goods and services. In addition to the
problematic goods/service distinction, the cultural industries, in combination with new
communication technologies, usually combine elements of both carrier and content. The relevance
of the carrier/content distinction for the goods/distinction is based on the three traditional tests that
have been applied for distinguishing goods from services: Accordingly, goods were considered
“tangible”, “storable”, and could be traded (transported) over wide distances, whereas services were
considered “intangible, “perishable” (*i.e* consumed the moment they are produced) and could not be
traded over wide distances. The foundations of these tests have long ago ceased to yield satisfactory results. For the cultural industries these tests are quite simply no longer adequate. For
instance, the former broad distinction of goods and services in tangible and intangible products
ceased to be helpful. The distinction between “storable” and “perishable” is equally obsolete,
especially with the increasing possibilities to detach the “intangible” content from its carrier as the

531 Article 1 GATS; see also infra Subsection §§ 7.2.1.
534 *Services Sectoral Classification List* (Note by the Secretariat), MTN.GNS/W/120 (July 10, 1991).
535 See e.g. S. Seelmann-Eggebert, *Internationaler Rundfunkhandel – Im Recht der World Trade Organization unter Europäischen Gemeinschaft* (Baden-Baden: Nomos, 1998) at 116-7, also emphasising on the problem differentiating between blank and recorded tapes and other data carrier.
538 On the traditional tests and their application to television and a discussion of the alternative so-called “real value” (*i.e* trying to evaluate the real value of the underlying transaction) and “necessary form of transaction” (*i.e* focusing on the the form of the property in the underlying transaction) tests, see Donaldson, * supra* note 400 at 123-129; see also Abu-Keel, * supra* note 530 at 189 et seq.
539 On problems concerning the goods/services distinction in light of the tangible/intangible dichotomy, see e.g Ch.E. McLure Jr., “Taxation of Electronic Commerce: Economic Objectivites, Technological Constraints, and Tax Laws” (1997) 52 Tax L. Rev. 269 mainly at 284-289.
tangible counterpart on which it is sold and consumed. Finally, geographical distance has also lost its appeal in the age of satellite communications or supersonic long haul flights.

These problems are all exemplified or, occasionally, fortified in the field of the cultural industries as their products can be sold either in tangible or in intangible form, consumed immediately or stored on, and exchanged between, different carriers as well as traded in the neighbourhood (e.g., video rental) or from outer space (e.g., satellite broadcasting). Clearly, while the former distinctions may have proved to be useful for some time in history, this is no longer the case. Recent technological innovations and notably the accelerated process of media convergence, fostered by the increasing digitisation and its resulting interchangeability between content and carrier, will further challenge any clear-cut distinction between goods and services in the near future. Due to large disparities between the current GATT and GATS framework, a future common understanding between the WTO Members on the good/service distinction will be crucial, since the initial qualification of the final product of the cultural industry is absolutely decisive for the legal implications that derive from it.

§§ 6.2.4. The Significance of Screen Quotas Today

In light of the rapid technological progress in the field of both cinema and television, it is necessary to shed some light on the overall utility of screen quotas today. Particularly, the process of digitisation has introduced new possibilities for distribution, which in a foreseeable future, will render tariffification at the border obsolete. The impact of the technological revolution on the film business has been expressed in the following macabre terms:

In fact, Internet distribution will require a complete rethinking of the film business the streets will be lined with dead bodies and lottery winners.\(^\text{540}\)

New distribution methods, such as the sending of motion pictures via the internet to movie theatres around the world, will further erode border measures. At the same time, non-border measures, like screen quotas, may become more important.

It was mentioned before that the common practice of states to adopt various restrictive measures regarding the exhibition of motion pictures, as for instance reflected in the Blum-Byrnes Agreement, exercised an important influence in the drafting of Article IV. Following the entry into force of the GATT, numerous states maintained or introduced new screen quotas for the exhibition of domestic films, occasionally combined with a regime of production subsidies, tax incentives, or levies.\(^\text{541}\) With the advent of television, the exhibition of cinematograph films in movie theatres came under pressure and threatened to gradually undermine the ratio legis for screen quotas. Furthermore, incessant pressure exercised in common by the US Government and the US motion picture industry has without doubt contributed to trend of abolishing screen quotas. This practice is repeatedly reported from as early as in 1944, such as in the circular letter, titled “American Motion Pictures in the Post-War World Order”, which called on diplomatic officers to report efforts of foreign governments to restrict the exhibition of foreign motion pictures and aimed at the unrestricted


distribution of American Motion Pictures.\textsuperscript{542} This pressure is also reported in the context of the Korean film industry, where a recent controversy about the utility of the system of screen quotas, adopted in 1966, has emerged.\textsuperscript{543} In this controversy the conflicting regulatory objectives are centred around the problem of guaranteeing both the quality and commercial viability of the domestic film industry.

A similar message comes from experiences in Canada. After decades of experiments with various quota and content rules, the Canadian Government has been confronted with major problems in the successful implementation of its cultural policy objectives.\textsuperscript{544} In evaluating Canadian content regulation for the movie industry in 1989, Maule and Acheson conclude by stating:

While Canada’s quotas and domestic content rules have had an effect, it has not been the intended one of providing a major stimulus to the production of distinctive domestic programming. The lesson which should have been learned is that such measures are a blunt and costly instrument for achieving either cultural objectives or fostering the growth of an efficient domestic industry.\textsuperscript{545}

In 2000, the Canadian Government rejected proposals for the introduction of screen quotas, requiring Canadian theatres to reserve at least 10 percent of screen time for Canadian films and box office taxes for the making of Canadian films based on the argument that they are “unworkable”.\textsuperscript{546}

Another interesting case concerning screen quotas arose in the European Union, which in 1965 (then as the European Economic Community) abolished import and screen quotas internally to secure the achievement of the common market.\textsuperscript{547} More precisely, the relevant Directive established the obligation for Member States to abolish in respect of certain beneficiaries, such as mainly nationals from the Member States and the overseas countries and territories as well as companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, (import and) screen quotas.\textsuperscript{548} However, this means that with regard to films of origin in third countries or persons other than the beneficiaries, the establishment of screen quotas was upheld.

A good example for a country having recourse to a system of screen quotas in the EU is Spain which as recently amended its legislation concerning films and the audiovisual sector (\textit{Ley 15/2001 de 9 de julio, de fomento y promoción de la cinematografía y el sector audiovisual}). The new law aims at supporting and promoting the film industry and states its principal motives as follows:

\begin{quote}
See Jarvie, supra note 312 at 37; see also Ming Shao, supra note 536 at 127-131; see also “KRRiTV enforces European TV quota, upsets USA”, BBC Summary of World Broadcasts (February 13, 1998) [available on LEXIS].


Ibid. at 522.


The beneficiaries, referred to in Art. 1 Directive 1965/264/EEC are listed in Title I of the \textit{General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services}; O.J. 2/36 (January 15, 1962).
\end{quote}
La creación cinematográfica y audiovisual es parte destacada de la cultura y tiene una importancia decisiva en el mantenimiento de la diversidad cultural.

El cine presenta en la sociedad actual una dimensión cultural de primera magnitud; no sólo como patrimonio, también como proyección de nuestro país en el exterior; como expresión de su personalidad, de sus historias, formando parte de la identidad viva de un país.549

Besides cultural and linguistic diversity, cultural identity, the law mentions the opportunities provided by new technologies (digital revolution), the role of the audiovisual sector for the creation of employment, and the need to guarantee a competitive cinema while at the same time respecting equal access to its products. For the achievement of the objectives, the law lists a great variety of support mechanism, ranging from access to loans, subsidies and aid, as well as fiscal incentives (Art. 4), various forms of assistance to the production (Art. 5), distribution and exhibition of cinematograph and audiovisual works (Art 6). The support for films is complemented by Article 7, which uses a screen quota (cuota de pantalla) to oblige movie theatres to show within a year for each three days of a film originating in a third country in dubbed version one day of a film originating within the European Union Member States.550

The Spanish law is a good example for the fact that screen quotas are still used today. In comparison with the debate within Korea, it provides a comprehensive regulatory approach to the film and audiovisual sector. It covers both broad cultural and commercial as well as political elements. The comprehensive approach shows the necessity for a coherent policy approach in order to obtain a quantitative and qualitative improvement of the domestic industry. As such the efficiency of quotas depends on a great variety of factors, from tariffs, domestic content quotas, censorship, subsidies, tax incentives, dubbing requirements, restrictions on ownership and establishment, as well as their definition and enforcement. In this wider context, screen quotas play a subsidiary role, mainly to guarantee that films, which are produced, can equally be seen by a wide public. Quotas alone, however, are no guarantee for the success of wider cultural policy objectives and particularly the improvement of the content.

§§ 6.2.5. The Legacy of Article IV GATT

The survey of the origin and history of Article IV GATT allow for a few interpretative speculations and possible conclusions regarding its meaning and scope as well as its possible role in future developments. First, in a broader and contextual reading, the prominent position of Article IV (in first the ITO Charter and then the GATT), situated right after the basic principles governing international trade, recognise its major role and constitutional status for the framework of the multilateral trading regime. Particularly, in light of the theory of comparative advantage, international trade’s unwritten Grundnorm, Article IV GATT represents an explicit recognition of the cultural difference and sovereignty of the trading partners. This recognition is rightly interpreted by some scholars as a sign for the cultural sensitivity as well as specificity of the GATT/WTO regime.552 At the same time, however, it imposes clear limits on the regulatory form by which contracting parties can make use of their sovereignty, especially as regards international trade. From the wording of

549 Ley 15/2001 de 9 de julio, de fomento y promoción de la cinematografía y el sector audiovisual, [2001] 164 B.O.E. 24904.
550 Article 7 Ley 15/2001 de 9 de julio, de fomento y promoción de la cinematografía y el sector audiovisual; ibid.
551 See Acheson & Maule & Filleul, supra note 544 at 515, 519-521.
552 See Carmody, supra note 1258 at 255; see also Rahmenbedingungen der Filmförderung⁴, supra note 450 at 751.
Article IV GATT it is evident that its scope clearly restricts the cultural sensitivity of the trading regime to the field of cinematographic films. Nonetheless, as was shown above, cinematographic films were, at the time of the drafting of Article IV, the dominant communication medium.

Based on the classification of cinematographic films as the dominant communication medium, it would be possible to argue for a more extensive reading of Article IV GATT. Such reading could be based on a historical/teleological interpretation and would entail that Article IV GATT not only covers cinematographic films but also extends to trade in television programmes and other cultural goods and services. The precise scope of such an extension would depend on the availability of a practical definition of the cultural industries. Such extension would entail that various cultural goods and services can be exempted from the NT obligation but not generally become subject to import restrictions, such as licenses, import quotas or import prohibitions. As a result, such scope would suffice for the maintenance of domestic cultural policies, and with it a sufficient degree of global cultural diversity, without unduly limiting the free global circulation of cultural goods and services.

The obvious problem with such interpretation is that for it to equally include television, it would have to extend the scope of Article IV to the GATS regime. At this stage in the WTO, however, such extension would appear less problematic given the present possibility for Members under the GATS to exempt certain measures from the MFN clause and NT. Notwithstanding this problem, such extensive interpretation is backed by the quasi-authentic explanation for the exclusion of television from the GATT given by the contracting parties throughout the 1960s. It could also be regarded as being backed by the recent trend of the WTO Appellate Body to apply the principle of evolutionary interpretation as formulated by the ICJ. For instance, in the Shrimp Case, the AB stated:

> where concepts embodied in a treaty are “by definition, evolutionary”, their “interpretation cannot remain unaffected by the subsequent development of law … . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”

Additionally, the AB in Japan – Alcoholic Beverages has declared that “[A] fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [VCLT] is the principle of effectiveness (ut res magis valeat quam pereat), which means:

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.

Given the rapid technological innovation of films from their invention until the drafting of the GATT, as well as the trend of the cultural industries towards convergence, it appears possible to take the view that the term “cinematograph films” is “by definition, evolutionary”. In line with such interpretative finding, it would be possible to argue that in today’s context, the provision could be read in a way to comprise of the cultural industries as a whole. Otherwise, it could be added, it would mean a deviation from the original intention of the drafters of the GATT to allow contracting

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553 See supra not 524.
555 Japan – Alcoholic beverages, supra note 63 at 12, quoting from the Yearbook of the International Law Commission (1966), vol. II, p. 219; see also US Shrimp Case, supra note 554 at para. 131 (Fn 116).
parties a certain degree of flexibility with regard to certain products, which were considered of pertaining more to the sphere of cultural than to the one of trade policies.

Furthermore, from the entry into force of the GATT 1947 to the creation of the WTO and until today, screen quotas are being used. This means that screen quotas continue to have a practical relevance. In connection with this practical relevance, it is difficult to estimate to what extent the existence of Article IV has contributed to the overall success of the GATT during the past decades. Nevertheless, from the generally moderate use of Article IV – I have to recall here that theoretically CPs could adopt a screen quota of 100% – it can be deduced that there does not seem to exist a great danger of a radical cultural relativism. This is even more astonishing in light of some domestic markets which feature a domination of foreign films up to 95%. Therefore, a more extensive reading of Article IV GATT could allow for the assumption that in light of the future uncertainty linked to the consequences of new media, room for domestic regulatory manoeuvre may help to reduce fears and thus increase the overall acceptability of the multilateral framework. By way of the *argumentum e contrario*, therefore, a minimal margin of domestic regulatory freedom may in turn enhance compliance and with it the overall functioning of the system of international trade.

Finally, for these reasons an extensive interpretation of Article IV GATT appears to yield a number of positive results which can be described as strongly desirable. Unfortunately, *de lege lata*, such extensive interpretation, although rooted in a combination of important single elements, is still by and large legally obstructed by the wording of Article IV GATT. Thus the wording of Article IV GATT may still be considered by the Appellate Body, certain WTO Members as well as other commentators as an obstacle they are not prepared to overcome.

To conclude, the principal element of the legacy of Article IV GATT is, hence, to function as a reminder for present and future WTO Members to look for ways of how to strike a better balance between global trade (i.e. the Members’ commercial interests in economic integration) and global culture (i.e. the Members’ respective cultural policy objectives as the foundation of global cultural diversity). *De lege ferenda*, Article IV GATT, therefore, can be interpreted as a mandate for the present and future negotiation rounds to permanently consider alterations in the balance between cultural and commercial concerns and to, if necessary, adapt the overall legal framework to these changes.

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§ 6.3. Antidumping, Subsidies, and Countervailing Duties – Articles VI and XVI GATT

§§ 6.3.1. Trade Creating or Inhibiting Practices

The next series of provisions concern the dumping and the subsidisation of goods as well as the respective, antidumping or countervailing measures taken against it. What Bela Balassa has pointed out for export subsidies equally applies to dumping, namely that they are in their economic effect symmetrical to import protection (through tariffs). Nonetheless, there are important differences in their regulation. This difference is important because dumping and subsidisation are closely linked to the theory of comparative advantage. In their effects they lie at the heart of the problem of finding the balance between the conflicting interest of, on the one hand, guaranteeing a competitive domestic industry, and, on the other hand, of fostering the international exchange of goods to the mutual benefit of all. In an increasingly complex trading environment this balance becomes more difficult to strike. As a result, a domestic industrial policy based on one single measure often does not yield the desired results. In this respect, the discussion of Article IV already indicated that for a viable domestic cultural industry screen quotas are only one, but not necessarily the most efficient measure. Their potential efficiency mainly lies in their successful combination with other measures, notably subsidies and fiscal measures.

For the cultural industries the principal regulatory challenge lies in the creation of an internationally competitive environment, which is capable of satisfying the local and global expectations, mainly expressed in the double need for, on the one hand, a reliable domestic medium providing the relevant cultural and political information, and for a global exchange of cultural goods (and services) for the improvement of the international understanding between peoples, on the other.

In trade terms, the respective conflicting interests raise questions about the admissibility of either measures taken inside a specific country to support the domestic industry, or similar measures taken inside a specific country, but with the goal to compensate for measures that have their origin in an exporting country. The first set of measures concerns subsidies and the second set antidumping and countervailing duties. In addition, the said measures can originate from either public (subsidies) or private actors (dumping). Due to their potential impact on the free flow of trade, they are presented here under one section.

§§ 6.3.2. Dumping and Subsidies in the GATT: An Evolutionary Perspective

6.3.2.1. Article VI GATT and Subsequent Developments

Despite the difference in the genesis of dumping and subsidies but due to the common potential negative impact on the flow of trade, both phenomena were originally addressed under the Havana Charter before they were carried over to Article VI and XVI GATT. The interpretation and application of Article VI GATT has been faced with difficulties. For instance, the precise characterisation of antidumping and countervailing duties has been qualified as difficult, which has

558 On the role of the cultural industries in the fostering of the international understanding between peoples, see supra Subsection §§ 3.4.2.
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earned them the description as a “curious hybrid of tariff ideas and price discrimination theories of antitrust law”.560 Similar difficulties concerned the question about the exact relation between trade and competition policy.561 Equally, the issue of subsidies has been termed as a “policy-making minefield” because it involves a successful balancing of economic efficiency and political goals.562 Such interpretative difficulties, which also open a way for an abuse of antidumping and countervailing duties for protectionist measures, have led to an increase in problems with regard to dumping and subsidies. Since particularly during the late 1950s, peculiar practical problems have arisen with regard to the evidence of dumping or subsidisation, the calculation of the normal value and the export price, and the proof of a real or potential material injury.563

As a direct result from these problems, the contracting parties looked for ways to reduce the ambiguity and to increase the legal uniformity as well as certainty with regard to the rules on antidumping and countervailing duties as well as subsidies. For the field of dumping, these efforts led to the adoption of a separate agreement, the so-called “Antidumping Code”.564 The code was signed during the Kennedy Round (1962-67) and revised during the Tokyo Round (1973-79).565 Similarly, for the field of subsidies, the Tokyo Round negotiations resulted in the adoption of a separate agreement, the so-called “Subsidies Code”.566 The Subsidies Code was hailed as perhaps the most important of the non-tariff barrier codes negotiated in the Tokyo Round, but nonetheless shared the common flaw with the rest of the Tokyo codes of being a separate and plurilateral agreement.567

The adoption of the two codes, however, did not manage to remove most of the problems and, for dumping, there was even a rise in the number of investigations concerning antidumping and countervailing duties.568 For subsidies too, especially the US perceived the Subsidies Code as a failure and therefore the issue of subsidies was opened for re-negotiation during the Uruguay Round negotiations.569 Out of the single package deal concluded during the Uruguay Round negotiations, two new agreements, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Subsidies and Countervailing Measures emerged as a result, making their provisions binding for all WTO Members.570

560 Quoted from Cooper in World Trade and the Law of GATT, supra note 319 at 403-401.
562 See e.g. T. Collins-Williams & G. Salembier, “International Disciplines on Subsidies: The GATT, the WTO and the Future Agenda” (1996) 30 J. World T. 5 at 5.
565 On the results of the Tokyo Round, see e.g Jackson & Louis & Matsushita, supra note 340.
567 See Jackson & Louis & Matsushita, supra note 340 at 273.
A. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

The AD Agreement aims at facilitating the interpretation and application of Article VI of GATT 1994 in so far as action is taken under antidumping legislation or regulations.571 As such the agreement provides clarifications for numerous issues. For instance, with regard to the determination of dumping, Article 2:1 of the AD Agreement explains that:

a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

In paragraph 2, it is written that in the absence of a domestic like product, the determination is made by comparison with a comparable price of the like product when exported to an appropriate third country and that a fair comparison shall be made between the export price and the normal value.572 In subsequent articles, the AD Agreement also provides guidance for the determination of injury, the definition of domestic industry, and lays down rules for the initiation and subsequent proceedings of investigations as well as for the evidence to determine the existence, degree and effect of any alleged dumping.573 It also provides standards for the application of provisional measures, price undertaking, the imposition and collection as well as duration and review of anti-dumping duties and action on behalf of a third country.574 For the improvement of legal certainty and transparency, Members are required to notify Members of which products are subject to investigations and to maintain judicial, arbitral or administrative tribunals.575 Most importantly for the review process, Article 17 AD Agreement stipulates the application of the unified WTO DSU to antidumping procedures.576

B. The Agreement on Subsidies and Countervailing Measures

The SCM Agreement also aims at enhancing the transparency, stability as well as legal certainty in the realm of subsidies and countervailing measures. For this purpose, Article 1 of the agreement provides a definition of “subsidy”, which shall be deemed to exist when the following conditions are met: First there has to be a financial contribution granted by a government or any public body within the territory of a WTO Member.577 Second, the kind of financial contributions are listed exhaustively as comprising either a direct transfer of funds (e.g. grants, loans and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees), foregone or not collected government revenues (e.g. fiscal incentives such as tax credits), governmental provision of goods and services other than general infrastructure, or governmental purchase of goods, government payments to a funding mechanisms or entrustments of a private body of functions which would normally be vested in the government, as well as any form of income or price support.578 The third condition is that a benefit has been conferred by the financial contribution.579

571 Article 1 AD Agreement.
572 Article 2 para. 2.1. AD Agreement.
573 Articles 3-6 AD Agreement.
574 Articles 7-11, 14 AD Agreement.
575 Articles 12 and 13 AD Agreement.
576 Article 17 AD Agreement.
577 Article 1 para. 1.1. lit. a) (1) SCM Agreement.
578 Article 1 para. 1.1. lit. a) (2) SCM Agreement.
579 Article 1 para. 1.1. lit. b) SCM Agreement.
Furthermore, it is important to note that the SCM Agreement distinguishes three types of subsidies: (1) Prohibited (Part II); (2) actionable (Part III); and (3) non-actionable subsidies (Part IV). These categories are sometimes referred to as the “traffic light” (“red”, “amber”, “green” subsidies) approach. The distinction is of great use for governments in the planning of supporting measures. Especially, the third category, the one of non-actionable subsidies, means the recognition of the fact that government assistance for various purposes is widely provided by Members.

The provisions in the final part of the agreement spell out, in a manner similar to the AD Agreement, the conditions and procedures applicable to the imposition of countervailing measures. In concreto, they provide guidelines for the initiation and subsequent proceedings of investigations, the notification of evidence, the organisation of consultations and a method to calculate the amount of a subsidy in terms of the benefit to the recipient. A final part on dispute settlement system and several Annexes conclude the agreement.

C. Summary

In sum, both the AD and the SCM Agreement have added new criteria and standards for the determination of dumping and subsidies. Notably the unification of the agreements under the aegis of the WTO and its dispute settlement system mark an important step towards greater coherence. However, specific problems underlying dumping and subsidies still persist and will continue to provide new challenges. Among these challenges, as will be shown below, are those induced by the special economic dynamics inherent in the cultural industries.

§§ 6.3.3. Subsidies, Antidumping and Countervailing Duties in Connection with the Cultural Industries

6.3.3.1. General Remarks

The lengthy and detailed regulation of subsidies, antidumping and countervailing duties in separate agreements in addition to the relevant provisions on the GATT reflect, first of all, the complexity of the issue. The complexity is inter alia due to the fact that the GATT is principally called to cover trade in all goods. Specific features of certain industries, such as notably of agriculture and civil aircraft, in the context of subsidies, have been only marginally recognised. To this complexity is added the adverse affects to international trade in goods in the hands of either private actors in the case of dumping, or in the hands of public actors in the case of subsidies or countervailing duties. Given the non-existent (or only limited) access of private individual in the WTO DSB, the mixed

580 See Guide to the Uruguay Round Agreements, supra note 372 at 92.
582 See Fn 23 to Article 8 SCM.
583 Articles 11-14 SCM Agreement.
584 Part XI Articles 31-32 and Annex I-VII SCM Agreement.
585 For agriculture, cf. Articles 3 para. 3.1, 5 last sentence, 6 para. 6.7., 7 para. 7.1., 10, and 15 para. 15.4. SCM Agreement and the Agreement on Agriculture. For civil aircraft, see Article 6 para. 6.1. (Fn 15) and the plurilateral Agreement on Trade in Civil Aircraft, Annex 4, available at http://www.wto.org.
586 Note that access of private actors to the WTO DSB has been discussed mainly in the context of the admissibility of amicus curiae briefs; e.g. US Shrimp Case, supra note 554 at para. 91, A.E. Appleton, “Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body’s Hat?” (2000) 3 J.I.E.L. 691, and “Issues of amicus curiae
public-private involvement is difficult to govern. Moreover, the tools described above can serve as an offensive instrument to open (or dominate and monopolise) a foreign market, as well as a defensive instrument to bar foreign goods from a domestic or a third Member country’s market. As a final point, I would like to stress that subsidies are equally at the heart of the spirit of international trade, since they are the principal support and, therefore a sort of artificial comparative advantage, for asymmetries in the natural constituents of a Member’s economy. The past and continuing controversy, as well as the recurrent seizure of the DSB underline the privileged role subsidies, but also related questions about the degree of state intervention in trade in the form of antidumping and countervailing duties, play in the multilateral trading regime.

Based on the above analysis the applicability of the rules on antidumping and countervailing duties as well as subsidies to various goods pertaining to the cultural industries shall be tested here. The point of departure, is the problem of dumping, which will be followed by an evaluation of the role of subsidies and the utility of countervailing duties.

6.3.3.2. Dumping and Price Discrimination in the Cultural Industries

In order to assess the relevance of Article VI GATT and the AD Agreement for the cultural industries, it is necessary to cast some light on the specific nature of cultural goods and services. Although, services are not covered by the GATT, for the present purpose no strict separation between the various cultural goods and services, such as books, motion pictures, music recordings, and video as well as broadcasting, shall be made, since, in absence of any evidence to the contrary, the major principles apply to both of them mutatis mutandis.

In addition to the special cultural, social and political aspects of the cultural industries, there exists a controversy as to the mere economic characterisation of the cultural industries. Already from the 1920s onwards, Walter Benjamin and Theodor W. Adorno have undertaken important work in the peculiar economic dynamics of the cultural industries. Later, during the 1960s, the field of cultural economics carried the process further and yielded some interesting results as regards the economic particularities inherent in the various cultural goods and services. The contrasting view is exemplified in the words of William Johnston who in 1926 contended that:

From manufacturer to consumer it [the motion picture business] functions exactly like the industries of automobiles, clothing, food products or of any manufactured product.

The same view was expressed in the words of former FCC Chairman Mark Fowler, who called television “just an other appliance”, a “toaster with pictures”. This last statement not only reveals the continuing controversy over the cultural/commercial as well as good/service character of television, but also over the special treatment of the media, or government intervention versus non-interference within domestic and international trade.


587 See supra Section § 1.1.

588 See supra Section § 3.3; for an overview, see M. Blaug, “Where are We Now on Cultural Economics?” (2001) 15 J. Econ. Surveys 123; see also J. Dayton-Johnson, “What’s Different About Cultural Products? An Economic Framework” Report Prepared For the Department of Canadian Heritage (November 23, 2000).

589 “The Structure of the Motion Picture Industry”, supra note 474 at 20, partly contradicting himself by denouncing some of the particularities of the industry, such as the role of copyrights (“selling” is a misnomer; “renting”, is the proper term”) or the star system.

590 Quoted in Sunstein, supra note 9 at 507.
Leaving aside for the moment the special cultural, social and political aspects, making up the dual character of the cultural industries, the application of Article VI GATT and other relevant provisions, to antidumping duties raises particular elements that need to be assessed in the context of the cultural industries. The dominant factors for the launch of antidumping measures are the determination of the normal value of the product, the cost of production, the comparable price for the like product ("produit similaire") in the ordinary course of trade, the definition of domestic industry and the determination of injury. In order to subsume the cultural industries under these legal concepts, it is necessary to cast some light on the modes of production as well as the organisation of the culture industry.

The first peculiarity inherent in most cultural goods is the feature of their initial, (relatively) high production costs and the (relatively) low or close to zero reproduction and distribution costs. In short, reproduction costs of a sort, if applicable to the Ford T model would have definitely enchanted Henry Ford (1863-1947). The low reproduction costs consequently favour economies of scale and of scope.591 In the economist's words, this means that, representative for all sectors of the cultural industries, “the market for films is transnational”.592 Closely linked to this peculiarity is the risk factor, characteristic for the cultural industries. From the risk there arise numerous modes of risk management.593 The risk is first due to the great uncertainty in the production process, depending on a great variety of production factors related to the location, the cast and crew and financing and technology.594 Linked to that a further risk element is found in the initial high investment costs that stand in stark contrast to the relative low cost the ultimate consumer pays as well as the great uncertainty of appeal of the final product. The time factor is also important and qualifies goods and services of the cultural industries as highly perishable goods.595 The uncertainty of success independent from the initial investment is coupled with the uncertainty of the statistical data that become available after the release. On the one hand, for instance, Waterworld (1995) has cost according to different sources between $ 172 to 225 million and grossed either $ 55 or 260 million.596 On the other hand, the film A Room with a View (1986) is reported to have cost only $3 million and grossed more than $68 million.597 From a regulatory perspective, the quite important uncertainty of reliable financial data is also explained by the high concentration, the resulting temptation for

591 See Sinclair, supra note 121 at 36-7.
592 Quoted from Acheson & Maule & Filleul, supra note 544 at 515.
593 See generally the study on risk and trust in the cultural industries by M. Banks et al., “Risk and trust in the cultural industries” (2000) 31 Geoforum 453.
594 For example, the delay in shooting of the film Cold Mountain due to an actor's wife going into labour cost the production company $1.1 million, see K. Auletta, “Beauty and the Beast” The New Yorker (December 16, 2002) 65 at 76; on the risk generally, see e.g. “The Structure of the Motion Picture Industry”, supra note 474 at 21, enumerating non exhaustively as reasons for the hazardous elements in production costs weather conditions, illness, accidents, inadequate studios.
595 See e.g. Odlum, supra note 474 at 22, stating that experiences of US producers in the 1920 reflect that about 43% of the total revenues are earned in the first 13 weeks, 73.5% during the first 26 weeks, and almost 100% during the first 60 weeks. General factors for the perishable character are the appeal of novelty and technological innovation; see e.g. Benhamou, supra note 202 at 83, Throsby, supra note 89 at 118-9, and “Economics of the US Motion Picture Industry”, supra note 178 at 183.
collusion and the importance of prestige in the “sunshine” or “dream fabric”, as the motion picture as part of the culture industry, is often termed.

Next to trust, other forms of risk management comprise attempts to maximise the audience and to move towards diversification and oligopolistic or, if possible, monopolistic market control, through vertical and horizontal integration. At the same time various competitive and anti-competitive practices, such as zoning, block booking and blind booking, runs and clearances, lump sum payments, price fixing and predatory pricing, “tying-in arrangements”, the use of “prototypes”, the institution of paloya and many more, have developed. These various practices crystallise in numerous forms of price discrimination, such as the division of both national and international markets (e.g. Zone 1, 2, 3 etc), the distinction between groups based on age, gender, language (e.g. reduced ticket prices), the distinction between various carriers of content of the cultural industries (e.g. the production chain of a book, to a film, or the sound recording to a soundtrack), differences in time (e.g. reduced prices on Wednesdays, graduated release dates). In most cases, the various forms of price discrimination are combined, such as the different release dates for different geographic areas through different distribution carriers and channels.

Another important peculiarity is found in the dominantly “public good” character intrinsic in the cultural industries. Unlike a bomb, which is ‘consumed’ when exploded, goods and services of the cultural industries can be consumed practically infinitely if one is ready to accept the patina of dog’s ears in books or bumping record needles. Linked to the public good character is the problem of externalities. Media products are capable of creating considerable positive and negative externalities.

As a result, the externalities of media products lead to an improper pricing with detrimental effects for the functioning of the market.

Finally, the cultural industries’ last peculiar characteristic is its proximity to intellectual property rights. The history of the cultural industries could be written in so-called “patent wars”, and the star system has been described as the trademarks of the producing companies. Of outstanding relevance, however, are copyrights. C. Edwin Baker has described copyright as a “form of propertization in the economically peculiar realm of communications”. The important difference to most other products is thus the possibility to distinguish the intellectual input from the actual material input. In economic terms, the separation of the two is further aggravated by the distinction of editorial from advertising content. In the particular context of dumping, this characteristic has notably important repercussions for the estimation of the value of the good (or service) in question.

599 See generally Subsection §§ 3.3.2; see also United States v. Paramount Pictures, Inc. et al., (Supreme Court of the United States, 1948), 334 U.S. 131 and K.G. Fox, “Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry” (1992) 21 Hofstra L. Rev. 505 [hereinafter “Paramount Revisited”].
600 See especially the analysis in Media, Markets, and Democracy, supra note 1274 at 8-10, 20-22; see also Ming Shao, supra note 536 mainly at 119-121.
601 See Media, Markets, and Democracy, supra note 1274 at 41-43.
602 See infra Chapter 8.
603 See “The Motion Picture”, supra note 460 at 7 and 13.
604 Media, Markets, and Democracy, supra note 1274 at 20.
605 See Canada Periodicals Case (AB), supra note 65; see Media, Markets, and Democracy, supra note 1274 at 11-12; for the implications of the confusion of editorial and advertising content in the news sector, see E.S. Herman & N. Chomsky, Manufacturing Consent – The Political Economy of the Mass Media (New York: Pantheon Books, 2002) at 14-18 and the discussion in Subsection § 1.1.
Having outlined these merely economic distinct characteristics, the establishment of the facts necessary for dumping to occur, is rendered more difficult through the inseparable linkage of the economic peculiarities with the cultural (and social as well as political) aspects. Among the many peculiarities mentioned, price discrimination is a comfortable means of assuring additional revenues assisting in the minimisation of risk.

Mainly, but not only, the United States due to the specific structure of its domestic market and its role as the greatest exporter of cultural goods, has been confronted with dumping accusations. Based on the big size and the linguistic homogeneity of the domestic market, it is contended, the US can recover their production costs in the home market (often defined as including Canada too) and consequently “dump” their products at extremely low prices in foreign markets, resulting in an unfair competitive advantage of US producers over its world-wide competitors.\textsuperscript{606} Likewise, it opens the possibility of discriminating prices according to the varying structure of foreign markets. For instance, prices for feature-length US films for television ranged from $90-150 in Bermuda to $30,000-40,000 in France.\textsuperscript{607} Equally, one hour of drama programming is sold to the Caribbean Island of Aruba for $80-100, to the Canada for about $10,000-60,000 and to the UK for $20,000-100,000.\textsuperscript{608} The temptation to price discriminate is induced by the cheap reproduction costs, which bestow on the cultural industries more characteristics of an investment rather than of a traditional good.

The issue becomes even more complicated when the various implications the cultural element inherent in the cultural industries are taken into account. Especially, the determination of the “normal value” is faced with enormous obstacles. Since the production costs of a film can range between approximately € 40,000 and 225,000,000 or higher, it is impossible to evaluate the normal value, since the final tangible product is usually a film reel. Like a Van Gogh painting’s value is not in the canvas and paint, but in the accumulation of historical, aesthetic, symbolical or other forms of value, the ultimate determinant for a film’s value lies in the intellectual, artistic and cultural content.\textsuperscript{609} Similar criteria determine the value of other cultural goods and services. Consequently, any attempt to determine the value or price of a cultural good is difficult.\textsuperscript{610} Furthermore, attempts to determine the value or price of a cultural good through the intellectual, artistic and cultural content may appear subjective and additionally hail criticism for a dangerous intrusion into the aesthetic, artistic or cultural value of the said good linked with accusations of cultural or artistic paternalism, elitism, or unqualified censorship. Unfortunately, for the determination of dumping first the evaluation of the “normal value” and second the “comparable price for the like product (“produit similaire”) in the ordinary course of trade” are absolute terms of reference. I would like to recall that the AD Agreement specifies that throughout the agreement like product “shall be interpreted to mean a product which is identical, \textit{i.e.} alike in all respects to the product under consideration, or in the

\textsuperscript{606} See Ming Shao, supra note 536 mainly at 104-5 and C Hoskins & Finn & McFadyen, supra note 556 at 70.

\textsuperscript{607} Ibid.

\textsuperscript{608} See Hoskins & Finn & McFadyen, supra note 556 at 70.

\textsuperscript{609} For a useful survey of the various categories of value and, especially, the relation between economic and cultural value, see Throsby, supra note 89 at 19-41.

\textsuperscript{610} For some economic particularities of the cultural industries influencing also price, see also Hesmondhalgh, supra note 165 at 17-22.
absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.611

In the realm of the cultural industries, the strict requirement imposed by the term “identical” leads to absurd comparisons of the music of the Spice Girls to a Bach Cantata, or the films by the Indian director Satyajit Ray (1921-92) with films of the sort of Rambo I-V. Although there exist useful categorisations of films, books, television programmes, or music recordings in genres, they are inadequate to determine to a satisfactory extent their respective economic value. 612 For instance, the inadequacy becomes even more obvious in light of the agreement’s method of comparing a weighted average normal value with a weighted average of prices of all comparable export transactions and the cumulative assessment of effects of imports which are simultaneously subject to antidumping investigations.613

From this uncertainty springs equally the problem of determining the cost of production. Some cultural products, such as periodicals, television programs, but also films in the form of “product placement”, recoup the production expenses through both advertising and the sale to the final consumer. Moreover, through recourse to the “prototype” system, i.e. models for the production of other similar products across the various sectors of cultural products, which create synergy effects and help in reducing the (high) advertising costs, allow for the cross-subsidisation of a good, and finally distort the final price of the good in question. The precise calculation is further inhibited due to, as has been stated elsewhere, the lack of reliable statistical data, both because of differences in nomenclature as well as the interest of the industry itself.614

Another problem concerns the “cost of production in the country of origin” as an alternative to the “normal value”.615 Since many productions in the cultural industries often involve multinational corporations or, are either co-productions or else involve artists and staff of various nationalities, the determination of the country of origin poses serious additional difficulties. These are difficulties known from the experiences with domestic-content rules in Canada or similar rules concerning “European works” within the framework of the Television without Frontier Directive.616

Similar difficulties persist in the determination of injury and the definition of domestic industry. 617 The AD Agreement specifies that

“injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.618


612 For instance, for the difficulty of blurred lines between the commercial cinema and the art film, see Auletta, supra note 594; see also Balio, supra note 597.

613 Cf Articles 2 para. 2.4.2. and 3 para. 3.3. AD Agreement.

614 See supra note 203.

615 Article 2 para. 2.2. AD Agreement.


617 Articles 3 and 4 AD Agreement.

618 Article 9 Fn 9 AD Agreement.
In exceptional cases of an existing market domination of up to 95%, a material injury or even material retardation of a domestic industry seems practically *prima facie* established. Nonetheless, any investigation into dumping, in order not to be challenged before the WTO DSB, will have to meet the procedural standards laid down in Article 5 AD Agreement.

Finally, this situation leaves the Member state authority concerned with alleged dumping with a great uncertainty as regards the conditions for the levy of antidumping duties. The only relatively certain method of comparison is found in the continuing division of markets into submarkets and of categories in various subcategories until the final direct comparison of each product – whether a film, book, music recording or a television soap – alone. This would mean that antidumping duties could be levied only on a product-by-product basis, which would certainly result in a huge gap between the administrative costs and the benefits obtained. The complexity and difficulty associated with the levy of antidumping duties, revives old questions about the overall utility of antidumping duties on all goods, and especially on those pertaining to the cultural industries. The issue of dumping focusing mainly on the controversy over its welfare effects (and less on its implications for social, cultural, artistic or political values), however, can also be addressed through another angle, the underlying spirit of the multilateral trading system as a whole. This last point can be better assessed in connection with the issue of subsidies and, subsequently, of safeguards.

6.3.3.3. Subsidies and Countervailing Duties in the Realm of the Cultural Industries

For countervailing duties, most of the points raised in the context of dumping apply *mutatis mutandis*. The major difference to dumping is that the price difference between imported and domestic goods stems from government payments to an enterprise, or an industry, instead of from a private company’s marketing and pricing strategy. For the levy of a countervailing duty, a subsidy must be at the origin of the alleged injury and there must be a causal link between the subsidised imports and the alleged injury to the domestic industry. Once a subsidy is believed to be at the origin of an injury, the injured Member can either request consultations or take countervailing measures. Since subsidies are at the origin of both, the main focus is in the present context is on the role of subsidies for the cultural industries.

Many countries maintain or introduce subsidy programmes in the cultural industries’ sector. At the same time, international trade flows in the cultural industries have been tremendous since their inception and are – as predicted long ago – constantly rising. Their international importance is
equally mirrored in an increasing regulatory activity on the regional level, such as in the frameworks of NAFTA, the EU or MERCOSUR. Last but not least, the economic and cultural significance of the cultural industries has also been realised in the local, especially urban, context. These factors help to explain the incentives for the subsidisation of the cultural industries, which are found in the “transnational market imperative” caused by the high production costs coupled with low reproduction costs. In light of the already existing international inequality, the transnational sale of cultural goods and services poses a threat in both cultural and economic terms, to the regional and local level in terms of a cultural homogenisation and an economic and financial loss due to the displacement of human and financial capital.

Hence, the combined economic and cultural, as well as global and local significance, explains to a large extent the interest of governments and sub-governmental bodies to subsidise. Almost a decade of experience with the new SCM Agreement shows the continuing significance of subsidies in the multilateral trading regime. Numerous disputes centred around countervailing duties and subsidies have been decided by the WTO dispute settlement system. The subject of subsidies was raised in a great variety of goods ranging from civil aircraft to cotton and sugar. This means that if subsidies are granted for ordinary goods their relevance is a fortiori established for the cultural industries. Nonetheless, it is remarkable to find that no case has yet arisen that deals with the issue of subsidies in the field of the cultural industries. Of course, the only exception is the Canada – Periodicals case, where the AB reversed the Panel’s original finding and concluded that the “funded” postal rates scheme is justified by Article III:8(b) of the GATT. Indirectly, perhaps a similar situation was given in Turkey – Taxation of Foreign Film Revenues, where the US requested consultations and later the establishment of a panel regarding Turkey’s discriminatory regime of taxation of revenues generated from the showing of foreign films, a twenty-five percent municipality tax on box office receipts, in a manner less favourable than its taxation of revenues generated from the showing of domestic-origin films. Although this case concerned primarily the national treatment principle of Article III GATT, it could – depending on the subsequent use of the revenues collected – be

largest industry in the world. See also Strong, supra note 1269 at 98-99, reporting disproportionally high growth rates for the copyright industries, plus the fact that they employ more workers than any other manufacturing industry, and have a favourable impact on the US foreign trade in form of an approximate $34 billion trade surplus of copyrighted goods in 1990.


626 See the index of disputes issues, WTO Homepage, online, http://www.wto.org/.

627 Compare for the GATT (GATS): Canada Periodicals Case (AB), supra note 65; for the GATS Canada – Measures Affecting Film Distribution Services (Request for Consultations by the European Communities) WT/DS117/1 S/L/53 (January 22, 1998) [hereinafter Canada Film Distribution]; and for TRIPS, see Subsection §§ 8.2.2.

628 Canada Periodicals Case (AB), supra note 65 at 35.

629 Turkey – Taxation of Foreign Film revenues (Request for Consultations by the United States), WT/DS43/3-G/L/85 (June 17, 1996) and Turkey – Taxation of Foreign Film revenues (Request for the Establishment of a Panel by the United States), WT/DS43/2 (January 10, 1997).
construed as to belong to the sphere of subsidies. The case, however, was settled by a mutual agreement.630

The main reason for this absence of case law with regard to subsidies in the sphere of the cultural industries must be sought in the general regular uncertainty governing the cultural industries after the Uruguay Round, especially with regard to the unsatisfactory answer to the good or service characterisation. The goods/service distinction is important, because with technological progress the importance of cultural goods diminished in favour of cultural services. As far as the regulation of subsidies is concerned, no equivalent Agreement, such as the SCM for goods, has yet been adopted. Another reason may be that given that the majority of states subsidise these sectors, there is a sort of “silent agreement” not to challenge these support regimes. Another interpretation may well be that it is the general “taboo” character that surrounds the invocation of cultural considerations within a trade context, which is exemplified in the general reluctance of defendants to explicitly raise the “cultural defence” in support of the targeted domestic policy.631 The reluctance may well be caused by the defendant’s knowledge about the economic impact of the contested measure in which case also the relevant trade rules need to be scrutinised in their sufficient consideration of the link between culture and economics. Or, the reluctance may stem from a fear about the emergence of a cultural relativism debate within the sphere of international trade rules, which again should give rise to serious discussions about the degree of harmonisation of national legislation balancing between the cultural and legal diversity and the removal of barriers to trade in their capacity of creating an incentive to engage in the international exchange of goods and services.

For the moment it is too early for a straightforward answer to the possible impact of the WTO current subsidies regime on the cultural industries. Before definite statements can be made, several preliminary questions, notably the goods/service distinction in connection with the present asymmetry between the subsidies regime under the GATT and GATS, need to be addressed. As the past has shown some WTO Members have a major interest in limiting the use of subsidies in the cultural sector, while numerous others remain highly dependent on some sort of government financial support632

The principal issue for the role of subsidies in the context of the cultural industries is the recognition of their complex combined cultural and economic character. Their cultural content manifests itself in specific economic characteristics, which are capable of rendering the efficiency and legitimacy of trade rules absurd. Especially, their public good character, plus their educational potential and wide societal impact as well as the usual high initial production costs seem to justify the use of subsidies. Therefore, like other industrial branches, such as agriculture but also the aircraft industry have received differential treatment, it seems necessary to address the specific needs of the goods and services making up the cultural industries. It must be recalled here, that the most important role of

630 Turkey – Taxation of Foreign Film revenues (Notification of Mutually Agreed Solution), WT/DS43/3-G/L/177 (July 24, 1997).

631 See e.g. the Canada Periodicals Case, infra Subsection §§ 9.1.3; see also Case 269/83, supra note 65 or Japan—Alcoholic beverages, infra note 63.

632 See e.g. Subsidies for Services Sectors: Information Contained in WTO Trade Policy Reviews (Background Note by the Secretariat), S/WPGR/W/25 (January 26, 1998) [hereinafter Subsidies for Services Sectors], see also Add. 1-4.
subsidies lies in the correction of the basic equilibrium underlying the multilateral order and therefore must be given a due place in the future WTO architecture.633

§§ 6.3.4. Subsidies and Dumping: Some of the Challenges Ahead

The issue of anti-dumping and countervailing duties in connection with subsidies represents a highly complex subject matter within the framework of the WTO. First, dumping or subsidisation differ only by way of their origin in either private or public actors, but can be regarded similar in their effect on international trade. It is important to stress here that Articles VI and XVI GATT do not prohibit, but only condemn dumping or subsidies, if they have harmful or other adverse effects on trade. From the outset, it must be acknowledged that both measures constitute important elements in the dynamic factory of international trade. In line with the complexity of the issue, it must be differentiated between various forms of dumping or subsidisation. For instance, in the case of dumping one must distinguish various managerial or structural measures taken to increase the competitiveness of a product in a foreign market from clear unfair or anti-competitive practices such as concertation, collusion, or predatory dumping (pricing) with the intent to remove competitors from the market concerned. A similar differentiation applies to subsidies, which can either contribute to the establishment of a viable domestic industry without discriminating between domestic producers and foreign investors, or the mere protection of an influential branch of a domestic (as well as foreign) industry.

It is a special characteristic of complex systems that small changes in one part immediately impinge upon the rest of its constituents as well as on the system as a whole. Applied to the regime of AD, CVD and subsidies under the WTO, this means that changes in their regime will certainly have an impact on the flow of goods and services. At the same time, changes in other sections of the GATT (or GATS) will also affect the utility of AD or CVD duties. In the analysis of AD and CVD duties, or subsidies, the close relation to competition law rules and to various other safeguards as well as exceptions emerged. It has even been suggested to repeal the AD regime altogether and to replace it, for instance by due amendments to the safeguard clause in Article XIX GATT.634 From this it follows that on a minor scale, for instance, the regime for subsidies (or dumping) depends largely on the regime for countervailing duties (or AD duties). On a larger scale, the scope of allowed subsidies depends on to what extend exceptions or safeguard clauses are interpreted narrowly or broadly. For the area of dumping the central question concerns the existence of relevant competition rules.

From the systemic nature of the WTO framework, the divergence in the regulation of subsidies under the GATT and the GATS appear problematic. As another issue, the recognition of measures of both public (subsidies) and private (dumping) origin also raises important questions about the involvement of private actors, both natural and legal persons.

With regard to the cultural industries, it is one of their predominant features to challenge not only one or more provisions falling either under the GATT or the GATS, but instead the trading system in its entirety. For the specific context of AD, CVD and subsidies, the importance for the cultural institutions in the law of the world trade organization


634 See Dale, supra note 620.
industries lies in the realisation of a legal framework which duly recognises their economic specificities and allows for these specificities to be taken into account within cultural and other societal implications.

Linked to the realisation of such a legal framework, the method of implementation is of great interest, particularly in relation to the complex issue of dumping and subsidies. In this process of implementation, the DSB assumes a crucial role. Leaving aside the different cases of various industries in difficulties, it is interesting to note three recent cases in the field of dumping and duties, which concerned not a certain number of measures but national laws of a general nature. These cases not only provide useful guidance for the implementation of the AD and the SCM Agreement by other WTO Members, but also raise important issues about the implementation and notably the degree of harmonisation of national laws.

First, in United States – Anti-Dumping Act of 1916, the United States Revenue Act of 1916, which “allows, under certain conditions, civil actions and criminal proceedings to be brought against importers who have sold foreign-produced goods in the United States at prices which are “substantially less” than the prices at which the same products are sold in a relevant foreign market”, was found to be inconsistent with the United States’ obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement.635 A similar violation was found in the second case, the United States – Continued Dumping and Subsidy Offset Act 2000, which concerned the imposition of AD and CVD duties and their subsequent distribution to affected domestic producers.636 In the case a long list of complaining parties argued that the United States Continued Dumping and Subsidy Offset Act of 2000 violated a number of provisions in inter alia the AD Agreement, Article VI:2 of the GATT 1994, the SCM Agreement and the WTO Agreement.637 In its ruling, the AB upheld the majority of the Panel’s findings, which found the US in breach of its obligations arising from the said agreements.638

The third case covered questions surrounding the consistency of the United States FSC Replacement and Extraterritorial Income Exclusion Act with the SCM Agreement, the Agreement on Agriculture, and the GATT 1994.639 In its report, the AB again upheld most of the Panel’s findings and found that the contested measure constitutes a prohibited export subsidy.640 The AB also found that the measure is inconsistent with Article III:4 of the GATT 1994 because it accords less favourable treatment to imported products as compared with like products of United States origin.641 The case is of major relevance, since it not only sheds light on the complex regulatory environment of subsidies, but also because it touches upon the sensitive issue of national systems of taxation. Based on the implications for the US tax system and the financial risk involved, the ruling has been received with critical voices in the US.642 It is noteworthy that before the Panel the scope and

637 Ibid. at paras. 1-10.
638 Ibid. at para. 318.
640 Ibid. at para. 256.
641 Ibid.
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The implications of the case for the tax system also raised questions about the competent international forum. According to the US, the EC should have raised the issues related to the FSC before the Organization for Economic Cooperation and Development (OECD) which has been the international forum primarily responsible for addressing international tax issues since its formation in 1961.643

The three cases are interesting because of their potential impact on the future of the WTO framework, during the next negotiation round(s). Particularly, the ongoing examination of national laws dealing with dumping and subsidies for their consistency with multilateral trade rules is of great relevance for the future of the cultural industries. Traditionally, it was the US that pushed its WTO partners towards the removal of subsidy programs, especially in the cultural sector. Suddenly, however, it is the US which is confronted with a critical legal examination of its own legal regime and, notably, its relevant tax laws.644 These domestic laws determine to a large extent, what is called a country’s, “business culture”, but also various social concerns. With the impact on these laws and, particularly on the US business culture, interesting developments may follow.

The regulatory challenge will notably be how to best develop the relevant WTO rules in order to reconcile existing disparities in the national laws regarding dumping and subsidies with the need for multilateral rules guaranteeing the degree of legal certainty necessary for the creation of a favourable business environment.645 In short, and in the words of Trebilcock and Howse, the challenge is to strike a balance between trade liberalisation and regulatory diversity.646

is noteworthy that the subsequent Decision of the Arbitrator finding appropriate the amount of countermeasures proposed by the European Communities in the amount of $4,043 million; United States – Tax Treatment for “Foreign Sales Corporations” (Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement - Decision of the Arbitrator), WT/DS108/ARB (August 30, 2002).


644 See Skeen, supra note 642 at 103-4, comparing the US and EC system with regard to the difference of indirect and direct taxes and their social impact (regressive or progressive).


646 “Trade Liberalization and Regulatory Diversity”, supra note 69.
§ 6.4. The General Exceptions of Articles XX GATT and XVI GATS

§§ 6.4.1. General Remarks on the Nature and Interpretation of Exceptions

6.4.1.1. The Need for Flexibility: Some Theoretical Considerations

In order to respond to the permanently changing conditions based on the natural flux of time (panta rei) as well as to successfully encompass the complexity of so-called “hard cases”, law has developed certain mechanisms guaranteeing a sufficient degree of flexibility to account for and to adapt to changes in the regulatory environment. Such flexibility is highly necessary in the field of the cultural industries, when considering the rapid development of their various technology-prone sectors. Aware of the flux of time, the GATT also foresaw several provisions aimed at duly confronting this challenge, as the example of Article IV GATT showed. Another set of such provisions are found in the so-called safeguard measures and escape clauses for balance-of-payment problems and other emergency actions. Although these provisions have been repeatedly invoked as a possible remedy against a potential threat of the domestic cultural industries from unrestricted international competition, their overall utility for achieving a more culturally sensitive regulatory environment within the WTO is doubtful. The doubts arise mainly from their temporary applicability. A potentially more promising set of provisions is therefore found in Article XX GATT (and XVI GATS), which provides several general exceptions to the trade obligations laid down in the GATT (GATS). The reason for the existence of these general exceptions has been explained by John H. Jackson as follows:

No international agreement, or domestic law for that matter, can long exist without some provision, formal or informal, for relaxing legal norms in certain circumstances.

The need for flexibility, it has been said, arises from the time factor in connection with the need for coherence and consistency among an increasing number and growing complexity of legal sources. The due confrontation of this need, however, is often obstructed by a general trend to enact ever increasingly precise and technical norms, while expanding the field of regulation altogether. This is linked to the growing fragmentation in the perception of life, according to which different phenomena require different legal approaches. The result is an increasing complexity of the legal order due to an ever growing number of separate sets of legal norms, which also reached the GATT through the adoption of so-called “codes”. According to the past (perhaps only partly conscious) perception, the application of these codes advanced by and large in isolation from each other through a dialectical process of mediating between concurring opposites, usually found in the conflicting parties to a dispute. This process could continue for a long time, until, for instance, the body of case law has grown, hence, pressuring for change and ultimately the respective code

647 Cf. H. Keyserling, Problems of Personal Life (London: Jonathan Cape Thirty Bedford Square, 1934) at 134-135, writing that “a judicial system will be less and less apt to do justice to reality, the more the latter becomes differentiated. All statistics allow the unique case to slip through them and the more humanity evolves, the more will it be precisely the uniqueness of each individual and of each special case which matters.”


649 See Footer & Graber, supra note 48 at 140-1, Bernier, supra note 620 at 121-2 and S. Cahn & D. Schimmel, “The Cultural Exception: Does it Exist in GATT And GATS Frameworks? How Does it Affect or is it Affected by the Agreement on TRIPS?” (1997) 15 Cardozo Arts & Ent. L.J. 281 at 284-6.

650 World Trade and the Law of GATT, supra note 319 at 535.
concerned became either amended or repealed to be finally replaced by a new one. Eventually, the new code then affected the balance underlying the entire legal system exercising a vital legal pressure to further changes in other codes, hereby keeping the ‘millstones of justice in motion’. In this process general exceptions may provide an important regulatory tool in order to minimise the danger of friction caused by the legal fragmentation of life in different aspects, such as international, municipal, public, criminal, civil, or especially for the present context in trade and non-trade issues. It follows that linked to the time factor, the need for consistence between different legal norms provides a second reason for the introduction of exceptions in legal instruments.

It must be noted that this traditional lengthy process, however, became challenged since the early 20th century by important changes in our common understanding of perception due to an acceleration of our sensory rhythm. These changes are, nonetheless, only gradually becoming recognised in the sphere of law. The gradual recognition surges in various other methods proposed for reconciling differences, such as the intertwined concepts of legal pluralism and regulatory diversity, or the subsidiarity as well as the introduction of cross-section or integration clauses.651 The present chapter, however, confronts the challenge of the reconciliation through the use of exceptions between state sovereignty and multilateral international uniformity on the one hand, and trade and non-trade issues, on the other.

6.4.1.2. Exceptions in the GATT/WTO Framework

A. Reconciling Trade with Non-Trade Issues

In the context of the GATT system, the primary role of the general exceptions is to reconcile conflicting interests, and especially trade issues with other, so-called “non-trade”, or not directly trade-related issues in the regulation of which governments may have a legitimate interest. Their reconciliatory role is aimed at guaranteeing the functioning of the multilateral trading system free from friction. For this purpose, the GATT system foresees different categories of exceptions.652 A first category distinguishes between exceptions that require notification or prior approval, such as waivers, and those which do not and are therefore deemed to be “self-executing”, such as the general and security exceptions of Articles XX and XXI GATT. A second category addressed the differentiation between so-called “particular” and “universal” exceptions. Particular exceptions apply only to a limited number of GATT obligations, such as Articles IV, VI, XII, and XIV GATT. Universal exceptions, on the other hand, apply to the sum of GATT obligations and, hence, free an invoking Member from the entirety of these obligations. They are usually introduced by the wording “nothing in this Agreement shall be construed to (prevent)…” Within this category fall the general and security exceptions of Articles XX and XXI GATT.

B. The Role of Article XX GATT

In light of the foregoing, Article XX GATT must be characterised as a “universal” and “self-executing” exception. Its text reads as follows:

651 See e.g. the integration clauses for “culture” and “industry” in the European context, supra Subsection 13.3.2.2.
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(c) relating to the importations or exportations of gold or silver;
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(e) relating to the products of prison labour;
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*
(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

At a first glance, the text of Article XX appears to be open to a field of broad application and, moreover, to be apt of playing a significant role in the process of reconciling trade and non-trade issues. As Roman law has exemplified, exceptions have a long tradition and parts of the text of Article XX were already contained in the original US Proposal resuming the US’ earlier practice of exceptions in bilateral agreements. The significance of a general exception is further underlined by the fact that the wording of Article XX GATT has served as a model for subsequent international trade agreements. Generally, the role of the GATT general exceptions has been described as follows:

At a first glance, the text of Article XX appears to be open to a field of broad application and, moreover, to be apt of playing a significant role in the process of reconciling trade and non-trade issues. As Roman law has exemplified, exceptions have a long tradition and parts of the text of Article XX were already contained in the original US Proposal resuming the US’ earlier practice of exceptions in bilateral agreements. The significance of a general exception is further underlined by the fact that the wording of Article XX GATT has served as a model for subsequent international trade agreements. Generally, the role of the GATT general exceptions has been described as follows:

Article XX enables states, or preserves their right, to take certain measures that would restrict or inhibit trade – measures that would otherwise run counter to the obligations under GATT.

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653 See infra note 724.
654 See Guide to GATT Law and Practice, supra note 563 at 551 and World Trade and the Law of GATT, supra note 319 at 741 (Fn 2).
655 See e.g. Article 30 (ex Article 36) of the Treaty Establishing the European Community, Art. 1201 CUSFTA and Article 2101 “General Exceptions” of the NAFTA [by way of incorporating Article XX (f) GATT], and (in part) Article XIV GATS.
In accordance with this description, the series of exceptions, listed in the various subparagraphs of Art. XX GATT, account today for the most urgent problems forming the broader trade linkage debate, comprising notably the realms of morals, human rights, health and environment, labour standards and culture. From the outset, this recognition must not lead automatically to the conclusion that these non-trade related measures always run counter to obligations under the GATT. Instead, it is believed here that, seen from a more distant view taking into account some of the broader goals underlying the existence of a multilateral trading system, these exceptions provide a potential for positive synergy effects for the entire multilateral trading system. Nonetheless, the primary role of Article XX, as laid down in its chapeau, is to make sure that if such measures are introduced, they take the least trade restrictive form and comply with certain criteria. To ensure the conformity of such measure with GATT obligations, it requires a proper interpretation of its wording. Notwithstanding the fact that Article XX GATT already occupied several GATT panels as well as the WTO Appellate Body in the early phase, further clarification of its precise meaning is still needed. Most of all, it is surprising that no case law exists with respect to the “public morals” (para. a) and “national treasures of artistic, historical or archaeological value” (para. f), which are of some relevance for the cultural industries. Before light can be cast on their potential relevance, it is necessary to scrutinise more closely the general criteria set forth in Article XX GATT.

C. The Interpretation of Article XX GATT

To determine the scope of Article XX GATT means to establish guidelines for the successful restriction of free trade rules in favour of other issues, which do not, or only through indirect criteria, belong to the realm of international trade. In other words, the scope of Article XX provides necessary information about the degree of balance achieved between trade and other non-trade related issues. In the analysis of Article XX GATT a few important points deserve to be mentioned.

To begin with, the chapeau of Article XX outlines the preliminary requirements of a measure that must be met in order to qualify for the exception by stipulating that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

The chapeau thus sets forth as three prohibitions that must be avoided, i.e. “arbitrary” or “unjustifiable discrimination” and “disguised restriction on international trade”. The three elements, the AB stated, impart on another and provide the fundamental theme of Article XX, which is to avoid abuse of the exceptions. Abuse of the exceptions would mean to pursue the goal of “indirect protection”, i.e. the imposition of a politically motivated measure for economically protectionist purposes. It is noteworthy that the argument of abuse has also been repeatedly made in the context of culturally motivated public policies.

In examining closer the meaning of the standards listed in the chapeau, the Appellate Body noted:

657 Cf. notably Article XX paras. a), b) and g), e) and f) GATT.

658 See Guide to GATT Law and Practice, supra note 563 at 519-550 and US Gasoline Case, supra note 394, Canada Periodicals Case (PR), supra note 65 at paras. 3.2, 3.5.-3.21, 5.3.-5.11 and 6.1., Hormones Case, supra note 64 at para. 40, 104, 236-7 and 239, and US Shrimp Case, supra note 554.


660 See e.g. supra Subsection §§ 7.1.2.
The negotiating history of Article XX confirms that the paragraphs of Article XX set forth limited and conditional exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.661

The AB continues and locates the reasoning behind the chapeau being rooted in the principle of good faith (bona fide), a general principle of law and international law.662 In the context of Article XX GATT, the principle of good faith encompasses the doctrine of abus de droit which prohibits the abusive exercise of a state’s rights.663 “Limited and conditional” thus refers to the relation between the chapeau and the various subparagraphs. In this context, the Appellate Body has held:

The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.664

In this two-tiered process, the subparagraphs focus more on the evaluation of a measure under examination whereas the chapeau governs rather the manner in which that measure is applied. This makes clear that a combined reading of the chapeau with the relevant subparagraph (para. a) and j)) is necessary. The AB has further clarified that the standards of the chapeau might vary greatly according to the measure under examination and depending on the respective applicable individual subparagraph.665 Different standards of interpretation between the single paragraphs can also be derived from the treaty language, which differentiates between the various measures by using different introductory phrases, such as “relating to”, “imposed to” or “necessary to”.666 With regard to the scope of the individual subparagraphs of Article XX, the difficulty of their interpretation due to a generally vague wording has been linked to their mutual relation.667

In light of the AB’s reasoning it is therefore appropriate to speak of the AB’s attempt to interpret and apply Article XX GATT as a “balancing process” testing closely and genuinely the relationship of means and ends.668 Such a balancing process is in perfect accordance with the changes in time and the environment, but has the disadvantage of providing only limited guidance, for instance for a government’s ex ante evaluation of a proposed measure. What remains to be answered, however, is whether there exists an implicit hierarchy between the substantive provisions of the GATT and the exceptions to them.669 Such a hierarchy would mean that more weight and wider application would be given to substantive provisions than to exceptions, which would have to be interpreted narrowly.670 The narrow interpretation of exceptions goes back to United States – Restrictions on Imports of Tuna, (Tuna-Dolphin II) where the panel, based on the findings of the report in Tuna-Dolphin I,671 recalled the myth of narrow interpretation of exceptions as a “long-standing practice”.672 Both

662 Ibid. at para. 158.
663 Ibid.
664 US Gasoline Case, supra note 394 at 23.
665 US Shrimp Case, supra note 554 at para. 120.
666 See McRae, supra note 656 at 226-7.
668 See McRae, supra note 656 at 229.
669 Ibid. at 232.
670 For a discussion of the presumption of the narrow interpretation of exceptions, see Feddersen, supra note 667 at 94-96.
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123 reports were not adopted. A further argument, which supports this assumption is found in the AB’s treatment of the burden of proof. In *US Gasoline*, the AB stated that:

The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception.673

The heavier burden on the Member invoking the exception bears a certain logic. It lies in the spirit of the GATT as an international trading agreement to emphasise on the substantive obligations purporting its principal objectives rather than its exceptions. In this respect, a case-by-case approach through a balancing process has its merits, despite its negative consequences for legal certainty and predictability. Nonetheless, the AB must not forget the equilibrium inherent in the structure of the GATT and the fact that there is no evidence for the prevalence of substantive obligations over exceptions.674 Instead, it is a fact that the universal character of the exception, introduced by the line “nothing in this Agreement shall be construed to prevent…”, creates the strict obligation of re-establishing an equilibrium between trade and other issues. In addition to GATT’s internal equilibrium, there is room for further considerations about the WTO internal equilibrium and, ultimately, the WTO’s external equilibrium.

D. The Constitutional Problematic Concerning the Interaction of the General Exception of GATT, GATS and TRIPS

A new situation for exceptions has arisen under the WTO “single undertaking” approach, combining at the present the three agreements of the GATT 1994, GATS and the TRIPS. The extension of the international trading system from trade on goods to trade in services and intellectual property rights has drastically altered the external scope and internal structure of the multilateral trading system under the aegis of the WTO. At the same time, the patterns of trade have changed, as indicated prominently by the important role of technology in the rise of services and IPRs in international trade relations.

From this short characterisation it follows that the former equilibrium inherent in the GATT 1947 has been shattered and must be regained on a broader level. In this struggle for equilibrium, characterised by a balanced progress of economic integration duly considering state sovereignty and transnational uniformity, general exceptions have an outstanding role to play. Therefore, it is surprising to see that the provisions in Article XX GATT are only partly reflected in the sister provision of Article XIV GATS.675 It is particularly interesting to note that the subparagraph on the protection of national treasures of artistic, historic or archaeological value has not been carried over to the GATS. For instance, in connection with cultural tourism to important cultural sites, the absence of an exception is capable of causing serious trouble.676 Notwithstanding the adoption of Article 8:1 in connection with Article 7 TRIPS, it is even more surprising that the general exceptions were practically left out in the case of the TRIPS Agreement, albeit the explicit incorporation of an


673 *US Gasoline Case*, supra note 394 at 23.

674 See McRae, *supra* note 656 at 232.

675 Cf. Articles XX para. a)-j) GATT and Articles XIV para. a)-c) GATS.

676 For a short survey of the cultural heritage and tourism sector in the UK, see Department for Culture, Media and Sport, *creative industries exports: our hidden potential*, Prepared by the Creative Industries Export Promotion Advisory Group (CIEPAG) at 33-36.
identical security exception. With respect to IPRs protection, it is particularly difficult to understand why security issues should weigh more than, say, health or other issues of public interest.

This asymmetry or lack of equilibrium between the three agreements, based on the existent uncertainty about the proper criteria for distinguishing goods and services and the mutual relation between the various multilateral WTO Agreements, will assume even greater significance in the future. In addition, a similar legal uncertainty governs the existence and scope of the international legal order. For these reasons, it is necessary for WTO Members to think about possible ways to redefine the WTO’s competences and bring them in accordance with the current needs arising from international trade and related fields.

§§ 6.4.2. Equilibrium Lost?: The Relevance of the General Exceptions for the Cultural Industries

In the aftermath of the controversy about “culture” during the Uruguay Round and aligned to the creation of the WTO, numerous critical voices emerged that urged the necessity for a redefinition of the equilibrium between trade and other values. The foundations for the former legal equilibrium inherent in the GATT 1947 were altered by the creation of the WTO and notably the introduction of stricter and more legalistic and efficient dispute settlement and enforcement system. The stricter adjudication of alleged violations of free trading rules and obligations combined with an improved enforcement mechanism reduced also the margin for the consideration of issues other than trade. Under the GATT 1947, these non-trade or societal values found sufficient room for consideration through consultations, negotiations, in short, trade diplomacy rather than trade law. Hence, it was the progress made in the field of international trade that disturbed the equilibrium and suddenly threatened to impede the due consideration of other fields, the regulation and institutional setting of which remained by and large the same.

The lost equilibrium in connection with Article XX GATT finds expression in a flawed distinction between the laws which are adopted for protectionist measures (indirect protection) and those which reflect legitimate public policy other than economic goals. Philip M. Nichols uses the term “societal values” to denominate non-trade issues, and has described this current disequilibrium as follows:

The World Trade Organization system, as currently envisioned, fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist.

How much space is available for other than economic or trade-related measures actually depends on the interpretation of general exceptions. The following subsections therefore evaluate the applicability of Article XX GATT to the cultural industries. Compared to the particular exception of Article VI GATT, which focused primarily on the economic aspects of the cultural industries, the general exceptions of Article XX GATT rather emphasise their “cultural” elements.

In conclusion, Article XX GATT contains three individual subparagraphs, which justify a closer look at their relevance for the cultural industries. These include the provisions concerning measures to

677 On the TRIPS security exception, see supra Section § 1.1 and on the public interest principle of Article 8:1 TRIPS, see Subsection 8.2.1.1.A.

678 Another expression of the lost equilibrium can found in the trade and democracy linkage debate; see e.g Atik, supra note 63.

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protect public morals (para. a)), to secure compliance with laws or regulations (para. d.)) and to protect national treasures of artistic, historic or archaeological value.

§§ 6.4.3. The Protection of “Public Morals”: Par. a) of Articles XX GATT and XIV GATS

6.4.3.1. Facts and Definitional Problems

Article XX:a) states that measures which fulfil the requirements of the chapeau and are “necessary to protect public morals” comply with the obligations under the GATT. For the evaluation whether the cultural industries, or one or more of its sectors, fall within the scope of paragraph a) poses a difficult interpretative task. The interpretative task linked to public morals in general has been described rightly as an “attempt to navigate between Scylla and Charybdis”, representative for the need for a balance between the opposite poles of “desired national sovereignty and required international uniformity”.

Especially, the progressive “waning of the nation state”, concomitant of the simultaneous emergence of a global culture fostered by the advent of the information age render the determination of public morals within strict territorial borders more difficult. In legal terms, the societal evolution and the short wording of paragraph a) plus the fact that in more than five decades of its existence paragraph a) has never been invoked before a GATT/WTO panel confronts any potential interpreter with a dilemma. A dilemma which Christoph T. Feddersen has described as follows:

In practice, though, the ambiguous and rather obscure wording of Article XX(a) invites possible misuse. If construed narrowly, Article XX(a) opens up a legal quagmire, in which states’ national sovereignty could easily vanish. Conversely, an excessively broad reading of Article XX(a) could lead to numerous invocations of the exceptions clause by individual states, which could call into question both the legitimacy of individual GATT provisions and GATT’s rule of law as a whole.

It is precisely this thin line between a too narrow or a too excessive interpretation which probably explains the absence of case law, on the one hand, and the great variety of issues it has been associated with, on the other. As a part of a wider trade and morals debate, the provision on the protection of public morals has been brought in context with issues such as child labour, pornography, leg-hold traps, dolphins, or in broader terms with human rights, the environment, labour standards and cultural identity.

Each of these broader terms is closely related to public morals and, therefore, principally apt for a potential subsumption of related measures under the concept of “public morals”. Since, the cultural industries have particular links to each of these broader terms and in particular to the concept of “cultural identity”, certain of their aspects might equally fall under the concept of public morals.

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680 Feddersen, supra note 667 at 78.
As concerns this link, cultural identity has often been invoked as the principal concern leading to various policy measures in the field of the cultural industries.\(^{684}\) As such certain policy measures pursuing cultural identity objectives may fall within the sphere of the public moral clause. For instance, a EU report on audiovisual policy described the causal link underlying the process of mutual influence between the cultural industries and cultural identity as follows:

[However,] the role of the media goes much further than simply providing information about events and issues in our societies or allowing citizens and groups to present their arguments and points of view: communication media also play a formative role in society. That is, they are largely responsible for forming (not just informing) the concepts, belief systems and even the languages – visual and symbolic as well as verbal - which citizens use to make sense of and interpret the world in which they live. Consequently, the role of communication media extends to influencing who we think we are and where we believe we fit in (or not) in our world: in other words, the media also play a major role in forming our cultural identity.\(^{685}\)

Once more, the major formative role and close link between cultural identity and the cultural industries must be sought in their strong, but (yet) incommensurable impact on the human mind and eventually human behaviour. It is again highly instructive to go back to the early formative years of motion pictures. It is surprising to what extent the potential consequences of the impact of motion pictures on the human mind, and consequently on social moral standards, including various phenomena, such as the divorce rate, violence and rape, racist behaviour, were known already long time ago.\(^{686}\) Since then many critical articles analysed and explained the impact of movies and television on human behaviour as the basis for social and moral standards.\(^{687}\) Although there is broad consensus with regard to the impact of the media on human behaviour,\(^{688}\) there is controversy over the precise causal link between them. It is particularly unclear when the consumption of violent media content triggers negative behavioural attitudes such as killing or other criminal forms of asocial behaviour. It is even less clear whether a crime that has been committed after the consumption of violent media content may lead to liability of the media in litigation. Based on these uncertainties it is also unclear to what extent and through which means regulation should address the problem.\(^{689}\) With regard to the cultural industries, it is interesting to note that first the issue arose with regard to films and then extended to television and more recently also to video games.\(^{690}\) A more recent example, closing the circle between human perception and human action, or linking virtual reality to actual reality, arose in a reference for a preliminary ruling in the EC context, where


\(^{685}\) See Report from the High Level Group on Audiovisual Policy, Homepage of the Commission of the European Communities, online: http://europa.eu.int/comm/avpolicy/legis/key_doc/blg_en.htm at 8 et seq [emphasis added] (last modified: December 1, 2000).


the mayor of a German town prohibited the operation of an installation known as a ‘laserdrome’, normally used for the practice of ‘laser sport’ in which people are able to hunt each other down equipped with laser machine guns and wearing sensory tags fixed to their jackets worn by players which start to vibrate once a player is shot (‘playing at killing’ or ‘simulated killing actions’). The order prohibiting the operation of the establishment was issued on the basis of the following reasoning:

The games which took place in Omega’s establishment constituted a danger to public order, since the acts of simulated homicide and the trivialisation of violence thereby engendered were contrary to fundamental values prevailing in public opinion.692

The trade issue underlying the case and alleged application of EC law came from the referring court’s consideration that the order violated the provisions on free movement of services and goods, given that the company supplying the equipment was of origin in the United Kingdom.693 The referring court asked the ECJ inter alia whether the prohibition of the said economic activity for reasons of the protection of fundamental values was compatible with Community law.694 For the WTO context, it is also interesting to note that the ECJ reasoned, based on its previous case law, that in the case before it the free movement of goods is entirely secondary in relation to the freedom to provide services and may therefore be attached to it.695

In the judgment, after discussing the principle of human dignity in German and Community law in light of the exception for public order laid down in Article 46 ECT, the ECJ answered the referring court’s question as follows:

An individual national public order notice banning a commercial activity found by the national courts to be incompatible with basic principles of constitutional law is compatible with the provisions of the Treaty establishing the European Community relating to freedom to provide services if that order is genuinely justified for public policy purposes relating to the public interest and it is ensured that that purpose cannot be achieved by measures that are less restrictive of the freedom to provide services.696

Back to the issue of media influence, consensus is broader when it comes to the effect of the media on the young, as Harmon B. Stephens has noted as follows:

[T]he motion picture has affected and will continue to vitally affect the moral conduct particularly of the young.697

Notably, the perceived impact on the moral conduct of the young has raised concerns and has led to the discussion of a protective measure, known as the V-Chip.698 A hypothetical example (due to the absence of EU specific commitments in this sector) for a measure that could be justified under the public morals protection clause (of the GATS) is found in the EU’s so-called Television Without Frontiers Directive, which dedicates an entire chapter to the protection of the physical, mental or moral

691 Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR 0000 [not yet reported].
692 Ibid. at pt. 8.
693 Ibid. at pt. 13.
694 Ibid. at pt. 23.
696 Ibid. at pt. 114.
697 Stephens, supra note 686 at 157.
development of minors and the preservation of the public order, particularly through a prohibition of broadcasts that “contain any incitement to hatred on grounds of race, sex, religion or nationality”.

In the context of television, it must be noted that the text of Article XIV:a GATS differs from Article XX:a GATT by adding the term “public order” (ordre public) to the one of “public morals”. It also clarifies that: “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” In accordance with the drafting history, the rationale for this extension during the Uruguay Round remains unclear but, nonetheless, it underlines the proximity but not the identity of the two concepts. Of the two, the concept of “public morals” goes beyond the legal concept of public order. Perhaps, adding public order must be deemed a timid attempt to provide a more authentic interpretation of the public morals clause.

Although the meaning of “public morals” cannot be determined clearly, its importance for social and cultural cohesion as well as societal peace is obvious. Furthermore, the proximity between morality and culture is reflected in numerous attempts to define culture. As such, the concept of culture, in line with its enormous elasticity, goes considerably beyond the meaning of public morals. In conformity with their multifaceted nature, the cultural industries also reveal their strong ability not only to play a formative role in cultural identity but also to influence and change public morals. Their ability is recognised in various legislative practices, such as the US ban on imports of various films, videotapes, or print media on grounds of their alleged indecency. Less clear is the basis for American Treasury regulations, which recently came under attack, restricting the publication, especially editing and marketing, of works by authors in countries subject to US trade sanctions, such as Iran, Cuba and Sudan. It is questionable in what the reasoning for such restrictions is rooted: in indecency, economics, culture or security concerns? Under such broad considerations, however, it could be asked for the GATT whether the import ban on split-run periodicals could not have been based on Article XX:a GATT in order to be justified.

Generally, related to these various practices in restricting the trade in various goods and services Joel R. Paul restates that:

699 See the TWF Directive 1989, infra note 1712, mainly at Chapter V, Articles 22, 22a, and 22b.
700 See Fn 5 to Article XIV:a GATS.
701 See Feddersen, supra note 667 at 119.
702 See e.g. the listing of conceptual elements in definitions of culture, notable those of manners and morals, in Kroeber & Kluckhohn, supra note 25 at 150.
703 For instance, the US Supreme Court the broadcast media had become a “uniquely pervasive presence in the lives of all Americans”, quoted in “The V-Chip Debate”, supra note 698 at 754.
704 See Paul, supra note 683 at 34 and Feddersen, supra note 667 at 115.
706 Note that the public morals clause has not been invoked yet. Instead para. d) was mentioned before the panel but it was dropped before the AB, see infra subsection §§ 6.4.4.
One could argue that the public morality exception in Article XX might be extended to protect the public from any import that threatens fundamental cultural values. It must be added that public concerns about morality in connection with the media have also been addressed under Article XX paragraph f) GATT.

6.4.3.2. Interpretative Methods and Conclusive Remarks

Various interpretative methods, from literal, contextual and historical interpretation, lead to the conclusion that there exists a genuine link between culture and public morals. The existence of this link can hardly be denied. In practice the application of Article XX GATT para. a) and Article XIV GATS para. a) requires no precise definition and delimitation of the concept of public morals in advance. Instead, in absence of definitional assistance from the AB, it is more important to provide—perhaps following the examples of the AD or SCM Agreement—a common understanding including explanatory guidelines for the scope and procedure of the application of paragraph a) and for its relation to the residual subparagraphs under Article XX GATT and Article XIV GATS. Such an understanding would allow for a nuanced application of the respective standards of public morals in accordance with the particularities of each WTO Member. Ultimately, it must not be forgotten that in accordance with the principle of sovereignty of states, presently the standards of what constitutes a concern of public morals still differs largely from country to country, whereas, at the same time, the process of the transformation of traditional national societies into multicultural societies fostered by closer global economic interdependence, assists in the emergence of a set of global standards of public morals.

§§ 6.4.4. Compliance with Laws or Regulations: Par. d) Art. XX GATT/Par. c) Art. XIV GATS

The exceptions of Article XX:d) GATT and XIV:c) GATS in order to secure compliance with laws or regulations do not establish a prima facie link with the cultural industries. However, their regulatory scope is broad since they authorise WTO Members to adopt measures, subject to the requirements of the chapeau which are “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement”. The enumeration in para. d) is thus not exhaustive, which means that any measure to secure compliance with a law or a regulation which is consistent with the GATT can be justified under the exception. Since the cultural industries are subject to a great variety of domestic GATT/GATS consistent laws and regulations, measures adopted to secure compliance may also be of relevance to the cultural industries. This was shown in the Periodicals Case, where Canada asked the Panel to find that Tariff Code 9958 is based on broader cultural policy considerations and thus justifiable under Article XX(d) of the GATT 1994. As mentioned above, the Panel, however, dismissed the Canadian claim by the excluding cultural identity concerns from its analysis.

707 Paul, supra note 683 at 34.
708 See Feddersen, supra note 667 at 115, Fn 187.
709 This trend is confirmed by the emergence of a concept of “transnational public policy” in the realm of international arbitration, see e.g. Lex Mercatoria, supra note 43.
710 See Guide to GATT Law and Practice, supra note 563 at 537 (“… these examples given under sub-paragraph (g) [XX(d)] are, in fact, only examples…”).
711 Canada Periodicals Case (PR), supra note 65 at paras. 3.2 and 3.5; see the detailed discussion of the case, supra Part II Subsection §§ 9.1.3.
712 Canada Periodicals Case (PR), ibid. at paras. 5.11, 5.45 and 6.1.
The Panel’s statement that “cultural identity was not at issue” was criticised for failing to acknowledge the cultural distinction based on content and by doing so revealed a bias in its analytical method which is inconsistent with protection of cultural identity in the modern world.713 The explicit exclusion of concerns about “cultural identity” also reveals another weakness in the application of Article XX GATT, which lies in the uncertainty that disguises the mutual relation of its individual paragraphs. Such uncertainty apparently not only concerns Members of the WTO but also panellists of the WTO dispute settlement system. If cultural identity was really at issue and the measure was necessary to protect both cultural identity (subsumed under the term “public morals”) and to secure compliance with the Tax Income Act what would be the implications for a Member if it invokes at least two or more exceptions of Article XX GATT, such as para. a), d) and f). Then the issue becomes more difficult in the case of a potential overlap between the GATT and the GATS, where the respective content of para. a) and d) Article XX GATT is practically identical to the GATS, but the one of para. f) is absent. Once more the category of cultural industries highlights serious problems resulting from the fragmentation not only of the various agreements administered by the WTO but even from the incoherent interpretation of some of the Articles subparagraphs.

