

# “Cultural Diversity” from WTO Negotiations to CETA and TTIP

## More than Words in International Trade Law and EU External Relations

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L'objectif visé dans cet article est de contribuer à une meilleure compréhension de la notion de diversité culturelle telle qu'elle a été développée dans les relations extérieures de l'Union européenne (UE). Nous y adoptons ainsi une conception conforme à la définition large de la diversité culturelle qui a été adoptée par la Convention sur la protection et la promotion de la diversité des expressions culturelles (ci-après, Convention UNESCO). L'article suppose que le concept de diversité culturelle touche à la fois des intérêts économiques et des sphères socioculturelles capables d'influencer la vie des individus. En s'appuyant sur une approche de droit qui met l'accent sur le cadre sociopolitique dans lequel le concept a pris forme, nous tentons d'analyser comment la diversité culturelle est élaborée dans les relations commerciales internationales. Cette analyse vise à expliquer comment la diversité culturelle a été abordée par l'Accord économique et commercial global (AECG) entre le Canada et l'UE. Les questions culturelles ont en effet

This article contributes to further understanding the meaning of 'cultural diversity' as it has developed in the external relations of the European Union (EU). The notion of cultural diversity described here adheres to the definition adopted by the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO Convention). This article assumes that the concept of cultural diversity touches upon both economic interests and socio-cultural spheres that have an influence on people's lives. Using an approach that analyses the law in context, emphasizing the socio-political framework in which this concept has taken shape, this article explores how cultural diversity is depicted in international trade relations. This analysis aims at explaining how cultural diversity was addressed in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. During these negotiations, cultural issues have, in fact, been among some of the most debated topics. Canada and the EU share similar, but not identical, unders-

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été parmi les sujets les plus débattus pendant les négociations de l'AECG. Si dans le cadre des relations commerciales internationales, le Canada et l'UE partagent de la diversité culturelle, des visions assez proches, celles-ci ne sont pas pour autant identiques. Le présent article dévoile les visions européenne et canadienne, analyse le développement de la notion de diversité culturelle dans des contextes plus vastes où le concept a pris forme ainsi que les intérêts antagonistes qui y sont débattus. Il examine comment la notion de diversité culturelle a été dépeinte dans les négociations de l'Organisation Mondiale du Commerce (OMC) portant sur les services audiovisuels et comment la Convention UNESCO a contribué à son développement. Une analyse du cas Chine-Publications et produits audiovisuels réglé par l'Organe de règlement des différends (ORD) de l'OMC offre un aperçu de la façon dont le cadre juridique et politique complexe des relations extérieures de l'UE a un impact sur le rôle exercé par l'Union européenne dans la protection et la promotion de la diversité culturelle. Enfin, cet article apporte de nouvelles considérations sur la façon dont la notion de diversité culturelle a été influencée par l'AECG et présente quelques remarques sur l'impact que cet accord pourrait avoir sur l'efficacité de cette notion. Il apporte aussi des considérations sur la façon dont cette notion pourrait être influencée par le Partenariat transatlantique de commerce et d'investissement (PTCI), tout en esquissant une réflexion sur le concept de protection-

tanding of the concept of cultural diversity in international trade. In order to disclose their different positions, this article analyses the development of cultural diversity within the broader contexts in which this notion has taken shape and the conflicting interests involved in its negotiation, promotion and protection. This article examines how the notion of cultural diversity has been portrayed within World Trade Organization (WTO) negotiations on audiovisual services and the contribution of the UNESCO Convention to its development. An analysis of the 2009 China-Publications and AV Products case settled by the WTO Dispute Settlement Body offers insight into how the complex legal and political framework of the EU's external relations impacts its role in protecting and promoting cultural diversity. Finally, this paper contributes new observations about how CETA has influenced understandings of cultural diversity and offers a few conclusions about the impact that this agreement may have on its effectiveness as a concept. It also includes considerations on how this notion may be shaped by the Transatlantic Trade and Investment Partnership (TTIP) and reflections on the concept of protection-