§§ 6.4.5. The Protection of National Treasures of Artistic, Historic or Archaeological Value

6.4.5.1. Preliminary Remarks on the Relevance of “National Treasures” for the Cultural Industries

A central anchor for cultural policy considerations in the sphere of international trade is the general exception laid down in Article XX:f) GATT, which allows a WTO Member to adopt measures to protect “national treasures of artistic, historic or archaeological value”. The measures deemed to fall within the scope of national treasures are mainly those envisaging restrictions on the cross-border movement of objects of cultural property. As a result, a WTO Member can exclude certain goods from free trade and particularly from the NT principle provided that such a measure meets the requirements of the chapeau. From a terminological point of view taking into account the historical evolution, the concept of cultural property appears to be broader than the one of national treasures. Similarly, such reading also calls into question the direct applicability of each of the two concepts to the cultural industries. The direct applicability also appears obstructed from a teleological perspective, according to which the exemption for cultural property from trade was based on the intention to keep treasures of national significance within the territory of the country. In contrast to that, most goods and services pertaining to the cultural industries can be reproduced at low costs and in almost indefinite numbers, which is why there is less reason for their whereabouts in the original context of creation.

Notwithstanding the fact that generally protection of the cultural industries under the national treasures’ exception must be denied on these grounds, the argument of the proximity between the two concepts has been repeatedly raised but remains controversial. Of great importance, however, is that the evolution of the concept of cultural property has not only provided a legal precedent for the contemporary discussion of the exception culturelle for audiovisual goods and services but can also be regarded as a useful point of repertory, hence a good point of departure, for an amendment of the

713 See Carmody, supra note 1258 mainly at 239-240.
current WTO regime. For these reasons, the evolution of the concept of cultural property to the concept of national treasures will be analysed by way of an excursus.

6.4.5.2. A Short Presentation of the Problem

The interpretive difficulty with regard to the concept of national treasures of artistic, historic or archaeological value is due to the fact that neither the text of the GATT provides further information on the kind of cultural goods that would qualify for the said exception, nor does there exist a panel ruling on that matter. The absence of supplementary information renders the evaluation of the relevance of the exception under para. f) for the cultural industries more difficult. Most likely, for these reasons various protectionist measures concerning the cultural industries have also been brought in context with the exception of para. f). Likewise it has been argued that, based on a broad reading of the concept of “national treasures of artistic, historic or archaeological value, states are allowed to take measures to protect the contemporary domestic cultural industries that produce artistic treasures. Similarly, it has been argued that the categories of goods that enjoy copyright protection under the Berne Convention for the Protection of Literary and Artistic works can probably be construed to fall within the scope of article XX(f) of GATT. Moreover, there is evidence that any product may attain the status of a “national treasure”, even an aeroplane or a car, thus a fortiori this status may be accorded in the cultural industries. To further evaluate the precise relevance of the exceptions for the cultural industries, however, it is necessary to look closer into the meaning of the concept “national treasures of artistic, historic or archaeological value”.

Despite the absence of a ruling of a competent GATT/WTO Panel on paragraph f), there exists a long record of legal history and a well-developed set of laws that provide information about the meaning of “national treasures of artistic, historic or archaeological value”. This body of law is usually referred to under the concept of “cultural property”. In light of the historical record, it is plausible to speak of the concept of cultural property as the “great-grandmother” of all cultural exceptions envisaging the role of the cultural industries within the WTO system. Its historical path and the consequent legal concerns have been described by Kurt Siehr as follows:

Cultural property has been the subject of trade, commerce, blackmail, theft, plunder, destruction and booty since early times. Documented history reveals that art objects either shared the same destiny as other kinds of property or they were given special significance whereby their acquisition could be used to humiliate an enemy or victim and/or to decorate the superior power or victor.

714 See supra note 708.
715 Paul, supra note 683 at 34.
717 For example, an aeroplane built in Ethiopia for Emperor Haile Selassie by German engineers in 1935, which was seized by the Italian Army and can be found in the Italian Aviation Museum; see “Let’s have our treasure back, please” The Economist (July 10, 1999) and R. Pankhurst, “Mussolini’s Booty” The Independent (London) (July 22, 2002) 13, reporting that “Italy has still not returned Emperor Haile Selassie’s prewar aeroplane Tsehai, called after his daughter who worked as a nurse in Britain during the Blitz, even though Ethiopia wants to install it in the new Addis Ababa airport”; a recent proposal for an Italian law foresees the protection of the legendary Fiat 500; see “Salvare le 500, in Senato arriva la legge”, Corriere della sera (October 28, 2004); for films, see e.g. R. Kennedy, “So Many Films, But Only a Few Are Treasures; Library of Congress Separates Mere Movies From Landmarks” The New York Times (February 5, 2004) E1.
This characterisation not only reveals the origins of international legislative efforts with regard to cultural property in belligerent behaviour but also the special nature of cultural vis-à-vis ordinary goods, which, in turn, made them special objects for pillage during war. As early examples of documented history and notably the *Institutiones* of Gaius show, the specific nature of cultural objects (*res extra commercium*) derives mainly from their symbolic, and often religious, or cult character (*res sacrae*). It was feared that the specificity inherent in a cultural object – recognised by Walter Benjamin in its loss of “aura” – will vanish once it becomes mechanically reproduced. Others, however, perceive this difference between the copy and the original as only being of marginal significance. One author regarded it as a “puzzling undervaluation of copies and of the idea itself of enjoying a reproduction” and called this idea an “an oddity and, somewhat fetishist”, asked:

What is the difference between an original and a perfect copy? If a perfect copy of the Elgin marbles could be made, would it matter if the originals were at the British Museum or in Athens?

The answer is probably clear and can also be explained in merely economic terms, leaving aside the concept of aura for the moment. Otherwise, how could it be explained that people visit the Galleria dell’Accademia for € 10 in Florence, when they have two copies of the *David* around the city for free? However, it is interesting to think of a “perfect copy”, since, in light of the technological progress made in the cultural industries, most of all, through the digital storage of their content, the difference between the original and the copy has practically disappeared. The shared “originality” between the original and the copy that provides the respective cultural good or service with its “aura” is thus a further particular quality intrinsic in the cultural industries. In legal terms, the “aura” has found its recognition in intellectual property rights law. From this quality, the cultural industries also acquire today the basis for their primary role in the process of shaping moral standards and cultural identity.

For the reasons of this analogy, the evolution of the concept of cultural property is not only of interest for the interpretation of Art. XX:f GATT, but also serves as an example for the general acceptance of the special character of cultural products within free trade rules. This acceptance is, for instance, reflected in identical provisions contained in notably the NAFTA, and the EU. It is also reflected in the vast amount of national legislation in place that aims at the prohibition of exportation of privately owned cultural property to another country (i.e. so-called “export control legislation”). This example shows how through a slow process, taking years and centuries, a consensus among the states of the international community has crystallised, which has justified the introduction of an exception for various cultural objects under trade rules.

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719 See the quote, infra note 724.
720 See supra note 129.
722 All mentioned sources, in almost identical wording, use the term “national treasures of artistic, historic or archaeological value”; compare Article XX (f) of the GATT, Article 2101 “General Exceptions” of the NAFTA [by way of incorporating Article XX (f) GATT], and Article 30 (ex Article 36) of the Treaty Establishing the European Community.
6.4.5.3. Excursus: The Emergence and the Evolution of the Concept of Cultural Property

A. The Historical Development

In order to shed some light on the meaning of the term “national treasures” it is helpful to analyse shortly the evolution of the concept of cultural property. From early history onwards, the precious nature, or specific “aura” inherent in cultural property made them desired objects of licit and illicit trade and commerce alike. Their precious character also secured them with special attention, destructive and constructive alike, during times of peace and times of war. These four elements and various closely intertwined legal responses to them accompanied the evolution of cultural property from early history until today.

As an example of early documented legal history, Roman law recognised the specificity of cultural property. It was in the second book of the *Institutiones*, redacted by the Roman jurist *Gaius* (130-180 BCE), where the special legal treatment of cultural property was laid down as follows:

§ 1 *res quae vel in nostro patrimonio sunt, vel extra nostrum patrimonium balentur.* – [things] which are either subject to private dominion or not subject to private dominion.[...]

§ 9 *Quod autem divini iuris est, id nullius in bonis est; id vero quod humanis iuris est plerumque alicuius in bonis est.* [...]

These distinctions made by *Gaius* form the basic reference to what in later writings became known as the category of “things which cannot be the object of exchange or of any legal commercial transaction (*res extra commercium* or *res quorum commercium non est*). The category of things that are not subject to private dominion was exempted widely from the rules of commerce, especially the right to buy and sell reciprocally. These things, exempted from commercial transaction, are: 1) the things known as those held in common (*res communes omnium*), such as the air, rain, or the sea, or public things, such as public places, rivers, or lakes, and 2) the things subject to divine dominion (*res divini iuris*). This last category is of utter importance because it exempts three categories of things from commercial transactions that can be understood to belong to the field of cultural property, or in broader terms, to culture. To these categories belong: (1) Sacred things (*res sacrae*), which are things consecrated to the gods above, such as temples, statues, altars, and various cultic objects; (2) Religious things (*res religiosae*) which comprise burial-places; and (3) Sanctified things (*res sanctae*) are mundane things none the less held under divine protection, such as city walls and city gates. 726

Their exemption from the ordinary rules of private law, is an early recognition of the public good character that dwells in cultural goods. 727 In the course of time, fostered by the advent of the nation state and fixed territorial borders during the middle ages, the restrictions on the private transfer of property, were complemented further by public measures restricting the free circulation of cultural property through various export control policies and measures. Early prominent examples of such export control measures are the Papal Bull *Cum Almam Nostram* of Pope Pius II issued on April 28,
In addition to a long list of open questions regarding the transfer of property, a legislation concerning the protection of cultural property has developed in the context of warfare. From antiquity to the late Middle Ages, warfare was practically not restricted by laws, and cultural property was found to be a favoured object for looting or destruction. A turning point came with a shift in the perception of art works during the Renaissance, recognising the uniqueness inherent in each work of art, which was (at that time) impossible to copy. However, the legal resonance of the change of perception only started to appear with the beginning of Enlightenment. Before, most weight was given to principal questions about the legitimacy to wage a war (ius ad bellum, bellum iustum) but not about the ways these wars were being conducted (ius in bello) and thus how to deal with cultural property. Only during the enlightenment were concerns increasing about the means to conduct wars and Justin Gentilis was among the first not only to mention the different qualitative character of cultural property but also to express the interest of future generations in the preservation of cultural heritage. As a result in wars during the 19th century cultural property was, albeit with major exceptions, more art-sensitive in a sense that looting prevailed over destruction. Despite continuous efforts to codify a set of rules governing the conduct of soldiers during armed conflict in general, and vis-à-vis cultural property in particular, violations were and continue to be commonly committed. Important stages in the process of codification of laws governing warfare are found in the Lieber Code (1863) and the Hague Conventions concerning the Laws and Customs of War on Land (1899 and 1907), the Geneva Convention (1929) as well as the Roerich Pact (1935). Notwithstanding these conventions violations were still common. Among them, the massive

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728 See Siehr, supra note 718 at 162-68.
730 See supra note 723.
731 See Siehr, supra note 718 at 168-77.
733 Ibid.
734 Ibid. at 75.
735 Instructions for the Government of Armies of the United States in the Field, April 24, 1863 [hereinafter Lieber Code].
736 Convention with Respect to the Laws and Customs of War on Land (HAGUE, II) (July 29, 1899) (entry into force: September 4, 1900); and Convention Respecting the Laws and Customs of War on Land (entry into force: January 26, 1910).
737 See e.g. the Convention relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, updated by the Third Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; see also Articles 38 (‘Recognized emblems’) and 53 (‘Protection of cultural objects and of places of worship’) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on June 8, 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (entry into force: December 7, 1979); for a full list of relevant conventions see the full text database of the International Committee of the Red Cross, available online at http://www.icrc.org.
739 Compare the development towards codification in Nahlik, supra note 732 at 78-89.
destruction, first of human lives, and, second, of all sorts of property during the two World Wars, meant a major setback in this process.

After World War II and with the creation of the United Nations Organisations, UNESCO carried on the work in the field of cultural property. Notably new developments in the politics of the international society and in arms technology required a new international text aimed at the protection of cultural property from the continuing dangers of warfare. Only a few years after its creation, UNESCO organised a conference which resulted in the signing of the Final Act of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.\(^{740}\) The principal task of the convention being the protection of cultural property, it introduces a precise definition of the term “cultural property” and recalls the growing danger for destruction of such property caused by new techniques of warfare and restates that the effective protection to cultural property in times of war begin with national and international measures taken in times of peace.\(^{741}\)

The need for seamless protection of cultural property between times of war and those of peace is acknowledged in the adoption of another international legal document, the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.\(^{742}\) The convention aims at the protection of cultural property from threats caused not only by the “traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction”.\(^{743}\) Behind the notion of “the world’s cultural and natural heritage” lies the idea that, based on the equality of cultures,\(^{744}\) there exists cultural property that is of such significance that it is common to all mankind and therefore the entire world has an interest in its protection and preservation.\(^{745}\) From this approach derives the controversy about the question of equal access to this common cultural heritage of mankind.\(^{746}\) The said convention was criticised for establishing an obligation \textit{erga omnes}, but at the same time leaving full discretion to the respective signatory states on whose territory the property is situated.\(^{747}\)

Last but not least, in addition to the dislocation of cultural property during war, the problem of its restitution at the end of an armed conflict, and its protection during times of peace, there exist various legal problems that can be framed under the broad problem of trade in works of art, \textit{i.e.} objects of artistic, archaeological, ethnological or historical interest. Problems of this kind cover the wide field of trade in fakes, wrongly attributed works of art, works of dubious provenance, and the

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\(^{741}\) Preamble and Article 1, \textit{ibid}.


\(^{743}\) Preamble, \textit{ibid}.

\(^{744}\) See infra note 780.

\(^{745}\) See infra note 780.


\(^{747}\) See J.H. Merryman, “Two Ways of Thinking About Cultural Property” (1986) 80 A.J.L. 831 [hereinafter “Two Ways”], contrasting the perception of cultural property either as a part of a national cultural heritage or as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.

illicit import, export, or the restitution, of stolen, looted or nationalised and expropriated works of art, or of works removed from territories before their independence.\textsuperscript{748}

More international cooperation is necessary in order to prevent the shift of cultural objects from so-called “artefact-rich” to “artefact-poor” countries. Moreover, cooperation is necessary to provide an economic incentive to report new discoveries of cultural property or to share the costs for their due excavation and subsequent preservation in order to guarantee access for mankind, both present and future.\textsuperscript{749} For some of these problems UNESCO has responded in promoting the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.\textsuperscript{750} The convention aims at protecting cultural property from the negative incidents of illicit trade and theft. It classifies stolen cultural property as inalienable and must be returned to its rightful owner against just compensation of the innocent purchaser or a person who has valid title to that property, and classifies the transfer of certain cultural property as illicit.\textsuperscript{751} Shortcomings of the 1970 Convention have led UNESCO to mandate UNIDROIT to work out a Convention based on previous work done by the Institute. The result of the Institute’s work is found in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.\textsuperscript{752} The said convention applies to claims of an international character for the restitution of stolen as well as illegally exported cultural objects (Art. 1).

B. Definitions of Cultural Property

The rules laid down in the various conventions contributed to the elaboration of a concept of cultural property. The first conventions contented themselves with providing an enumerative list of treasures which have to be protected during an armed conflict. For instance, the Lieber Code gives an enumerative list of cultural property as comprising of various objects belonging to churches, to hospitals, or other establishments of an exclusively charitable character, establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character including classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes.\textsuperscript{753} Similarly, the Hague Conventions of 1899 and 1909 protect particularly “edifices devoted to religion, art, science, and charity” as well as the “property of the communes, that of religious, charitable, and educational institutions, and those of arts and science” by prohibiting “all seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science”.\textsuperscript{754} The Rœrich Pact aims at the universal adoption of a flag in order to

\textsuperscript{751} Articles 7 lit. b) (ii.) and 3 loc. cit.
\textsuperscript{753} Lieber Code, \textit{supra} note 735 mainly at Articles 34-36.
\textsuperscript{754} Articles 27 and 56.
preserve in any time of danger all nationally and privately owned immovable monuments. It is interesting to note that it introduces the concept of “cultural treasure of peoples” and declares in Article I that:

The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.\(^755\)

After the war, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict defines cultural property \textit{inter alia} as:

movable or immovable property of great importance to the cultural heritage of every people [...] works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives [...].\(^756\)

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is of major interest for the Article XX exception. In its Article 1, the convention not only lays down that:

\begin{quote}
(F)or the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science [...];
\end{quote}

but also lists among the various objects forming cultural property:

\begin{itemize}
\item g. property of artistic interest, such as:
  \begin{itemize}
  \item i. pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); [...]
  \item iii. original engravings, prints and lithographs;
  \item iv. original artistic assemblages and montages in any material;
  \item h. rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; [...]
  \item j. archives, including sound, photographic and cinematographic archives [...].\(^757\)
  \end{itemize}
\end{itemize}

Last but not least, the UNESCO 1972, with its definition of cultural heritage close to the one of cultural property, emphasises the heritage character of cultural property, and hereby supports the insight that knowledge of the past is a precondition for the determination of the present and future identity.\(^758\)

C. “National Treasures” versus “Cultural Property”

In absence of any authoritative definition of the term “national treasures of artistic, historic and archaeological value” within the GATT/WTO framework, it was necessary to highlight its meaning based on a contextual analysis taking into account the practice of the states prior and subsequent to the adoption of Article XX:f) GATT. The long tradition protection of cultural property shows, on the one hand, the special character of various cultural objects, notably expressed in their close relation to and relevance for further concepts, such as cultural heritage and cultural identity; on the other hand, it makes clear that the meaning of cultural property is broader in scope than the one of

\(^755\) Roerich Pact, supra note 738.

\(^756\) Article 1 Convention for the Protection of Cultural Property in the Event of Armed Conflict, supra note 740.

\(^757\) Cf. Article 1 para. a)- k) UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, supra note 750; see also its Article 2 in connection with the Annex of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, supra note 752.

\(^758\) Cf. the numerous sources and quotes in “Public Interest in Cultural Property”, supra note 727 mainly at 348-350; see also Orwell, supra note 155 at 34, writing: “Who controls the past [...] controls the future; who controls the present, controls the past”.
“national treasures of artistic, historic and archaeological value” within the context of the GATT. Their mutual relation can be described by way of analogy with the concept of *corpus ex cohaerentibus* (*Corpus quod ex pluribus inter se cohaerentibus constat*) under Roman law, which denominates a thing composed of several physically united things of the same or different material, which serves a given economic or social use. Through the junction the component parts lose their legal individuality and share the legal situation of the whole.759

What is therefore entirely missing in the numerous conventions concerning the protection of cultural property is a proper evaluation of their economic implications.760 This is regrettable since the possession of a “cultural treasure” can be counted for an economic comparative advantage of artefact-rich as opposed to artefact-poor countries. The absence of a combined economic and cultural consideration not only hampers seriously many efforts under these various conventions but also renders more difficult their proper evaluation and treatment under the international trading regime. Some supplementary information is available from the EU context, which, due to its regional character but advanced level of economic integration, however, cannot be transplanted easily to the WTO.761 This is another example for the failure of due institutional cooperation.

Furthermore, the analysis of the concept of cultural property has shown that in principal it is naturally incumbent to the state concerned to define what constitutes a “national treasure”.762 This unilateral declaration, as will be appear in the context of the security exception,763 bears some dangers of abuse, which the chapeau of Article XX GATT tries to prevent. This danger of abuse requires that there exists a set of multilateral rules against the background of which the respective measure can be tested. The need for mediation appears particularly necessary in light of the conflicting interests in national protection (cultural nationalism) and global accessibility (cultural internationalism).764 Herein lies an important parallel to the cultural industries as a powerful tool for local culture and a global dialogue of cultures.765

Finally, the unilateral determination of what constitutes a “national treasure” impinges directly on the question whether the cultural industries fall within the exception of Article XX(f) GATT. It cannot be excluded that occasionally certain goods of the cultural industries qualify as a “national treasure”, particularly those of artistic or historic value. For services, the open question of the asymmetry between the GATT and the GATS general exceptions as well as the need for sectoral specific commitment prevents momentarily a definite answer to the subject. Nonetheless, it is clear that in

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760 See especially St.S. Madeja, “The Arts as a Cultural and Economic Factor in World Trade” (1994) 14 N. Ill. U. L. Rev. 439, noting *inter alia* that “[T]he arts today pose a different problem than they did at the time of the creation of the United Nations Charter. They are now commodity-oriented rather than people oriented and thus are more accessible to a world audience” and Villanueva, *supra* note 749 at 549 et seq.


763 See *infra* Subsection § 6.5.

764 See *e.g.* “Two Ways”, *supra* note 746.

the era of global trade and tourism, the lines of distinction between cultural property and the cultural industries, representative for goods and services, continue to fade away.

§§ 6.4.6. A final Evaluation of Articles XX GATT and XIV GATS

6.4.6.1. Major Difficulties with the Cultural Industries in Relation to the General Exceptions

In the course of the analysis of the relevance of Article XX GATT for the cultural industries a few major problems surfaced. The first problem is related to the broad language in Article XX GATT and the serious absence of additional interpretative information from litigation, especially on the two paragraphs dealing with “public morals” and “national treasures of artistic, historic and archaeological value”. It is characteristic for the dominant approach of contracting parties to separate culture from trade and vice versa that, during more than five decades of the existence of the GATT, no panel was ever asked to clarify the meaning of, for example, public morals, national treasures or cultural identity. At the same time, the same states have, inside the walls of UNESCO, created an abundant source of definitions in international texts related to cultural property and heritage, without creating sufficient economic incentives that may contribute to the goals enshrined therein.

Secondly, the information on the mutual relation between the various individual paragraphs united under Article XX GATT and XIV GATS must be described as insufficient. Although contracting parties/Members have invoked two or more of the individual paragraphs in parallel, the Panels have preferred to deal with them separately. As complex as life can be, it therefore likely that a measure, for instance one concerning the cultural industries, relates to two or three paragraphs (e.g. para. a), d) and f)), but does not prima facie establish a direct terminological link to each single of them. This would be, for example, the case of a measure touching upon the cultural industries but aiming at social cohesion and cultural identity. It seems likely that under the current approach it seems to weigh less, if a measure relates indirectly to two or more paragraphs than a measure which is limited in scope and falls only under one. This interpretative approach seems to lack a strong backing in an ever growing complex reality. Moreover, to render a measure that falls within one of the general exceptions efficient, it is normal that they must provide some sort of economic incentives for the addressees, as was suggested in the case of cultural property. This vindicates the necessity of a combined cultural and economic approach.

In addition to the horizontal problem of interpretation between the single paragraphs under Articles XX GATT/XIV GATS, there exists a vertical dimension which consists in the relation of the chapeau to the single paragraphs. Since it was stated by the AB that the standards of the chapeau might vary greatly according to the measure under examination depending on the respective applicable individual subparagraph, this can lead to various interpretative difficulties in case that they are taken into consideration together. However, this does not seem to pose a serious problem and the relevant factors could be weighed accordingly.

Since the creation of the WTO, another problem concerns the existing asymmetries within the WTO system. The only partial overlap between the provisions of the GATT with the GATS, and the
absence of similar provisions in TRIPS, may increase interpretative uncertainties in the future, particularly since there exists no consensus as regards the categorisation of the various sectors of the cultural industries in goods and services.

Moreover, as was shown in the context of cultural property, there exists a rich set of laws defining and delimiting its scope, which were adopted in international fora other than the GATT/WTO. Here, the interpretative challenge lies in the consistent application of GATT rules in relation to other international agreements. In this context, the WTO AB has, as was shown in the context of “cinematograph film”, already set some positive signs through the application of the Vienna Convention on the Law of Treaties, the principle of evolutionary interpretation and the principle of effective treaty interpretation. In times of rapid technological innovation, the application of these principles will gain further momentum.

Finally, these considerations seem noteworthy, since the analysis of the cultural industries has established simultaneous links to at least three exceptions, namely those to safeguard “public morals”, to secure “compliance” and to protect national treasures. Therefore, the cultural industries possess the ability to transcend the formal lines of distinction between the various individual paragraphs on the one hand, and based on their goods/service character between the various agreements on the other.

6.4.6.2. A Short Outlook

The “founding fathers” of the GATT/WTO have introduced general exceptions in the GATT/GATS which serve the noble purpose of guaranteeing sufficient flexibility in the process of trade liberalisation. Legally spoken, they are designed to strike a balance between the original disparities in the Member’s national laws and the uniformity of the multilateral trade rules. The precise determination of this balance depends largely on the underlying legal paradigm, situated somewhat between the extreme poles of legal uniformity and legal diversity. Equally, the striving for a balance includes the combined consideration of cultural and economic factors. Generally, for the determination of the scope of these exceptions, and notably their sensitivity towards culture in its economic implications, it would be helpful to have more reliable data at one’s disposal. In this sense, Ron and Anil Hira cite Douglass North, Nobel Prize Winner (1993) and theoretician of the new institutionalism school of economics as stating that:

[...] culture is another neglected aspect of human behaviour from rational models, and defines it as the passing, from one generation to the next, of knowledge, values, and other factors that affect human behaviour.

The statement concludes with the recommendation that:

future [economic] models should explicitly define and delineate the true ultimate sources of institutional change, namely changes in culture, ideas, and social practice, and then we can turn to how they relate to the institutional and preference changes that result from them.  

767 See supra section §§ 6.2.5.
768 North defines institutions as “the rules of the game in a society”, or the constraints that shape human interaction”; see A. Hira & R. Hira, “The New Institutionalism: Contradictory Notions of Change” (2000) 59 Am. J. Econ. & Sociol’y 267 at 269.
769 Ibid. at 271 et seq.
770 Ibid. at 280.
This combined cultural and economic consideration is indispensable in the context of the cultural industries.

For the reasons mentioned above, it seems that the legal status of exceptions needs to be rethought. Particularly, the assumption of a hierarchy between substantive provisions under the WTO system and the exceptions seems unfounded. Important developments, such as the rise of the number of 23 initial contracting parties to currently 148 WTO Members must equally be recognised as impinging on the former equilibrium. The number of Members is crucial, because it increases the difficulties of negotiations and amendments as well as the legal, cultural, economic and political disparities among its Members. For these reasons, the balancing process has to be undertaken by the greatest, taking into account the broader implications and notably connections, whether yet discovered or not, that result from the interaction between trade and culture. By recalling the spirit of flexibility enshrined in the GATT 1947, these measures are capable of yielding positive results, among them the possibility to even increase the attractiveness of the WTO for a wider range of third states that are currently not Members of the WTO.
§ 6.5. The Security Exceptions of Articles XXI GATT, XIVth GATS and 73 TRIPS

§§ 6.5.1. The Security Exception: Certain Parallels to the ‘Exception Culturelle’?

Immediately after the general exception of Article XX GATT, another important mechanism for greater flexibility in the GATT/WTO system is found in the security exception of Article XXI GATT. The text of Article XXI GATT, which has also served as a model for similar clauses introduced in the GATS and the TRIPS, reads as follows:

**Security Exceptions**

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

From a literal interpretation of the text, no direct link between Article XXI GATT and the culture and trade debate, or the cultural industries, can be deduced. Notwithstanding the absence of such link it has been argued that the film, broadcasting and sound recording industry are “purveyors of national culture deserving of treatment accorded to national security which is given exemption under Article XXI of the GATT”. This argumentation thus refers to the security exception of Article XXI GATT as a possible model clause for the so-called “exception culturelle”. Indeed, it appears that from a more systematic approach and a critical evaluation of the problems related to the security exception in light of a hypothetical cultural exception, certain parallels can be deduced, or at least, some useful insights in the deeper problems linked to the legal model of an exception be gained.

The parallels which vest the security exception with a model clause character for the cultural exception, it may be argued, stem, first, from the problem of reconciling essential national security interests with universal rules of international trade and, second, from past experiences related to the application of the security exception, which have raised important institutional question as to the competent forum for the settlement of disputes, which contain mixed elements of trade and security concerns. Similar substantive and institutional problems can be expected to occur in the case that an exception culturelle would be introduced in the WTO system. Finally, a derivative parallel between the security and a (potential) cultural exception is found in a possible overlap between their respective scopes, which is due to the importance of certain sectors of the cultural industries for the maintenance of both national security and international peace and security.

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771 *Cf.* Articles XIVth GATS and 73 TRIPS.
772 See “New Technology in the Film and Television Industry”, *supra* note 537 at 47 *et seq.*
6.5.1.1. International Trade versus National Security: “Trade Follows the Flag”

Historically, the combined regulation of international trade and international peace and security stood at the beginning of the current international legal order as commenced under the League of Nations and finally established under the aegis of the United Nations. Still the Havana Charter recognised as its principal goal the “determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations” for the purpose of “realizing the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter”. The underlying reasoning is simple and seems to reflect the common knowledge that international peace and security are favourable and even necessary preconditions for international trade as a way to increase the wealth of all the nations. This reasoning, as enshrined in Article 55 UN Charter, is recalled in the Preambles of the GATT 1947 and the WTO Agreement.

Unfortunately, the link between peace and trade is not one-sided and can also present itself in the reverse order. The history of commerce is replete with examples indicating the complex causal relation between trade and war. In *The History of Commerce*, published in 1926, T.G. Williams finds a plethora of examples altering the relation between trade and war. He describes the interaction between trade and war for different contexts as follows:

> Peace and liberty are the very air that commerce breathes. [...] Trade led naturally to war and war fostered trade. In fact, under the old commercial system, trade was itself a species of war. [...] Political sovereignty sometimes led to commercial exploitation – “trade followed the flag”; but usually the process was reversed, and the merchant opened up territory which afterwards passed into the hands of the administrator.

In the spirit of the wisdom concerning the complex causal relationship between issues of trade and international security, the founding fathers of the GATT foresaw, by virtue of Article XXI GATT, the adoption of an article that would allow the contracting parties to take into account their essential security interests, just as much as Article IV GATT took account of similar cultural concerns.

Based on the introduction’s wide scope and the lack of precision inherent in some of the evoked concepts, there is little to restrict a contracting party from invoking the exception of Art. XXI GATT in defence of its essential security interests. For what eventually constitutes a contracting party’s essential security interest, the situation is aggravated by the repeatedly expressed presumption that “every country must be the judge in the last resort on questions relating to its own security”. Article XXI, thus, gives a Member *de facto* the right to decide unilaterally whether it considers some obligations under the multilateral trading regime in conflict with its national security interests. Unfortunately, in many cases, a national security concern may easily deteriorate and become a concern of international peace and security. This is why an exception of strictly unilateral standards may conflict with the spirit of a multilateral framework and notably the MFN clause of Art. I GATT.

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774 Cf. especially subsection §§ 5.2.1.
775 Art. 1 Havana Charter; see also Art. 72 para. 1 lit. f) Havana Charter, *supra* note 317.
776 Williams, *supra* note 430 at 92, 152-3, 202, *supra* note 430; see also Polanyi, *supra* note 16 at 217, writing that “[...] trade followed the flag”, while the flag followed the need of invading governments [...].
778 See *Guide to GATT Law and Practice*, *supra* note 563 at 554-5.
and save the legal principle of *index in re propria* (a judge in its own affair) in connection with *sibi esse iudicium, sibi ius dicere* (no one may be judge in his own controversy with another). The danger of conflict is further aggravated by the wide discretion the language of lit. b) allows by authorising a contracting party to take “any action” for the protection of its security interests.

In the unilateral invocation of the security exception is rooted a first parallel to a hypothetical cultural exception. Similar to the field of security, the primary judge of a country relying on a cultural exception would be the country invoking it. Any other suggestion would come close to a violation of the principle of the equality of all cultures. It is therefore obvious that the primary task of determining, for instance, French or Chinese culture rests in the hands of the French or the Chinese people. However, as a consequence of the equality principle as well as a growing multicultural setting of modern societies due to growing migratory flows, all other cultures (and third Members of the WTO) have an interest in the consequences that would derive from such a measure taken under such a cultural exception, both in terms of the free circulation of goods (or services) and in terms of access to the world’s cultural heritage. The parallel between the potential causal link between national and international security is exemplified in the concept of humanitarian intervention and the concept of a right to cultural intervention. Last but not least, both exceptions have in common the great potential for abuse for economic protectionist purposes and may pave the way for a dangerous erosion of the multilateral framework for international trade. Finally, they raise important questions about the competent international forum or, in other words, sadly highlight the institutional rupture and insufficient degree of coherence between the UN and the WTO.

Concerning the danger of eroding the multilateral trading system and further economic implications linked to the invocation of the security exception there exist several cases. One of the best known examples for the invocation of Art. XXI GATT is the perennial conflict that hovers over the US-Cuba trade relations. The conflict began first with the United States embargo on Cuba in 1962, which was not formally raised in the Contracting Parties, but notified by Cuba in the inventory of non-tariff measures. In 1996 the embargo was tightened with the adoption of the Cuban Liberty and Democratic Solidarity Act (LIBERTAD), the so-called “Helms Burton Act”. Consequently,

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780 The principle of equality of cultures is a concomitant of the principle of equality of all states (Art. 2.1. UN Charter) and is, for example, restated in Article 1 of the 1966 UNESCO Declaration of Principles of International Cultural Co-operation, supra note 253, or para. 1 and 4 of the 1982 Mexico City Declaration on Cultural Policies, Mexico City, July 26 to August 6, 1982, as well as implicitly recognised in the Convention Concerning the Protection of the World Cultural and Natural Heritage, supra note 742, see generally L. Galenskaya, “International Co-operation in Cultural Affairs” (1986) 198 Rec. des Cours 265.

781 On humanitarian intervention, see e.g. J.L. Holzgreve & R.O. Keohane, eds., *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge: Cambridge University Press, 2003); on cultural intervention, see e.g. Vernon, supra note 747.

782 See also the *Decision Concerning Article XXI of the General Agreement*, November 30, 1982, GATT Doc. I./5426, B.L.S.D. 298/23-24, which notes *inter alia* the specific danger of trade disruption inherent in Art. XXI and which recommends that “in taking action in terms of exceptions provided in Article XXI of the General Agreement, contracting parties should take into consideration the interests of third parties which may be affected”.

783 See Perez, supra note 367.


785 For a discussion of the conflict, see P. Levesque, “La saga de la loi Helms-Burton: liberte de commerce versus securite nationale” 39 C. de D. 881.

786 See *Guide to GATT Law and Practice*, supra note 563 at 559.

the open questions about the Act’s legitimacy under international law, and particularly its impact on third countries, equally became subject to consultations under the WTO DSB. The European Communities, relying on Article XXIII:1 GATT 1994 and Article XXIII:1 (GATS), expressed its concerns over the consistency of the Helms-Burton Act with the US’s obligations under both the GATT 1994 and the GATS.\(^788\) The concerns of the EC pointed to a number of provisions contained in the Helms-Burton Act, “which have the intent and effect to restrain the liberty of the EC to export to Cuba or to trade in Cuban origin goods, as well as to restrict the freedom of EC registered vessels and their cargo to transit through US ports” and “which may lead to the refusal of visas and the exclusion of non-US nationals from US territory in a way which may contravene US commitments under GATS”.\(^789\) Subsequently, at first a panel was established but, nonetheless, the proceedings were first suspended in view of the negotiations for a mutually agreed solution and finally the time lapse for the panel to issue a report without bringing a final satisfactory solution to the conflict.\(^790\) This international political stand-still situation with regard to the Helms-Burton Act was sufficient reason for Rene E. Browne to circumscribe the role of Article XXI GATT as follows:

Nevertheless, the national security exception in GATT Article XXI still poses a latent, lingering threat to the stability of the fledgling World Trade Organization, as its endorsement would encourage other countries to carve out “national security” exceptions to justify any number or type of international trade restrictions.\(^791\)

As can be seen, the problem of the judiciary with the reconciliation of security interests with free trade rules is inseparably linked to respective institutional uncertainties about the jurisdictional competence in trade and security issues. Especially, paragraph c.), regarding any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security, raises difficult questions about the coherence of the international legal order, particularly with regard to the current legal vacuum between the GATT/WTO system and the UN system in the aftermath of the failure of the ITO.

The lack of coherence and resulting inefficiency is exemplified in the past conflict between the United States and Nicaragua, which occupied the International Court of Justice, the Security Council,\(^792\) the General Assembly,\(^793\) and finally a GATT Panel. More precisely, in the Nicaragua Case\(^794\), once the ICJ established its jurisdiction and competence to rule in the matter,\(^795\) the United

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\(^{788}\) United States – The Cuban Liberty and Democratic Solidarity Act (Request for Consultations by the EC) WT/DS38/1 (GL/71 and S/L/21) (May 13, 1996).

\(^{789}\) Ibid.

\(^{790}\) United States – The Cuban Liberty and Democratic Solidarity Act (Constitution of the Panel Established at the Request of the European Communities) WT/DS38/3 (February 20, 1997) and United States – The Cuban Liberty and Democratic Solidarity Act (Communication from the Chairman of the Panel) WT/DS38/5 (April 25, 1997) and United States – The Cuban Liberty and Democratic Solidarity Act (Lapse of the Authority for Establishment of the Panel) WT/DS38/6 (April 24, 1998).


\(^{792}\) See e.g. Security Council Resolution 562 (Nicaragua-USA), [1985] S/RES/562, adopted unanimously at the 2580th meeting, on May 10, 1985.


\(^{794}\) Case Concerning Military and Paramilitary Activities in and against Nicaragua (1986), P.C.I.J. No. 70 at 14 [hereinafter Nicaragua Case].

States first ended its participation in the Court’s proceedings, and was afterwards found guilty in all points and asked to pay reparations to the Government of Nicaragua. Finally, as a consequence of the judgement, the US decided to terminate its commitment entered into under the Optional clause declaration. The judgment not only found various violations of customary international law (use of force, non-interference), but also held that the US:

...by declaring a general embargo on trade with Nicaragua on 1 May 1985 has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the parties at signed at Managua on 21 January 1956 and therefore

decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the parties at signed at Managua on 21 January 1956.

The mention of the breach of the Treaty of Friendship Commerce and Navigation is interesting, because, it inter alia established obligations of “equitable treatment” (Art. I) and “freedom of commerce [and navigation]” between the parties. Both obligations are similar to the GATT language and therefore, the GATT provisions could equally have served as a legal basis for the adjudication of the conflict.

In fact, the same considerations with regard to Nicaragua were raised within the GATT and subsequently dealt with by the Contracting Parties. The subject of the proceedings before the GATT Contracting Parties was the 1985 Executive Order issued by the President of the United States prohibiting all trade with Nicaragua. In response to the measure Nicaragua first requested consultations with the US and later asked for the establishment of a GATT panel. The United States representative objected to the establishment of a panel unless it was understood that the Panel could not examine or judge the validity of or motivation for the invocation of Article XXI:(b)(iii) by the United States in this matter. Once a panel was established it faced the enormous difficulty of adjudicating a combined political and economical measure in light of the nullification and impairment procedure (Art. XXIII). Moreover, Nicaragua had maintained that GATT could not operate in a vacuum and that the GATT provisions must be interpreted within the context of the general principles of international law taking into account inter alia the judgement by the International Court of Justice and United Nations resolutions. Under this aspect and in the light of an incoherent framework of international law, the Panel, in a realistic form of judicial self-restraint, declared that it:

...considered it to be outside its mandate to take up these questions because the Panel’s task was to examine the case before it “in the light of the relevant GATT provisions”, although they might be inadequate and incomplete for the purpose.

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796 Nicaragua Case, supra note 794 at 18; see also K. Highet, “Litigation Implications of the U.S. Withdrawal from the Nicaragua Case” (1985) 79 A.J.I.L. 992.


798 Nicaragua Case, supra note 794 at 148-9.


800 Ibid.

801 Ibid.
The inadequacy and incompleteness can be described as a general symptom not only occurring in the linkage of trade and security but also of the one of trade and culture. It is therefore unfortunate that the cited Panel report was never adopted and shared the same fate as the ICJ Judgment in the Nicaragua Case.

The Nicaragua Case and the corresponding Panel Report exemplify how the same conflict can occupy two different international fora and still, or precisely because of this division of the subject matter in combination with a great jurisdictional uncertainty, end in complete deadlock. Thus, what concerns mainly the jurisdictional competence between the WTO and the UN Security Council with regard to security problems and trade sanctions may equally apply to problems with regard to commercial implications of a cultural exception. In addition to the institutional deficiencies inherent in the current international legal order, which also play a role in the sphere of culture, regardless of the existence of absence of a cultural exception clause, the Nicaragua Case also highlights another possible link between security and culture. Characteristic for this link, the ICJ condemned the US for the distribution of a printed manual entitled “Operaciones sicologicas en guerra de guerrillas”. The reference to the manual points also to a potential role for the cultural industries, or certain of their important subsectors, in the maintenance of both national and international peace and security, which – as will be shown – is based on the “soft power” of the cultural industries and the insight of UNESCO that wars begin in the “minds of men”.

6.5.1.2. The Cultural Industries as Implements of War: “Trade follows the Film”, and “War Follows...?”

The last element justifying a short inquiry into the parallels between the security exception and a cultural exception is found in the specific nature of the cultural industries related to the maintenance of national and international security. The specific nature refers to the privileged role of some sectors of the cultural industries in the functioning of a democratic system and some economic particularities deriving from that. Such specificity also allows for the following speculations on the “dual-use” character of some goods and services of the cultural industries.

As quoted in the beginning Article XXI GATT para. b) lit (ii) grants WTO Members wide discretion with regard to “traffic in [...] implements of war” and “traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment”. The imminent question is what determines whether a good or service is directly or even indirectly linked to a military establishment. Past practice suggests that actually every good and service is capable of becoming linked to a military establishment, when considering that in 1975 Sweden introduced a global import quota system for certain footwear on the basis of Article XXI GATT.

Hence if footwear may assume the status of an “implement of war”, it can be argued that a fortiori the cultural industries may assume such a role. This is due to the complex causal links between trade and

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802 See Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26, 1984), reprinted in (1985) 24 I.L.M. 59, at 138, in which the Court found by 14 votes to 1 that “the United States of America, by producing in 1983 a manual entitled Operaciones sicologicas en guerra de guerrillas, and disseminating it to contra forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America.”.

803 Cf. Article 73 par. b) lit. (ii) TRIPS and Art. XIVb par. b) lit (i) GATS (“relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment”).

war, on the one hand, and trade and the film, on the other, combined with the ability of the cultural industries to positively and to negatively influence human behaviour and, as a consequence, the peaceful or belligerent behaviour of states.

In positive terms, it is the potential constructive role of the media for both the enhancement of international trade and for a cultural dialogue between the peoples of this world.\textsuperscript{805} Indeed, the advent of the motion picture, as any other communication medium before it, has been acclaimed in somewhat naïve terms as an instrument of culture and education of “immeasurable” and “illimitable” power, “composing only the overture to a veritable symphony of human progress”.\textsuperscript{806} The recognition of a positive contribution of a cultural dialogue – as opposed to the theory of a “clash of civilisations” – \textsuperscript{807} is also enshrined in the Constitution of UNESCO which is restated by the 1966 Declaration of the Principles of International Cultural Co-operation as follows:

Recalling that the Constitution of the Organization declares that “since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed” and that the peace must be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind,

Recalling that the Constitution also states that the wide diffusion of culture and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.\textsuperscript{808}

The first paragraph’s reference to the beginning of wars in the mind is, on the one hand, based on the uncertainty about the exact impact of the media on the mind, and, on the other hand, reveals the other, the potentially more destructive side of the media. In their destructive side, the cultural industries function not as a mere “trade getter”\textsuperscript{809}, a “silent sales man” or even less as an instrument of culture and education, but instead more like the Sirens in Greek mythology leading their ‘consumers’ to their certain death (“war following the film”). Thus, in their destructive role, the cultural industries may rather foster an individual’s, a society’s, or a state’s belligerent behaviour and assist in the disruption of international trading relations. The potential for both positive and negative consequences linked to the cultural industries, has been recognised in the sphere of international law, for instance, in the Convention for Facilitating the International Circulation of Films of an Educational Character and the International Convention Concerning the Use of Broadcasting in the Cause of Peace, which were both drafted in the 1930s.\textsuperscript{810} At the present, the influential role of the cultural industries in the context of belligerent behaviour has been resumed by Joseph Nye under the term “soft power”. Similar to the concept of “soft” law,\textsuperscript{811} “soft power” is used as a contrast to so-called “hard” power. Nye gives the following definition:

\textsuperscript{805} See Section §§ 6.2.2.
\textsuperscript{806} See E. Johnston, “The Motion Picture as a Stimulus to Culture” (1947) 254 Annals Am. Acad. Pol. & Soc. Sci. 98 at 98.
\textsuperscript{808} Declaration Cultural Co-operation, supra note 253; see also the Preamble of the UNESCO Universal Declaration on Cultural Diversity, supra note 106.
\textsuperscript{809} See supra note 478.
\textsuperscript{810} See supra note 478.
\textsuperscript{811} See Film Convention (1933), supra note 234 and the Broadcasting Convention (1936), supra note 236.

Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU European University Institute

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Hard power is exercised through economic sanction or military force. Soft power is our [the US] ability to get what we want through attraction rather than coercion. When other countries want the same outcome we want, then we can get what we want without having to spend as much on coercion. Both dimensions of power are important, and they work best when they reinforce each other.\textsuperscript{812}

Among the sources of soft power, Joseph Nye lists culture, such as the US values of liberty, human rights and democracy, education (attraction of American universities for the half-million foreign students who study in them) and notably cultural exports, such as films and television programmes, art and academic writing, and material on the Internet, which touches upon important sectors of the cultural industries. The “soft” versus “hard” power qualification corresponds to the list of tool that are available to states to influence the behaviour of other states. How the “soft” power of the cultural industries can turn into “hard” military power and bloodshed has been proved in history many times.\textsuperscript{813} For instance, a relatively recent example is the outbreak of the civil war in 1990 in Rwanda, where hate speech, disseminated via various print media and radio, led to genocide and the subsequent destabilisation of the entire region.\textsuperscript{814}

This process of influencing public opinion is usually termed propaganda, which was defined as “the deliberate attempt to influence mass attitudes on controversial subjects by the use of symbols rather than force”.\textsuperscript{815} Nevertheless, it must be added that, unfortunately, propaganda has ultimately often led to the use of force itself. In theory, propaganda is \textit{ab initio} neutral, but in its common use and in practice, rightly confers more of a negative meaning.\textsuperscript{816}

The concept of propaganda is interesting for the present context, because it points out the complex entwinement of politico-cultural versus economic elements and entertaining versus informing functions, which are combined in some sectors of the cultural industries. In this respect, Edward S. Herman and Noam Chomsky have provided a useful analysis, in their so-called “propaganda model”, addressing the political economy and the underlying determinants for the performance of the mass media.\textsuperscript{817} In particular, the model is based on the premise that:

The mass media serve as a system for communicating messages and symbols to the general populace. It is their function to amuse, entertain, and inform, and to inculcate individuals with the values, beliefs, and codes of behaviour that will integrate them into the institutional structures of the larger society. In a world of concentrated wealth and major conflicts of class interest, to fulfil this role requires systematic propaganda.\textsuperscript{818}

This model, although primarily tailored to the structure of the US media market, helps to understand the complex mechanisms underlying the cultural industries. The model fleshes out several elements which assist the potential propagators to get the messages across to the public in the way they want

\textsuperscript{812} Nye, \textit{supra} note 77.
\textsuperscript{813} See e.g James, \textit{supra} note 37 at 191 (Crime War) and 441 (Cinema), Herman & Chomsky, \textit{supra} note 605, and Chomsky, \textit{supra} note 472; see generally J. Wilke, ed., \textit{Propaganda in the 20\textsuperscript{th} Century: Contributions to its History} (New Jersey: Hampton Press, 1998).
\textsuperscript{816} See e.g \textit{The Canadian Oxford Dictionary}, \textit{supra} note 14 at 1158, defining propaganda first as “an organised program of publicity, selected information etc., used to propagate a doctrine, practice, etc.” and second “usu. derogatory the information, doctrines, etc., propagated in this way esp. regarded as misleading or dishonest”.
\textsuperscript{817} See Herman & Chomsky, \textit{supra} note 605.
\textsuperscript{818} \textit{Ibid.} at 1.
The authors notably mention important factors concerning the structure of the industry, such as the size, ownership, owner wealth, and profit orientation of the mass media. This rubric notably designs the tendency of the cultural industries towards concentration and their diversification through affiliation with other branches of industries. The affiliation with other industrial may become problematic in connection with the fact that advertising is the primary income source of the mass media. This refers to the problem of the double clientele that the media serve, first the advertising companies and second the final consumer. Based on the great selling power of the media, companies are willing to pay huge sums in advertising. These higher revenues for the media create a realistic danger of tipping the balance of a favourable treatment to the advertiser. This tendency may equally open the door to a dangerous mixture of the editorial and the advertising content in the various media. Linked to the mixture there exists a problem of sourcing the news disseminated by the media. The need of news materials is becoming a more serious problem in times of practical real-time coverage of events around the globe through the media. As a result, quality in the news coverage drops, since it is economically and practically unfeasible to check and verify the reliability of the source of various news data. This can lead to a bottleneck situation where a few press officers or news agencies exercise total control over the flow of information. Finally, the authors also mention the so-called “flak”, which refers to negative responses to media releases or programmes and the ideology of “anticommunism as a control mechanism”. The last point of “anticommunism” is obviously an American peculiarity, and could according to time and space, be used interchangeable with “anti-Capitalism” or “anti-Americanism”. Therefore, the concept, for its wider or global applicability, should instead be replaced by a neutral concept of Feindbild (foe image) denominating certain keywords where consensus about its precise meaning, if it conveys one at all, is widely absent.

This analysis of propaganda has shown the potential of the cultural industries to function as a means or to incite hatred and sow the germs of war but equally contains useful insights in the way to prevent wars from beginning in the minds of men. In negative terms, this quality of the cultural industries qualifies them as potential “implements of war” in the sense of Article XXI GATT. However, in terms of finding a sustainable solution to the culture and trade problem, there is only little practical use for the security exception. It is even less desirable in terms of the positive aspect of the cultural industries to function as a means of fostering international mutual understanding.

§§ 6.5.2. Security versus Culture: A Critical Evaluation of the Character of Exceptions

A contextual reading of Article XXI GATT, when contrasted with the hypothetical existence of a cultural exception for the cultural industries, allows for the following few critical conclusions de lege ferenda. First, the security exception, like the general exceptions in the chapter before, is another case of a universal exception from the GATT rules without requiring former approval or notification with the objective of mitigating between legitimate national security interests and global trade rules. In this function lies the main similarity between Article XXI GATT and a possible cultural exception. In accordance with a country’s right to invoke Article XXI GATT based on a threat to its security interests, it would be upon the country of which the culture is under threat to invoke the exception. It does not extend to the cultural industries to invoke the exception for the threat to their culture. This follows for the simple reason that the threat to culture is by definition not an objective threat to national security of the country seeking to invoke the exception. In the same manner, cultural industries of a country cannot invoke this exception on behalf of the culture of another country. In this manner, the security exception is perfectly suited to the role of an exception for the protection of legitimate national security interests.

819 Ibid. at 1-35.
820 See e.g. Benjamin, supra note 128 at 443 and Brady, supra note 598.
821 See Taylor, supra note 469 at 1 and the glossary at 203 defining “infotainment” as the “packaging of news and information in a popularly entertaining manner”.

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cultural exception. This unilateral right of invocation, and the possibility of an abusive practice, is not without danger for the functioning of the multilateral trading system as a whole. Consequently, as much as a national security threat is linked to global security, a national culture is part of the world’s cultural diversity and cultural heritage. For this reason, a strictly unilateral invocation of national cultural policy concerns appears counterproductive for both the global cultural diversity as well as the global trading regime. Moreover, the past and present fragmentation of the international legal order, especially with regard to issues of essential security interests in form of the rift between the WTO and the UN system, calls for great caution in the sphere of culture concerning not only the choice for the right legal instrument but also the best-suited organisation to administer it. In this connection it is particularly important to take into account the regulatory context, such as the legal tool (cultural exception or cultural specificity clause), the degree of (economic and political) integration and the institutional architecture of each of the international organisations together. Taking the present situation as a point of departure, a cultural exception appears to produce the same unsatisfactory results as the security exception has in the past with regard to mitigating not only national with global but also to political and economic objectives.

Finally, the close relationship of political and economic elements in international security concerns is also matched by a similar entwinement of political and economic considerations linked to the cultural industries. As was shown, the cultural industries also play, next to their entertaining function, an important role in informing the societies that have access to them. As was shown, the informing role can manifest itself in a positive and a negative way, either contributing to an international cultural exchange or the incitement of hatred and belligerent behaviour. This additional function qualifies the goods and services of the cultural industries, if not practically, than at least metaphorically as dual-use goods (or services) falling within the proximity of the national security exception. Any international regulatory attempt in connection with the cultural industries also ought to take this combined economic and political aspect of the cultural industries into account.
Chapter 7  TRADE IN SERVICES: THE GENERAL AGREEMENT ON SERVICES (GATS)

§ 7.1.  The Rise of Services in International Trade

§§ 7.1.1. From the GATT 1947 to the GATS 1994

The current section concerning the General Agreement on Services (GATS) is of considerable importance for the present examination of the cultural industries.\(^{822}\) It is so for manifold reasons. First of all, the adoption of the GATS resulted in the extension of the international trading system to trade in services, hereby following the trend of dynamic technological innovation and the significant changes encountered in the modes and patterns of international trade. As a matter of fact, at the time of the drafting of the GATT 1947, services assumed almost no role in international trade, save those related to transport, tourism and communication.\(^{823}\) As predicted by Walter Benjamin as early as 1926 and confirmed in the context of Article IV GATT in connection with the advent of television during the 1960s, numerous technological innovations contributed to the emergence and stark rise of services in international trade.\(^{824}\) The various links between trade in goods, trade in services and technological innovation in the communication (and transport) sector and the subsequent factors contributing to the establishment of the GATS within the multilateral trading system, were pertinently explained by Thomas Cottier as follows:

> The advent of modern tools of electronic and satellite communication substantially reduced the costs of transporting data and created global markets. It facilitated the control of business operations abroad even more so than before - when air travel first rendered the world a much smaller place. Without such technologies, potentials to provide services abroad, and therefore the drive to seek liberalization of market access for an ever-increasing service industry, would have hardly gained such prominence.\(^{825}\)

The new technologies, however, not only contributed to the expansion of trade in services, but also posed new challenges to a successful international regulation of trade in services. The challenge, according to Cottier consists in the fact that:

> New technologies are [...] the most important driving force in the process of globalization of the economy. They have a profound impact on the future of international law as the elaboration of international trade regulation is likely to become more complex.\(^{826}\)

Obviously, the wider implications of the globalisation of the economy for the WTO Members’ domestic cultures and, in a wider sense, their cultural industries take part in this growing legal complexity. The GATS already contains, or otherwise promises to address various aspects of the regulation of trade in services, which are – although to a varying degree – related to the creation or preservation of the world’s cultural diversity through the efficient regulation of services pertaining to the cultural industries.

With their economic weight growing, services became an interesting subject for international trade, but at the same time contributed to a growing legal uncertainty surrounding the classification of

\(^{822}\) General Agreement on Trade in Services, Annex 1B, (1994) 33 I.L.M. 1168 [GATS].


\(^{824}\) See supra notes 131 and subsection §§ 6.2.3.

\(^{825}\) “New Global Technology Regime”, supra note 823 at 421 [footnotes omitted].

\(^{826}\) Ibid. at 435.
economical transactions as pertaining to goods or services. As could be seen in the context of cinematograph films, the classification issue gained significance with the advent of television and direct satellite broadcasting. In general, the contracting parties recognised the rise of services in the framework of international trade at the beginning of the Uruguay Round, launched by the *Punta-del-Este Ministerial Declaration*, as follows:

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.827

Second, it is worth noting that the attainment of the objectives laid down in the Declaration has been, to a large part, obstructed, or, perhaps, delayed due to the contracting parties’ disagreements over the treatment of the cultural industries, and especially their audiovisual sectors. Interestingly, the controversy over the treatment of audiovisual goods and services gave rise to the (re)emergence of the concept of the *exception culturelle* (cultural exception) and the continuous debate about the relation between trade and culture. This last point is of major importance, since many questions framed in the context of the audiovisual sector, can be applied *mutatis mutandis* to other sectors.

As a third reason, the inclusion of services in the multilateral framework of international trade under the aegis of the WTO also raises important questions about the legal coexistence of the GATT 1994 and the GATS. This is, because the expansion of trade from goods to services, reveals the complex and difficult mutual relation of goods and services, which in practice often is complementary because:

Goods exports can have a high services content and rely on transport, communications, insurance, banking, and business services. A significant volume of services output is dependent on the manufacturing sector.828

According to this finding, as time passes, the awareness of the regulation of trade as a process rather than a one-time establishment appears to grow. Before 1986 seven multilateral negotiation rounds were held in the field of trade in goods introducing important changes to the initial scope of the GATT 1947. In Article XIX GATS, the wider process of global economic integration is equally recognised through the progressive liberalisation of services based on successive rounds of negotiations. Despite this commonality, there exists an important asymmetry between the GATT and the GATS. In fact the present GATS framework has been compared to the level of trade liberalisation in the sphere of goods at the time of the adoption of the GATT 1947.829 In addition to the GATT’s lead of half a century, regulatory coherence has not been enhanced by the separate negotiation of the GATS and the GATT.830 Although, the advantage of a separate negotiation is the

827 Preamble to Part II (“Negotiations on Trade in Services”) of the *Ministerial Declaration on the Uruguay Round*, supra note 309.


829 Guide to the *Uruguay Round Agreements*, supra note 372 at 161-2 (“Each government’s schedule of liberalization commitment for trade in services is also only a first step, comparable not with its GATT schedule of 1994, but rather with the initial limited tariff-cutting undertaken when the GATT was launched half a century ago”).

830 See Gippini Fournier, supra note 823 at 364.
avoidance of trade-offs between various commitments of negotiators, the obvious inconvenience is found in the outcome characterised by a partial overlap and a possible inconsistency or conflict between provisions of the two agreements.

To sum up, from the perspective of the cultural industries, notwithstanding the quandary surrounding the goods/service distinction, the inclusion of services has positively contributed to a more complete regulation of international trade relations. Strong controversies that arose during the negotiation of various cultural industries’ subsectors, have contributed to the discussion of an exception culturelle, which at this point must be seen as a possible starting point for a fruitful debate leading to a more coherent regulatory framework within and outside the field of application of the WTO.

Before analysing more closely the status quo of the GATS’ legal framework as regards the cultural industries, it is felt that the main arguments underlying the controversy over audiovisual sector during the Uruguay Round must be shortly revisited, because it is likely that similar positions are going to be taken and similar arguments are going to be made in any future attempt to further liberalise trade covering both goods and services.

§§ 7.1.2. The ‘Exception Culturelle’ during the Uruguay Round Negotiations

7.1.2.1. The History of the ‘Exception Culturelle’

During the Uruguay Round negotiations there was considerable disagreement between representatives of two conflicting views about the exact consideration of the audiovisual industry within the realm of international trade. The polemics concerned mainly the United States, Canada and the European Union, but criticism of both views were and continue to be voiced in all countries concerned.831 The polemics concerned first and foremost the basic problem of cultural goods and services, namely whether they ought to be considered as being “cultural” or “economic” in nature and, therefore, require treatment either like any ordinary merchandise or like a res extra commercium. Accordingly two different views crystallised each of them insisting on either protecting culture from the influence of free trade by exempting cultural goods and services, or including them based on their economic value. These apparently conflicting views were expressed in a great number of statements:

For instance, prominent statements mainly from the American side contended that, one the one hand, that “there is no such a thing as Canadian culture” and that the reason for protectionism is purely economic.832 Similar arguments were raised about the efforts made by the European Union to protect their existing culture and to create a new European culture.833 Obviously alluding to the weakness of the European film industry and directed particularly to France, Carla Hills, former President Bush’s trade representative and GATT negotiator, said: “make films as good as your

831 For instance, Steven Spielberg is reported to have shown some understanding for the French system of subsidisation; see “Culture and Trade: Cola v. Zola” The Economist (October 16, 1993) 78; on the other hand, Jean-Marie Messier has announced in 2001 that according to him: “L’exception culturelle franco-française est morte”; see J.-M. Bezet & Ch. Chombeau, “Droite et gauche s’opposent a Jean-Marie Messier sur l’exception culturelle” Le Monde (December 29, 2001). See also P.A. Messerlin, “France and trade policy: is the ‘French exception’ passed?” (1996) 72 International Affairs 293 and Bhagwati, supra note 1274.
832 See Carlson, supra note 6 at 619.
833 Compare Garrett, supra note 7 at 572-576.
cheese and you will sell them!”

Another argument against cultural protectionism voices the concern that limiting free trade in various cultural products violates the freedom of speech and has a negative impact on the natural exchange of information between countries and their cultures.

Different commentators in Canada and the EU, on the other hand, defended their domestic policies by charging the U.S. with “cultural imperialism”, “cultural colonialism” and alluding to the quality of their protects with “intellectual terrorism”.

As a response to the intrusion of free trade, state intervention in, or protection of, cultural affairs appears as a legitimate response and forms the only choice for Canada, just as expressed by Sir John Aird by the following wording: “C’était l’Etat ou les États-Unis”.

In other statements the US entertainment industry was compared to an “elephant” or a “cultural monolith”. Generally, globalisation in trade of goods in terms of the American perspective is best described by “McWorld”. At least Canadians seem not to have lost their sense of humour and of ironical self-reflection, such as a popular Canadian creation myth reveals. According to the myth, the Fathers of the Confederation intended to borrow:

“the best of what their ancestors and neighbors had produced” by combining “French culture, British politics, and American technology. But the plan went wrong, and Canada was left instead with French politics, British technology, and American culture”.

The short sketch of the language underlying the various statements reveals first of all the recurring character underlying the conflict. For instance, similar arguments have been recorded during the negotiation of the Blum-Byrnes Agreement in the 1940s, debates within UNESCO, and the negotiations for the CUSFTA. After the Uruguay Round, the controversy over culture continued during the time period from negotiations for a Multilateral Investment Agreement (MAI) to the Ministerial Meeting in Seattle in 1999, both ending in a failure. The regular patterns underlying the culture/trade debate give a good impression of what might arise during the next multilateral trade talks.

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834 See Murray, supra note 4 at 209.
835 See Carlson, supra note 6 at 610.
836 See Grant, supra note 2 at 1335-1336 and 1343.
837 See Lehmann, supra note 3 at 199.
838 See Murray, supra note 4 at 209.
839 See Vulser, supra note 5.
840 See Lehmann, supra note 3 at 215.
841 For an overview of the parallels, see Jeancolas, supra note 1269 at 171, citing a statement by the Minister of Canadian Heritage Sheila Copps.
844 For an overview of the parallels, see Jeancolas, supra note 485 at 48.
845 See supra note 528.
846 See supra Section 4.1
848 On the patterns underlying the negotiations dealing with culture and trade, see Culture, Trade and Globalization, supra note 70.
7.1.2.2. The Scope of the ‘Exception Culturelle’

The origin, meaning and scope of the exception culturelle and its role during the Uruguay Round are relatively well-documented. Therefore, the central focus in this subsection rests on the substantial legal aspects linked to the exception culturelle in the framework of the negotiations for the GATT 1994 and GATS. During the negotiations, in response to the view that all goods and services fall within the scope of the WTO agreements, whether of cultural relevance or not (“total inclusion” or “cultural denial”), three main options gradually emerged. These options are the insertion of a clause of (a) cultural exclusion; (b) cultural exception, or (c) cultural specificity.

A. Cultural Exclusion Clause

The first option is as radical as is the counter-claim for the total inclusion of cultural goods and services in the multilateral trade system. Theoretically, as a result of the total exclusion of “culture” from the sphere of trade, any good or service that bears traits of culture would be excluded from the rights and obligations deriving from the GATT/WTO system, leaving its Members with a maximum of freedom to introduce cultural measures and policies. Model clauses according to which this goal could have been transformed into law are found in Article 2005 CUSFTA (2106 NAFTA) and the security exception(s) of Article XXI GATT (and XIVbis GATS). To the same effect, though as another regulatory means, a waiver could be used under certain conditions to exclude the application of trade rules to certain cultural goods and services. The regulatory approach of a total exclusion is however accompanied by serious obstacles and numerous disadvantages. First of all, a satisfactory exclusion would require a proper definition of the concept of culture. Such a clear-cut definition is confronted with the particular problem of rapid cultural changes in a global environment and there exist a real danger that the definition and hence the scope of the exemption would be outdated before it would enter into force. Too narrow a definition would become useless, and too broad a one could – by allowing unfettered discretion to each state – damage the foundations of the entire multilateral trade system. As a second problem appears that even if such a workable definition could be found, still – given the elasticity and the appeal to the emotions of a wide public – it appears unlikely that it would find the necessary votes among the current 148 WTO Members. Last but not least, a further risk lies in the possibility of Members, whose economic interests in the exempted cultural sectors are hence nullified or impaired, to have recourse to retaliatory action, which is capable of undermining the functioning of the multilateral trading system as a whole.

B. Cultural Exception Clause

Closely related to a total cultural exclusion is the option of cultural exception and the difference is only one of degree. A cultural exception would exempt a limited aspect of culture, such as the audiovisual sector, from GATS (or GATT) obligations. Examples are perhaps Article IV GATT on


851 On the use of a waiver for the exclusion of the cultural industries, see also the discussion in Subsection 10.2.2.2.
cinematograph films, or the single provisions listed under the general exceptions of Article XX GATT and Article XIV GATS. The advantage is that the task of defining the scope of the exception appears to be easier, but the inconvenient is that the usually narrow definition of exceptions by Panels diminishes their practical use. For the cultural industries a definition similar to “national treasures” in Article XX GATT could have been introduced in the GATS.

C. Cultural Specificity Clause

Another proposal relevant for the cultural industries is found in the concept of cultural specificity. Behind cultural specificity stands the understanding that cultural goods and services are not like ordinary industrial products or commercial services, but that they, nevertheless, have an economic dimension and, therefore, should, in principle, be included in the framework of the GATS. Notwithstanding their inclusion, some service sectors would benefit from special treatment in order to secure their specific character and role for society. In legal terms, this could be achieved through a listing in a schedule of special commitments or an annex attached to the final agreement, such as the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty. During the Uruguay Round, particularly in light of the Television without Frontiers Directive, the EU proposed to bind the existing commitments to the effect that the existing access would not be undermined.

§§ 7.1.3. The Status Quo and Consequences of the “Agreement to Disagree”

It is well known that in the final phase of the Uruguay Round negotiations, none of the options was adopted, and the result was the famous “agreement to disagree”. In other words, the United States were opposed to any recognition of a specific cultural character inherent in certain categories of goods and services, whereas Canada and the European Community among other states decided not to make any commitments in the service sectors concerned and have lodged some exceptions to the MFN obligation.

The oxymoronic taste left behind by the “agreement to disagree” highlights well the difficult nature of the cultural industries. The reasons for the failure to agree are manifold, among the most important feature a lack of due preparation, misinformation and polemics, as well as cultural differences manifest in cultural, political and economic terms, and, in addition to that, the general difficulty inherent in negotiations dealing with cultural matters.

At a first glance the immediate result of the standstill is limited in scope. From a broader perspective, however, the “agreement to disagree”, i.e. the lack of consensus translates into considerable disparities in the various sectoral commitments undertaken by the WTO Members

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852 See PART IV, infra note 1814.
853 See Falkenberg, supra note 850 at 432 and Croome, supra note 568 at 355.
854 See Croome, supra note 568 at 376 and Bernier, supra note 620 at 127; see also Seelmann-Eggebert, supra note 535 at 97-112.
856 See Cahn & Schimmel, supra note 649.
under the GATS. For the service sector falling within the scope of the cultural industries, such as notably audiovisual services, the direct result of the lack of consensus is that they “neither enjoy any special cultural status nor are committed to the particular terms of liberalisation.” In addition, the GATS remained incomplete in several aspects, such as notably with regard to the MFN and NT principle as well as to the issue of subsidies. In the present regulatory system governing the international trade in services, these sectoral disparities aggravate further the already difficult relation between services and goods within the WTO framework. Nonetheless, for a proper evaluation of the standstill with regard to the future, it is necessary to take a closer look at the existing legal framework.

§ 7.2. The GATS’ Legal Framework

§§ 7.2.1. The General Scope and the Guiding Constitutional Principles

The conclusion of the GATS during the Uruguay Round negotiations means a formal recognition of the growing importance of trade in services for the growth and development of the world economy. Its principal objectives are:

[...]
to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries.

Seen from the objectives and constitutional principles, the GATS resembles widely those laid down in the GATT and therefore fits in the overall letter and spirit of the body of WTO law. To the difference of the GATT, the GATS covers measures that affect trade in services. The GATS, however, does not provide a precise definition of services but instead states that:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;
(b) in the territory of one Member to the service consumer of any other Member;
(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

The “measures by Members” referred to include measures taken by central, regional or local governments and authorities as well as non-governmental bodies in the exercise of powers delegated by the former. Furthermore, such services include all sectors of services, except for those supplied in the exercise of governmental authority, meaning that it is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Like in the GATT, the MFN principle is accorded a crucial role in the GATS. Subject to two important exceptions, the Article II GATS lists the obligation of each Member to accord:

immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

The first exception to the MFN principle authorises a WTO Member to maintain a measure inconsistent with the MFN provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions. For existent measures, granted for more than 5 years, the Annex provides a review mechanism under the aegis of the Council of Trade in Services. For new GATS inconsistent measures, introduced after the entry into force of the GATS, it states that they be subject to the general provisions regarding waivers under the WTO Agreement.

858 Indent 1 of the Preamble of the GATS.
859 Indent 2 of the Preamble of the GATS.
860 Article I:1 GATS. See also Gippini Fournier, supra note 823 and Arkell, supra note 828.
861 Article I:2 GATS; see also the definitions in Article XXVIII GATS.
862 Article I:3 (a) GATS.
863 Article I:3 (b) and (c) GATS.
865 Paragraphs 3 and 4 of the Annex on Article II Exemptions.
866 Note that Paragraph 2 of the Annex on Article II Exemptions refers to Article IX:3 WTO Agreement.
Annex specifies, the exemption terminates on the date provided for it, and that “in principle” such exemptions should not exceed a period of ten years. The legal significance of “in principle” is not entirely clear, but – in accordance with the “agreement to disagree” – the Annex also states that they shall be subject to negotiation in subsequent trade liberalising rounds.

The second exception to the MFN principle concerns advantages granted to “adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed”.

Next to the general and security exceptions, other exceptions to the MFN include special provisions dealing with specific services supplied in the exercise of governmental authority, economic and labour market integration, the selective recognition of licenses or certifications of services suppliers, government procurement, and subsidies.

As a further important step towards flexibility, the GATS recognises as another constitutional principle the commitment to transparency. Transparency means the Members’ obligation to promptly publish, or make publicly available, all relevant information concerning measures or international agreements affecting trade in services, and to annually inform or notify the Council of Trade in Services, as well as other Members at their request, about changes in laws, regulations or administrative guidelines. The only exception to transparency concerns the disclosure of confidential information. In close relation to transparency, the GATS obliges its Members as regards their domestic regulation to provide the appropriate framework guaranteeing the rule of law.

In Part III “Specific Commitments”, the GATS makes the application of the MFN principle dependant on the positive listing of a service in the schedules (Article XVI:1 GATS). In paragraph 2, Article XVI GATS sets forth certain limitations and restrictions which are deemed unlawful once Members have made such commitments. Equally, the application of the national treatment principle is dependant on the positive listing of a commitment for a specific service sector in the schedules (Art. XVII GATS). Consequently, the application of the national treatment principle in the GATS is different from the one in the GATT. Under the circumstances of the GATS, WTO Members can determine more flexibly the exact extent of the conditions for the application of the national treatment rule. The relative large degree of flexibility characterises the GATS as a whole and can also be found in the Preamble, where the WTO Members expressed their determination to recognise:

the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.

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867 Paragraphs 5 and 6 Annex on Article II Exemptions.
868 Article II:3 GATS.
869 Articles XIV and XIVbis GATS.
870 Articles I (b), V, Vbis, VII, XIII, and XV GATS.
871 Article III GATS.
872 Article IIIbis GATS.
873 Article VI GATS.
875 See also A. Mattoo, “National Treatment in the GATS: Corner-Stone or Pandora’s Box?” (1997) 31 J. World T. 107.
876 Indent 4 of the Preamble of the GATS; see also Article XIX:2 GATS.

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In sum, the combined approach of a sectoral distinction for specific commitments, the possibility of listing exceptions to MFN for (“in principle”) ten years, the existence of various unfinished provisions, with the Article XIX GATS laying down the progressive liberalisation through successive rounds of negotiations make flexibility an important cornerstone in the multilateral framework governing trade in services.

§ 7.2.2. Selected GATS Provisions and Some Cultural Considerations

7.2.2.1. Free Movement of Persons, Economic Integration and Labour Markets Integration Agreements

Following the constitutional principles, a set of GATS provisions deals with the related issues of the role of natural persons, of economic integration in general and labour market integration specifically. To begin with, Article I:2 (d) GATS includes the supply of services through the presence of natural persons of a Member in the territory of any other Member. Given the importance of movement of natural persons for the supply of services, the WTO Members declared in the Ministerial Decision on Negotiations on Movement of Natural Persons that:

Negotiations on further liberalization of movement of natural persons for the purpose of supplying services shall continue beyond the conclusion of the Uruguay Round, with a view to allowing the achievement of higher levels of commitments by participants under the General Agreement on Trade in Services.

For that purpose a working group was established with the goal to carry out the negotiations and to inscribe eventual commitments in the Member’s Schedules. The negotiations were prolonged once and subsequent Member’s new commitments were annexed to the Third Protocol to the General Agreement on Trade in Services.

The treatment of persons under various international trade regimes is also a prime indicator for the degree of integration obtained at the background of the ladder of economic integration. Where the GATT 1947 as a mere tool for trade liberalisation contained no provisions on the cross-border movement of persons, various free trade agreement, such as NAFTA, provide for the temporary entry for business persons. The EU, from its outset, provided for the free movement of workers and the freedom of establishment and to provide services. Of particular relevance for the regional level is that the GATS, by way of Articles V and Vbis, introduces exceptions for economic integration and the integration of labour markets. The main difference between the GATS and the regional exceptions in the realm of goods lies in the threshold for the internal liberalisation, which requires that the agreement liberalising trade in services between or among the parties has only “substantial sectoral coverage”, as opposed to “substantially all the trade” in Article XXIV GATT. The GATS specifies that “substantial coverage” is understood in terms of number of sectors, volume of trade

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877 See also the Annex on the Movement of Natural Persons Supplying Services under the Agreement, (1994) 33 I.L.M. 1187.
879 Ibid. at paras. 2 and 4.
880 See Decision S/L/7 of the Council for Trade in Services (June 30, 1995) and the Third Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/12 (July 24, 1995).
881 See Chapter Sixteen: Temporary Entry for Business Persons (Articles 1601-1608) NAFTA, supra note 293.
882 See Title III: Free Movement of Persons, Services and Capital, Chapters 1-3, EECT, infra note 1404.
883 Article V:1 GATS.
affected and modes of supply and that “in order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.” 884

Second, as a further exception to multilateral liberalisation, the GATS authorises WTO Members under certain conditions to enter agreements establishing “full integration” of their labour markets. 885 Full integration is defined as providing “citizens of the parties concerned with a right of free entry to the employment markets of the parties” and including “measures concerning conditions of pay, other conditions of employment and social benefits.” 886

7.2.2.2. Participation of Developing Countries, Technology, Competition and Subsidies

A second set of provisions concerns some major problems the globalisation of the economy through the liberalisation of services poses to the goal of the establishment of a competitive global market for services. The GATS, following the text of the Preamble of the WTO Agreement, stipulates that:

The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV. 887

This obligation has been taken into consideration during the Doha Ministerial Conference when it stated that:

The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. 888

The sensitivity for a Member’s respective development situation is in line with the overarching principle of the WTO to contribute to reciprocal and mutually advantageous arrangements. 889

A first potential important hindrance to the achievement of this objective lies in the availability of service technology to all Members of the WTO. As will be shown below, this is particularly important for communication and audiovisual services in their character of technology-prone services. A second potential hindrance can be found in the natural entwinement of trade and potentially anti-competitive behaviour. 890 In the past decades, the expansion of international trade from goods to services and to IPRs based on the emergence of new sectors and technologies thriving towards the establishment of a global market have further increased the need for a combined consideration of trade and competition policy. 891 The ongoing intensification of international economic relations therefore fosters the complexity and sophistication of patterns of business and trade. After some discrete provisions in the GATT, it is therefore no surprise that the GATS as well as the TRIPS dedicate some more explicit provisions to restrictive business

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884 See Fn 1 Article V:1 (a) GATS.
885 Article Vbis GATS. See also the exception in Article II:3 GATS concerning adjacent countries.
886 Fn 2 Article Vbis GATS.
887 Article XIX:2 GATS. See also *supra* note 876.
888 *Doha Declaration, see supra* note 379.
889 *Indent 3 Preamble of the WTO Agreement.
practices. However, it must be recalled here that the challenges linked to changes in the patterns of trade are of much broader scope and therefore require a more coherent approach on the global plane. First important steps have been taken in the course of the Doha Ministerial Conference, by “recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development”.

Within the GATS, Members recognise by way of Article IX that certain business practices of service suppliers may restrain competition and thereby restrict trade in services and therefore provides for a consultations mechanism with a view for the elimination of such business practices. Exempt, however, are monopolies and exclusive service suppliers mentioned in Article VIII GATS, provided that they are not abusing their monopoly or otherwise dominant position. For the granting of a monopoly rights to a service sector covered by specific commitments after the entry into force of the WTO Agreement, notification to the Council of Trade in Services is obligatory.

Finally, linked to competition law and technology, it is of great importance for the establishment of a global and, at the same time, competitive market to address the question of a multilateral discipline on subsidies. So far, the GATS regime recognises the potential distorting effects subsidies may have on trade in services but specific rules on subsidies, such as the SCM Agreement in the realm of goods, have not yet been developed. Instead, as the only article mentioning subsidies explicitly, Article XV GATS calls on the WTO Members to “enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distorting effects”. The negotiations shall also include the problem of countervailing duties and the role of subsidies in relation to the development programmes of developing countries. In this last point it recalls the need for flexibility in this area. For the preparation of these negotiations, Members are asked to exchange information concerning all subsidies related to trade in services. For a possible dispute arising from subsidies a Member may request consultations which shall be accorded “sympathetic consideration”.

Finally, it will be seen to what extent the results deriving from such negotiations on subsidies on services will resemble those of goods.

7.2.2.3. The GATS Regime and the Cultural Industries

The preceding overview of the current GATS regime helps to explain the prominent position the liberalisation of trade in services holds in the ongoing controversy of the global cultural and trade debate. It also highlights the complex entwinement of the single GATS provisions, especially those

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892 Cf. Articles VI, XVI and XVII GATT and Article 8 TRIPS.
894 Doha Declaration, see supra 379.
896 Article VIII:4 GATS.
897 Cf. Article XV:1 with Indent 4 of the Preamble and Article XIX:2 GATS.
898 Article XV:1 GATS. See e.g. Subsidies for Services Sectors: Information Contained in WTO Trade Policy Reviews (Background Note by the Secretariat), S/WPGR/W/25/Add.3 (September 19, 2002).
899 Article XV:2 GATS.
900 For the point of departure of such negotiations, see Working Party on GATS Rules, Subsidies and Trade in Services (Note by the Secretariat), S/WPGR/W/9 (March 6, 1996); see also Bernier, supra note 620 at 129.
on natural persons, economic and labour integration, developing countries, technology, competition rules and subsidies, when they are considered from the perspective of the tensions between free trade and cultural diversity as they are set free by the particularities of the various service sectors pertaining to the cultural industries. With regard to cultural diversity, their currently only rudimentary character, in some cases only containing a negotiation mandate for later negotiations, opens the possibility for their combined consideration and the attainment of a more balanced multilateral trading regime in the future.

For instance, the free cross-border movement of natural persons is important for the cultural industries, because compared with goods, trade in services has far-reaching cultural implications, since their provision usually relies more directly on activities involving human beings (natural persons), no matter whether the presence of natural persons of a Member in the territory of any other Member is required or not. Hence, natural persons are not only important “trade getters”, because human contacts usually precede commercial contacts and exchange, but, at the same time, also the most important carriers of “culture” both in the form of producers and consumers of various cultural products and services. In this context, various immigration laws have been found to constitute economic protection against competition from foreign artists. This has a peculiar impact on the field of the cultural industries where obstacles to perform or to promote cultural goods or services may have a negative impact on the sale of the respective goods and services. At the same time, it runs counter not only to the objectives of global trade liberalisation, but also desirable goals of cultural diversity and a broad cultural dialogue between different peoples and countries.

In the WTO, Article I:2 (d) GATS includes the supply of services through the presence of natural persons of a Member in the territory of any other Member. Given the importance of movement of natural persons for the supply of services, the WTO Members adopted the Ministerial Decision on Negotiations on Movement of Natural Persons, which calls for further liberalisation of movement of natural persons. For that purpose even a working group was established with the goal to carry out the negotiations and to inscribe eventual commitments in the Member’s Schedules. Notwithstanding these efforts, so far the liberalisation of the free movement on natural persons has – despite claims of a basic convergence of economic interest between developing and developed countries – remained limited.

The free movement of natural persons also relates to the problematic of the participation of developing countries in the global market for services, as addressed in Article IV GATS. Also in the context of services, the important role of the cultural industries as a “nation-building instrument that ensured due respect for cultural diversity, traditions, national values and heritage” has been...
mentioned. Often the size of the domestic market in cultural (goods and) services, especially in competition with the US market, obstructs the establishment, or viability of a domestic cultural industry and may, thus, foster the trend of global cultural homogenisation. In this context, regional cooperation in the form of economic integration including labour market integration, as a first step towards liberalisation of free movement of natural persons, has been mentioned as a possible remedy.

For developing countries as well as the regulation of the cultural industries, another significant problem is found in the rapid emergence of new technologies. Article IV:2 (c) GATS recognises the importance of the availability of services technology for developing countries, which, in turn, is also important for a diverse offer of cultural goods and services at global level. Here, particular problems result from the specific characteristics inherent in the cultural industries, as technology-prone goods and services. Access to the latest technologies for satellite uplinks or computer software as well as the converging environment of audiovisual and telecommunications services have been named as central problems to address in the context of the culture and trade debate. Despite the explicit exclusion of the audiovisual sector from the liberalisation of the telecommunications sector in the Annex on Telecommunications, it is argued that the technological convergence, by way of new concepts such as “electronic commerce” or “information and entertainment services”, poses a real danger to the status quo the cultural regime under the GATS.

Another regulatory challenge deriving from new technologies and the process of convergence regards the problem that certain business practices may restrain competition and thereby restrict trade in services (Article IX GATS). In particular, the cultural industries, in their natural strive for an oligopolistic market structure, are highly susceptible to various forms of anti-competitive behaviour. In parallel with the ongoing convergence, the lack of clarity of existing competition rules at the WTO level has been stated and several recommendations have been made calling for the drafting of supplementary rules. In the context of the preservation and promotion of cultural diversity through a balanced global exchange of cultural goods and services, competition rules are called to play an important role.

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908 UNCTAD, Report of the Expert Meeting on Audiovisual Services: Improving Participation of Developing Countries, TD/B/COM.1/56 (December 4, 2002) at 2; see also G. Pagniet, “Industries de la culture et développement”, (2002) 194 Le Courrier ACP 42, characterising the role of the cultural industries as follows: “Phénomène social aux caractéristiques très diverses et aux multiples ramifications, les industries culturelles doivent être étudiées à travers les divers sous-secteurs qui les composent. Au fil du temps, une prise de conscience de plus en plus forte des enjeux liés aux « industries culturelles » a abouti à l’idée que culture et développement sont intimement liés”.

909 UNCTAD Secretariat, Audiovisual Services: Improving Participation of Developing Countries, TD/B/COM.1?EM.20/2 (September 30, 2002) at 10-12.

910 Ibid. at 12-13; see also the quote by Pauwels and Loisen, infra note 928.

911 Paragraph 2 (b) Annex on Telecommunications, Annex 1B, (1994) 33 LL.M. 1192; but see the Agreement between the International Telecommunication Union and the World Trade Organization, S/C/11 (September 21, 2000), recognising explicitly the increasing linkages between the various aspects of telecommunications and trade policy-making.


913 For the telecommunications sector, see e.g. the Reference Paper to the Fourth Protocol to the General Agreement on Trade in Services, (1997) 36 LL.M. 367.

914 Cf. UNCTAD Secretariat, Audiovisual Services: Improving Participation of Developing Countries, supra note 909 at 5-6, mentioning i.a. the “Window” distribution system, price discrimination, output deals, block booking and exclusivity clauses.

Finally, a similarly important role must be attributed to the question of government support for the cultural service sector, especially through the use of subsidies. Generally, subsidies for the cultural industries are subject to the WTO rules. However, there are not such GATS rules on subsidies yet and, so far, it has been only agreed between WTO Members to pursue further negotiations (Article XV GATS),916 which to the present day have been characterised by a lack of progress.917 This stagnation appears unsurprising given that most WTO Members are relying heavily on subsidies to support their domestic industries.918 More specifically, it must also be recalled that many WTO Members were especially reluctant to open their domestic market in the sector of cultural services. Most of all, considering that there are practically no GATS obligations limiting the recourse to subsidies in the service sectors (yet), states also strongly support their domestic cultural service sectors at practically every stage of the production process.919 Subsidies, however, are of particular importance in the debate about the preservation and promotion of cultural diversity. Subsidies are not only deemed to maintain a diverse offer of cultural content through the support for small and medium enterprises (SMEs), which otherwise would not withstand the economic pressure from competition with big and internationally acting companies. It is also interesting to note that subsidies are generally important in various cultural service sectors, such as notably the audiovisual sector, but do not necessarily undermine trade competitiveness, since they do not compete in the same market as the global major players and because their main aim is “to promote creativity, develop necessary skills, including management, and ensure the availability of a variety of cultural products”.920 In this sense, it has also been argued from an economic perspective that subsidies – when used reasonably – not only contribute to greater cultural diversity in the offer but also have “positive spillover effects that are not captured by the market.”921 Additionally, considering the numerous remakes in the film sector, for instance, it can even be argued that subsidies granted to SMEs guarantee a greater offer of cultural content on the market which not only benefits the audience but also the few global players. As such they function as a think tank, offering numerous ideas and, hereby, provide the prerequisites for a competitive market from which the global companies can pick and choose.

For the time being, the issue of a multilateral discipline on subsidies appears to be in suspense, since only little progress has been made in the current negotiations. Nonetheless, the present stagnation may not last forever, especially since the exemptions to the MFN clause should “in principal, not exceed a period of 10 years.”922 Thus, developments in the cultural service sectors will depend largely

916 For the point of departure of such negotiations, see Working Party on GATS Rules, Subsidies and Trade in Services (Note by the Secretariat), S/WPGR/W/9 (March 6, 1996); see also Bernier, supra note 620 at 129.
918 For an overview of such subsidy programmes, see e.g. the notifications pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures by Canada (WTO Doc. G/SCM/N/95/CAN of March 30, 2004), France (WTO Doc. G/SCM/N/95/EEC/Add.5 of December 15, 2003), Germany (WTO Doc. G/SCM/N/95/EEC/Add.6 of December 15, 2003), and the United States (WTO Doc. G/SCM/N/95/USA of October 31, 2003).
920 UNCTAD Secretariat, Audiovisual Services: Improving Participation of Developing Countries, supra note 909 at 11.
922 See Article II:2 GATS in connection with the Annex on Article II Exemptions.

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on the overall progress of the Doha round negotiations as well as present attempts to draft an international legally binding instrument on cultural diversity.\textsuperscript{923}

\textbf{§§ 7.2.3. Cultural Specificity – Gone with the GATS 1994?}

\textbf{7.2.3.1. A Short Résumé of the Facts and Findings}

The expansion of the multilateral trading regime under the WTO from the coverage of trade in goods to trade in services marks, in principle, a considerable step towards a coherent legal framework for international trade. From the viewpoint of the cultural industries, the inclusion of all services sectors in the GATS, including audiovisual and communication services, can be considered as a positive contribution to the objectives of legal predictability and certainty. These objectives resume great importance in light of the cultural industries’ pioneering role in international trade which derives mainly from the combined goods and services as well as cultural and economic character.

Their pioneering role is due first to the innovative business practices and technology they rely on and which point out the way for future developments concerning all goods and service sectors. As such, they raise important questions in connection with the overall mutual consistency of the various agreements administered by the WTO, and subsequently their relation to related instruments governed by other international organisations. This problem has surfaced, in part directly and in part indirectly, in the context of the \textit{Canada Periodicals} case.\textsuperscript{924} Other cases, such as the \textit{EC – Bananas} case by combining issues of the GATT, the GATS, and the \textit{Agreement on Agriculture}, as well as waivers and regional agreements, highlight the degree of enormous complexity the international trading regime has reached.\textsuperscript{925}

Second, and on a minor scale, the specificity inherent in the cultural industries provides an equally interesting model testing the functioning of the GATS itself. The GATS, as a \textit{pars pro toto} of the WTO system, sets out ambitious goals such as fostering the liberalisation in trade in services to foster economic integration including labour market integration while closing the widening gap between so-called “developing” an “developed” Member countries. Necessarily, these goals require a regulatory approach marked by great flexibility and a process of progressive liberalisation. In this respect, the comparison of the GATS with the GATT 1947 before the establishment of the WTO is flawed, because unlike the former, the latter is supported by a formal institutional framework and governed by a dispute settlement system based on strict and rigid legal rules. Nonetheless, in absence of flanking measures of positive integration, the current pace of negative integration envisaged in the service sector, accompanied by rapid technological innovation, runs the risk of neglecting various subtle specificities inherent in several sectors as well as disparities in the WTO Members’ economic power. The resulting danger is thus found in the further deterioration of the already existent loose but complex legal patchwork, consisting of the GATS and various annexes, understandings, decisions, and protocols attached to it.

\textsuperscript{923} See also “Les subventions”, \textit{supra} note 919.

\textsuperscript{924} See \textit{infra} Subsection \textit{§§} 9.1.3.

\textsuperscript{925} See \textit{supra} note 410.
Already, the general GATS legal framework has been termed insufficient and inadequate to encompass the special characteristics inherent in various service sectors, requiring the adoption of additional texts. The more liberalisation proceeds, the stronger various sectoral specificities will make themselves felt. After important achievements in the liberalisation of the telecommunications sector, the cultural industries as a part of the cultural sector are most likely to become a future target. For instance, it has been observed that:

the increasing convergence between traditional and new, digital, communications media (telecommunications and other ICT services) is leading to a situation where audiovisual service sector policy and regulation are coming into contact with other forms of service provision. The result of this convergence is that borders between formerly relatively isolated concepts such as ‘audiovisual services’, ‘electronic commerce’ or ‘online trading’ are becoming blurred.

Perhaps as a first foreboding, shortly after the Canada Periodicals case, another conflict arose this time concerning film distribution services. In Canada – Measures Affecting Film Distribution Services, the EC requested consultations based on Articles XXIII GATS concerning measures deriving from the 1987 Policy Decision on film distribution and its application to European companies, which were deemed to contravene Articles II (Most-favoured-nation treatment) and III:1 (Transparency) of the GATS. The case, however, ended with a lapse of the consultation period, due the take-over of the European company concerned by a Canadian company.

As a final point it is necessary to mention the ongoing process of convergence between various service sectors, especially based on the increasing digitisation, which brings about “unimedia” as opposed to multimedia. In addition to the blurred lines of distinction between goods and services, services among themselves become more difficult to distinguish. With the Internet and the possibility of direct peer-to-peer (P2P) sharing of music, for example, one former major difference between telecommunications and radio and television programming has disappeared. As a consequence, important new regulatory challenges in the cultural services sector, especially in connection with the protection of IPRs and competition law, lie ahead.

7.2.3.2. Some Parameters for the Services Negotiations

This subsection aims at casting some light on the imminent questions that the present negotiations on services in the framework of the GATS are likely to face. During the multilateral trade talks in services, successfully concluded by the adoption of the WTO Agreement, the old conflict between culture and trade emerged anew. The result was a standstill, a deadlock, the so-called “agreement to disagree”, or another “battle” in an ongoing “war”. Among the causes leading to the standstill,
particularly, a lack of preparation of all participants has been mentioned. The result is a more or less incoherent but nonetheless flexible legal framework, which momentarily reserves for governments sufficient room for manoeuvre in their pursuit of cultural policy objectives. In short, a touch of cultural specificity, balancing culture and trade, has prevailed. However, the principle of progressive liberalisation enshrined in the GATS and rapid technological innovation put the sensitive equilibrium between commercial and cultural concerns at risk. Moreover, the current contrast between substantive norms that are loosely defined or still unfinished, and formal rules that govern the dispute settlement system, is capable of not only shattering the foundations of the balance between concerns of commercial and cultural nature, but especially of the entire multilateral framework governing trade and, consequently, the international legal order as a whole.

A. The 1990 Note on Matters Relating to Trade in Audiovisual Services

The point of departure for the future legal framework that will govern the cultural industries is thus the deadlock reached at the end of the Uruguay Round negotiations. Of principal interest here is to what extent the awareness of the cultural implications attached to certain service sectors that occurred since then has changed. For the sake of contrast of earlier considerations on that matter with discussions and controversies following the establishment of the WTO in 1994, I mention as a first reference the Note by the GATT Secretariat, titled “Matters Relating to Trade in Audiovisual Services”, which was drafted in 1990 at the request of the Working Group on Audiovisual Services. First and foremost, the Note recognised, by way of elaborating on the drafting history of Article IV GATT, its direct relevance – as a legal precedent – for the treatment of audiovisual services. Then the note examines various aspects it considers relevant for audiovisual services. These aspects encompass transparency, market access, national treatment and MFN, the participation of developing countries, safeguards and exceptions as well as subsidies. Finally, the note lists international agreements or organisations addressing culture existing at the time of the Note’s issue, such as inter alia the OECD, the EEC, the Council of Europe, the CUSFTA, UNESCO, and WIPO. Notwithstanding the fact that the Note gives a good overview of most relevant issues touching upon the audiovisual services, it clearly does so solely from a trade perspective. For instance, it states that:

The cross-border provision of audio-visual services may take place through the import/export of audiovisual works recorded on a physical medium or through international transmissions by cable and radio waves. In the case of cross-border movement of audiovisual works, access to a particular market may hinge on traditional trade policy instruments applied by the importing country. Similarly to goods trade, trade in audiovisual works may be subject to special tariffs or non-tariff barriers which are applied for various reasons, including conformity with national laws and regulations alongside concerns of a cultural, moral and public nature.

Hence, the note allots no significant space to an explicit recognition or consideration of the implications trade liberalisation may have for culture, and of the way in which culture, in turn, may

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933 See supra Subsection §§ 7.1.3.
934 Working Group on Audiovisual Services, Matters Relating to Trade in Audiovisual Services (Note by the Secretariat), MTN.GNS/AUD/W/1 (October 4, 1990).
935 Ibid. at paras. 2-4.
936 Ibid. at paras. 5-16.
937 Ibid. at paras. 17-22.
938 Working Group on Audiovisual Services, Matters Relating to Trade in Audiovisual Services (Note by the Secretariat), MTN.GNS/AUD/W/1 (October 4, 1990), para. 7.
affect the foundations of international trade itself, except for a few references to the opinion of single contracting parties, or to the activity of international organisations active in the field of culture.939

B. The 1998 Note on Audiovisual Services and WTO Members Post-Uruguay Round Submission in AV Services

The 1990 Note on Matters Relating to Trade in Audiovisual Services is thus merely descriptive and still far away from the wider legacy of Article IV GATT, as a reminder of the need for balancing carefully cultural against commercial objectives.940 It mainly represents the ground on which the controversy over audiovisual goods and services towards the end of the Uruguay Round developed. Since then, a sizeable volume of literature, as presented throughout this thesis, emerged commenting on the various aspects pertaining to cultural goods and services. Subsequent to the conclusion of the Uruguay Round, the Appellate Body’s ruling in the Canada Periodicals case as well as the debacle at Seattle further contributed to the emergence of cultural concerns within international trade. Incidentally, the concept of cultural industries, next to the one of cultural diversity, has gained wider acceptance.941 The principal focus here is on how the view of the respective Governments of the WTO Members has evolved.

In the past years, the Council of Trade in Services has received several communications from individual Governments explaining their position on audiovisual services. The starting point, however, was again a Background Note on Audiovisual Services prepared in June 1998 by the Secretariat at the request of the Council of Trade in Services.942 The 1998 Note is considerably distinct from the 1990 Note as regards the treatment of culture. For example, in the introduction, it reads:

Audiovisual services typically reflect the social and cultural characteristics of nations and their peoples, and are consequently regarded as being of great social and political importance. For these reasons, government regulations and public support programmes play a major role. The regulations on audiovisual services concern not only social and cultural issues, but also the promotion of domestic industry and foreign content restrictions[...].943

In direct comparison with the 1990 Note, this passage, by emphasising the dual nature of audiovisual services, reflects a more sophisticated approach to the culture and trade quandary. In the following paragraphs, the 1998 Note recommends governments a modification of their regulatory structures in order to accommodate rapid technological change and the new multimedia services, and warns that the “social and economic issues at stake, however, are both important and complex”.944 There follows a description of the AV sector with an explanation of its classification as a subsector within the communications sector. By way of reference to the United Nations “Provisional Central Product Classification” (CPC), the Note lists audiovisual services, together with postal, courier, and telecommunication services, under the sector of “communication services”. The audiovisual sector itself is subdivided into 6 subcategories consisting of:

939 Ibid. at paras. 3, 5, 7, 14, 15, 18, 21, 22.
940 See Subsection §§ 6.2.5.
941 For instance, next to the precedents in CUSFTA/NAFTA, the concept of cultural industries emerged in the Cotonou Agreement, infra note 1187, the proposal for An International Agreement on Cultural Diversity (IACD), see An International Agreement on Cultural Diversity, supra note 307 and the UNESCO Universal Declaration on Cultural Diversity, supra note 106.
942 Audiovisual Services (Background Note by the Secretariat), S/C/W/40 (June 15, 1998) [hereinafter AV Services Note].
943 Ibid. at para. 2.
944 Ibid.
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a. Motion picture and video tape production and distribution services (CPC 9611);

b. Motion picture projection service (CPC 9612);

c. Radio and television services (CPC 9613);

d. Radio and television transmission services (CPC 7524);

e. Sound recording (CPC n.a.); and

f. Other (No CPC categories specified, but could cover, for example, the contents of multimedia products).945

Each of the subsectors is in itself subject to further subdivisions.946 The classification is interesting because it follows – except for the mention of the periodicals and book industry – the definition of the cultural industries given in NAFTA.

The Note also states that at the national level, definitions of statistical categories, as well as the availability of information, vary widely in regard to audiovisual services, but nonetheless undertakes a concise overview of statistical data with regard to their economic importance.947 In one paragraph, the Note undertakes an analysis of the regulatory structure, relevant trade restrictions and industry support programmes.948 The last chapter, before listing some useful references,949 covers the GATS negotiations and existing commitments in the audiovisual services sector.950 It characterises the starting point for negotiations as follows:

These social and economic concerns, and the pressures for change exerted by new technology, underlay the discussion of audiovisual services in the Uruguay Round, in which there was a heavy focus on the cultural specificity of the film and television industries, in particular. There was no specific recognition of these concerns in the text of the Agreement, but at the end of the Round only 13 countries made commitments in this sector. A substantially larger number took MFN exemptions. As a result of accessions, the number of Members making commitments has since risen to 19.951

The reluctance of most WTO Members to make substantial commitments in the audiovisual sector signals a potential concern about a loss of national cultural sovereignty. Interestingly, the first comment on the 1998 Note was received in the same year from the US Government, one of the former fiercest opponents of a cultural exception during the Uruguay Round. Therefore, it is surprising to read in the Communication that:

The United States wishes to join with the Secretariat in underscoring that audiovisual services reflect the social and cultural characteristics of a nation and its peoples, and in acknowledging the great social and political importance of these services - as a source of entertainment and education, as a means for helping to integrate a nation domestically, and in presenting to the rest of the world a nation's unique identity.952

Notwithstanding the recognition of the audiovisual services cultural and even artistic characteristics, the communication puts emphasis on the commercial aspects it shares with other sectors. According to the US Government, the GATS provides sufficient regulatory flexibility to address both the creative and commercial aspects of the AV sector.953 It is equally interesting to note that, as

945 Ibid. at para. 3; see also Services Sectoral Classification List (Note by the Secretariat), MTNS/GNS/W/120 (July 10, 1991).
946 Ibid. at para. 4-5.
947 Ibid. at paras. 6-16; see also Tables 1-5 annexed to the Note.
948 Ibid. at para. 17-23; see also Tables 6-8.
949 Ibid. at para. 33.
950 Ibid. at para. 24-32; see also Tables 9-10.
951 Ibid. at para. 24.
952 Communication from the United States (Audiovisual Services), S/C/W/78 (December 8, 1998), para. 2 [hereinafter US Communication 1998].
953 Ibid. at para. 3.
mentioned in the context of anti-dumping duties,\footnote{954 See supra Subsection 6.3.3.2.} the US Communication confirms that – fostered by technological innovation – the AV sector’s possesses special economic characteristic of high initial production but comparably low reproduction and distribution costs bringing about the tendency to strive towards audience maximisation.\footnote{955 US Communication 1998, supra note 952 at para. 4.} According to the US, this characteristic and the changing technological environment, which has opened global exhibition possibilities to film and television producers from every nation and was accompanied by a spread of multichannel distribution systems creating an explosive demand for a diverse range of products fostering international competition, calls into question the existing WTO regulatory framework.\footnote{956 Ibid.} The main problem of the US, is thus the exclusion of film distributors and dubbers from competing in a major export market, or, in other words, the absence of a truly global market for audiovisual services. This explains the communication’s call for the necessity for Members to develop a meaningful multilateral discipline that guarantees all countries to be able to take advantage of the export market opportunities they require to have a successful audiovisual sector and to minimise the danger of a patchwork of different national regulations.\footnote{957 Ibid. at para. 5 (a), (b) and (c).} The Communication concludes by listing three principal points that deserve to be considered in the next steps taken in view of a new round of service negotiations:\footnote{958 Communication from Israel (Review of Article II Exemptions / Replies to Questions Posed on Israel’s MFN Exemptions in the Area of Audiovisual Services in the Course of the Review of MFN Exemptions), S/C/W/158 (July 10, 2000), para. 2.} First, it recommends to broaden the scope of discussion of how the existing rules can be properly applied, while duly respecting their necessary flexibility. As a second point, it mentions the problem of the boundary between content and transmission, deriving from the Provisional Central Product Classification (CPC) list. The third and final point is devoted to the ongoing process of convergence of information, communications, and computer technologies and suggests that discussions will focus on how structural problems for the AV sector might be resolved.

In 2000, another communication was received from Israel, which made clear that:

The Israeli government places great importance on cultural policy matters as a means of strengthening and promoting national and cultural identity. The MFN exemption was listed to preserve preferences granted to a certain number of countries aiming at promoting both Israeli works as well as greater diversity among foreign audiovisual works in the Israeli market. This remains a key policy objective for Israel.\footnote{959 Communication from Israel (Review of Article II Exemptions / Replies to Questions Posed on Israel’s MFN Exemptions in the Area of Audiovisual Services in the Course of the Review of MFN Exemptions), S/C/W/158 (July 10, 2000), para. 2.}

The same year, in a second communication, the US distributed a proposal, which was intended:

- to provide a framework for future work in the WTO that will 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. At the same time, the proposal is intended to stimulate discussion of the significant role that the audiovisual sector plays in the digitally networked society.\footnote{960 Communication from the United States (Audiovisual and Related Services), S/CSS/W/21 (December 18, 2000), para. 1.}

The second US communication refers to the “new” AV sector and underlines that the sector, based on technological changes, has gone under significant changes since the end of the Uruguay Round.\footnote{961 Ibid. at paras. 2-4.} Despite these changes, the communication declares itself against an “all or nothing” approach,
consisting either in the exclusion of culture from the WTO or in the complete liberalisation of all aspects of audiovisual and related services. The final negotiation proposal reiterates three main interrelated points, ranging from classification problems, the negotiation of specific commitments for the audiovisual sector helping to establish clear, dependable, and predictable trade rules with due account taken of the sector’s specific sensitivities, to the development of an understanding on subsidies.

A Communication from Japan highlights the growing significance of both telecommunications and audiovisual services parallel to the recent technological innovations in the information and communication sector. As such it implicitly recognises the increasing convergence between telecommunications and audiovisual services. As regards audiovisual services, the communication emphasises the issue of cultural diversity when it states that:

The liberalisation of audio-visual services is important for respecting the right of the citizens of each Member to free access to a variety of cultures and information. Audio-visual services have become remarkably important with the recent progress of information technology.

Concerning the negotiations in the AV sector, Japan expects the current negotiations to improve questions about the MFN exemptions, quantitative limitations and deviations from the NT principle.

The Canadian Government, parallel to the activities of the SAGIT working group, and generally in line with its pioneering role and long tradition in multiculturalism and the cultural industries, made clear that:

Canada will also not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established.

The next communication was received from the Swiss Government, which revisits the main positions during the Uruguay Round and gives a very good description of the AV sector when it states that:

The audio-visual sector basically covers the production and distribution of audio-visual contents such as motion pictures, radio programmes, television programmes and sound. The digital revolution has modified the way audio-visual contents are created, produced and distributed. In some instances, the so-called convergence has blurred the boundary between the telecommunication and the audio-visual sector. New services are emerging that raise questions as to their relevance for telecommunication, audio-visual and cultural policies. At the same time, they suggest that the present classification may need to be revisited to better take these developments into consideration.

Most importantly, from this description, the communication concludes that before bilateral talks can commence, multilateral solutions must be found to questions relating to inter alia a cultural diversity safeguard, subsidies, public service, illicit content, competition law and market access. As a central

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962 Ibid. at paras. 5-9.
963 Ibid. at para. 10 (i), (ii) and (iii); see also Annex A and B.
964 Communication from Japan (The Negotiations on Trade in Services), S/CSS/W/42 (December 22, 2000) at paras. 32-37.
965 Ibid. at para. 36.
966 Ibid. at para.37.
967 Communication from Canada (Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals), S/CSS/W/46 (March 14, 2001), para. 9. On the Canadian initiative for such instrument, see the discussion infra Subsection 10.2.2.5.A.
968 Communication from Switzerland (GATS 2000: Audio-visual services), S/CSS/W/74 (May 4, 2001), paras. 2-8 [hereinafter Switzerland Communication].
969 Ibid. at paras. 9-17.
argument, the final chapter of the Swiss lists some possible regulatory approaches for a multilateral trade policy framework for the audiovisual sector, such as an Annex to the GATS and warns that:

[T]he work to be undertaken under the GATS would also need to take into account any relevant development outside the WTO framework on the issue of audio-visual regulation, and cultural diversity in particular.970

Similarly, the Government of Brazil stressed the need to contribute to the increasing participation of developing countries and the importance of the promotion of:

the progressive liberalization of this important sector while ensuring at the same time governments’ autonomy to preserve and promote cultural identity and cultural diversity.971

In this endeavour it is necessary to consider that any “special treatment” for the audiovisual sector must take into account possible systemic implications of such treatment vis-à-vis other areas of the WTO.972 The communication from Brazil equally revisits the main positions during the Uruguay Round and rejects both extremes.973 It displays a useful overview of the treatment of the AV sector under the WTO and finally proposes that the Council of Trade in Services initiates a debate on trade defence and/or competition provisions necessary to address unfair trade practices and/or restrictive business practices in the sector.974

Finally, it is noteworthy that the EC has not yet submitted a communication on audiovisual services.975 The EC’s probable negotiation position, however, can be arrived at from a number of internal documents, which suggest that the Commission, similar to the Canadian Government, will pursue the goal of the preservation of the status quo.976

7.2.3.3. A Final Remark on the Services Negotiations

Since the controversy over the audiovisual services sector during the Uruguay Round, the quantity but also the quality of the considerations about the sectors’ specificities has drastically increased. Between the 1990 and the 1998 Note issued by the Secretariat a considerable evolution of the understanding of the subject matter has happened, and notably of the “paradoxical” nature of the cultural industries, with their combination of cultural and economic elements.

From the content of the existing few communications it is clear that there is a general agreement on the global significance of cultural diversity, at least regarded in isolation from the special dynamics and possible trade-offs between sectors and countries that normally emerge during heated negotiations. However, the views on the implications of this agreement and how global cultural

970 Ibid. at paras. 18-19.
971 Communication from Brazil (Audiovisual Services), S/CSS/W/99 (July 9, 2001), para. 1.
972 Ibid. at para. 7.
973 Ibid. at paras. 5-6.
974 Ibid. at para. 12.
975 But see Communication from the European Communities and their Member States (Autonomous Liberalisation of Trade in Services: Elements for Criteria and Modalities), S/CSS/W/133 (February 22, 2002).
diversity are supposed to be achieved widely diverge. Nonetheless, there is room for hope that the preparation of the Members and the WTO Secretariat for the Doha round in the field of audiovisual services appears to be better than during the Uruguay Round. Yet, in addition to the open issues mentioned in the GATS, there still exist numerous questions that need to be addressed and respective answers formulated in detail.\(^\text{977}\) Beside the principal agreement on the need for the respect of cultural diversity, the list of open issues directly related to the GATS includes not only the precise sectoral classification of the audiovisual sector, the formulation of competition rules and adoption of disciplines on subsidies but also the broadening of the discussion generally, especially with regard to the coherence and flexibility of the framework in light of the implications of the AV sector’s specificity for other areas, both inside and outside the WTO.

Especially, because of this last point, it is necessary to proceed with the analysis of the cultural industries under the WTO’s regime of intellectual property rights. It is due to the elasticity of the concept of culture as well as the duality of the cultural industries, covering goods and services alike, plus their reliance on an intellectual property rights regime that the general balance between culture and trade cannot be guaranteed by the introduction of relevant provisions in the GATS framework alone. Instead, based on the insights gained in the context of services a broader solution under the WTO Agreement, taking into account not only trade in goods, services and IPRs but also the existence of other related international documents and organisations, must be sought.

\(^{977}\) Cf. Articles VI:4, X, XIII, XV, and XIX GATS.

Following the survey of the GATT and the GATS, the discussion will proceed with the intellectual property rights regime under the Agreement on Trade-Related Aspects of Intellectual Property Rights, that is to say, the WTO’s third main pillar of major interest for the cultural industries.\(^\text{978}\) The protection of intellectual property rights under the WTO is a result of the “single package deal” concluded under the Uruguay Round.

Intellectual Property Rights (IPRs) are closely interrelated with the cultural industries, and accordingly with broader questions underlying the cultural and trade quandary. In abstract terms, in line with the juxtaposition of “culture” and “industry”, the concept “intellectual property” introduces another oxymoron, which exercises a stimulating effect on the mind in association with (international trade) law.\(^\text{979}\) For instance, the meaning of culture in its etymological evolution shifted from “culta agrì” to “culta mentis”, indicating a process of constant refinement of both work of the hand (manual) and the mind (intellectual).\(^\text{980}\) Similarly, the legal protection of intellectual property on the international level passed – fostered by events leading to the French Revolution and then the Industrial Revolution – from industrial (patents and trademarks) to intellectual property (copyrights or droits d’auteur).\(^\text{981}\) In substance, the inherent duality of IPRs – like the one of the cultural industries – stands at the beginning of a process of which the purpose has been aptly described as follows:

The main purpose of copyright and neighbouring rights protection is to encourage and reward creative work, ensuring that creators are remunerated for the product of their work – a key ingredient for the successful development of cultural industries. Copyright and neighbouring rights (i.e. the rights of performers, producers of sound recordings and broadcasting organisations) thus constitute a fundamental element for the audio-visual sector of the products and services (CDs, films, CD-ROMs etc.). They provide the creators, the artists and the content industry with the basic intellectual property rights allowing them to be remunerated and to invest into more creation and revenues.\(^\text{982}\)

As reflected in the concept itself, the laws underlying this process, first, combine the intangible world (associated with “intellect”) with the tangible world (associated with “property”). Second, they bridge this gap by granting protection to, not the idea itself, but its fixation in more or less tangible form.\(^\text{983}\) Third, they also affect the common distinction between art and technology, which lies at the heart of many societies differentiation in the value attached to a work of art or an industrial work, or between “high” and “low” art. However, from the viewpoint of IPRs there is no such difference since both cases are based on an identical initial intellectual effort and its subsequent fixation or “creation” in tangible form of any sensory sort. Consequently, there is no difference in the composition of a

\(^{979}\) Cf. Subsection §§ 7.1.3 (“agreement to disagree”).  
\(^{980}\) See supra Fn 25 and 26.  
\(^{981}\) Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900; at Washington on June 2, 1911; at The Hague on November 6, 1925; at London on June 2, 1934; at Lisbon on October 31, 1958; and at Stockholm on July 14, 1967, 828 U.N.T.S. 306 (entry into force: April 26, 1970) [Paris Convention] and the Berne Convention, supra note 716.  
\(^{983}\) See e.g. Article 9 (2) TRIPS, supra note 978, and Article 2 (2) Berne Convention, supra note 716.
symphony and the design of a chair, only that there are symphonies which are hard to listen to and chairs which are uncomfortable to sit on. Such view is confirmed by the fact that intellectual property protection on the international plane started to materialise towards the end of the 19th century with two important conventions, one concerning the protection of industrial property and the other the protection of copyrights. Equally, an etymological dictionary reminds us of the original meaning of technology, deriving from the Greek term tēkhnē which means "art".

Another aspect of this process engendered by the protection of IPRs is that the mitigate between private rights and public interest. As the Preamble of the TRIPS recalls, intellectual property rights are private rights, granted exclusively to the holder of the right, whether in form of a copyright, patent, industrial design or a trademark. The rationale behind this private right is found in the theory of natural justice, which holds that any person has a natural right in the protection of her/his ideas. This, however, points to the complementary aspect of the raison d'être for intellectual property rights, namely the attempt to use the benefits resulting from the due recognition or remuneration of individual effort for technological progress and greater welfare for society as a whole. As such they represent essentially a trade-off between private and public interests, which reveals the importance of the distributive function IPRs assume.

A similar implication of IPRs for this process concerns the distinction between culture and trade aspects underlying the cultural industries. More precisely, for the cultural aspect, the intellect plays a primary role in the inspiration, creation and development of cultural content. At first sight it appears that the laws governing intellectual property, by way of legally recognising and protecting the efforts of authors and creators, resume an important role in the safeguard and promotion of the a country's cultural works. As such, their purpose may coincide with various cultural policy measures. In this context it must be specified that intellectual property rights, such as the TRIPS Agreement, comprise copyright and related rights, trademarks, geographical indications, industrial designs, patents, and layout-designs (topographies) of integrated circuits. For the cultural industries, copyright is of particular relevance but, nonetheless, the other categories of intellectual property are also important. As mentioned before, patents and related technological innovations (such as from Gutenberg's typographium to the Lumières' cinématographe) often stood at the beginning of each sector of the cultural industries. In similar terms, the star system, as applied in many cultural industries, has been compared to the institution of trademarks. The proximity of IPRs to cultural policies has also surfaced in the past through their separate consideration from trade policies. Gradually, however, the trade aspect of IPRs became recognised, which ultimately led to the negotiation of the

984 Cf. Paris Convention, supra note 981 and the Berne Convention, supra note 716.
985 The term “Technology” stands for the “scientific study of the arts”; from “technic”, meaning “pertinent to art or an art”, deriving from the Greek word tēkhnē (i.e. art or craft); cf. C.T. Onions, ed., The Oxford Dictionary of English Etymology (Oxford: Clarendon Press, 1966) at 906.
986Indent 4 of the Preamble of the TRIPS, supra note 978.
989 See Part II TRIPS Agreement, supra note 978.
990 See infra note 1002 and supra note 460.
991 See supra note 603.
TRIPS agreement. For, authors and creators have an interest in the wide dissemination of their work for a maximisation of their revenues in order to be able to finance their creativity in the future. As an important aspect of trade, intellectual property rights, mainly through copyrights, but also patent and trademark protection, are the primary guarantee for revenues flowing from the initial investment made for the production of either a good or a service.992

From the understanding of this complex entwinement of economic and cultural aspects inherent in IPRs, there develops the awareness that intellectual property laws can assume an important role in the design of not only trade but also cultural policies.993 Moreover, the changing technological environment and, following that, the widening scope of protection of IPRs accompanying the advent of the information age, suggest a tendency of further mutual encroachment of the economic and the cultural aspect.994 It is in this sensitive equilibrium between cultural and economic elements that IPRs tend to achieve in which is rooted the determination for the effect of an IP law. For instance, the extension of the duration of copyright may economically enrich an individual creator but culturally impoverish a society, because there is less incentive for this creator to create and less opportunity for other potential creators to built upon and innovate the creations from the past.

It is interesting to note here that many countries, such as the US and Japan, which today concentrate a high level of technological know-how and ownership in IP, argue in favour of stronger international protection of IP although in the past they had very weak levels or simply no protection of IP at all.995 This is why, the international harmonisation of IP legislation can have trade creating or trade impeding effects as well as positive or negative implications for the cultural development of a society and its economic welfare. To give an example, it is submitted that too strong a protection of intellectual property can lead to the emergence of various anticompetitive practices undermining the proper functioning of the market as well as the generation of cultural content.996 Clearly, cultural and economic factors are intertwined and whether a desired effect of any proposed law in the field of IPRs will be realised, therefore, also largely depends on other various factors or institutions governing a society. Within an international trading regime, it particularly depends on factors such as the discrepancy in the economic and democratic development of its Members, the degree of the international harmonisation of intellectual property laws, the efficiency of the enforcement mechanism, the progress in the liberalisation of trade in goods and services as well as in the coherence of the global trading regime with regard to the drafting of multilateral competition rules and subsidies disciplines.

992 See C.E. Baker’s definition of copyright above, supra note 604.
So far, the complexity underlying the governance of global trade relations has not yet been fully understood and even less implemented. This becomes particularly apparent in the case of the ill-timed distinction between so-called “developed countries”, on the one hand, and “developing” as well as “least-developed countries”, on the other. Indeed, much of the criticism of the TRIPS Agreement, namely that it favours the interests of developed over those of developing countries, stems from this flawed perception. It is only from a merely exogenous economic perspective, that certain countries from the Northern hemisphere appear more developed, because their industry, based on multinational companies, often accumulates wealth from the production and distribution of IPR protected products or services, while the sources remain unprotected and thus without remuneration. This problem appears, for example, in new terms such as the attempts to recognise and to grant legal protection to “traditional knowledge”997, or “intangible cultural property or heritage”.998

It is clear that today the principal problem of economic and cultural development in the context of cultural industries is less linked to national boundaries than to factors inherent in the organisational structure of the industry resulting in a general power imbalance between globally acting large-scale companies and SMEs as well as independent producers. Consequently, notwithstanding the high concentration of technological know-how and ownership in intellectual property in the so-called “developed countries”, the existence of such large-scale, vertically integrated enterprises may not only impede the production of cultural goods and services in the economically weaker, so-called “developing countries”, but its effects may also have negative repercussions for the production in the economically and technologically stronger countries.999 A critical evaluation of the economics of TRIPS in its present state shows that factors such as the original size of the market, price discrimination, or technological progress may unduly affect the production of cultural goods and services in any country whether situated in the Southern or Northern hemisphere. Relevant debates in countries like Australia and the US support the assumption of a real danger brought about by the TRIPS in its current form for the preservation of a nationally and globally rich and diverse offer in cultural products.1000

From the short survey of pressing problems in relation to the regulation of IPRs, the privileged role intellectual property rights assume in the organisation of international trade in cultural industries is obvious. Based on its equally oxymoronic character, the term “intellectual property” anticipates much of the controversy and debate over the nexus between culture and trade, as it is found in the concept of the cultural industries. Their familiarity culminates in the announcement of a new

paradigm requiring a change in the former perception of the organisation of life based on the opposition of the concepts of trade and culture.\textsuperscript{1001} In terms of the evolution of international trade law, the familiarity also appears in important institutional changes that derive from the inclusion of the TRIPS Agreement into the WTO system. Most importantly, for the WTO framework as a whole to be considered worthy of a reciprocal and mutually advantageous arrangement, the design of the future global IPR regime under TRIPS must be endowed with the instruments to successfully address the challenges resulting from an increasing entwinement between the economic and cultural dynamics underlying international trade in cultural goods and services. Before the scope of the TRIPS agreement will be examined more closely, it is deemed useful to undertake a short outlook on the principal incentives, stages and actors in the development of the intellectual property rights regime.

\section*{§§ 8.1.2. The Historical Evolution: From Intellectual Cooperation to Intellectual Property Rights under the TRIPS Agreement}

\subsection*{8.1.2.1. A Synopsis of Substantive Developments and Institutional Aspects}

Like most laws, intellectual and industrial property rights laws are rooted in drastic changes in the legal environment. In this respect, they share the close entwinement with the technological progress accompanying the historical development of the various sectors of the cultural industries, from book printing, to photography, cinematography, radio and television as well as sound and video recording until their convergence in a digital “unimedium”. Hence, the first major regulatory challenge in the realm of intellectual and industrial property rights law, is rooted in the invention of the book printing press, the so-called “\textit{typographium}” by Johannes Gutenberg (c. 1400-68), which allowed for the mechanical reproduction of written information.\textsuperscript{1002} Early typography meant an early challenge to the perception of art as expressed by Leonardo Da Vinci (1452-1519) as a unique object which cannot be copied.\textsuperscript{1003} Moreover, the sudden proliferation of information and its topical expansion constituted an early media revolution. The new possibilities almost immediately gave rise to new concerns, namely those of governments about their effective exercise of control over new means of disseminating information and those of printers and publishers about unfettered competition in their sector.\textsuperscript{1004} These two concerns were addressed by the granting of exclusive printing rights or privileges to printers and publishers by national authorities, which mark the beginning of early copyright laws.\textsuperscript{1005} However, these laws protected first the rights and interests of publishers, and those of the authors only developed gradually in the following two centuries. The development culminated in the period of the French Revolution during which laws recognised for the first time the rights of authors, dramatists, composers and artists.\textsuperscript{1006} Originating from France the following century saw copyright laws being enacted in practically all European countries. In view of the universal dissemination of works of art, literature, or music, the plethora of national laws was soon

\begin{footnotesize}
\begin{enumerate}
\item See also Vivant, \textit{supra} note 994 at 17, stating about the new technologies impact in IP regulation: “\textit{En vérité nous sommes certainement à un instant où un nouveau paradigme va devoir se substituer aux anciens}.”
\item See Giesecke, \textit{supra} note 459 mainly at 63-85.
\item See da Vinci, \textit{supra} note 124 at 233-234.
\item \textit{Ibid.}
\item \textit{Ibid.} at 3-5.
\end{enumerate}
\end{footnotesize}
confronted with cross-border questions such as piracy, but also general conflicts arising from substantive disparities in these laws.

As a response to these problems, the first steps towards international harmonisation included the protection of foreign works on the basis of reciprocity, which later crystallised in bilateral agreements.\(^{1007}\) The increase in bilateral agreements still could not guarantee complete international protection of copyrights, as only a multilateral framework could provide. With the advent of “unions” in times of increased international communication and transport, as reflected in the creation of the still existing International Telecommunication Union (ITU) in 1865 and the General Postal Union (since 1878 Universal Postal Union (UPU)) in 1874, calls for a multilateral convention in the field of copyrights multiplied.\(^{1008}\) As a first step, resulting from the industrial revolution, the Paris Convention for the Protection of Industrial Property, was successfully signed in 1883, which created a Union for the protection of industrial property.\(^{1009}\) The Paris Convention defines its scope by stating as follows:

> The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.

> Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.\(^{1010}\)

Three years later, spurred by the cooperation of prominent literary figures such as Victor Hugo, followed the 1886 Berne Convention for the Protection of Literary and Artistic Property ("Berne Convention").\(^{1011}\) The Berne Convention created a union among its members and granted authors protection of their works on the basis of national treatment.\(^{1012}\) Hereby, the adoption of the Berne Convention in 1886 ended the process launched by the invention of book printing. However, the end of this cycle was superseded by the surge of a new media revolution found in the permanent rise of film, radio and television as well as sound recording. As was mentioned before, some of these related challenges outside the sphere of intellectual property rights were confronted in the framework of the International Committee of Intellectual Co-operation (ICIC) (later International Institute of Intellectual Co-operation (IICI)) of the League of Nations, particularly, with the adoption of the 1933 Convention for Facilitating the International Circulation of Films of an Educational Character and the 1936 International Convention Concerning the Use of Broadcasting in the Cause of Peace, which were followed by the Beirut and Florence Agreements administered by UNESCO, the successor organisation of the International Committee of Intellectual Co-operation (ICIC).\(^{1013}\)

Nonetheless, the continuing technological progress also affected the Berne Convention which, from its inception, foresaw periodic revisions that led to numerous amendments and a gradual extension

\(^{1007}\) Ibid. at 25-37.
\(^{1008}\) Ibid. at 39-80.
\(^{1009}\) Article 1 (1) Paris Convention, supra note 981.
\(^{1010}\) Article 1 (2) and (3) Paris Convention, supra note 981.
\(^{1011}\) Berne Convention, supra note 716.
\(^{1012}\) Articles 1 and 2 Berne Convention, supra note 716.
\(^{1013}\) See also Subsection 6.2.2.2.
Important changes brought, for instance, additional protection for authors when their works were reproduced by new mechanical recording technologies, such as photography, sound recording and cinematography (done at the Berlin Revision Conference 1908), or the protection of works from distortion, mutilation or other modifications through moral rights as well as the introduction of a broadcasting right (done in Rome 1928). Thus adaptations to the convention were constantly made in accordance with the technological progress. As a result, the Berne convention’s scope of protection in its most recent version extends to most activities comprised of the cultural industries defining it as follows:

The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Some other technological changes were absorbed under neighbouring conventions such as the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (“Rome Convention”), and the 1971 Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms.

In parallel with the substantive adaptations, the institutional framework of the body of laws protecting intellectual property changed as well. Since the year 1893, the Berne and Paris Convention were administered by two small bureaux united to form an international organisation called the United International Bureaux for the Protection of Intellectual Property (BIRPI), based in Berne, Switzerland. In 1967, BIRPI was transformed into the World Intellectual Property Organization (WIPO), which in 1974 became a specialised agency of the United Nations system of organisations. Since then WIPO serves as an umbrella organisation for the unions created by the said Paris and Berne Conventions with a mandate to administer intellectual property matters recognised by the member States of the UN, and is designed to promote and harmonise the protection of intellectual property and copyrights. As an exception, the Universal Copyright Convention (UCC), adopted in Geneva in 1952 parallel to the existing Berne Convention in order to bridge the regulatory gap between the members of the Berne Union and the system of copyright conventions that developed between the various American republics from 1889-1928, continues to be administered by UNESCO.

As a further new challenge, the impact of the advent of space technology in the 1960s on the cultural industries was mentioned in the context of the relation between cinematograph films and

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1014 For a useful article tracing the amendments, see e.g. P. Burger, “The Berne Convention: Its History and Its Key Role in the Future” (1988) 3 J.L. & Tech. 1.
1015 See Article 1 (1) Berne Convention, supra note 716. But see the limitations in Article 2bis loc. cit. (such as speeches, lectures and addresses or collections thereof).
1017 See Meng, supra note 334 at 814 et seq.
1018 Universal Copyright Convention, supra note 252.
1019 See Ricketson, supra note 1004 at 123.
television. It was said that even in the peaceful use of outer space, the transmission of television signals across borders via direct satellite television broadcasting threatened to erode state sovereignty and to diminish further effective government control over, on the one hand, the content of information accompanied by fears about social cohesion and cultural identity, as well as over the lucrative tariffication of various goods or services at the border, on the other. Loss of governmental control over information and tariffs was however not the only problem. Another threat was found in the hitherto lack of efficient protection of intellectual property rights in outer space due to the absence of international regulation. In short, the challenges to the intellect, which were brought about by the expansion of human activity to outer space, had also turned into practical legal problems of how to guarantee an efficient protection of intellectual property, floating freely in form of data between the Earth and its orbit.

As a consequence, the ITU, BIRPI, WIPO and UNESCO convened in a joint effort an International Conference of States on the Distribution of Programme-Carrying Signals, transmitted by Satellite, which adopted the Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite (‘Brussels Convention’). The convention directly refers to the protection of IPR and works relating to satellite communications and sets forth the obligation of a signatory to “take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended”.

Notwithstanding the codification effort, the struggle with the unstable character of the subject matter continued and problems in this field endured. As mentioned before, the UN General Assembly saw the necessity to adopt a Resolution on Principles Governing the Use by States of Artificial Earth Satellites for Direct Satellite Broadcasting, which addressed inter alia the problem of efficient copyright protection, but also the unavoidable problem of spill over. With the rapid technological development and the advent of new media, the controversy over state and cultural sovereignty versus the free flow of information persists, not only between remote cultures but also neighbouring countries.

As another example of technological innovation necessitating a legal response, it is essential to mention the technology used for the production of computer chips. Due the dominant view that so-called “layout-designs of integrated circuits (topographies)” were not protected by existent copyright and patent laws, calls for an international legal framework intensified. As a result, negotiations started within WIPO in parallel to ongoing GATT Uruguay Round negotiations, and resulted in the adoption of the Treaty on Intellectual Property in Respect of Integrated Circuits in 1989.

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1020 See supra note §§ 6.2.3.
1022 Satellite Convention, supra note 252.
1023 Preamble and Article 2.
1025 Cf. J.E. Bailey, “Current and Future Legal Uses of Direct Broadcast Satellites in International Law” (1985) 45 La. L. Rev. 701 with Loeb, supra note 1268 (see also PART II) and Xiaoming, supra note 506.
In the year the TRIPS Agreement entered into force, another effort concerned the recognition of the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments and of “the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works”.
This effort led to the adoption of the 1996 WIPO Copyright Treaty, which – as a special agreement to the Berne Convention – extends copyright protection to computer programs and databases. At the same Diplomatic Conference the copyright protection was extended to the protection of performers, producers of phonograms, and broadcasting organisations.

Despite the plethora of substantive legal instruments centred around intellectual property law, the old struggle between legal certainty, distributive justice and technological progress as well as between cultural sovereignty and the free flow of information across borders remains a permanent international regulatory challenge. Relatively new in this struggle, and therefore susceptible to further development, is the combined cultural and economic consideration of the impact of intellectual property rights on the development, again both economic and cultural, of states, regions and their local communities. Concomitant of the plethora of substantive instruments is the proliferation of institutional arrangements in the form of international organisations or various new regulatory bodies. It is in this light, that the present value of the TRIPS Agreement must be evaluated and its future role defined.

8.1.2.2. Reasons for the Inclusion of IPRs in the WTO: On the Entwinement of Trade with IPRs

The awareness of the nexus between intellectual property rights and international trade dates back to the early days of international efforts to protect IPRs. This nexus underlines once more the embeddedness of trade in a broader cultural context. The real novelty that was introduced by various efforts leading to the TRIPS Agreement, however, consisted in the direct substantive and institutional link which was established by the enforcement of IPRs in connection with trade in goods and services. The establishment of this link crystallised in efforts undertaken during the Tokyo Round to adopt a draft agreement on Measures to discourage the Importation of Counterfeit Goods. Like at the epoch of the invention of the book printing press or the cinématographe before, the beginning of the 1980s, faced drastic changes in the societal and commercial environment through technological advances mainly in the communications and transport sector as pioneers in the expansion of international trade. For the realm of international trade, these changes were followed by the:
- advent of copy-prone electronics-based technologies and products;

1029 See e.g. the list of instruments in United Nations, International Agreements and Other Available Legal Documents Relevant to Space-Related Activities (Vienna: United Nations, 1999).
the growing competitiveness of newly industrialized developing countries in the manufacturing sector;
- the increasing globalization of the market-place;
- the growing perception of intellectual property by the enterprises of the developed countries as a strategic asset.1032

Against this background, the contracting parties decided at the Punta-del-Este Ministerial Conference to include the IPRs in the negotiations mandate. This was formally accomplished with the Declaration, which comprises trade-related aspects of intellectual property rights and gives the following guidelines:

In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters.1033

From the scope of the Declaration derives the first main reason for the inclusion of IPR-related matters in the realm of international trade the existence, or the absence, of adequate national intellectual property legislation and the possible distorting and impeding effects they may exercise on international trade. These negative effects on international trade are due first to the absence of efficient national IPRs legislation. It is clear that in the international exchange of goods and services national IPRs protection impinges in many ways on the direct competitiveness of domestic as opposed to foreign goods. On the one hand, the infringement of IPRs, for example in the case of counterfeit goods or piracy, may give a comparative advantage to the producer of the imitated goods over the initial inventor, who, in order to remain price competitive, cannot include previous research and development costs in the selling-price (free rider problem). On the other hand, national IPRs legislation may give an undue advantage to domestic producers by establishing a non-tariff barrier to the trade of foreign goods. As a good example for such a non-tariff barrier, Pamela Samuelson detects in the former so-called “manufacturing clause” of US copyright law a measure with the effect of protecting both economic and cultural values.1034 This clause provided that foreign authors were ineligible for U.S. copyright protection unless they agreed to use American firms to print their works for U.S. markets, with the effect that US printers were protected against competition by foreign printers until 1986.1035

Next to the undesirable effects of IPRs infringement, the Declaration hints to a second reason for the consideration of IPRs in the context of international trade, which is found in the increasing proliferation of international bodies governing the progressive development of international IPRs protection. As was shown before, the administration of the numerous convention in the field of IPRs was shared by WIPO, UNESCO, and the ITU. The growing degree of complexity was

1032 See Yusuf, supra note 1030 at 3-4.
1033 Ministerial Declaration on the Uruguay Round, supra note 309.
1034 See Samuelson, supra note 993 at 96.
1035 Ibid.
accompanied by an increased desire for simplification with the objective to strengthen the efficiency and enforcement through a powerful dispute settlement system.\textsuperscript{1036}

Thus, considerations of technological progress, piracy and IPRs infringement in general, as well as the possible negative impact of national IPRs legislation were crucial in the process leading to the adoption of the TRIPS Agreement, which introduced universal minimal standards in the protection of IPRs.\textsuperscript{1037} In connection with this process, however, two more elements deserve to be mentioned. First of all, the adoption of universal minimal standards raises important questions about the minimum level of protection introduced and, linked to that, about the permissible degree of regulatory diversity.\textsuperscript{1038} In the wake of the TRIPS Agreement, this problem has, first, surfaced in divergent views between the Southern and Northern hemisphere regarding the appropriate level of protection and, second, in the allegation that a too rigid level of minimum protection has been forced upon so-called “developing” country Members by their “developed” counterparts.\textsuperscript{1039} In this respect, it is well known that countries with a delay in technological progress tend to favour a weaker protection and vice versa. For example, even the US, in its early days, considered it legitimate to neglect international intellectual property rights in order to further its social and economic development.\textsuperscript{1040} This attitude is confirmed by Terry Ramsaye, who reports from the general practice in the early days of cinema (and copyright protection) where many films were:

Ruthlessly pirated by all of the American picture-makers, by the simple process of putting an original film through a printing machine with the negative stock producing a duplicate or contra-type negative from which unlimited copies could be made.\textsuperscript{1041}

In light of this natural trend to pirate products in order to make up for a delay in technological progress, the TRIPS standards – despite the short transition period for developing countries – seem to appear unbalanced and inconsistent with the spirit of the GATT/WTO framework as an arrangement of mutual advantages and benefits. From this perspective, the effect of the TRIPS seems to prevent rather than to curb the transfer of knowledge and technology between WTO Members. Moreover, the imbalance is fostered by the clear prevalence of considerations of a technological, or economic rather than a cultural kind. In line with the idea/expression dichotomy, piracy of products is outlawed, whereas cultural piracy, or so-called “biopiracy” (in the context of public health and the pharmaceutical industry) based on intangible cultural property or traditional knowledge are not legally protected (yet).\textsuperscript{1042}

\textsuperscript{1036} See Mort, supra note 1028.


\textsuperscript{1038} See e.g. Panel Report, US – Copyright Act, at paras. 6.189, infra note 1112, noting that “while the WTO Members are free to choose the method of implementation, the minimum standards of protection are the same for all of them”.


\textsuperscript{1040} See e.g. the report by the Office of Technology Assessment (OTA) of the US Congress, quoted in Yusuf, supra note 1030 at 4-5.

\textsuperscript{1041} “The Motion Picture”, supra note 460 at 9.

\textsuperscript{1042} Note that a convention on the Safeguarding of Intangible Cultural Heritage has been adopted in October 2003 and is now in the process of ratification; Convention for the Safeguarding of Intangible Cultural Heritage, supra note 998.
This imbalance helps to explain the lack of consensus about TRIPS in the aftermath of the Uruguay Round and the unease expressed at the Seattle Ministerial Conference in 1999.\textsuperscript{1043} As a first step towards a more balanced approach, the events in Seattle left their imprint on the Fourth Ministerial Conference, held in Doha (Qatar) in 2001. In the relevant Declaration, the WTO Members agreed to instruct:

the Council for TRIPS [...] to examine, \textit{inter alia}, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.\textsuperscript{1044}

The critical role of the TRIPS in the area of public health, particularly in light of serious problems resulting from HIV/AIDS, tuberculosis, malaria and other epidemics, was also addressed in a separate declaration.\textsuperscript{1045}

Despite some progress made during at the Doha Ministerial Conference, the exact assessment of the prospects for the future of the TRIPS Agreement are difficult to ascertain.\textsuperscript{1046} The difficulty also derives from the dependence on progress in other areas, such as the agricultural and the service sector, as well as cooperation with other international organisations. A further important factor in the functioning and acceptance of the TRIPS Agreement lies in the interpretative practice of the dispute settlement body. Nonetheless, before an attempt to cast more light on these prospects, particularly with regard to the cultural impact, will be made, a short survey of the principal provisions of the TRIPS Agreement and of culture-related case law of the DSB will be offered.


\textsuperscript{1044} Doha Declaration, supra note 379 at para. 19.

\textsuperscript{1045} Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/W/2 (November 14, 2001) and Doha Declaration, supra note 379 at para. 17.

\textsuperscript{1046} See also L.D. Tully, “Prospects for Progress: The TRIPS Agreement and Developing Countries after the DOHA Conference” (2003) 26 B.C. Int’l & Comp. L. Rev. 129.
§ 8.2. The Agreement on Trade-Related Aspects of Intellectual Property Rights

§§ 8.2.1. The Legal Framework

8.2.1.1. The Guiding Principles

A. The Preamble, Main Principles and Objectives

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) entered into force with the WTO Agreement on January 1, 1995. Its basic rationale is laid down in the Preamble, which reiterates some of the principles enshrined in the Punta-del-Este Ministerial Declaration. In addition to the need to reduce potential distortions, impediments or barriers to legitimate trade caused by inadequate and inefficient protection of intellectual property rights protections, the Preamble recognised the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;
(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;
(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
(e) transitional arrangements aiming at the fullest participation in the results of the negotiations.

In the following, the Preamble also recognises the need for a multilateral framework dealing with international trade in counterfeit goods, that intellectual property rights are private rights, as well as their underlying public policy objectives of national systems, and the special needs of the least-developed country Members. Finally, the Preamble stresses the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures and the desire to establish a mutually supportive relationship between the WTO and WIPO as well as other relevant international organisations.

The considerations in the Preamble find their concrete expression in Articles 7 and 8 TRIPS, laying down the Agreement’s objectives and principles. As the main objective, Article 7 TRIPS mentions:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

For the achievement of these objectives, Article 8:1 TRIPS establishes a public interest principle, which states that:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

1047 TRIPS, supra note 978.
1048 Indent 2 of the Preamble of the TRIPS.
1049 Indents 3-8 of the Preamble of the TRIPS.
The wording of the public interest principle first reads like an exemption which authorises a Member to deviate from the following provisions in order to take into account values other than those related to trade. From the scope of the principle, various measures in the cultural field and notably the sphere of the cultural industries could be taken under the concept of “sectors of vital importance”. The freedom to adopt measures is however constrained by the consistency requirement laid down in the last subordinate clause of Article 8:1 TRIPS. This requirement was not contained in the initial proposal of the developing country Members but was added later on the insistence of developed country Members.\(^{1050}\) The freedom is further restrained by the need to prevent “the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology”.\(^{1051}\) In this context, the exact scope of Article 8 TRIPS and its ability to introduce a certain degree of flexibility remains unclear.

### B. National Treatment and Most-Favoured-Nation Treatment

One of the cornerstones of the GATT/WTO system, the principle of national treatment, was already laid down in the Berne Convention and its related conventions, which Article 1:3 TRIPS incorporates.\(^{1052}\) For this purpose, Article 3 TRIPS lays down – subject to certain exceptions – the obligation of each Member to accord to the nationals of other Members treatment no less favourable that it accords to its own nationals with regard to the protection of intellectual property. As such the national treatment principle is an important tool in the international harmonisation of national IPR laws.\(^{1053}\)

A novelty of TRIPS vis-à-vis the IP conventions, however, is provided by the adoption of the MFN principle, which prohibits the discrimination not between domestic vis-à-vis foreign, but between different foreign nationals of other Members. Article 4 TRIPS stipulates:

> With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members[...].

The obligations of the MFN principle, however, are subject to some exceptions, such as those emanating from international agreements on judicial assistance and law enforcement, from international agreements entered into force prior to the entry into force of the WTO Agreement, or from the Berne or the Rome Convention, to name but a few.\(^{1054}\) Similarly Article 5 TRIPS exempts various procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights. As a consequence of these exemptions, the TRIPS agreement preserves the reciprocity requirements contained in these conventions. Generally, the principle of reciprocity means that an advantage, or here the protection of IPRs, accorded by one country to the nationals of another country is dependent on the advantage accorded by the other country to the nationals of the first country and, hence, stands in direct opposition to the MFN principle. As a consequence, the TRIPS agreement does not fully extend the MFN principle, for example, to the entire scope of the Berne and the Rome Convention.\(^{1055}\) Despite

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\(^{1050}\) See Yusuf, supra note 1030 at 13.

\(^{1051}\) Article 8:2 TRIPS.

\(^{1052}\) Cf. Article 1, 2 (6) and 5 Berne Convention, supra note 716, and Article 2 Paris Convention, supra note 981.

\(^{1053}\) See Yusuf, supra note 1030 at 19 et seq.

\(^{1054}\) Article 4 a)-d) TRIPS, supra note 978.

\(^{1055}\) See e.g. Articles 5 and 5 par. 8 Berne Convention, supra note 716 and Articles 4 and 5 Rome Convention, supra note 252.
these specific exceptions, the inclusion of the MFN principle in the TRIPS in general, may be seen as a first step towards simplification and harmonisation of the international IPRs regime which was thus far largely built upon the complex framework of numerous bilateral, regional and multilateral treaties.\textsuperscript{1056}

C. Transparency

As an important element of the rule of law principle, the requirement of transparency passes through the WTO/GATT system like a golden thread.\textsuperscript{1057} It is therefore no surprise that the TRIPS Agreement is subject to the dispute settlement system, including the nullification and impairment procedure of Articles XXII and XXIII GATT, of the WTO.\textsuperscript{1058} In conformity with the strengthening of the rule of law, the TRIPS Agreement also contains a provision on transparency. According to Article 63 TRIPS, Members are obliged to publish, or make publicly available, in a national language, laws and regulations, and final judicial decisions and administrative rulings of general application as well as international agreements, pertaining to the subject matter of the TRIPS Agreement, \textit{i.e.} especially with respect to the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights.\textsuperscript{1059} As institutional support for Article 63 TRIPS, the WTO Agreement created a Council for Trade-Related Aspects of Intellectual Property Rights ("Council for TRIPS").\textsuperscript{1060}

D. Flexibility

The TRIPS Agreement contains numerous provisions that introduce a certain degree of flexibility in the implementation, application or enforcement of its norms. Flexibility not only yields a safeguard for the proper application of legal norms in a changing environment, but also assists in the process of balancing between issues covered and those falling outside the direct scope of any given norm or agreement. In the context of the TRIPS Agreement both reasons play an important role, since intellectual property rights are placed in a rapidly evolving technological environment and equally relate to a great many issues pertaining to the broader questions of life.

In concrete terms, the first characteristic of the TRIPS is that it introduces universal minimum standards, which provides that every Member has the right to exceed, but not to fall short of, the standard of IP protection enshrined in the TRIPS.\textsuperscript{1061} The character of universal minimum standards is also bolstered by the general rule of Article 72 TRIPS, according to which Members may not enter reservations in respect of any of the provisions of the TRIPS agreement unless there is consent of the other Members.\textsuperscript{1062} Nonetheless, as the Preamble recognises, in the achievement of the goals of

\textsuperscript{1056} See \textit{e.g.} L.L. Hicks & J.R. Holbein, “Convergence of National Intellectual Property Norms in International Trading Agreements” (1997) 12 Am. U.J. Int’l L. & Pol’y 769, discussing not only the horizontal convergence such as between the Paris and Berne Conventions with the TRIPS, but also their vertical impact on regional agreements such as NAFTA and MERCOSUR.

\textsuperscript{1057} See \textit{e.g.} Articles II (and the \textit{Understanding Article II:1(b), supra note 440}) and X GATT, Article III GATS.

\textsuperscript{1058} Article 64:1 TRIPS.

\textsuperscript{1059} But see Article 39 TRIPS concerning the protection of undisclosed information.

\textsuperscript{1060} Article IV:5 WTO Agreement and Article 68 TRIPS.

\textsuperscript{1061} Article 1:1 TRIPS. See also Articles 12 (term of copyright protection), 14:5 (performers, producers of phonograms (sound recordings) and broadcasting organisations, 18 (trademarks), 26:3 (industrial design), 33 (patents), 38 (layout-design of integrated circuits) TRIPS.

\textsuperscript{1062} See also Article XVI:5 WTO Agreement.
the TRIPS Agreement, the differences in national legal systems must be taken into account. The underlying philosophy of TRIPS to respect national legal systems surfaces in many provisions, which often merely state the level of protection to achieve but leave their implementation to the discretion of each Member.

More flexibility in the application of TRIPS is found in the transitional arrangements of Part VI. First, generally Members were obliged to apply the provisions of the TRIPS only after one year after the entry into force of the WTO Agreement. Developing country Members and those in transition from a centrally-planned to a market and free-enterprise economy are entitled to a further period of four years of delay. Least-developed country Members benefit from a period of ten years of delay. Furthermore, TRIPS provides for assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights for developing countries by developed countries. Last but not least, there exists also a delay of five years in the application of the nullification and impairment procedure of Article XXIII GATT to the TRIPS. Notwithstanding these transitional arrangements, developing countries have faced severe problems with the implementation of the TRIPS provisions, additionally aggravated by external pressures put forward by some developed countries to accelerate the pace of reforms. These transitional arrangements also widely proved to be insufficient in terms of improving the “development dimension” inherent in IPRs. To this end, some negotiating strategies for a comprehensive review of the agreement have been put forward, especially aiming at striking a better balance between the interests of producers and users of technology.

In line with the complexity of IP laws, the TRIPS agreement foresees several exceptions in the context of its substantive provisions, either incorporated by way of reference to the Berne and its related conventions or of direct mention in the TRIPS. In addition to these specific exceptions, the TRIPS agreement contains a few general, or universal, exceptions. As a first example the public interest principle of Article 8:1 was mentioned, which must be read together with Article 7 TRIPS. Nonetheless, it was said that its scope and overall utility are doubtful due to the consistency requirement. A stronger exception, however, is found in the (unilateral) security exception of Article 73 TRIPS. Another general exception similar to Article XX GATT/XIV

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1063 Indent 2 c) Preamble of the TRIPS Agreement.
1064 See generally Article 1:1 TRIPS; see also, for instance, Article 61 TRIPS on criminal procedures reads: “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale[...].”
1065 Article 65:1 TRIPS.
1066 Article 65:2 and 3 TRIPS.
1067 Article 66 TRIPS. See also Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members For Certain Obligations with Respect to Pharmaceutical Products (Decision of the Council for TRIPS of 27 June 2002), WTO Doc. IP/C/25 (July 1, 2002).
1068 Article 67 (Technical Cooperation) TRIPS.
1069 Article 64:2 TRIPS. Note that the transition period mentioned in paragraph 2 has lapsed in 1999 and has not been renewed since then; see “TRIPS in Seattle”, supra note 315 at 173.
1071 Ibid. at 228-229; see also “TRIPS & Global Economic Development”, supra note 999 and Tully, supra note 1046.
1072 See e.g. Articles 3, 9, 11, 13, 17, 24:4, 6 and 8, 26:2, 27:2 and 3, 30, 40:2 TRIPS.
1073 See Subsection 8.2.1.1.A.
1074 See also the discussion in Subsections 6.4.1.2.D.
GATS, but confined to the protection of patents, is laid down in Article 27:2 TRIPS, which states that:

Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

In comparison with copyrights, the protection of patents, however, is only of minor relevance for the cultural industries. For copyrights specifically, a general exception is found in Article 13 TRIPS, which obligates Members:

To confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.1075

Finally, another element of flexibility, due to a lack of consensus as expressed in another “agreement to disagree”, is found in the important issue of exhaustion of intellectual property rights.1076 The exhaustion of rights doctrine is certainly one of the most important trade-related aspects of intellectual property rights. For instance, without the rule of exhaustion there is the possibility to fragment the global market and to price discriminate between national markets by controlling parallel trade.1077 At the same time, if applied, the rule of exhaustion may account for considerable losses in revenues for the right holder or licensee. Therefore, it appears highly regrettable that – pending further negotiations – the issue of exhaustion has not been addressed but excluded under the TRIPS Agreement.1078

8.2.1.2. The Scope and Basic Provisions of the TRIPS Agreement

A. General Remarks

In terms of its scope, the TRIPS Agreement includes provisions covering the protection of copyright and related rights, trademarks, geographical indications, industrial designs, patents and layout-designs (topographies) of integrated circuits and complemented by provisions on the protection of undisclosed information and the control of anti-competitive practices in contractual licenses.1079 For their protection it puts into place a comprehensive set of rules on the enforcement of IPRs, comprising of both civil and criminal procedures, as well as rules governing the acquisition and maintenance of IPRs, complemented by a rigid dispute prevention and settlement system.1080 Based on the scope, the TRIPS Agreement has been termed one of the most significant achievements of the Uruguay Round.1081

1075 See the discussion in Subsection, infra §§ 8.2.2.A.d.).
1078 See Article 6 TRIPS, which states: “For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights”. On the issue of exhaustion, see also Yusuf, supra note 1030 at 17 et seq.
1079 Part II (Articles 9–40) TRIPS.
1080 Part III (Articles 41–61), Part IV (Article 62) and Part V (Articles 61–63) TRIPS.
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In the present context, the provisions on the protection of copyright and related rights are of major interest for the cultural industries, since they not only guarantee that revenues keep coming back to the producers or authors, but also serve a distributive function in the allocation of revenues between different actors in the production chain. The primary role of copyrights for the cultural industries as so-called “creative industries” is well established. Nonetheless, the cultural industries’ dependence on various supporting industries also relates them, directly or indirectly, to other fields of intellectual property such as trademarks, patents and layout-designs. Furthermore, the ongoing trend of convergence in an emerging global market, based on the digitisation of data, contributes to the general blurring of the former lines of distinction between these subcategories of IPRs. Notwithstanding the relevance of the IPRs regime as whole for the cultural industries, emphasis in the present context will be put on the protection of copyrights.

B. Copyright and Related Rights Protection under the TRIPS Agreement

The relevance of copyright for the cultural industries stems first and foremost from the overlap between the scope of copyright protection and the definition of the various sectors pertaining to the cultural industries. First, the TRIPS Agreement contains a conflict rule in relation to the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits. More specifically with regard to copyright, Article 9 TRIPS obliges WTO Members to comply with the provision of Articles 1 through 21 of the Berne Convention (1971). These articles first of all define the scope of protection for “literary and artistic works”, which include inter alia books, musical works, cinematographic works to which are assimilated works expressed by a process analogous to cinematography, and the exclusive rights of authors to authorise the broadcasting of their artistic or literary works. The first set of provisions contain the principal substantive provisions with respect to possible limitations to protected works, criteria for the eligibility, the term of protection, the right of translation and reproduction, certain free or possible free uses of works, special rights with regard to dramatic and musical, literary as well as the broadcasting of works. Explicitly exempted from the obligations under the TRIPS is Article 6bis of the Berne Convention which recognises an author’s moral right in his creation. The exemption of moral rights and the limitation of TRIPS to economic rights is regrettable. It is so, because it not only tips the balance in favour of economic as opposed to cultural considerations and may furthermore yield important conflicts between divergent national laws.

The second set of provisions governs issues such as the droit de suite, the right to enforce protected rights, infringing copies, and special provisions concerning developing countries.

The TRIPS Agreement also extends copyright protection to computer programs and compilations of data and gives authors and their successors in title the right to authorise or to prohibit the

1082 Article 2 TRIPS.
1083 Article 2 (1) and 14bis Berne Convention, quoted supra note 1015.
1084 See e.g. Articles 2bis, 3-4, 7 and 7bis, 8, 9, 10, 10bis, 11, 11bis, 11ter Berne Convention, supra note 716.
1085 Article 9:1 TRIPS.
1087 See e.g. Articles 14bis, 15 and 21 Berne Convention, supra note 716.

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commercial rental to the public of originals or copies of their copyright works.\footnote{1088} For the term of protection of a work, the TRIPS Agreement provides that

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.\footnote{1089}

Article 12 clarifies the mode of computation of the term of protection when it is not based on the life of a natural person. This clarification was necessary, since, to the difference of the Berne Convention, the TRIPS Agreement also extends the protection of copyright to legal persons.\footnote{1090}

Article 13 TRIPS introduces the obligations for Members to “confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Additionally, Article 14 TRIPS lists several obligations that Members must fulfill with regard to the protection of the rights of performers, producers of phonograms (sound recordings) and broadcasting organisations. These obligations concern especially the guarantee of the right of holders of a copyright to prohibit the fixation, the reproduction, or rebroadcast by wireless means of broadcasts, as well as the communication to the public of television broadcasts, when undertaken without their authorisation.\footnote{1091}

A final issue of major concern for the cultural industries in the context of copyrights is the problem of anti-competitive practices in contractual licenses, as addressed in Article 40 TRIPS. Anti-competitive practices related to intellectual property rights lie at the heart of the nexus between trade and competition law. The triangular relationship between IPRs, trade and competition law derives from the importance licensing plays in the marketing of IP products as a major source for revenues. This is particularly the case for the cultural industries, where recourse to anti-competitive practices is not unknown.\footnote{1092} In this respect, the TRIPS Agreement only recognises that “some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology” and leaves much room to the discretion of the national legislator. For a future combined consideration of IPRs, trade and competition law on a multilateral level, important challenges lie ahead. One author has characterised the main features of the challenges to come as follows:

Member countries will face a particularly complex task to the extent that the areas that may have to be covered are rather broad and heterogeneous. Patent licenses restrictions do not raise the same problem as trademark licences (for example, software licences for computer work stations), and patent pools certainly are different from collecting societies for copyright royalties.\footnote{1093}

\begin{footnotes}
\item[1088] Articles 10 and 11 TRIPS; see also the WIPO Copyright Treaty, supra note 1027.
\item[1089] Article 12 TRIPS.
\item[1090] Article 1:3 (Fn 1) TRIPS, stating that: “When “nationals” are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory”.
\item[1091] Article 14:1-3 TRIPS.
\item[1092] See supra Subsection 6.3.3.2. See e.g. Dorion, supra note 182.
\end{footnotes}
C. Some General Problems Related to the TRIPS Agreement

The regulatory choice to include intellectual property rights protection in the framework of international trade in times of the increasing commodification of intangible goods based on the advent of new technologies must be considered a logic step. Equally, the decision to incorporate existing IP convention within the WTO framework in order to preserve the continuous development of the subject matter, instead of creating an entirely new and separate regulation can be welcomed. However, the partial incorporation of the IP Conventions in the TRIPS Agreement also creates problems. First of all, it may create an asymmetry between the obligations of Members that are both WTO Members and Members of the IP Conventions and those which are only WTO Members, though there is a considerable overlap in obligations under the different agreements.\(^{1094}\)

Nonetheless, one such example is found in the recognition of moral rights in the Berne Convention against their exclusion from the TRIPS Agreement.\(^ {1095}\) Second, given the rapid development of the IP sector, it will be interesting to observe the effect that the institutional bifurcation in the field of IPRs will have on the overall development of an international IPRs regime. This point deserves some attention despite, or precisely because of the exemption of the NT and MFN obligations under the TRIPS from procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights (Art. 5 TRIPS). Nonetheless, a certain mitigating effect may derive from the call for consultations with WIPO for an institutional cooperation between the Council for TRIPS and various bodies of WIPO (Art 68 TRIPS).

In light of the complexity and the rapid development of the subject matter as well as the numerous unresolved issues, it is likely that the DSB of the WTO will be asked to clarify, through the evolutionary interpretation of TRIPS provisions, existing TRIPS provisions in light of the dynamic changes in the legal environment.

§§ 8.2.2. TRIPS Case Law Related to the Cultural Industries

Notwithstanding the temporary moratorium on the application of non-violation and the delay in the implementation for developing and least developed, the DSB has already had to deal with a considerable number of cases.\(^ {1096}\) It is hard to imagine the number and scope of future disputes, once the transitional arrangements have expired. Nonetheless, emphasis here will be put on the chronological presentation of cases with a more or less clear link to the cultural industries or, at least, to one of their subsectors.

A. Cases in the Sphere of the Cultural Industries

a.) Japan – Measures Concerning Sound Recordings

In 1996, the first conflict concerned copyright protection granted to performances and sound recordings under Japanese law. Both the US and the EC requested consultations with regard to the obligations of Japan accruing from the TRIPS Agreement. Both the US and the EC considered the


\(^ {1095}\) Article 6bis Berne Convention, supra note 716, and Article 9:1 TRIPS.

degree of Japanese copyright law protection to be insufficient and inconsistent with its obligations under the TRIPS Agreement. Using arguments similar to those of the parallel US application, the EC claimed that:

[B]y virtue of the TRIPS Agreement, particularly its Articles 14.6 and 70.2 in conjunction with Article 18 of the Berne Convention (1971), Members of the World Trade Organization (“WTO”) are required to protect producers and performers of sound recordings for a period of 50 years from the end of the year in which the fixation was made or the performance took place and which have not yet fallen into the public domain. In practice, this means that works which have come into existence since 1 January 1946 have to be given TRIPS level protection for the remainder of the 50 year period because the TRIPS Agreement became effective for the developed country Members of the WTO on 1 January 1996. The above-mentioned Japanese Legislation (Law No. 112 of 1994) only provides for protection of those sound recordings produced after 1 January 1971. In the view of the European Community and its Member States, the Japanese legislation is therefore not compatible with Japan’s obligations under the TRIPS Agreement, since it does not extend the protection of sound recordings produced in the time period between 1 January 1946 and 1 January 1971.

Subsequent to consultations, the conflict was settled by the notification of a mutually-agreed solution, after the Government of Japan amended its copyright law on December 26, 1996.

b.) Ireland/EC – Measures Affecting the Grant of Copyright and Neighbouring Rights

In 1997, the US – due to the EU’s internal system of division of competence – requested consultations with both Ireland and the EC concerning the protection of copyright and neighbouring rights under Irish law. In particular, the US stated that the Irish legislation for the protection of copyright and neighbouring rights was insufficient and inconsistent with the TRIPS Agreement. In its request for the establishment of a panel, the US provided a long list of measures by which Ireland and the EC failed to duly implement the provisions of the TRIPS Agreement as of January 1, 1996. More precisely, the US asked the panel:

to examine this matter in light of the TRIPS Agreement, and to find that the legal regime in Ireland fails to conform to the obligations in Articles 9, 13, 14, 41, 42, 43, 44, 45, 46, 47, 48, 61, 63, 65 and 70 of the TRIPS Agreement, and nullifies or impairs benefits accruing directly or indirectly to the United States under the TRIPS Agreement.

The many alleged violations listed in the request comprise of the US contention that the legal regime in Ireland is inconsistent with the Berne Convention in that, for example, it does not cover translations of official works, the protection of architectural works, anonymous and pseudonymous works, ownership of rights in film, and the recognition of bodies established to protect the rights of

1097 See Japan – Measures Concerning Sound Recordings (Request for Consultations by the United States), WT/DS28/1/IP/D/1 (February 14, 1996) and Japan – Measures Concerning Sound Recordings (Request for Consultations from the European Communities), WT/DS42/1/IP/D/4 (June 4, 1996).

1098 See Japan – Measures Concerning Sound Recordings (Request for Consultations from the European Communities), WT/DS42/1/IP/D/4 (June 4, 1996); see also Japan – Measures Concerning Sound Recordings (Request for Consultations by the United States), WT/DS28/1/IP/D/1 (February 14, 1996).


1100 Ireland and European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights (Request for Consultations by the United States), WT/DS82/1/IP/D/8 (May 22, 1997) and WT/DS115/1/IP/D/12 (January 12, 1998).

1101 Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights (Request for the Establishment of a Panel by the United States), WT/DS82/2 (January 12, 1998).

1102 Ibid.
unknown authors of unpublished works.1103 Moreover, the US contends that that the exceptions to
copyright holder's exclusive rights under Irish law exceed those permissible under Article 13 of the
TRIPS Agreement and that the grant of rental rights to producers of phonograms and any other
right holder in phonograms is inconsistent with the TRIPS Agreement.1104 The US deemed
inadequate the protection granted to pre-existing works, phonograms, and performances for a
full term of protection, the provision of civil remedies with respect to the unauthorised making of
phonograms or cinematographic films from a performance and the unauthorized broadcast of such
performance just as much as the provision of criminal procedures and penalties to be applied in
cases of copyright piracy on a commercial scale.1105

In light of the many articles invoked, it is unsurprising that in the course of the subsequent
consultations, Ireland agreed to amend its copyright law in order to bring its legislation in conformity
with Ireland's obligations arising from the TRIPS Agreement. With the prospect of the
implementation of the necessary amendments scheduled for the end of December 2000, Ireland, the
European Communities and the United States notified the Dispute Settlement Body that a mutually
satisfactory solution has been reached.1106

c.) Greece/EC – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs

In 1998 the US requested consultations with Greece and the EC respectively, concerning the
enforcement of the TRIPS Agreement (Article 41 TRIPS) and the availability of remedies for
copyright holders (Article 61 TRIPS).1107 The concrete subject of the conflict was the alleged
violation of TRIPS obligations through regularly broadcast copyrighted motion pictures and
television programs without the authorisation of copyright owners by a significant number of
television stations in Greece and the absence of effective remedies for copyright holders whose
rights have been infringed.

The conflict has been settled by the notification of a mutually-agreed solution after Greece had
passed legislation on October 13, 1998 which provides an additional enforcement remedy for
copyright holders whose works were infringed by television stations operating in Greece and to
comply with several conditions.1108

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1103 Ibid.
1104 Ibid.
1105 Ibid.
1106 Ireland and European Communities – Measures Affecting the Grant of Copyright and Neighbouring Rights (Notification of
Mutually Agreed Solution), WT/DS82/3 and WT/DS115/3 (September 13, 2002).
1107 Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Request for Consultations by the
United States), WT/DS 125/1-IP/D/14 (May 7, 1998) and European Communities – Enforcement of Intellectual Property Rights
for Motion Pictures and Television Programs (Request for Consultations by the United States), WT/DS 124/1-IP/D/13 (May 7, 1998).
1108 Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programmes (Notification of Mutually
Agreed Solution), WT/DS125/2-IP/D/14/Add.1 (March 26, 2001) and European Communities – Enforcement of Intellectual Property
Rights for Motion Pictures and Television Programmes (Notification of Mutually Agreed Solution), WT/DS124/2-IP/D/13/Add.1 (March 26, 2001).


d.) United States – Section 110(5) of the US Copyright Act

In 1999, based on a complaint by the Irish Music Rights Organisation (IMRO),\textsuperscript{1109} the European Communities and their Member States requested consultations with the US regarding Section 110(5) of the United States Copyright Act as amended by the “Fairness in Music Licensing Act” 1998.\textsuperscript{1110} Consequently, consultations were held between the US and the EC, but failed to produce a mutually satisfactory solution. Therefore, the EC requested the establishment of a Panel mainly based on the argument that

Section 110(5) of the United States Copyright Act, as amended by the “Fairness in Music Licensing Act” enacted on 27 October 1998, exempts, under certain conditions, the communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes (sub-paragraph A) and, also under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a non dramatic musical work intended to be received by the general public (subparagraph B) from obtaining an authorisation to do so by the respective right holder. In practice this means that Section 110(5) of the US Copyright Act permits under certain circumstances, the playing of radio and television music in public places (such as bars, shops, restaurants etc.) without the payment of a royalty fee.\textsuperscript{1111}

Before the Panel, the EC reiterated its allegations that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act violate the United States’ obligations under the TRIPS Agreement and requested the Panel to find that

the United States has violated its obligations under Article 9.1 of the TRIPS Agreement together with Articles 11bis(1)(iii) and 11(1)(ii) of the Berne Convention (1971) and to recommend that the United States bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.\textsuperscript{1112}

In its response, the US contended that Section 110(5) of the US Copyright Act is fully consistent with its obligations under the TRIPS Agreement. Thus it requested the Panel to find that both measures meet the standard of Article 13 of the TRIPS Agreement and the substantive obligations of the Berne Convention (1971) and, consequently, to dismiss the claims of the European Communities.\textsuperscript{1113}

The factual aspects of the case thus concern Section 110(5) of the US Copyright Act of 1976, as amended by the Fairness in Music Licensing Act of 1998 (FIMLA). Section 110(5) places limitations on the Section 106 of the US Copyright Act of 1976, which provides copyright holders with the exclusive rights in their copyrighted works. The two limitations listed in Section 110(5) and contested before the DSB are first the so-called “homestyle” exemption of subparagraph A, and second the “business” exemption of subparagraph B, which was added by the Fairness in Music Licensing Act of 1998.

\textsuperscript{1109} The initial complaint by IMRO (an Irish collecting society administering, licensing and enforcing the performing rights in musical works) was based on the EC Trade Barriers Regulation, Council Regulation No 3286/94 and lodged on March 21, 1997.

\textsuperscript{1110} United States – Section 110(5) of the US Copyright Act (Request for Consultations by the European Communities and their Member States), WT/DS160/1-IP/D/16 (February 4, 1999).


\textsuperscript{1111} United States – Section 110(5) of the US Copyright Act (Request for the Establishment of a Panel by the European Communities and their Member States), WT/DS160/5 (April 16, 1999).

\textsuperscript{1112} Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) at paras. 3.1 and 3.2 [hereinafter US – Copyright Act].