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<b>Introduction</b>	<b>42</b>
<b>1. “Cultural Exception,” “Cultural Specificity” and “Cultural Diversity” in WTO Negotiations</b>	<b>45</b>
<b>2. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions</b>	<b>49</b>
<b>3. Cultural Diversity and EU Relations with China: the China-Publications and AV Products case</b>	<b>51</b>
<b>4. EU-Canada Relations and CETA</b>	<b>53</b>
<b>5. The Notion of “Protectionism”, the TTIP and Other Challenges with regard to Cultural Diversity</b>	<b>56</b>
<b>Conclusion</b>	<b>59</b>

## INTRODUCTION

The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter: the “UNESCO Convention”)<sup>1</sup> provides a broad definition of cultural diversity that does not impose any discernible limit to the scope of its application. In this article, I also adhere to this “open” definition, which includes an interpretation of culture both as artistic expression and as an expression of customs and traditions. According to Article 4, paragraph 1 of the UNESCO Convention, “Cultural diversity’ refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies [paragraph 1]. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used [paragraph 2].”

In order to contribute to further understandings about approaches to cultural diversity adopted by CETA, I will examine its development within the WTO negotiations and show that, internationally, cultural diversity as a concept became more solidified through the UNESCO Convention. I will also try to depict, through an analysis of the 2009 *China-Publications and AV Products* WTO case, how the complex legal and political framework of the EU’s external relations has an influence on its role in protecting and promoting cultural diversity.

In international trade negotiations, the notion of “cultural diversity” has been informed by a protectionist approach aimed at limiting the power of transnational oligopolies and monopolies that tend to reshape cultural industries and expressions on a global scale. This protectionism mainly addresses the concerns of states and regional economic organisations like the European Union (hereinafter: the “EU”) to support local economies and limit global cultural homogenization, thus reinforcing the conditions for the development and conservation of cultural pluralism. For example, with specific regard to the film industry, the notion of cultural diversity reflects the aim of supporting cinematographic production through state aid. One can argue that this aid has “a double nature: it is both cultural and economic, as it supports both an artistic expression and a historically fragile industry. This distinction [which can be applied to all cultural industries] is actually factious, because the only way to really support a film as a cultural expression is by fostering the un-

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1. English text available at <<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>> (accessed October 12th, 2015)

derlying industry,”<sup>2</sup> but is of crucial importance since it shapes international trade negotiations.<sup>3</sup>

The EU’s terminology, developed for the purpose of external relations, configured the notion of cultural diversity during the international negotiations on trade in services, and particularly audiovisual<sup>4</sup> services that were held within the World Trade Organization (hereinafter: the “WTO”).<sup>5</sup> Negotiating the international regulation of these services also means negotiating the socio-cultural dimensions, which include both “values” and beliefs that touch people’s daily lives. This is because such dimensions directly affect the realities individuals inhabit and the way in which these realities are both organized and constructed.

Because of the complexity of these issues, the negotiations on trade in services are very difficult to conclude. WTO Members did not find a balance between liberalizing cultural markets to acquire economic benefits and protecting local differences to avoid cultural homogenization. Even though these negotiations have currently been suspended, they are still at the root of the notion of cultural diversity as developed in international trade relations; therefore, they are still crucial to its understanding.

The difficulties related to the multilateral framework of the WTO created a strong incentive for its Members to turn towards bilateral *Free Trade Agreements* (FTAs). Therefore, issues involving the protection and promotion of cultural diversity have been, and will increasingly be, negotiated within FTAs. These agreements have primarily adopted the so-called “negative list approach,” as in the case of the North American Free Trade Agreement (hereinafter: “NAFTA”) concluded between Canada, Mexico and the United States (hereinafter: the “US”). This approach implies that the agreement covers all service sectors and measures except for those expressly mentioned in a list of reservations: discriminatory measures affecting all included sectors are liberalized unless specific measures are set out in the FTA. It also requires states to establish a definitive list of restrictions, thus preventing them from gradually opening their markets. This approach differs from the so-called “positive list approach,” according to which the sectors that a Party to the FTA wants to liberalize will be listed in a schedule of commitments: only those which are explicitly mentioned are liberalized. This “positive list approach” has shaped the EU tradition and methodology in international trade negotiations, thus determining the ways in