\textsuperscript{1113} Ibid. at paras. 3.3 and 3.4.
The first limitation, the “homestyle” exemption (Subparagraph A), is a clause, which declares that no copyright infringement takes place when a transmission embodying a performance or display of a work is communicated through the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes and if no direct charge is made, or the transmission received is further transmitted to the public.\textsuperscript{1114} In short, the basic rationale of this clause has been described as the secondary use of the transmission by turning on an ordinary receiver in public being so remote and minimal that no further liability should be imposed.\textsuperscript{1115}

The second limitation is provided by the so-called “business” exemption (Subparagraph B), which exempts establishments – provided they meet a series of conditions – from copyright infringements when they communicate a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, similarly an audiovisual transmission by a cable system or satellite carrier.\textsuperscript{1116} The exemption covers establishments and food service and drinking establishments provided that they fall under a certain minimum size, or they use audiovisual technical devices, equivalent of a non-commercial equipment, \textit{i.e.} featuring limited technological standards plus the use a limited number of screens, or loudspeakers per room. It must be emphasised here that the business exemption only exempts non-dramatic musical work, which is work other than an opera, operetta, musical or other similar dramatic work when performed in a dramatic context,\textsuperscript{1117} whereas the homestyle exemption appears to cover all sorts of works, thus also including dramatic musical works. This view, however, has been rejected by the US Government in its first submission and Subparagraph A has been interpreted in a way to cover only non-dramatic works too.\textsuperscript{1118}

After having cleared the problem of burden of proof\textsuperscript{1119}, the Panel cast some light on the scope and limitations of the exclusive rights covered by the TRIPS Agreement and also – by way of incorporation – the Berne Convention. The relevant articles in the Berne Convention is first Article 11\textsuperscript{bis}(1) (iii), which states that:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.\textsuperscript{1120}

The second article is Article 11(1)(ii), which states that:

Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(ii) any communication to the public of the performance of their works.\textsuperscript{1121}

The US acknowledged the implications of subparagraphs (A) and (B) of Section 110(5) for Articles 11(1)(ii) and 11\textsuperscript{bis}(1) (iii) of the Berne Convention and, therefore, the core question before

\textsuperscript{1114} \textit{Ibid.} at para. 2.3.
\textsuperscript{1115} \textit{Ibid.} at para. 2.5.
\textsuperscript{1116} \textit{Ibid.} at para. 2.3.
\textsuperscript{1117} \textit{Ibid.} at para. 2.8.
\textsuperscript{1118} See \textit{US – Copyright Act, supra note 1112, Attachment 2.1., First Written Submission of the United States} (October 26, 1999) at paras. 9, 31 and 35. But see Helfer, \textit{supra note 1110} at Fn 7, pointing out the contradiction between the reading by the US Government and the intention of the US Congress.
\textsuperscript{1119} \textit{US – Copyright Act, supra note 1112} at para. 6.16.
\textsuperscript{1120} \textit{Ibid.} at para. 6.19.
\textsuperscript{1121} \textit{Ibid.} at para. 6.23.
the Panel was, which of the exceptions under the TRIPS Agreement invoked were relevant to this
dispute and whether the conditions for their invocation were met so as to justify the exemptions
under subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act.1122 For this purpose the
Panel turned to Article 13 TRIPS, entitled “Limitations and Exceptions” which it characterised as
“general exception clause applicable to exclusive rights of the holders of copyright”.1123 According
to the US, Article 13 TRIPS incorporates, clarifies and articulates the scope of the minor exceptions
doctrine of the Berne Convention, which allows Members to place minor limitations on the
exclusive rights of authors.1124 In examining the legal status and scope of the minor exceptions
doctrine, the Panel had recourse to the general rules of interpretation as codified in the Vienna
Convention on the Law of Treaties.1125 As regards the scope of the exception, the Panel noted the
difference between minimal uses, such as at religious ceremonies, or by military bands, which have
no commercial implications, and other examples, such as adult and child education, where an
exclusively non-commercial nature of potentially exempted uses is less clear. The Panel concluded
from this difficulty that the criterion of its commercial character is insufficient to determine whether
the exception is minor and thus a national law is covered by the minor exceptions doctrine.1126 As
regards the determination of the legal status of the minor exceptions doctrine under the TRIPS
Agreement, the Panel was careful to reconcile the provisions of the TRIPS Agreement with those of
the Berne Convention, which taken together form the overall framework for multilateral copyright
protection. In its result, the Panel states that the incorporation of Articles 11 and 11bis of the Berne
Convention (1971) into the TRIPS Agreement includes the entire acquis of these provisions,
including the possibility of providing minor exceptions to the respective exclusive rights.1127

The resolution of the dispute depended on the three criteria set forth in Article 13 TRIPS, which
requires that limitations and exceptions to exclusive rights:

   a) be confined to certain special cases,
   b) do not conflict with a normal exploitation of the work, and
   c) do not unreasonably prejudice the legitimate interests of the right holder.

Subsequently, the Panel examined both the “homestyle” and the “business” exemption contained in
Section 110(5) of the US Copyright Act. The Panel clarified that the three conditions apply on a
cumulative basis, each being a separate and independent requirement that must be satisfied and that,
as an exception, Article 13 TRIPS must be interpreted narrowly.1128

With regard to the business exemption, the statistical data available to the Panel clearly showed that a
large part of all eating (65.2%), drinking (71.8%) and retail (27%) establishments of the US would
benefit from it. Based on this data, the Panel concluded that the business exemption of
Subparagraph (B) does not qualify as a “certain special case” in the meaning of Article 13 TRIPS.1129

For the homestyle exemption, the statistical data were considerably lower, and the Panel followed

1122 Ibid. at para. 6.29.
1123 Ibid. at para. 6.31.
1124 Ibid. at paras. 6.35, 6.37 and 6.42.
1125 Ibid. at paras. 6.43-6.46.
1126 Ibid. at para. 6.59.
1127 Ibid. at paras. 6.66 and 6.92-6.96.
1128 Ibid. at para. 6.97.
1129 Ibid. at para. 6.133.
the view put forward by the US Government, according to which Subparagraph (A) only covered dramatic works. For these reasons, the Panel concluded that the “homestyle” exemption meets the conditions of Article 13 TRIPS.

For reasons of judicial economy, the Panel also analysed the two other criteria, despite the fact that Subparagraph (B) already failed to fulfil the first one. For the second criterion to be fulfilled it was necessary to establish that the exception (or limitation) to the exclusive rights does not conflict with the “normal exploitation of the work”. Due to the relevance for the cultural industries, it is noteworthy to highlight the Panel remark that the exclusive rights in relation to the work enshrined in the TRIPS Agreement and the Berne Convention are “the legal means by which exploitation of the work, i.e., the commercial activity for extracting economic value from the rights to the work, can be carried out”. In the process of determining what constitutes a normal exploitation of the work, the panel considered both actual and potential effects when assessing the permissibility of the exemptions since it would be consistent with similar concepts and interpretation standards as developed in the past GATT/WTO dispute settlement practice. The Panel also stressed the importance of defining normal exploitation in a way that includes a dynamic element capable of taking into account technological and market developments since “what is a normal exploitation in the market-place may evolve as a result of technological developments or changing consumer preferences”.

For the US, the business exemption did not conflict with the normal exploitation of works, because, first, individual right holders (or their collecting management organisations (CMOs)) face considerable administrative difficulties in licensing a great number of small eating, drinking and retail establishments, second, a significant portion of the establishments exempted by the new business exemption had already been exempted under the old homestyle exemption and, third, many of the establishments eligible for that exemption would have been able to avail themselves of an almost identical exemption under the group licensing agreement under the various US CMOs. In its response the EC stated that administrative difficulties in licensing are not a legitimate excuse for non-compliance and, in addition, pointed out that the use of recorded music (e.g. on CD) is not covered by the exemptions, which further undermines the argument of administrative difficulty as being at the causal origin of the exemption. In the US response it is interesting to detect an implicit cultural argument, which contends that the reason for the differentiation between broadcast and recorded music is a historical one, namely according to which:

The policy purpose justifying subparagraph (A) is the protection of small “mom and pop” businesses which “play an important role in the American social fabric” because they “offer economic opportunities for women, minorities, immigrants and welfare recipients for entering the economic and social mainstream”.

1130 See supra note 1118.
1131 Ibid. at paras. 6.142 and 6.146.
1132 Ibid. at para. 6.159.
1133 Ibid. at paras. 6.160-6.162.
1134 Ibid. at para. 6.171.
1135 Ibid. at para. 6.185.
1136 Ibid. at paras. 6.178 and 6.187.
1137 Ibid. at para. 6.190.
1138 Cf. paras. 6.156 and 6.192.
In the light of these arguments, the Panel stated that historical reasons alone do not justify the distinction between recorded and broadcast music for the assessment of what constitutes a normal use of musical works and concludes that the business exemption conflicts with a normal exploitation of the work.\footnote{Ibid. at paras. 6.207 and 6.211.} For the homestyle exemption, the Panel adopts the narrow interpretation of Subparagraph (A), so as to include only dramatic works, and consequently establishes that it is not conflicting with the normal exploitation of a work.\footnote{Ibid. at paras. 6.112-6.119.}

Following a request by the EC, the Panel explained that Article 1.3 TRIPS means that “the United States is required to observe the obligations of the TRIPS Agreement with respect to nationals of all other WTO Members including, but not limited to, EC nationals.”\footnote{Ibid. at paras. 6.230 and 6.231(Fn 206).} In this context, the evaluation of the homestyle and business exemption in light of whether they do not “unreasonably prejudice the legitimate interests of the right holder”, the Panel faced difficulties of a statistical kind in determining the level of prejudice caused by the exemptions, especially because both parties applied different methods of calculations (“bottom-up” or “top-down”), obviously yielding different results.\footnote{Ibid. at paras. 6.255-6.256.} For instance, the US estimated the maximum annual loss to EC right holders of distributions from only the largest US collecting society in the range of $294,113 to $586,332 whereas the EC arrived at an annual loss to all right holders amounting to $53,65 million.\footnote{Cf. paras. 6.252 and 6.253.} In its conclusive remarks on the business exemption that Panel expressed the view that the US has not been able to demonstrate that the business exemption does not unreasonably prejudice the legitimate interests of the right holder and, therefore, failed to meet the third criterion laid down in Article 13 TRIPS.\footnote{Ibid. at paras. 6.265 and 6.266.} For the homestyle exemption, on the other hand, the Panel saw the third criterion fulfilled.\footnote{Ibid. at para. 6.272.} In the aftermath of the Panel Report, the parties to the dispute had recourse to arbitration and an award of the arbitrators had been issued at the end of the year 2001.\footnote{See United States – Section 110(5) of the US Copyright Act (Recourse to Arbitration under Article 25 of the DSU – Award of the Arbitrators), WT/DS160/ARB25/1 (November 9, 2001); see also United States – Section 110(5) of the US Copyright Act (Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute United States – Section 110(5) of the US Copyright Act (WT/DS160)), WT/DS160/18/Add.13 (March 7, 2003).} In the award, the arbitrators fix ed the level of EC benefits, which were being nullified or impaired as a result of the operation of Section(5) (B) at the amount of US$ 1,219,900 per year.\footnote{See United States – Section 110(5) of the US Copyright Act (Recourse to Arbitration under Article 25 of the DSU – Award of the Arbitrators), WT/DS160/ARB25/1 (November 9, 2001) at para. 5.1.}

B. \textit{A Short Evaluation of the Cases and Some Interpretative Issues}

From the previous analysis of TRIPS case law in the sector of the cultural industries it is clear that almost every year, since the entry into force of the TRIPS Agreement on January 1, 1996 (for developing country Members), a case has arisen. It is interesting to note that thus far, the cases have involved the implementation of the TRIPS standards in Japan, the EC and the US, \textit{i.e.} the main global economic trading powers and so-called “developed” country Members. It is therefore difficult to evaluate what future cases will be brought to the DSB, once the transitional arrangements have lapsed.
Moreover, three out of the four cases were solved by mutual agreement and a panel was never established. Only in the last, the US – Copyright Act case, was a Panel established and a report issued. The case is highly interesting for several reasons. The first reason is mainly symbolic and reveals a certain, to use a private international law term, “homing-trend”, which means an obvious imbalance in the US attitude to pressure countries abroad to implement and enforce intellectual property laws while “deliberately” choosing to ignore its own TRIPS obligations at home.\(^\text{1148}\) Second, in more substantive terms, the US – Copyright Act case gives a good overview of the state of play of the implementation and enforcement of the multilateral framework of IPRs. It first of all shows the emergence of an almost seamless, but nonetheless still flawed, web of commercial relations extending from the private individual (author) through smaller or larger groupings (e.g. CMOs, national legislation) to a wider public or global audience. These commercial relations find their counterpart in legal relations between national legislation, regional or supranational bodies of law, and international universal treaties, such as notably the TRIPS Agreement or the Berne Convention. In this web, the main challenge lie in the function of IPRs to contribute to economic efficiency and cultural development through distributive justice.\(^\text{1149}\) This challenge reveals certain weak points in the knots weaving the web, such as notably the administrative or practical problems linked to the licensing of authors’ exclusive rights through CMOs. Within this category of problems falls the criticism of the CMO practice of “double dipping” (i.e. the collection of royalties for performances of music for which they have already received license fees from broadcasters) and the abuse of their monopoly pricing power.\(^\text{1150}\) En passant, the Panel also considered the ever-recurring problem of technological innovations and their impact on the structure of the market as well as consumer preferences.

Finally, in the wake of the Panel’s ruling in the US – Copyright Act, it remains to be asked what are the main obstacles or possible means for their mastery in the process of the implementation of the TRIPS obligations in the national legal orders. It has been said that the Panel’s ruling fails to provide clear guidelines for Members to bring their national IP legislation in conformity with the obligations arising from the TRIPS Agreement.\(^\text{1151}\) Considering the regulatory approach of the TRIPS, which consists of the harmonisation of a great number of divergent national laws, such guidelines, established in the process of dispute settlement resolution, are urgently needed given the gradual phasing out of the transitional arrangements applicable mainly to developing and least-developed countries. In this respect, it is noteworthy that the TRIPS Agreement not only provides an attempt to unite the realm of trade with the one of intellectual property, but also to subordinate intellectual property rights under a rigid dispute settlement system backed by a clear enforcement procedure.\(^\text{1152}\) For the successful achievement of these ends, the due interpretation of the TRIPS norms is a

\(^\text{1148}\) See also Helfer, supra note 1110 at 100-101 and 204, writing: “In enacting the Fairness in Music Licensing Act of 1998, Congress deliberately chose to ignore the United States’ international trade and intellectual property policies and to enact a treaty-incompatible statute that the European Community was virtually certain to challenge before the World Trade Organization”.

\(^\text{1149}\) Ibid. at at 105-141.

\(^\text{1150}\) Ibid. at 116-118.


prerequisite. In the interpretation of its norms, the Panel, in *US – Copyright Act* follows the broader trend of applying the general rules of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties, in the field of international economic law.\(^{1153}\) Nonetheless, given the specificities of the TRIPS agreement, as manifest in sometimes divergent meanings attached to the identical words used in the context of IPRs and the context of international trade in goods,\(^{1154}\) the DSB has been criticised for not taking into due account the principles and objectives of the TRIPS Agreement.\(^{1155}\) Such practice is particularly dangerous when it comes to the protection of patents in the field of pharmaceutical products, where the immediate availability of certain medicines decides over life and death of entire populations. It must not be underestimated, however, that – by way of analogy – the protection of copyrights equally shapes and influences a country’s cultural identity, and, with it, exercises an important influence on its long-term economic, political and cultural development. The relevance of IPR protection for a country’s economic and cultural development has been described as follows:

> Pour son bien-être économique et social, tout pays a besoin d’un système de propriété intellectuelle harmonieux et solide. La protection de la propriété intellectuelle encourage la fructification des talents créatifs et artistiques locaux et la valorisation de leurs produits; elle alimente et sauvegarde les actifs de propriété intellectuelle locaux que constituent par exemple les savoirs traditionnels et le folklore; enfin, elle attire les investissements, en assurant l’environnement stable dans lequel les investisseurs, locaux ou étrangers, peuvent être assurés que leurs droits de propriété intellectuelle seront respectés. En outre, une infrastructure de la propriété intellectuelle permet de participer à l’échange international d’informations d’intérêt commercial auquel œuvre l’OMPI, et notamment d’accéder rapidement et facilement à l’information relative aux nouvelles techniques. Le système de propriété intellectuelle peut en outre aider à combattre des actes illicites telles que la contrefaçon et la piraterie.\(^{1156}\)

To this long list of factors to consider in the context of the IPRs involvement of the cultural and economic development of societies specific trade-related issues, such as multilateral rules on competition, investment, of subsidies must be added. Perhaps, as the difficulties and subsequent failure of the negotiations for a Multilateral Agreement on Investment (MAI) has shown,\(^{1157}\) various trade issues of cultural relevance cannot be solved to a satisfactory extent on their own but need a careful consideration of the system in its entirety. More specifically, the efficiency of the TRIPS Agreement in terms of global cultural and economic aspects must be linked to questions of the trade

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\(^{1155}\) See D. Shanker, “The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement” (2002) 36 J. World T. 721 mainly at 721, analysing the DSB practice by referring to the Panel Report in Canada – Patent Protection of Pharmaceutical Products, WT/DS114/R (March 6, 2000), and denouncing “the misuse of Dispute Settlement System of the WTO by certain countries to amend the TRIPs provisions by consciously disregarding the object and purpose not only as expressed in Articles 7 and 8 of the TRIPs Agreement [...].”


liberalisation of trade in services (GATS), competition rules, disciplines on subsidies for both goods and services, transfer of technology and foreign direct investment.\textsuperscript{1158}

As a minor step in this direction, as far as the issue of public health was concerned, the Doha Ministerial Conference displayed greater awareness about possible negative implications related to the implementation and enforcement of international minimum standards for intellectual property. Accordingly, the WTO Members intended to correct the interpretation of the TRIPS Agreement by adopting the Declaration on the TRIPS Agreement and Public Health.\textsuperscript{1159} In the said Declaration, the Members acknowledge the outstanding importance of public health and the promotion of access to medicines for all. To this end, Paragraph 5 refers to the application of the customary rules of international of public international law as follows:

\begin{quote}
each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles.
\end{quote}

Notwithstanding the absence of explicit statements to this end, the Declaration may serve as a point of reference for the resolution of future disputes not only concerning patents in connection with public health issues but also copyrights in their impact on the cultural industries. In this context, special attention must be given to the different meaning of the relevant vocabulary in the trade or the IPRs context, such as the meaning of “protectionism” or “competition”, as explained by Dreyfuss and Lowenfeld.\textsuperscript{1160} The different and often diametrically opposite meaning, has a clear impact on, for instance, questions concerning the narrow or broad interpretation of exceptions or limitations contained in the TRIPS Agreement. As opposed to Articles XX GATT, or XIV GATS, a narrow reading of Article 13 TRIPS may – according to the context – vary in its effect on trade, from a barrier to an incentive to trade. Therefore, when interpreting the provisions TRIPS, the DSB should also have in mind the distributive function inherent in IPRs and hence take into better account the socio-economic and cultural development of the countries concerned and not merely state that “while the WTO Members are free to choose the method of implementation, the minimum standards of protection are the same for all of them”.\textsuperscript{1161} Finally, it needs to be stressed that for the

\begin{footnotesize}
\begin{enumerate}
\item[1158] See also “TRIPS & Global Economic Development”, supra note 999 mainly at 405, concluding \textit{inter alia} that: “The optimal approach to creating an maintaining an equitable balance in the international IPRs system will likely involve a combination of approaches. The goal of the international IPRs system should be to promote innovation, while protecting against the continuation and exacerbation of a stark division of the global economic system among the technological haves and have nots”; WTO Rules in the Audio-Visual Sector, supra note 982, Barton, supra note 921, Th. Cottier & I. Meitinger, “The TRIPs Agreement without a Competition Agreement”, Paper presented at the Fondazione Enrico Mattei, \textit{Trade and Competition in the WTO and Beyond}, Venice, December 4-5, 1998 and K.C. Kennedy, “Foreign Direct Investment and Competition Policy at the World Trade Organization” (2001) 33 Geo. Wash. Int'l L. Rev. 585.
\item[1159] Declaration on the TRIPS Agreement and Public Health, supra note 1043 and Doha Declaration, supra note 379 at para. 17.
\item[1160] See Cooper Dreyfuss & Lowenfeld, supra note 1152 at 279-80.
\item[1161] See \textit{US – Copyright Act}, at para. 6.189, supra note 1112.
\end{enumerate}
\end{footnotesize}
sake of greater coherence in the application of the TRIPS provisions by the DSB, their regulatory scope must also be further analysed and possibly amended, in particular with respect to the balance these provisions strike in the equal economic remuneration between the so-called “cultural” and the “industrial” effort, as well as in the just consideration of private and public interests.
§ 8.3. The Nexus of Trade, Culture and Intellectual Property Rights: A Summary

§§ 8.3.1. Résumé of the Achievements of the TRIPS Agreement: Its Merits and Deficiencies

The analysis of the relevance of the TRIPS Agreement for the cultural industries, first of all, recalls the similarity between the concepts of “intellectual property” and of “cultural industries”, which rests in their common oxymoronic character. From this character it is clear that intellectual property, just like “culture industry”, denotes a highly dynamic but equally comprehensive or else holistic and inclusive concept. The concept’s inclusiveness becomes obvious at various levels. First of all, in principal, it forges together not only the world of ideas with the material world, but also distinct areas of goods and services under the common term “copyright industries”. The TRIPS Agreement recognises both the nexus between ideas and their expression in material form as well as between trade and IPR in general, through the incorporation of the relevant IP conventions. The relevance of intellectual property rights for both goods and services finds their expression in the architecture of the WTO system, based upon the three pillars of the GATT 1994, the GATS and the TRIPS. The Panel in US – Copyright Act described the WTO architecture as follows:

Given that the agreements covered by the WTO form a single, integrated legal system, we deem it appropriate to develop interpretations of the legal protection conferred on intellectual property right holders under the TRIPS Agreement which are not incompatible with the treatment conferred to products under the GATT, or in respect of services and service suppliers under the GATS, in the light of pertinent dispute settlement practice.

The Panel’s statement reflects the first major merit of the TRIPS Agreement, which rests in the successful marriage of trade with IPR – two closely related areas which were too long separated from each other. From the involvement of the DSB of the WTO follows the second merit of the TRIPS Agreement, which lies in the submission of the IPRs regime under the binding dispute settlement system of the WTO.

The enumeration of the two merits, representing the TRIPS Agreement as an important international forum for negotiations and the resolution of disputes, is incomplete. In practice, numerous issues remain open, which, if not resolved in the near future, might turn into the TRIPS Agreement’s major deficiencies capable of endangering the success of the efforts taken in- and outside the WTO. In the process of an increasing complexity characterising both human and commercial relations on a global scale, transparency and coherence determine the ability to render justice to the entirety of actors involved in the multilateral trading order. Therefore, first from an institutional perspective, the cooperation between the TRIPS/WTO with other international organisation, such as WIPO or the ITU, must be strengthened in order to cope with the rapid technological progress and the legal loopholes it might engender. In substantive terms, the

1163 See e.g. Strong, supra note 1269 at 94, writing that “[A]lthough no trade agreement refers to them as such, cultural industries are essentially synonymous with copyright industries, which are defined as industries that produce copyrighted goods or provide copyrighted services”.
1164 See US – Copyright Act, at para. 6.185, supra note 1112.
1166 See e.g. Cooper Dreyfuss & Lowenfeld, supra note 1152.
1167 See e.g. the Agreement between the International Telecommunication Union and the World Trade Organization, supra note 911.
frequent recourse of the DSB to the general rules of treaty interpretation marks a beginning on a long way towards a coherent multilateral legal framework.

Finally, however, the quality of the rulings by the DSB depends largely on the content of the relevant provisions from which it extracts the meaning for its decisions through their due interpretation. In this context, the dynamic nature of the concept of intellectual property recalls the dynamic nature underlying the concept of the cultural industries, which is marked by the striving for a more stable equilibrium between its two major constituents: culture and trade. As was mentioned above, the laws of intellectual property may in their effects be categorised as falling either in the scope of cultural policies or else in the one of trade policies. Most of the time, they actually do both. However, at a more subtle level, this categorisation could also be framed as meaning that IPRs balance between different cultural policy concerns or between different trade policy concerns. Without doubt, due to their general significance, intellectual property rights may contribute positively not only to the achievement of the objectives enshrined in the Preamble of the WTO Agreement, but also to the emergence and maintenance of an global democratic society characterised by international peaceful relations and the highest degree possible of economic cohesion. This potential role of IPRs Neil Weinstock Netanel subsumed under the process of democratisation, which in his words includes:

A democratic culture, supported by the widespread dissemination of information and opinion, an independent and pluralist media, and a belief in the efficacy of individual contributions to public discourse, is central to that process of democratization. In some circumstances, particularly in advanced democracies, copyright can contribute significantly to those constitutive factors. In others, copyright – at least a proprietary set of rights modelled on Western copyright – would have a marginal or negative impact on their realization. To assert the principle that copyright should further democracy is thus not to require that all countries adopt Western-style copyright laws. It is rather to examine particular issues, market sectors, and local conditions with an eye towards tailoring copyright towards furthering democratic development.1168

His concern about the way this democratisation process through copyrights is implemented receives a careful consideration under regulatory approaches that are capable of taking into account the cultural diversity of the Members of the international community.1169

For the end of this Chapter, it remains to point out a few regulatory questions linked to the specific character of IPRs in the context of international trade. Specifically, it remains to be seen how a balance between cultural and economic considerations may be achieved.

§§ 8.3.2. A Cultural Exception for Intellectual Property Rights?

In this last subsection, it remains to be considered how the regime of intellectual property rights within the WTO system may contribute to the overcoming of the conceptual conflict between free trade principles and cultural policy objectives.1170 It was said already that, based on the dynamic nature inherent in the concept, intellectual property rights are inclusive and, therefore, well-suited to transcend the existing barriers raised between culture and trade. It is safe to say now that the TRIPS Agreement has an impact on culture and on trade.1171

1169 See e.g. Govaere & Demaret, supra note 1039.
1170 See also Strong, supra note 1269.
1171 See also Samuelson, supra note 993.
The impact on both was described by reference to the production process underlying the so-called “copyright industries”, another synonym of the cultural industries. In a simplified presentation, the production process starts with an artistic (intellectual) effort, because it is an idea or thought (conscious or unconscious), which precedes any action; it continues with the fixation of an idea on a carrier, passes the stage of its subsequent (mechanical or digital) reproduction and ultimately ends with the distribution and consumption of the final product. In this process, the simultaneous distribution and (repeated) consumption by a varying number of individual consumers creates a link among them and the information it contains contributes to the processing of ideas, which again are responsible for the formulation of new ideas and their transformation in the production of new goods or services. In this process lies an important challenge for (trade) laws in general, namely to provide the framework that guarantees the necessary flexibility and transparency for the functioning of the network linking the individual to the collective as much as the mind to matter.

In other words, content is for culture what is money for trade. Access to both is an absolute necessity for the functioning and viability of a global market in a global society. On a large scale, in the organisation of the global market and the global society alike with the least friction possible, lies the major challenge for international law. In this challenge, the TRIPS Agreement as one pillar of the WTO system, is called to play an important role since it not only applies to the two other pillars of the WTO system, the GATT 1994 and the GATS, but also combines aspects of the two realms of culture and trade. In the analysis of the rules governing both, trade in goods and trade in services, the necessity to inject in them a certain degree of flexibility could be seen, in order to compensate for the lack of explicit recognition of the link between the sphere of culture and the one of trade, or so-called trade with non-trade issues. As their principal legal tool to reconcile trade with non-trade issues, the GATT 1994 and the GATS rely on exceptions or safeguards. The TRIPS Agreement equally uses exceptions to counterbalance the need for legal certainty with changing circumstances in the environment. However, in the context of the TRIPS Agreement, these exceptions must be carefully distinguished with regard to their impact on the balance between cultural and economic concerns. This particular difference becomes clear when considering cultural or other non-economic public policy concerns. For instance under the GATT and the GATS such non-economic or trade-related public policy concerns are recognised mainly in the form of justifications for exceptions to the main rule, which is the one of greater trade liberalisation in compliance with the NT and the MFN principle. Under the TRIPS such public or, more precisely, cultural policy concerns are to some extent already part of the main rule, at least in the sense that granting copyright protection and national treatment to foreign copyright holders can in itself be regarded as serving a specific cultural policy objective, such as the one of protecting a country cultural identity. This important feature is implicitly reflected in the exception of Article 13 TRIPS, which calls on Members to limit the use of exceptions to “exclusive rights to certain special cases which do conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.

Similarly, under the GATT and the GATS, in principal, the formula applies that the broader the exception, the greater the room for manoeuvre for each Member in the field of culture. This is because the regulatory aim is basically one-sided, namely consists in the mere removal of barriers to trade. While leaving aside for the moment the question, whether the greater the room for manoeuvre of each WTO Member is beneficial or not to its respective population, things are different in the
context of TRIPS. The TRIPS Agreement, by the very nature of its regulatory scope, consisting of the connection between intellectual property rights protection and international trade, strikes a sensitive balance between cultural and economic concerns. Moreover, it covers not only the protection of copyrights, but also of patents, trademarks and layout-designs. Therefore, according to the context, an exception in the TRIPS Agreement may in one case enlarge and in another reduce the room for the consideration of national cultural concerns. For instance, as a clear example, Article 9:1 TRIPS, which exempts moral rights from its scope of protection clearly favours the economic over the cultural aspect of various copyrighted goods and services. Equally, in principle, Article 9:2 TRIPS, which practically exempts ideas, procedures, methods of operation or mathematical concepts as such, from the protection of copyrights, can be seen as the expression of preferences for industrial or economic over creative or cultural values. Article 27:2 TRIPS on the other hand, which allows Members to deviate from the protection of patents based on concerns of ordre public or morality as well as the protection of human health, appears to favour broader public policy over trade concerns. Finally, it must be repeated that by introducing only universal minimum standards, the TRIPS Agreement allows each WTO Member to introduce higher levels of IPRs protection.

These few examples are meant only to highlight the enormous complexity of the benefits and costs, as well as the divergent interests involved. In the WTO, these divergent interests surface between the individual author (patentee of trademark holder) and the broader public, and, linked to that, between the individual Member State and the provisions of a multilateral framework.

From this short observation and in line with the findings made in the analyses of the GATT 1994 and the GATS, it follows that a single cultural exemption clause confined to the TRIPS Agreement alone appears not only inappropriate but also counterproductive. The TRIPS Agreement, by being relevant for goods and services alike, and by touching upon many other related issues, rather suggests a quest for a more comprehensive regulatory response situated on a higher level, such as the one of the WTO Agreement.
Chapter 9  THE CANADA PERIODICAL CASE: A CASE STUDY

§ 9.1. NAFTA and the WTO: The Setback of the Canada Periodicals Case

§§ 9.1.1. Introductory Remarks on Regionalism and the NAFTA/WTO Relationship

Before concluding the Part on the WTO centred around the legacy of Article IV GATT followed by a short outlook, it is helpful to present the legal precedent of the global culture and trade debate, the Canada Periodicals Case. The case is peculiar in many respects. One imminent issue that needs to be mentioned is the fact that the dispute underlying the case arose in the regional context of NAFTA but was decided in the framework of the global dispute settlement system of the WTO. This curiosity is, first of all, due to provisions inscribed into the NAFTA, which determine its relation to the WTO. Legally speaking, one author described the juridical interface between NAFTA and the WTO as being of “considerable interest from the standpoints of policy and technical analysis of legal norms”.

In more general terms, the uncertainty surrounding the NAFTA/WTO relationship assists in casting some light on the link between regionalism and multilateralism in general.

Point of departure for this short overview is Article 103 NAFTA, titled “Relation to Other Agreements”, which – fulfilling the role of a conflict-of-law rule – stipulates:

1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other agreements to which such Parties are party.

2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

Paragraph 2 thus clearly introduces the priority of NAFTA over the other agreements and the GATT to the extent of any inconsistency. Only certain environment and conservation agreements prevail over NAFTA. With regard to the later succession of the WTO Agreement to the GATT, Article 301 NAFTA referring to the GATT, or any equivalent successor agreement, seems to indicate that – due to the parallel negotiation process of NAFTA and the WTO – Article 103 para. 1 NAFTA is meant to cover equally obligations arising under the WTO Agreement as the legitimate successor of the GATT. This reading is further underpinned by the relevant provision on the choice of dispute settlement forum. Article 2005 para. 1 NAFTA states that:

Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.

In addition, the text of the agreement specifies that once dispute settlement procedures have been initiated by a NAFTA Member, the forum selected shall be used to the exclusion of the other.

This last clause explains not only why the dispute was decided within the WTO dispute settlement system but also why the case could have been analysed both in the context of the NAFTA or the WTO. More important, however, is that this question points to more central problems, namely first,
the mutual relation between regionalism and multilateralism in general, and, second, the conformity of clauses granting special, or ‘exceptional’, treatment to the cultural industries in trade agreements concluded at the regional level with obligations enshrined in multilateral trade rules.

To begin with the first, preferential trading arrangements are as old as commerce.\textsuperscript{1177} The first concrete steps with regard to the later regional exception in the GATT, however, were taken in the inter-war period and during the negotiations for an ITO.\textsuperscript{1178} Even the UN Charter (and to a minor extent the Covenant of the League of Nations) as a model for a strong and universal legal instrument, explicitly authorises regional arrangements for its key areas, such as the maintenance of international peace and security, the existence of regional arrangements or agencies, provided that they are consistent with the “Purposes and Principles of the United Nations”.\textsuperscript{1179} It even encourages the Member States to attempt the pacific settlement of local disputes or to enforce related actions through the use of such regional arrangements and refers only a subsidiary role to the Security Council.\textsuperscript{1180} Although the UN Charter contains no further provisions regarding other regional organisations of a political, economic, technical or cultural nature, the spirit of subsidiarity prevails, for instance, also in the fulfilment of economic functions through five principal regional economic commissions.\textsuperscript{1181}

In the history of international trade law and since the entry into force of the GATT 1947, a continuous trend towards regionalism through the negotiation of regional trade agreements (RTAs) can be observed. For example, in the period 1948-1994, the GATT received 124 notifications of RTAs (relating to trade in goods), and since the creation of the WTO in 1995, over 100 additional arrangements covering trade in goods or services have been notified.\textsuperscript{1182} Today, the proliferation of RTAs means that almost all WTO Members belong to one or more RTAs.\textsuperscript{1183} The increasing proliferation of regional trade agreements, it is assumed, has led or is leading to the emergence of so-called “trading blocks”.\textsuperscript{1184} In recent decades every continent, in fact, from Europe, America, Asia, Australia to Africa, has experienced or experimented with the concept of regional integration agreements, of which the European Community (EC), North American Free Trade Agreement (NAFTA), Asia-Pacific Economic Cooperation (APEC), Association of Southeast Asian Nations (ASEAN), Southern Common Market (MERCOSUR) are some prominent examples.\textsuperscript{1185} However, numerous other, inter-regional or even inter-continental RTAs, such as the Free Trade Area of the

\textsuperscript{1177} For instance, the Roman term “\textit{Ius commercii}”, denominating the right to trade as a merchant, meant the grant to the colonies of privileges in their trading relations with Rome; see also The Regulation of International Trade, supra note 278 at 17, mentioning a commercial treaty between the Kings of Egypt and Babylonia concluded in 2500 BCE.

\textsuperscript{1178} See the well-documented survey of the history of the regional exception in J.H. Mathis, Regional Trade Agreements in the GATT/WTO – Article XXIV and the Internal Trade Requirement (The Hague: T.M.C. Asser Press, 2002) at 11-53; see also the short overview in World Trade and the Law of GATT, supra note 319 at 575-580.

\textsuperscript{1179} Article 21 Covenant of League of Nations and Articles 52-54 UN Charter.

\textsuperscript{1180} Articles 33 para. 1, 52 para. 2 and 3 and 53 UN Charter.

\textsuperscript{1181} The Economic Commission for Europe (ECE), for Latin America and the Caribbean (ECLAC), Asia and the Pacific (ESCAP) and Western Asia (ESCWA); see Hummer & Schweitzer supra note 323 at 686.

\textsuperscript{1182} See “Regionalism: facts and figures”, available online at http://www.wto.org/english/otr_e/trac_p_e/trac_p_e region_e/egftrac_e.htm (date accessed: October 7, 2002).


\textsuperscript{1185} See e.g. the overview in, de Mestral, supra note 97 at 240-251.
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Americas (FTAA)\textsuperscript{1186} or the European Partnership Agreement (EPA)\textsuperscript{1187}, have been signed, leading to an increasing overlap between RTAs.

There are several attempts to explain the reasons and motives underlying this trend towards regionalism. The arguments presented are based on a wide range of factors, ranging from political, economic, geographic, to historical, hegemonic or cultural reasons.\textsuperscript{1188} Regionalism may also serve occasionally as an exit option to multilateral trade liberalisation.\textsuperscript{1189} It is equally important to highlight the differences in the degree of economic integration envisaged within the various RTAs. The most important difference is found in the distinction between FTAs and CUs, or, more generally, the degree of economic integration. Such degree of integration appears crucial mainly for two reasons. The first reason is that the degree of economic integration also determines largely the outcome of the economic evaluation of a proposed or existing RTAs under the multilateral trading order. Indeed, the evaluation concerns mainly the question whether such a RTA is characterised as a so-called “building block” or “stumbling block”; the former having a trade creating effect whereas the latter a trade diverting/distorting effect in the process of multilateral trade liberalisation.\textsuperscript{1190} Although it is recognised that RTAs can be both trade creating and trade distorting, customs unions are – based on the common external customs tariff – vested with the presumption of a more trade creative effect than FTAs requiring a complicated system of rules of origin.\textsuperscript{1191} As a second reason, empirical data of the evolution of projects of economic integration suggest that there exists a causal link between the degree of integration obtained and the treatment of culture under the relevant rules on trade. Besides the important economic integration regimes of the CUSFTA/NAFTA and the European Union, many more RTAs include special clauses addressing either culture issues or the cultural industries.\textsuperscript{1192}

The proliferation of RTAs, in general, and given that they often contain cultural clauses must be considered in connection with the fact that both the GATT (Article XXIV) and the GATS (Article V) contain articles authorising the establishment of RTAs. As exemplified by Article XXIV GATT, the two articles enshrine the firm belief in the overall positive impact of RIAs and grant

\textsuperscript{1186} Summit of the Americas, Declaration of Principles, Plan of Action, (1994) 34 I.L.M. 808; see generally F.J. Garcia, \textquotedblrightAmericas Agreements\textquotedblright – An Interim Stage in Building the Free Trade Area of the Americas\textsuperscript{\textendash} (1997) 35 Colum. J. Transnat'1 L. 63 [hereinafter “Americas Agreements”].


\textsuperscript{1188} See e.g. the survey in S. Cho, “Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism” (2001) 42 Harv. Int'l L.J. 419 at 423-9; see also R.E. Baldwin, “The Causes of Regionalism” (1997) 20 The World Economy 865.

\textsuperscript{1189} See e.g. Odell & Eichengreen, supra note 319 mainly at 191-4.

\textsuperscript{1190} See e.g. A.O. Krueger, “Problems with Overlapping Free Trade Areas” in T. Ito & A.O. Krueger, eds., Regionalism versus Multilateral Trade Arrangements (Chicago: The University of Chicago Press, 1999) 9 mainly at 11; see also Mathis, supra note 1178 at 101-5 [hereinafter “Problems with Overlapping Free Trade Areas”].

\textsuperscript{1191} See especially Art. 2106 in NAFTA (supra Section § 4.1), Art. 151 TEC (infra Section 13.3.2.2.A) and Canadian bilateral FTAs with Chile, Costa Rica and Israel (supra note 305) as well as Art. 27 of the Cotonou Agreement, quoted infra note 1850. See generally the survey in H. Galperin, “Cultural Industries in the Age of Free-Trade Agreements” (1999) 24 Can. J. Communc., online: C.J.C. Homepage http://www.cjc-online.ca/ (date accessed: June 10, 2002) and H. Galperin, “Cultural industries policy in regional trade agreements: the cases of NAFTA, the European Union and MERCOSUR” (1999) 21 Media, Culture & Society 627.
WTO Members, subject to various conditions, a “regional” exception to the MFN and other GATT obligations. The positive view is expressed in the following terms:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.1193

This expression of a positive belief, however, cannot deceive about the underlying problems between the regional and the global level and that their implementation causes considerable difficulties,1194 which not even the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 was able to mitigate.1195 In addition to problems of overlapping RTAs,1196 criticism is raised about the insufficient legal criteria enshrined in Article XXIV GATT.1197 So far only, a few rulings by the AB have contributed further to the increasing juridification of Article XXIV.1198 Such criticism underlines the need for a new understanding of the relation between regionalism and multilateralism, which has been adequately framed by Sungjoon Cho as follows:

[t]he global trading system requires a new paradigm capable of overcoming the deficiencies and obsolete elements embedded in Article XXIV in order to make trade regionalism compatible with multilateralism in a constructive, rather than destructive manner. This new paradigm must proceed from a holistic perspective that breaks down the barrier between regionalism and multilateralism by emphasizing areas of institutional “convergence,” rather than the traditional dichotomy between the two. Indeed, this institutional convergence can offer the global trading system much-needed guidance in developing a structure for the effective management of the rapid expansion of economic interdependence and integration.1199

As an example, one possible conceptual remedy for the present deficiencies in the relation between regionalism and multilateralism may be found in the subsidiarity principle, which Jacques H.J. Bourgeois has examined in for the WTO context.1200 In his comparative analysis he found sufficient room for positive effects in the division of competences between the WTO and its Members leading to improved efficiency, acceptance and compliance with WTO rules.1201 Applied to regionalism, which is interposed between the national and the global level, the subsidiarity principle can serve national governments and parliaments as an insurance against the threat encroached on national sovereignty.1202

1193 Article XXIV:4 GATT; see also Articles V and Vbis GATS.
1196 See also “Problems with Overlapping Free Trade Areas”, supra note 1191 mainly at 11; see also Mathis, supra note 1178 at 101-5.
1197 See e.g. Serra Puche, supra note 1183 at 126, Blackhurst & Henderson, supra note 1184 at 423.
1198 See e.g. Appellate Body Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R (October 22, 1999) [Turkey – Textile], and EC – Bananas Case, supra note 410.
1199 Cho, supra note 1188 at 421-2.
1200 “Subsidiarity in the WTO Context”, supra note 1264; see also “Sovereignty, Subsidiarity, and separation of powers”, supra note 1264.
1201 See “Subsidiarity in the WTO Context”, supra note 1264.
1202 Ibid. at 44.
In conclusion of the foregoing paragraphs, a new interpretation of regionalism within the multilateral context is also of great significance for the issue of culture and the cultural industries. It must be added that the Canada Periodicals Case must be read in this particular light too.

§§ 9.1.2. The Background of the Case

The dispute in the Canada – Periodicals Case arose not only from the fact that Time Warner published Sports Illustrated Canada as a split-run periodical;\(^\text{1203}\) it has its roots in a longstanding Canadian tradition to support the Canadian magazine industry.\(^\text{1204}\) The rationale for such policy is found in the interpretation of the press as a communications medium, which provides an important factor in the cultural expression, social cohesion and a sense of national destiny.\(^\text{1205}\) The policy related to the magazine industry, however, is only part of a wider range of coherent policies in the field of the cultural industries, comprising of not only publishing, but also the music, film and broadcasting industry.\(^\text{1206}\) The latter, in turn, are again part of a coherent cultural policy, expressed inter alia in the spirit and letter of the law on multiculturalism.\(^\text{1207}\) These various policies in turn have considerably affected the bilateral Canadian-US relations and repeatedly given rise to disputes in the past, covering the entirety of the sectors forming the cultural industries.\(^\text{1208}\) These conflicts reflect deeper underlying divergences in the Canadian and the American approaches to the interplay between cultural policies and trade policies, or between cultural and economic forces. The can also be seen as a vicious circle encompassing US economic power and dominance, on the one hand, and Canadian cultural resistance and policy responses on the other.\(^\text{1209}\) This vicious circle is kept in movement additionally through new technological innovations affecting not only the cultural industries but the way international trade is being conducted.\(^\text{1210}\) Sheridan Scott has correctly stated that stating inter alia that

\[\text{As a result of technological changes, geographic boundaries are increasingly less effective as regulatory control points.}\]

The simultaneous impact of technology on both the cultural industries and international trade could be observed in the case of Sports Illustrated, which had found a so-called “loophole” in Canadian policy when in 1993 it circumvented the customs tariff by electronically transmitting the content

\(^{1203}\) See e.g Scow, supra note 1258 at 255-259 and Much Ado about Culture, supra note 512 at 186-194.


\(^{1205}\) Ibid. at 396-7.

\(^{1206}\) See e.g Much Ado about Culture, supra note 512 at 91-184.


\(^{1208}\) See Much Ado about Culture, supra note 512 at 186-328.

\(^{1209}\) See e.g. Hoskis & Finn & McFadyen, supra note 556.


\(^{1211}\) On technological change and its impact on the cultural industries, see also Sh. Scott, “The Impact of Technological Change on Canada’s Cultural Industries” in D. Browne, ed., The Culture/Trade Quandary – Canada’s Policy Options (Ottawa: Centre for Trade Policy and Law, 1998) 54 at 66.
from the US to Canada.\footnote{1212}{See \textit{Much Ado about Culture}, supra note 512 at 190.} This practice gave rise to the later amendment of the Excise Tax Act, underlying the \textit{Canada – Periodicals Case} before the WTO.

Ultimately, the divergences over the interplay of economic and cultural forces also found their way into the legal sphere through the adoption of the cultural exemption in CUSFTA, later carried over, in a slightly amended version, to NAFTA.\footnote{1213}{See generally D.S. Macdonald, “The Canadian Cultural Industries Exemption Under Canada-U.S. Trade Law” (1994) 20 Can.-U.S. L.J. 253.} The cultural exemption in NAFTA, albeit formulated in negative terms, nonetheless provides a point of contact between free trade, on the one hand, and culture, on the other, through the wider nexus found in the dynamics underlying the process of trade negotiations. In particular for the Canada-US context, these dynamics have been described as follows:

First, cultural sovereignty in the context of free trade with the U.S. is a highly sensitive and political issue in Canada; both economic and non-economic considerations are involved. Culture is inextricably linked with questions regarding national identity and sovereignty, and concern for these matters translates into political expectations. Accordingly, trade law issues cannot be isolated from these political considerations. Moreover, public opinion and lobbying have a direct effect on the multilateral negotiation process, and hence on the substance of trade law as well. Trade law is the product of negotiations whose nature and scope are defined by the domestic political conditions of the parties.\footnote{1214}{See de Fazekas, supra note 1267 at 142.}

Indeed, the domestic political conditions of the Canada and the US diverge in many important aspects, and are manifest particularly in their approach to the free trade versus culture issue.\footnote{1215}{For a good account of these differences, see \textit{e.g.} I. Slotin, “Free Speech and the Visage Culturel: Canadian and American Perspectives on Pop Culture Discrimination” (2002) 111 Yale L.J. 2289; see also J.A. Ragosta, “Sovereignty Revisited: The Information Revolution – Culture and Sovereignty – A U.S. Perspective” (1998) 24 Can.-U.S. L.J. 155 and J.M. Robinson, “Sovereignty Revisited: The Information Revolution – Culture and Sovereignty – A Canadian Perspective” (1998) 24 Can.-U.S. L.J. 147.} These differences, ultimately, also surfaced in the \textit{Canada – Periodicals Case}, which will be discussed next.

\textsection 9.1.3. Facts, Arguments and Findings

\textsection 9.1.3.1. The Panel Report

In July 1996, after previous consultations between the United States and Canada had ended without a resolution of the dispute, the DSB established a panel upon the request of the United States in order to examine certain measures maintained by Canada in the periodicals sector. In concrete terms, their dispute evolved around three Canadian measures, which the United States contested and claimed to be in violation of the obligations arising from the GATT: The first contested measure concerned Tariff Code 9958, the effect of which was the prohibition of the importation into Canada of certain periodicals, namely special editions, including a split-run or regional edition, that contain an advertisement that is primarily directed at a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical’s country of origin.\footnote{1216}{\textit{Canada Periodicals Case (PR)}, supra note 65 at para. 2.2-2.5.} Not included in the regime were catalogues, newspapers, or periodicals. The second contested measure related to the Excise Tax Act, which provided for the imposition, levy and collection, in respect of each split-run edition of a periodical, a tax equal to 80 percent of the value of all the advertisements contained in the split-run edition. The Excise Tax Act defined a split-

\textit{Canada Periodicals Case (PR)}, supra note 65 at para. 2.2-2.5.
run edition as an edition of an issue of a periodical in which more than 20 percent of the editorial material is the same as a comparable edition and which contains an advertisement that does not appear in identical form in all the excluded editions.\textsuperscript{1217} Finally, the last of the contested measures concerned the Canadian scheme of “funded” (“commercial Canadian”) postal rates for Canadian periodicals, which were lower than those applied to foreign imported periodicals (“international rates”).\textsuperscript{1218}

In the course of the Panel proceedings, the United States argued that the first measure, \textit{i.e.} Tariff Code 9958, constitutes a quantitative restriction in the sense of Article XI:1 GATT 1994, which prohibits restrictions on imports. The second measure, the Excise Tax Act, the US claimed to be inconsistent with the national treatment principle, in particular Article III:2, or in the alternative, Art. III:4 GATT 1994. For the beneficial postal rates, the US also stated a violation of Article III:4 GATT 1994 and that it cannot be considered a domestic subsidy within the meaning of Article III:8 of GATT 1994. In response to these arguments, Canada claimed that the Tariff Code can be justified on the basis of the general exception laid down in Article XX(d) GATT 1994. For the Excise Tax Act, Canada argued that GATT 1994 does not apply, and in the event that the Panel concludes that it does apply, it is consistent with Article III GATT 1994. Regarding the postal rates, Canada asked the Panel to find that Article III:4 GATT 1994 does not apply to the “commercial rates” and that the “funded” rates constituted allowable subsidies within the meaning of Article III:8(b) GATT 1994.

Both parties to the dispute supported the principal claims by various arguments that in one way or the other related to the specific characteristics inherent in the periodicals sector and featured the principal divergences in the approach to these characteristics in the respective countries South and North of the US-Canadian border.

For instance, the United States, as the complainant, held consistently that the Canadian import ban on split-run periodicals has the effect of reserving to Canadian magazines a monopoly on the sale of magazines containing so-called “domestically oriented advertisement”, thereby providing them a competitive advantage over foreign-produced magazines that are denied the right to carry such advertisements.\textsuperscript{1219} Similarly, for the excise tax on split-run periodicals, the US insisted on the view that the measure was designed to “shore up Canada’s GATT-inconsistent import prohibition” and that the sole purpose of the tax is protectionist.\textsuperscript{1220} In the view of the US, the protectionist character resides in the purpose of eliminating competition between foreign and domestically produced such magazines. The measure practically has the effect of removing the “commercially attractive” option of publishing a split-run edition of an existing magazine by levying a prohibitive 80 per cent excise tax. The 80 per cent excise tax means that a foreign magazine producer can not make use of the economies of scale that split-run editions provide on the basis of their mass production, \textit{i.e.} the fact that split-run editions “drive down per unit production costs by spreading the expense of producing articles and photographs over a greater number of magazines.”\textsuperscript{1221} The United States also argued that

\begin{itemize}
\item \textsuperscript{1217} \textit{Ibid.} at para. 2.6-2.9.
\item \textsuperscript{1218} \textit{Ibid.} at para. 2.10-2.19.
\item \textsuperscript{1219} \textit{Ibid.} at para. 3.3.
\item \textsuperscript{1220} \textit{Ibid.} at para. 3.22.
\item \textsuperscript{1221} \textit{Ibid.} at para. 3.22.
\end{itemize}
the excise tax created an artificial distinction between otherwise entirely like products, *i.e.* split-run and non-split-run magazine editions. The US effectively rejected the argument that the distinctive feature of non-split-runs vis-à-vis split-runs is the fact that they contain “original content” and therefore argued further that split-runs and non-split-runs are “like products”, or at least, “directly competitive or substitutable” products. The rejection, expressed in the submission of the US that the “whole notion of original content” is protectionist in nature, equally implies a total dismissal of the respective distinctions between editorial content compared to advertising content and between intellectual or cultural content compared to economic value. Economic considerations also dominate the arguments submitted by the US concerning the beneficial postal rates, which according to the US are “openly discriminatory” based on the distinction they draw between imported and domestically-produced magazines and therefore stand in contravention to the national treatment principle enshrined in III:4 of GATT 1994. For the same reason, the Canadian postal rates do not constitute the payment of subsidies exclusively to domestic producers and hence cannot be considered to fall within the exception of Article III:8(b) GATT 1994.

By contrast, Canada as the defendant in the dispute, tried not to argue on the basis of a merely economic and separate view of each measure but instead sought to defend the measures as the implementation of a comprehensive governmental policy through a coherent set of measures. This view is reflected in the defence of Tariff Code 9958 on the basis of the argument that:

> it forms an integral part of a package of measures with a single objective, it can be so justified on a natural and reasonable reading of the treaty language. Canadian public policy for the magazine industry is designed to provide Canadians with a distinctive vehicle for the expression of their own ideas and interests. Such a vehicle faces enormous competition from foreign magazines for both advertising and readership. Public policy measures aim to balance the need to establish and maintain a place for Canadian periodicals in their own domestic market while at the same time ensuring that Canadians have unrestricted access to foreign periodicals. To achieve this long-standing policy objective, government policy has focused on two areas: advertising and distribution. The Government of Canada has introduced a series of measures to ensure that magazines with editorial content developed for the Canadian market can compete for the limited advertising revenues.

Already in this submission it becomes clear that Canada not only tried to defend the contested measures on the basis of a “long-standing policy objective”1228 but also applied a more systematic reading of the agreements administered by the WTO. The more comprehensive reading of the agreements administered by the WTO surfaces in the Canadian argument that the dispute concerns the provision of advertising services to Canadian advertisers, which leads to the conclusion that not the GATT 1994 but instead the GATS would be applicable. Since Canada had not undertaken any commitments in respect of the provision of advertising services under GATS, it felt not bound to apply the national treatment principle to Members of the WTO. Furthermore, it also appears that Canada applied a more comprehensive approach to the specific characteristics of the periodicals and magazine industry. Canada explained that it saw a “direct correlation between circulation, advertising

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1222 *Ibid.* at para. 3.60.
1223 *Ibid.* at paras. 3.72 and 3.111.
1224 *Ibid.* at paras. 3.72, 3.76 and 3.143.
1225 *Ibid.* at paras. 3.146 and 3.177.
1227 *Ibid.* at para. 3.5.
1229 *Ibid.* at paras. 3.33-3.34.
revenue and editorial content” and consistently argued in this direction.\textsuperscript{1230} Such line of argument surfaced particularly in the context of the excise tax levied on split-runs and their qualification as “like products” in the context of which Canada submitted that:

Magazines are distinct from ordinary articles of trade. Magazines are intended, by their very nature, for intellectual consumption as opposed to physical use (like a bicycle) or physical consumption (like food). It follows that the intellectual content of a cultural good such as a magazine must be considered its prime characteristic.\textsuperscript{1231}

The specificity of magazines also emerges in the way they are consumed, because according to Canada the end-use of a magazine is not simply reading but it is instead the “transmission and acquisition of specific information”.\textsuperscript{1232} For the same reason, Canada exemplified, a sports magazine cannot be considered essentially the same as a philosophical journal and this explains why the Canadian legislation introduced the concept of “original content” as the distinguishing feature. This approach stands in contrast to the US denial of “original content” as a distinguishing feature and – according to Canada – leads to a “lumping together of all magazines as indistinguishable commodities”.\textsuperscript{1233} In general terms combining both a comprehensive interpretation of the WTO agreements and a broader perspective on magazines, Canada was seeking a unique treatment for magazines under the GATT, based on the distinguishing features of various cultural goods and services based on the fact that they contain intellectual or cultural content.\textsuperscript{1234} Although the concept of cultural industries appears nowhere in the Panel Report, it is due to the context in the NAFTA that Canada perceived magazines not only as an important subsector of the cultural industries but also as sharing some distinct features with the residual sectors. The Canadian view, which was not met by the Panel, can be extracted from the following paragraph:

Canada argues that because magazines contain intellectual or cultural content, they should receive unique treatment under GATT. Many products, as diverse as works of art, designer clothing, phonograph records and cinematographic films contain intellectual or cultural content. Like magazines, these products were in widespread use prior to the adoption of GATT 1947. But of these products, only cinematographic films were accorded special treatment in GATT 1947. Had the drafters of GATT 1947 sought to treat other intellectual or cultural products differently from products in general, they would have done so.\textsuperscript{1235}

As another important feature of magazines shared by other cultural industries, Canada defended the excise tax by stating that “far from having a protectionist aim, it is a legitimate response to an anti-competitive abuse in the advertising field, with the ultimate object of ensuring the survival of a distinct Canadian culture” and that the “marketing of split-runs is akin to dumping”.\textsuperscript{1236} In the context of dumping as a form of anticompetitive behaviour again the Canadian qualification of the contested measures as affecting trade in services and not trade in goods re-emerged. Ultimately, in light of the Canadian policy, the comprehensive approach to the dynamics inherent in the magazine and periodicals sector also explains the adoption of the scheme of funded postal rates, which has been developed:

\textsuperscript{1230} \textit{Ibid.} at para. 3.28.  
\textsuperscript{1231} \textit{Ibid.} at para. 3.61.  
\textsuperscript{1232} \textit{Ibid.} at para. 3.63.  
\textsuperscript{1233} \textit{Ibid.} at para. 3.68.  
\textsuperscript{1234} \textit{Ibid.} at para. 3.84.  
\textsuperscript{1235} \textit{Ibid.} at para. 3.84.  
\textsuperscript{1236} \textit{Ibid.} at paras. 3.124 and 3.135.
to ensure that Canadians, regardless of where they live, have access on a reasonable basis to periodicals.

Subsidized postal rates are provided to maximize the opportunity for distribution, particularly in light of Canada’s relatively small and widely dispersed population.  

The argument of access of the population living in remote areas to periodicals is intertwined with the economic argument of economies of scale and mere economic power, which vests certain publishers with resources and purchasing power which other smaller publishers may not have.

In its reasoning, the Panel shows occasional sensitivity towards the specificity of cultural products. For example, in answering the question whether split-run and non-split-run periodicals are “like products” the Panel noted the necessity of a case-by-case approach, i.e. “an interpretation that takes into account of all the relevant circumstances and in particular the unique characteristics of cultural products”. It also acknowledged that the price and demand comparisons are more complicated in the case of magazines and other cultural products that in the use of ordinary commodities and accordingly the comparison of consumer behaviour in response to price changes on a bottle of shochu and a bottle of vodka cannot be compared to the case of magazines because of the too many qualitative differences. In another place, the Panel rebuts the United States’ argument that the “whole notion of original content” be protectionist by remarking that this assertion “amounts to a blanket denial that cultural products have any specificity that distinguishes them from ordinary items of trade” and dismisses as incorrect the conclusion that “original content” is inherently protectionist. Notwithstanding this occasional sensitivity, the Panel ultimately finds no interpretative method that would accord specific treatment to periodicals under GATT obligations based on the general uniqueness of cultural products and consequently embarks on the usual analysis of measures in light of the relevant GATT provisions. For instance, the Panel rejected the Canadian claim according to which the import ban and the excise tax are part of a “single, indivisible package” by stating that it is called to examine the instruments chosen by the Canadian Government for the attainment of its policy objectives but without examining or passing judgment on the policy objectives of the Canadian measure regarding periodicals. Subsequently, the Panel did not accept that the import ban might serve as an enforcement measure for the excise tax and hold the import ban to be inconsistent with the GATT prohibition on quantitative restrictions, which could also not be justified under the general exception of Article XX(d) GATT 1994. Concerning the excise tax and particularly the question of the goods or service character of the contested measures, the Panel merely notes the “single package” character of the WTO agreements, mentioned in Article II:2 WTO Agreement, and deduces from it that:

The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other.

1237 Ibid. at para. 3.184.  
1238 Ibid. at para. 3.171.  
1239 Ibid. at para. 3.114.  
1240 Ibid. at para. 3.116.  
1241 Ibid. at para. 3.143.  
1242 Ibid. at para. 5.9.  
1243 Ibid. at paras. 5.16 and 5.17.
The Panel added that there exists no hierarchical order between the GATT 1994 and the GATS and expressed its disagreement over Canada’s contention that overlaps between GATT 1994 and GATS should be avoided. Instead, the Panel plausibly affirmed that:

Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system.\footnote{Ibid. at paras. 5.16 and 5.18.}

On the basis of this statement, the Panel holds the national treatment principle enshrined in Article III GATT 1994 applicable to the excise tax and finally – after having established the likeness of split-run with non-split-run periodicals – held the Excise Tax Act to be in violation of Article III:2 GATT 1994. For the postal rates scheme, by differentiating between “commercial Canadian” and “funded” rates for Canadian periodicals which are lower than the “international” rates applicable to imported periodicals, the Panel found them to be inconsistent with the obligation arising from Article III:4 GATT, which states that imported products shall not be accorded “treatment no less favourable than like products of domestic origin.”\footnote{Ibid. at para. 5.39.} The funded rate scheme, however, was qualified as an allowable subsidy under Article III:8(b) GATT 1994.\footnote{Ibid. at para. 5.44.}

Finally, the Panel, before recommending to the DSB that Canada bring the measures it found inconsistent with GATT 1994 into conformity with its obligations thereunder, evoked the promising, and in the meantime famous, phrase that:

in order to avoid any misunderstandings as to the scope and implications of the findings above, we would like to stress that the ability of any Member to take measures to protect its cultural identity was not at issue in the present case. The only task entrusted to this Panel was to examine whether the treatment accorded to imported periodicals under specific measures identified in the complainant’s claim is compatible with the rules of GATT 1994.\footnote{Ibid. at para. 5.45.}

Before the consequences of this phrase are discussed it is necessary to revisit shortly the Appellate Body’s findings.

9.1.3.2. The Appellate Body Report

Upon the presentation of the Panel Report, both Canada and the US appealed certain issues of law and legal interpretations.\footnote{Canada Periodicals Case (AB), supra note 65.} In accordance with the procedures set forth in the DSU, the appeal was limited to issues of law covered in the panel report and legal interpretations developed by the panel. Hence, Canada claimed that the Panel erred in law when it qualified the Excise Tax Act as a measure regulating trade in goods subject to the GATT 1994 and when it concluded that split-run and non-split-run periodicals are like products. Canada agreed, however, with the Panel’s conclusion that the “funded” postal rate scheme is a permissible subsidy in accordance with the terms and conditions of Article III:8(b) of the GATT 1994. This last point, was appealed by the United States, which, for obvious reasons, agreed with the rest of the Panel’s conclusions.

The AB in its conclusions in substance upheld the findings of the panel with regard to Tariff Code 9958 and the excise tax but reversed the Panel’s finding with regard to the “funded” postal rates...
scheme and concluded that the “funded” postal rates scheme is not justified by Article III:8(b) of the GATT 1994.

In answering the first important question of the applicability of GATT 1994, the AB notes first that the Excise Tax Act reads “Tax on Split-Run Periodicals” and not “tax on advertising”. Second, it asserts that a periodical is a good comprised of two components, namely editorial content and advertising content, of which both can be viewed as having service attributes, but nonetheless combine to form a physical product, which is the periodical itself. The AB also qualifies the Excise Tax Act as a companion to Tariff Code 9958 and follows the Panel’s conclusion about the possible coexistence of the GATT 1994 and the GATS. The AB, however, found the Panel’s qualification of split-run and non-split-run periodicals as “like products” to be incorrect since it was based on a single hypothetical example and inadequate factual analysis and reversed it. In the following, the AB, although Canada claimed that the AB did not have the jurisdiction to examine a claim under Article III:2, second sentence, GATT 1994, completed the analysis of the Excise Tax Act on the basis of Article III:2, second sentence, GATT 1994. The second sentence of Article III:2 GATT 1994 stipulates that “no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.” The AB analysis of the measure led to the result that:

imported split-run periodicals and domestic non-split-run periodicals are directly competitive or substitutable products in so far as they are part of the same segment of the Canadian market for periodicals.

Having established their direct substitutability and competitiveness, the AB examined the question whether the two are granted similar tax treatment within Canada. In this context, the AB concluded on the basis of the magnitude of the differential taxation, the Government of Canada’s explicit policy objectives in introducing the measure and the demonstrated actual protective effect of the measure that the Excise Tax Act is inconsistent with Article III:2, second sentence, GATT 1994. Finally, the AB recommended that the DSB request Canada to comply with the findings of the AB Report.

9.1.3.3. The Aftermath of the Canada – Periodicals Case

The dispute between the United States and Canada about the treatment of periodicals, however, did not end with the AB’s ruling in the Canada – Periodicals Case. In the transitional period between the presentation of the AB ruling and the expiry of the deadline for Canada to comply with the recommendations made by the DSB by the end of October 1998, the Canadian Government announced that it was preparing legislation to comply with the ruling. During this period the Canadian Government sought for GATT consistent ways to protect the domestic periodicals industry. The final outcome of this search was the Foreign Publishers Advertising Services Act, known as Bill C-55, which was adopted on June 17, 1999. In order to forestall another WTO Panel, already the title of Bill C-55 suggests that it deals with services instead of goods. In substantive terms, the
Bill’s main purpose is laid down in clause 3 (1) which stipulates that “No foreign publisher shall supply advertising services directed at the Canadian market to a Canadian advertiser or at a person acting on their behalf”.\textsuperscript{1252} From the US perspective, the bill has been received with harsh criticism and the then US Trade Representative Charlene Barshefsky asserted that the bill perpetuates “longstanding anticompetitive policies and is protectionist and discriminatory”.\textsuperscript{1253} In general, the US position is that the bill continues to restrict the access of foreign magazines to the Canadian market and that, in substance, the bill is about goods and not services. For Canada, the Bill is in line with Canada’s longstanding cultural policies and respects its international trade obligations. However, until further legal actions are taken, it remains uncertain to what extent bill is in conformity with Canada’s international trade obligations.\textsuperscript{1254} As the so far final step in the long-lasting dispute, Canada and the US have signed an agreement, the so-called “U.S.-Canada Magazines Agreement”, in which Canada promised to amend the scope of Bill C-55 and the US, in return, has agreed that it will take no action under the World Trade Organisation (WTO) Agreements, the North American Free Trade Agreement (NAFTA), or section 301 of the Trade Act of 1974, as amended, in response to Bill C-55.\textsuperscript{1255} Pursuant to the signing of the agreement, Canada indeed amended the proposed Bill C-55 by way of introducing the exceptions in sections 21.1 and 21.2 to the effect that it facilitates slightly the access of foreign publishers selling advertising services directed to the Canadian market.\textsuperscript{1256}

Thus, in a short term perspective, the dispute between the US and Canada has once more found a diplomatic rather than legal ending. Or in other terms, another so-called “agreement to disagree” has been concluded, not adding legal certainty to the issue but merely postponing it until the occurrence of another conflict in the future. Moreover, this legal uncertainty in connection with deeply divergent ideas of the US and Canada about the interplay between trade and cultural policies, voices have been raised expressing fear that the dispute is likely to continue and not only with regard to the magazine sector but also to the broadcasting, film and book industries.\textsuperscript{1257}

\begin{footnotesize}
\textsuperscript{1252} Section 3 (1) Bill C-55, \textit{ibid}; see also the short description in \textit{Much Ado about Culture}, supra note 512 at 197-199.
\textsuperscript{1253} See the background information to Bill C-55 prepared by T.J. Thomas (1998).
\textsuperscript{1254} See e.g. Y.A. Naqvi, “Bill C-55 and International Trade Law: A Mismatch” (1999/2000) 31 Ottawa L. Rev. 323.
\textsuperscript{1255} For the full text of the \textit{US-Canada Magazines Agreement}, see Trade Compliance Center, online at \url{http://199.88.185.106/tcc/data/commerce.html/TCC_Documents/Canadamagazines.html} (date accessed: November 8, 2002); see also V. Lawton, “Canada, U.S. End Trade Dispute”, \textit{The Toronto Star} (May 26, 1999).
\textsuperscript{1256} Cf. Sections 21.1 and 21.2 Bill C-55, supra note 1251.
\textsuperscript{1257} See e.g. V. Lawton, “Ottawa Set to Pledge $150 Million to Subsidize Magazines” \textit{The Toronto Star} (December 10, 1999), V. Lawton, “Ottawa Warned to Make Sure Magazine Deal Stays on Track” \textit{The Toronto Star} (June 3, 1999) and L. Eggertson, “Broadcasting, Film, Book Industries Fear They’ll Be Next” \textit{The Toronto Star} (May 27, 1999).
\end{footnotesize}
§ 9.2. A Critical Evaluation of the Canada Periodicals Case and the Cultural Exemption

§§ 9.2.1. An Important Legal Precedent for the Global Culture and Trade Debate

In the North American trade context, the decision in the Canada Periodicals Case has aroused a series of diverse, but equally vivid, reactions. The reactions reflect the great complexity of the issues that were at stake. The Canada Periodicals Case was not only a first test case for the cultural industries exemption of NAFTA but also for the newly established WTO dispute settlement system. To recall shortly, the Periodicals Case only was the second decision the AB handed down after it started work in 1995. The case therefore perfectly fit in the growing trend towards regional economic integration in the late 1980s and early 90s within an – after the Uruguay Round – expanded and reinforced multilateral trading system under the aegis of the WTO. Moreover, it raised several issues of growing global concern in connection with the technological revolution in the communications sector. For these reasons, the case has also received great attention at global level going far beyond the North American context and can be regarded as the first important legal precedent which inaugurated the present global culture and trade debate.

In the following years it became clear that the decision before the Appellate Body of the WTO cannot be entirely separated from the debate having to do with the cultural industries exemption within the context of NAFTA. The two issues, the cultural industries exemption and the ruling in the Periodicals Case are inextricably linked and, in both their negative and positive aspects, give rise to a great number of important useful questions as well as insights into problems that require future action.

To begin with the negative aspects, a first important insight was that NAFTA’s cultural industries exemption was actually of no legal use given the choice of forum provided by NAFTA for the dispute settlement procedure. Hence, the initial uncertainty linked to the exemption’s substantive value with regard to the scope of possible retaliatory measures taken by the US was aggravated by the formal uncertainty of the applicable treaty law based on the complaining party’s discretion to choose the forum in which the dispute is going to be settled. The little utility of the exemption for the contested Canadian measures in the Periodicals Case is also evident in the absence of any reference to the NAFTA as the set of rules governing Canada-US trade relations. As a matter of fact, the problem of conflicts of jurisdiction is part of a broader global challenge linked to the growing fragmentation of the international legal order in general and the “imperfections of the global economic polity” in particular, fostered by the proliferation of international treaties and


1259 See Article 2005 NAFTA.

organisations. On a minor scale, it evokes the conceptual difficulty in defining the relation between regionalism and multilateralism, which may vary, depending on the case, from complementarity to competition or conflict. Evaluating the complex nature of the juridical interface between the WTO and the NAFTA and comparing it with other regional trade agreements, Abbott concludes that “there is only limited reason to believe that conflicts between these legal systems will lead to long-term difficulties” but, nonetheless, recalls that:

[It is, nevertheless, important to bear in mind the potential for such threat when considering the advantages and disadvantages of regional integration mechanisms.]

To confront the increasing complexity of global trade regulation in light of technological change and the proliferation of international instruments and organisations, however, it will be necessary to conduct a closer inquiry into the dynamics that reign between the regional and the global level, leading eventually to the formulation of criteria deciding the prevalence of each of the set of rules for specific cases. Such criteria could be based either on the experiences gained in the field of private international law with jurisdiction-selecting rules providing a fluid and flexible determination of the “strongest connecting factor” between a case and the legal systems that potentially apply, for instance through the introduction of a global equivalent of the EU’s subsidiarity principle. In the current situation, judging from a European perspective, it would appear abnormal for certain issues in the EU, especially where the acquis communautaire has developed beyond the acquis of the WTO system, would be judged by the DSB of the WTO using, for instance GATT or GATS rules, instead of the ECJ using the EC and the EU Treaty. In the same way, it could have been credibly argued by Canada that the inclusion of the cultural industries’ exemption constituted a “regional” added value in the governance of Canada-US bilateral trade relations, which prevails over the rules of the multilateral trading system. Such argument could have been based on the absence of equivalent rules in the WTO context, which, regarding the specific issue of the periodical and magazine industry, would make the law of NAFTA on the cultural industries appear as a lex specialis derogating the respective WTO rules as leges generales.

The potential conflictual overlap between NAFTA and the WTO arising from their respective different substantive scope, leads to the second important insight that derives from the Periodicals Case, namely the – except for Articles IV and perhaps XX:f GATT – wide absence of specific rules dealing with the cultural industries within the WTO context. Most probably having the NAFTA exemption in mind, Canada argued in the Periodicals case that periodicals, as part of the culture industry, should receive unique treatment under GATT. The Panel nonetheless acknowledged the

1265 See the quote in Fn 1233.
existence of such a right for cinematograph films but denied such specific treatment for periodicals on the basis of the original will of the drafters of GATT 1947. It is, however, hard to imagine how the drafters of the GATT 1947 might have foreseen in the late 1940s a scenario in which the content of a periodical would be sent electronically “across a border” to be printed in another country. At this point of the proceedings, the Panel had the possibility to show greater cultural awareness, but instead merely concluded that “cultural identity was not at issue”.1266

Notwithstanding the possible flaws in the conclusions of the Panel and the AB, which to a certain extent can be explained by the present imperfections inherent in the WTO Agreements, as they were negotiated by the founding Members of the WTO, they also bear a positive dimension. The criticism raised above can equally be used to transform the ‘vices into virtues’. The without doubt greatest benefit for the global community deriving from the Periodicals Case was the formal inauguration of the so-called “global culture and trade debate”. Both parties to the dispute must be given the credit for it: Canada, because it insisted on the introduction of an exemption for the cultural industries within free trade regimes and the US, because by raising the issue before the WTO enhanced the global awareness about the problem. Together, the NAFTA exemption and the Periodicals Case have proven the former dominant position that culture and trade belong to separate spheres obsolete and no longer tenable. The first reference to the cultural industries in the 1988 CUSFTA (carried over to NAFTA), despite the choice for an exemption, can be regarded as a first explicit legal contact point for the issues of trade and culture after the adoption of Article IV GATT 1947 and before the introduction of Article 128 TEC on culture with the 1992 Maastricht Treaty. Already with the adoption of the CUSFTA, the Canada-US trade relationship has set free a, sometimes polemical but in general, fruitful debate between the two countries on the interplay between cultural and economic forces.1267 With the Periodicals Case, the debate has become considerably broadened. Most of all, it can be characterised as having initiated a critical introspective process on both sides eventually freeing the way for a mutual rapprochement between the respective positions that were previously strictly opposed.1268 For example, in the follow-up of the case, numerous critical voices argued inter alia for a rethinking of the way Canadian cultural policies are implemented, or even suggested the elimination of the exemption in NAFTA.1269 Other commentators ponder on the ways how to better reconcile

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1266 See the quote in Fn 1247.
Canada’s struggle for a cultural identity with American economic expansionism through free trade. Most significant is the emphasis on the value of the Canadian pioneering role and the relevance of the special treatment of the cultural industries for the purpose of maintaining a country’s cultural identity without unduly restricting international trade in such products. There is definitely more than one “lesson” that can be learned from the Canadian experience. Surprisingly the debate has also led to a change of view in the US, which was predominantly preoccupied by a radical approach to free trade, which is reflected for instance in the introduction of an article on international trade obligations under NAFTA and the WTO which starts by saying that

The North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements represent an unprecedented step toward the full globalization of the U.S. economy.

These American commentators acknowledge “America’s blind spot” with regard to culture or particularly stress the importance of a comprehensive debate on the complex impact of the economic dynamics governing the cultural industries on a great variety of issues, including local identity or the formation of public opinion and democracy. One author has explained the reasons for the change of view in the US as follows:

Oddly enough, at the end of the day Canada may receive help from the most unlikely source. The United States might join Canada’s team. As cultural phenomena from abroad, most notably Pokemon from Japan, grip the American public (and its dollars), the United States might yet come to understand why Canada has been making such a fuss over culture. Ironically, in the end, Canadian culture may well not be saved by countless hours at the negotiating table, securing cultural exemptions in every trade agreement into which it enters, funnelling public monies into cultural industries through direct subsidies, or making concessions in other industries to the United States in order to bring relief to Canadian artists, publishers, and producers. Rather, relief might come if the United States gets a large enough dose of its own medicine.
From this quote it becomes clear that the problem is a global one and no country is immune from it, nor can it solve the problem on its own. The ultimate purpose and value of the culture and trade debate for the global community is therefore the search for ways how to reconcile further trade liberalisation with the maintenance of some sense of cultural identity and particularly a cultural variety. In the following years this search has led to the debate for the adoption of an international standard-setting instrument on cultural diversity.1276

§§ 9.2.2. Concluding Remarks

To sum up, the NAFTA experience concerning the exemption for the cultural industries, originating in the privileged bilateral international relations between Canada and the United States, has functioned as an important setter of trends as well as legal precedent. First of all, it has produced a precise definition of the cultural industries. Furthermore, due to the Canadian ‘stubborn’ insistence, it has formulated a broad clause dedicated to the cultural industries within the sphere of a regional trade agreement. Despite its modest legal value in terms of scope, certainty and predictability, it has sufficed to generate a generally fruitful debate on the difficult relationship between culture and trade as inherent in the dual nature of certain cultural goods and services. Last but not least, due to an equally ‘stubborn’ resistance by the US against the said exemption (and probably diligent legal advise), the disagreement over the treatment of split-run periodicals has been transferred from the North American to the global context by choosing the WTO DSB as the forum for the settlement of the dispute, hereby making it known to the entire world.

The decision in the Canada – Periodicals Case itself bore several negative aspects, such as notably the persistent lack of coherence both between the provisions dealing with trade in goods and those on services and between the regional and the multilateral legal framework. Further problems derive from the absence in the WTO agreements of any provision which allows them to deal in satisfactory terms with the consequences of past technological innovations on the sectors making up the cultural industries. However, in terms of positive aspects, the dispute has inaugurated formally the culture and trade debate and increased global awareness about the both economic potential and hidden cultural dangers inherent in the cultural industries. Moreover, it pointed out the serious flaws in the architecture of the present international legal order, notably as regards its unity and the coherent functioning of all its branches. In sum, it can be said to have contributed to the launch of an interesting debate, which is centred around the adoption of an international standard-setting instrument on cultural diversity. Such debate, however, is only the beginning of a move in the right direction; soon numerous difficult questions about how to implement the underlying goals of such initiative will need to be answered in a multipolar global context.

1276 See e.g. Bristow, supra note 1274; see especially the discussion in Subsection 10.2.2.5.
Chapter 10  THE CULTURAL INDUSTRIES UNDER THE WTO: A RETROSPECTIVE SUMMARY AND THE WAY FORWARD

§ 10.1.  A Retrospective Summary on the International Trading Regime

§§ 10.1.1. International Trade Law between Coherence, Constitutionalism and Culture

10.1.1.1. Introduction

In the preceding chapters, the legal framework governing international trade under the aegis of the WTO has been closely scrutinised. For this scrutiny, the concept of the cultural industries has served as a relatively well-defined category for trade in cultural goods and services. The principal questions underlying this scrutiny included the degree of continuity in the development of multilateral trading rules and their ability to successfully address the challenge of the “perpetual conflict” between trade and culture from the adoption of the GATT 1947, born out of the failed project of an International Trade Organisation, to the creation of the WTO. These questions were motivated by the evaluation of the current trade regime with a view to drawing the contours for future adjustments to the legal framework in order for it to better adapt to the specificities inherent in the cultural industries.

At this interim stage, it remains to evaluate the present trading regime in light of its ability to cover, administer and promote the cultural industries and to locate the main options for future amendments.

10.1.1.2. The Major Changes in the International Trade Regime: Law as a Process

In retrospective, the past century is replete with numerous attempts to subject international relations to a stable and predictable framework of international law. Under the specific branch of international economic law, similar attempts were made to create a viable legal framework guaranteeing stability and legal certainty for international commercial relations. To this end, a first concrete project was the plan for the creation of an International Trade Organisation under the auspices of the UN system and flanked by the IMF and the World Bank. At the last minute, the project failed and instead the GATT 1947 was adopted. With the GATT 1947, a skeletal body of trade rules and procedures without real institutional support filled the gap and was to govern international commercial relations for almost half a century. For some time, the lack of real institutional support proved to be also its strength, since its informal character, more of a diplomatic conference or negotiation forum than an international organisation, was well-suited to adapt to the dynamic changes in the environment of trade and commerce. This quality has brought the GATT the denotation of a model of “law in process”.

More or less at the same time as the GATT 1947 was adopted, the concept “culture industry” was coined by Adorno and Horkheimer in order to indicate the eventual significant changes based on technological and industrial progress and its implications for society. The changes, the concept alluded to, also concerned our usual path of perception. On the one hand, it summed up the latest technological innovations, such as the invention of motion pictures and television, literally altering

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our “vision” and, on the other hand, it announced important new challenges to existing ways of thinking deriving from these new perceptive conditions affecting our thoughts and, ultimately, our deeds.

These preliminary remarks on the perceptive changes help to explain the practical changes to the GATT 1947 until the creation of the World Trade Organisation in 1994 and their consequences for the cultural industries as a specific category of cultural goods and services. As was shown above, based on their “cultural” aspect, deriving directly from the holistic and elastic nature of the concept of culture, the cultural industries bear an enormous relevance for the foundations of societal life. Based on their “commercial” or “trade” aspect, they equally unfold relevance for the almost entire set of provisions contained in the WTO agreements. Their relevance for the constitutional principles such as national treatment and most-favoured nation is established as it is for goods, services and intellectual property rights, the issues of dumping, subsidies, security and other interests of the general public, as well as for regionalism. Behind each single of these contacts with these fields stand legitimate and absolutely necessary functions that guarantee a stable and democratic society. Their role is undisputed in the transmission of information, the communication of values, or the mere provision of leisure after work, as well as in the broader objectives such as political and democratic, cultural, and economic development.

10.1.1.3. The Cultural Industries under the WTO: An Evaluation of the Current State of Affairs

The previous chapters have shown that already the original drafters of the Havana Charter and the GATT 1947 have been aware of the cultural implications of trade, or else the commercial implications of culture. In line with the traditional perception, the awareness of these implications between culture and trade was translated, at its best, into the exclusion of one from the sphere of the other. In substantive terms, this initial perception is first and foremost reflected in the drafting history of Article IV GATT on cinematograph films, the sole explicit ‘exception culturelle’ of the GATT/WTO system. Slightly weaker forms of expression of the same perception are the general exceptions, covering various issues of public interest, such as public morals, the environment and cultural heritage. Similarly, the special treatment for so-called “developing countries” introduces a further potential element for flexibility into the multilateral trade system. Another indirect link to the cultural and trade quandary is found in the GATT/WTO Members’ national security interests as well as regional trade agreements, which are equally exempted from the WTO system.