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2. Lucia BELLUCCI, “National Support for Film Production in the EU: An Analysis of the Commission Decision-Making Practice”, (2010) 16-2 *European Law Journal* 211.
  3. *Id.*, 211-212. It also shapes the EU competition policy, in particular the Commission decision-making practice.
  4. Following the Commission’s interpretation of the term “audiovisual,” my contribution understands this term in its broadest sense, and includes both cinema and television.
  5. Cf Christopher Arup, *The New World Trade Organization Agreements. Globalizing Law Through Services and Intellectual Property*, Cambridge, Cambridge University Press, 2000, p. 97.

which cultural diversity and expression have been protected and promoted within an international context.

In economic terms, the most relevant FTAs for the EU are the Comprehensive Economic and Trade Agreement (CETA), which was concluded between the EU and Canada, and the Transatlantic Trade and Investment Partnership (TTIP), which the EU is currently negotiating with the US. CETA concerns two politically and economically “developed” international actors that share very similar views on issues related to cultural diversity, whereas TTIP involves two commercial partners that have markedly different positions on these issues.

The concept of cultural diversity in the external relations of the European Union also involves the ties it maintains with a particular kind of partner – of which China is the most prominent – that on the one hand, according to its generation of wealth, can be classified among developed countries, while on the other hand, according to the distribution of this wealth, is still considered a developing country. In the negotiations between these partners, the EU is confronted with different and competing interests that affect its position with regard to the protection and promotion of cultural diversity. For example, some Member States’ interests in protecting their film industries are in direct conflict with other Member States’ interests in liberalizing markets to ease restrictions in the music industry’s export sector.

In addition, to enable the European Commission (hereinafter: the “Commission”) to negotiate for the EU on culturally sensitive issues, the EU Member States need to find ways to work toward compromise between their disparate cultural policies. It is therefore necessary for the Commission to find middle ground between different and competing economic interests but also between the distinct social values they advocate. The results of this mediation process may vary for political and economic reasons. These considerations support the argument of my work, which concludes that in international trade negotiations, the EU protects and promotes cultural diversity; however, it is frequently confronted with conflicting interests which limit the scope of its action.

It is therefore crucial, in the following discussion, to address how the notion of cultural diversity has developed in the EU’s external relations and the countries with which the EU negotiates on cultural matters. In the next sections, I take an approach that addresses the law in context and acknowledges the socio-political framework in which the notion of cultural diversity has taken shape.

Section 2 discusses the conceptual premises of cultural diversity and their development within the WTO trade negotiations. Section 3 focuses on the UNESCO Convention, which internationally recognizes this concept through a legally-binding instrument. Section 4 discloses the contradictions related to the EU’s protection and promotion of cultural diversity, through a study of the 2009 *China-Publications*

and *AV Products* case.<sup>6</sup> Section 5 considers issues related to cultural diversity as regulated in the CETA. Section 6 focuses on the TTIP negotiations and the notion of protection. It also considers this notion in light of developing countries' peculiar needs. Section 7 concludes the analysis.

## 1. “Cultural Exception,” “Cultural Specificity” and “Cultural Diversity” in WTO Negotiations

To properly analyze the nature and scope of negotiations on audiovisual services, one needs to take a step back and consider those conducted within the framework of the Uruguay Round (1986-1994)<sup>7</sup>, which is the round that led to the establishment of the WTO through the Marrakech Agreement of April 15<sup>th</sup>, 1994.