In institutional terms the objectives envisaged by the project for an ITO reflect a similar understanding of culture and trade as two separate spheres. It was planned that the ITO, next to the IMF and the World Bank, would carry out special tasks related to trade under the umbrella of the UN system, as established under the UN Charter. The so-called non-trade issues would be governed and administered by the relevant specialised agencies with UNESCO responsible for culture. The only institutional link between culture and trade, or UNESCO and the ITO respectively, would have been through the UN Economic and Social Council (ECOSOC).1278 This sensitive equilibrium based on a strict division of competence was first shattered by the failure of the ITO, which – until the creation of the WTO half a century later – left the GATT 1947 and the multilateral trading system without a real organisational and institutional support.

1278 See Article 63 UN Charter.
Subsequent changes to the GATT 1947 system in eight negotiation rounds left the original separation between culture and trade untouched. This, despite the advent of many new cultural goods and services on the international market (e.g. television) and the extension of the trading system to services as well as the adoption of numerous flanking measures enshrined in additional, occasionally plurilateral, binding legal documents (e.g. the anti-dumping code). During the last of the eight rounds, a striking change occurred in institutional terms with the creation of the WTO. The creation of the WTO not only ended the ongoing trend of fragmentation in codes through the negotiation of a “single package deal”. It also added a new dispute settlement system, based on stricter and more rigid legal decision-making and enforcement rules. Unfortunately, with regard to the original division of competence between culture and trade under the GATT 1947, the creation of the WTO has by and large maintained the status quo, despite the important changes brought about by the widening and deepening of the multilateral trading system.

Accordingly, sceptics may legitimately ask whether the evolution of the multilateral trading system does not equal more the attempt to “reinvent the wheel” instead of bringing true improvement to the world’s community. Paradoxically, at the beginning of the multilateral trading system stood the desire to achieve a maximum unity of the international order by bringing the world’s political organisations in line with its economic organisations.\textsuperscript{1279} As a part of a dawning historical irony, today the same problem persists and the world’s economic organisations are again ahead of their political counterparts.\textsuperscript{1280} Even the splendour of impressive numbers in the growth of the international trade volume and their linkage to an eventual raising of standard of living during the past decades loses its halo when the financial gain of the majority of world citizens’ is contrasted with those of a small minority digging deeper the trench between the losers and the winners of a globalised trading system.\textsuperscript{1281}

Even the only change to the GATT system brought about by the creation of the WTO that could affect the relation between culture and trade is biased against its cultural aspects. This change concerns the linking of trade with so-called trade-related aspects of intellectual property rights, addressed in the TRIPS Agreement. Although intellectual property rights are the primary source for remuneration from artistic and other creative endeavour, the TRIPS Agreement knows several exceptions that favour the distribution of financial gains to actors involved in the economic rather than the cultural aspects of the process of production of cultural goods and services. In other words, the prime beneficiaries of the present international IP regime are large-scale multinational enterprises rather than various creative sources such as single authors and artists or traditional knowledge and folklore. It must be noted that in contrast to the GATS and the GATT, where most exceptions are likely to enlarge the room for manoeuvre of states or governments in the cultural sector, the contrary is true for the TRIPS Agreement. For instance, the TRIPS Agreement exempts precisely the protection of moral rights, \textit{i.e.} those existing independently of the authors’ economic rights and relating to the integrity of the work as well as his honour and reputation. In the effect, this means

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1279} See supra note 327.
\item \textsuperscript{1281} For an international survey of the perceived impact of globalisation, see \textit{e.g.} M. Lagos, “World Opinion: Global Trends in Culture and Trade” (2003) 15 \textit{International Journal of Public Opinion Research} 335.
\end{enumerate}
\end{footnotesize}
that TRIPS does not raise the minimum standards of protection of authors’ moral rights beyond those laid down in the Berne Convention.

A great portion of criticism related to the TRIPS Agreement concerns its effect of preventing a mutually beneficial technology transfer between technologically advanced countries and those which are less advanced, as well as impeding generally the access to various products protected by IPRs. As a result the TRIPS may favour a so-called “power imbalance” between products and services originating from a big market (of which the production costs are already covered internally) with those from a small market. Given the domination of a few large-scale enterprises in the sectors of the cultural industries, this scenario means in numerous cases of a total absence of a country's viable domestic industry mean no competition for foreign products from big markets at all. Not all of these factors can be attributed to the TRIPS alone since in cases where there is competition from smaller companies, the absence of international competition rules in a global trend towards further liberalisation of trade in goods and services threatens their survival in a highly integrated, risky and competitive business environment. Pressure on WTO Members to adopt stricter disciplines for subsidies may foster this trend.

From a mere static viewpoint on the equilibrium between culture and trade, the GATT 1947 and the WTO system appear to display continuity and even regularity. Or, in other words, for the world’s trading system under the GATT 1947 and the WTO respectively, this means that although the “tones” and the “pitch” may have changed it is still the same old “melody”. What this means is mainly a matter of opinion or a subject for philosophical discourse. From a legal viewpoint, it appears more as the cure to an old flaw handed down from the past. The creation of the WTO is then more about the closing of a circle which finally allows for new developments to take place. By these new developments, I refer to developments that are listed in the WTO Preamble and which could not be addressed appropriately under the GATT system, lacking universal support in terms of membership and substantive and institutional support in terms of scope. The WTO has the ability to tackle a long list of important topics for the global trade agenda in the near future. It provides the point of departure for a possible redefinition of the culture and trade dichotomy to one of synergy and the respective implementation in the legal framework of international law. It, therefore, remains to hope that more dynamic developments in the WTO will also entail drastic changes to the architecture of the UN system.

In this respect, the former perception and resulting regulatory approach of a clear-cut separation of competence between commercial and cultural policies mainly by way of exceptions has not yielded the desired results. Moreover, it has failed to locate the subtle linkages between culture and trade, as they are found in the causal link between cultural diversity and comparative advantage, the unwritten Grundnorm of international trade theory. Furthermore, it does not take into account the many new mechanisms that have developed under the broader notion of global governance. The overall

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1282 See e.g. the list of possible trade topics, in R. Blackhurst, “The WTO as the Legal Foundation of International Commercial Relations: Current Status and Options for the Next Decade” in F. Snyder, ed., Regional and Global Regulation of International Trade (Oxford: Hart Publishing 2001) 193 at 205.

1283 See also M. Poiares Maduro, “The Constitution of the Global Market” in F. Snyder, ed., Regional and Global Regulation of International Trade (Oxford: Hart Publishing 2001) 49 at 68, assuming that the “WTO will probably be the front runner of global constitutionalism”.

trend is an increase in dynamism that stems from the closer interaction between former opposites, such as suggests the transition from regulation to coordination and government to governance. Thus the main recommendation from that results from the previous analysis is that there exists a link between culture and trade, even when it is expressed by way of their exclusion. It is first of all Article IV GATT that fulfils the functional role of a mnemonic trace left behind in the GATT 1947. Notwithstanding an unprecedented speed of technological innovation, leaving us with new means of perception of the world as well as manifold possibilities to communicate them to others, the basic legal rules on culture were left unchanged. In the past decades, the content of these rules remained the same, but – fostered by the recent wave of global economic integration through trade liberalisation – their field of application and way of enforcement changed. In the changing environment, however, the existence of Article IV GATT corresponds to the principal role of law, namely to serve as a mnemonic device in the present legislative process to remind us of past experiences for their wise transplantation in the future. What the existence, or “legacy”, of Article IV GATT entails is subject of the following section.
§ 10.2. The Legacy of Article IV GATT and the Future of Culture in the WTO

§§ 10.2.1. Article IV GATT Revisited: A Sleeping Beauty?

The symbolic legacy of Article IV GATT, we have stated, lies in its role as a reminder of the need to establish a coherent legal framework taking into due account cultural aspects of international trade. It serves also as a reference point for the rapid evolution and the major changes it brought to the international trade regime in the past five decades. These considerations should guide in particular the present negotiations held in the course of the Doha Round. In concrete terms, the major issues concerning cultural industries are the following. A first problem concerns the uncertainty governing the goods/service distinction as it is further aggravated by severe asymmetries in the degree of economic integration achieved in the form of the GATT and the GATS. A second related problem is found in difficulties with the interpretation and application of the various instruments that are designed to introduce the necessary degree of flexibility and/or consistency into the GATT/WTO system. These instruments are the numerous general and specific, or particular and universal exceptions, the safeguard and escape clauses and waivers. These difficulties first derive from disparities between the GATT, GATS and TRIPS and are further aggravated by changes in the regulatory environment, such as technological progress and the gradual move of regulatory discrimination between foreign and domestic products from national borders to the inside of a domestic market. Other reasons are the increase in the number of WTO Members and the introduction of a rule-based dispute settlement and enforcement system. As a third and final problem the lack of coherence in the international institutional framework and danger for an erosion of the unity of the international legal order must be mentioned. Under this category fall, particularly, questions concerning the partition of jurisdictional competence between various international organisations, including those of universal and of regional vocation. In direct relation to uncertainties about jurisdictional competence stand questions regarding the consistency of substantive norms derived from overlapping treaty obligations.

From the present complexity of international commercial relations, characterised by an increasing global economic interdependence, it becomes clear that any attempt to tackle each of these single problems requires a careful consideration of other directly and indirectly related problems. Several decades of a process of ongoing juridicisation of the international and regional level have created a dense web of legal norms in which the change of one “strand” affects the system as a whole. Of course, in their effect, various changes carried out in a treaty or conglomerate of treaties such as those combined under the WTO Agreement, strongly depend on the subsequent practice of interpretation and application. For instance, the introduction of a broad and general “cultural exception” in the GATT can be useless when it is interpreted narrowly by the DSB. In turn, recourse by the DSB to the general rules of treaty interpretation, and especially the use of a historically objective or evolutionary treaty interpretation can help to mitigate the risks that may result from the absence of a due consideration of cultural aspects in these treaties.

The systemic complexity of the legal system must be duly considered when asking what kind of adjustments are necessary in the WTO framework for the preservation of the balance between trade and culture to ensure a well-functioning legal framework that also encompasses the specificities of the cultural industries? The historical survey of the legal and political debate relating to the cultural
The Cultural Industries in the Law of the World Trade Organization

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industries has clearly shown the awareness of all contracting parties and recent WTO Members of the dual, both economic and cultural, character inherent in the cultural industries from their very beginning. Therefore, any extreme positions, such as those that emerged during the end of the Uruguay Round as well as a general denial of the existence of one of its constituents, equals gross negligence or deliberate oppression based on mere self-interest. As a result, Article IV GATT can either remind us, like a sleeping beauty, of the possibility of being ‘awakened’ by a few amendments that are able to bring the current legal framework for international trade in line with its contemporary and future exigencies. In the contrary case, by neglecting the reminder, it reinforces the risk of creating another major setback to the multilateral trading system. Such setback is capable of not only endangering the peaceful existence of, and stable commercial exchange between, the peoples of this world, but also of minimising various incentives to economic efficiency introduced by the world’s cultural diversity.

§§ 10.2.2. Possible Options for the Reconciliation of Culture and Trade within the WTO

10.2.2.1. Preliminary Considerations for the Cultural Adjustment of the WTO System

Having outlined the principal requirements and constraints related to the objective of the cultural adjustment of the WTO system, it is logical to consider the main options for its realisation. In this context, it is recommended to take the emerging broad consensus on the dual, cultural and economic, character of the cultural industries as a starting point. In practical terms, this includes first of all the necessary attempts to define and to categorise the various sectors of cultural goods and services concerned. In light of the rapid technological development and the ongoing trend of convergence in the cultural industries, it would be wise to approach the issue on the basis of broader sectoral negotiations, embracing the film, video, book, and the audiovisual industry together. Equally, it is strongly required to introduce a common tariff nomenclature that allows for the commensurability of the statistical data, indispensable for the smooth and constructive development of the negotiations. To this end, the concept of cultural industries offers many advantages, since it not only provides a adequate coverage supported by an emerging critical set of scientific literature, but has equally gained sufficient acceptance in the international community. Moreover, with the passage in the text of NAFTA, there exists a well-circumscribed definition of the cultural industries that can serve as a starting point. Last but not least, the concept provides simultaneously a sufficient degree of precision for practical reasons and elasticity for the challenges of a complex trading environment, as it is reflected in the justified claims for an ambitious and comprehensive round including a great variety of topics proposed under the Doha Agenda.  

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Finally, the following sections discuss several options of legal techniques to adjust the current WTO system.

10.2.2.2. Exclusion Clauses, Exceptions, Waivers, Understandings or Annexes

The first option is the most radical and amounts to the total exclusion of cultural issues from the multilateral trading system by the introduction of a clause of cultural exclusion. This approach, however, was never a realistic option, not even at the time of the drafting of the GATT 1947.  

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See also Blackhurst, supra note 1282 at 204 et seq.

Cf. the discussion in Subsection 7.1.2.2.A.

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Moreover, it would totally contradict the dual character of the cultural industries. Instead, the first realistic option is at the same time the one chosen by the original drafters of the Havana Charter/GATT 1947. This approach means the drafting of a special exception, as it is found in Article IV GATT, a general exception such as in Article XX GATT/XIV GATS, or else Articles 2005 and 2012 CUSFTA (now Article 2106 NAFTA). The basic reasoning underlying an exception is the assumption that the subject matter concerned will be excluded from the application of the legal obligations deriving from the multilateral trade rules. This reasoning is handed down from the adoption of Article IV GATT and in a different way from the context of CUSFTA/NAFTA.

The main advantages of a general exception lie in the relative freedom governments would be granted in their pursuit of cultural policy objectives. However, backed by past experiences, these advantages are likely to be neutralised by major difficulties with exceptions, such as first their limited scope in the WTO architecture due to its division in three main pillars. This means that every agreement united under the WTO Agreement would have to list an identical exception, like it is the case with security concerns. A second difficulty is found in the tendency to interpret exceptions narrowly, which – especially in the light of the fluidity of the concept of culture and the rapidly changing underlying technologies – would deprive them of most of their efficiency while adding nothing to the demand for legal certainty and predictability. If, on the other hand, the exception was formulated in overly broad terms, it is not only less likely to be accepted some important WTO Members but may also undermine the multilateral trade discipline.

As discussed above, a more comprehensive approach would be the use of a general waiver for culture or the cultural industries. To recall, the main differences between a general exception and a waiver is that the former applies generally and under all circumstances to all (trade) obligations, without limitation in time, and is laid down in the agreement itself, whereas the latter only applies to one or more specifically mentioned obligations of the agreement, is limited in time, and subject to special circumstances which are not provided for in the agreement its obligations it is supposed to waive.\textsuperscript{1287} In principal, an exception and a waiver also differ in the way they are adopted.\textsuperscript{1288} A detailed proposal of how such a waiver could be drafted was elaborated by Chi Carmody under the title of a “Waiver for the Cultural Industries”.\textsuperscript{1289} The proposal has the purpose of better protecting cultural autonomy in the world trading system and, ultimately, of bringing WTO practice into closer conformity with international law. This proposal would apply to all measures for the protection of cultural industries and lay down the basic rights and obligations of WTO Members. As an important element, the waiver introduces a risk management mechanism, which obligates Members to ensure that:

\begin{quote}
a measure imposed for the protection of cultural industries is based upon an objective and impartial assessment of the risks to cultural life of the status quo prior to adoption of any such measure, conducted by an independent body which takes into account risk assessment techniques developed by the relevant international organizations.\textsuperscript{1290}
\end{quote}

\textsuperscript{1287}\textit{Cf.} Articles XX and XXV:5 GATT as well as Subsection 6.4.1.2.A.
\textsuperscript{1288}\textit{Cf.} Articles IX and X WTO Agreement.
\textsuperscript{1289} Carmody, supra note 1258 mainly at 309-320.
\textsuperscript{1290} See Article 3 Waiver; see Carmody, supra note 1258 at 315.
Most importantly, the waiver establishes a dispute settlement system in the framework of the WTO which “envisages a three-tiered review, including reference to the Ministerial Conference, with the possibility of referral to the DSB and thereafter appeal to the Appellate Body”.

In institutional terms, the waiver foresees the establishment of a specific Committee on Culture as a regular forum for consultations and which holds close cooperative relations with the relevant international organisations in the field of culture and cultural protection, particularly UNESCO.

In an Annex, the Waiver enshrines a definition of the cultural industries, modelled after the exception in the CUSFTA/NAFTA.

The content of this proposal for a waiver could also be put in the form of an Annex or a specific Understanding on Culture. This possibility was raised by a Communication from Switzerland in the context of audiovisual services as follows:

It seems however that possible solutions to the audio-visual issue could take the form of an Annex to the GATS on audio-visual services, or of any other suitable instrument, depending of the nature of the solutions to be elaborated. They could also have implications on the General agreement itself, be it through the addition of a specific provision on audio-visual services, or by way of interpretation of an existing provision when applied in the audio-visual sector. In any case, the process should permit to distinguish regulatory issues that lend themselves to the elaboration of common provisions, from measures that represent restrictions from market access and/or national treatment and should therefore be listed as reservation in the schedule of specific commitments. The work to be undertaken under the GATS would also need to take into account any relevant development outside the WTO framework on the issue of audio-visual regulation, and cultural diversity in particular.

The clear advantage of a Waiver, Annex, or Understanding over an exception is their ability to bridge the gap between various separate agreements, in particular the GATT and the GATS, but also related instruments such as the SCM or AD Agreement. This approach can be expected to gain in persuasiveness due to the current negotiations in several leftover from the Uruguay Round (e.g. GATS subsidies) as well as important new issues included in the Doha Agenda (e.g. competition law).

10.2.2.3. An Enabling or Integration Clause for Culture

Not substantially different from a possible waiver or Annex for cultural diversity is the form of an enabling clause, which could be modelled after the so-called “Enabling Clause” the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. The 1979 Decision authorises contracting parties to accord differential and more favourable treatment to developing countries on a discriminatory basis. The special and differential treatment of developing countries has recently been confirmed in the Doha Ministerial Declaration. For the issue of culture but without going into technical details, Switzerland has suggested in a Communication to introduce such a “general enabling clause” for the safeguard of cultural diversity into the GATS. Such a clause would ensure that the notion of cultural diversity is sufficiently taken into account by, for instance, “targeting the instruments put in place by Governments to preserve cultural diversity

1291 Ibid. at 314.
1292 Article 7 Waiver; see Carmody, supra note 1258 at 318 et seq.
1293 Annex A Waiver; see Carmody, supra note 1258 at 320.
1294 Switzerland Communication, supra note 968 at para. 19; see also Subsection 7.2.3.2.
1295 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, November 28, 1979, GATT Doc. L/4903, B.I.S.D. 26S/203-205 [Enabling Clause].
1296 Doha Declaration, supra note 379.
and ensuring that their implementation remains possible.\textsuperscript{1297} Similarly, the Australian Film Commission and the Australian Film Finance Cooperation have asked for the explicit acknowledgment of the special status of culture in the text of GATS for which options include either an exemption of cultural goods and services from the commitments under GATS or (ii) an ‘annex’ or ‘general enabling clause’ to deal with the complexity of the arts, audiovisual and entertainment industries, as is the case with telecommunications.\textsuperscript{1298} Following these suggestions, WTO Members could adopt a so-called “Decision on the Cultural Industries”, which would then authorise either a specific category of (or all) Members, such as those who want to promote their cultural diversity, the right to exempt a specified category of cultural goods or services (i.e. the cultural industries) from the NT and the MFN obligations laid down in the GATT and the GATS respectively.

Another similar, but even more comprehensive, option is found in the so-called “cross-section” or “integration clauses”. The EU’s legal framework, by way of Article 151 (4) [ex Art. 128] ECT, provides a good example for such an integration clause for culture, which obliges the Community to take cultural aspects into account in its various other areas of policy actions. In the absence of comparable competences attributed to the WTO, such an “integration clause” would have to be adapted to the proper exigencies of the WTO. To give an example, such an integration clause for culture could be added to the provisions laying down the main functions of the WTO (Art. III WTO Agreement). More precisely, it could be introduced after paragraph 5 (calling for greater coherence in global economic policy-making) and enshrine the obligation for the WTO to establish the appropriate institutional links for cooperation with the agencies or international organisations competent in the field of culture as well as for WTO Members to take cultural aspects into account in the subsequent negotiation rounds, especially with a view of analysing the trade-related implications of the constant technological innovation affecting the goods and services pertaining to the cultural industries in order to preserve and to promote global cultural diversity. A second and additional possibility would be to introduce a similarly-framed integration clause into the DSU calling on the DSB to take cultural aspects into account in making the recommendations or in giving the rulings provided for in the covered agreements.

10.2.2.4. Cooperation, Power Sharing and the Delegation of Competences to Specialised Agencies

So far the various presented options all concerned amendments to the WTO system itself. However, there also exist possibilities to reduce the major deficiencies of the current WTO system by means of a total separation from, cooperation with, or delegation to other international organisations. Once again the first approach of a total separation of the competence of the WTO from competences of other international organisations is the equivalent of a total exclusion of culture in substantive terms and must therefore be dismissed as little realistic and most of all not convincing. Instead intensified cooperation with or the delegation of competences to other international organisations, notably UNESCO or an eventually new organisation, bears the strength of allowing the WTO to further specialise on trade issues while exchanging mutually relevant information and experiences.

\textsuperscript{1297} Switzerland Communication, supra note 968 at para. 11.

\textsuperscript{1298} Australian Film Commission and Australian Film Finance Corporation, Submission to the Department of Foreign Affairs and Trade, Public Consultations on WTO Fourth Trade Policy Review of Australia (August 2001) at 2.
As far as the WTO’s cooperation with other international organisations is concerned there exist many useful precedents. First of all, the WTO Agreement, in Article V itself contains a clear obligation for the WTO to cooperate with other related intergovernmental and non-governmental organisations. In part, this obligation has been executed in numerous agreements, such as notably with the IME and the World Bank, but also UNEP, the United Nations Conference on Trade and Development (UNCTAD) and WIPO. There exists a long list of potential future partners for the WTO in the governance of international trade relations. For the sphere of culture and the cultural industries, UNESCO is at the forefront. In fact, UNESCO was associated with the work of the Uruguay Round in the capacity of an observer, and made specific contributions to particular negotiating groups. A further link between UNESCO and the WTO is found in their work in the field of intellectual property rights. Given the undeniable mutual interaction between trade and culture, as notably shown by the evolution of the concept of the cultural industries, UNESCO must therefore be included into the group of international organisations of which the work is relevant for the WTO.

Having in principle established the relevance of UNESCO, as a model representative for cooperation between the WTO and other intergovernmental as well as non-governmental institutions active in the field of culture, the next logic step concerns the question of the substantive scope and institutional framework for a common agenda. While mere cooperation is certainly helpful in the course of the legislative process mainly through negotiation rounds, such as the elaboration of rules on cultural diversity, it must be held insufficient for the common standards of legal certainty and predictability. In concreto, either the cooperation itself must be institutionalised, or its work must yield certain visible results that allow for the consideration of cultural aspects, also in the process of the dispute settlement procedure. The lack of such cooperation in the course of dispute settlement procedure became woefully obvious in the Canada Periodicals Case, with the well-known statement that “cultural identity was not at issue”. A possible way to link cultural aspects to the organisation of trade relations can be found in the sharing of power or delegation of competence. Already, based on Article 13 DSU, which explicitly grants a panel the right “to seek information and technical advice from any individual or body which it deems appropriate”, UNESCO could be empowered to render an advisory opinion in a case concerning the cultural industries, or cultural in general. In this sense, a precedent is found in the letter of the panel in the US – Copyright Act Case, where the panel requested WIPO to provide factual background information on certain provisions in the Berne

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1299 Article V WTO Agreement “Relations with other Organisations”; see also Article XXVI GATS and Article 68 and Indent 8 of the Preamble of the TRIPS Agreement; compare Article 87 para. 2 ITO Charter.

1300 See Declaration WTO/IMF and Agreement WTO/IMF/WB, supra note 364.


1302 See e.g. Memorandum WTO/UNCTAD, supra note 356.


1304 See generally Arrangement for Effective Cooperation, supra note 361.

1305 See Sub-committee on Institutional, Procedural and Legal Matters, The WTO and Other Inter-governmental Organizations (Note by the Secretariat), PC/IPL/W/2 (June 29, 1994).

1306 Ibid. at Pt. III (a).

1307 Ibid.

1308 Ibid.

In contrast to the field of intellectual property rights, where the TRIPS Agreement explicitly incorporated the Berne and other IP Conventions, there exists no direct link to a specific binding legal document dealing with the cultural industries, based on which UNESCO could decide. The absence of such a link explains the necessity to deepen the institutional ties and to make available substantive rules dealing with the specificities of the cultural industries in a standard setting international binding legal document.

In analogy to Article V WTO Agreement, the Constitution of UNESCO itself paves the way for such cooperation. Seen from the perspective of UNESCO, cooperation with the WTO would definitely help this institution to overcome its weakness in managing its activities and to improve its efficiency in the pursuit of its goals.

10.2.2.5. An International Agreement on Culture or a New Instrument on Cultural Diversity (NICD)

The last of the options discussed is at the same time the most comprehensive and consists in a separate multilateral agreement, or an international convention dealing solely with culture in relation to trade. Such an agreement would be capable of combining all the various aspects of the options mentioned before and, therefore, allow for a better balance between their respective advantages and disadvantages. However, for the drafting process of such a multilateral agreement on culture, two principal choices have to be made. First, an important choice concerns the substantive side, particularly the scope and content of the said agreement. In this context, the spectrum runs from a broad scope focusing on culture in general, via a more balanced approach focusing on cultural diversity to a narrower one, found in the concept of the cultural industries. The second important choice is an institutional one and regards the responsibility of the administration, application and amendment of such an agreement. Here, the main possibilities are that the agreement is adopted under the auspices of the WTO, under a specialised international agency, such as UNESCO, or under a entirely new, still to be established, international agency of organisation.

In the past years, mainly following the Canada Periodicals Case, efforts multiplied that tried to address the issue of culture and trade. As regards the broadest approach possible, efforts for a general reconciliation of culture and trade must begin with the relation of the multilateral trading regime with the existent vast body of diverse international documents addressing the issue of culture. This body of laws comprises diverse texts, such as the Universal Declaration of Human Rights (Art. 22 and 27) and the two International Covenants, various international conventions or declarations touching upon the sphere of culture. In the trade context, various provisions that are more closely affiliated with cultural concerns, such as Articles IV and XX GATT, XVI GATS and TRIPS as well as similar provisions on the regional level (e.g. NAFTA, EU, or MERCOSUR) should serve as first contact...
points. Except for the latter category, the great disadvantage of these bodies of laws is that they generally follow a strict separation of trade from cultural issues. However, a broader approach faces the serious problem of finding a common denominator in the definition of culture, which, as the human rights debate knows under the term “cultural relativism”, is not expected to yield satisfactory results. If such a definition could be found, it would probably be written in general terms and, in turn, run the risk of undermining the functioning of the entire international legal order and notably the international economic order. For these reasons, it is preferable to endeavour for a narrower approach to the culture and trade quandary under the concepts of “cultural industries” and “cultural diversity”.

Combined efforts in this direction were made by the Culture Ministers of the Francophonie, UNESCO, and the International Network for Cultural Diversity (INCD), and an initiative launched by the Canadian Government. Due to constraints in time and space, the Canadian initiative, which in the meantime has presented a concrete model for discussion, will be shortly discussed and subsequently critically evaluated.

A. An International Agreement on Cultural Diversity

The proposal for an International Agreement on Cultural Diversity (IACD) is the continuation of earlier work by the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT). In an earlier report, SAGIT suggested that the prime role for a new instrument is to:

- recognise the importance of cultural diversity;
- acknowledge that cultural goods and services are significantly different from other products;
- acknowledge that domestic measures and policies intended to ensure access to a variety of indigenous cultural products are significantly different from other policies;
- set out rules on the kind of domestic regulatory and other measures that countries can and cannot use to enhance cultural and linguistic diversity; and
- establish how trade disciplines would apply or not apply to cultural measure that meet the agreed upon rules.

These principal goals have been well addressed in the IACD. It also recognises the importance of cultural pluralism and freedom of expression. At the same time it avoids an uncritical bias towards culture and mirrors a careful awareness of the significance of economic aspects for the cultural

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1313 See especially the List of International Instruments which Make Reference to Culture, prepared by the Liaison Bureau, June 2000 and based on research by Professor Ivan Bernier of l’Université Laval and Stephan Paape of the Department of Canadian Heritage, available online at: http://206.191.7.19/se-group/se-ccl/list.pdf (date accessed: April 3, 2004).

1314 Organisation internationale de la Francophonie, Déclaration de Beyrouth, IXe Conférence des chefs d’État et de gouvernement des pays ayant le français en partage, Beyrouth, les 18, 19 et 20 octobre 2002, available online at: http://www.francophonie.org/css/frm (date accessed: November 5, 2002); Organisation internationale de la Francophonie, Plan d’action de Beyrouth, IXe Conférence des chefs d’État et de gouvernement des pays ayant le français en partage, Beyrouth, les 18, 19 et 20 octobre 2002; Organisation internationale de la Francophonie, IIIe Conférence ministérielle sur la Culture, Déclaration de Cotonou (June 15, 2001); Organisation internationale de la Francophonie, VIIIème Conférence des chefs d’État et de gouvernement des pays ayant le français en partage, Déclaration, (Moncton, September 3-5, 1999).

1315 UNESCO Universal Declaration on Cultural Diversity, supra note 106.


1318 International Agreement on Cultural Diversity [hereinafter IACD], reprinted in Canadian Culture in a Global World, supra note 307 at 10-16.

1319 Canadian Culture in a Global World, supra note 307.

1320 Preamble and Part I (“Principles and Objectives”) IACD.
industries. In this context, I would like to recall the precedent of the 1948 Beirut Agreement, which provides a positive example of inter-institutional cooperation, because a first draft prepared by the UNESCO Secretariat was submitted to a meeting of the contracting parties to the General Agreement of Tariffs and Trade (GATT), where it was revised. The IACD also seems to achieve a balance between the interest in creating and preserving local cultural content and the interest in intercultural exchange and dialogue. The definition of “cultural content” is precise, yet at the same time broad enough to combine certainty with dynamic technological change and convergence of the various cultural industries. In this sense, “cultural content” is defined to cover, next to the performing arts and cultural property:

The sounds, images and texts of films, video, sound recordings, books, magazines, broadcast programs, multimedia works, and other forms of media, whether now existing or to be invented, that are creative expressions of individuals [...].

The definition of “cultural content” in lit. b) is largely identical to the definition of cultural industries in NAFTA, but only slightly modified to take into account the rapid technological progress in the field. Finally, Annex I provides a useful illustrative list of measures that parties to the agreement may take. For instance, such measures include:

- Measures to support the creation, production, distribution, exhibition, performance and sale of cultural content of national origin through subsidies, fiscal measures or other incentives to the creators of the content or to the cultural undertakings that provide them.

As such the IACD, together with the UNESCO Universal Declaration on Cultural Diversity (to which it makes explicit reference), not only provides a successful attempt to frame the open question of how to successfully combine culture and trade, but also a useful model for discussion and subsequent adoption. The most problematic element, however, is found in Part IV and concerns institutional matters and dispute resolution. According to the explanatory introduction to the IACD and despite the early stage in the consultation process, the drafters seem to favour a solution involving a separate agreement outside a particular institutional setting and notably outside the WTO system. Part IV sets up its own dispute resolution system, a so-called Cultural Dispute Resolution Body (CDRB). For the alternatives with regard to possible forms of dispute settlement, the International Network for Cultural Diversity has compiled a list of prototypes in its proposal for a Draft Convention on Cultural Diversity, from the Council of Europe to the WTO.1330

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1321 Intend 5, 8 and 9 of the Preamble IACD, supra note 1318.
1322 See A Guide to the Operation, supra note 245 at 5.
1323 Art. I para. 4 and 7 IACD, supra note 1318.
1324 Article V IACD, ibid.
1325 Article V para. 2 lit. b) IACD, ibid.
1326 Annex 1 para. 1 IACD, ibid.
1327 UNESCO Universal Declaration on Cultural Diversity, supra note 106.
1328 But see the Government's announcement to seek a multifaceted strategy which keeps all options open and a maximum flexibility in international agreements; IACD, supra note 1318 at 1.
1329 Article X-XIV IACD.
1330 It mentions the Council of Europe, the Optional Protocol to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UNESCO Conciliation and Good Offices Commission, the NAFTA (Side agreements on Labour and Environment, Chapter 19), domestic remedies and the WTO DSB; INCD Draft Convention, supra note 1316.
B. A Critical Evaluation of the Proposal

Concerning the project for a so-called “New Instrument on Cultural Diversity”, Ivan Bernier and Hélène Ruiz Fabri have conducted a comprehensive feasibility study for the Franco-Quebecois Working Group. After reviewing the main existing legal instruments dealing with culture, the authors of the study concluded that:

There is good reason to believe that the tensions between trade and culture could be eased effectively by developing an international instrument on cultural diversity. In this regard, it is not very surprising to note that, of all the instruments reviewed here, those that deal more directly with the key issues of the trade-culture question and make it possible to already identify the main parameters of a future international instrument — namely, market access, subsidies, removal of investment barriers, performance requirements, intellectual property protection, the liberalization of services with cultural content, the mobility of creators, and dispute settlement — derive by and large from the trade sector. What is lacking, however, is an instrument that presents a cultural perspective articulated in light of the trade-culture problem, since existing cultural instruments have virtually never focused on this issue. They equally found that the principal commercial instruments fail to successfully provide a balanced approach to the trade-culture question. Based on the review of existing instruments they identify a few solutions for a binding international instrument. In accordance with the need in legal terms to put culture on an equal standing with trade, it is logical that any international instrument on cultural diversity must be of legally binding character, which excludes particularly declarations, recommendations or general sources of soft law. As a first step, the authors address the issue of the host organisation and mention as the principal potential organisations the International Network on Cultural Policy (INCP) or UNESCO. With respect of the objectives of such an instrument, they distinguished between short-term and long-term objectives considering that:

The short-term objective of the new instrument would be to ensure that the diversity of cultural expression is preserved and promoted in the face of the challenge posed by globalization, given that the achievement of this objective is essential to preserving and promoting the diversity of cultures and thus cultural diversity itself.

On the other hand, the long-term and ultimate goal of the instrument is the preservation of cultural diversity. According to the authors:

This goal should be highlighted in the new instrument by underscoring how closely it is linked to other societal objectives, such as democratic expression, social cohesion and economic development, without, however, turning the instrument into a text on democratic governance or economic development per se.

For the realisation of both goals, they differentiate between three types of normative interventions, including (1) the context of human rights; (2) government initiatives at the national level and (3) national measures aimed at influencing international trade flows in the field of culture. Following

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1331 The feasibility study addressed the following three main questions: (1) Identification of existing international instruments that could govern trade in cultural goods and services; (2) Identification of legal solutions that allow for the adoption of a binding international instrument; (3) Identification of legal solutions that ensure that the international instrument is compatible with the normative system of the World Trade Organization (WTO); see I. Bernier & H. Ruiz Fabri, Evaluation of the Legal Feasibility of an International Instrument Governing Cultural Diversity (2002) Groupe de travail francophone-québécois sur la diversité culturelle at V.
1332 Ibid. at 18.
1333 Ibid.
1334 Ibid. at 22.
1335 Ibid. at 26.
1336 Ibid. at 27.
1337 Ibid. at 27-30.
the outlook on the types of normative intervention, the authors discuss possibilities for the
enforcement of the new instrument, especially the monitoring of the implementation and the
efficient settlement of disputes.\textsuperscript{1338} The study’s final part contains a careful evaluation of an
instrument on cultural diversity on the WTO regime, particularly in relation to its impact on and
compatibility with the existing body of laws and future negotiations.\textsuperscript{1339}

In a conclusive statement on the evaluation and criticism of a possible international instrument on
cultural diversity, it can be said that the contours of the culture and trade debate are well demarcated.
The model of discussion provides a positive step in the preparation of a more culturally sensitive or
better-balanced multilateral trading regime. In this respect, however, the feasibility study, while
emphasising on the role of the WTO, is too modest in its attempt to establish a real (legal)
equilibrium between culture and trade by missing the great opportunity the new WTO negotiation
round provides for halting the deepening of the trench between culture and trade.\textsuperscript{1340} At this stage,
for the sake of efficiency, legitimacy and coherence, a solution within the framework of the WTO
should clearly be favoured.

Still in June 2003, Acheson and Maule have warned of the consequences of not taking into due
account the role of the WTO in the preservation and promotion of cultural diversity. Their warning
was framed as follows:

\begin{quote}
We have argued that implementation of the current NICD alongside existing WTO commitments will
reduce not increase the degrees of freedom of its members in framing their cultural policies. If this is so,
it is hard to understand the rationale for the NICD initiative unless it was intended from the beginning
as a strategic diversion to obtain a better bargain for its supporters in the Doha round. The whole
exercise reflects the antipathy that some have in the successful operation of the WTO, and their implicit
belief that an anarchic arrangement for governing culture, disguised as a rules-based agreement, will
miraculously promote cultural creativity and understanding. It will likely end up, after the expenditure of
much time and money, as yet another statement in favor of exercising best efforts to support cultural
diversity whatever that means.\textsuperscript{1341}
\end{quote}

Despite these well-reasoned warnings, it must be added, the UNESCO General Conference, at its
32\textsuperscript{nd} session, held in October 2003, decided that cultural diversity should be the subject of a
convention under the (provisional) title “\textit{Convention on the Protection of the Diversity of Cultural Contents
and Artistic Expressions}”.\textsuperscript{1342} At the time of the writing, the negotiations for the adoption of such
convention are on the way and a first preliminary draft has been circulated and commented on.

\textbf{C. Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions}

\textit{a.) Avant Propos: A Chronology of Events}

It was on the initiative of Canada, France, Germany, Greece, Mexico, Monaco, Morocco and
Senegal, supported by the French-speaking group of UNESCO, that the desirability of a standard-
setting instrument on cultural diversity has been placed as item 3.4.3 on the agenda of the 166th

\begin{footnotes}
\item\textsuperscript{1338} \textit{Ibid.} at 30-35.
\item\textsuperscript{1339} \textit{Ibid.} at 35-45.
\item\textsuperscript{1340} See also I. Bernier & D. Atkinson, \textit{Commerce international et diversité culturelle: la recherche d’un difficile équilibre} (Québec: Canadian Centre for Foreign Policy Development, 2000).
\item\textsuperscript{1342} \textit{Report of Commission IV}, supra note 269.
\end{footnotes}
session of the Executive Board.\textsuperscript{1343} The Study, following an outline of several international standards, both legally binding and non-binding, that already govern different aspects related to cultural diversity, comes to highlight UNESCO’s leading role in the subject matter, which is reflected not only in its Constitution but also the more recent adoption of a Declaration on Cultural Diversity.\textsuperscript{1344} The Study ends with the recommendation to the General Conference that it take a decision to continue action aimed at drawing up a new standard-setting instrument on cultural diversity and to determine the nature of that instrument.\textsuperscript{1345} As mentioned above, in October 2003, the General Conference, at its 32\textsuperscript{nd} session, adopted a resolution in which it decided that “the question of cultural diversity as regards the protection of the diversity of cultural contents and artistic expressions shall be the subject of an international convention”.\textsuperscript{1346} Furthermore, as concerns the timetable, the General Conference of UNESCO asked the Director General to submit to the General Conference at its 33\textsuperscript{rd} session, to be held in October 2005, “a preliminary report setting out the situation to be regulated and the possible scope of the regulating action proposed, accompanied by the preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions”.\textsuperscript{1347}

Since then, works on the elaboration of this new legal instrument have commenced and already three meetings of independent experts have been convened in order to prepare a first preliminary draft of a convention.\textsuperscript{1348} In July 2004, a first Preliminary Report, summarising the work progress, was drafted and submitted together with a first Preliminary Draft of the Convention to the Member States for comments and observations.\textsuperscript{1349} In the following, a first meeting of the Intergovernmental Meeting of Experts took place, supported by the work of a subsidiary organ, the Drafting Committee, in order to produce a revised text of the Preliminary Draft Convention.\textsuperscript{1350} Only about half a year away from the 33\textsuperscript{rd} session of the General Conference a second Preliminary Report was made available, to which a composite text of a preliminary draft of the convention is annexed together with the promise to circulate a consolidated version within due course.\textsuperscript{1351}

Given that it is to a large extent a work in progress\textsuperscript{1352} and that, at this moment, several options in

\begin{thebibliography}{99}
\textsuperscript{1344} Cf. UNESCO Constitution, supra note 237 and UNESCO Universal Declaration on Cultural Diversity, supra note 106.
\textsuperscript{1345} \textit{Desirability Study}, supra note 1343 at para. 26.
\textsuperscript{1346} \textit{Report of Commission IV}, supra note 269 at 13-27.
\textsuperscript{1347} Ibid.
\textsuperscript{1348} See Première réunion d'experts de catégorie VI sur l'avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques, UNESCO Doc. CLT/CPD/2003-608/01 (February 20, 2004); Deuxième réunion d'experts de catégorie VI sur l'avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques, UNESCO Doc. CLT/CPD/2004/602/6 (May 15, 2004); and Troisième réunion d’experts de catégorie VI sur l’avant-projet de convention sur la protection de la diversité des contenus culturels et des expressions artistiques, UNESCO Doc. CLT/CPD/2004/605/5 (June 23, 2004).
\textsuperscript{1352} For past and future developments, see UNESCO Homepage, online at: \url{http://portal.unesco.org/culture/}.
two preliminary drafts are tabled and the final outcome is still uncertain, it suffices to shortly present
the general traits of the Preliminary Draft Convention, which will be followed by a critical evaluation
of its potential implications for the global culture and trade debate.

b.) The Preliminary Draft Text

In about 34 articles, the Preliminary Draft Convention pursues the goal to protect and promote the
diversity of cultural expressions. The draft features a preamble, which presents the principal motives
and considerations underlying the convention among which Recital 10 reads as follows:

> Being convinced that cultural goods and services are of both an economic and a cultural nature and that
> because they convey identities, values and meanings, they must not be treated as ordinary merchandise
> or consumer goods.

The same consideration is reiterated in Article 1 lit. (b), which contains a list of the main objectives
of the Convention. Equally interesting for the field of trade is lit. c, which, in simple terms,
recognises cultural policies as a sovereign right of states. Following the list of objectives of the
convention, Article 2 provides a list of the main principles, such as respect for human rights and
fundamental freedoms, free access and participation, or the principle of equal dignity of and respect
for all cultures. Very interesting to note is the so-called “Principle of the complementarity of
economic and cultural aspects of development” (para. 4), which is characterised as follows:

> Since culture is one of the mainsprings of development, the cultural aspects of development are as
important as its economic aspects, which individuals and peoples have the fundamental right to
participate in and enjoy.

The following two articles try to establish the scope of the convention and provide some basic
definitions, such as the one of “cultural diversity”, “cultural expressions” and “cultural goods and
services” (Art. 3 (1)-(3)). Of main interest is the definition of cultural industries given in para. 4,
which refers to those industries that produce cultural goods and services. The meaning of “cultural
goods and services” is defined as referring to those goods, services and activities that embody or
yield cultural expressions and have the following characteristics:

(a) they are the outcome of human labour (industrial, artistic or artisanal) and require the exercise of
human creativity for their production;

(b) they express or convey some form of symbolic meaning, which endows them with a cultural value
or significance distinct from whatever commercial value they may possess;

(c) they generate, or may generate, intellectual property, whether or not they are protected under
existing intellectual property legislation.

Subsequently, a Title III sets forth and clarifies the rights and obligations of the states’ parties at the
national level to the convention (Art. 5-11). A second Section of Title III clarifies the rights and
obligations of the parties at the international level (Art. 12-15), such as the promotion of the central
role of culture in sustainable development or the preferential treatment for developing countries to
mention a few.

The third and still fragmented part of the preliminary draft convention summarizes the comments of
the Plenary on the articles it examined but which have not been redrafted. This part includes
provisions on an obligation to protect vulnerable forms of cultural expressions and the
establishment of a Cultural Diversity Observatory. Such an observatory, which is planned to be set
up within UNESCO, would be charged with the development of the “exchange of information and
expertise concerning data and statistics on the diversity of cultural expressions as well as on best practices for its protection and promotion” (ex Art. 15). Of great significance for the wider culture and trade context is a clause dealing with the relationship to other instruments (ex Art. 13 and 19), which at this stage contains two options. These provisions are followed by provisions related to follow-up bodies and mechanisms, such as the establishment of a General Assembly of States Parties and an Intergovernmental Committee as well as an Advisory Group (Art. 20-23). Article 24 a system of settlement of disputes, which proposes solutions to a dispute through negotiations, good offices and a request of mediation by a third party as well as arbitration or submission to the ICJ. A set of final clauses (Art. 25-34) and the annexes (1-4) concludes the preliminary draft convention

c.) *A Critical Evaluation of the Work in Progress*

Given that work on the convention is continuing, at this current stage it is too early to give a comprehensive statement about the possible value of the *Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions* for the future or the culture and trade debate provided that it will enter into force. Nonetheless, the work process has thus far been accompanied by a plethora of comments and critical observations about the potential merits and major deficiencies of the project, pointing out the major difficulties in the attempt to bridge the gap between culture and trade at the global level.

As argued throughout this thesis, the main concerns linked to the project relate to the convention’s scope and, particularly, its substantive as well as institutional linkages with the World Trade Organization. Despite the acknowledgment of the overall positive direction the project takes, several commentators have shown the insufficiency of the project with regard to the objective of establishing a coherent legal framework for the treatment of the cultural industries with a view to preserving and promoting cultural diversity at the global level. The key issue in this context, already known before the beginning of the negotiations was, the question concerning the mutual relation between the proposed convention and other international agreements.1353 For instance, Germany points out several deficiencies of the project, for instance, specifying that it is more concerned with the symptoms than the causes underlying the present disequilibrium in the field of cultural goods and services.1354 Accordingly, the drafters may miss a great opportunity and even render most of its provisions “dead letter law”. 1355 The principal question concerns the precise relationship to and, notably, the avoidance of overlaps or conflicts with, the agreements administered by the WTO and, particularly, the GATS. In a recent communication, the European Community and its Member States, building upon a long line of preparatory documents for the adoption of a legally binding international instrument on cultural diversity,1356 have among other things emphasised the need for clarification of the convention’s relation to other instruments.1357 It is interesting to note that in this

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1354 Ch. Germann, *supra* note 912 at 348 et seq.


communication, the EC expresses the view that cultural policy measures may fall within the exception of public order in the GATS. Most importantly, it deems unsatisfactory the options put forward in the draft concerning the relationship between the draft Convention and other agreements. It stresses the need to “accentuate the coherence and mutual supportiveness between the Convention and other international agreements and ensure an effective implementation of the Convention” and suggests that their complementarity be improved by “clarifying and reducing the scope of the definition of cultural goods and services and better defining the measures foreseen under this Convention”.

Similar emphasis is put on the potential conflictual relationship between the UNESCO Convention and the GATS in a comprehensive legal opinion written by Markus Krajewski. In this opinion, he identifies the potential of the UNESCO Convention to generate not only conflicts between legal norms (Normenkonflikte), both in a wider and a narrower sense, but equally so-called Programmkonflikte, i.e. conflicts arising from the pursuit of contrary policy objectives. The draft, therefore, must be deemed insufficient with regard to the ability to avoid such conflicts and overall enhancement of the mutual supportiveness between cultural and trade policy objectives corollary to the dual nature of cultural goods and services. Krajewski therefore suggests the incorporation of provisions equivalent of those proposed in the UNESCO Convention into the GATS or the wider WTO context.

At this stage, the overall inadequacy of the mutual relationship between the UNESCO Draft Convention and the WTO agreements boils down to the somewhat disappointing realisation that there will be either conflict or no added value to the relation between culture or trade policy considerations at the global level. Although the proposal definitely contains certain useful clarifications with regard to the issue of cultural diversity and the special nature of the cultural goods and services pertaining to the cultural industries, the overall result may well turn out to be too modest in view of the global challenges for cultural diversity deriving from the constant pressure for further trade liberalisation and the pace of technological innovation. Particularly, the coordination between the jurisdiction of UNESCO and of the WTO must be deemed insufficient, as it is also reflected in present lack of involvement of the WTO in the drafting process and its general helplessness documented in the records of the relevant meetings within the WTO. Therefore, the present results, yielded by the efforts to adopt a legally binding international standard-setting instrument for cultural diversity at the global level, may rather prove to be the juridification of the problems underlying the global culture and trade debate than their settlement to the mutual satisfaction of all parties involved.

1358 Ibid, see also Japan’s Comments on the Preliminary Draft Convention on the protection of the diversity of cultural contents and artistic expression, (November 24, 2004), available online at: [https://www.unesco.ch/work-d/vielfalt_frame.htm](https://www.unesco.ch/work-d/vielfalt_frame.htm) at 2 (date accessed: March 28, 2005).
1360 Ibid. at 31-34.
§§ 10.2.3. Conclusive Remarks on the Optional Amendments to the WTO Framework

Part III has prepared the contours of the main problems underlying the culture and trade quandary by using the concept of the cultural industries as a golden thread or guiding principle in the analysis of the WTO framework. Based on the great variety of insights, problems and challenges that follow from the special and multifaceted nature of the cultural industries, it remains to deepen the insights into the problem by carefully balancing against each other the options’ principal advantages and disadvantages. Any choice between these various options and their respective legal instruments, however, requires a careful consideration of the context. The context is an important factor, because it is precisely the precise demarcation of the competence of the WTO to other regulatory bodies and authorities, such as notably UNESCO, that poses the most difficult challenge. Moreover, the previously and still widely separated fields of trade and culture are engaged in a highly dynamic process of mutual interaction, which can finally be called “evolution”.

For a better understanding of these dynamics and for an improvement of the regulatory response to their consequences, it is helpful to shortly pursue the analysis of the cultural industries in the principal stages of the European integration process under the European Union, which can serve as a useful model in the struggle for the establishment of a regulatory equilibrium between culture and trade.
PART IV

**THE CULTURAL INDUSTRIES: THE STRANGE CASE OF THE EUROPEAN UNION**

Following the analysis of the NAFTA and WTO, Part IV on the European Union brings the last substantive analysis of the concept of “cultural industries” in international economic integration regimes. In an attempt to pave the way for the next part’s conclusive findings on general dynamics in the interaction between culture and trade, it contextualises the concept of the cultural industries with the process of European integration from the European Economic Community (EEC) towards “an ever closer union”.

**Chapter 11 THE EUROPEAN UNION IN A GLOBAL CONTEXT**

§ 11.1. Prologue

The interest in casting light on the global “culture and trade debate” by subjecting the concept of the cultural industries to a closer scrutiny in the context of European Union law, *i.e.* a body of law of which the primary sources make no mention of it, can be defended on several grounds. First there is the concept’s historical origin in Europe, coined amidst drastic political changes and belligerent activities that help to explain the later resumption of past continuous efforts towards an institutionalised process of European and also global integration. In fact, both World War I and II, from a specific perspective, have been appropriately termed “European Civil War”\(^{1362}\), or else “fratricide”\(^{1363}\), which was fought and lost together for all and at the expenses of the entire world. Indeed, records of the international tensions that characterised the period, both preceding and during the two World Wars, which are handed down to us in writing, sound and image, one is led to assume, should be sufficient to preserve the lessons to be learned from such disastrous encounters between the peoples inhabiting this world.\(^{1364}\) Instead, even the generation that coined the concept in the course of an overall European decay, found many of their fears being reconfirmed in another context, the “new” world they emigrated to.\(^{1365}\) Herein lies a symptomatic piece of evidence recalling the universality or recurrence of human problems *in abstractu*, consequently changing guise through the prism of cultural diversity and becoming manifest in other form, bearing other faces and names at different times in different places.\(^{1366}\)

A second reason, based on the said universality of human problems, is provided by the two concepts’ equal capacity of oxymora. Both “cultural industries” and “European Union”, carry with themselves the extraordinary quality to link apparently opposite and conflictual tendencies and to sow the germ for their harmonious dissolution on a higher level of understanding. Broadly speaking, in the case of the former concept, it describes new possibilities that the technological innovation in the media sector opened in the production, storage, reproduction, direction and dissemination of

1365 See Steinert, *supra* note 159 at 23, reporting that “[A]fter 1938, Adorno’s experience of American culture merely served to reinforce his convictions with regard to culture industry”.
1366 See also Koselleck, *supra* note 40 mainly at 9-16.
information including their potential impact on culture. In the case of the latter, it refers to a new mode for the organisation of politics within the boundaries of the European continent and thus – to use the Treaty language – “arks a new stage in the process of European integration”. In other words, the cinematograph added a new aspect to human perception through the possibility of linking numerous single static pictures engraved onto a film strip and wound up together with sound on a film reel into a causal chain of a continuous story. Likewise, the European Union (and their early predecessors in the process of European integration), understood as Discordia concors, as used by Jacob C. Burckhardt’s (1818-1897)1367, added a new, i.e. supranational, level to each of the six original and subsequently following (9, 10, 15 and eventually 25 or more) Member States, which allowed and continues to allow for the transformation of their policies from a seemingly random and most of the times bilateral pactomania, which before had already undermined inter alia the operability of the League of Nations, into a more ordered, legalistic and institutionalised framework for a henceforward commonly shared destiny.

In this comparison, it is striking to see the parallels in the language of Jakob Burckhardt, describing Europe as Discordia concors, referring to the distant chime of bells, whether harmonious or not from the close, and the one of representatives of Gestalttheorie, explaining perception through the distinction of tonal or melody Gestalt.1368 From this may well be deduced that the change in perception – denominated by the concept of the cultural industries – has also had an impact on the perception of international relations and thus contributed to the formation of the European Union in its past and present form.1369 Be that as it may, the crucial element is found in the shift from a static to a dynamic mode of perception and its implementation in the law underlying the integration process. In this shift lies the main commonality between the two concepts, as the following few examples show:

First, the concept of “culture industry”, in the conception of its fathers, represented a shift in the perception that blurred the lines between the single individual to the mass. In similar terms, the legal instruments used and elaborated in the course of European integration mark a departure from the solely public interpretation of international law, or “law of nations” as it was called before. The original tendency toward increased private participation in international or especially European law is also reflected in Jean Monnet’s words, “nous ne coalisons pas des États, nous unissons des hommes”.1370 The Court has characterised this shift in Opinion 1/91 by stating that

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In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals.\footnote{1371}{Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991] E.C.R. I-6079 at para. 1.}

Most importantly, both concepts struggle with the strict separation of economic from cultural forces. In the sphere of the cultural industries the economic aspect was traditionally fairly neglected, or only laconically accepted ("par ailleurs, le cinéma est une industrie")\footnote{1372}{See Malraux, supra note 462.} or, at its best, held responsible for the shift from “high” to “low” art or from “culture” to “mass culture”, as a result of the danger of the so-called “commodification”, or commercialisation of art through new methods of mechanical and industrial reproduction. In the early evolution of the European Union, or European Economic Community as it was then called, too, cultural concerns were widely neglected in or even excluded from the legal framework governing the agenda of economic integration among its Member States, or perceived as in opposition to each other, as the anecdotal phrase – attributed wrongly to Jean Monnet – according to which “Si c’était à recommencer, je commencerait par la culture”\footnote{1373}{See M. Dumoulin, “Europe de la culture, culture européenne” (1999) 5 J.E.I.H. 7 at 16.} indicates.

Moreover, in combination with the two points raised before, the cultural industries and the European Union are also confronted with the dilemma of a cultural dialogue versus the protection of regional, national, local or individual cultural identity in light of international trade but even more so of international peace and security, which sadly enough has recently gained enormous significance.\footnote{1374}{See e.g. “Clash of Civilisations”, supra note 807 and Said, supra note 807.} While, on the one hand, new technological developments in the reproduction and distribution in the cultural and information industries created new economic incentives, opening new ways for the global exchange of cultural symbols and values, they also introduced new risks capable of diminishing cultural diversity and leading to the cultural homogenisation of the globe. The same danger can be held to persist in the process of regional integration, such as it is the case for the EU.

Finally, in their quality of normative concepts, \textit{i.e.} understood as indicating a desirable (or undesirable) outcome in the future based on a precise description of the present reality, such as a better understanding of the mutual interplay between cultural and economic forces, or a better organisation of the relations between European states, they both merge and are challenged by the difficulties an idea faces in the process of its realisation.\footnote{1375}{See Constantinesco, supra note 1362 at 69 (“Europa als Idee und als politische Wirklichkeit”).} Hence, their mutual approach is rooted in the precise grasp of the cultural and economic forces at work in a specific set of goods and services and its appropriate implementation in the legal framework governing the integration process.

In addition to the similarities between the two concepts, the juxtaposition of the NAFTA, the WTO and the EU in the context of the cultural industries, appears justified by the general structures and dynamics that governed their respective creation and subsequent evolution. Under the overall debate framed by the term “global governance”, particularly, between the WTO and the EU exists a terminological overlap or mutual cross-fertilisation as well as various substantive and formal interfaces which ought not to be underestimated.\footnote{1376}{This observation applies \textit{mutatis mutandis} to the NAFTA (see also supra Subsection §§ 9.2.1).} Next to the persuasive authority of solutions and concepts elaborated in their respective playgrounds of a clash between culture and trade in the
international exchange of goods and services, it is the institutional interlocking that must be mentioned. On the one hand, the interlocking is obvious on the one hand in the EU playing a major role, i.e. one of a global player, inside the WTO. On the other hand, it is a fact that, in turn, the WTO – through Article XXIV GATT – originally authorised and later continued to influence the path the EU is taking. In short, their relation is characterised by a mutual interplay, which gradually developed into special dynamics fostering a steadily increasing interdependence.

For instance, the mutual cross-fertilisation or mere parallels in the evolution surfaces inter alia in the genesis of Article XXIV GATT itself, which was lent from early European integration efforts. The opposite example is found in Article 36 of the Treaty Establishing the European Economic Community (Rome Treaty), which was drafted in close accordance with Art. XX GATT. A close parallel is found in the failed attempts to initiate global and European economic integration through trade liberalisation within a broader political framework. Here, the failure of the Havana Charter can be mentioned in the same breadth as the European Political Community (EPC). In both cases a functionalist (or sectoral) approach prevailed over a constitutionalist (or holistic) one, leaving a broader political project with its economic skeleton behind. Since then, both projects have made considerable, but varying progress in the realisation of their original objectives.

Finally, the parallels at global and regional level also become obvious in the clear-cut division of labour between institutions in charge of culture and trade respectively. At international level, the formal ties between the WTO, as the competent organ for trade, and the UNESCO (as part of the UN system), as the specialised agency for culture, have never been sufficiently clarified and become institutionalised. Similarly, the evolution of the European legal order has proceeded for a long time on a similar path, directed between the predominantly economic agenda of the European Community and the political and cultural agenda of the Council of Europe. The growing mutual economic interdependence, or equally described as “convergence of international trade law”, definitely increases the need for comparative studies assisting the

1379 See P. Demaret, “Le régime des échanges internes et externes de la Communauté à la lumière des notions d’union douanière et de zone de libre-échange” in F. Caportori et al., eds., Du droit international au droit de l’intégration (Baden-Baden: Nomos, 1987) 139 at 139 (Fn 1) [hereinafter “Notions d’union douanière et de zone de libre-échange”].
1380 On the different methods of integration, see e.g. Konstantinou, supra note 136 at 113-122.
1381 On the relation between the Council of Europe and the European Economic Community, see also B. de Witte, “Cultural Linkages” in W. Wallace, ed., The Dynamics of European Integration (London: Pinter, 1990) 192.
formulation of various lessons that can be drawn from each of the compared projects. Such comparative study, for example, taking into account the different stages of various integration projects on the ladder of economic integration, may lead to the logical conclusion that the “examination of the evolution of the EU might help shed additional light on how the WTO, NAFTA, or MERCOSUR might evolve in the future.” In addition to the abstract commensurability, real changes to each of the in many ways divergent systems have resulted in a mutual approach of the EU and the WTO. The creation of a legalised dispute settlement system for the WTO as a result of the Uruguay Round and the imminent enlargement of the EU, in short a respective process of widening and deepening, are likely to bring the immediate challenges in both systems closer.

As a matter of fact, the entire evolution of the European Union to its advanced state of integration provides a rich repertory of primary and secondary, including case, law, as well as other political texts and documents of interest for the explanation of the basic structures underlying the process of integration. These basic structures point out the major characteristics of the development that states undergo in the shift from mere international cooperation to economic integration and the special dynamics the latter process sets free. The so-called “integration dynamics” has been aptly described as chain reaction set off between a great variety of competing concepts, such as widening and deepening, negative and positive co-ordination/integration, various general centripetal and centrifugal forces, or else culture and trade. Here again the oxymoronic conception of the European Union is as highly revelatory as its history is rich of indicators for logical links that exist in the transition from a free trade agreement to a customs union, from the liberalisation of goods to services, labour and capital, including the role of a common commercial policy, competition law, and a monetary union and finally the constitutionalisation of its evolving legal order. For the global context it remains to test the accuracy of the hypothesis that such a chain reaction of integration dynamics exists, and, most importantly, whether a causal relationship can be established between ‘culture’ and ‘trade’, namely that at a certain point trade liberalisation necessarily brings the issue of culture to the fore.


1385 For NAFTA, to a minor extent the widening of integration is found in the negotiations for an FTAA. For further parallels, see “Americas Agreements”, supra note 1186.

1386 On the differences between “cooperation” and “integration”, see also Constantinesco, supra note 1362 at 123-135.

1387 Ibid. at 140.


1390 Indeed, a number of studies addressing the interplay of economic and cultural forces, or the impact of the former on the latter, have been compiled; for NAFTA, see e.g. Bendesky, Saleé, and Norgen & Nanda, supra note 1268; for the EU, see e.g. Communication de la Commission au Conseil, au Parlement européen, au comité économique et social et au comité des régions, “Politique de cohésion et culture: Une contribution à l’emploi”, COM(96) 512 final (November 20, 1996) at 2, noting that “L’importance croissante de la culture est étrangement liée à l’évolution récente du développement économique” [hereinafter COM(96) 512]; for the WTO and the global level, see e.g. Paul, supra note 683.
Notwithstanding the natural learning effect that can be deduced from comparative endeavours, caution is necessary in the over-zealous formulation of premature conclusions or the volatile transplantation of concepts from their original context into another. This is particularly dangerous without due recognition of different legal cultures and the, for international law absolutely indispensable involvement of their respective representatives. Equal representation and participation is without doubt among the principal source of legitimacy of international legal norms. It is fortunate that the recent rise of awareness of cultural diversity within the process of economic integration is capable of halting hegemonic tendencies and the unfounded belief in an absolute truth, or to become a victim of the “eternal misunderstanding” which at all times separated nations and peoples, as Stefan Zweig reminded as follows:

*L’Éternel malentendu qui les [peuples] sépare, c’est d’estimer chacun que leur croyance est la seule bonne, leur manière d’être la seule convenable, c’est d’avoir l’arrogance d’être les seuls justes.*

It is therefore clear that the present analysis of the cultural industries in the EU context is understood as a parallel description aiming at a comparative search for a global “interpretive concept” for future negotiations in the global field. The only authority the part on the EU may therefore claim is the one of a “persuasive authority” in the dynamics that govern the integration process, just like NAFTA’s choice to introduce the concept of “cultural industries” is vested with terminological and definitional authority.

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1391 See also Constantinesco, *supra* note 1362 at 96, emphasising the specific character and strong originality of various integration projects in comparison to the EC by writing that “Obwohl einige dieser Einigungsbestrebungen in verschiedener Hinsicht von dem freiwilligen Integrationsprozeß der EG beeinflußt sind, stellen sie gleichwohl mehr als nur bloße Nachahmungen dar; denn jedes der Projekte weist einen spezifischen Charakter auf und ist von einer starken Originalität geprägt”.


1393 *Romain Rolland, supra* note 1363 at 220.

Chapter 12 THE INTERPLAY OF CULTURE AND TRADE IN VARIOUS INTEGRATION STEPS

§ 12.1. The History of Institutions in Europe: From the Year 1945 to the Present

§§ 12.1.1. General Preliminary Remarks

In a rapidly changing time, in which the only constant appears to be the one of change itself,\(^{1395}\) it becomes more difficult to draw the contours and to determine the exact degree of organisational equilibrium that the legal order of the EU has achieved at any given stage, and, especially, with regard to the cultural and economic forces at work in the creation and operation of the common market and beyond. At the same time it is almost impossible to discern the exact origins of the European integration process in accordance with the ancient distinction between cultural and economic forces. Most text books on EU law begin with a short introduction dealing with the historical attempts to integrate Europe, but concentrating exclusively on the economic and political aspects of it.\(^ {1396}\) Treatises on culture, on the other hand, fairly neglect the economic dimension.\(^ {1397}\) The oxymoronic concept of cultural industries is therefore used to take occasion to mutually approach the economic and broader political (i.e. including the cultural) aspects reigning the dynamics of European integration. Although the focus of this thesis is clearly EC law, or in other words, the process of European integration as initiated by the Rome (and Paris) Treaty and its subsequent amendments, other regional and international institutions will have to be considered for the sake of a better explanation of its basic structures, especially in light of their comparison with the international plane.

§§ 12.1.2. The Institutional Origins of European Integration after World War II: A Contextual Approach

After World War II, a first important concrete step towards European integration was taken by Robert Schuman with his declaration on May 9, 1950, celebrated every year since 1985 as “Europe Day” on May 9.\(^ {1398}\) His initiative eventually led to the adoption of the Treaty Establishing the European Coal and Steel Community (ECSC) signed in 1951, entering into force on July 23, 1952 and concluded for a duration of 50 years between the six founding Members, France, Germany, Belgium, France, Italy, Luxembourg and the Netherlands.\(^ {1399}\) The unique character of the act establishing the ECSC is rooted first and foremost in its overall symbolic value and furthermore its underlying profound reasoning, but equally in the practical effects and concrete actions that immediately followed.


\(^{1397}\) See e.g. O. Schwencke, Das Europa der Kulturen – Kulturpolitik in Europa: Dokumente, Analysen und Perspektiven – von den Anfängen bis zur Grundrechtscharta (Bonn: Klartext Verlag, 2001).


\(^{1399}\) Treaty Establishing the European Coal and Steel Community, signed at Paris, on April 18, 1951, 261 U.N.T.S. 142 [ECSC].
A first insight is laid down in the reasoning behind the ECSC, as explained in the first Indent of the Preamble, whereby the High Contracting Parties are

CONSIDERING that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it.

In addition, in Indent 3 of the Preamble contains a further ever true insight, namely in form of the High Contracting Parties

RECOGNISING that Europe can only be built by practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development.

Finally, based on these, the High Contracting Parties are

RESOLVED to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations for institutions which will give direction to a destiny henceforward shared.\textsuperscript{1400}

Consequently, these considerations are translated into reality by Article 1 which establishes a \textit{European Coal and Steel Community}, founded upon a common market, common objectives and common institutions. In further concretisation of the foundations for common supranational institutions, by virtue of Article 7, the so-called \textit{"Haute autorité"} (High Authority), assisted by a Consultative Assembly, the Common Assembly, the Special Council of Ministers and the Court of Justice, were established. With these institutions the foundations for the overall institutional framework developing and surveying the process of further European integration were laid.

The process hereby institutionalised prepared the ground for further “creative efforts” in the process of European integration. Before the next creative step could be made, a setback occurred when the \textit{European Defence Community} (EDC) and plans for a \textit{European Political Community} (EPC) failed to crystallise in 1954.\textsuperscript{1401} This failure must be considered in the broader context of the existing framework for military cooperation under the Western European Union (WEU),\textsuperscript{1402} and the North Atlantic Treaty Organisation (NATO),\textsuperscript{1403} established in 1949. The next important steps were made successfully with the establishment of the \textit{European Atomic Energy Community} (EURATOM) and, most importantly, the \textit{European Economic Community} (EEC), with their respective treaties signed in Rome on March 25, 1957, entering into force on January 1, 1958, for an unlimited period.\textsuperscript{1404} - The Treaty Establishing the European Economic Community, the so-called “Rome Treaty”, enshrined the famous phrase, according to which the High Contracting Parties are:

\begin{quote}
\textit{Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU European University Institute} \ DOI: 10.2870/50465
\end{quote}

\textsuperscript{1400} Indent 5 ECSC Treaty, ibid.
The main stages, this process of widening and deepening has run through in the years following the establishment of the EEC, comprise, in terms of primary law, the Merger Treaty (1965), the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997), the Treaty of Nice (2001), and finally the Treaty Establishing a Constitution for Europe (EU Constitution), which was signed on October 29, 2004 in Rome. Further important stages are marked by the respective accession acts for Denmark, Ireland, the United Kingdom (1972), Greece (1979), Portugal and Spain (1985),

1405 Indent 1 and 2 of the Preamble of the Rome Treaty, ibid. Please note that the extensive quotation of the various Preambles is based not only on the belief in their significance for the historical interpretation of their respective norms, but also the legal effect that might derive from them, see especially St. Schepers, “The Legal Force of the Preamble to the EEC Treaty” (1981) 6 E.L.R. 356. On the interpretation of Community law, see G. Ress, Kultur und Europäischer Binnenmarkt (Stuttgart: W. Kohlhammer, 1991) at 22, emphasising the significance of teleological interpretation in addition to the literal and systematic interpretation based on the principle of effet utile.


1407 Cf. Articles 2-4 Rome Treaty.


and Austria, Finland and Sweden (1995), as well as ten Eastern and Central European Countries (2004).

Nonetheless, for due consideration of the broader culture and trade dichotomy in European integration it is necessary to point out the parallel work of other international and regional institutions either established or active in Europe. Since many scholars correctly emphasise external factors that assisted in the process of European integration, there must first of all be mention of the organisations active at the global level. The first important development is found in the political will that made possible the creation of the United Nations Organisation (UNO) through the UN Charter in June 1945, to which also the EEC Treaty’s Preamble makes reference. From a cultural perspective, in November of the same year, UNESCO has been established and resumed work with the goal to enhance the mutual understandings between peoples. In the year 1947, in a spirit of universalism expressed by the UN Charter while nonetheless respecting regionalism, the Economic and Social Committee (ECOSOC) set up a regional commission in Europe, the United Nations Economic Commission for Europe (UNECE) with the primary objective of coordinating reconstruction efforts. In later stages the UNECE’s tasks evolved with its political context. A further important element is found in the entry into force of the GATT 1947, which provided the overall legal framework for the progressive international liberalisation of trade in goods, while at the same time authorising regional economic integration efforts (Art. XXIV).

The creation of the Organisation for European Economic Cooperation (OEEC) in 1948 is a good example for the intersection between the regional and the global level. The OEEC was originally entrusted with the administration of Marshall Plan Aid and further efforts towards the recovery of Europe. Later, it was transformed into the Organisation for Economic Cooperation and Development (OECD) of which the aims are to promote policies designed:

(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;

(b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and

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1416 UN Charter, supra note 332.

1417 UNESCO Constitution, supra note 237.


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(c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations. 1422

A major effort for European integration was taken in 1949 with the signature of the Statute of the Council of Europe. 1423 The Statute of the Council of Europe formulates the declared aim of the Council of Europe (COE) as follows:

(a) The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

(b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

(c) Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.

(d) Matters relating to national defence do not fall within the scope of the Council of Europe. 1424

The relatively broad constitutional mandate attributed to the organs of the COE is limited by the Council’s intergovernmental character, which lacks widely the efficiency of the supranational method applied in the framework of the EEC and its successors. 1425 Nonetheless, the COE’s role in the integration of Europe should not be underestimated. Particularly, its contribution to European integration particularly through the development to a European human rights regime, notably by virtue of the European Convention for the Protection of Human Rights and Fundamental Freedoms, establishing also the European Court of Human Rights in Strasbourg, must be highlighted. 1426

In sum, until the present day, the Council of Europe has adopted almost 200 treaties, of which a great number deal with various aspects related to culture. 1427 It can be said that in the years following their creation, both the work done by the Council of Europe and the one of the EEC and its successors has become more closely entwined. 1428

Another relevant organisation is found in the Organisation on Security and Co-operation in Europe (OSCE), which emerged from the Conference on Security and Co-operation in Europe (CSCE), itself based on an idea for a pan-European security conference, forwarded by the former Soviet Union during the 1950s. 1429 Born out of the Cold War legacy and being primarily concerned with security issues and the peaceful settlement of disputes, the OSCE nonetheless recognises the


1423 Statute of the Council of Europe, London May 5, 1949, E.T.S. – Nos. 1/6/7/8/11. The founding members are Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, United Kingdom, but membership as of 2003 covers 45 European countries.

1424 Article 1 Statute of Council of Europe.

1425 On the difference between the federalist-constitutional and the functional method and their respective expression in intergovernmental and supranational forms of integration, see Constantinesco, supra note 1362 at 113-122.


significance of cultural cooperation and cultural exchanges for the attainment of its principal goals.\(^\text{1430}\)

§§ 12.1.3. Institutional Trialogues between Peace, Trade and Culture

The short survey of the principal institutions established in the years following World War II aimed at presenting a simple sketch of the institutional framework directing the following substantive developments in the continuous process of European integration. In this context, two derivative observations deserve to be added and their meaning clarified. First of all, the character of these institutions reveals a relatively strict division of labour in line with their respective mandates dealing with peace (or politics), trade (or economics) and culture (including human rights), despite a strong desire for “universalism” and/or “constitutionalism” prevalent at that time as expressed especially in the UN Charter and the subsequent Universal Declaration of Human Rights. A desire similar to the one of a global dimension was prevalent at the European level manifest in attempts to integrate Europe in all its dimensions, political, economic and cultural.

Although the intent to create bilateral links between politics and trade, or politics and culture, and to a lesser extent culture and trade, have occasionally been formally recognised,\(^\text{1431}\) it was impossible to implement them in their full dimension, i.e. in a way which would have allowed them to complement each other in their entirety. Instead a strong degree of fragmentation and compartmentalisation occurred in the institutional realisation of the initial objective of a constitutional dimension. The fragmentation at global level, notably in the break-up between the GATT and the UN system after the failure of the ITO to materialise, can be easily compared to the one at the European level, evident in the different mandates of the EEC and the Council of Europe, aggravated by the failure of the European Political and Defence Community. However, a significant difference is found in the dominance of intergovernmental mechanisms at international level and the absence of supranational institutions.

In Europe, however, such desire for a constitutional dimension in the integration of Europe was to become impeded by the difficulties vested in various political, economic and cultural realities.\(^\text{1432}\) The proper interpretation of and response to these difficulties was found in a partial, so-called functionalist method, as expressed by the words of Robert Schuman, that

> L’Europe ne se fera d’un coup, ni dans une construction d’ensemble: elle se fera par des réalisation concrètes créant d’abord une solidarité de fait.\(^\text{1433}\)

The basic thoughts inherent in the functionalist method are thus characterised by a compartmentalisation of integration into various partial moves and based on the belief that European integration must emerge from a variety of successive small and partial steps. The

\(^{1430}\) See especially, Helsinki Act, Paragraph 3 on “Co-operation and Exchanges in the Field of Culture”, ibid. at 49-56.

\(^{1431}\) For politics and trade, see e.g. Art. 1 Havana Charter, supra note 317; for politics and culture, see e.g. Art. 1 (1) UNESCO Constitution, supra note 237; and perhaps for trade and culture, if at all, a marginal point of contact is provided by Art. IV and XX (f) GATT; and at the European level, cf. the respective Preambles of the ECSC and the EEC Treaty, Article 36 EEC Treaty, and Art. 1 of the Statute of the Council of Europe. With regard to the nexus between trade and culture, it is noteworthy that a first explicit legal recognition was introduced in the TEC by virtue of Article 128 (4) (now Art. 151 (4)) with the Maastricht Treaty in 1992.

\(^{1432}\) For an overview of these difficulties, see D.W. Urwin, The Community of Europe: A History of European Integration since 1945 (London: Longman, 1991) at 27-42, accurately using chess language to describe the beginnings of European integration as “opening gambits”.

\(^{1433}\) See the facsimile of a draft of the Schuman declaration, reprinted in generally Fontaine, supra note 1398 at 14.
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The functionalist method is often presented in direct opposition to the so-called “federalist” or “constitutionalist method”, which aims at arriving at European integration through a single act, such as the establishment of a Federal State of Europe, or the United States of Europe. Still after more than 50 years of European integration, unfortunately, this Methodenstreit between functionalists and constitutionalists, is too often perceived as one of mutually excluding theories, rather than a necessary dialectic and complementary process.\(^{1434}\)

In the context of complementarity, the survey of institutions also reveals a strong interconnectedness and mutual cross-fertilisation in the relations between the global and the regional level, at least if conducted in good faith. In this light, the international legal order as a whole appears as an entity constituted by the sum of the relations between various actors and polities linking in a sliding scale the global and the municipal level, rather than its “peak” based on a clear-cut and hierarchical separation between the global and the national level.\(^{1435}\) Various international institutions, such as the OECD, NATO, the OSCE, which include a certain number of Members going beyond the regional or continental level, further underline this observation.

Largely in this trend lie also various observations, derived from developments over the past 50 years, according to which there exists a mutual cross-fertilisation among the actors along the horizontal lines of compartmentalisation. It is very difficult to establish valid guidelines for the assessment of the efficiency of a specific institution and its impact on the work of another. For instance, it would be interesting to know more precisely to what extent the political cooperation in the framework of the Council of Europe helped the process of economic integration established under the EEC? Indeed, it has been argued that the Council of Europe assisted the EEC, for instance in bringing together the for a long time irreconcilable parties of the EEC and the European Free Trade Association (EFTA), as much as UNECE helped to close the ideological gap between the Western on the one hand, and the Central and Eastern European Countries, on the other.\(^{1436}\) Equally, one may ask about the impact that the EEC had, and continues to exercise, on the functioning of the various international organisations.\(^{1437}\) In the aftermath, it is difficult to assess to what extent these meetings have contributed positively, for instance, to the establishment of the European Economic Area (EEA) in 1994, and for the EU enlargement round to take place in 2004. The same argument can be made for the work of UNESCO that might have helped to reduce legitimate fears for a loss of cultural sovereignty and diversity in the context of economic globalisation, although in this case the greater institutional fragmentation at global level plus the wider geographic and cultural disparity

\(^{1434}\) But see the recent signs of reconciliation in the present debate about EU constitutionalism, see e.g. G. de Búrca & J.B. Aschenbrenner, “The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights” (2003) 9 Colum. J. Eur. L. 355 at 362, infra note 1962; see also B. de Witte, “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process”, in P. Beaumont & C. Lyons & N. Walker (eds.), Convergence and Divergence in European Public Law (Hart, 2002) 39 at 39, writing that: “Unlike what happened with most national constitutions, the “European Constitution” (if there is such a thing, which I will assume here) has not been solemnly enacted at one particular moment in time but by an authoritative constitutional assembly, but has been developed in a piecemeal fashion over the past fifty years” [hereinafter “Treaty Revision Process”].

\(^{1435}\) For example, see the interesting analysis of the voting behaviour and policy coordination of the EEC Members in the main UN General Assembly; see de Gara, supra note 1419 mainly at 567-575.


\(^{1437}\) For an overview of the EC membership in international organisations, see S. Denza, “The Community as a Member of International Organizations” in N. Emiliou & D. O’Keeffe, The European Union and World Trade Law: After the Uruguay Round (Chichester: John Wiley, 1996) 3.
between the parties involved, must be taken into account.\textsuperscript{1438} In the same breath, however, the dangers of such compartmentalisation and institutional division of labour without an appropriate and stable framework, which lie in potential overlap and conflict, must be pointed out. Here the global level is exposed to greater dangers than the regional one, due to the greater disparities in the overall administrative culture and weaker institutional ties. Nonetheless, with the increasing complexity of the regulatory environment the occurrence of similar dangers at the European level cannot be excluded entirely.\textsuperscript{1439}

\section*{§§ 12.1.4. European Integration and the Cultural Industries}

Over the past half a century, the original fragmentation that characterised the European integration architecture has changed considerably. The years following the Paris and the Rome Treaties, the EEC, later renamed into European Community (EC),\textsuperscript{1440} has emerged as the driving force of the European integration process.\textsuperscript{1441} This driving force of the so-called “European Communities” was given formal recognition in the establishment of a common framework under the European Union, which henceforth became the “gravitational centre” of European integration, around which other developments can take place in concentric circles, or like orbiting planets.\textsuperscript{1442} The various institutional changes were accompanied and equally induced by substantive provisions and changes to them. Here various objectives, pursued in the course of economic integration, such as the establishment of the customs union within 12 years and a common market, gradually pushed forward developments of a political nature, such as the introduction of direct elections to the European Parliament (i.e. the former “Assembly”),\textsuperscript{1443} the provision of a formal legal basis for a European Political Cooperation paving the way for a Common Foreign and Security Policy (CFSP),\textsuperscript{1444} and cooperation in Justice and Home Affairs (JHA),\textsuperscript{1445} show. At the same time, the basic treaty’s scope was extended first to economic and monetary union, economic and social cohesion, research and technological development, and the environment,\textsuperscript{1446} and later to education, industry public health and culture.\textsuperscript{1447}

\textsuperscript{1438} Cf. also the same argument about the significance of Article IV GATT, see supra Part III, Subsection §§ 6.2.5.

\textsuperscript{1439} See e.g. E.F. Defeis, “Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights” (2001) 19 Dick. J. Int’l L. 301. The overlap of jurisdiction in human rights issues is more likely to increase with the prospective incorporation of the Charter of Fundamental Rights in the future Constitution. However, potential overlap is not limited to the sphere of human rights but can also extend to other areas, such as the media. For an overview of some of the activities of the Council of Europe, see J. Siddle, “The Role of the Council of Europe in the Legal Field” (1977) 2 E.L.R. 335.

\textsuperscript{1440} See Title II Art. G (now Art. 8) Treaty on European Union.


\textsuperscript{1442} Art. A para. 3 (now Art. 1) TEU.

\textsuperscript{1443} Decision 76/787/ECSC, EEC, Euratom of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly direct universal suffrage, [1976] O.J. L 278/1 (October 8, 1976).


\textsuperscript{1445} Title VI Art. K (now Art. 29)

\textsuperscript{1446} Cf. SEA, supra note 1409.

\textsuperscript{1447} Treaty of Maastricht, supra note 1410; see also R. Lane, “New Community competences under the Maastricht Treaty” (1993) 30 C.M.L.R. 939.
This brief overview of subsequent changes in the architecture only touches upon the top of the iceberg of developments and amendments in the overall framework of European integration, induced by the interplay between a functionalist approach and a constitutionalist desire, broadening and deepening through negative and positive integration as well as supranationalism and intergovernmentalism. It is therefore meant to pinpoint the constantly increasing, enormous complexity that underlies the European integration project, like a black hole, of which the gravitational field has reached a density where almost no ray of light can escape. In this situation it is difficult to measure the degree of organisation attained in the process of European integration, by isolating one specific field, such as culture, without considering other related areas. It seems that the causes underlying such difficulty can only be approached successfully through a change in the tools of perception, apt for the observation of the targeted phenomenon. In a search for the causes, it is helpful to recall the broader culture and trade debate, as the *lex generalis* for the more specific concept of cultural industries.

To recall once more, the concept of the cultural industries, next to its reference to a well-defined category of goods and services, carries also a paradigm for a change in human perception, through precisely the technological innovations that led to their appearance. The dynamic semantic meaning inherent in the oxymoronic content of the concept seems apt to tackle the various tensions inherent in European integration. In short, this means to subject the integration process to a simplified analysis through the distinct, but nevertheless intertwined concepts of culture and trade, as representatives for combined efforts in economic and cultural integration. This comparison is not far-fetched, if we move back to the original ideas laid down in the Preamble of the ECSC and the EEC. The reading of the respective Preambles leads Bruno de Witte to describe this tension inherent in European integration as follows:

> The signatories of both European treaties thus incorporated within them a tension which is characteristic of European integration, between a short-term and rather uninspiring *formal image* of Europe (Europe as institution; Europe as common market) and an ambitious long-term and permanently *moving image*, which points into a direction (that of an ever closer union) but without defining in advance the end station to be reached.1448

This description of the dynamic legal language used in the Treaties as a “moving image” recalls precisely the novelty in the perception that was introduced towards the end of 19th century by the invention of the motion picture. European integration then appears as the sum of idle efforts of individuals crystallising from time to time in a decisive moment in history, as described by Stefan Zweig, or else in the sequence of an (almost) infinite number of single pictures engraved onto a film reel. From this metaphor, we will now move on to the broader implications of these tensions within EU law, first through a presentation of the principal provisions of the legal framework governing culture and trade and second to their subsequent application to the cultural industries in their quality as a well-defined set of goods and services.

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§ 12.2. The EU’s Legal Framework With Regard to the Cultural Industries

§§ 12.2.1. A Chronology of the Principal Legal Provisions Governing Trade and Culture

The Rome Treaty enshrined the goal to “lay the foundations for an ever closer union” and to “ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe”¹⁴⁴⁹. This formulation does not allow for a distinction between cultural and economic aspects. It rather expresses the spirit underlying a functionalist approach that the first concrete steps must be taken in the economic sphere and cultural aspects will follow automatically. Nothing in the Treaty can be construed in a way that suggests that cultural aspects have been excluded from the Treaty’s scope.¹⁴⁵⁰ For instance, the Rome Treaty’s Preamble calls for the elimination of all barriers which divide Europe and not only economic ones.¹⁴⁵¹ Such interpretation is also reinforced per argumentum e contrario from the limited exemption from the provisions on the freedom of goods for national treasures possessing artistic, historic and archaeological value in Article 36 Rome Treaty. Prima facie, the Rome Treaty created a somewhat paradoxical situation in connection with the Community law principle of attributed (or conferred) powers¹⁴⁵², whereby the Community is competent to deal with the economic effects on culture, but simultaneously is excluded from the adoption of positive measures in the field of culture. This situation, however, was to become subject to changes in the years following the entry into force of the Rome Treaty. What happened was that the initial, mainly economic, legal framework was gradually complemented by numerous provisions referring to cultural aspects in different contexts and the Community was given some, albeit limited competence, in the cultural field.

§§ 12.2.2. The Basic Legal Framework for Economic Integration

12.2.2.1. The Rome Treaty: A Static Beginning

The Rome Treaty’s main purpose was the creation of a common market and the progressive approximation of the economic policies of the Community’s Member States.¹⁴⁵³ Deriving from this purpose, Article 3 of the Treaty called inter alia for the

(a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) the establishment of a common customs tariff and a common commercial policy towards third countries;
(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;
(d) the adoption of a common policy in the sphere of agriculture;
(e) the adoption of a common policy in the sphere of transport;

¹⁴⁴⁹ See supra Fn 1405.
¹⁴⁵¹ See supra note 1405.
¹⁴⁵² Art. 4 (1) Rome Treaty and Art. 7 (ex 5) TEC.
¹⁴⁵³ Cf. Art. 2 Rome Treaty.
(f) the institution of a system ensuring that competition in the common market is not distorted;
(g) the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balance of payments remedied;
(h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market.  \[1454\]

This Article reflects the basic logic underlying the Treaty’s structure, which follows the dynamics of economic integration from cooperation to a common and, eventually an internal, market.  \[1455\] This structure receives its further concretisation in the following provisions. \[1456\] Before, it is important to mention the principle of solidarity, proportionality and non-discrimination, which, having status of general principles of Community law, impose a spirit of solidarity on Member States in the fulfilment of the obligations and prohibit any discrimination on the grounds of nationality. \[1457\] Furthermore, the unifying spirit inherent in the Treaty was reinforced by the principles of supremacy and direct effect of Community law, as elaborated by the jurisprudence of the ECJ. \[1458\] The first important set of provisions dealt with those on free movement of goods, the elimination of quantitative restrictions and stipulated the gradual establishment of a customs union and the setting up of a common customs tariff within 12 years. \[1459\] Article 12 required that

Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

In the same line, Article 30 stipulated that

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Only Article 36 allowed – within a strict set of criteria – for a deviation from Art. 30 if “justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”. In this exemption a first contact point between wider cultural (and social) and economic aspects is found.

The goal of a customs union was achieved even before the deadline set by the Treaty on July 1, 1968. \[1460\] The establishment of a customs union in which goods (and services) move freely across internal borders requires – to the difference of a free trade area – a common customs tariff and a common commercial policy for the representation vis-à-vis third countries and in international

\[1454\] Cf. Art. 3 paras. (a) - (k) Rome Treaty.

\[1455\] For the distinction between a “common” and an “internal” market, see L.W. Gormley, “Competition and Free Movement: Is the Internal Market the Same as a Common Market?” (2002) 13 E.B.L.R. 517.


\[1459\] Art. 9-37.

organisations, such as notably the GATT/WTO regime.\footnote{1461} The Common Commercial Policy (CCP) was then regulated in Art. 110-116 and clarified, among other things, that

By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.\footnote{1462} Most importantly, the CCP, which falls in the exclusive competence of the Community gives the authorisation to conclude tariff and agreements.\footnote{1463} The rules on the freedom of movement of goods in the common market is also inseparably linked to the rules on competition and state aid in order to minimise the danger of a distortion of competition between so-called “domestic” and “foreign” goods – a distinction incompatible with the concept of a common market.\footnote{1464}

The next set of important provisions concern the three other fundamental freedoms, namely the free movement of persons, services and capital.\footnote{1465} Following goods, the free movement of persons is one of the most important pillars of European integration because of its socio-cultural and anthropological dimension. In fact, after Article 36 the provisions on the free movement of persons, although primarily based on economic arguments, provide another link between cultural and economic aspects of integration, indicated indirectly through the provisions on social policy and their educational aspect.\footnote{1466} The movement of persons is also interesting because of its relevance for the establishment of a European citizenship.\footnote{1467} Finally, the provisions on the free movement of services, right of establishment and of capital complement the logic making possible the establishment and guaranteeing the functioning of a common market. The process of integration as a whole through the proper application of the Treaty’s provisions is governed by the Community institutions as regulated in Part V.\footnote{1468}

\subsection*{Changes and Amendments to the Rome Treaty or a Creeping ‘Culturification’ of Trade}

The years following the entry into force of the Rome Treaty on January 1, 1958, instigated a dynamic process of integration, which, however, not always proceeded smoothly.\footnote{1469} Nevertheless, the integration process seemed to follow the original logic of functionalist integration on a step-by-step basis. A useful classification of the chronology of these steps is given by Joseph Weiler, who distinguishes (1) a foundational period (from 1958 to the middle of the 1970s), (2) a period of...
mutation of jurisdiction and competence (from 1973 to the middle of the 1980s) and (3) a period beginning with the Maastricht Treaty and the creation of the European Union from 1992 onwards. The same author has also drawn a picture of a more trade-based analysis of the EEC's evolution distinguishing five generations of relevant case law. In light of the recent Treaty Establishing a Constitution for Europe (EU Constitution), this last period could be termed the “constitutional period” of the EU. The entirety of innumerable efforts in the process of European integration from 1958 to the present, however, is summed up in the major changes to the Community institutions and treaties, as enumerated above.

The same time span can also be elucidated from a cultural perspective. Seen from this angle, with the continuous and gradual progress in the economic field, the contact between economic and cultural dimensions of Community law intensified and consequently a creeping “culturification of trade” (as opposed to “commodification of culture”) took place. In other words, a gradual adjustment of the original treaty structure to the respective needs linked to the progressive development of society was undertaken. This process also took the form of explicit amendments to the Treaties.

Hence, there exists a clearly identifiable analogy between the economic and the cultural progress that was made in the strive for the creation of an internal market, evident for instance in the ECJ’s jurisprudence from Cassis to Dassonville and Keck, or for a closer political integration, from the direct elections to the EP, the formal recognition of European Political Cooperation to the creation of the European Union and its well-known three pillar structure. This cultural analogy in the progressive development can be divided in three main periods, albeit not without temporal overlap. The stage in the evolution of the EEC, marks a break with the traditional perception of international law, as it was represented for instance by the League of Nations based on the clear distinction between individuals and states, between the private and the public sphere, the national and the international level, as well as culture and trade. During this period, which extends roughly from the entry into force of the ECSC Treaty and especially the EEC Treaty in 1958 to the mid 1970s, culture played no role worth mentioning.

A second period which inaugurated the second stage in the process of European integration, where a mutual approach between the culture and trade took place, can be identified, extending from the mid 1970s to the crucial year 1992. Similar to the Renaissance period, which amounted to an “anticlimax between two peaks” in the sciences between the dark ages and modernity, making necessary a re-examination on the clear-cut separation between artistic and scientific activities, the next stage in the evolution of the EEC was characterised by the gradual reorientation as concerns the relationship between culture and trade. As much as the change in perspective, scientifically introduced by Brunelleschi, allowed for the construction of new forms of buildings, the introduction of new means of perception changed the construction of the “House of Europe”, which later became visible in the
EU’s pillar structure. Among these new means of perception the expansion of the cultural industries, through notably the advent of far-reaching innovations in the audiovisual sector, were beginning to make themselves felt. The change in perception induced by the new media was gradually gaining terrain and led to a proportional intensification of related activities until its culmination in the events directly preceding 1992. The transition from the first to the second stage in European integration was described as follows:

Autrement dit, l’intéressant est que si pendant longtemps on accepte, avec le Traité de Rome, de séparer l’économie et la culture, à partir d’un certain moment on réalise qu’une construction aussi considérable dans ses effets que la construction économique ne peut pas ne pas avoir, pour les Etats, des effets dans le domaine culturel.1475

Finally, the climax in the relation between the cultural and economic forces in the creative process of European integration occurred in the year 1992 with the signature of the Treaty on European Union, the so-called “Maastricht Treaty”. With the explicit reference to culture, henceforward dealt with in Article 128 (now Art. 151) TEC, a third stage was entered. This period of this stage extends until the present day and perhaps the recent attempts to draft a European Constitution, which eventually will inaugurate a new period, to be named accordingly by future historians. For the moment, notwithstanding the legal progress that was made in the consideration of both cultural and economic forces in the integration process, many open questions remain awaiting their solution in the future. The time span from the *intervalium lucidum* in Maastricht to the present day is successfully summed up by Bernard Esmein, who also points at the future challenges when he writes that

Les pays Européens avaient tenu à séparer de manière étanche l’économie et la culture. Ils réalisent qu’il est impossible de séparer les deux. C’est une découverte. Si la phrase de J. Monnet sur la culture a eu tant de succès dans les années 90, c’est qu’elle correspond à une remise en question des rapports entre économie et culture tels qu’on les avait imaginé jusque là. On voulait les deux domaines étanches, ils ne le sont pas; on voulait que l’ouverture économique ait une vertu integratrice sur le plan culturel, on doute qu’elle l’ait; on pensait les comportements économiques universels, on découvre qu’ils dépendent de racines culturelles et de déterminants éducatifs! L’économie et la culture entretiennent décidément des rapports plus conflictuels que la philosophie libérale ne l’imaginait. Aussi l’oeuvre culturelle de l’Union ne saurait être considérée simplement comme le prolongement linéaire de la construction économique.1476

Before the challenges arising out of some of the conflictual aspects between culture and trade can be addressed, the three periods will be subject to a short legal analysis with regard to the cultural industries.

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1475 Esmein, *supra* note 1466 at 78.
1476 Ibid. at 103.
Chapter 13 INTEGRATION DYNAMICS OF CULTURE AND TRADE


§§ 13.1.1. The Immediate Agenda

In the beginning of the European Economic Community stood an idea expressed in general objectives enshrined in the Rome Treaty awaiting their gradual realisation. Following the entry into force of the Rome Treaty on January 1, 1958, immediate points on the agenda concerned the progressive establishment of the common market in accordance with the provisions enshrined in the Treaty. The common market – the Treaty stipulated – was to be set up in three stages within a transitional period of twelve years, i.e. until December 31, 1969. This objective was accomplished some months before the official deadline, namely on July 1, 1968. During this first decade, strenuous efforts were necessary internally to gradually abolish customs duties and charges having an equivalent effect on imports and exports between Member States and externally to adopt a common customs tariff in a time during which multilateral tariff reduction negotiations were held within the GATT. The basis on which these efforts were carried out was provided by a set of legal provisions enshrined in the Rome Treaty. The legal framework, established by the Rome Treaty, is founded on a set of objectives and principles, the fundamental freedoms concerning the free movement of goods (including agricultural goods), the free movement of persons, services and capital, and further policies including rules on competition, tax provisions, the approximation of laws, a common commercial policy as well as the contours of a social policy. Finally, a set of provisions establishing and governing the main institutions, the Assembly, the Council, the High Authority (from 1965 onwards ‘Commission’) and the Court of Justice complement the Treaty’s coherent structure.

The Rome Treaty’s framework is peculiar since, in its conceptual idea, it marked a significant rupture with the legal instruments and tools found in the wider international context, which in the following years contributed to its unique dynamic development. Distinctive elements underlying this rupture include particularly its scope, namely the complete coverage of the Treaty of the free movement of not only goods, but also persons, services and capital, the inclusion of competition law and state aid, the creation of a set of supranational bodies, such as especially the Commission as the guardian of the Treaty and the European Court of Justice as its authentic interpreter. Most importantly, the Treaty also gave any natural and legal person locus standi before the Court. On the other hand, the GATT 1947 was deprived of nearly all of them. These conceptual differences between the EEC and the GATT 1947 order are of great significance also for the treatment of culture, and the cultural industries in particular. As a matter of fact, the literal differences in each provision were minor as compared to the systemic dimension that they were placed in. For instance, at that time, the only direct reference to culture in the EEC Treaty was found in Article 36, which reflected by and large

1477 See especially the Preamble and Articles 2 and 3 Rome Treaty.
1478 Article 8 Rome Treaty.
1479 Regulation (EEC) No 950/68, supra note 1460.
1480 On the various points on the agenda, see EC Bulletin 1-1958. See also Development of an overall approach to trade in view of the coming multilateral negotiations in GATT, EC Bulletin Supp. 2/73.
1481 Cf. Article 9 Merger Treaty, supra note 1408.
1482 Article 173 Rome Treaty.
the language of the GATT 1947. Having stated this analogy, it will be interesting to see to what extent the application of a similar, or almost identical, provision differs in accordance with its systemic position in the entire framework. In broader terms, it will be interesting to see what kind of regulatory dynamics can be derived from the relation between culture and trade in commensurable integration schemes. For this purpose and greater clarity about the various evolutionary steps, it is more appropriate to shortly trace back the beginnings of European integration to the origins in the Rome Treaty, without the subsequent amendments made to it. This retrospective view is a precondition for the visibility of the dynamic process that the original framework was capable of setting free.

Indeed, in the years upon the establishment of the EEC, without doubt, the principal elements laid down in the Treaty paved the way for the rapid institutionalisation of the subsequent dynamic process underlying European integration and the emergence of a truly new legal order. As a matter of fact already the first decade of the history of the EEC contributed greatly to the elaboration of the principal foundations of Community law, such as the doctrine of direct effect formulated by the ECJ inter alia in the cases *Van Gend en Loos* and *Costa v. ENEL*.\(^\text{1483}\) Step-by-step and case-by-case, the web of Community law was being woven.

**§ 13.1.2. Free Movement of Goods**

13.1.2.1. Customs Union and Common Customs Tariff

For the creation of a common market, Title I on the free movement of goods departs from the goal of establishing a customs union and the adoption of a Common Customs Tariff (CCT) (Ch. 1 Art. 9-29) within a transitional period of twelve years. The central provision is Article 9:

> The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having an equivalent effect, and the adoption of a common customs tariff in their relation with third countries.

The language of Article 9 is of great interest for the cultural industries, since it leaves no doubt as to the general scope the Treaty and of goods in particular. In concrete terms, this means that *all* goods are covered, whether they are of cultural nature or not. As to the actual scope of the Treaty, the Court clarified in the Case *Commission v. Italy*, proceedings concerning an Italian tax levied on national treasures possessing artistic or historic value, as follows:

> By goods, within the meaning of Article 9 of the EEC Treaty, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions. The rules of the common market apply to articles possessing artistic or historic value subject only to the exceptions provided by the Treaty.\(^\text{1484}\)

In this quote the Court restated the rupture with the antiquated perception of a category of *res extra commercium, i.e.* a category of goods which cannot be subject to commercial transactions. As a consequence, special categories of goods bearing for instance cultural characteristics may only be accorded distinct treatment, or be exempted, where the Treaty provides so. The existence and scope of such exemptions will be discussed in the next subsection.

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The creation of the customs union required the progressive abolition of customs duties and equivalent charges between Member States. The Treaty also listed a so-called stand-still clause, which prohibited the introduction of new customs duties. As a particularity of a customs union, it is necessary to add the fact that – as opposed to a mere free trade area – even products originating from a country outside the Community may circulate freely.\(^\text{1485}\) The setting up of a customs tariff, on the other hand, required the computation of the arithmetical average of the duties applied in the (then) four customs territories of the Community. With regard to the general Treaty dynamics, the complementarity of the provisions on the customs union with those in the chapter on tax provisions (Articles 95-99) deserve to be mentioned.\(^\text{1486}\) A similar relationship can be said to govern the provisions on the setting up of the CCT and the chapter on a Common Commercial Policy (CCP) (Articles 110-116).

13.1.2.2. Non-Discrimination and the Elimination of Quantitative Restrictions

The second set of provisions in the Title on the free movement of goods concerns the elimination of quantitative restrictions between Member States (Ch. 2 Article 30-37). In this context, Article 30 Rome Treaty is the central provision, which stipulated that

Quantitative Restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

The prohibition of measures having an equivalent effect is a logic necessity in the process of establishing a common market, free from discrimination between so-called “domestic” and “foreign goods”, or, more precisely, goods imported from other Member States. The concept of measures having equivalent effect is therefore an important extension of the principle of non-discrimination (or national treatment).\(^\text{1487}\) As such Article 30 is a powerful tool, since if interpreted extensively, Article 30 would have the effect that ultimately all regulatory disparities between Member States part of the common market that are capable of hindering intra-community trade must be removed.\(^\text{1488}\) As a matter of fact it has been observed that “in a common market the range of state measures liable to affect inter-state trade is virtually unlimited.\(^\text{1489}\) In extremis, this would mean that by removing any barriers to trade at, and harmonising the laws beyond the border of a Member State, its domestic industry is exposed to the unrestricted competition of goods deriving from all other Member States. Such unfettered competition, deprived of any protectionist legislative or regulatory tools, it is feared, could bring as a possible consequence a threat to the existence or establishment of an equivalent viable domestic industry. Ultimately, the total harmonisation of the laws of the Member States would also deprive the economic theory of comparative advantage of its basic foundation which ultimately rests in the cultural diversity of the trading partners.\(^\text{1490}\) On the other hand, without the (at least selective) removal of such disparities between the various national provisions through the

1485 Article 10 Rome Treaty.
1486 On the relation between Articles 9-17 and 95-99, see Craig & de Búrca, supra note 1396 at 562-582.
approximation of laws, not only the economic and welfare effects resulting from a common market caused by its continuing partition and the resulting distortion of trade and competition would be put at risk, but also the entirety of objectives underlying the Treaty itself. This is however, only a limited presentation of the free movement of goods, which reflects only a minor part of the general dynamics that the Treaty’s functional approach was meant to set free.

This natural tension between free competition and protection, or between harmonisation and disparity, is in line with the broader principles governing the trade and culture debate. The precise nature of the relation between culture and trade in the context of goods only depends largely on the degree of cultural values attached to goods. Framed in other words, the question is whether the reading of a book, or listening to a record originating in another Member State bears different cultural consequences as the riding of a car, or the wearing of a pullover. The Court clarified that no matter what the goods concerned are, as soon as they are capable of being the subject of commercial transactions, they fall within the scope of the Treaty, except for where the Treaty provides exceptions. What clearly results from the Courts interpretation is that, based on the literal interpretation, there is a need for a systemic interpretation considering the wider context of the provisions on the free movement of goods. In addition to this hermeneutic sensitivity, there is a need for a careful consideration of the respective wider regulatory context in which it is applied. As a matter of fact, in the past 50 years, Article 30 has been used in accordance with the wider context in order to balance between discrimination and harmonisation in the wider process of integration through measures of both widening and deepening as well as of positive and negative nature.

Going back to the early days of European integration, a first delimitation of the provisions on the free movement of goods is found in the exceptions contained in Article 36. This article lays down the following grounds for a deviation from the prohibition on quantitative restrictions:

The provisions of Article 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or a disguised restriction on trade between Member States.

The wording of Article 36 strongly resembles Article XX GATT by which it was inspired. Nonetheless, given the different context of the Community, characterised by farther-reaching objectives beyond the mere reduction of customs tariffs, and implementation of the NT and MFN principles, the scope of the Community exception appears narrower than the already narrow

1491 This inherent risk seems to have been recognised at a later stage, once the internal market was completed, not only by the Court new approach formulated in Keck, but also a general shift from harmonisation towards greater differentiation and regulatory diversity; see e.g. N. Reich, “Competition between legal order: A new paradigm of EC law?” (1992) 29 C.M.I.L.R. 861 [hereinafter “A new paradigm of EC law?”], de Witte & Hart & Vos, supra note 69 and P. Beaumont & C. Lyons & N. Walker, eds., Convergence and Divergence in European Public Law (Oxford: Portland Oregon, 2002).

1492 See also P.-Ch. Müller-Graff, “Vorbemerkung zu den Artikeln 30 bis 37” in H. Groeben & J. Thiesing & C.-D. Ehlermann, eds., Kommentar zum EU-/EG-Vertrag, vol. 5th ed. (Baden-Baden: Nomos, 1999) 621 at 623 [hereinafter “Vorbemerkung Art. 30-37”], mentioning among the objectives of the provisions on freedom of goods not only positive welfare effects but also positive effects for peace and society through the possibility of autonomous contacts among private individuals and the mutual obligation of Member States to make these contacts possible.

1493 For an overview of the application of Art. 30, see e.g. M. Poiarese Maduro, We The Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty (Oxford: Hart, 1998) mainly at 35-60 [hereinafter We The Court]; see also “Epilogue”, supra note 1471.
exception in the GATT. 1494 Like Article XX GATT, the text of Art. 36 gives rise to several speculations about its utility for cultural concerns. In particular proximity to the realm of culture is given in the concepts “public morality” and “public policy” as well as “national treasures possessing artistic, historic and archaeological value” and the “protection of industrial and commercial property”.

Before evaluating the relevance of each single concept the introductory phrase must be more closely analysed. To begin with, Article 36, unlike the chapeau in Art. XX GATT, does not speak of a mere exception (“nothing shall be construed”), but instead adds a higher standard by the need for a justification on the diverse grounds mentioned. 1495 In addition, the Court in the Commission v. Italy Case concerning national treasures clarified the interpretative scope of Art. 36 by saying that

Because such measures constitute an exception to the fundamental principle of the elimination of all obstacles to the free movement of goods between Member States, they must be strictly construed. 1496

The Court’s ruling has been criticised for that it missed a great opportunity to define more closely the scope of the exception. 1497 Nonetheless, there exist many reasons, why the Court should refrain from doing so. The first reason is found in the concept of “national treasures”, which evokes different associations in the different languages of the Member States. Based on these differences it is hard to introduce Community wide criteria delimiting the scope of the concept, as to age, type, origin and so on. Ultimately, a fragmentation of the market for cultural property would deprive the Community of the possibility to foster mutual understanding of the Member States’ different civilisations and cultures. Most of all, it would be confronted with several contradictory claims, such as that Leonardo da Vinci’s Mona Lisa be considered a French trésor national and Beethoven’s Ode of Joy in the 9th Symphony an Austrian Kulturgut, the latter being chosen as the European Community’s anthem in 1986. This last example shows that for millennia cultural works in Europe have always in one way or the other benefited from or were inspired by influences other than the respective nation state in which they were produced. Finally, it would have also contradicted the spirit and letter of the Council of Europe’s European Cultural Convention, signed in 1954 by all the then six EEC Member States. 1498 In this sense, economic reasons equally support cultural reasons for an abandonment of a purely territorial conception of culture and its replacement by a wider framework of the common market. 1499

A similar reasoning applies to the concepts of “public morality” and “public policy” which, unlike in the GATT context, appear antagonistic considering the basic objectives of the Treaty, especially expressed in the determination to lay the foundations for an ever closer union. 1500 This might also

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1494 On the interpretation of Article XX GATT, see supra Subsection 6.4.1.2.C.
1495 Ibid.
1496 Case 7-68, supra note 1484 at para. 4.
1497 See McMahon, supra note 1473 at 123.
1498 Council of Europe, European Cultural Convention, supra note 1427. See especially Articles 1 and 4, stipulating respectively that “Each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe” and “Each Contracting Party shall, insofar as may be possible, facilitate the movement and exchange of persons as well as of objects of cultural value so that Articles 2 and 3 may be implemented”.
1500 See also supra note 1534.
explain why Member States have been relatively reluctant to invoke these concepts as a justification for impediments to trade.  

Economic reasons are at the forefront of a similar reasoning with regard to the concept of “industrial and commercial property”. Reinforced by the obligation of the Community to leave the rules in Member States governing the system of ownership untouched, Article 36 creates a strong tension with the goal of the removal of the initial partition of the Community common market. In an early case, the ECJ bypassed the limitation imposed by Articles 36 and 222 EEC Treaty, by distinguishing the existence, which refers to the right in itself, and the exercise of intellectual property rights. In the *Park Davis* case, the Court pointed out this tension between Article 36 and the general links that exist between intellectual property rights, the rules on competition and the provisions on free movement of goods, as follows:

> The national rules relating to the protection of industrial property have not yet been unified within the Community. In the absence of such unification, the national character of the protection of industrial property and the variations between the different legislative systems on this subject are capable of creating obstacles both to the free movement of the patented products and to competition within the common market.

There exists thus a clear link of complementarity between the provisions on the free movement of goods and competition law united under the general obligation of Member States to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (Article 5). It is clear that in the attainment of the objective of a common market, as mentioned in the quoted paragraph, the Court saw a great need for the unification in the area of intellectual property rights as a whole. In this context it is important to note that the Court in the case *Deutsche Grammophon* recognised that the provisions of Article 36 are applicable to a right related to copyright as much as to industrial and commercial property. Nonetheless, concerning Article 36, the Court stated:

> It is clear from Article 36 that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Article 36 only admits derogations from the free movement of products in order to protect industrial and commercial property.


1503 On the concept “industrial and commercial property” and its relation to the concept “intellectual property”, see B. Harris, “The Application of Article 36 to Intellectual Property” (1976) 1 *E.L.R.* 515 et seq.


1506 On the later evolution, see also M. Bonofacio, *The Information Society and the Harmonisation of Copyright and Related Rights: (Over)Stretching the Legal Basis of Article 95 (100a)?* (1999) 26 *L.L.E.L.* 1.

1507 See M. Neuwirth, *supra* note 1464.

1508 On the evolution, see also M. Bonofacio, *The Information Society and the Harmonisation of Copyright and Related Rights: (Over)Stretching the Legal Basis of Article 95 (100a)?* (1999) 26 *L.L.E.L.* 1.


1512 On the concept “industrial and commercial property” and its relation to the concept “intellectual property”, see B. Harris, “The Application of Article 36 to Intellectual Property” (1976) 1 *E.L.R.* 515 et seq.


1514 On the later evolution, see also M. Bonofacio, *The Information Society and the Harmonisation of Copyright and Related Rights: (Over)Stretching the Legal Basis of Article 95 (100a)?* (1999) 26 *L.L.E.L.* 1.

to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific matter of such property.\footnote{1509}

This case is interesting because it treated the field of sound recordings, thus an important sector of the cultural industries. However, no cultural aspects were discussed, but instead the danger of a partition of the common market was recognised. This danger was described in the following wording:

It is in conflict with the rules providing for the free movement of products within the common market for the holder of a legally recognized exclusive right of distribution to prohibit the sale on the national territory of products placed by him or with his consent on the market of another Member State on the ground that such distribution did not occur within the national territory. Such a prohibition, which could legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.\footnote{1510}

This statement, taken from a case concerning sound recordings, can be taken as exemplary for the main tendencies vis-à-vis all, including cultural, goods during the first period of integration. Although intellectual property rights, and particular the subcategory of copyrights, provide an important source of income for creators and artists and therefore provide the main economic basis for the creation of cultural works, it seemed too early for the Commission to consider the wider effects of economic integration on cultural goods and services. Instead, the main emphasis was on the establishment of a common market. In the pursuit of this goal, it was first necessary to remove the principal obstacles and, from a legal point of view, to find complementarity in the interaction between the different treaty provisions.

\textit{§§ 13.1.3. Free Movement of Persons, Services and Capital}

The next set of provisions which must be regarded as complementary to the provisions on the free movement of goods is found under Title III, entitled “Free movement of persons, services and capital” (Art. 48-73). As it was said that the free movement of goods pursues not only the goals of positive welfare effects through greater competition, but also for peace and society, this applies even more so to the realm of the free movement of persons and services.\footnote{1511} More than trade in goods, especially the free movement of persons allows for a replacement of the purely territorial conception by a more personal, \textit{i.e.} human conception, of both trade and commerce. The free movement of persons rests therefore not only on one aspect, which is found in the liberalisation of the labour market in order to increase the Community’s labour force, but also in the fostering of mutual understanding between the peoples of Europe. Even more so, it has been described as early as in 1968 as the embryonic form of a European citizenship, which became a reality with the amendments introduced in 1992 by the Treaty of Maastricht.\footnote{1512} Nonetheless, in terms of trade, the free movement of persons, services, and capital follows a clear logic. Trade in goods, particularly technology prone products, may need maintenance once they have been sold and crossed the border. Maintenance works are usually necessary for a longer time period, depending on the service life of the product. The provision of services is usually linked to the crossing of borders by persons,
such as the service or business staff. From the initial provision of a service, a company may well decide for this purpose to establish a permanent branch in the country of destination. In this process, of course, the cross-border transfer of capital marks a necessary corollary.

13.1.3.1. Free Movement of Workers

Listed among the objectives in Article 3, the free movement of persons forms one of the fundamental objectives of European integration. Although initially designed to cover the free movement of workers only, later developments, led to a gradual extension of a free movement of workers to all persons in form of the broader legal status under citizenship. Already indicated in the prohibition of discrimination on ground of nationality, this gradual development is already traced out in Article 48 itself:

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

After fleshing out the necessity to abolish any form of discrimination based on nationality and certain limitations, paragraph 3 extends the right of free movement from actual employment to the free movement within the territory of Member States for the purpose of and to stay there as well as to remain in that state once the employment has been terminated. Article 49, obligates the Council to issue directive or make regulations setting out the relevant measures required to bring about, by progressive stages, freedom of movement for workers. In the late 1960s, the Council followed this call in a series of regulations.

The wide implications of the provisions on free movement of workers go beyond the scope of this essay. In this context it suffices to point out the dynamic forces, which go beyond the mere economic sphere, which the free movement of persons was meant to set free. By including the human dimension in the concept of economic integration, the Treaty prepares the basis for a broader political and social dimension of European integration. The social, and even cultural

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1513 Cf. for this purpose Ch. 16 NAFTA, “Temporary Entry for Business Persons”, which can be compared to an embryonic form of free movement of persons.

1514 See Craig & de Búrca, supra note 1396 at 653-712.

dimension, is reflected in the provisions on Social Policy in Title III, which inter alia concern the working and living conditions of workers and particularly contain a reference to education through the inclusion of basic and advanced vocational training plus the establishment of a European Social Fund.\textsuperscript{1516} There is no doubt that the free movement of persons not only generally bears a strong cultural dimension but also, in particular, has wide implications for the cultural sector.\textsuperscript{1517}

13.1.3.2. Right of Establishment and the Free Movement of Services and Capital

In between the extreme poles of trade contained in the provisions on the free movement of goods and persons, the Rome Treaty places the right of establishment (Art. 52-58) and the free movement of services (Art. 59-66), followed by the free movement of capital (Art. 67-73). For the right of establishment the treaty aims at the progressive abolishment of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Most important for the cultural industries is the second paragraph in Art. 52 which states:

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

The provisions on the freedom of establishment thus complement those stipulating the freedom of workers as well as of self-employed natural persons and legal persons, in particular companies and firms. The freedom of establishment in turn is complemented by the freedom to provide services, contained in Article 59, and defined in Article 60 as follows:

Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

“Services” shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the state where the service is provided, under the same conditions as are imposed by that State on its own nationals.

In both these realms too, the first steps concerned the removal of all national restrictions impeding the establishment of a common market. Such restrictions were in place also in various cultural sectors. Based on the general programmes for the abolition of restrictions on freedom to provide services and on freedom of establishment,\textsuperscript{1518} the Council adopted a series of directives concerning the film sector.\textsuperscript{1519} These directives show the initial difficulties in establishing the common market,

\begin{footnotesize}
\textsuperscript{1517} On the various cultural aspects of the free movement of persons and of establishment, see also Schmahl, supra note 1450 at 88-93 and Loman et al., supra note 1501 at 50-66.
\end{footnotesize}
sector-by-sector and step-by-step. The first Directive concerned services and undertook the difficult attempt to define criteria for the nationality of a film and stipulated that films having the “nationality” of one of the Community’s Member States shall be allowed to circulate freely for the purposes of distribution and commercial exploitation among all Member States.\footnote{1520} In the following directive, Member States were obliged to abolish certain restrictions in respect of the natural persons and companies or firms engaged in the films industry.\footnote{1521} This obligation comprised of restrictions in particular relating to

(a) the opening of cinemas specialising exclusively in the exhibition of foreign films in the language of their country of origin, with or without subtitles;

(b) import quotas and screen quotas;

(c) the dubbing of films.\footnote{1522}

The Directive also confronts the possibility that conditions of establishment become distorted by direct or indirect aids granted by the Member State of origin.\footnote{1523} Most of all, it abolishes screen and import quotas for films originating in the Community and former national requirements according to which the dubbing of films must take place in the importing country by December 31, 1966 at the latest.\footnote{1524}

With regard to the freedom of establishment and to provide services, the 1968 and 1970 Directives abolish, in respect of the natural persons and companies or firms, numerous restrictions affecting the right to take up and pursue their activities in the film sector.\footnote{1525} Next to general guidelines in its application, the Directive obliges Member States to abolish the following restrictions:

(a) those which prevent beneficiaries from establishing themselves or providing services in the host country under the same conditions and with the same rights as nationals of that country;

(b) those existing by reason of administrative practices which result in treatment being applied to beneficiaries that is discriminatory by comparison with that applied to nationals.\footnote{1526}

The scope of these restrictions is extended and further clarified in the 1970 Directive.\footnote{1527} The Directive 67/43, on the other hand, also extends the freedom of establishment and to provide services for artistic and literary activities.\footnote{1528}

As invited by this example, the sectoral advancement in the establishment of the common market may not deceive about the complex nature of the endeavour. Moreover, especially the sectoral division between goods and services but also between different sectors does not correspond to the
mutual synergies that govern the various subsectors of the cultural industries. Nonetheless, the treaty structure follows a strict logic in the mutual entwinement of the various provisions it contains. This phenomenon surfaced in the Sacchi Case, which raised several important issues. A first such important issue, also for later controversies within the GATT framework, concerned the distinction between goods and services. The Court reasoned as follows:

Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to the free movement of goods, such is however the case, as appears from Article 60, only insofar as they are governed by such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. On the other hand, trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods.

This classification is of utmost importance for the legal treatment of the various sectors combined under the concept of cultural industries. Nonetheless, the case also raised important questions other than the relation between goods and services, namely particularly as regards the interaction between the rules on freedom of services and the rules on competition, including the treatment of public undertakings. Important for later developments, the case also touched upon the dual character inherent in television as a sector of the cultural industries, as contained in the Italian and the German Governments suggestions that

Since television undertakings fulfil a task which concerns the public and is of a cultural and informative nature, they are not ‘undertaking’ within the meaning of the provisions of the Treaty. At least (it is argued) they are entrusted with a service of general economic interest so that they are subject to the rules contained in the Treaty and in particular to the rules on competition only insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them.

The Court, however, did not enter this debate, but merely states that the Treaty does not prevent Member States from removing radio and television transmission from the field of competition by conferring one or more establishments an exclusive right to conduct them but they nonetheless remain subject to the Treaty’s prohibitions against discrimination.

§§ 13.1.4. Résumé of the First Stage and the Transition towards the Second Stage

The first two decades following the entry into force of the Rome Treaty feature no direct reference to the cultural industries. They do not even seem to consider explicitly the wider cultural implications of economic integration. In accordance with the institutional division of labour between the Council of Europe and the European Economic Community, no direct need was felt to consider culture and trade together. Although in the course of the operation of the EEC the field of cultural property and occasionally some of the cultural industries’ specific subsectors, such as film, television and sound recordings, featured in Community legislative acts or the Courts rulings, reference to them however was strictly limited to their economic nature as stipulated by the Treaty’s provisions. In this respect, one major achievement of the first two decades can be summed up by the principal clarification of the Court that the Treaty applies to all goods and services, which can be subject to commercial transactions. This inclusive approach is a clear rejection of the ancient view of the existence of res

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1530 Ibid. at para. 6 and 7.
1531 Ibid. at para. 13.
1532 Ibid. at para. 14.
extra commercium. In this context it can be said that the, already only marginal, scope of Article 36 has served, on the one hand, as a reassurance for Member States in light of their loss of sovereignty and, on the other hand, as a basis for dialectic reasoning than a way to exclude specific fields from the Treaty’s scope.

The transitional period of the first twelve years was therefore clearly controlled by the removal of various obstacles, mainly in the form of Member States legislative and administrative restrictions, that are capable of impeding the establishment of a common market. Indeed, of such obstacles, there exist a great many of them. This process of negative integration is pushed forward alternatively by the Commission, the Council and the Court of Justice. Nonetheless, despite the wide absence of a cultural dimension in European integration, the principles and objectives laid down in the Treaty, plus its provisions on the fundamental freedoms combined with various complementary provisions, such as notably the rules on competition and the approximation of laws including the residual powers clause, vest the Treaty with a special structure which is capable of bringing about the progressive and evolutionary transformation not only of the States members of the Community, but also the Community as a whole. Such transformation is based on the removal of various national and territorial restrictions, especially to the successful exercise of the four freedoms, and their subsequent replacement, in order to close the regulatory gap, by a common, i.e. Community policy.\textsuperscript{1533}

At no point during these early years of European integration, the broader objectives enshrined in the letter and the spirit of the Treaty have been left aside. Already at the end of the transitional period for the establishment of the common market, the Community envisaged enlargement, the creation of a political union and an economic and monetary union. In this sense, at the The Hague Summit in 1969, the Heads of Governments expressed their conviction that

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a Europe composed of States, which, in spite of their different national characteristics, are united in their essential interests, assured of its internal cohesion, loyal to its friendly relations with outside countries, conscious of the role it has to play in promoting the relaxation of international tension and rapprochement among all peoples and, first and foremost, among those of the entire European continent, is indispensable for preserving an exceptional seat of development, of progress and culture, for world equilibrium and for peace.\textsuperscript{1534}
\end{flushright}
\end{displayquote}

The points of this agenda were reiterated and further concretised at the 1972 Paris Summit, the first conference after the Community’s enlargement by the United Kingdom, Ireland and Denmark.\textsuperscript{1535} One year afterwards, at the Copenhagen Summit Conference, the Member States of the Community also adopted a fundamental declaration defining European identity in both its internal dimension but also vis-à-vis the rest of the world.\textsuperscript{1536} The then nine Member States of the Community outlined the fundamental elements of European identity as wishing to

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ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights.\textsuperscript{1537}
\end{flushright}
\end{displayquote}

\textsuperscript{1533} See “Cultural Policy: Complementarity”, supra note 1450 at 200.

\textsuperscript{1534} EC Bulletin 1-1970 at 12.

\textsuperscript{1535} Cf. EC Bulletin 10-1972 mainly at 14-26.

\textsuperscript{1536} EC General Report 7-1974 at 492.

\textsuperscript{1537} Ibid.
At the same time, further efforts towards the establishment of economic and monetary union, including institutional aspects, were undertaken. To sum up, the end of the first period thus already anticipated greater aspirations during the following stage not only with regard to political but also economic integration, with both having wider implications for the cultural dimension of the Community.

1538 See e.g. Communication from the Commission to the Council on the progress achieved in the first stage of economic and monetary union, on the allocation of powers and responsibilities among the Community institutions and the Member States essential to the proper functioning of economic and monetary union, and on the measures to be taken in the second stage of economic and monetary union, EC Bulletin Supp. 5/73; see also A. Britton & D. Mayes, “The Road to Monetary Union” in R.T. Griffiths, ed., The Economic Development of the EEC (Cheltenham: Elgar, 1997) 567.

§§ 13.2.1. From Mercatus Communis to Sensus Communitatis: Strengthening the Web of Community Law

In the second period of European integration, the European Communities reinforced their role as the original nucleus from which European unity sprang and developed further.\footnote{Cf. EC Bulletin 1-1970 at 12.} Each single action taken and each single case decided contributed to the fortification of the web of Community law. The closer the meshes of the web were drawn and the more the common market took shape, the greater was also the mutual rapprochement between the respective spheres of culture and trade. This rapprochement first took place through the harmonising effect the application of the fundamental freedoms had on the apparent disparities in national laws. With the gradual advent of the cultural industries awareness rose about the positive impact that radio and television broadcasts may have, not only in the creation of a common market, but, most of all, on the development of a common sense, or what could be called a “Sensus Communitatis”, among the citizens of Europe.\footnote{Cf. Communication from the Commission to the Council and Parliament, Stronger Community action in the cultural sector, EC Bulletin Supp. 6/82 at 12 (“Widening the audience”).} The new technological possibilities in the transmission of sound and images across borders corresponded to the basic ideas underlying the establishment of a common market. Nonetheless, these new technological innovations were capable of having an impact on the national customs and cultures comparable to the one of the removal of various barriers to trade and establishment of the free movement of persons. In addition to this twofold challenge, the consolidation of the Community also brought about new possibilities but also responsibilities at global level. The responsibilities arose especially in the promotion of international trade, as laid down as an exclusive Community competence in the rules on Common Commercial Policy.\footnote{See e.g. EC Bulletin 10-1972 at 16, about the role of the Community in the GATT and IMF procedures.}

Altogether, during these decades the scope and complexity of European affairs steadily increased. The increasing complexity became visible in an increasing overlap between measures of negative and positive integration. In the beginning the complementarity in this process appeared in linear and subsequent steps. Gradually, the former linear process became replaced by a frequent alternation of several mutually entwined and simultaneous processes of negative and positive integration. Moreover, during this period, the Community also widened its scope with the adhesion of three new Members (Greece, Spain and Portugal). Finally, towards the end of this period, the drastic changes in the regulatory environment and the increasing fuzziness in the governance of European affairs called for new legal responses at Community level.

§§ 13.2.2. From the Common Market to the Internal Market

13.2.2.1. Prelude: Juggling Culture and Trade: “Community action in the cultural sector”

The beginning of the mid-1970s saw a continuation of the process launched by the Rome Treaty. In the absence of an explicit legal competence in the cultural field, positive cultural action was rare, and if it occurred, it was either based on the residual powers clause of Article 235,\footnote{See e.g. Commission Report on the Establishment of a European Foundation, EC Bulletin Supp. 5/77 at 19; see the Agreement in EC Bulletin 3-1982 pt. 1.2.1.} or on intergovernmental cooperation outside the Community, such as the establishment of the European
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University Institute in Florence, entrusted *inter alia* with the “development of the cultural and scientific heritage of Europe, as a whole and in its constituent parts.” 1543 As before, positive cultural action in a strict sense, it appeared, was originally left to the Council of Europe, even in the sphere of audiovisual policy. 1544 In 1977, through a Communication, entitled “Community action in the cultural sector”, the Commission made it clear that it strictly distinguished between “culture” and the “cultural sector”, the latter being defined as

the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services.1545

Accordingly, the Communication focused especially on the free movement of trade in, and thefts1546 of, cultural goods, the free movement and establishment for cultural workers and their vocational training, plus the harmonisation of taxation and intellectual property rights.1547 The Communication, which reads like a homage to Walter Benjamin, also refers to the economic consequences of technological progress for artists, especially the dangers caused by a boom in audio and visual reproduction equipment and in the use of the photocopier.1548 As a remedy to the real economic losses for authors through duplication, the Commission proposes the introduction of a public lending right for authors and publishers, subsidies to play writers and composers, and resale rights for artists in the plastic arts.1549 Other actions proposed concerned the Community’s contribution to the preservation of the architectural heritage, towards the development of cultural exchanges, cooperation between the cultural institutes of the Member States and the promotion of socio-cultural activities at European level.1550 Five years later, the same approach to the cultural sector prevailed in the Communication entitled “Stronger action in the cultural sector”.1551 Gaston E. Thorn, the President of the Commission, has laid out the consequences of this approach in the Communication by saying that

Our Communications clearly shows that to serve culture there is no need for the Community to encroach on the responsibilities of governments or of other international organizations. Without ruffling any feelings, it simply has to keep firmly within the bounds of competence assigned to it, which are already wide enough.

One expression seems to me to epitomize the spirit in which we compiled this paper: instead of speaking about ‘artists’ we speak about ‘cultural workers’. This is intended to show that the Community is concerned with creators (writers, composers, painters…) and performers (actors, musicians, singers and dancers…) seen in terms of their social situation as employees or self-employed people and not of their artistic personality which is their business and theirs alone.1552

1543 See Art. 2 of the Convention setting up a European University Institute, [1976] O.J. C 29/1 (February 9, 1960).
1545 Commission Communication to the Council, Community action in the cultural sector, EC Bulletin Supp. 6/77 at 5, pt. 3.
This is an important distinction since it means that Community action in the cultural sector does not constitute a cultural policy, which is why criticism of Community action cannot be simply equaled with an encroachment in the sphere of culture.\textsuperscript{1553} Any contention to the contrary would mean a “recidivism” in the stereotype contention of the “creative but poor artists”, deprived of any economic basis. The assumption that artists are in no need of economic resources belongs to the myth of ancient fairy tales, one of the most expressions of which is given in Stefan Zweig’s introduction to \textit{Decisive Moments in History}.\textsuperscript{1554} Nonetheless, it is clear that a change in the economic basis of creators and artists will also have an impact on the way their cultural products are made but does not equal an intrusion into the substance and quality of their work. This fine-tuned distinction is of great importance because it helps to protect the realm of culture from undesirable, both economic or political, intrusions by governmental authorities. Such intrusion may take the form of a \textit{dirigisme artistique} or an even abusive stance in the form of selective propaganda supporting artists whose works support the government while denouncing works opposed to governmental interests, for instance, as “\textit{entartete Kunst}” (degenerated art).\textsuperscript{1555} Weaker forms of the abuse of governmental cultural policy if not based on predominantly economic term may take the form of favouritism within a limited circle of artists.

The 1982 Communication continued the action plan of the 1977 Communication and addressed, first of all, the free movement of trade in cultural goods. By “cultural goods”, the Communication speaks, first and foremost, of national treasures possessing artistic, historic and archaeological value”. In this context, the Commission points out the complementary link between the rules on free movement of goods and of persons by remarking that

\begin{quote}
Cultural workers will be among the first to benefit from freedom of trade in works of art and cultural goods in general. Artists in the plastic arts will be able to exhibit their works in Community countries other than their own with a minimum of formalities and at very little expenses. Actors, musicians and film directors will enjoy the same advantages when they travel with their scenery, instruments, or equipment. The aim is to solve what is both a practical and a psychological problem: in practical terms, formalities still required at internal Community frontiers are time-consuming and expensive and the deposits which must still be paid can often be substantial; psychologically, cultural workers and organizers of cultural events, including exhibitions, will not fell they are living in a Community until they can move works of art and equipment from one country to another almost as easily and as cheaply as between the two towns in the same country.\textsuperscript{1556}
\end{quote}

For cultural workers, relying on Articles 117-118 Rome Treaty, the Communication addresses their living and working conditions as well as the problem and potential of employment in the cultural sector in general.\textsuperscript{1557} For the advent of the cultural industries, an interesting evolution is found in the discussion of the social, economic and cultural implications of the expansion of the audiovisual media. In this sphere too, the Commission limited itself to the socio-economic implications, in particular to the question “how audiovisual techniques will affect he earnings of creative artists and

\begin{footnotes}
\item[1554] See the quote \textit{supra} note 86.
\item[1557] \textit{Ibid.} at 9-12.
\end{footnotes}
the jobs and incomes of performers”. How to confront the cultural implications, the Commission argued, is a matter for the Member States to decide. For the cinema sector, the Communication notes the decline in cinema-going and the absence of efficient European distribution networks that are capable of coping with the commercial competition from American majors. Finally, the Communication concludes by stating that

There is no pretension to exert a direct influence on culture itself or to launch a European cultural policy; what a stronger Community action in the cultural sector means in effect is linking its four constituents − free trade in cultural goods, improving the living and working conditions of cultural workers, widening the audience and conserving the architectural heritage − more closely to the economic and social roles which the Treaty assigns to the Community, to the resources − mainly legislative − that it provides, and to the various Community policies (vocational training, social and regional policies).

This call for a stronger link between the constituents of the cultural sector is also interesting for the concept of the cultural industries, which combines several sectors across the distinction made between goods and services. In comparison with NAFTA’s definition, the inclusion of the conservation of the architectural heritage in the cultural sector must be outlined.

At this stage, however, there is no explicit mention of the cultural industries yet. A first reference, at least in a secondary Community act, will not occur until 1987. Before, however, it is necessary to mention an important institutional change affecting the Assembly, formally renamed into European Parliament only with the Single European Act in 1986. The important change referred to occurred in 1979, by which the Members of the Assembly became elected by direct universal suffrage. This date marks an important milestone not only in the evolution of European Parliament, of which the institutional power has considerably increased over time, but can also be regarded as a significant step forward in the Community’s consideration of cultural aspects of economic integration. Backed by direct elections, the Parliament was in a better position to raise cultural concerns beyond the socio-economic dimension, since it was backed by the European electorate. Compared to the Commission and the Council, the direct representation of Parliament also provided greater immunity against the smouldering criticism of a democratic deficit as a consequence of the creeping expansion of Community competences. This is an important element in the growing cultural awareness during the second period of European integration. Already in 1974, Parliament sent a cultural sign by adopting a resolution on the protection of European cultural heritage. Later the Parliament also supported the Commission’s Communication on Community action in the cultural sector. In the relevant resolution it reads that the EP is conscious that

1558 Ibid. at 12, pt. 17.
1559 Ibid. at 13, pt. 18.
1560 Ibid. at 14, pt. 24.
1561 Cf. also D. Throsby’s definition, quoted in Fn 213.
1562 In 1962, the Assembly decided to describe itself as European Parliament; see F. Jacobs & R. Corbett, The European Parliament (Padlog: Longman, 1990) at 7. See also Article 3 (1) SEA, supra note 1409.
1563 See supra note 1443.
(a) the culture of our continent, in its richness and diversity, constitutes an essential element of European identity and helps to make a reality of the building of Europe for the citizens of its Member States;
(b) the European cultural heritage must be adequately safeguarded, properly exploited and carefully fostered, and that for these reasons the Community has a duty to undertake Community action in the cultural sector.\footnote{1567}

It is interesting to note en passant the mention of diversity but to highlight particularly the emphasis on citizenship in European integration. The reference to citizenship illustrates that the, perhaps initially only psychological, strengthening of the role of the Parliament points to the rise of a new cultural dimension in European integration. Unlike in the first period, this time, the cultural dimension derived not exclusively from economic and negative integration but showed nascent signs of political and positive integration. The voice of Parliament perfectly joined in the general institutional tenor that was calling for greater political integration transforming the Community into a “European Union”, as especially expressed in the 1976 Tindemans Report.\footnote{1568} Although the Tindemans Report did not make an explicit reference to culture in the various proposals for change, it nonetheless described successfully the wider context and recognised the importance of a positive solidarity governing a political union among the Community Members States, which “must be felt in education and culture, news and communications, it must be manifest in the youth of our countries, and in leisure activities”.\footnote{1569} Equally, the ‘European Act’, launched in the European Parliament in 1981 based on an initiative by the Foreign Ministers of Germany and Italy (‘Genscher-Colombo Plan’) expressed the conviction that

The unification of Europe in freedom and respect for its diversity will enable it to make progress and develop its culture and this contributes to the maintenance of equilibrium in the world and to the preservation of peace.\footnote{1570}

To this end, the European Act proposed to complement the political and economic progress already made by

close cultural cooperation between the Member States in order to promote an awareness of common cultural origins as a facet of European identity, while at the same time drawing on the existing variety of individual traditions and intensifying the mutual exchange of experiences, particularly between young people.\footnote{1571}

During the European Council in Stuttgart on June 19, 1981, the Heads of Governments signed the \textit{Solemn Declaration on European Union}, finally adopted in 1983, which named \textit{inter alia} the objective

to promote to the extent that these activities cannot be carried out within the framework of the Treaties: closer cooperation on cultural matters, in order to affirm the awareness of a common cultural heritage as an element in the European identity.\footnote{1572}

The scope of “closer cooperation on cultural matters” was further clarified as comprising of cooperation in higher education, measures to raise European awareness about Europe’s history and

culture, the safeguard of cultural heritage, a closer coordination of cultural activities in third countries, and the examination of “possibilities of promoting joint activities in the dissemination of culture, in particular as regards audio-visual methods.”

Similarly, the European Parliament contributed to the greater cultural awareness, fostered by the strive for stronger political integration with the presentation of a Draft Treaty Establishing the European Union, which emerged from an initiative by the Italian deputy Altiero Spinelli. Spinelli’s effort was described as

more than a simple revamping of Rome. It outlined a single institutional framework that would encompass all levels of cooperation, as well as making the institutions more efficient and democratically accountable.

In this wider institutional context, the Draft Treaty not only proposed an extension of the Treaty objectives to “scientific progress and the cultural development of its peoples” but also a separate provision on cultural policy, which read:

1. The Union may take measures to:
   - promote cultural and linguistic understanding between the citizens of the Union,
   - publicize the cultural life of the Union both at home and abroad,
   - establish youth exchange programmes.
2. The European University Institute and the European Foundation shall become establishments of the Union.
3. Laws shall lay down rules governing the approximation of the law of copyright and the free movement of cultural works.

The Commission also found strong words in describing the challenge that arose in parallel with the economic agenda linked to the completion of the internal market as proposed in the 1985 White Paper, which concluded that:

Europe stands at the crossroads. We either go ahead – with resolution and determination – or we drop back into mediocrity. We can now either resolve to complete the integration of the economies of Europe; or, through a lack of political will to face the immense problems involved, we can simply allow Europe to develop into no more than a free trade area.

The White Paper was mainly concerned with the removal of diverse barriers of trade (physical, technical and fiscal) listing about 300 measures to be taken. Proposals of a more political kind touching upon the sphere of culture, such as notably Community symbols (flag, passport, car number plates, anthem), however, were found in the Communication entitled “A People’s Europe”, following the relevant deliberations at the European Council Summit in Milan in 1985.

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1573 Ibid. at 28.
1575 Urwin, supra note 1432 at 224.
1576 Articles 9 and 61 of the Draft Treaty Establishing the European Union, supra note 1574 at 48.
1577 Commission of the European Communities, Completing the Internal Market, White Paper from the Commission to the European Council, COM(85) 310 final (June 14, 1985) at 35.
During the first decade of the second period (1975-1985), as exemplified in the foregoing examples, the cultural sphere was affected by two different but mutually intertwined processes. The cultural sector was affected by not only the ongoing process of economic integration through the removal of various barriers in the functioning of the common market, but also by a stronger strive for further economic integration assisted by closer political integration. These two processes continued and forged eventually with the amendment of the Treaties with the entry into force of the Single European Act on 1 July, 1987. Before light can be shed on these developments,\textsuperscript{1579} it is useful to shortly summarise important cases before the Court.

13.2.2.2. Case Law Touching Upon the Sphere of Culture

In the process of tracing the evolution of cultural concerns within the European Community it must be noted that in the years following the completion of the common market, the Court pursued and intensified efforts to abolish restrictions to trade within the Community. The Court progressively expanded the scope of Article 30 from \textit{Dassonville} to \textit{Cassis de Dijon} and beyond.\textsuperscript{1580} Poiares Maduro summarises this development as follows:

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\textit{Cassis de Dijon} dealt with a national regulation that was probably protectionist and discriminatory, but the impulse given to the broad Dassonville statement and the introduction of what came to be known as the principle of mutual recognition among national laws, led to an extension of the range of action of Article 30 that was taken up and developed in following decisions. Such development can be seen in many decisions on national measures applicable without distinction where the objective of the State was not regulate with other States but to regulate the market in the pursuit of public goals other than economic protectionism.\textsuperscript{1581}
\end{quote}

The doctrine of mandatory requirements and the principle of mutual recognition, as supported by the rule of reason, are important balancing mechanisms in the tension between harmonisation of laws and regulatory diversity.\textsuperscript{1582} The same importance may be attached to the act of balancing cultural homogenisation and cultural diversity. The Court, until the decision in \textit{Keck} in 1993,\textsuperscript{1583} repeatedly made use of these mechanisms in a great variety of different factual contexts. In line with this trend and not without consequences for the relational tension between culture and trade, several national preferences or idiosyncrasies became subject to proceedings before the Court. A first set of cases fitting in this category concerned consumer, or literally drinking, habits within Member States. All too often alcoholic beverages, like food in general, seem to be associated with a State’s culture, as found in the stereotypes of the beer-drinking Germans and British compared to the wine-drinking French and Italians, or the whisky drinking Scots.\textsuperscript{1584} Like \textit{Dassonville} itself, the Court was asked at several occasion to examine measures concerning alcoholic beverages, which often reflected interesting cultural habits of the Member States’ respective population.\textsuperscript{1585} These cases range from “\textit{likier}” in Holland,\textsuperscript{1586} the choice between wine or beer in the UK,\textsuperscript{1587} the shape of traditional French
Champagne-type bottles, 1588 and the beer-brewing culture in Germany (and Greece). 1589 The series of cases of the European “menu” before the Court, continued with various foodstuff, such as Italian spaghetti and French cheese. 1590 Another series of cases mirroring national particularities dealt with the opening hours of shops and limitations to employment on Sundays. 1591 Equally, in the context of the freedom to provide services, national lotteries were described as bearing moral, religious or cultural aspects. 1592

Last but not least, cases other than those on eating and drinking habits but touching upon the culture of a Member State involved issues related to the concept of public morality, as reflected in disputes dealing with inflatable dolls and other erotic articles 1593 and, most interestingly for a subsector of the cultural industries, also with restrictions on the importation of pornographic articles, such as obscene films and magazines. 1594

To briefly reconsider these cases in context, they fall within a time period of European integration which, following the establishment of the common market, saw a steady expansion of the scope of Article 30 to a wide array of situations linked to the disparities in Member States’ laws. However, the expansion, as the Sunday Trading Cases showed, was not without limits. Notwithstanding the occasional limitations, the Court’s increased judicial activism has aroused some discontent. 1595 On the other hand, the Court’s increased judicial activism can not only be explained by the spirit and letter of the Rome Treaty but also by the new impetus in European integration deriving from the White Paper on the Completion of the Internal Market, 1596 as well as a regulatory gap deriving from legislative inertia. At the same time, as referred to above, the cultural industries made their first explicit appearance in the Community context, to which we will now turn.

13.2.2.3. The Rise of the Cultural Industries: ‘A fresh boost for Culture in the European Community’

The 1980s, crucial in the emergence of the cultural industries, are characterised by a steady increase in the complexity of European affairs, caused by various coinciding developments. Most importantly, the path of European economic integration proceeded along the line of negative integration, affecting not only various cultural aspects of certain goods but also the entire cultural sector, including notably the free movement of persons. The goal of the achievement of the internal market even intensified the former strive. This development resulted in a general continuing trend of deregulation, which opened up so-called regulatory gaps that consequently had to be filled by new regulatory measures. In addition to these complementary trends, the regulatory environment

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1593 Case 121/85, supra note 1501 at pt. 2.
1594 Case 34/79, supra note 1501.
1596 See supra note 1577.
changed drastically, both inside and outside the Community. Internally, while various sectors were deregulated and the various obstacles in the establishment of an internal market were removed, these sectors were transformed by new technological innovations, even before new regulatory measures could be introduced at the Community level. The new technological innovations coincide with the growing awareness of the synergies between not only cultural and economic forces but also between different categories of cultural goods and services, as they are comprised in the concept of the cultural industries. At the same time, on the external front, new challenges arose on the horizon. The removal of internal barriers to trade created a vacuum which could not be filled immediately by resources stemming from within the Community. In the cultural sector, this provided a great opportunity in particular for American products, which benefited from large global distribution networks, which were absent at Community level. This trend coincided with global trends towards multilateral trade liberalisation, as reflected in the beginning Uruguay Round negotiations, which accounted for new pressure and competition from outside the Community. In brief, the situation presented itself not as a static problem of removal and replacement of various legislative and regulatory measures but, instead, as a dynamic, constantly changing, multi-factor as well as multi-actor game.

In the beginning of a survey over these dynamics, it is useful to present an overview of the Court’s case law regarding this matter, which gives a good introduction to the main problems relating to the cultural industries.

A. Overview of the Case Law in the Cultural Sector

At the same time that the Court dealt with problems pertaining to the broader relation between trade and culture, or the common market and disparities between the laws of the Member States, numerous cases arose that can be qualified as belonging to the narrower sphere of the cultural industries. One such early case touching upon the cultural industries was the Sacchi case, which provided a classification of various sectors of the cultural industries along the goods/services distinction. Other related cases concerned the sphere of copyright, and the problem of the partition of the common market. In the years following the establishment of the common market, three main areas of cases crystallised, namely those relating to the free movement of goods, services and the rules on competition. In terms of sectors, the case law was mainly centred around the audiovisual and the book/printing sector but also involved cases related to the music industry.

To begin with the music industry, its characteristic is that the case law raised fewer questions of a cultural but more of a socio-economic kind in relation with the protection of intellectual property and the rules on free movement of goods. This the Court qualified as follows in the GEMA case:

It should first be emphasised that sound recordings, even if incorporating protected musical works, are products to which the system of free movement of goods provided for by the Treaty applies. It follows that national legislation whose application results in obstructing trade in sound recordings between Member States must be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.1598

1597 See the quote, supra note 1530.
In *GEMA*, the legislation in question concerned an article in the German law on copyright, on which a copyright management society based its objection against the distribution of sound recordings originating in another Member State on the basis of the exclusive exploitation right which it exercises in the name of the copyright owner. This objection had to be examined in light of the possible justification enshrined in Article 36. The Court, referring to its well-established case law, stated that

the proprietor of an industrial or commercial property law of a Member State cannot rely on that law to prevent the importation of a product which has been lawfully marketed in another Member State by the proprietor himself or with his consent.  

In brief, the Court ruled that the disparities between the national legal systems, which continue to exist in the absence of any harmonisation may not be used to impede the free movement of goods in the common market. Another problem linked to the disparities in Member States’ national legislation surfaced in the *EMI Electrola* Case, where the subject was a different period of protection afforded by German and by Danish copyright law. Copyright management companies were also subject to proceedings before the Court in the context of competition law and the abuse of a dominant position. In *GVL v. Commission*, the Court confirmed a Commission Decision declaring the copyright management society’s failure to conclude management agreements with foreign artists where the latter were not resident in the Federal Republic of Germany, or otherwise to manage performers’ rights vested in such artists in Germany, constituted, in so far as such artists possessed the nationality of another Member State or were resident in a Member State, an abuse of a dominant position within the meaning of Article 86 of the Treaty.

A similar case was decided involving a French copyright management society (SACEM). The cases have in common that they reflect the difficulties for artists in the Community of securing the revenues from their creative works. These difficulties have been described as consisting mainly in the fact that per Member State there exists only one such company, and the possibility for representation by such a company in another Member State is precluded by the mutual agreements that are concluded between the management societies.

Turning to the print media and book sector, a first interesting case, which deserves to be mentioned, concerned the supporting industry of the printing sector, namely certain reprographic articles, such as offset printing machines, microfiche scanners, or optical photocopying equipment. Subject of the case was a French finance law which introduced a levy on the use of reprography on sales and appropriations for their own use. The said law did not discriminate between domestic and imported such machines. Nonetheless, in the course of the proceedings it was established that France’s share in the production of such equipment was extremely small as compared to imports (approx. 1%).

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1604 See Loman et al., supra note 1501 at 113 et seq.
The levy, therefore, raised concerns as to both Article 12 (in relation of equipment originating in other Member States) and Article 113 (in relation to the one originating in third countries outside the Community). The interesting feature of the case is that the levy was introduced in order to counter the losses of authors and publishers caused by the widespread use of reprography for the reproduction of printed works, as also stated by the Commission Communication.1607 The said law also introduced a levy on the publication of books payable by publishers on their sales (other than exports). The relevant provisions of the law, it was stated, served the following purpose:

The sums raised by both those levies are entirely allocated to the Centre national des lettres and remitted to a special account called the “fonds national du livre” (National Book Fund). Those levies are added to other resources of the fund – particularly subsidies – which are available to the centre national des lettres which uses them amongst other things to subsidize the publication of quality works and the purchase of both French and foreign books by libraries and the translation of foreign works into French.1608

The Court did not seem insensitive to the problems for the printing sector caused by the introduction new technology and ruled that the said law did not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty.

Two more interesting cases, raising questions about measures having equivalent effect and state aid deserve special attention, since, taken together, they resemble strongly the facts presented before the WTO in the Canada Periodicals Case.1609 In the first case, the Commission brought an action under Article 169 against France for a declaration that

by reserving a preferential postal tariff to French newspapers and periodicals, to the exclusion of similar publications of other Member States which might be posted and distributed in France, the French Republic has failed to fulfil its obligations under Article 30 of the EEC Treaty.1610

The relevant provision was Article D 18 of the French Postal and Telecommunications Code, which granted a preferential ‘press rate’ to newspapers and periodicals provided that they are of general interest in terms of information, education, instruction and entertainment. In Art. D 21 the Code provided that newspapers and periodicals printed abroad, in whole or in part, shall be governed by the tariff applicable to ordinary printed matter. An exception to this rule was granted to French publications printed in another Member State, as long as the chief editor has French nationality or residence as well as to foreign publications posted in France, if the country in question reciprocally grants such preferential treatment to French publications.1611 Before the beginning of the Court proceedings, the French Government in a letter to the Commission argued that Article 30 was inapplicable since “it was furthermore questionable whether that article was at all applicable to products which served as vehicles of political, social and cultural information and hence could not be equated with goods”.1612

This argument, however, was not repeated in the proceedings before the Court but it is interesting to note – in line with past practices – the occasional tendency to deduce from the specificity of cultural
goods and services their total exemption from economic aspects. However, the French Government maintained that the disputed provisions did not constitute an obstacle to the free movement of goods and that the reduced postal rate is quite irrelevant to the reader’s choice.\textsuperscript{1613} The Commission in turn argued that the preferential rate lowers the subscription rate for the publications that benefit from it and is therefore capable of obstructing the distribution in France of publications from other Member States. The Court concluded that the French Code was in violation of Article 30.

Subject in the second case, were certain tax advantages accorded by the French General Tax Code (\textit{Code général des impôts}) to publishers of newspapers or monthly or fortnightly periodicals devoted primarily to political news.\textsuperscript{1614} The same Code accorded certain tax advantages to undertakings publishing either a newspaper or a monthly or fortnightly journal devoted mainly to political affairs. Those advantages consist in the authorization to establish, by means of charge against taxable profits, a tax-free reserve for the purchase of assets needed in order to run the newspaper or to deduct from taxable profits any expenditure incurred for that purpose.\textsuperscript{1615}

In 1980 a change was introduced by the Finance Law, which stipulated that newspaper publishers shall not benefit from these aforementioned advantages in respect of publications which they printed abroad.\textsuperscript{1616} In its defence against the Commission’s consideration that the said rule infringed Article 30, the French Government claimed the non-applicability of the rules on free movement of goods because printing is not a good but a service. More precisely, the French Government argues that the preparation and marketing of a publication consists of three stages, namely the supply of paper, printing and distribution of the printed product, of which only the first and third stage concern goods.\textsuperscript{1617} The French Government also argued that, in the event that the Court should qualify the measure in question as a part of an aid scheme, the measure cannot be dissociated from the aid scheme introduced in favour of the newspaper industry but instead forms an integral part of it.\textsuperscript{1618} Based on the classification in the CCT, the Court observed first that printing work cannot be considered a service, since it leads directly to the manufacture of a good and second that an aid scheme for the newspaper industry has never been notified to the Commission. On those grounds, the Court declared that France had failed to fulfil its obligations arising from Article 30.

Two other cases in the publications sector concerned selective distribution systems for newspapers and periodicals which fell within the sphere of EEC competition law, especially the rules laid down in Article 85 (now Art. 85). In the first case (\textit{Salonia}), the subject-matter was a dispute between the holder of a licence, issued by administrative authorities competent for the retail selling of newspapers and periodicals, and the proprietors of the warehouses distributing these print media.\textsuperscript{1619} The latter refused to supply newspapers and periodicals to the former on the basis of a selective distribution clause laid down in a national agreement concluded between the Italian Federation of Newspaper Publishers (\textit{Federazione Italiana Editori Giornali}) and the United Federation of Trade Unions of

\begin{itemize}
\item \textsuperscript{1613} Case 269/83, \textit{supra} note 65 at pt. 7 and 8; \textit{cf}. the difference between the preferential and the normal tariffs, ranging, according to weight, between respectively 0.194-0.853 FF and 1.70-6.50 FF; Case 269/83, \textit{Opinion of Mr Advocate General Lenz delivered on 22 January 1985}, [1985] E.C.R. 837 at 840.
\item \textsuperscript{1614} Case 18/84, \textit{supra} note 65.
\item \textsuperscript{1615} \textit{Ibid.} at pt. 2.
\item \textsuperscript{1616} \textit{Ibid.} at pt. 3.
\item \textsuperscript{1617} Case 18/84, \textit{Opinion of Mr Advocate General Mancini delivered on 12 March 1985}, [1985] E.C.R. 1340 at 1340-1341.
\item \textsuperscript{1618} Case 18/84, \textit{supra} note 65 at pt. 10.
\end{itemize}
Newsagents (Federazione Sindacale Unitaria Giornalai). Based on this agreement the defendants argued that they neither had an obligation to supply nor did the applicant fulfil the requirements for distribution. Hence, the Court was asked to respond to the question whether the said agreement was incompatible with Article 85 (now Art. 81) and capable of distorting trade between Member States.\(^{1620}\) In response, the Court had first to consider the fact that the said agreement was no longer in force by the time the dispute arose. The Court, however, replied that the defendants have raised the issue in defence, and moreover, in course of the oral proceedings, the defendants themselves did not rule out the possibility that the agreement might have still been applied in practice.\(^{1621}\) For the obstructive effect on intra-Community trade, the Court stated, in reliance on earlier case law, that by virtue of Article 85 (now Art. 81) any agreement that

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\text{makes it possible to foresee, on the basis of all the objective factors of law or of fact, with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of single market between states and which has as its object or effect the restriction or distortion of competition within the common market.}\(^{1622}\)
\]

For the present case the Court stated that the said agreement, consisting in a closed-circuit distribution system and containing a selective distribution clause, may have the effect of reinforcing the partitioning of the common market along national boundaries.\(^{1623}\) Nonetheless, the Court said that in order for the agreement to fall within the ambit of Article 85, it must have an “appreciable” effect on intra-Community and that for newspapers and periodicals, the assessment of such effect is stricter than in the case of other products. The Court did not rule out this effect beforehand but left the final decision about the appreciativeness to the national court.\(^{1624}\)

In the Binon Case the facts were similar.\(^{1625}\) This time in Belgium, a shop owner (Binon) was refused supply from a newspaper distributor (AMP). In this context too, there existed a selective distribution system whereby every retailer was subject to the approval by a Regional Consultative Committee, whose opinion was followed by the majority of publishers. This collective agreement was declared incompatible with Belgian legislation and Articles 85 and 86 (now Art. 81 and 82) of the EEC Treaty by Belgian Courts. Furthermore, the Court noted that the Belgian

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\text{Conseil du contentieux economique (Council for Economic Disputes) issued, pursuant to the Belgian Law on Protection against Abuse of Economic Power, an opinion in which it stated that AMP and the deliberating members of the consultative committee wielded economic power over the retail market in newspapers and periodicals and their distribution and had abused that power.}\(^{1626}\)
\]

Following these judgments, AMP and the publishers had replaced the collective system by an individual system of acceptance or rejection. A first question the Court had to address was whether the parallel conduct of publishers qualified as “concerted practice” within the meaning of Article 85. Here too, the Court responded that the replacement by the collective by an individually negotiated agreement left the economic effects of restricting competition untouched. A second question related

\(^{1620}\) Ibid. at pt. 1.
\(^{1621}\) Ibid. at pt. 9.
\(^{1622}\) Ibid. at pt. 12.
\(^{1623}\) Ibid. at pt. 13-15.
\(^{1624}\) Ibid. at pt. 19.
\(^{1626}\) Ibid. at pt. 5.
to the operation of the distribution system and whether AMP could be considered of occupying a
dominant position on the market in the meaning of Article 86. In its defence, AMP raised several
arguments that refer to the specificities of cultural goods in general and newspaper and periodicals in
particular. According to AMP, the specificity of the print media market lies in the fact that it requires
a “stable and balanced distribution network with adequate geographical spread”. The stability and
balance is necessary because of the limited duration for the consumption of newspaper and
periodicals, especially dailies which lose their actuality by the end of every day. This implies that
publishers have to take back unsold copies, which is a costly enterprise. A second reason is the little
elasticity in the demand for newspapers and periodicals, especially in the case of foreign newspapers.
These reasons led AMP to conclude that

[Finally, the social and cultural role of the press justifies the maintenance of a specialized distribution
network which allows a representative selection of all publications to be made available to the reader.]

In line with its judgment in the Metro Case, the Court confirmed that selective distribution systems
can be compatible with competition rules provided that they are based on objective criteria of a
qualitative nature and that such criteria are laid down uniformly and not applied in a discriminatory
manner. Quantitative criteria, on the other hand, such as the reference to a minimum number of
inhabitants in the vicinity of an outlet, do not comply with these criteria and causes a selective
distribution system to infringe Article 85. The Court also specified, however, that quantitative criteria
may be authorised by the Commission, based on an application for exemption under Article 85 (3).
It also stated that, for the distribution of newspapers and periodicals, such an exemption can also be
granted for price-fixing mechanisms in order to support the financial burden resulting from the
taking back of unsold copies, which under normal circumstances constitutes and infringement of
Article 85 (1).

This last element leads to another (continuing) series of competition cases that concerned the
culturally sensitive book sector. At the origin of case VBVB & VBBB v Commission was an action
brought by two associations, one Flemish (Vereniging ter Bevordering van het Vlaamse Boekwezen
(VBVB)) and one Dutch (Vereniging ter Bevordering van de Belangen des Boekhandels (VBBB)) which both
represent the majority of publishers and bookseller in their respective countries. Their action
addressed Commission Decision 82/123/EEC, which declared a transnational agreement concluded
in 1949 and amended in 1958 between the two associations void. The agreement was notified to the
Commission by both associations in accordance with Regulation No. 17 of 30 October 1962 and the
notification accompanied by an application for exemption under Article 85 (3) in the event that the
agreement should be considered contrary to Article 85 (1). In the mentioned Decision, the
Commission stated that the agreement constituted an infringement of Article 85 (1) and denied the
grant of an exemption. The agreement in question provided first the introduction of a system of
resale price maintenance, according to which the publisher must fix for each of his publication a

1627 Ibid. at pt. 27.
1628 Ibid. at pt. 27.
1629 See Case 26/76, supra note 1647.
1630 Case 243/83, supra note 1625 at pt. 33.
1631 Ibid. at pt. 46-47.
1632 Compare the cases involving the book sector in Subsection 13.3.3.3.
1633 Joined Cases 43/82 & 63/82, Vereniging ter Bevordering van het Vlaamse Boekwezen, VBVB, & Vereniging ter Bevordering
retail selling price and make sure that the price is observed. Second, it established an exclusive dealing system which mutually recognised publishers and booksellers of both national associations and prohibited any trade with non-recognised publishers or booksellers. Third, under the penalty system a supervising committee was set up to supervise the “scrupulous observance” of the agreement and, in case of infringement, to make the appropriate arrangements possibly leading to the exclusion from trade. In their arguments before the Court, the applicants mentioned that the exclusive dealing system was still in place but not applied anymore. In the context of several complaints of procedural character, the Flemish association criticised the Commission for not having properly replied to certain arguments, which is reflected in the fact that

the Commission attached no importance to its arguments of a cultural nature or to those relating to Article 10 of the European Convention for the Protection of Human Rights and to Article 10bis of the Paris Convention.1634

In substantive terms, the applicants based their arguments mainly on an interference with the freedom of expression as guaranteed by the ECHR, an infringement of Article 10bis of the Paris Convention and the Commission’s failure to interpret Article 85 in consistence with Member States’ practice and especially

the Commission’s failure to have regard to the special structure of the market in books and finally the complete absence of any injurious effect on competition within the common market, regard being had to the special features of the linguistic region in question.1635

For the interference in freedom of expression the applicant’s argument is basically one of cultural diversity, namely that the price maintenance system helps to encourage the publication of a multiplicity of titles, including less readily saleable works, such as works of science and poetry. Although the Court recognised that certain economic provisions are not without effect from the point of view of freedom of expression, it dismissed – without further reasoning – this application based on the impression that the applicants failed to establish a real link between the Commission Decision and freedom of expression.1636 The possible infringement of the Paris Convention, which provides protection against unfair competition, was based on the argument that the resale price maintenance system provides a remedy against the practice of loss-leading, i.e. the sale at abnormally low prices of certain books with the sole object of attracting customers.1637 The Court calls the protection against loss-leading an incidental effect of price maintenance systems which is not a sufficient reason for failing to comply with Article 85 (1) and dismisses also this application.1638 With regard to the Member States practice, the Court responds by pointing to the fact that the practice of other Member States is not comparable to the facts in the present case.1639 Most importantly, for the special structure of the book market, the applicants spell out that competition in the context of books means “effective competition” that is competition adapted to the special conditions of the book market. The specificity of the book market in terms of competition is that every book constitutes a market in itself and price elasticity of books is minimal, so that facets other than price,

1634 Ibid. at pt. 21.
1635 Ibid. at pt. 33.
1636 Joined Cases 43/82 & 63/82, supra note 1633 at pt. 34.
1638 Joined Cases 43/82 & 63/82, supra note 1633 at pt. 37.
1639 Ibid. at pt. 38-40.
such as content or style, play a more important role in competition. Included in the specificity is the variety of supply which required a great diversity of stock and the speedy execution of orders plus the information and advice offered to consumers. The applicants also point out that according to their view resale price maintenance does not restrict competition, since publishers remain free to determine the price. The Commission however insists on the fact that competition disappears at the retail level.\(^{1640}\) Notwithstanding the fact that the Court recognised the special feature of the book market as the central issue of the proceedings and even the “supposition that the specific nature of books as a object of trade may justify certain special conditions in the matter of distribution and price”, it limits the scope of the judgment strictly to the effects of the transnational agreement in question which comes under Article 85 (1) and dismisses the application. \(^{1641}\)

Only one year later, with the *Leclerc* Case, \(^{1642}\) a similar matter involving book price fixing or maintenance was decided by the Court. The main difference between the two cases is that while *VBVB & VBBB v Commission* concerned a private undertaking within the meaning of Article 85, the *Leclerc* case concerned a French law providing for book price maintenance. The law, otherwise known as the *Loi Lang*, was adopted in 1981 and obliged all publishers or importers of books to fix retail prices for the books which they publish or import. Retailers in turn are bound to charge an effective price for sales to the public between 95\% and 100\% of the price fixed by the publisher. The law accepts certain exceptions such as for libraries or educational establishments and authorises clearance sales. In the case of a contravention of these rules, the law foresees injunctions or damages as well as criminal proceedings. In its defence, the French Government sought to justify the legislation on the ground that its aim is to protect books as cultural media form the adverse impact that untrammelled competition in retail prices would have on the diversity and cultural level of publishing [...] and that such legislation is necessary both in order to conserve specialist booksellers in the face of competition from other distribution channels which rely on a policy of reduced margins and a limited range of titles in order to prevent a small number of large distributors from being able to impose their will on publishers to the detriment of poetic, scientific and creative works. It is therefore indispensable in order to preserve books as an instrument of culture and has counterparts in most of the Member States. \(^{1643}\)

The Commission shared the French Governments view that Article 85, even in conjunction with Article 5 does not apply to this case, but instead contested the utility and desirability of special national rules for the book trade. The Court, on the other hand, noted that national legislation, such as the French law, requiring traders to abide by specific retail prices, can be solely be justified on the grounds set out in Article 36, but added that

> Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein. Neither the safeguarding of consumers' interests nor the protection of creativity and cultural diversity in the realm of publishing is mentioned in Article 36. It follows that the justification put forward by the French Government cannot be accepted.\(^{1644}\)

In its final decision, however, the Court recognised that at the point where Community law stood at the time, the second paragraph of Article 5 (now Art. 10) in conjunction with Articles 3 (now Art. 3)
and 85 does not prohibit Member States from enacting legislation introducing price maintenance systems.\footnote{See also M. Niedobitek, The Cultural Dimension in EC Law (The Hague: Kluwer, 1997) at 177-8.} Only a few years later, the same law came before the Court again but no change in the Court’s approach occurred.\footnote{Case 254/87, Syndicat des libraires de Normandie v L’Aigle distribution, [1988] E.C.R. 4457.}

Next to the print media and book sector, the Court was also confronted with several cases concerning the audiovisual sector. In this context too, it is interesting to note that a series of cases began with an early case concerning the borderline between, what has been termed, “ordinary goods and services” and “cultural goods and services”. In concrete terms, subject of the case was a selective distribution system in the sector of electronic equipment for the leisure market, such as television sets, with which several such cultural goods and services could be consumed.\footnote{Case 26/76, Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities, [1977] E.C.R. 1875.} After Sacchi, the Court was again confronted with the nature television in the Debauve Case.\footnote{Case 52/79, Procureur du Roi v Marc J.V.C. Debauve and others, [1980] E.C.R. 833.} In this case, the subject was Belgian legislation, which prohibited national radio and television broadcasting organisations, which – at that time – had a legal monopoly on broadcasting, from making broadcasts in the nature of commercial advertising. This prohibition also extended to the transmission of broadcasts via cable. The principal question put before the Court was therefore whether the said prohibition might infringe the provisions on the free movement of services within the Community. In his reply the Court recognised the particular nature of certain services such as the broadcasting and transmission of television signals and the specific requirements that may be imposed upon the providers of such services. Such requirements are compatible with the Treaty as long as they are founded upon the application of rules regulating certain types of activity and are justified by the general interest and apply to all persons and undertakings established within the Member State in question. Particularly for later developments it is useful to emphasise on the Court’s finding that in absence of any harmonisation of the relevant rules, a prohibition on the telecommunications remained within the residual power of each Member State.\footnote{Ibid. mainly at 12, 15-18.} The meaning of “general interest”, as a restriction on Article 59 (now Art. 49), was further clarified by the Court in the case Bond van Adverteerders.\footnote{Case 352/85, Bond van Adverteerders and others v The Netherlands State, [1988] E.C.R. 2085.} The subject of this dispute, which arose between the Dutch Advertisement Association, several advertisement agencies and a cable network and the Netherlands Government was a Dutch ministerial decree (Kabelregeling) that banned advertisement and subtitling in broadcasts intended for the Dutch public. The Court found that the said ban on advertising and subtitling entails restrictions on the supply of services.\footnote{Ibid. at pt. 27 and 29.} It went on to consider whether such restrictions on the free movement of services may be justified on the grounds relating to the public interest and proportional to the objectives which they set out to achieve, and whether these grounds might relate to cultural policy in general or to a policy designed to combat a form of unfair competition.\footnote{Ibid. at pt. 27 and 29.} In its response, the Court considered that the only derogation from the freedom of services may derive from public policy, as mentioned in Article 56, but asserted that economic aims cannot constitute grounds of public policy. Without contemplating further the argument put forward by the Netherlands Government according to which the ban pursues a non-economic objective, namely that of maintaining the non-
commercial and pluralistic nature of the Netherlands broadcasting system, the Court characterises the measure as disproportionate and concludes that the ban cannot be justified on grounds of public policy.\textsuperscript{1653}

Interesting from the point of view of the mutual synergies – symptomatic for the beginning convergence – between various cultural goods and services are two cases, which not only feature the special relationship between cinematographic films and television broadcasts but accordingly also between goods, services, copyrights and competition. The case \textit{Coditel arose} from a reference by a Belgian Court for a preliminary ruling with regard to an action for copyright infringement by a Belgian cinematographic film distribution company (Cine Vog) against a French company and three Belgian cable television diffusion companies.\textsuperscript{1654} The plaintiff sought compensation for damages that were allegedly caused by the reception in Belgium of a German broadcast of the Film \textit{Le boucher}, for which the plaintiff had obtained the exclusive distribution rights in Belgium from one of the respondents. One of the main questions concerned the danger of a partitioning of the common market as regards the film industry in violation of Articles 59 and 60 caused by a series of assignments of exclusive copyright in a film. Of great relevance for the concept of the cultural industries is here the Court’s explanation that

\begin{quote}
[A] cinematographic film belongs to the category of literary and artistic works made available to the public by performances which may be infinitely repeated. In this respect the problems involved in the observance of copyright in relation to the requirements of the Treaty are not the same as those which arise in connexion with literary and artistic works the placing of which at the disposal of the public is inseparable from the circulation of the material form of the works, as in the case of books or records.\textsuperscript{1655}
\end{quote}

This statement must be seen in its historic context, made before further technological advances such as the Internet and digitisation resulting in a further blurring of the lines between content and carrier. The distinction, however, is significant for the correct order in the economic exploitation of the cultural industries, which in relation to films and television broadcasts usually starts with the performance in cinemas, followed by the exploitation via video tapes ending with the broadcast via television signals. Accordingly the contract of assignment of the said film foresaw both the exploitation in movie theatres and television stations but the latter not before 40 months after the first showing of the film in Belgium. Due to the fact that the film was shown in Belgium for the first time in May 1970 and screened by a German television channel, which could be picked up in Belgium in January 1971, Cine Vog therefore considered that the broadcast had jeopardised the commercial future of the film in Belgium. Going back from the correct order in the economic exploitation of cultural goods and services to the legal qualification, the Court recognises that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright. Based on this the Court ruled that the Treaty provisions on the freedom to provide services do not preclude an assignment of an exclusive copyright limited to the territory of a Member State. Within two years later, the Court was confronted with the same subject matter again.\textsuperscript{1656} This time the question concerning the contract granting the exclusive right was

\begin{footnotes}
\item[1653] \textit{Ibid.} at pt. 34-39.
\item[1655] \textit{Ibid.} at 12.
\end{footnotes}

Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU European University Institute DOI: 10.2870/50465
considered from the point of view of a possible distortion of competition. Here the Court concluded that such a contract is not subject to the prohibitions laid down in Article 85 but left it, where appropriate, for the national Court to ascertain whether that contract is exercised in a way, which is to prevent or restrict the distribution of films or to distort competition within the cinematographic market.\footnote{1657}{Ibid. at pt. 20.}

More evidence for the correct order of economic exploitation of various cultural goods and services is found in the joined Cinéthique cases.\footnote{1658}{Joined cases 60 and 61/84, Cinéthique S.A and others v Fédération nationale des cinémas français, [1985] E.C.R. 2605.} The problem before the Court concerned the French law on audio-visual communication adopted in 1982 which provided that no cinematographic work shown in cinemas may simultaneously be exploited in the form of recordings intended for sale or hire for the private use of the public, in particular in the form of video-cassettes or video-discs, before the expiration of a period of between six and 18 months to be determined by decree. The period was fixed by a decree at one year. The Fédération nationale des cinémas français, reflecting the French Government’s view, pointed out that

the legislation in question applies to imported and national products alike, that it was adopted in the absence of Community legislation in a field falling within the exclusive competence of the Member States, and that it was justified by the mandatory requirements of the general interest. What was at issue was the protection of the cinema as a means of cultural expression, which protection was necessary in view of the rapid development of other modes of film distribution.\footnote{1659}{Ibid. at para. 15.}

The French Government also specified that the legislation thus aimed at maintaining an incentive for cinema-going and thereby contributing to the financial survival of the films industry, since the exploitation of films in cinemas provides the bulk of their revenues (80\%), which in turn help to safeguard a continuing film production.\footnote{1660}{Ibid. at para. 16.} The Commission, on the other hand, emphasised that the legislation in question has the undeniable effect of restricting intra-Community trade, by hindering imports of video-recordings lawfully produced and marketed in other Member States but nonetheless maintained that

cultural aims may justify certain restrictions on the free movement of goods provided that those restrictions apply to national and imported products without distinction, that they are appropriate to the cultural aim which is being pursued and that they constitute the means of achieving them which affects intra-Community trade the least.\footnote{1661}{Ibid. at para. 18.}

The Court, after having been informed that in the majority of Member States different contractual, administrative or legislative provisions with a similar purpose as the French law exist, stated that in principle the Treaty leaves the determination of the form of the regulation such a system to the Member States. The Court generally warned that such a system is capable of creating barriers to intra-Community trade in video-cassettes, precisely because of the disparities in the Member States laws, but, noting the non-discriminatory character of the law, concedes that

a national system which, in order to encourage the creation of cinematographic works irrespective of their origin, gives priority, for a limited initial period, to the distribution of such works through the cinema, is so justified.

\footnote{1662}{Ibid. at para. 22-23.}

\footnote{1657}{Ibid. at pt. 20.}
\footnote{1658}{Joined cases 60 and 61/84, Cinéthique S.A and others v Fédération nationale des cinémas français, [1985] E.C.R. 2605.}
\footnote{1659}{Ibid. at para. 15.}
\footnote{1660}{Ibid. at para. 16.}
\footnote{1661}{Ibid. at para. 18.}
\footnote{1662}{Ibid. at para. 22-23.}
Another aspect to be considered in the context of the cultural industries, and especially television broadcasts case arose in the realm of competition law, concerning an alleged abuse of a dominant position within the meaning of Article 86. This aspect touches, first, upon the marketing power of broadcasting also for other, so-called “ordinary” goods, and, second, upon the beginning convergence or growing interdependence between the audiovisual media and telecommunications sector. In Centre belge, a Belgian telemarketing company brought an action against a television station (RTL) and its exclusive agents for television advertisement in which it claimed an injunction restraining the respondents from refusing to sell it television time on the RTL station for telephone marketing operations using a number other than that of RTL’s exclusive agent.\footnote{Case 311/84, Centre belge d’études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB), [1985] E.C.R. 3261.} After having established the applicability of Article 86 to the present case, the Court went on to qualify telemarketing as an ancillary activity on a neighbouring but separate market. The Court concludes that RTL has therefore abused its dominant position by reserving this activity to its exclusive agent with the possibility of eliminating all competition from that market. The applicability of competition rules to television organisations was equally the subject in Elliniki Radiophonia Tiléorassi.\footnote{Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Synlogon Prassopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, [1991] E.C.R. I-2925.} By virtue of reference to the Sacchi case, the Court noted on the basis of Article 90 (now Art. 86) that nothing in the Treaty prevents Member States, for considerations of a non-economic nature relating to the public interest, from removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out.\footnote{Sacchi, supra note 1529 at pt. 14 and Case C-260/89, supra note 1664 at pt. 10.}

In the Sacchi Case the Italian and German Government had suggested that television undertakings fulfil a task which concerns the public and is of a cultural and informative nature.\footnote{Sacchi, ibid. at para. 13.} Similarly, the Greek law, which established the Greek radio and television undertaking, pursued the objective to organise, exploit and develop radio and television without a view to profit and to contribute to the information, culture and entertainment of the Hellenic people.\footnote{Ibid. at para. 41-42.} However, recalling the judgment in Centre belge, the Court reiterated that an “undertaking which has a statutory monopoly may be regarded as having a dominant position within the meaning of Article 86 of the Treaty”.\footnote{Ibid. at paras. 41-42.} The Court goes on stating that Article 86 does not prohibit monopolies as such but only their abusive conduct.\footnote{Ibid. at para. 45.} Finally, the Court also reconfirms with regard to Article 10 of the European Convention on Human Rights that in a consistent line of case law it held that “fundamental rights form an integral part of the general principles of law, the observance of which it ensures”, but nonetheless points out that it lacks the power to examine the compatibility of national rules with the ECHR.\footnote{Ibid. at para. 45.} Notwithstanding this jurisdictional lack of power, the Court ruled that the restrictions on the free supply of services on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression.\footnote{Neuwirth, Rostam Josef (2005), The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU European University Institute DOI: 10.2870/50465}
Freedom of expression was the underlying issue in the Mediawet Case, which concerned the Dutch Law of April 21, 1987 governing the supply of radio and television programmes, radio and television licence fees and press subsidies, which allegedly restricted the freedom of services by laying down conditions for the transmission by cable of radio and television programmes broadcast from other Member States, which contain advertising specifically intended for the Dutch public. In concrete terms, the restrictive measures laid down in the law consisted *inter alia* in the obligation that advertisements are produced by a separate legal person, are clearly identifiable as such and separated from other parts, are not broadcast on Sundays, and that their duration does not exceed 5% of the total air time utilised; and the requirement that the entire revenues are used for the production of programmes and that “in principle bodies which have obtained air time may not be used to enable a third party to make a profit”. The Netherlands Government named as the justifications for these measures imperatives relating to the cultural policy in the realm of the audiovisual sector, the safeguard of the “freedom of expression of the various – in particular social, cultural, religious and philosophical – components of the Netherlands in order that that freedom may be capable of being exercised in the press, on the radio or on television”. It added that an excessive influence of advertisers over the content of programmes is capable of jeopardising these objectives. Referring to its ruling in Bond van Adverteerders Case, the Court, however, ruled that the said law constitutes a restriction on the freedom to provide services, which cannot be justified by overriding requirements relating to the general interest. In similar terms, the Court dismissed arguments based on cultural policy objectives put forward by the Belgian Government in order to defend a series of measures in the field of broadcasting applied in the Flemish Community. The measures consisted in a prohibition of the transmission of television programmes of broadcasting services from other Member States where the programme is not in the language or one of the languages of the Member State in which the broadcasting service is established; a system of prior authorisation, subject to possible conditions, for the transmission of television programmes of non-public broadcasting services from other Member States; a reservation of 51% of the capital of the non-public television broadcasting company which serves the entire Flemish Community to publishers of Dutch-language daily and weekly newspapers whose registered office is situated in the Dutch-speaking region or in the bilingual Brussels region; and the discriminatory definition of own cultural productions which constitute a compulsory part of the programmes of non-public television broadcasting companies. In response to the Belgian Government, the Court found that in reality the measures are aimed at restricting genuine competition with the national broadcasting stations in order to maintain their advertising revenue and to reduce demand for television productions in Dutch language. Consequently, the Court, referring to the Mediawet case, held that

1673 Ibid. at para. 2.
1674 Ibid. at para. 22.
1675 Ibid. at paras. 28-30; see also Case C-353/89, Commission of the European Communities v Kingdom of the Netherlands, [1991] E.C.R. I-4069.
1677 Ibid. at para. 1.
the justifications put forward by the Belgian Government do not come within any of the grounds for exemption from the freedom to provide services permitted by Article 56, namely public policy, public security and public health.\footnote{1678}

Finally, in the so-called Fedicine case, the Court also held a Spanish regime in violation of the provisions on the freedom to provide services, because it reserved the grant of licences for dubbing films from third countries into one of the official national languages to distributors who undertake to distribute national films.\footnote{1679} Practically, the Spanish decree-law stipulated that film distributors were entitled to a maximum of four licenses for dubbing films originating in third countries into one of the official languages of Spain for each Spanish film they were distributing.\footnote{1680} In its analysis based on Article 59 TEC, the Court recognised, on the one hand, the economic nature of the measure, but, on the other hand, dismissed the claim of the Spanish Government according to which the same measure pursued a cultural aim, based on the argument that Article 56 \textit{[ex 46]} TEC does not mention cultural policy as a legitimate justification.\footnote{1681}

B. The Beginning Process of Positive Integration in the Cultural Sector

The foregoing survey of the case law before the Court during the late 1970s and 1980s is helpful in casting some light on the problems relating to the cultural industries through their different subsectors.\footnote{1682} Each case reveals different aspects linked to the specificity of cultural goods and services in general but also with regard to the cultural industries’ various subsectors. At the same time, it shows that the transition from the common to the internal market is accompanied not only by an intensified process of removal of barriers to intra-Community trade but also by the advent of new technologies transforming both the economy and society. In these dynamic times, a dialogue between the principal European institutions themselves, between the institutions and Member States but also between the Community and individual persons, both legal and natural, proved to be a necessary precondition for the adaptation to an ever changing environment. To these changes, the Commission responded by a series of Communications in the field of culture.

One important key date is 1987, coinciding also with the thirtieth anniversary of the signing of the Rome Treaties. In parallel with the official celebrations in Rome, the Commission organised a Conference in Florence in collaboration with the European University Institute and the City of Florence entitled “The changing Community: the cultural challenge – culture, technology and the economy”.\footnote{1683} The Conference, focusing primarily on the economics of culture and the impact of the new technologies on the cultural sector, culminated in the unanimous recognition of culture as an essential factor in development and of the need for closer cooperation at European level to meet the formidable technological and socio-cultural challenges facing it in the future.\footnote{1684}
Six months later, as a follow-up to the Conference, the Commission presented the 1987 Commission Communication entitled “A fresh boost for culture in the European Community”. It presents the general guidelines and a priority programme for the period 1988 to 1992. The actions, the Community proposes, cover the following five fields: (1) the creation of a European cultural area; (2) the promotion of the European audiovisual industry; (3) access to cultural resources; (4) training in the cultural sector; (5) dialogue with the rest of the world. Obviously in response to a critical debate about Community competence in the cultural field, the Communication basically recognises the challenges that derive from the inter-relationship between economy, technology and culture and describes Community actions in the cultural sector as a political and economic necessity. For its plan of action the Community identifies the following:

In discharging its economic, social and legal responsibilities, the Commission will pay particular attention to the free movement of cultural goods and services, better living and working conditions for those engaged in cultural activities, the creation of new jobs in the cultural sector in association with the expansion of tourism and regional and technological development, and the emergence of a cultural industry which will be competitive within the Community and the world at large.

In this paragraph a first explicit mention of the term “culture industry” is conspicuous. The emergence of “culture industry” is due to several factors both inside and outside the Community. It first of all underscores the tendencies towards a convergence and greater complexity in the links between the various cultural sectors in parallel to the completion of the internal market. This for instance is recognised in the statement that

Information, communication and culture are all bound up with one another in that the creation of a large market establishes a European area based on common cultural roots as well as social and economic realities.

Without doubt, the Communication draws on insights that followed from the various problems that were presented during this epoch before the Court as mentioned above. These problems have been confronted in earlier Communication dealing with various sectors separately, such as notably the book and audiovisual sector. The European Parliament too, in a Resolution, considered that “outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to protecting young people and establishing a code of practice for advertising at Community level”. The first Communication on television without frontiers addresses the technological innovations and their potential as well as their consequences for the internal market. It puts forward three main objectives which consist in:

Mettre en evidence l'importance de la radiodiffusion (radiodiffusion sonore et télévision) pour l'intégration européenne et notamment les libertés et la démocratie dans les Communautés européennes,
souligner l’importance que le traité instituant la Communauté économique européenne (traité CEE) revêt pour tous ceux qui produisent, diffusent, retransmettent et reçoivent des programmes de radiodiffusion et faire connaître les conceptions de la Commission sur le rapprochement de la législation des États membres en matière de radiodiffusion et de droits d’auteur avant la présentation des propositions formelles au Parlement et au Conseil.\footnote{COM(84) 300 final, supra note 1690 at 1.}

These objectives not only recognise the broader implications of the cultural industries for liberty and democracy, but also the economic consequences deriving from the Treaty for those engaged in the audiovisual industry. Particularly, the legal obstacles in the completion of the internal market and the widespread absence of a set of harmonised rules, as they appeared in diverse Court rulings, find their further expression in the \textit{Action Programme for the European audio-visual media products industry}.\footnote{COM(86) 255 final, supra note 1690.} From a closer investigation of the audiovisual sector it is clear that “the economic and cultural dimensions of communications cannot be separated”.\footnote{Ibid. at 4.} This dual agenda is even more explicit in the book sector, where the nature of books has been recognised as

\begin{quote}
Véhicule par excellence de la pensée et de la connaissance, s’inscrivant presque comme emblème de la culture et embrassant les disciplines les plus variées, le livre est en même temps un produit important de l’activité économique, objet de consommation, de production et d’échanges.
\end{quote}

Each of these documents addresses a variety of problems linked to the partitioning of the common market. Unlike the audiovisual sector which is regulated within the Member States’ borders, the book sector is often fragmented along the linguistic zones. In light of the common market, however, the fragmentation of the common market is the same. They equally feature the same specific commercial characteristics intrinsic to cultural goods and services. The common characteristics have been described as follows:

In a society characterised by rapid advances in information and communication books, together with the audiovisual media, constitute the basic educational tool available to Europeans in their quest to relate to an environment distinguished by the diversity of national and regional cultures on the one hand and by a shared set of values on the other. They are the medium for literary creation, research and reflection, essential to the pursuit of knowledge, self-awareness and an understanding of others and of the world around us.\footnote{Communication from the Commission, \textit{Books and Reading: A Cultural Challenge for Europe}, COM(89) 258 final (August 3, 1989).}

The same Communication also refers to the publishing sector as pertaining to the cultural industries.\footnote{Ibid. at 8.}

The increased number of references to the cultural industries is backed by several problems common to all the various sectors. A first element is the fragmentation of the Community along linguistic lines, which in the book sector is confronted by the support for the translation of publications of important literary, scientific and technical – classical and contemporary – material.\footnote{COM(85) 681 final, supra note 1690 at 1.} In the audiovisual sector, the linguistic dimension is present in the form of subtitling and dubbing as a means to overcome the fragmentation of the market.\footnote{COM(86) 255 final, supra note 1690 at 9 and Communication from the Commission to the Council and Parliament on audiovisual policy, COM (90) 78 final (February 21, 1990) at 11-12.} The multilingual nature of the Community

\begin{itemize}
\item Neuwirth, Rostam Josef (2005), \textit{The Cultural Industries as a Regulatory Challenge for International Trade Law: Insights from the NAFTA, the WTO and the EU} \European University Institute DOI: 10.2870/50465
\end{itemize}
forms also subject of efforts in the framework of deeper political integration. Another problem with regard to the fragmentation of the market in terms of disparities in the Member States’ legislation exists with regard to copyrights and the challenge of new technological means for reproduction and dissemination. Great similarities between the two sectors dominate the realm of competition law, where the aspiration for the creation of a European scale of production and distribution meets with the risk for a diminution of the diversity and quality of the content offered. Here the functional equivalents of book price fixing and selective distribution systems in the book and print media sector are found in restrictions on advertising or the introduction of a chronological order in the exploitation of audiovisual works. Another common element is found in the greater competition introduced by a greater offer in various media (multimedia). The decline in cinema-going is accompanied by a decline in reading and both are due to the increased offer of television programmes and other forms of consumption, such as video cassettes. In the entirety of these problems external factors, such as increased competition from imported products, mainly of American origin, and greater world-wide liberalisation of trade in goods and services play another important role. To recall, at that time the Uruguay Round negotiations were launched at Punta-del-Este with the prospect of a multilateral agreement on services. In this context it is particularly interesting to refer to the CUSFTA which was concluded in 1989 between the US and Canada, introducing the concept of “culture industry” to the realm of international trade law.

In direct response to these challenges the Commission proposes a great number of actions. For a great part of the cultural sector, the Commission proposes actions in the field of vocational training. Also in the framework of fostering the awareness of a European identity, next to Community symbols, various actions in the cultural field, such as the European Youth Orchestra and a scriptwriters’ competition as well as some sporting events were organised. At that time, supporting actions were proposed for almost every cultural activity. The most important measures are found in the MEDIA Programme (1991-1995), on the one hand, and the Directive on Television without Frontiers (TWF) on the other. The MEDIA Programme, adopted by the Council in 1990 provided a complete action programme for the promotion of the European audiovisual industry.

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1700 COM(88) 331 final, supra note 1578 at 15, stating that “learning languages is a cornerstone in the construction of Europe”.
1701 COM(89) 258 final, supra note 1696 at 4-7 and COM (90) 78 final, supra note 1699 (February 21, 1990) at 17.
1702 Ibid. at 21 and COM(89) 258 final, supra note 1696 at 8 et seq. (“Concentration and internationalisation in publishing”).
1703 On the particularities of media products in general, see Media, Markets, and Democracy, supra note 1274 and Herman & Chomsky, supra note 605 mainly at 1-35.
1704 See e.g. COM(89) 258 final, supra note 1696 at IV (“reading is no longer the favourite leisure activity”) and COM(86) 255 final, supra note 1690 at 4-6 (“over the last ten years cinema audiences have shrunk by 25% in Germany, 75% in Italy and 70% in the United Kingdom”).
1705 See e.g. COM(86) 255 final, supra note 1690 at 5, naming 35-65% the market share of US products on various Member States whereas the one of European imports to America accounts for only 1%.
1707 Communication from the Commission, Vocational Training in the Arts Field, COM(90) 472 final (October 25, 1990).
1708 See e.g. COM(88) 331 final, supra note 1578 at 10 and 17.
1709 See e.g. COM(87) 603 final, supra note 1685 at 12-33.
The principal aims of the Programme are in the creation of a favourable environment for Community undertakings, the increase of the competitive supply capacity of European audiovisual products, the improvement of distribution and commercial production, the increase European production and distribution companies’ share of world markets, the promotion of better access to and use of the new communications technologies, and the stimulation of financial investment and the development of professional skills in the audiovisual sector.\footnote{1711} The so-called \textit{Television Without Frontiers Directive} was intended to facilitate the integration and harmonisation of the various broadcasting laws already in place in the individual Member States of the Community in order to establish a legal framework for a single Community-wide broadcasting area in conformity with the Treaty’s objectives.\footnote{1712} There were, however, also broader policy considerations, such as ‘European cultural identity’ or technological progress, involved.\footnote{1713} The way these goals were going to be achieved consisted mainly in measures coordinating certain aspects of the laws of Member States regulating advertising, broadcasting in the interests of protecting children and young persons and the protection of copyright holders. In this respect it is noteworthy that the Directive lays down only minimum requirements and leaves untouched the right of Member States to adopt more detailed and stricter rules for broadcasters.\footnote{1714} The key and, at the same time, its most controversial provision is found in Article 4 (1) which obliges Member States to ensure where practicable and by appropriate means, that broadcasters reserve for European works, within the meaning of Article 6, a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster’s informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.

Obviously pursuing the goal of greater diversity and support for small content producing undertakings, a similar obligation exists for Member States to ensure that broadcasters reserve at least 10\% of their transmission time to European works created by producers who are independent of broadcasters.\footnote{1715} The meaning of “European works” is defined more closely in its Article 6. It is worth noting that “European works” extends not only to all EC Member States but equally to all European third States party to the \textit{European Convention on Transfrontier Television} of the Council of Europe and under certain conditions also works originating from other European third countries.\footnote{1716} It is also interesting to note is also Article 8 which, in line with the proceedings in \textit{Coditel}, creates an obligation, subject to certain exceptions, for Member States that television broadcasters under their jurisdiction do not broadcast any cinematographic work until two years have elapsed since the work.

was first shown in cinemas in one Member State of the Community. With regard to advertising, the Directive lays down rules that require that advertising be readily recognisable and kept separate from other parts of the programme service by optical and/or acoustic means and prohibits subliminal techniques as well as surreptitious advertising. The Directive also sets forth certain qualitative standards for Television advertising with regard to human dignity, discrimination on grounds of race, sex or nationality, religious or political beliefs, health, safety and the environment. For health matters, the Directive introduces a complete ban on advertising for cigarettes and other tobacco products and specific criteria for the advertising of alcoholic beverages. In the context of advertising, specific protection is also provided for minors and the sponsoring of television programmes. The latter is of particular interest due to the potential risks for the editorial independence of the broadcaster and ultimately the diversity of the programmes. Article 19 allows for stricter rules in the Member States concerning the total amount of advertising per daily transmission time in order to

reconcile demand for television advertising with the public interest, taking into account in particular of:
(a) the role of television in providing information, education, culture and entertainment;
(b) the protection of pluralism of information and of the media.

Finally, before the final provisions (including a review mechanism), two separate chapters contain specific rules for the protection of minors and the right of reply. In sum, the TWF Directive provided for a coherent Community framework for the broadcasting sector, which at that time remained absent in other cultural sectors.

§§ 13.2.3. The Final Years from the Single European Act (SEA) and to the Maastricht Treaty

The final years of the 1980s were not only marked by a natural shift from negative to positive integration, but also, as Leo Tindemans suggested in his report ten years before, by a shift of attention from economic integration to a political union. In other words, awareness grew about the close entwining of economic integration and a political union as laid down in the founding Treaties of the Community. With greater political awareness, the early efforts for the achievement of stronger political integration began to crystallise, albeit not without initial difficulties. As part of the dialectic process of European integration, remarkable progress could not be made without the previous occurrence of minor setbacks. Nonetheless, internal and external factors alike contributed to the rising awareness about the need for a major reform of the structure of the Treaties. Under this influence stood the first major amendments to the founding Treaties introduced by the Single

1717 Article 10 (1) TWF Directive 1989, ibid.
1718 Article 10 (3) TWF Directive 1989; see also Article 18, limiting the total amount of advertising at 15% of the daily transmission time, ibid.
1721 Articles 16-17 TWF Directive 1989, ibid.
1723 “At this stage, the stakes are political, that is quite irrefutable”, see European Union: Report by Mr Leo Tindemans, supra note 1568.
1724 See generally, Urwin, supra note 1432 at 218-228.
European Act signed in 1986.1725 For some commentators it meant a major step forward, while for others it was a major setback.1726 However, the tides of history having passed, it remains an important interim stage to greater changes that were obtained in 1992. It is useful to add for the wider context that the SEA revived the momentum for the completion of an internal market which it defined as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty”.1727 It also achieved some progress in the field of political cooperation, the introduction of an economic and monetary policy, and the shift from unanimity to qualified majority voting in a wider range of areas. Furthermore, it also added a few new Community policies, such as economic and social cohesion, research and technological development and the environment. The provision on the environment is significant in light of later amendments because it codified for the first time the principle of subsidiarity, which was to assume greater significance in the next stage.1728 Despite this progress, it was soon clear that further amendments to the Treaty structure were necessary and further steps, which led to the second Intergovernmental Conference on the political union, were inaugurated. There are several reasons that led to the formation of a new IGC, as successfully summarised by Richard Corbett.1729 As a first important reason he points out the general dynamic of unification as follows:

The Community is never at standstill. The whole process of integration from 1950 until the present day has been one of successive steps forward on the basis of compromises negotiated among the Member States. The Community has actually spent more than half of the years of its existence in IGCs or other reviews of its constitutional bases.1730 To this dynamism he adds the functional logic behind the creation of a single market.1731 Within this rubric fall also renewed attempts to establish a economic and monetary union (EMU), based on the insight that “the full benefits of a single market would not become available if it continued to be based on separate currencies”.1732 In addition to these internal economic elements, concerns about external factors increased. The growing size of the single market gave the Community an additional economic weight at international level. Such weight, however, was widely absent in political terms. This became an important issue in the changing international context, especially with the fall of the Wall of Berlin in 1989 but also during the crisis in Yugoslavia and the first Gulf War.1733 These developments revived earlier attempts to strengthen the Community’s foreign policy. Like previous enlargement rounds, the drastic changes in the international context paved the way for new aspirants for Community membership, such as Turkey, Malta, Cyprus, Austria, Switzerland, Finland, and Sweden, to emerge. With the prospect of a widening of European integration, the necessity for a

1725 SEA, supra note 1409.
1727 Article 25 SEA, supra note 1409.
1728 Article 25 SEA, supra note 1409. See also the Resolution on the European Parliaments position concerning the reform of the Treaties and the achievement of European union, supra note 1574, calling the principle of subsidiarity “one of the essential principles of the union”.
1730 Ibid. at 1.
1732 See Corbett, supra note 1729 at 3.
1733 Ibid. at 5-7.
parallel process of deepening crystallised, in order for the Community to remain efficient.\textsuperscript{1734} In this process of deepening, the European Parliament also played – as indicated above – an ever increasing role. Ultimately, Corbett also mentions as important factors the efforts of individuals, such as the French President Mitterand and the President of the Commission Jacques Delors, in pushing forward the agenda for European integration.\textsuperscript{1735}

Finally, these last years before the adoption of the Treaty on European Union in 1992 were characterised by an unprecedented complexity in European affairs. The complexity resulted from the dynamics enshrined in and derived from the founding Treaties as well as from technological progress and its impact on society at large. Part of this complexity is the growing awareness of the interdependence between, or even the causal dependence of, various antagonistic concepts and tendencies, which began to call for a broader view focusing on questions related to the achievement of greater synergy effects. Such effects were clearly recognised between for instance measures of negative and positive as well as of economic and political integration. They were also found to exist between economic integration in the form of the fundamental freedoms and Community actions in the cultural sector. Cultural policy, on the other hand, was recognised as an important element for progress in political cooperation towards a political union. A political union again required a sufficient degree of European identity which could only be built based on the adequate degree of cultural sensitivity towards Europe’s diversity. These new perspectives opened up also because of the technological innovations that changed considerably the perception of individuals and the collective based on the cultural industries’ ability to disseminate writings, pictures and sound across borders.

\textbf{§§ 13.2.4. Résumé of the Second Stage and Leading Over to the Third Stage}

The second stage in the history of European integration is in many ways crucial. First and foremost it is crucial for the concept of “cultural industries” which, backed by significant technological changes, made its appearance in the Community context roughly at the same time it was introduced into an international trade agreement by virtue of the CUSFTA. The appearance in the Community context, however, was of secondary nature, whereas the Treaties, as the primary sources of EC law, continued to ignore such a notion and even an explicit clause on culture or cultural aspects, except for the related, but limited, concept of “national treasures”. A second important element during that period was the final recognition of the cultural dimension of Community law, even if it only derived from, what the Commission called “actions in the cultural sector”, \textit{i.e.} the economically motivated cultural dimension as a result of the application of the Treaty’s provisions to the culture industry. At the same time though, new impetus for cultural action derived from the strive for greater political integration, as already laid down as an objective in the founding Treaties. This politically motivated cultural dimension was summed up by one observer in 1986 as follows:

\begin{quote}
Née d’une idée de l’Europe définie dès le Congrès de la Haye en 1948, prolongée par les Traités de Paris et de Rome, relancée et approfondie par la coopération politique européenne dont les règles sont régies
\end{quote}
par les rapports de Luxembourg, Copenhague et Londres et activée par le Parlement européen, ravivée par son élection au suffrage universel direct, la dimension européenne de la culture est là. 1736

The cultural dimension having finally received substantive recognition, it was still awaiting its formal recognition. The formal recognition appeared necessary for at least two reasons: The first reason rests in concerns about legal certainty and predictability, since the Court was faced with an increasing workload including many cases falling within the sensitive area of the cultural industries. The evidence presented before the Court underscored the characteristic of the dual nature of cultural goods and services but the Court itself lacked the appropriate provisions to deal with them in a way that would enhance the legal predictability for Member States’ Governments when adopting their cultural policies. It also failed to take into account the broader dynamics different media products have in common, such as the problematic feature of their economic activity, which consists in selling “media content to audiences and audiences to advertisers”. 1737 The second reason concerns the progress in European integration as a whole, in parallel to technological and societal change, which was becoming increasingly dependant on more comprehensive and at the same time more elastic concepts to describe various phenomena of an ever growing complexity. In this category fall a wide range of problems, from the delimitation of powers between the Community and the Member States to the institutional framework and the nature of cultural policies as such. These problems related to the architecture of the Community structure as a guarantee for the coherence between of an ever extending inventory of Community policies.

Notwithstanding the formal absence of culture in the Community treaty framework during this period, consequent important steps were undertaken in this direction and towards the end of the period started to crystallise inaugurating a new period. 1738 For the cultural industries, an important example is provided by the adoption of the TWF Directive, which removed substantial obstacles to a European market for broadcasting. In the overall Community architecture, the SEA paved the way for a subsequent series of Treaty revisions, which was inaugurated with the signing of the Treaty on European Union in Maastricht on February 7, 1992.

1737 See Media, Markets, and Democracy, supra note 1274 at 11.
§ 13.3. The Third Stage: 1992-2005

§§ 13.3.1. The Maastricht Treaty and Following Changes to the Treaties with Regard to Culture

13.3.1.1. Introduction: A Short Chronology of the Major Events

The Treaty on European Union, commonly referred to as “Maastricht Treaty”, signed on February 7, 1992, inaugurated a new stage in European integration over the period from 1992 until the present (during which period the Treaties of Amsterdam (1997) and Nice (2001) as well as the Charter and draft Constitution also became realities). In strictly formal terms, it marks a “decisive moment”, or, to use the Treaty language, “a new stage” in the continuous process of European integration in its striving towards “an ever closer union”. In other words, it can be compared to a lucidum intervallum finally bringing together some aspects of the constitutionalist (or federalist) and the functionalist approaches to European integration. As the Treaty’s title suggests, it marks a transition from the European Economic Community to the European Union (EU) and its well-known three pillar structure, including a Common Foreign and Security Policy (CFSP) and cooperation in the fields of Justice and Home Affairs (JHA). The third stage, extending from 1992 to the present year, can be aligned with the beginning of a new era of European integration, i.e. the process of the constitutionalisation of the European legal order, which was envisaged from the very beginning but only started to materialise formally by the end of the millennium with the Convention on the Future of Europe. This temporal classification, however, is not intended to minimise earlier contributions to a constitutional debate in Europe. It is rather meant to point to the culmination of the sum of single efforts, both by institutions and individuals, in one decisive moment in European history. In 1992, however, the Treaty on European Union avoids the term “constitution” but nevertheless suggests in its Article C that some progress has been made in the consistency of its legal framework when it reads that:

The Union shall be served by a single institutional framework which shall ensure the continuity and the consistency of its activities in order to attain its objectives while respecting and building upon the ‘acquis communautaire’.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers.

The need to establish a more stable institutional framework was fostered by the extension of Community competences under the Maastricht Treaty, such as public health, consumer protection, or economic and social cohesion. The Treaty on European Union also introduced a detailed road

1740 Preamble, TEU, supra note 1410.
1741 Cf. Articles A and G, and Titles V and VI TEU, supra note 1410.
1743 See e.g. J. Schwarze & R. Bieber, eds., Eine Verfassung für Europa: Von der Europäischen Gemeinschaft zur Europäischen Union (Baden-Baden: Nomos, 1984); see also the survey in Striet & W. Mussler, supra note 1441.
1744 TEU, supra note 1410.
1745 See e.g. Lane, supra note 1447.
map towards an economic and monetary union. From the cultural industries’ perspective it is noteworthy that by virtue of Article 128 TEC, a new provision on “culture” was introduced in the Treaty Establishing the European Community. At the same time, with Article 130 TEC, a new provision on “industry” was added, which – as will be shown below – is also of relevance for the cultural sector. The extension of Community competences under the new Treaty brought as a necessity the restructuring of the sensitive equilibrium within the Treaty. Such equilibrium points to the degree of consistency attained in the application of its provisions and to the ability to reconcile apparently divergent interests with a view of achieving a maximum of coherence in light of changes to the context, such as the transition from the common to the internal market.

Nonetheless, the progress made with the Treaty on European Union in this respect was soon neutralised by new challenges waverings in the global context deriving by and large from the shift from a bipolar to a multipolar and globalised world, the technological revolution, and, in the immediate neighbourhood, from another imminent round of enlargement. The alternate process of widening and deepening therefore kept the process of European integration alive. As a consequence, soon after Maastricht, new deficiencies in the institutional framework, such as a policy, democracy and an implementation deficit, were identified. One commentator even went to state that

The result of the Maastricht summit is an umbrella union threatening to lead to a constitutional chaos; the potential victims are the cohesiveness and the unity and the concomitant power of a legal system painstakingly constructed over the course of some 30 odd years.

Other commentators soon gave reasons for which the Treaty on European Union needed to be revised and asked whether the EU would need a constitution. Even the next IGC, after a new enlargement round with Austria, Sweden and Finland joining the EU, leading to the Amsterdam Treaty, could not silence criticism and did not achieve much with regard to the many desired results for the Union’s constitutional structure. The Amsterdam Treaty also did not, despite a renumbering of the Treaties’ provisions, contribute to a simplification of the increasingly complex Treaties’ structure. Philip Allott even detects three major fallacies, incorporated in the structure of the EU with the – what he calls “deplorable” – Treaty on European Union, which he lists as follows:

The first fundamental fallacy has been the idea that a constitution is a legally formulated arrangement of institutions. The second is the idea that there is something called the economy which is autonomous in relation to the rest of social phenomena, that res economica is systematically separable from res publica, and even from res privata. The third fallacy is the idea that democracy can be conducted as if it were a species of diplomacy, as if diplomacy can be democracy by other means.

Nonetheless, the Amsterdam Treaty did not constitute a total failure but rather proved the EU’s strength to move forward, despite significant constraints that are rooted in the given political

1746 Title VI TEC.
1747 See infra Subsection 13.3.2.2.B.
context. For example, an important element introduced by the Amsterdam Treaty is found in the possibility of closer cooperation between Member States, which also opened new possibilities for the field of culture. Immediately after the entry into force of the Amsterdam Treaty on May 1, 1999, new challenges appeared on the Union horizon. A first challenge was found in the question about the relationship between the EU and the European Convention on Human Rights (ECHR) in the aftermath of Opinion 2/94. A second important challenge concerned the Union’s institutional structure with the prospect of a new enlargement round, as it was mentioned in the Amsterdam Protocol on the institutions. For both challenges the European Council at the summit meeting in Cologne 1999 had an answer. With regard to the issue of human rights, the European Council took the view that “at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident”. This led to the creation of a convention which elaborated the EU Charter on Fundamental Rights, which was proclaimed jointly by the Council, the EP and the Commission at the Nice Summit in 2000, but not transformed into a legally binding instrument incorporated into the Treaty. Regarding the institutions and other leftovers from Amsterdam, the European Council agreed to convene another IGC, which eventually led to the signing of the Nice Treaty on February 26, 2001. Due to the ratification of the Nice Treaty in Ireland only after holding a second referendum, the Nice Treaty entered into force with some delay on February 1, 2003. Already in the Declaration on the future of the Union, annexed to the Nice Treaty, the conference of the representatives of the Governments of the EU Member States called for “a deeper and wider debate about the future of the European Union”. Following the said Declaration, the European Council laid down the contours of the debate in the Laeken Declaration, which raised a number of principal questions related to the process towards a “Constitution for European citizens”. These questions were centred around the division and definition of competences in the EU, the simplification of the Union’s instruments, and how to achieve more democracy, transparency and efficiency in the EU. For that matter, the Laeken Declaration set out the work plan for the Convention on the Future of Europe under the chair of Mr V. Giscard d’Estaing, supported by two Vice-Chairmen G. Amato and J.L. Dehaene, entrusted with the task of identifying various possible responses to these questions. As

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1756 See Protocol (No 7) on the institutions with the prospect of enlargement of the European Union (1997), see supra note 1411.
1757 See Presidency Conclusion, Cologne European Council, June 3-4, 1999 at para. 44.
§ 13.3

13.3.1.2. The Amendments to the European Union’s Treaty Structure: A Cultural Perspective

The chronological presentation of the major amendments points out the characteristics for the third period in European integration. In the past 17 years, not less than 5 different treaties (including the Draft Treaty), were elaborated, each of them altering considerably the scope of the Treaties, the decision-making process, the division of competence or the institutional balance. The frequent revision of the Treaties is the result of a broader constitutional debate, of which the origins are rooted in the early days of European integration. The years since Maastricht, however, have given rise to a regularity in the Treaty revision process, pointing the way in the direction of a Constitution for Europe. No matter how the story concerning the finalité of the European integration continues, there is no doubt that the past revisions had a strong impact on the way “culture” was perceived in the Treaty framework. The Community’s “cultural consciousness” was first in a legally explicit form recognised in Maastricht by virtue of the Preamble of the Treaty on European Union and Article 3 (1) lit. p and Articles 92 (3) d. (‘Aids granted by States’), 126 (1) (‘Education’) and 128 (‘Culture’) TEC. Particularly, the so-called “integration clause” of Article 128 (4) TEC functioned as a mnemonic device in the Treaty as the Community’s “brain”, obliging its institutions to remember the cultural aspects for the entirety of their actions. With the Amsterdam Treaty, the text of integration clause of Article 128 (4) was amended with a view to ensuring respect for and promotion of cultural diversity. At the same time the entire Article 128 was renumbered Article 151. This cultural integration clause can also be regarded as having functioned as a subconscious reminder in further amendments to the Treaties, such as those introduced by the Nice Treaty with regard to the common commercial policy (Article 133 [ex 113] TEC). Finally, this trend continues until the Treaty Establishing a Constitution for Europe, which inter alia absorbs the EU Charter of Fundamental Rights.

In sum, the sequence of consecutive amendments has altered the structure of the Treaties and with it the legal framework governing the cultural industries. It can be argued that even without considering the specific amendments of the Treaty with regard to “culture” or “industry”, the regulatory context for the cultural industries has become changed considerably. In the following sections light will be cast on the individual articles that touch upon the cultural industries and were most affected by these changes.

§§ 13.3.2. An Overview of the Principal Articles Touching Upon the Cultural Industries

13.3.2.1. The Treaty on European Union

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1761 See supra note 1413.
1763 See also “Treaty Revision Process”, supra note 1434.
1764 The Treaties in the consolidated version after the Maastricht Treaty, see supra note 1410.
1765 See supra note 1411.
1766 See supra Subsection 13.3.2.2.D.
1767 See Article I-9 and Part II EU Constitution, see supra note 1413.
As a general rule of interpretation the Vienna Convention on the Law of Treaties specifies that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. It explains that the context for the purpose of the interpretation of a treaty shall comprise in addition to the text, also its preamble and annexes. In the European context, it has also been argued that the Preamble to the EEC Treaty can – under certain circumstances – give rise to the same legal force as specific treaty articles. From this it follows that, for the interpretation of Treaty provisions after Maastricht, it is useful to mention Recital 5 of the Preamble of the Treaty on European Union, which expresses the desire “to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”. This desire is elaborated on in Article G TEU, which amended Article 3 TEC to the effect that it added a Community obligation to contribute inter alia to the “flowering of the cultures of the Member States”. This goal is then further elaborated on in Article 128 (new 151) dealing with culture.

13.3.2.2. The Treaty Establishing the European Community

A. Article 151 [ex 128] TEC on Culture

The Treaty on European Union, thus raised the cultural awareness of the Community in a series of provisions. After the Preamble and Article 3, the central provision dealing with culture is Article 128 (new 151) on Culture. In its entirety and as amended by the Amsterdam Treaty, it reads as follows:

(1) The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

(2) Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

(3) The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

(4) The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.

(5) In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251,
- acting unanimously on a proposal from the Commission, shall adopt recommendations.1772

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1768 Article 31 (2) Vienna Convention, supra note 416.
1770 TEU, supra note 1410.
1771 Article 3 lit. p) TEC.
The length of the Article indicates the numerous aspects, both external and internal, that culture raises in the Community context. As a consequence, both its scope and significance have given rise to extensive commentaries.\textsuperscript{1773} For the present purpose, it suffices to emphasise on the principal merit of Article 128, which lies in the explicit legal recognition, \textit{i.e.} codification, of the cultural dimension of the Community. The Commission has indeed welcomed the new article by stating that “[T]he Community is on the threshold of a new era in which it will be able to grow beyond its purely economic dimension and enjoy unprecedented opportunity for cultural cooperation and support”.\textsuperscript{1774} At the same time, however, the article on culture has been read as introducing a containment of Community action in the cultural field, seen “as an attempt to block the more or less further expansion of Community law in this area”.\textsuperscript{1775} The restriction imposed on the Community in the field of culture must be seen in connection with the principle of subsidiarity, equally introduced by the Treaty on European Union in order to put a bar on the infinite extension of Community policies and greater centralisation.\textsuperscript{1776} This bar is also reflected in the decision-making procedure applied, which is based on co-decision referred to in Article 251 TEC, in consultation with the Committee of the Regions, requiring the Council to act unanimously throughout this procedure. Nonetheless, particularly in light of the prohibition of any harmonisation of the laws and regulations of the Member States in the field of culture (para. 5), the restriction imposed on the Community could also be seen as a useful repudiation of any direct regulation of culture and, particularly, its content, which would stand in stark contrast to the creative and spontaneous nature of the concept. This view is also supported by the fact that no attempt was made to define culture for the Community context.\textsuperscript{1777} The ambiguity of the provision on culture that appears at a first reading is due to the apparently contradictory goals that Paragraph 1 in common reading with the Preamble (TEU) and Article 3 (1) lit. p (now q) TEC lists. The Commission has commented the provision by stating that

\begin{quote}
  [T]he challenge is twofold: cultural action should contribute to the flowering of national and regional identities and at the same time reinforce the feeling that, despite their cultural diversity, Europeans share a common cultural heritage and common values.

  The frontier-free area must provide a stimulating environment for intellectual life, cultural activities and artistic creativity for the ever-growing numbers of European citizens now demanding greater access to cultural. In the face of growing intolerance the aim will also be to help them understand, appreciate and respect other cultures in the same way as their own.\textsuperscript{1778}
\end{quote}
In this quote, the paradox of Paragraph 1 is solved in a way that a stronger national and regional identity is in no contradiction with a European identity. It rather points out the potential complementarity between, or added value to, different levels of identity within a strong economic framework common to all, as the internal market provides. The article also takes into consideration the external aspect of the Community’s cultural dimension in the relation to third countries and international organisations (Para. 3). Such an approach clearly marks a different interpretation of the Zeitgeist prevalent at a time in which Huntington presented his theory of a clash of civilisations.1779 Furthermore, the quote emphasises the close causal link between economics, politics and culture, by pointing out the changes in the environment with the advent of the internal market. This link is further elaborated on in the Commission’s Communication when it states that

The economic and political integration which will be the hallmark of tomorrow’s Community must be accompanied by a stronger cultural dimension which respects national, regional and local diversity.1780

This comment reflects the strong ties that bind together in a permanent process economic and political integration as well as their cultural aspects. The extraordinary merit of Article 151 is therefore the insight that “Kultur und Wirtschaft lassen sich nicht trennen” (culture and economics cannot be separated).1781 This basic insight intrinsic to the concept of “culture industry” evolved over the past decades and materialised with the relevant experiences drawn from case law during the 1980s. The sum of these experiences was codified particularly in Paragraph 4 of Article 151, the so-called “cultural integration” or “cross-section” clause, which obliges the Community to take cultural aspects into account in actions taken under other provisions of the Treaty.1782 This provision is, first and foremost, of greatest interest for the cultural goods and services due to their dual nature. This clause may, for instance, have a strong impact on the consideration of the national book price fixing systems or public service broadcasting in light of the fundamental freedoms and the rules on competition and state aid. However, its potential application goes – especially since the Amsterdam Treaty adding respect for and promotion of cultural diversity – considerably beyond the cultural industries.1783 In sum, the cultural integration clause, in line with other such clauses, not only fulfils a mitigating function but can also be conducive to greater coherence in the ever growing complexity of Community policies, due to their principal function of interconnecting various provisions.1784 For possible conflicts that may arise between the various integration clauses a solution is available in the form of weighing against each other different measures based on their objective, content and effect.1785

Finally, a direct reference to the cultural industries is made in Paragraph 2, according to which the Community is entrusted with encouraging and, if necessary, supporting and supplementing cooperation between Member States in the field of “artistic and literary creation, including the

1779 “Clash of Civilisations”, supra note 807.
1780 COM(92) 149 final, supra note 1774 at 4.
1781 See Fechner, supra note 1773 at 1492. See also supra note 1475.
1783 See e.g. COM(92) 149 final, supra note 1774 at 7-8.
audiovisual sector”. The diction of paragraph 2 clearly comprises of the cultural industries, especially the sectors of books and the audiovisual media. For these areas the Commission has specified a three-fold objective: rules of the game, technology, and promotion of the programmes industry.1786

To sum up, Article 128 (new 151) TEC has legally recognised the cultural dimension in the process of European economic and political integration. However, instead of relying on the concept of the cultural industries alone, such as was the case in the NAFTA, the drafters of the Treaty on European Union relied on the much broader concept of “culture”. In this context, special attention is also given to various aspects pertaining to the cultural industries, without, however, using this concept. In the Treaty context, the term “cultural industry” can only be arrived at through a combined reading of Article 128 and Article 130 (new 157) TEC on Industry. The inalienable merit of Article 128 is that, after decades of legal uncertainty and unpredictability, it raised the cultural awareness of the Community by excavating it from an informal and inferior position outside the Treaty structure and bringing it to an explicit legal recognition within the Treaty structure. Moreover, since its adoption, it continued to contribute to a fruitful discourse on the mutual interplay between culture, economics and politics and, therefore, has definitely helped to improve the understanding of the essential elements in European integration.

B. Article 157 [ex 130] TEC on Industry and Article 158 [ex 130a] TEC on Economic and Social Cohesion

The Treaty on European Union also introduced as a new Community objective, the “strengthening of the competitiveness of Community industry”.1787 This objective is further specified in Article 130 (new 157) TEC, which calls on the Community and the Member States to “ensure that the conditions necessary for the competitiveness of the Community’s industry exist”. Its Paragraph 1 contains the commitment to a system of open and competitive market and lists several priority areas, which comprise of the adjustment to structural changes, the creation of a business-friendly environment, especially for small and medium enterprises (SMEs), and the better exploitation of the industrial potential of policies of innovation, research and technological development.1788 Even without any reference to the adjective “cultural”, these priority areas for the Community industry correspond to the preconditions for a viable cultural industry, which is, as a technology prone product, on the one hand, subject to rapid changes in the environment due to technological innovation (hardware), and, on the other hand, depends largely on innovation, research and development. Additionally, SMEs hold an important position in the cultural industries due to their greater ability to adapt to structural changes and their, in general, culturally more diverse output and product range.

Another striking similarity is that in the field of industry, like in the domain of culture, there existed a certain reticence on the part of Member States to give up their sovereignty in the field of industrial policies, or in other words, “business culture”.1789 Such reticence was reflected in the initial

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1786 COM(92) 149 final, supra note 1774 at 10, 13 and Annex A at 13-17.
1787 Article 3 lit. l) (now lit. m)) TEC.
1788 Article 157 (1) TEC.
requirement for unanimity, which was only removed by the Treaty of Nice.\footnote{Cf. Articles 151 (5) and 157 (3) TEC.} Moreover, Article 157 (3) contains another integration clause, which asks the Community to contribute to the achievement of the objectives in the field of industry through the policies and activities it pursues under other Treaty provisions. Considering the cultural industries, this formulation creates a typical case for greater coherence in Community policy-making, since under Article 151 (4) a Community action in the field of industry must take into account its possible cultural aspects. Under Article 157 (3), on the other hand, the Community is obliged to consider its industrial objectives in other policy areas. A good example for how the TEU has paved the way for greater coherence and the presumption that the numerous integration clauses must not stand in contradiction but may rather mutually enrich each other is precisely the case of the cultural industries, as exemplified by Community action in the audiovisual sphere. Before the entry into force of the TEU and in absence of a relevant provision on either “culture” or “industry”, the MEDIA Programme (1991-95), a programme to strengthen the European audiovisual industry, was first inaugurated in 1990 by a Council Decision based on the Treaty’s residual powers clause, Article 235 (now 308) TEC.\footnote{Council Decision 90/685/EEC, supra note 1710.} In contrast to this, the two successors, the MEDIA II (1996-2000) and Media Plus Programme (2001-2005), have been based on Articles 130 (3) and the new Article 157 (3) TEC respectively.\footnote{Council Decision 95/563/EC of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II – Development and distribution) (1996-2000), [1995] O.J. L 321/25 (December 30, 1995) and Council Decision 2000/821/EC of 20 December 2000 on the implementation of programme to encourage the development, distribution and promotion of European Audiovisual works (MEDIA Plus – Development, Distribution and Promotion) (2001-2005), [2001] O.J. L 13/35 (January 17, 2001).} Notwithstanding the fact that these programmes were based on the legal provision of industry, they show first of all that the cultural industries are related to a great variety of economic, cultural and political issues. Moreover, they highlight that the pursuit of one objective, especially when considering other policy goals, can have beneficial effects and produce synergy effects for the development of many more areas than the one initially envisaged. In this sense, the various integration clauses and even the subsidiarity principle can contribute positively to the formulation of a more coherent policy and therefore even greater efficiency. In this sense, the MEDIA Programme set forth several objectives, which can be summed up as trying to increase the competitiveness of the European audiovisual industry through development and training as well as improved circulation of European works.\footnote{Article 2 Council Decision 90/685/EEC, see supra note 1791.} The weakness of the European audiovisual industry was characterised by:

the lack of competitiveness of its products as well as by its fragmentation. Lack of competitiveness results mainly from insufficient upstream (training, development) and downstream investments (distribution). This overall picture is reflected in the low level of circulation of European works within Europe and in the commercial competitiveness of American distribution structures and audiovisual works.\footnote{See Media II Programme Mid-Term Evaluation, Final Report, BIPE (November 30, 1998) at 13.} It is safe to contend that the mere creation of industrial objectives, such as a more competitive audiovisual industry based on a more important role of SMEs drawing from improved training and research possibilities and benefiting from greater distribution networks in the single market, can have a positive impact on a wider range of areas. It may not only improve the diversity and, hence, the quality of programme content hereby enhancing the cultural resources of the EU, but it may also
contribute to greater economic and social cohesion among the Member States, as well as a high level of employment. These side-effects correspond to other major objectives pursued by the Treaty and, particularly, more recent discoveries about the cultural industries’ impact on employment and the role of diversity policies in enterprises. In short, the article on Industry, especially when encompassed by a coherent policy approach based on a complementary reading of the various integration clauses in light of the principal treaty objectives, can unfold a great potential for the development of the cultural industries.

One such related article, where culture is not explicitly mentioned but where, nevertheless, the cultural integration clause unfolds a great potential, is Article 158 [ex 130a] TEC on “economic and social cohesion”, also mentioned among the objectives in Articles 2 and 3 TEC. Article 158 TEC stipulates that

In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion.

In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.

In a Communication, entitled “Cohesion Policy and Culture – A contribution to employment” the Commission begins its evaluation of Article 158 TEC by stating that

The diversity of cultural heritage in Europe is one of its most valuable assets. It forms a major part of the continent’s identity. As yet, however, the full potential of this asset remains underexploited, as do opportunities for further innovation.

From this statement it follows that the value of cultural diversity can only unfold its full potential when embedded in a broader economic framework granting equal rights and benefits to all. Hence, diversity as distinctiveness, only makes sense within a common framework, since otherwise it lacks the basis conditions for the equal interaction of its distinct partners. Cultural diversity without a common economic and political framework would only lead to distinctiveness encapsulated within national borders and thus deprive it of its full potential. In this sense, the Communication reasons that

[C]ultural measures are most effective where they form part of a strategic concept for sustainable development. Economic development, social cohesion, environmental protection and cultural action are interrelated and not necessarily opposed to each other.

The approach of complementarity rather than opposition to culture and other areas is not entirely new in the Community context but still regarded with scepticism in the common perception and practice of the Court as well as international organisations. The complementarity between culture and economic and social cohesion as well as regional development, the Commission points out by referring to past projects developed and implemented with the help of the Structural funds in a great

1795 Cf. Article 2, Titles VIII “Employment” and XVII “Economic and Social Cohesion” TEC; on social policy in general, see F.W. Scharpf, “The European Social Model: Coping with the Challenges of Diversity” (2002) 40 J.C.M.S. 645.
1797 See also the Protocol on economic and social cohesion annexed to the TEC with the Treaty on European Union.
1798 COM(96) 512, supra note 1390 at 2.
1799 Ibid., at 8.
number of Member States, from Greece, France, Germany, to Sweden, the UK and Italy. Of particular interest in this context is the common use to the concept of “cultural industries”. For instance, the text of the Communication states that

[C]ultural products and industries offer opportunities for job creation, adding significantly to the effects of more “classical” measures such as the preservation or development of cultural heritage. Culture is not merely a public occupation creating extra costs but also an increasingly important part of the private economy with considerable growth potential, fostering creative, innovative and productive effects for regional and local economies. For example, culture contributes significantly to content and applications development which is one of the key elements of competitiveness in the Information Society.1801

Last but not least, the Article on economic and social cohesion, like the one on industry, provides another useful example for the benefits that may derive from the combined consideration of, and strategic approach to, culture and other related areas, arrived at in particular through the application of the cultural integration clause of Article 151 (4) TEC.

C. Rules Applying to Undertakings (Article 81 TEC) and Aids Granted by States (Art.87 TEC)

Another Community policy affected by the “cultural revolution” introduced by the Treaty on European Union is the area of competition policy, albeit to some varying degree. While the rule on undertakings (Art. 81 [ex 86] TEC) and abuse of a dominant position (Art. 82 [ex 87] TEC) were left untouched, the rules regarding aids granted by states (Art. 87 [ex 92] TEC) were amended to the effect that they refer explicitly to cultural concerns. The discrepancy between the degrees of cultural consciousness in the two areas is not intelligible since both (private) agreements between undertakings and (public) aids granted by states may give rise to distortion of competition within the internal market.1802 In this sense, there exists complementarity between the two fields in their principal objective to provide a “system ensuring that competition in the internal market is not distorted”, as laid down in Article 3 (1) lit. g TEC. In general terms, this is the principal role of Competition law, which has been defined as follows:

Competition law is a rapidly developing area, fundamental to most legal systems. Despite its idiosyncratic and technical character, it influences numerous fields of law and itself draws heavily on principles of economics and politics. Its primary aim is to protect and encourage the competitive process, resulting in an optimum allocation of resources and the maximisation of consumer welfare.1803

In its dynamic nature, especially the aim to “encourage the competitive process”, rests the great and growing significance in balancing economic and public policy objectives, and especially culture and trade, with a view of deriving an optimum of synergy effects. The discrepancy between the public and private potential sources of distortion of competition within the common market is even more incomprehensible when considering the growing tendency of privatisation that has also found its way into culture, especially with the advent of the cultural industries.1804 The discrepancy between the rules on undertakings and state aid is, therefore, a matter for the application of the cultural integration clause of Article 151(4) TEC to the rules on undertakings.

1800 Ibid. at 3, 5-12.
1801 Ibid. at 2.
Articles 81 TEC deals with anti-competitive behaviour of undertakings, so-called “cartels”, and in concreto prohibits as incompatible with the common market agreements between undertakings, decisions by associations of undertakings and concerted practices, which are capable of affecting trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Article also lists a few categories which fall within this category of anticompetitive behaviour, such as direct or indirect price-fixing agreements, and declares them void. Paragraph 3, on the other hand, declares any decision by associations of undertakings or any concerted practice compatible,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

By contrast, Article 82 TEC prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States. Article 82 also gives an illustrative list of what may constitute an abuse, such as, for instance, the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions.

In both articles, there is no explicit reference to culture or cultural concerns although, in the past, and especially before the Maastricht Treaty was signed, the rules on undertakings have often been invoked in the context of the cultural industries, in particular the book and printing as well as the audiovisual sector. An implicit recognition of cultural concerns, however, may be arrived at through a generous reading of the exceptions listed in Paragraph 3, particularly the improvement of production or distribution of goods and the objective to give the consumer a fair share of the benefit. Otherwise, the provisions in Articles 81 and 82 TEC are a case for the cultural integration clause and the Community’s obligation to take cultural aspects into account in the enforcement of the rules on competition. There is in fact evidence in the 1st Report on the Consideration of Cultural Aspects in European Community Action that the Commission paid attention to the specificities of the cultural industries – even if in insufficient terms – before the adoption of Article 151, for instance, when it acknowledged the need for diversity of supply in the print sector and for media pluralism in the audiovisual sector. Next to public security, the plurality of the media is also mentioned in the Merger Regulation as a “legitimate interest” that Member States may protect. Nonetheless, in the same context, the Commission – obviously interpreting narrowly Article 151 (4) – did not exclude

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1805 See supra Subsection 13.2.2.2; see also the survey in Loman et al., supra note 1501 at. 95-121.


the possibility that “cultural criteria may, in the future, be directly considered by the Commission, although the principal objective of the internal market will not be questioned”.1808

The situation with regard to culture is slightly different in the realm of state aid. With the Treaty on European Union, Article 87 [ex 92] was amended and, in a way, rendered more sensitive towards the specificities of the cultural sector.1809 Paragraph 1 declares incompatible with the common market any aid granted by a Member State or through state resources that are capable of distorting or threatening to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. Paragraph 2 declares certain aids compatible (e.g. aid of social character or to make good damages from natural disasters), and Paragraph 3 states that certain forms of aid “may be considered compatible with the common market, among which lit. d. lists “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest”. Aid to promote culture is thus neither prohibited (para. 1) nor automatically permitted (para. 2). The procedure of declaring an aid in the cultural field compatible with the common market implies therefore a careful balancing of the trading conditions and competition in the Community against the common interest. In this context, the Commission has found that the cultural sector does in principal not pose a specific problem from the point of view of competition policy, especially with regard to the fact that Member States subsidise culture, but in some cases objects to the way these aids are granted, in particular when they are discriminatory nature.1810 Aid is most prominent in the audiovisual, i.e. the television and film, sector, especially in form of the funding for public services broadcasters (PSB).1811 In response to the number of complaints from private broadcasters in the Member States concerning the public funding of public broadcasters as well as to a general need for greater legal certainty, the Commission began elaborating guidelines on state aid for culture, the arts and the audiovisual sector.1812 In this context, the Commission concluded that:

Article 92 (3) (d) takes specific account of cultural objectives. The European film and television programme production and distribution industries represent an important part of the European cultural landscape. The promotion of cultural diversity is accepted by the Commission as a justification for state aid to the film industry and the production of television programmes, provided the aid does not cause undue distortions of competition.1813

The balancing between economically driven considerations of a possible distortion of competition and trade between Member States on the one hand, and the consideration of cultural aspects, especially the promotion and conservation of culture and heritage, on the other, is difficult and will therefore have to be assessed in light of the given context. Especially in the case of the dual nature of the cultural industries, there will be a constant need for the simultaneous consideration of both

1808 COM(96) 160, supra note 1806 at 18.
1809 See also the analysis of Article 93 (3) lit. d) in Schmahl, supra note 1450 at 241-258.
1810 COM(96) 160 final, supra note 1806 at 18.
1812 COM(96) 160 final, supra note 1806 at 19; for such guidelines, see Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works, COM(2001) 534 final (September 26, 2001) mainly at 5-10.
1813 COM(96) 160 final, supra note 1806 at 20.
cultural and economic elements. Nonetheless, it can be concluded that cultural aspects will henceforward play a more important role than in the past, given the explicit reference in Article 87 (3) lit. d supported by the cultural integration clause. Guidelines and specific criteria for the interpretation and application of Article 87 (3) lit. d) therefore assume an important role. For instance, interpretative guidelines concerning the audiovisual sector are found in the Protocol on the system of public broadcasting in the Member States, which was introduced by the Amsterdam Treaty. In the Protocol the Member States Governments consider that “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”.1814

D. The External Dimension of Culture in the European Union

A final important aspect of the changes introduced into the Community structure with the Treaty on European Union regards the external dimension of Community actions. It is clear that in an ever more interdependent global regulatory environment and an increasing overlap between legal systems, internal changes to a legal system will also alter, in one way or the other, its external capacity.1815 Last but not least, it is probable that the changes in the external domain, caused by internal changes, will – in the long run – also impinge in turn on the internal domain by way of international obligations arrived at in various external actions undertaken in the various international fora where the EU participates through the EC and/or its Member States.1816 In this sense, and regardless of the precise nature of the international legal status of the EU, the external dimension was said to be influenced not only by “the existence of external legal capacities of the Union, but also from the unity of the Union’s legal system”.1817 The changes that were introduced into the Community legal system with the Treaty on European Union, therefore, not only called explicitly on the Community to foster cooperation with third countries and the competent international organisations in the sphere of culture (Art. 151 [ex 128] (3)), but also obliges them to take cultural aspects into account in actions taken under other Treaty provisions (Art. 151 [ex 128] (4)). From the cultural industries’ perspective a set of such important Treaty provisions is found in the form of the Common Commercial Policy (CCP), regulated in Articles 131-134 [ex 110-115] TEC. Another set of provisions where the greater cultural awareness can be observed is the respective fields of “development cooperation” (Art. 177-181 [ex 130u-130y] TEC) and, since the Treaty of Nice, also of “economic, financial and technical cooperation with third countries” (Art. 181a TEC).

a.) Common Commercial Policy: Articles 131-134 TEC

In the Rome Treaty, the CCP constituted primarily a logic consequence of the Common Customs Tariff and the need for the external representation of the customs union. In the course of the extension of Community competences, the CCP, however, also gained greater importance in the

1814 Protocol on the system of public broadcasting in the Member States, annexed to the Treaty of Amsterdam supra note 1411.

1815 See also Eeckhout, supra note 1378.

1816 In this context, it must be noted that until now only the European Community has been granted explicit legal personality (Art. 281 [ex 210] TEC) and can in this capacity become a member of international organisations (but see Art. 1-7 EU Constitution); see Denza, supra note 1437; on the internal effect, D. Schermers, “The internal effect of Community treaty-making”, in D. Schermers and H.G. O’Keeffe, Essays in European Law and Integration (Kluwer, 1982) 167.

assertion of the Community’s role on the international plane in general, and the pursuit of, directly or indirectly related, Community objectives in particular. In light of the objectives listed in Art. 2, the activities of the Community shall also include a common commercial policy (Art. 3 (1) lit. (c) TEC. Committed to the harmonious development of world trade, the CCP shall be based on:

uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.\footnote{Cf. Articles 131 and 133 (1) TEC.}

Such uniform principles are of notable practical importance especially in the negotiation and conclusion of bilateral, regional and multilateral tariff and trade agreements.\footnote{On the problem of the multiplication of bilateral and regional FTAs under the WTO system from the perspective of the CCP, see also Cremona, supra note 1377.} A lack of commercial policy coherence of the EU can easily damage the internal coherence already achieved and by contribute to the ongoing fragmentation of the global legal system further erode the efficiency and functioning of the Community system.\footnote{See generally M. Smith, “The European Union’s commercial policy: between coherence and fragmentation” (2001) 8 J.E.P.P. 787.} This danger is real for a great number of Community policies but in particular for the policies with regard to the cultural industries. It results from this danger that various Community measures aimed at creating a harmonious relation between the cultural and economic forces at the Community level, by for instance allowing a certain form of state aid in the cultural sector, may become impeded by the parallel process of global trade liberalisation under the aegis of the WTO where “cultural considerations” are so far, by and large, absent.

With the signing of the Treaty on European Union, the CCP was left untouched, and changes with regard to culture may only have occurred indirectly by way of the cultural integration clause. Next to the insistence of the French Government, such an indirect, or perhaps only subconscious, effect of then Article 128 (4) TEC may also have caused the “agreement to disagree” over the issue of the audiovisual industry in the final phase of the Uruguay Round negotiations.\footnote{See supra Part III Subsection §§ 7.1.2. See also Warêgne, supra note 66 mainly at 34-56, noting that “[…] la Commission européenne a donné le sentiment qu’elle n’était pas prête à défendre jusqu’au bout les intérêts culturels européens, alors même que le traité de Maastricht donne à l’Union européenne des competences plus explicites en la matière”.} The persisting uncertainty with regard to the cultural industries since the conclusion of the Uruguay Round at global level is matched by uncertainty about the internal division of competence between the Community and the Member States by virtue of Article 133 TEC. In this context, it is useful to recall Opinion 1/94 of the ECJ, which stated:

1. The Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods.
2. The Community and its Member States are jointly competent to conclude GATS.
3. The Community and its Member States are jointly competent to conclude TRIPs.\footnote{Opinion 1/94, supra note 93.}

Already at the time the publication of Opinion 1/94 was accompanied by a vivid criticism from commentators.\footnote{See “Programmed Desaster”, supra note 1378.} In particularly, it has been criticised that the Court’s attribution of competence has been tailored according to the needs of the old GATT 1947 limited to trade in goods but fell short of the requirements imposed by the new structure of the WTO, including services and intellectual
property rights, which by virtue of Article II:2 WTO Agreement form an integral part of the WTO Agreement (“single package”).

To the detriment of greater coherence in the CCP, the Court's opinion therefore did not critically challenge the overall fragmentation of the WTO system in light of the EU’s internal structure and various experiences underscoring, for instance, the complementarity between provisions on goods, services and IPRs in the common market. In denying such links, it did not even take into proper account the dynamic formulation of the scope of the CCP contained in the non-exhaustive enumeration of Article 133 (1) TEC, which points to the possibility, or necessity, to adapt the scope of the CCP to the effect that it allows for the formulation of a coherent Community response to global developments in the ongoing process of further trade liberalisation, especially in the service sector. It contributed even less to greater clarity for the treatment of the cultural industries, which combine characteristics of both goods and services, and, in addition, rely heavily on copyrights in assuring the return of revenues. Such legal uncertainty with regard to the Community competence in the field of commercial policy is reinforced by different positions among the Member States in determining the appropriate approach to role of the cultural industries in international trade, as it surfaced once more in the internal debate on the revision of the TWF Directive.

Following Opinion 1/94, the legal situation of the CCP in the process of the conclusion of the Uruguay Round made it necessary to conclude the WTO Agreement as a so-called “mixed agreement”, i.e. accepted jointly by the Community and its Member States. As a special feature, a mixed agreement has the effect that it grants every single Member State a de facto right of veto. This situation prevented a Member State of being outvoted in a sensitive area such as the cultural field, due to the qualified majority voting (QMV) procedure. At the same time, however, it was capable of halting the further progress in the harmonious development of world trade, in particularly through the progressive abolition of restrictions on international trade and the lowering of customs barriers under the aegis of the WTO.

This situation did not change until the Treaty of Nice which amended Article 133 TEC to the effect that henceforward it principally covers the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property. The inclusion of services and IPRs is only theoretical, since it is subject to the exceptions listed in Paragraph 6, which – among

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1824 Ibid. at 389.
1825 See also B. Beutler et al., eds., Die Europäische Union: Rechtsordnung und Politik, 5th ed. (Baden-Baden: Nomos, 2001) at 710 et seq.
1826 On the “division of powers between the EC and its Member States in the field of culture trade”, see “Trade in Culture” supra note 48 at 249-252.
1827 During the Uruguay Round Negotiations, France, Spain, Ireland, Italy, Portugal and Belgium supported specific treatment of audiovisuais, whereas the Netherlands, Germany, the UK, Luxembourg and Denmark were generally more sceptical, see Warêgne, supra note 66 mainly at 39, 40, 54 and 56; on the Member States’ positions during the revision of the TWF Directive, see the Forth 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 1997-8, COM(2000) 442 final (July 17, 2000).
1829 See “Trade in Culture” supra note 48 at 251.
1830 Article 113 (new 133) (4) TEC in the version before the Treaty of Nice.
1831 Cf. Article 131 TEC.
1832 Cf. Article 133 (5) TEC.
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other sensitive sectors – explicitly recognised the specific nature of the cultural industries. It reads as follows:

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community’s internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States [...].

From this paragraph it follows, first of all, that in future the Council is barred from concluding agreements in areas where the Treaty itself rules out any harmonisation of the laws or regulations of the Member States, such as it is the case of culture (Article 151 (5) TEC). Furthermore, the Nice amendments to Article 133 mean that the negotiation and conclusion of agreements relating to trade in cultural and audiovisual services is subject to unanimity and therefore requires the conclusion of a mixed agreement. The provisions of Article 133 (5)-(7) leave not only a great uncertainty with regard to the relation to Article 151(3) TEC but also to the various other Community external competences such as in the field of development cooperation. In sum, they have been described as largely incapable of guaranteeing greater unity and coherence in the external representation of the Community.

As regards the telos of the unanimity requirement for cultural services it appears that, on the primary insistence of France, it is meant to protect the Member States’ cultural service industry as an important foundation of their cultural diversity. Linked to mixity, another important aspect is that mixed agreements help to maintain the current number of votes and to prevent a diminution of the Community’s current number of votes.

In sum, the amendments introduced by the Nice Treaty have received with critical commentaries, in particular as regards the Community’s ability to speak with one voice as the precondition for a coherent CCP. Even with regard to the cultural industries there remains a considerable degree of uncertainty with regard to the exact division of competence between the Community and its Member States. Altogether, the legal ground for determining the future of the cultural industries in

1833 Article 133 (6) TEC, as amended by the Treaty of Nice, see supra note 1412 [Italics added].
1835 Ibid. at 1529-30.
1837 Cf. “Mixed Agreements: A List of Problems”, supra note 1828 at 7; see also Fn 2 in Article IX WTO Agreement, stating that “The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities”.

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external relations of EU will be decided primarily on the basis of four different treaty provisions: First and foremost, the mixed economic and cultural aspects of the cultural industries will be dealt with under Article 133 TEC; second, the cultural aspects are based first on the cultural integration clause of Article 151 (4) and third on the cultural cooperation clause of Article 151 (3) TEC; fourth and last, the provisions on the CFSP must be considered as an flanking measure that, if applied consistently, may help not only “to assert the Union’s identity on the international scene” (Art. 2 Recital 2 TEU) but also – as the American example in supporting (and exporting) the soft power of the US via the cultural industries has proven – to strengthen the diversity of the Community’s cultural industries.1839

At this point only the future, or perhaps already the near future, will show to what extent these factors and related developments will affect the mode of the current global trade liberalisation to the effect that it will respond to the “new trade agenda” by taking cultural aspects, and particularly, cultural diversity, into greater account.1840

b.) Development Cooperation: Articles 177-181 TEC

Another important set of provisions relating to the Union’s external dimension is found in the Articles on “development cooperation”. In this area too, the greater cultural sensitivity of the EU’s Treaty framework can be observed, albeit only indirectly and implicitly. Paradoxically, the forerunner of development cooperation, Article 182(3) TEC on the Association of the Overseas Countries and Territories (OCT), had already highlighted – in the version of the Rome Treaty – the cultural dimension of cooperation with third countries when it stated that

[I]n accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.1841

The last words form indeed a remarkable statement ahead of their time, since the treaty mentioned “cultural development” in relation to the OCT before it was (explicitly) recognised in relation to the E(EE)C Member States. It must therefore be seen as a trend-setter for later developments in the field of European integration and EC development policy; and it should not remain the last example of inspiration drawn from the field of development cooperation.

The association of the OCT is explained by their privileged situation deriving from the colonial past of some Member States, which can be described as at the same time geographically remote but historically close.1842 Another such privileged form of cooperation existed in the context of the cooperation between the African, Caribbean and Pacific (ACP) countries and the E(EE)C in the framework of the Lomé (and Yaoundé I and II) Conventions.1843 In the course of this

1839 On the circular letter, see Fn 542 and on “soft Power”, see the quote in supra note 812.
1840 See R. A. Wessel, “The Inside Looking Out: Consistency and Delimitation in EU External Relations” (2000) 37 C.M.L.R. 1135 at 1145 et seq, isolating the domain of culture as one of the particularly problematic areas for potential overlap between the CCP and the CFSP.
1841 See e.g. Cable, supra 69.
1842 Article 182 TEC [Italics added]; see also the Preamble to the TEC Recital 7 and Article 3 (1) lit s) [ex r.] TEC.

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partnership, it was the third Lomé Convention (1985-90) that first explicitly recognised the role of culture within a great variety of areas in the broader framework of development and trade cooperation. In its principles, it especially recognised the fundamental principle of “the right of each State to determine its own political, social, cultural and economic policy options”. In Article 10, the Convention sets forth the objectives and main guidelines of the Convention as follows:

Cooperation shall be aimed at supporting development in the ACP States, a process centred on man himself and rooted in each people’s culture. It shall back up the policies and measures adopted by those states to enhance their human resources, increase their own creative capacities and promote their cultural identities. Cooperation shall also encourage participation by the population in the design and execution of development operations, Account shall be taken, in the various fields of cooperation, and at all the different stages of the operations executed, of the cultural dimension and social implications of such operations.

As a matter of fact, the last sentence reads like the cultural integration clause of the later Article 128 TEC. The specific provisions for “Cultural and Social Cooperation” are listed in Articles 114-128 Lomé III, which inter alia contained specific provisions on the audiovisual media. Lomé IV mentions that the ACP States’ cultural goods and services are “highly representative of their cultural identities in the ACP countries and the Community.” In the so far final version of the Lomé partnership, the so-called “Cotonou Agreement”, concluded for the years from 2000 and to 2020, the chapter on cultural cooperation was changed and the relevant Article 27 “Cultural Development” stipulates that:

Cooperation in the area of culture shall aim at:

(a) integrating the cultural dimension at all levels of development cooperation;
(b) recognising, preserving and promoting cultural values and identities to enable inter-cultural dialogue;
(c) recognising, preserving and promoting the value of cultural heritage; supporting the development of capacity in this sector; and
(d) developing cultural industries and enhancing market access opportunities for cultural goods and services.

In this Article, the concept of “cultural industries” has been introduced for the first time, which not only confirms the rising importance and wider acceptance of the concept itself but also underscores once more the importance of the nexus between trade in cultural goods and services and sustainable development.

In the same line, the Euromediterranean Partnership (EUROMED), initiated by the 1995 Barcelona Declaration, foresees cooperation not only in the field of trade (i.e. the progressive establishment of a...
free trade area) but also taking into account the specific role of culture and especially the media.1852 In this context, it must be added that with the Treaty of Nice a new Article 181a TEC on “Economic, Financial and Technical Cooperation with Third Countries” was introduced, opening up new possibilities for cooperation with third countries.1853 Article 181a TEC opens the possibility for the Community to cooperate with third countries which are not so-called “developing countries”. Its main legislative purpose was to clarify the scope of, and to demarcate different Community competences in external matters, such as particularly the CCP, development cooperation and the so-called “residual power clause” of Article 308 TEC.1854 However, from a cultural perspective – and cultural aspects will have to be taken into account under all forms of cooperation with third countries – the distinction between so-called “developing” and “developed” countries appears flawed, especially when one considers the objectives of Article 181a (1) TEC, which shall contribute to “developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms”. The reason for the flaw is that strictly speaking “culture” and “development” are inseparably linked, and have in common the designation of a process striving for improvement, as already the etymological origin of the concept of culture (“cultivation”) indicates.1855 The formal nexus in EC law, however, was only established by the Treaty on the European Union which not only formally introduced an article on culture but also a set of articles dealing with development cooperation (Art. 177-181 [ex 130u-130y] TEC). Nonetheless, already in the Rome Treaty, the cultural aspect of any form of cooperation was recognised in the context of the OCT. Similarly, the ACP-E(E)C partnership produced in 1984 with Lomé III a broader cultural consideration in the framework between the ACP States and the EEC Member States than the one governing the relations between the EEC Member States. Equally, human rights clauses were introduced into the ACP-EC framework long before the EU Charter of Fundamental Rights was proclaimed.1856 Finally, these examples suggest that the distinction between “developing” and “developed” countries is generally flawed and should therefore be abandoned, or at least become dissociated from the North-South divide and the description of different degrees of industrialisation. The reason is that from a cultural perspective, the degree of development of a country does not depend solely on industrial or economic factors at any given moment in time but instead embrace an ongoing process towards improvement.1857 Moreover, any form of cooperation is a synallagmatic relationship, which always, in one way or the other, bears benefits for both parties. Most of all, in practice it is


1855 Cf. Part I, Subsection 2.1.1.2.B.

1856 See especially Article 5 Lomé IV, supra note 1847; see also Recital 4 of the Preamble of Lomé III, supra note 1846.

increasingly difficult to separate various aspects within a cooperation agreement concluded with a third country.\textsuperscript{1858}

\S\S\ 13.3.3. The Cultural Industries: An Evaluation of the Changes in the Treaty Framework and Case Law

13.3.3.1. General Remarks

After the short glimpse at the main changes to the EU Treaties’ framework after Maastricht with regard to culture, it remains to evaluate the impact these changes had on the respective sectors of the cultural industries. In particular, it will interesting to see to what extent the explicit reference to culture in the Treaties may have altered the relationship between culture and trade, or more specifically the treatment of the cultural industries within the internal market. The task of showing the impact of the new provisions dealing with culture, however, is rendered more difficult due to important changes in the constitutional structure of the Treaties and the inclusion of further Community competences, which altogether are capable of altering the internal equilibrium in a system as complex as that of the EU. It appears that, similar to water in communicating vessels, each change in the legal framework and/or the number of constituents, reiterates a quest for an internal equilibrium, which is best-suited to sustain the existence of the system.\textsuperscript{1859} Thus, the best way of confronting the frequent changes in the EU’s legal framework with regard to the applications of its various norms to the cultural industries is, therefore, to continue the analysis of the Court’s judgments in the field of the cultural industries, and evaluate its legal reasoning and argumentation in careful comparison with the case law before Maastricht. It must be added here that in terms of the scope of Community actions in the field of culture, the Maastricht Treaty has not introduced major novelties. Instead of introducing new actions, the amendments to the Treaty with regard to culture, in particular through Article 128 (now 151) TEC, equal a mere codification of the past Community actions in the cultural sector and at the same time an attempt to halt the creeping expansion of the Community’s competence. From this perspective, and also in line with the Commission’s approach to the changes, there exists continuity in Community action with regard to culture.\textsuperscript{1860} One commentator has found another sign of continuity between the time before and after Maastricht, which consists in an unchanged line of case law, widely neglecting the amendments to the Treaty and in particular the role of the new Article 151 [ex 128] TEC. The commentator not only states a general misinterpretation of Article 151 but also points out the failure of the Court to correct it, because


\textsuperscript{1859} See e.g. “A new paradigm of EC law?” supra note 1491 at 895, stating that “the more competences the Community is acquiring, the less exclusive will be its jurisdiction, and the more “interbrand” competition between legal order will take place”; see also de Witte & Hanf & Vos, supra note 69 at xiii, introducing the topic of the book by stating that the “view that emerges from many of the contributions is, in fact, that differentiation may be the opposite of uniformity, but that it may well – if handled with care – actually strengthen European unity”.

\textsuperscript{1860} COM(96) 160, supra note 1806 at 15-18; see also R. Craufurd Smith, “European Community Intervention in the Cultural Field: Continuity or Change?” in R. Craufurd Smith, ed., Culture and European Union Law (Oxford: Oxford University Press, 2004) [forthcoming], remarking that “[I]ndeed, given the extensive reach of Community law into the cultural domain, one is tempted to ask not why a new treaty article on culture was added in 1992, but why one was not introduced earlier”. 333
In summary, the new cultural provisions in the Treaty have not prompted the ECJ to adjust its analysis in cases involving culture. By continuing to treat culture as it did prior to Maastricht, the ECJ prevents Article 151 from performing its intended role. The ECJ could have interpreted Article 151 to require that cultural aspects be taken into account “vis-à-vis EC fundamental economic rules.” Instead, the ECJ has continued to analyze cases as if Article 151 had not become law.1861

It is therefore appropriate to review shortly some case law touching upon the realm of culture.

13.3.3.2. The Case Law Experience I: General Cultural Considerations

Before discussing the relevant case law touching upon the cultural industries and a possible alteration in the relation between the fundamental economic freedoms and the respect for culture within the internal market, it is useful to mention briefly a few cases representative of the broader culture and trade debate and in which the new article on culture was raised.

An early such case in which cultural aspects were raised was the Bosman Case, which was centred around the free movement of football players in light of transfer rules for professional players and national legislation, so-called “nationality clauses”, which restricted the extent to which foreign players could be recruited or fielded in a match.1862 During the proceedings, it was the German Government that contended that a sport such as football is not an economic activity and that it has “points of similarity with culture” and that according to Article 128 (1) TEC, the Community is obliged to respect the national and regional diversity of cultures of the Member States.1863 The existence of a link between sport and culture is also indicated by the scope of various committees, such as the EP’s Committee on Culture, Youth, Education, the Media and Sport, the Council Committee on Education, Youth and Culture and the Commission’s Directorate General on Culture and Education. Especially, the nexus between culture, media and sports seems well chosen in this context, since football is not only an important economic activity per se but also generates considerable financial revenues in the form of its broadcasting rights.1864 In simple terms, sports like cultural activities have in common a dual both cultural and economic aspect. The argument before the Court, thus, demonstrates once more the conceptual difficulty of accepting this dual nature. Similarly, the Court responded by not accepting the argument, reasoning that

the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48, which is a fundamental freedom in the Community system.1865

As a consequence, the Court declared that Article 48 TEC precludes the application of both transfer rules and nationality clauses. It must be added here that only after the Court’s ruling, the social significance and in particular its role in forging identity and bringing people together was explicitly recognised in form of a declaration.1866

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1861 See Cunningham, supra note 1782 at 153 [footnotes omitted].
1863 Ibid. at para. 72.
1865 Case-415/93, supra note 1862 at para. 78.
1866 See Declaration on Sport, Amsterdam Treaty, supra note 1411.
The difficulty of overlapping considerations was also subject in another case. In *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, the Court declined its jurisdiction in a case concerning a regional park which was created by an Italian regional law “in order to protect and enhance the value of the environment and the cultural heritage of the area concerned”.\(^\text{1867}\) In this case, Mr. Annibaldi, the owner of an agricultural holding, of which the territory was partially overlapping with the said regional park, was denied the permission to plant orchids. According to him this refusal amounted to an expropriation without compensation and was contrary to the provisions of the EC Treaty, in particular Articles 40 (now Art. 34) and 52 (now Art. 43) thereof, as well as the general principles of law. In answering the questions by the referring national court, the Court also mentioned the second indent of Article 128(2) TEC on the conservation and safeguarding of cultural heritage of European significance, but finally came to the conclusion that the facts fell outside the scope of Community law.\(^\text{1868}\) Although, the denial of jurisdiction can be duly regarded as an attempt to put a limitation on Community competence in the field of culture,\(^\text{1869}\) it appears that the facts of the case did not offer a sufficient basis for a consideration at Community level and must therefore be seen a due respect of the Member States’ competence in this field.

More appropriate guidance for the difficult process of determining the proper legal basis for Community action and hereby establishing greater clarity for the scope of Community competences vis-à-vis the Member States derives from two other cases. First, in *Portuguese Republic v Council of the European Union*, the Court had to assess inter alia whether the inclusion of provisions on cultural cooperation within the Cooperation Agreement between the European Community and the Republic of India in the framework of development cooperation Article 130y (now 181) TEC), required recourse to Article 235 (now Art. 308) TEC, or the conclusion of a mixed agreement.\(^\text{1870}\) The Court found the cultural obligations mentioned in the agreement to constitute objectives which fall within the framework of development cooperation and therefore concluded that “it was possible for the contested decision to be validly adopted on the basis of Article 130y of the Treaty”.\(^\text{1871}\) The Court’s ruling takes into account the need for development cooperation to take a broad approach, in which culture obviously plays an important role.\(^\text{1872}\)

In the second, case the clash of legal provisions occurred between the provisions on “industrial policy” (Article 157 TEC) and “culture” (Art. 151 TEC). The subject of the proceedings in *European Parliament v Council of the European Union* was a Council decision adopting a multiannual programme to promote linguistic diversity of the Community in the information society (MLIS).\(^\text{1873}\) Its sole legal basis was the article on industrial policy. According to the Parliament, by pointing to the content of the MLIS and especially its title, the contested decision should have also been based on Article 128 (now 151) TEC, as the Parliament advocated also in its proposed amendments to the programme in order to underline the programme’s cultural aspects. The Commission, nevertheless, retained Article 130(3) as the sole legal basis of the measure and rejected the dual legal basis, because it the


\(^{1868}\) *Ibid.* at para. 16.

\(^{1869}\) See Cunningham, *supra* note 1782 at 152.

\(^{1870}\) *Case C-268/94, supra* note 1858.


\(^{1872}\) *Ibid.* at para. 35.

programme’s principal objective was to encourage industrial actions to provide multilingual services and that the inherent cultural and social aspects constitute mere spin-offs.\footnote{1874} For a solution to the dispute, the Court reasoned that

In order to determine whether the dual legal basis contended for by the Parliament was necessary, it is appropriate to consider whether, according to its aim and content, as they appear from its actual wording, the contested decision is concerned, indissociably, both with industry and with culture.\footnote{1875}

In this statement the principal difficulty with regard to the distinction between, on the one hand, cultural policies and measures in the cultural sector on the other, which are highly relevant for the concept of cultural industries surfaces again.\footnote{1876} The Court, after having examined the object of the programme concluded that the main object of the programme is the promotion of linguistic diversity seen primarily as an element of an essentially economic nature and only incidentally as a vehicle for or element of culture as such.\footnote{1877} Hence the Court confirmed the decision to base the programme on the sole legal basis of industrial policy.

Regardless of their outcome, these few cases already illustrate a slight change in the legal discourse before the Court to the effect that it is literally forced to discuss cultural aspects, which hitherto were merely described as background considerations. It remains now to investigate briefly the line of case law touching upon the cultural industries in a narrower sense.

13.3.3.3. The Case Law Experience II: Specific Considerations of the Cultural Industries

As regards the cultural industries, the post-Maastricht developments link up with those during the 1980s, with the focal point on the book and printing sector as well as the audiovisual sector. Occasionally, issues concerning other sectors part of the cultural industries, such as the film, the video and the music sector in connection with IPRs, were also raised, pointing out the intensification of the past trend towards convergence, especially induced by the process of digitisation and the dawning emergence of the information society.

To begin with the book and print sector, between 1992 and the present three cases involving book price-fixing occurred, of which two were based on agreements between undertakings and one on a Member State’s national legislation. In the first case, Publishers Association v Commission, subject of the proceedings were two private agreements, the “Net Book Agreement”, concluded under the aegis of the Publishers Association, which represented the vast majority (70 to 80\%) of publishers in the United Kingdom.\footnote{1878} The one agreement was for Members of the Publishers Association while the other was for non-Members. The effect of the agreements was also supposed to apply for sales in Ireland, which added a transnational element to the case. The Commission decided that the agreements infringed Art 85(1) TEC, because they restricted trade between Member States. Contrary to the Court of First Instance’s ruling, on appeal before the ECJ, the Commission’s decision was rescinded to the extent that it refused the exemption based on Art 85(3) TEC. With regard to Article 128(4) TEC, it is interesting to note that reference to the new article on culture is only made by the Advocate General in his opinion, in which he noted that the Commission had not overlooked

\footnote{1874} Ibid. at para. 24. \footnote{1875} Ibid. at para. 38. \footnote{1876} See supra note 1552. \footnote{1877} Case C-42/97, supra note 1873 at para. 61. \footnote{1878} Case C-360/92, The Publishers Association v Commission of the European Communities, [1995] E.C.R. I-23.
its duty to “take cultural aspects into account”. It is important to note here that no further decision was rendered because of the participating publishers’ voluntary renunciation of the use of the agreements which were being evaded by imports from the USA. The second case (Free Record Shop) involving book price-fixing agreements arose from the organisation of the book retail market in the Netherlands. However, in this case reference was made neither to the cultural aspects of book price-fixing nor to the new Article on culture. Instead, the main problem discussed in the case concerned the notification and provisional validity of the agreement fixing book retail prices pending a decision by the Commission. A far more interesting case is the Echirolles Case, which not only discussed more broadly the cultural aspects of book price fixing but, most of all, the implications of the amendments introduced by the Maastricht Treaty and especially the transition from the common to the internal market. Echirolles virtually continues where the Leclerc Case left off. The dispute giving rise to the reference for a preliminary ruling by a French Court concerned again the French law of August 10, 1981 on book prices. Since January 10, 1985, the day the judgment in the Leclerc Case was rendered, however, the legislative structure of the Treaty has drastically changed and, therefore, altered the Community legal framework with which the French law on book prices must conform. The principal question asked by the French Court was whether the French legislation requiring publishers to impose on booksellers fixed prices for the resale of books, regardless of their contents, to consumers and to purchasers for occupational purposes is compatible with the internal market established on 1 January 1993, and in particular with Articles 3(c) and (g), 3a and 5, the second paragraph of Article 7a and Articles 102a and 103(3) and (4) of the Treaty establishing the European Economic Community, as amended by the Single European Act and the Treaty on European Union.

The changes referred to relate to the definition of the internal market and the introduction of provision on economic policy, which lay down the principles of an open market economy with free competition. The reason to ask this question was well founded, because in its analysis of the said French law in the Leclerc Case, the Court explicitly rendered its judgment by hinting at the state of Community law at the time of the judgment (“as Community law stands”) as a tribute to the dynamic development of European integration. The change with regard to culture by virtue of Article 128 (now 151) TEC was taken into account indirectly via reference to Council Decision 97/C 305/02 of 22 September 1997 on cross-border fixed book prices in European linguistic areas, which “recognises the dual character of books as the bearers of cultural values and as merchandise”. In raising the Council Decision and Article 128(4), the French Court acted with imprecision, which also the ECJ did not rectify in its subsequent reasoning. It did so by interpreting the cultural integration clause (Art.128(4) TEC), first, as “a definition of culture that is oriented primarily towards artistic and literary creation” and, second, by making a distinction between cultural and technical books, which obviously denies the latter any “cultural” value and at the same time the special character of a
dual product. Both conclusions are totally unfounded since Article 128 (now 151) TEC does not contain a definition of culture. Paragraph 4 fails to confirm an orientation towards artistic and literary creation,\(^\text{1887}\) and the Council decision does not contain a distinction between cultural and technical books.\(^\text{1888}\) Not even a combined reading of paragraphs 2 and 4 would support this interpretation. In the following, the Court neither discussed the cultural aspects of the issue nor assessed whether the amendments to the Treaty have altered the legal basis for book price fixing agreement. Instead, without giving a reasoned explication, the Court merely followed the Commission’s argument according to which the mentioned changes to the Treaties do not impose on the Member states “clear and unconditional obligations which may be relied on by individuals” but are rather general principles forming the basis of complex economic assessments. Furthermore, the Court stated that “since Articles 30, 36 and 85 of the Treaty have not been amended, the Court’s interpretation of them in \textit{Ledere}, in conjunction with Article 5 of the Treaty, cannot be called in question”.\(^\text{1889}\) For this reason, the Court concluded that national legislation on book price fixing is compatible with the Treaty.\(^\text{1890}\)

Another series of connected cases in the book sector concern a French state aid scheme for the export of books.\(^\text{1891}\) The time span of these cases covers the amendments introduced by the TEU and in particular the introduction of Article 92 [now Art. 87 (3) d) TEC on aid to promote culture. The starting point for these cases was an initiative by the French Ministry of Culture, initiated in 1980 through the establishment of CELF (\textit{Coopérative d'Exportation du Livre Français}) entrusted with the principal task was to satisfy the demands of small consumers all over the world with the purpose of encouraging the spreading of the French language.\(^\text{1892}\) CELF administered various aid schemes, such as subsidies for air freight going to the OCT or to distant foreign countries, the offer of French-language books at half-price to readers in Central and Eastern Europe and the provision of half-price text books for university students in sub-Saharan Africa.\(^\text{1893}\) The complaint against the aid scheme was raised by a French agency company, active in the export of French books to other Member States of the European Union and to non-member countries, which asked the Court to annul the Commission’s decision. The Court, by applying the derogation provided for in Article 92(3)(c) of the EC Treaty, declared the French regime subsidising the exports of French books compatible with the common market.\(^\text{1894}\) Unfortunately, a profound discussion of the wider implications of the introduction of Paragraph 3 (d) in Article 92 TEC was obstructed by the repeated failure of the French Government to notify the aid to the Commission and the subsequent Court’s focus on procedural aspects.\(^\text{1895}\) However, from these three rulings derives that the transition from Article 92(3) lit. c) to lit. d) appeared to be smooth, since the Commission came to a similar

\(^{1887}\) \textit{Cf.} Article 128 (now 151) TEC, for “artistic and literary creation”; see also Blanke, supra note 1773 at 1708, stating that the Article on culture does not contain a definition of “culture”.


\(^{1890}\) Ibid. at para. 26.


\(^{1892}\) Case T-49/93, supra note 1891 at para. 1.

\(^{1893}\) Ibid. at para. 5.

\(^{1894}\) Ibid. at paras. 1 and 4.

\(^{1895}\) Cases T-155/98, C-332/98 and T-49/93, supra note 1891.
conclusion based on both on the basis of lit. c and lit. d, namely that the said aid constituted an aid within the meaning of Article 92(1) TEC but was however compatible aid, since it pursued a legitimate cultural objective and was necessary to attain that objective. Notwithstanding the result of the Commission’s analysis, the final result was that the Court annulled the Commission’s decision with regard to its qualification of the French measure as state aid compatible with the common market.

In line with the past cases in the print sector, another case that arose concerned the alleged abuse of a dominant position within the meaning of Article 86 [ex 90] TEC by a press undertaking which holds a very large share of the daily newspaper market in a Member State. The reason for the complaint was that the press undertaking refused to allow a publisher of a rival newspaper to have access to that scheme for appropriate remuneration. Unlike in the Binon Case, this case contained no discussion of cultural issues such as special “social and cultural role of the press” and no mention of the new article on culture analysing the potential impact of the distribution system on media pluralism was made.

In the audiovisual sector, most case law from 1992 onwards was linked to the articles enshrined in the Television Without Frontiers Directive. Only in three cases can an explicit reference to culture be found: First, in Commission v Belgium, the Commission asked to Court to declare that Belgium had failed to fulfil its obligations arising from the TWF Directive, especially by maintaining a system of prior authorization for retransmission by cable of television broadcasts from other Member States and by failing to comply with the provisions concerning television advertising. In defence of the system of prior authorisation, the Belgian Government raised Article 128 TEC as a justification based on the measure’s intent to secure respect for cultural objectives. The Court, by referring to its former decision in Mediawet and Commission v Netherlands, repeated its acknowledgement that cultural policy may under certain conditions constitute an overriding requirement relating to the general interest hereby justifying a restriction on the freedom to provide services, but nonetheless dismissed the argument, by finding that

Belgian Government has not shown adequately in detail that the system of prior authorization was necessary and proportional for protecting pluralism in the audiovisual field or in the media generally.

In subsequent cases, the Court applied the same standard to cultural policy objectives without mentioning Article 128 TEC. Another cultural aspect was discussed in the context of media

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1896 Case T-49/93, at para. 53 and Case T-155/98, at paras. 55 and 56 and Case C-332/98 at paras. 11 and 14; ibid.
1897 Cases T-155/98, C-332/98 and T-49/93; ibid.
1899 See supra note 1628.
1901 Case C-11/95; ibid. at 46.
1902 See supra note 1675.
1903 Case C-11/95, supra note 1900 at 54-55.
pluralism in its relation to competition law. In *Metropole*, four private broadcasters were seeking the annulment of a Commission decision addressed to the European Broadcasting Union (EBU), which declared the provisions of Article 85(1) inapplicable for a period of five years.¹⁹⁰⁵ The EBU is a non-profit-making trade association of radio and television organisations set up in 1950 with the goal of promoting radio and television programmes (e.g. through Eurovision and Euroradio).¹⁹⁰⁶ The principal subject of the contested decision were internal provisions and other regulations of the EBU governing the joint negotiation, acquisition and sharing of television rights to sports events, which according to the Commission, were capable of restricting, if not eliminating in many cases, competition between Members of the EBU and that the EBU membership rules favour the distortion of competition vis-à-vis commercial channels.¹⁹⁰⁷ Nonetheless, the Commission granted an exemption based on the benefits that the EBU system provided through the “joint acquisition and the sharing of rights as well as to the exchange of the signal and its transport on the common network and to the contractual access granted to non-members”.¹⁹⁰⁸ The principal problem in the case related thus to the difference between public service broadcasters and private commercial channels and the question to what extent socio-economic or cultural aspects, especially the protection of pluralism, had to be taken into account in the sphere of competition.¹⁹⁰⁹ The Court, however, declined to take such aspects into account and merely stated that “[I]n any event, the Decision is based primarily on the strictly economic benefits arising out of the exempted decisions and agreements”.¹⁹¹⁰ Finally, the Court found that the Commission’s erred in law by subsuming the public mission, defined as the “obligation to provide varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs” under Article 90(2) on services of general economic interest and misinterpreted Article 85(3) TEC.¹⁹¹¹ In addition to the mere neglect of arguments relating to public mission or legal pluralism, the Court found that the Commission failed to base its assessment on a minimum amount of actual economic data.¹⁹¹² In another case, however, the same purely economic reasoning with no space for considerations of cultural aspects, led the Court to dismiss an action against a Commission decision declaring a concentration in the market for television advertising and independent television production incompatible with the common market.¹⁹¹³ Based on the Court’s approach it is no surprise that also the assessment of the question whether funding for public broadcasters constitutes aid granted by States within the meaning of Article 92 TEC, is based on merely economic considerations and no reference to the cultural integration clause or Article 92(3)[ex 87] lit. d.) TEC is made.¹⁹¹⁴ The wide neglect of broader non-

¹⁹⁰⁴ Case C-6/98, at para. 50 and Case C-245/01, RTL Television GmbH v Niedersächsische Landesmedienanstalt für privaten Rundfunk, [2003] E.C.R. 0000 at para. 71 [not yet reported], supra note 1900.
¹⁹⁰⁶ Ibid. at para. 7.
¹⁹⁰⁷ Ibid. at para. 29.
¹⁹⁰⁸ Ibid. at para. 30.
¹⁹⁰⁹ Ibid. at para. 112.
¹⁹¹⁰ Ibid. at para. 120.
¹⁹¹¹ Ibid. at para. 116 and 123.
¹⁹¹² Ibid. at para. 120.
economic considerations also stands in contrast to the Protocol on the system of public broadcasting in the Member States.\footnote{1915}

Finally, there is some modest evidence of cultural considerations in the field of copyright, as an import factor of remuneration in the cultural industries as a whole. As the Commission pointed out, there are

both economic and cultural aspects to copyright, the former relating to the author’s right to derive a financial advantage from the economic exploitation of his work, and the latter relating to the fact that they promote intellectual and artistic creation.\footnote{1916}

To reconcile both elements and to eliminate differences between national laws, which are liable to create barriers to trade, distort competition and impede the achievement and proper functioning of the internal market in the field of intellectual property rights, the Council adopted alongside other relevant directives, the Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property.\footnote{1917} In Metronome, the Court was given the opportunity to pronounce itself on the validity of the said Council Directive.\footnote{1918} Article 1(1) of the said Directive requires the Member States to provide a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject-matter with the purpose to compensate authors for the loss of remuneration caused by the lending of their works and, particularly, by piracy based on various new copying technologies. Quoting from the Preamble to the Directive, the Court notes that the

increasing importance to the economic and cultural development of the Community must in particular guarantee that authors and performers can receive appropriate income and amortise the especially high and risky investments required particularly for the production of phonograms and films.\footnote{1919}

This objective, the Court contextualises with the recognition that

the cultural development of the Community forms part of the objectives laid down by Article 128 of the EC Treaty, as amended by the Treaty on European Union, which is intended in particular to encourage artistic and literary creation.\footnote{1920}

\footnotetext[1915]{See supra note 1814.}
\footnotetext[1916]{COM(96) 160 final, supra note 1806 at 8.}
\footnotetext[1919]{Case C-200/96, ibid. at para. 22.
The link between economic and cultural aspects of copyright is found in the assumption that the proper remuneration of those investing in the creation of products will in turn lead to the creation of new works. However, such rental right, one of the parties running a business renting out compact discs contended, may impinge on the freedom to pursue a trade or profession. In response, the Court did not interpret the general principle of freedom to pursue a trade or profession in isolation from the general principles relating to protection of intellectual property rights and relevant international obligations and found that the objectives of the Directive by introducing an exclusive rental right were not pursued in a disproportionate and intolerable manner.

13.3.3.4. Résumé of the Case Law Experience in an Interinstitutional Context

Notwithstanding the general increase in explicit references to culture after the amendments introduced by the Treaty on European Union, the Court’s rulings in the field of the cultural industries show some continuing difficulties in the attempt to combine economic with cultural considerations with a view of their complementarity and deriving possible synergy effects. In this respect there is clear continuity with the developments that took place before the Treaty on European Union entered into force. Generally, the Court also continues to attribute – albeit to some varying degree – a minor role to cultural aspects in the interpretation of the rules governing the internal market. In way, it appears appropriate to state that the Court acted “as if Article 151 TEC had not become law”, despite the explicit reference by the French Court in Echirrolles to the impact of the changes in the Treaty and particularly the completion of the internal market.

Yet, the apparent Court’s lack of sensitivity towards cultural aspects in the case law may be chimerical, because it may appear disproportionate in light of the increase in documents in the cultural field issued by the other organs of the European Union. For example, first the Commission has continued on the path it started to walk on in 1977 with its first Communication on Community action in the cultural sector. Immediately, the Commission seized the opportunity, prepared by the amendments in the cultural field brought about by Maastricht Treaty, to revisit and consequently reshuffle its approach to action in the cultural field. Furthermore, it has looked at specific cultural sectors, notably the audiovisual industry, and cast light on various linkages between culture and other areas listed in the Treaty, such as economic cohesion, employment and competitiveness. Finally, the Commission has recently contributed to the international debate on the adoption of an

1920 Ibid. at para. 23.
1921 Ibid. at para. 24.
1922 Ibid. at para. 9.
1923 Ibid. at para. 27.
1924 Cf. supra notes 1861 and 1884.
1928 See e.g. COM(96) 512, supra note 1390; see also SEC (98) 837, supra note 623, COM(93) 700 final, supra note 1796, and ‘The Costs and Benefits of Diversity’, supra note 1796.
international standard-setting instrument on cultural diversity.\textsuperscript{1929} Similarly, the Council – since Maastricht engaged in a new interinstitutional dialogue with the European Parliament, based on a proposal by the Commission –\textsuperscript{1930} has adopted numerous documents in the cultural field and some of its specific sectors. For instance, immediately after the signing of the Maastricht Treaty, the Council formulated guidelines for Community cultural action aimed at adapting the Community to the new Treaty framework.\textsuperscript{1931} It has also addressed the more traditional areas, such as free movement in connection with the cultural sector.\textsuperscript{1932} Most of all, in addition to the Protocol on the system of public broadcasting in the Member States, it has put drafted specific guidelines concerning the state aid in the audiovisual industry and has taken a specific interest in book price fixing systems.\textsuperscript{1933} In its cultural affairs capacity, the Council also found numerous points of contacts between culture and economic growth considering that

\begin{quote}
 culture has an intrinsic value which should not be measured primarily by its economic utility but basically by qualitative criteria in the conviction that its value is not diminished by estimating its potential economic dimension.\textsuperscript{1934}
\end{quote}

Equally, it pondered on the future role of culture in the Union context and ways to integrate cultural aspects further into Community actions with a view of increasing possible synergies with other sectors.\textsuperscript{1935} More recently, it has dedicated its time and effort to new challenges to the field of culture, such as the advent of the information society and proposed new ideas for the role of culture and a plan for cooperation in the field of culture.\textsuperscript{1936} Last but not least, the European Parliament has confirmed its past innovative role as a fervent advocate and leading voice in the field of culture. In numerous occasions, it has raised awareness about a great number of cultural issues, which hitherto have not received due attention.\textsuperscript{1937} Of greatest interest in this respect is the recent \textit{EP Resolution on Cultural Industries}, a comprehensive study based on a final report, which itself was conducted on a wide consultation process, that casts light on the broader dynamics and specific characteristics

\begin{thebibliography}{99}
\bibitem{1930} Cf. Article 151(5) in connection with 251 [ec 189b] TEC.
\bibitem{1937} See e.g. European Parliament resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity, F5_TA-PROV(2003)0087 (March 12, 2003).
\end{thebibliography}
governing the cultural industries from various different angles, covering for instance cultural identity, cultural diversity, IPRs, racism and xenophobia, democracy, plurality of media, competition policy, technology and research, to mention but a few.1938

Finally, mirrored against this vast amount of documents reflecting the repeated changes to the Treaties in the field of culture, the Court’s record of its recognition of the legal and practical value of Article 151 on Culture appears indeed modest. Nonetheless, it must be admitted that one of the Court’s primary roles is the guarantee of continuity and stability,1939 although the Court has often proven to be quite innovative in the past. Or, perhaps, the Court has in fact incorporated the changes that occurred with the Treaty on European Union by other means, namely a “revolutionary” departure from its past approach, as manifest in the famous words “contrary to what has previously been decided” announced in Keck.1940 In this context, Poiares-Maduro has speculated about the reasons for this change and argued that – next to an increase in the cases before the Court – it is possible that

[T]he Court is setting up a new kind of approach to the common market with reflections in the European Economic Constitution. Moreover, to greater self-restraint in free movement of goods may correspond greater activism in other areas of market integration.1941

The Court’s task in providing stability and continuity, however, is aggravated by an intensification of treaty amendments over the past two decades possibly culminating in a new major change to the Treaties’ structure instigated by the present ‘tug of war’ over the European Constitution. What these eventual changes will bring, provided that the Constitution will be ratified, is subject to a short outlook in the next subsection.

§§ 13.3.4. The Treaty Establishing a Constitution for Europe and an Open-ended Résumé

13.3.4.1. A Short Overview of the Draft Treaty on the European Constitution with Regard to Culture

In retrospective, there is no doubt that the signing of the Maastricht Treaty has inaugurated a new stage in the continuous process of European integration as a whole, and in the relation to culture in particular. Constructed upon previous but continuous efforts, the so-called “modern period” has considerably altered the mutual relation of cultural and economic forces in the project of European integration. The alteration that has taken place up to present can generally be described as one of an early reconciliation with the subsequent consolidation between the concepts of culture and trade, which were widely and falsely regarded as mutually exclusive in previous times. From such a perspective it is possible that a new period is well on the way, which, like the previous two periods outlined above, will set a new course for an alteration of the equilibrium between cultural, political

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1939 Cf. Article 220 [ex 164] TEC.
1941 We The Court, supra note 1493 at 88.
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and economic aspects in European integration through fresh changes the framework of the Treaties’ structure. The decisive moment for the inauguration of this new period can only be dated in precise terms from a formal perspective and leaving aside the various substantive efforts. Presently, from a formal perspective, and pending its ratification, the beginning of the new stage can be dated with the day of the submission of the final Draft Treaty for a Constitution of Europe to the President of the European Council on July 18, 2003, after it has been adopted by consensus by the European Convention on 13 June and 10 July 2003. Next to the merely symbolic value of its character as a basic constitutional text, the changes proposed in the Treaty Establishing a Constitution for Europe are most likely to drastically affect the future path of European integration. The future of the Constitution and with it the EU, is also inseparably tied to the coming greatest enlargement round in the history of the EU, with the adhesion of ten new Member States. The Constitution is also associated with the thought of a panacea for not only a Union of 25 or more Members amidst recent challenges imposed by economic globalisation and global political instability but also for a simplification and reduction of the complexity of the numerous Treaty provisions, the increase of its moral and political legitimacy through the incorporation of the Charter of Fundamental Rights, and particularly greater coherence and clarity in the Union’s actions and policies. Especially, greater coherence in the Union’s policies is of great significance for the cultural sphere. To what extent the Constitution is apt to continue, or further consolidate, the trend of greater sensitivity towards cultural aspects within economic and political integration, even for a more diverse Union of 25 or more Member States cannot be determined with accuracy. At present, it remains to be hoped that the overzealous quest for a finalité of European integration, based on the strong human desire for stability as well as certainty and as expressed in the debate about a Kompetenzkatalog, will not instigate the beginning of its end. Nonetheless, for the causa culturae, possible trends may be found enshrined in the various provisions of the Constitution that directly, or indirectly, impinge upon the sphere of culture.

In general, it can be said of the Treaty Establishing a Constitution for Europe that it incorporates without major changes the most relevant articles and provisions related to culture. This holds true in particular for the provisions on free movement, the rules on competition, the articles on industry and culture, the provisions on common commercial policy and on cooperation with third countries. The preservation of the substantive status quo is explained in part by the mandate given to the Convention in the Declaration (No. 23) on the future of the Union to simplify the

1943 See supra note 1413.
1944 On various potential implications and a criticism of the Constitution, see e.g. B. de Witte, ed., Ten Reflections on the Constitutional Treaty for Europe (Florence: EUI, 2003).
1946 For a defence of the status quo and the possibility of a regress in the EU’s constitutional development, see e.g. J.H.H. Weiler, “In defence of the status quo: Europe’s constitutional Sonderweg” in J.H.H. Weiler & M. Wind, eds., European Constitutionalism Beyond the State (Cambridge: Cambridge University Press, 2003) 7.
1947 Part III Chapter I Articles III-130 to III-176 EU Constitution.
1948 Part III, Section 5, Articles III-161 to III-169 EU Constitution.
1949 Article I-17 “Areas of Supporting, Coordinating or Complementary Action” and Articles III-279 and III-280 EU Constitution.
1950 Title V Chapter III Articles III-314 and III-315 EU Constitution.
1951 Title V Chapter IV Articles III-316 to 321 EU Constitution.

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Treaties à droit constant, i.e. without changing their meaning. Nonetheless, it is conspicuous that the order of appearance of some of the articles has changed; for instance the rules on trade in goods now feature after those on the free movement of persons and services, and the article on culture after the one on industry. One may wonder whether these changes reflect a change in priority and hence hierarchy among the norms. Another important change implicates the legal instruments by which the Union may exercise its competences. As a part of the abandonment of the pillar structure, the Constitution has incorporated the provisions on the CFSP plus provisions on a Common Security and Defence Policy, which may assist in the establishment of greater coherence in the Union’s external actions as well as greater consistence between the Union’s internal and external policies. The most important change, however, relates to the incorporation of the EU Charter on Fundamental Rights in Part II of the Treaty Establishing a Constitution for Europe. Already before the incorporation and without explicit legally binding character, the Charter was said of unfolding also legal effects. Concerning the implications of the legal nature of the Charter, it is premature and therefore difficult to predict the precise legal weight the articles of the Charter might be given before the Court of Justice, especially in connection with the fundamental economic freedoms. This is particularly true for diverse cultural aspects, which in the future will have to be taken into account by virtue of the cultural integration clause of Article III-280 EU Constitution and equally the Union’s duty to respect “cultural, religious and linguistic diversity”, as laid down in the Charter’s Article II-82. More interesting questions will arise in the context of other provisions in the Charter, such as the right to the integrity of a person, the freedom of thought, conscience and religion, of expression and information, of the arts and sciences but also the freedom to conduct a business and access to services of general economic interest.

Generally, it can be stated that a broad tendency in the Treaty Establishing a Constitution for Europe can be found towards, on the one hand, introducing more references to common cultural values, and, on the other hand, a reinforced insistence on greater cultural diversity, as it is mentioned in the Preambles to Part I and Part II, in the Union’s objectives, as well as in an explicit provision designating the Union’s motto as “United in Diversity”. In this motto, the old idea of Europe as a discordia concors, described by the reference to the chime of bells, and also reflected in the concept of “European Union”, emerges anew. In this respect it fits seamlessly into the dialectics that the concept of cultural industries introduced in the early 20th century, first designating a new paradigm for a means of communication and perception, and second describing a new category of cultural goods and services. Notwithstanding this continuity in the underlying spirit of European integration, a significant alteration in the balance between economic integration and cultural diversity can be said to be found in the newly introduced possibility for a voluntary withdrawal from the Union.

1952 Declaration No. 23 on the future of the union annexed to the Nice Treaty, supra note 1412 at para. 5 recital 3.
1953 Cf. Article 249 [ex 189] TEC with Title V, Chapter I, Articles I-33 to 39 EU Constitution.
1954 Title V, Chapter I, Articles I-16 and III-292 to 308 EU Constitution.
1956 See also Article II-85 EU Constitution on the rights of the elderly.
1958 Cf. Indent 1 and 2 of the Preamble, Articles I-3 (3) and I-8, Indent 3 of the Preamble to Part II, Art. II-82, Art. III-121, III-167 (3), III-280, III-282 (1) and III-286 (2) EU Constitution.
1959 Article I-60 EU Constitution.
The Cultural Industries: The “Strange” Case of the European Union § 13.3

347 provision seems to counter the spirit underlying the project of European integration and the entirety of experiences gained in the long history of Europe as well as European integration. This slight, albeit at first sight perhaps only psychological, deviation is documented in the missed opportunity to incorporate the different Preambles of the preceding Treaties and especially the one of the ESCS Treaty. The principal problem with the withdrawal clause is that it stands in stark contrast with the practically invariable geographic realities on the continent, which has also been expressed in temporal terms by virtue of the characterisation of Europe as a “community with a shared common historical destiny” and enshrined in the Treaty as the desire of European peoples to forge their common destiny by transcending their ancient, and often “bloody”, divisions. The clause may function like a leak in a boat and this is likely to weaken the economic and political framework of the EU to the detriment of its possibility to contribute to the flowering of its cultures while respecting its national and regional diversity. Both in international and European law, the past half a century has shown that respect for cultural diversity is first and foremost dependent upon the equal participation of all (Member) States. Similarly, in order for the cultural aspects inherent in certain categories of goods and services to be taken into due account and to unfold their hidden potential in terms of trade, it needs a common framework such as the internal market. In this sense, it remains to hope at this early stage of a new era that the strive for a finalité has not become translated into its end instead – at least as far as the original idea is concerned; because it is from Romain Rolland that we learn that “une idée n’a de force qu’en ne se réalisant jamais”.

13.3.4.2. Résumé of the Third Stage and a Short Outlook

The beginning of the so-called “modern period” in European integration history was formally inaugurated by the – in many ways – truly enlightening moment of the signing and entry into force of the Treaty on European Union. The Treaty on European Union explicitly recognised for the first time the role of culture within the sphere of economic integration and thus codified the wisdom obtained through experiences in the previous period. The principal conclusion drawn from these experiences was that culture and trade cannot be separated. From the point of view of the cultural industries, the legal recognition, and especially the Community obligation to take cultural aspects into account in other areas, provided, de iure, the proper basis for a henceforward improved legal recognition of the dual character inherent in certain categories of goods and services. De facto, however, the survey of the last decade demonstrated a high degree of continuity in the treatment of the cultural industries. Such continuity refers first to the Court’s general difficulty to reconcile the tensions between culture and trade inherent in the cultural industries, which often make their...


1961 The gradual establishment of the principle of sovereign equality of States can be illustrated by comparing the 1920 Covenant of League of Nations, which in the Preamble states that “in order to promote international cooperation and to achieve international peace and security” the League seeks inter alia to prescribe “open, just and honourable relation between nations” with the 1945 UN Charter, which stipulates in Art. 1(1) that “[T]he Organization is based on the principle of the sovereign equality of all its Members”. Subsequently, the International Bill of Rights has further developed the principle of equality and expanded its scope to the sphere of individuals and only recently efforts are being made to introduce greater cultural diversity into international law; see the discussion in Section 10.2.2.5.

1962 Cf. de Búrca & Aschenbrenner, supra note 1434 at 362, writing that “[T]he constitutional features of the EU legal and political system have, certainly up to this point, evolved over time in a piecemeal but continuous way without any definite moment(s) of finalité”.

1963 See Romain Rolland, supra note 1363 at 130.
appearance as conflictual situations between various cultural policy objectives and the provisions of the four freedoms and related provisions guaranteeing the functioning of the internal market. More specifically, the difficulty is linked to the economic specificities and peculiar dynamics of the cultural industries, in particular as concerns their financing, production and distribution in light of their public goods character and inherent cultural content. In this respect, the survey of case law confirmed the continuity with the past in so far as it dealt with similar problems and formulated similar responses. Especially, the respective fields of the audiovisual sector, the book and print media sector, as well as certain questions related to copyright, proved to be most problematic. Particularly, the relation between public and private broadcasters, the role of advertising, broader cultural policy objectives such as media pluralism in the audiovisual sector and price fixing mechanisms and distribution systems in the book and print media sector made their repeated appearance before the Court. This is no surprise, since Community action in these areas, as much as in the field of culture, started before the Maastricht Treaty and resumed accordingly, albeit sometimes on a different legal basis. Nonetheless, in between these sectors intensified what could be called a creeping process of the convergence of the various subcategories of the cultural industries based on their special dynamics such as the well-established order for their economic exploitation. The process of convergence is also underlined by the more frequent use of the concept of cultural industries as opposed to the former focus on specific sectors. Due to this intensification it was more surprising to find the Court’s hesitant use of the new cultural integration clause. Nonetheless, in response, it can be argued that the Court has successfully maintained stability and continuity and reacted to the repeated changes to the EU’s Treaty provisions as well as the transition from the common to the internal market by a sudden change in its (until then) established line of case law.

There is little doubt that the introduction of an article on culture in the framework governing the EU has facilitated a fruitful dialogue on not only the sensitive role of culture in European integration in general, but also more specifically the diverse cultural aspects of economic and political integration. Such a dialogue includes the EU institutions, the EU Member States as well as both legal and natural persons. This dialogue equally extends to the external sphere, particularly ongoing multilateral trade negotiations and cooperation agreements with third countries. Especially, the Commission, the Council and the European Parliament have responded with a plethora of documents casting light on different aspects of culture within the process of European integration and making express use of the new article on culture. These documents have also asserted the dual

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1968 See e.g. C. Brossat, La culture européenne: définitions et enjeux (Bruxelles: Bruylant, 1999).
character of cultural goods and services, equally reflected in the mentioned trend towards a more frequent reference to the concept of cultural industries. Concerning the scope and definition attached to the concept, it must be noted that, next to the sectors mentioned in NAFTA (i.e. undertakings in the book, newspaper, music, broadcasting, film and video sector), even cultural property (or heritage), tourism and architectural services were occasionally included in, or at least closely associated with, the concept of cultural industries.\(^{1969}\) Furthermore, with the advent of the knowledge-based economy in the information society, the creative element is advancing within the cultural industries, which is also reflected in the synonymous terms “information”, “creative” or “copyright industries”, eroding the boundaries not only between countries but also between various sectors as much as between goods and services.\(^{1970}\) As a consequence of the digital age new categories of cultural goods and services, such as the software sector generally and in particular video games, await their inclusion into the concept.\(^{1971}\)

In the EU context, it can be generally stated that the concept of cultural industry, due to its intrinsic specificities and, especially, dual character, evolved gradually from its past legacy as a category of goods pertaining to cultural property via the present cultural goods and services to a future category of goods and services forming the “creative industries”. In parallel to this semantic evolution, the concept also stands for a new paradigm of holistic thinking, which gradually establishes an enhanced perceptual and conceptual framework seeking to adapt to the present complex reality. These two parallel development together also help to explain the pioneering role of the cultural industries for other industrial branches.\(^{1972}\) Within the legal sphere, the consequence of this new paradigm is that new mutual causal relationships, which were hitherto unrecognised, have surfaced. This trend is exemplified in the new legal approach to culture (and other areas) in their relation to predominantly economic provisions within the EC Treaty through the so-called “integration clause”, which, in theory, has the effect of linking every single Treaty provision to cultural concerns.\(^{1973}\) In methodological terms, this practice marks a departure from a predominantly literal interpretation of legal norms towards a more systematic and teleological interpretation.\(^{1974}\) In some areas, such as state aid and common commercial policy, the Treaty has – due to their known importance – even formally recognised the existence of such links. A more holistic perception also surfaced in other areas, particularly in form of the constitutionalisation debate. One important aspect of a constitution is to reconcile apparently opposed interests and diverging views.\(^{1975}\) This function of a Constitution arguably also includes the reconciliation of different concepts (or views about them), such as “culture” and “trade”. In this respect the recent crystallisation of a project for a Constitution for

\(^{1969}\) See COM(96) 512, \textit{supra} note 1390.

\(^{1970}\) See Aronson, \textit{supra} note 87 mainly at 319.

\(^{1971}\) On video games, see also European Parliament Committee on Culture, Youth, Education, the Media and Sport, \textit{Working Document on Cultural Industries, supra} note 1938 mainly at 7.

\(^{1972}\) For the pioneering role of the cultural industries it is interesting to note the gradual transformation of what was considered an “ordinary industry” such as the car industry, which are undergoing a significant transformation; see B. Coriat, “Globalization, Variety, And Mass Production: The Metamorphosis of Mass Production in the New Competitive Age” in J.R. Hollingsworth & R. Boyer, \textit{Contemporary Capitalism: The Embeddedness of Institutions} (Cambridge: Cambridge University Press, 1997) 240.

\(^{1973}\) For a good overview of the various links between the cultural industries and other areas, such as competition law, cultural identity, cohesion and employment, see \textit{Report on Cultural Industries, Rapporteur Ms. M. Zorba, supra} note 1938.

\(^{1974}\) See also Ress, \textit{supra} note 1405.

\(^{1975}\) See e.g. Roe \textit{et al.} v. Wade, (Supreme Court of the United States, 1973), 410 U.S. 113, stating that “[The Constitution] is made for people of fundamentally differing views”[...].

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European University Institute

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Europe is likely to contribute to greater coherence in EU policy making and thus to the establishment of a more consistent and balanced legal framework for the cultural industries in light of their dual nature. Especially, the proposed incorporation of the Charter of fundamental rights into the Constitution can be expected to supplement the debate on the cultural industries, regarding both intrinsic potentials (e.g. employment and cohesion) and hidden dangers (e.g. media concentration, consumerism, and cultural and linguistic homogenisation). The need for greater coherence in the regulatory framework will grow considerably in the future. Recently, the Commission has pointed out the need for strategic objectives and coherent and holistic approaches in the context of a new, both cultural and technological, revolution, i.e. the field of life sciences and biotechnology, for which it stated that

Life sciences and biotechnology are widely recognised to be, after information technology, the next wave of the knowledge-based economy, creating new opportunities for our societies and economies.1976

In biotechnologies, the ethical implications and potential dangers for the integrity of a person, both mental and physical, are considerably more serious than they are in the case of the cultural industries. Nonetheless, the experiences gained with the cultural industries can assist in meeting the challenge of newly emerging problems; similarly, the new Constitution, once ratified, may provide the EU institutions and the Member States with a better instrument to confront them.

In sum, the modern period of European integration must be credited with the great success of having formally introduced the concept of culture into EU law. Instead of choosing the negative formulation of an exception culturelle, it has opted for a positive formulation of a proper provision on culture including an integration clause. By doing so, it has contributed to a more balanced legal approach to culture and trade, or cultural diversity vis-à-vis economic integration, hereby shifting the view from their mutual incompatibility to their possible complementarity. This also means a more coherent legal framework with regard to the cultural industries in their present and rapidly changing form. Notwithstanding, the Court’s hesitant use of Article 151 TEC and numerous remaining questions as to its practical implications, such as the precise line of distinction between mere action in the cultural sector and traditional cultural policy, or the exact translation of cultural concerns into the fields of competition law and in external relations, it has definitely paved the way for a fruitful debate. Such debate is highly desirable given the rapid progress and growing pace of innovation, which often transform society faster than suitable regulatory responses can be formulated, resulting more than once in great dangers for the peaceful and sustainable development of the humanities.

Chapter 14  CONCLUSIVE REMARKS ON THE EUROPEAN UNION

§ 14.1. From a Strange Case to a New Paradigm?

14.1.1. A Retrospective Summary

The presentation of the history of the European Union in three main epochs and from the angle of the relation between culture and trade in general, and the cultural industries in particular, allows for some general conclusive remarks. As a first theoretical observation, it must be acknowledged that the distinction of three main periods regarding the formal recognition of cultural aspects within the broader process of European economic and political integration appears problematic in light of the process-based character of its evolution. It may only be justified based on a reasonable simplification and abstraction of reality in order to filter out the basic dynamics. In this case, the temporal division of three periods is based on particular formal acts or achievements, such as the completion of the common market or formal Treaty amendments, which – as with all “decisive moments in history” – can make their appearance only after a series of continuous and strenuous efforts have been made in order to achieve such moments. This observation presumes the existence of a causal link between “action and reaction”, as reflected in the laws of physics.\textsuperscript{1977} Indeed, such causal links appear in many more empirical observations, such as those by Christian Ehrenfels or else Jakob Burckhardt, according to who there is a relationship between the constituent parts and the complex as a whole. Their respective metaphors of the relation between tones and melody, or the chime of bells, also apply to the European Union as “united in diversity” and established on the relations between not only the EU Member States and the European Community, but also the hundreds of millions of EU citizens forming the peoples of Europe. In this respect there is also similarity between the concepts of European Union and culture industry in that they combine two apparently opposite concepts and engage them in a dynamic process of mutual complementarity. The process-based perspective, which underlies, for instance the evolution of EU law, was facilitated, if not introduced, by the invention of the cinematograph, which set single photographs in motion. This idea has been expressed in the description of the EU as a “moving image”. From this perspective, the European Union is as unthinkable without its diverse Member States and citizens as its constituent parts, as culture is without the industrious ‘industrial’ efforts behind each work of artistic creation, or, in turn, trade without impact on culture. Causality implies that from a static perspective in any given moment, the constituent parts may appear separate and even in direct opposition (\textit{expressio unius est exclusio alterius}) whilst over the course of time they reveal their complementarity (\textit{contraria sunt complementa}). After all, Robert Stevenson’s Dr. Jekyll and Mr. Hyde are the same person, and his life only take a devastating turn once the personalities split and one tries to dominate and extinct the other.\textsuperscript{1978}

These dynamics can be said to frame the principal stages of the relation between culture and trade within the process of European integration from the Rome Treaties to the \textit{Treaty Establishing a Constitution for Europe}. It was shown that in the first stage of European integration, culture did not

\textsuperscript{1977} Cf. Isaac Newton’s third law of mechanics (“To every action there is always opposed an equal reaction: or, the mutual actions of two bodies upon each other are always equal, and directed to contrary parts”), see Isaac Newton, \textit{Principia: The Motion of Bodies}, vol. 1 (Berkeley: University of California Press, 1934) at 13.

\textsuperscript{1978} R.L. Stevenson, \textit{The Strange Case of Dr. Jekyll and Mr. Hyde} (London: Longmans & Green, 1886).
play an explicit role, except for the legacy inherited from the GATT in form of the past exemption of *res extra commercium* or, literally, “national treasures possessing artistic, historic and archaeological value”. The absence of culture from the realm of economic integration can be explained, on the one hand, by the primary occupation with the establishment of the customs union and a common customs tariff, and, on the other hand, by the institutional fragmentation and division of labour between the EEC and the Council of Europe. Nonetheless, the structure and scope of the Rome Treaty, by including not only trade in goods and services, but also the freedom of establishment and the free movement of persons distinguished itself considerably from its past context. Only once the pace of economic integration accelerated mainly in the form of the removal of barriers to trade, did cultural considerations make their gradual appearance, fostered by renewed attempts to strengthen also political forms of integration. This turning point was reached during the second stage of European integration during the 1980s. In this period the concept of cultural industries not only made its first appearance in Community documents but also the first positive steps towards Community actions in the cultural sector were undertaken while the pace of negative integration continued on the basis of the Court’s *Dassonville* formula. At this stage the causal link between culture and trade in the broadest sense surfaced in the form of the complementary process of negative and positive integration. In this connection it is necessary to point out the importance of the existence of supranational bodies like the Commission in the governance of economic integration which cushioned the potential negative effects of unfettered trade liberalisation, in particular the possible detrimental effects on specific groups and industrial branches. Thus, positive action complemented the void that was created by negative integration and thereby limited the potential domination of economic over non-economic aspects of trade liberalisation within the general process of European integration. The necessity for a greater equilibrium in this process, and especially with regard to cultural concerns was taken into account by the Treaty on European Union, which formally created the European Union and inscribed “culture” into the Treaty Establishing the European Communities. This moment inaugurated the most recent so-called “modern period” of European integration. The Treaty on European Union, however, not only codified the past experiences gained with respect to the causal links between economic and cultural aspects of integration but also between the process of widening and deepening of European integration, both in terms of Community competences and the number of Member States. Various developments during the 1990s, such as the completion of the internal market, the establishment of an economic and monetary union contributed to repeated calls for the necessity of a stronger political and legal framework, in short a constitution, for the EU, especially in light of the changing global context and the next enlargement round. These calls were answered with a wider constitutional debate on the future of the Union, which resulted in the presentation of a Draft Treaty Establishing a Constitution for Europe in the year 2003, which was signed in October 2004 as the *Treaty Establishing a Constitution for Europe*. Pending its ratification, the *Treaty Establishing a Constitution for Europe* marks – for the time being – the last step in the process of European integration and this analysis of the equilibrium between culture and trade. Regardless of the next developments, the *Treaty Establishing a Constitution for Europe* can already be credited with the attempt to further consolidate the legal framework of the EU in order to achieve greater efficiency, legitimacy, and stability through greater internal consistence and coherence. Here in particular the abandon of the pillar structure and the incorporation of the EU Charter of fundamental rights deserve to be mentioned. In brief, these
constitutional efforts are quasi paradigmatic for the wide array of problems or aspects linked to the concept of culture, manifest dominantly in the form of the cultural industries.

14.1.1.2. The Cultural Industries in a Wider Context: Framing the Debate

To conclude the part on the European Union, it is useful to extract the principle dynamics relating to the cultural industries as part of the broader cultural and trade debate for its comparison with the current global debate. From the very beginnings of the Paris and the Rome Treaties, the interplay between culture and trade has developed from the traditional distinction between ordinary goods and those pertaining to the realm of cultural property. Gradually, with the progressive establishment of the common market the awareness about new categories of goods and services emerged that were granted a specific, i.e. cultural, value. These goods and services were classified in specific sectors, such as the book and print media or the audiovisual sector. Based on further technological innovations, these sectors were set in motion towards their convergence, which has thus far culminated in the advent of the digital age. Digitisation has introduced unprecedented possibilities for the transport of content to different carriers virtually all around the globe. The specific economic dynamics these sectors have in common in turn contributed to the more frequent use of the concept of cultural industries. In a narrow sense, it designs a specific category of undertakings in the field of books and newspapers, music, film, video and broadcasting. In a wider sense, they stretch out to various related activities, such as the hardware industry providing the carriers for their content and even to related services such as the tourist and cultural heritage conservation sector. In more recent developments following the advent of the knowledge based economy in the information age, new categories of goods and services, such as the software sector and particularly video games are pushing for their inclusion. The wider definition of the cultural industries leads over to the next and broader concept found in the wider culture and trade debate. The key concept is the one of “cultural diversity” which is situated in between the homogenising trends of trade liberalisation for economic integration and natural differences rooted in geography, history, language, culture or religion. Diversity in general is advancing in light of the end of geography in times of economic globalisation fostered by the revolution in transport and communications. Thus, in a diminishing spatial framework and greater economic interdependence, differences, or else diversity, increases in importance and sets free a quest for new identities. From cultural diversity across cultural identity it is only a minor step to “culture” as the umbrella concept in the context of human rights law. To this area belong, first and foremost, the right to culture in combination with the right of equality and non-discrimination and then follow related rights, such as freedom of religion, freedom of thought and expression. Above all stands the extremely elastic and broad concept of culture, which, precisely for well-known reasons rooted in the diversity of cultures, should not be legally defined on a universal basis. These different layers of the culture and trade debate, the concept of the cultural industries has equally added a new paradigm, which developed out of new possibilities of perception.

and particularly the shift from a static to a dynamic and process-based explanation of reality. In its ability to adapt to this shift, the European Union is less a ‘strange’ case or a polity *sui generis*, than a possible, but nonetheless persuasive, response to present challenges.
PART V

CONCLUSION

Part V, finally, resumes the various findings of the preceding parts on the NAFTA, the WTO and the EU, and formulates a synthesis of their respective dynamics in light of their possible mutual implications. It advocates the utility of the concept of “cultural industries” for the evaluation of economic integration regime with regard to their sensitivity towards cultural concerns on the one hand, and their ability to react to changing patterns of trade based on technological innovations on the other. The main objective remains to link useful insights from the preceding analysis to the general dynamics of law in dealing with the two concepts of culture and trade in order to create a fertile ground for future trade negotiations and, as a result, provide useful amendments to the international trading regime with a view of strengthening the unity of the international legal order as a whole.

Chapter 15  THE METAPHOR OF CULTURE AND TRADE REVISITED

§ 15.1. The Cultural Industries or “Contraria sunt complementa”

§§ 15.1.1. Principal Remarks

The comparative study of the three respective models of integration, the NAFTA, the WTO and the EU, when looked at through the prism of the cultural industries in their evolution throughout most of the 20th century, reveals – despite their distinct vocations and varying degree of cooperation obtained – a strong common dynamism, especially when examined along the line of the dichotomous nature of the culture and trade debate. Finally, it allows for some responses to the questions posed in the beginning of this thesis. First, it can be stated that, indeed, cultural goods and services are different from other, so-called “ordinary” goods and services. Second, following from the answer to the first question, they are supposed to receive a treatment different from their ordinary counterparts; and third, culture and trade, at least in form of their respective policies, are not mutually excluding each other but instead are not only reconcilable but may equally mutually complement each other and contribute to a more sustainable development under a common conceptual as well as legal framework. Last but not least, in light of the answers to the former questions, the establishment of such an order in, or its better adaptation to, the future is a clear necessity and falls within the function, nature and scope of the multilateral trading system. In pondering on the way how these necessary amendments will be implemented legally, the assumption of the existence or absence of an international legal order is first and foremost a theoretical act, but again, of course not without implications for its practical realisation. Nonetheless, judging from the intentions of the drafters of the existing framework of international law and, more precisely, in light of the past technological innovations and their impact on the organisation of societal life around this globe, the answer should be in the affirmative, i.e. that, in fact, there is such a thing called “the international legal order”.

For each of these principal statements, which derive from the data reviewed and different observations made throughout this study, the concept of cultural industries proves to be a highly fruitful conceptual tool or, possibly, a valuable new paradigm of which the main traits and consequences will be outlined in the following subsections providing some clarifying, complementary and explanatory comments.
15.1.1.1. Why Are Cultural Goods and Services Different?

Each single product can be said to be a carrier or transmitter of some cultural content next to its economic value, although to a varying degree, depending on distinct factors, such as origin, quantity, quality, way of manufacturing or its service life. These distinct factors also influence the implications the product has for the person consuming it. As a result, the category of “cultural goods and services”, bearing traits of a dual, i.e. economic and cultural nature, is practically unlimited and ranges from cultural property, across agri-cultural commodities, foodstuff and especially alcoholic beverages via the cultural industries and their subsectors including cinematograph films, video, books, music recordings and broadcasting, to practically any item and service listed in the schedules of concessions. The inclusion of this wide range of products helps to explain the universal significance of the wider culture and trade debate, which is well reflected in not only the general exceptions to the GATT (e.g. for cultural property) but also the range of selected WTO rulings, from Japan – Taxes on Alcoholic beverages to EC Measures Concerning Meat and Meat Products (Hormones) to the Canada Periodicals Case. Nonetheless, among all these goods and services one category, the one of the cultural industries, clearly stands out due to some specific characteristics, which make them a privileged field of study for the principal problems underlying the broader culture and trade debate.

In general, these characteristics comprise first and foremost their strong reliance on technology and second the degree of cultural and, in other words, intellectual input, which – due to, since the invention of book printing, ever improving reproduction technologies – remains widely independent or separable from the carrier transmitting it. At the same time, the process of their manufacture and highly ‘volatile’ or intangible content renders the former clear-cut distinction between their good or service character widely obsolete. At the same time, it accounts for the vicinity to the field of intellectual property rights. In predominantly economic terms, they are characterised by high production costs (for the content) and comparably extremely low distribution costs (for the carrier) and dependent on so-called “neighbouring” industries, such as the electronics and hardware industry. In connection with their highly perishable character, i.e. a possible short service life and uncertain consumer demand, the cultural industry is known for the inherent trend to minimise the risks through various means ranging from vertical and horizontal integration to concentration or price discrimination and from the development of prototypes, the star system, to other peculiar contractual arrangements, such as block booking, zoning, tying-in arrangements or the palyoga. From a cultural perspective, their uniqueness lies first and foremost in their “public good” character, which – to the difference of “ordinary” goods and leaving aside the content – makes them practically infinitely consumable. Deriving from the public good character are problems of both negative and positive externalities, which may translate into improper pricing mechanisms causing instability in the proper functioning of and competition in the market to the detriment of consumer choices. The public good character, fostered by recent developments in communications technology, also expresses the widely unrestrained dissemination of content across the entire globe and, hence, the unfettered penetration of the consumer’s mind in most parts of this world. The transition from “public” to “global goods” also favours what in positive terms allows for better information of citizens and improved dialogues across regions, countries and cultural borderlines, i.e. in short the strengthening of the foundations of a democratic society. This aspect, however, may, in negative terms, turn into an Orwellian scenario of brainwashing, inciting hatred and holding man’s free will in an invisible but iron grip, for the sake of establishing or maintaining a totalitarian regime.
Accordingly, from this quality also spring the respective concepts of cultural identity or cultural imperialism.

Today, especially the impact on a psychological level on the mind cannot be seriously questioned anymore. It is a fact. Awareness of this effect has also been translated into the economic sphere by the recognition of, for instance, film as the “silent salesman” or “trade getter” as early as 1926. In the political sphere, the same effect accounts for the public opinion formation process based on the dangerous mixture of entertainment with information, expressed in the term “infotainment”. Summed up on the cultural level, this effect has been recognised in studies about the shaping of tastes and fashions, the readiness to violent behaviour, or the formation of cultural and linguistic identity. In the qualitative evaluation of the effect on the mind, it is true, as Jason Bristow points out,\footnote{1981 Bristow, supra note 1274 at 14-17.} that there are still uncertainties in reception theory. However, the fact that some sitcoms, such as *Dallas*, are being received differently by different people originating in different cultural or social settings\footnote{1982 Cf. Ch. Barker, Global Television: An Introduction (Oxford: Blackwell, 1997) at 118-126 [hereinafter Global TV].} depends on the quantity of exposure and the availability of different content offering other, and more diverse, points of references. This argument wins ground in the form of cultural diversity, particularly when perceived in combination with the economic dynamics towards concentration and homogenisation that govern the production and distribution process of these kinds of goods and services.

These specificities express the dual nature of the cultural industries, *i.e.* the numerous linkages between the cultural and economic sphere. In short, these specificities are common to a series of goods and services which, within the whole range of products, distinguish them from the so-called “national treasures possessing artistic, historic and archaeological value” (*i.e.* cultural property) on the lower end and to “ordinary” products on the higher end of the spectrum of goods and services embraced by the entire culture and trade debate. These goods and services have gradually evolved and subsequently been defined as “cultural industries” in the context of the NAFTA (and before in the CUSFTA), as comprising of any activity in the field of books, periodicals and newspapers, film, video or music recordings and radiocommunications. Since then, the differences between these respective subsectors have become increasingly blurred and continue to be subject to an ongoing process of convergence due to the creeping expansion of digital technology. As the Latin concept *corpus ex cohaerentibus* suggests, the various individual sectors underlying the cultural industries have nowadays, through their tendency to converge, lost most of their individuality and obtained a sufficient degree of common features to be summed up under a broader concept. This means therefore that they are predestined to share the legal situation of the whole.\footnote{1983 Cf. Encyclopedic Dictionary, supra note 759.}

Due to their convergence, other definitions are in use in slightly different contexts that include, for instance, tourism and architectural services or the software and video game industry, which once more underpin the argument in favour of a holistic approach under the aegis of the broader culture and trade debate or, in legal terms, under an even more comprehensive constitutional legal framework. In this respect, the evolution of the process of European integration provides relatively complete picture of the entire range of the culture and trade debate and in the past its framework has proven to be relatively well-equipped in accommodating the pressure to widen the definition also

\footnote{1981 Bristow, supra note 1274 at 14-17.}
indicates the significance and velocity of technological innovations, which exacerbate the difficulty in the legal sphere to find appropriate and regulatory responses that last more than a season or a parliamentary term.

For these reasons it can be concluded that among the entire range of goods and services traded across the world today, there exists a category termed “cultural industries” that can be defined with sufficient precision and that bears characteristics that are special enough to distinguish them from other categories of goods and services.

15.1.1.2. Why Should The Cultural Industries Receive a Different Legal Treatment?

Having established the categorical nature of the concept of cultural industries and its difference in comparison with other goods and services, it is only normal to subject them to a treatment that takes into due account their special characteristics. Nonetheless, despite the principle that one ought to treat different things differently, there exists, especially in the WTO context, another reason for subjecting them to a special, i.e. novel and different, legal treatment. This reason is found in the time factor and the fact that the rules that are applicable to the cultural industries today date back to a large extent to the years the GATT 1947 was drafted and since then remained by and large unchanged, although, in the meantime, the scope of the GATT, following the shift from a goods towards a service economy, was extended to services under the GATS and intellectual property rights under the TRIPS. The only reference to the specificity of the nature of the cultural industries today is found in Article IV GATT on cinematograph films, the dominant audiovisual medium at that time. At the same time, the original number of former contracting parties has grown steadily from 23 original “Contracting Parties” to currently 148 WTO Members. The parallel processes of widening have only been marginally followed by a process of deepening. The major accountable difference is found in the establishment of a more legalistic, as opposed to the former “diplomatic”, dispute settlement system. The more legalistic dispute settlement, however, has tightened the control of the Members’ trade as well as other policies and hence increased the efficiency of the enforcement mechanism. The only one-sided process of deepening, however, has shattered the sensitive equilibrium between trade and, what is falsely called, “non-trade” issues, including culture, which was in place at the time of the negotiations for the GATT 1947. In addition, the language of the GATT was incomplete from the beginning, since its text was drafted in light of the establishment of the International Trade Organization based on the Havana Charter, which itself was meant to be incorporated in the coherent structure of the UN system. Therefore, the failure of the ITO to materialise not only left the GATT deprived of its institutional backing but also outside the organisational structure of the UN system and especially its various specialised agencies. To visualise this deeply rooted flaw, one must only look at the present issues discussed in the global trade linkage debate, which is precisely shaped along the lines of the insufficient coordination and institutional ties between the WTO on the one hand and the various UN specialised agencies on the other. For instance, the ‘trade and environment’ debate comprises the WTO and UNEP, while the one of ‘trade and labour’ involves the WTO and the ILO, and the one on ‘trade and culture’ embraces both the WTO and UNESCO.

For some time, the fragmentary character of the GATT, in particular as long as it only covered trade in goods and border control was efficient and could, for example, not be circumvented by electronic transmission of editorial content across state borders, the skeletal structure of the GATT proved to
be no obstacle but instead perhaps over some time period marked its peculiar strength. With an increasing alteration of the trading environment, this virtue, however, turned into a vice, which the success of the creation of the WTO was incapable of healing to a satisfactory degree.

From the above, it is clear that the cultural industries should receive special treatment based first on their different and dual character and second because of the ever recurring need to adapt a legal framework to the drastic changes that took place. The fact that such adaptation has not yet been achieved points to the existence of a more deeply-rooted problematic enigma, for which the culture and trade debate is highly representative. Thus, before the legal framework can be successfully brought in line with current necessities and encompass the specificities inherent in the cultural industries, it is first necessary to solve the enigma.

15.1.1.3. Why Are Cultural Policies and Trade Policies Not Mutually Excluding Each Other?

The early origins of the multilateral trading system under the auspices of the GATT 1947 were characterised by the strong assumption enshrined in its Article IV that films, which in its significance as a mass medium represents today the cultural industries, was more related to domestic cultural policies than to the realm of international trade. The path taken reflected thus the idea of the ancient separation of culture from trade, as manifest in the Latin terms res extra commercium based on the logic reasoning of the adage expressio unius est exclusio alterius. Nonetheless, the wording of Article IV GATT reveals that cultural goods were not exempted in total but it only authorised, as an important deviation from Article XI GATT, certain forms of quantitative restrictions, i.e. screen quotas. The same tendency surfaces in the general exemption of Article XX:f) for goods pertaining to the category of cultural property, which, nevertheless, was given an extremely narrow scope. This regulatory choice indicates a gradual change in perception, which, paradoxically, can itself be explained by new technological means, leading to the step-by-step confirmation of the view that culture and trade, or cultural and economic values cannot be separated.

This view was first supported by the emergence of cinematograph films, as both an industry and a cultural and artistic medium, and was confirmed ever since, especially marked by the global breakthrough of broadcasting and, in particular, satellite broadcasting in the mid-1980s. The facile transcendence of state borders by television signals not only meant a significant assault on the concept of state sovereignty but also brought about the possibility to considerably broaden the perceptive horizon to issues of global concern. It is true that there exist many sources reporting a global consciousness, as expressed, for instance, in Immanuel Kant’s concept of the globus terraqueus, or precisely in the concept of koan. Mysticism, philosophy, religion, art, and even law have produced a long list of visionary statements about the unity of humanity as a whole and including the planet it inhabits. Hitherto, however, this was based on wise intellectual reasoning or sudden revelation but still lacks a real expression in the visible and material world. Unfortunately, one of the first tangible expression of the unity of humanity on this globe came by the threat of self-destruction through nuclear weapons, which, in parallel with satellite broadcasting, started its exploration of outer space to leave no single spot on this planet inaccessible. Both phenomena can be said to have (at least for some time) altered the perception of humanity and with it the dominant way of thinking. The effect of this new threat and the possibility to record its devastating consequences, was put by Mikhail Gorbachev into the following accurate words, stating that

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Conclusion

§ 15.1

Under these conditions everything became interconnected; all problems – both national and international – were tied in a single knot that had to be unravelled. And this had to be done in the name of one’s own national interests (which coincided with the interests of all countries) and for the survival of the human race.1984

The “interconnectedness” of all things is the crucial insight from the first time that we were able to see the planet as whole from outer space quasi invisibly suspended in the stellar concert of our solar system. In terms of citizenship, Jürgen Habermas has described this evolutionary step as follows:

The Vietnam War, the revolutionary changes in eastern and middle Europe, as well as the war in the Persian Gulf are the first world political events in a strict sense. Through the electronic mass media, these events were made instantaneous and ubiquitous. In the context of the French Revolution, Kant speculated on the role of the participating public. He identified a world public sphere, which today will become a political reality for the first time with the new relations of global communication. Even the superpowers must recognize world-wide protests. The obsolescence of the state of nature between bellicose states has begun, implying that states have lost some sovereignty. The arrival of world citizenship is no longer a mere phenomenon, though we are still far from achieving it. State citizenship and world citizenship, form a continuum which already shows itself, at least, in outline form.1985

Long before, however, and extremely shocked by two early but cruel manifestations of the advent of global conflicts in the disguise of two subsequent world wars, Horkheimer and Adorno, proved that they were able to initiate meaningful and “interesting”1986 developments by forging the two different and tense concepts of Kultur (culture) and Industrie (industry) into the single word “Kulturindustrie” (“culture industry”). In this sense, their work has already, especially in conceptual form, anticipated many difficult problems that we are confronted with in the present time. In sum these are problems that are best characterised by the analogy of the human mind’s tendency to think in binary terms with innovation in the computer industry, which is creating more and more powerful microprocessor chips in which more and more data is treated in the form of binary digits (BITS) with increasing velocity between the range of “0” and “1”.1987 Similarly, in the process of finding the right words to describe our entourage, we make more frequently use of paradoxical or oxymoronic concepts. As an example, one such early concepts is the one of intellectual property introduced in the sphere of law with the 1886 Berne Convention. Other such concepts, mentioned before, are “fragmegration” and “glocalisation”. Arguably, another important example is found in the concept of European Union, rooted in the seemingly contradictory term discordia concors, which must have inspired its new motto “United in Diversity”. The appearance of such concepts is reflected in several theoretical approaches to the mastery of a growing complexity, such as Gestalttheorie, which combines the relations between the single constituents into a proper Gestalt, like single photographs, or more recently, pixels make a film and single tones a melody following the same pattern as 25 Member States that constitute the European Union.

The culture and trade debate also follows a similar pattern, since it tries to reconcile cultural with economic, local with global or regional with multilateral, public with private, theoretical with practical considerations to mention but a few. A first promising sign of success in this reconciliatory endeavour is found in the concept of cultural diversity, although “cultural variety” would have been

1987 For the transcendence of binary thinking in the computer world, see e.g. the short note about “quantum computing” in “Quantum computing: Bit by bit” The Economist (April 3, 2004) 77.
more appropriate since it is free from, what has been termed “inherent pull towards social fragmentation”.\footnote{1988}{See \textit{Global TV} supra note 1982at 230.} This means that the concept of cultural diversity can only be deemed a success when it is combined with the attempts to establish a strong legal framework rendering more coherent or “constitutionalising” not only the trading regime but the entire global legal order. As a further paradox, cultural diversity can only be established when there is an equality of all cultures. In short, to be different means first to have equal rights, especially political, cultural and economic rights as recognised in the International Bill of Rights. From this perspective, the two concept of culture and trade appear entwined in a harmonious mutual process characterised by both the attempts to provide a common framework, either in form of a community or a market, in which interactions between individual constituents, either in form of communication or business transactions, can take place with a view of improving or refining the welfare or well-being of all its members. In the case of culture the procedural character, the continuous strive for cultivation and refinement is at the very heart of its etymological origins in \textit{culta agri} and \textit{mentis}, whereas in the case of trade, commercial transactions are the basis of existence or sometimes also a mere means for the accumulation of wealth. The two concepts also coincide in their reliance, even dependence, on diversity. Monocultures are, as expressed by analogy to biology and recognised in the 1992 \textit{Convention on Biological Diversity}, running greater risk of facing extinction.\footnote{1989}{The Preamble of the \textit{Convention on Biological Diversity}, supra note 419, states in Indent 2 that the contracting parties are “\textit{Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere}.”} Similarly, identical trading conditions in all parts of the world would deprive trade and commerce of their basic \textit{Grundnorm}, the theory of comparative advantage. Diversity, as the common ground between culture and trade, was described by T.G. Williams with the following sentence: “As variety is the spice of life, so is it the spring of commerce”.\footnote{1990}{See Williams, supra note 430.} Similar is also their relation to law and legal regulation. Culture, based on its spontaneous and creative nature, is extremely hostile to strict legal regulation and attempts to regulate its content (but not what has been termed “cultural sector” and the institutional setting in which it may flourish) is, as history has shown repeatedly, are a dangerous endeavour. Similarly for trade, T.G. Williams has once more found the appropriate words, stating that “Peace and liberty are the very air that commerce breathes”,\footnote{1991}{Ibid.} which from a WTO perspective is reflected in the aims of deregulation and the removal of all sorts of barriers to trade. Nonetheless, it is important to state that the absence of some degree of coordination providing incentives to innovate either lead to cultural dismay and decay or to a monopoly or other malfunctions in the market. To provide such incentives for creativity and improvement can be said to form the basic rationale of cultural and trade policy measures. Hence creativity emerges as a further commonality between culture and trade, also expressed in the etymological origin of the Greek term for technology (\textit{tēkhnē}), which simply refers to “art”. These various points of contact between culture on the one hand and trade on the other, are in a figurative sense all contained in the tension created by the concept of cultural industries, whence their role of a “metaphor” for the culture and trade debate. Finally, like the “flickering flame”, man and woman may be torn apart between these two contrasting drives of “culture”, as a way to “tear free of its material tether” or “trade”, as “the oil that fuels its existence” but nonetheless
they form both important aspects, if not the essence, of their human existence. To remind us of this essential dualism and to guarantee their mutual flowering in a harmonious process forming the basis of our existence, is also one of the principal roles of law.

In sum there exist too many contact points between the respective sphere of culture and of trade in order to treat them separately. Moreover, their interaction, as expressed in the term “cultural industries”, has been intensifying throughout the past century based on important technological inventions and innovations. In this state of growing global interaction, interdependence and interconnectedness the complexity of world affairs is on the rise. With it, the quest for more coherent policy and regulatory approaches, which comprise already from the stage of planning a critical cause-effect analysis, becomes a true necessity. At least, the literal “quantum leap” forward in perception, broadening our horizon in terms of information and communication, should be reflected in the legal framework governing global affairs. Finally, we should be able to see that, in fact, there is a true international or even global order (despite its current chaotic disorder) and there has always been. Whether there is or there will be an international legal order is therefore a matter of choice requiring a search for the right conceptual framework that enables us to put in place an appropriate legal framework for the safeguard of our peaceful coexistence and harmonious relation to our environment. This choice rests ultimately on humanity as a whole but is particularly the responsibility of the various states representatives negotiating and hence determining the fate of the various international agreements and organisations.

15.1.1.4. How Should the Multilateral Trading System Respond to Cultural Concerns?

Backed by the identification of many points of contacts as well as commonalities between the spheres of culture and of trade, it is necessary to look at the way how the interplay between their respective forces may become translated into greater coherence of the current international trading regime. In this connection, the past experiences, obtained during the evolution of the GATT/WTO system and its regional counterparts, the NAFTA and the EU, provide some useful insights into their underlying dynamics. To begin with the GATT 1947, with regard to culture, its drafters have chosen the legal form of an exception for cultural property on the one hand (Art. XX:f), and for cinematograph films on the other (Art. IV). Nonetheless, in effect, none of these categories of goods were exempted in total from the rules governing international trade in goods but mainly minimised their scope under certain conditions. This choice reflects the general trend within GATT 1947 to use various exception or safeguard clauses to inject the necessary degree of flexibility into its legal framework to allow for changes that the tides of time may bring about. This trend also reflects the degree of institutional fragmentation and the, in relative terms, absence of jurisdictional overlap between the existent international organisations and their respective fields of action. Since the entry into force in 1948, the GATT’s regulatory scope as well as the number of contracting parties constantly widened in eight successive negotiations rounds, held in periodically recurring cycles. This process culminated in the creation of the WTO in 1994, resulting in more stringent rules for the settlement of disputes and the extension of the multilateral trading regime from goods to services and intellectual property rights. This constant process of widening was accompanied by the parallel trend of increasing overlap and complexity through the proliferation of international treaties and

\footnote{Cf. Tauber, supra note 1 at 220.}
organisations marking the governance of world affairs in the era of the “end of geography” in the “shrinking global village”. This trend has undermined the utility of the legal form of exception clauses which, instead, of injecting flexibility, would rather add uncertainty, friction or, at its worst, conflict. This problem is best highlighted by the various exception clauses for security in the GATT 1994, the GATS and the TRIPS, where the institutional fragmentation between the GATT/WTO system and the UN system has led to a stalemate. By analogy to cultural concerns, based on such exception the unilateral determination of what constitutes a state’s legitimate security (or cultural) interest simply poses a great inherent danger threatening to undermine the proper function and efficiency of any multilateral legal regime. In addition, important technological changes also affected the patterns of trade and in particular the properties of the products being traded as well as their impact on previously distinct and separated areas, such as the environment, security, development, social and labour standards or culture. Particularly, these developments have aggravated the problems deriving from the respective differences in the regulatory standards of the GATT, the GATS and the TRIPS.

The limited value of an exception is also reflected in the North American experience under the NAFTA, which contains an exemption for “cultural industries”. The negotiation history of the agreement coincided with the Uruguay negotiation round and reflects the disagreement over the causal relationship between culture and trade in general and the nature of certain cultural goods and services in particular. Already at the time of the conclusion of the Agreement, the (originally two) contracting parties, Canada and the United States, were divided over the issue of the scope of the said provisions, especially as concerns the United States’ right to retaliate. The legal value of the exemption was further undermined by the choice of forum for the resolution of disputes, which, as the Canada Periodicals Case exemplified, practically rendered the exemption non-existent. Nonetheless, contrary to the Panel’s concluding assertion that “cultural identity was not an issue”, the North American experience shows that, even between two relatively homogenous countries in terms of economic, political and even cultural development, at a certain level of economic integration mainly through trade liberalisation, the economic dynamics created inevitably set free cultural concerns and considerations.

Undoubtedly, the most complete picture of the complexity that holds sway over the mutual interaction between cultural and economic forces is given by the experience with European integration, in the evolution from the European Economic Community to the European Union. The European Union too, by way of its predecessor, the EEC, departed from the dominantly dualist approach to culture and trade, as often recalled in the paraphrase “Si c’était à recommencer, je commencerai par la culture”, (false) attributed to one of its founding fathers Jean Monnet. In institutional terms, the dualist approach was mirrored the division of labour between the Council of Europe and the European Economic Community. Like the GATT 1947, the Rome Treaty also started with an exception for cultural property without listing an exception for cinematograph films comparable to Art. IV GATT. Instead, all screen quotas in place between the then EEC Member States were abolished by a regulation in 1965. The gradual abolition of screen quotas within the common market reflects already the different regulatory philosophy that was enshrined in the Rome Treaty. This philosophy consists in a functional approach paving the way for an “ever closer union among the peoples of Europe”. More than that, it established a strong supranational both
substantive and institutional framework that at the same time was comprehensive in terms of its objectives but realistic about the means to achieve them. For instance, unlike the GATT 1947, the Rome Treaty not only covered trade in goods but also the free movement of persons, services and capital. Nevertheless, these fundamental freedoms were not created in one night or else in seven days but instead set free a process implementing them on a step-by-step, sector-by-sector and case-by-case basis weaving the web of Community law closer and closer. Although the Treaty itself contained no explicit reference to culture, several facts contributed to the gradual realisation that culture and economic integration, or Kultur und Wirtschaft, cannot be separated. Among these factors, the technological innovations in the audiovisual sector and the competition with foreign, especially American, audiovisual products, the growing institutional overlap with the Council of Europe, the expanding membership but also the increasing democratic participation of European citizens through the directly elected European Parliament and the access of individual persons to the European Court of Justice deserve to be mentioned. The Commission too, during the gradual realisation of the common and the internal market, showed a growing interest in the impact of negative integration on the cultural sector as much as the Council became increasingly aware about the fact that mere economic integration, or a common market, alone does not suffice to forge a common sense of a European way leading towards “a destiny henceforward shared”. These and many more factors can be said of having contributed to the sudden realisation that the Treaty’s silence about culture created an ever growing state of uncertainty and predictability. As a result, the 1992 Maastricht Treaty introduced a proper Article on culture (Article 151 [ex 128] TEC) into the Treaty Establishing the European Community (TEC). The greatest novelty of the Article on culture was that in paragraph 4 it formulated a so-called “cultural integration” or “cross-section clause” to the effect that in the future the Community had to “take cultural aspects into account in its action under other provisions” of the Treaty. Thus, instead of exempting culture or certain cultural sectors from the scope of the Treaty, the integration clause virtually has the effect that cultural aspects must be considered in any other field of Community action. In certain fields, such as state aid or common commercial policy, such cultural considerations were explicitly inscribed in their text. The final step in the evolutionary history of the European Union thus far came with the presentation of a Treaty Establishing a Constitution for Europe. The Treaty Establishing a Constitution for Europe, in view of a Union of 27 and more Member States, considerably altered again the overall equilibrium of the Union, especially through the inclusion of the EU Charter of Fundamental Rights, but grasso modo left the provisions with regard to culture untouched.

The survey of each integration model shows the same experience that, in one way or the other, cultural concerns must be met within the sphere of economic integration. The remaining central question is then how this insight is going to be successfully translated into legal language and implemented in the current context of the multilateral trading regime.

The principle options available to such endeavour are first an exception culturelle, as discussed during the Uruguay Round, which could be modelled after Articles XX or XXI GATT. A slight variation of a general straightforward exception for culture would be an exception of the cultural industries following the example in NAFTA. Another variation would be a clause of cultural specificity, or, for instance, cultural diversity, which would practically leave the status quo untouched and by allowing WTO Members to refrain from further commitments in the culturally sensitive service sectors. The
forth option would be a cultural integration clause, modelled after Article 151(4) TEC, which would oblige Panels and the Appellate Body to take cultural aspects into account in all cases presented before them.

These options, which could be combined, however, call for some more concrete problems of first how and second where to implement them in the overall architecture of the various agreements administered by the WTO. For this problem of how to implement them, there exist already various useful proposals, which range from a proper Article, to a Waiver, to an Understanding, Annex, enabling or integration clause. The question of where is less obvious and such a solution would have to take into account the variations between the different Agreements, such as the GATT, the GATS and TRIPS, and the possible overlap between them. The problem with cultural goods and services is precisely that they combine aspects of goods with those of services and are closely linked with intellectual property rights. Moreover, the current attempts to amend the WTO in the ongoing Doha Round and to add a regime of competition rules must be duly considered in this context.

It is much to regret that for the moment it seems that the path chosen is none of the options outlined, but instead the adoption of a proper instrument on cultural diversity under the auspices of UNESCO, presently known as Convention on the Protection of Diversity of Cultural Contents and Artistic Expressions. Unfortunately, this project in its current form risks to add nothing to the current state of affairs within the WTO and, furthermore, by ignoring the various linkages between culture and trade and the dual, economic and cultural nature of the cultural industries risks of being outdated before it enters into force. It might only add to the current trend of the fragmentation of the international legal order caused by the embarras de riches of international instruments and organisations. Most of all, it does not correspond to the ever increasing complexity of a globalised economy which, in order to function properly, needs a coherent set of rules minimising the negative effects of globalisation and guaranteeing a just redistribution of the wealth accumulated by the welfare effects derived from free trade. Furthermore it requires a stable and coherent legal framework in which the various competing interest related with trade, such as the environment, national security, labour standards, development and culture, can be not only mediated but mutually support each other. Particularly, for a culturally diverse offer of cultural products and equal access to them, competition rules are badly needed. In its current form, UNESCO seems to have sufficient expertise to deal with the cultural aspects, but it totally lacks the structure and expertise in trade and commerce, which is indispensable for the eventual realisation of the objectives pursued. For these reasons, at the present moment, the choice of UNESCO as a host of the project would totally miss the point and merely extend once more the “perpetual conflict” of dualist reasoning as expressed in the perception of culture and trade being mutually excluding each other. Instead it will require much broader considerations taking into account both the WTO and UN system. In the light of difficult global challenges lying ahead, for the time being, it must be seriously asked why go for the second best choice, if one has not even seriously tested the best one available?
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