During these negotiations, some countries, including France,<sup>8</sup> Canada and Australia, supported the idea of a “cultural exception”<sup>9</sup> or, in other words, that the audiovisual sector should be excluded from the scope of the General Agreement on Trade in Services (hereinafter: “GATS”). They had as an inspirational model the original General Agreement on Tariffs and Trade<sup>10</sup> (hereinafter: “GATT 1947”), which provides, in Article IV, for a specific exception for cinematographic films, and, in Article XX letter f), for an exception that protects national treasures of artistic, historic or archaeological value.<sup>11</sup>

The concept of “cultural exception” aimed at excluding cultural services from the liberalization process thus highlighting their significance for the system of values

6. WTO, Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, 12 August 2009, available at: <[www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm)> (accessed 12 October 2015); WTO Appellate Body Report, WT/DS363/AB/R, 21 December 2009, available at: [www.wto.org/english/tratop\\_e/dispu\\_e/363abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/363abr_e.pdf) » (accessed October 12th, 2015)
7. Sir Leon Brittan, who was responsible for the Commission's negotiations, defined the Uruguay Round as an exercise without precedent in the process of international economic regulation. Leon BRITTAN, “Guest Editorial: Uruguay Round”, (1994) 31-2 *Common Market Law Review* 229.
8. France is the country with the biggest film production industry in Europe and also the broadest support system for film. It is therefore the most engaged in monitoring legal and political issues that have a potential influence on the audiovisual sector.
9. For two different positions on cultural exception, see Serge REGOURD, “L'audiovisuel et le GATT: pour un questionnement juridique de l'exception culturelle”, (1993) 106-II *Légipresse* 101 and Laurent BENZONI, “Entre exception culturelle et culture de l'exception”, (2001) 124 *Revue de la Concurrence et de la Consommation* 10.
10. The provisions of GATT 1947 were incorporated into the GATT 1994, which is a component of the Agreement establishing the WTO (Annex 1A).
11. Cf on the topic Aude TINEL, “Qu'est-ce que l'exception culturelle?”, (2000) 435 *Revue du Marché Commun et de l'Union Européenne* 78, 80.

and the identity of a society, and therefore the need to protect them from a commercial logic.<sup>12</sup> The idea of granting the cultural sphere the privilege of protection in trade agreements stood in full opposition to that advocated by the US, for example, whose negotiators argued that cultural services should be considered as any other services and, therefore, liberalized.

The Commission, which took charge of the negotiations for the then EC, was not bound by a negotiating mandate<sup>13</sup> to abide by the idea of “cultural exception,” and it privileged a new concept: that of “cultural specificity.”<sup>14</sup> According to this notion, audiovisual services should fall within the scope of GATS, but be subject to a specific legal regime.<sup>15</sup>

During the Uruguay Round negotiations, the Parties failed to reach an agreement on audiovisual services, which have therefore been integrated into GATS without a specific legal regime. Neither the notion of “cultural exception,” nor that of “cultural specificity,” was legally recognized in the WTO agreements. Even though the Commission rejected the concept of “cultural exception,” it acknowledged the need to protect audiovisual services within WTO negotiations. To address the matter, the Commission presented a list of exemptions to the most favoured nation principle<sup>16</sup>

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12. Lucia BELLUCCI, *Cinema e aiuti di Stato nell'integrazione europea. Un diritto promozionale in Italia e in Francia*, Milano, Giuffrè, 2006, p. 311 and Milagros DEL CORRAL (ed), *Culture, Trade and Globalisation: Questions and Answers*, Paris, UNESCO, 2000, pp. 35-38, available at: <<http://unesdoc.unesco.org/images/0012/001213/121360e.pdf>> (accessed October 12th, 2015)
  13. The Council gave the Commission a mandate to negotiate agreements on behalf of the European Community, as stated in the Declaration of Punta del Este of 20 September 1986 pursuant to former Art 228 (now Art 300) of the EC Treaty. This mandate, however, was not fully complied with, because the Council did not adopt directives. The negotiations have in fact been conducted within the framework of the Council Decision, adopted on September 20 in Punta del Este, which gave the Commission a very generic mandate. This could have been intended to demonstrate the Council's willingness to give the Commission a large degree of flexibility or is perhaps the result of its inability to provide precise negotiation criteria. See Catherine SCHMITTER, “La Communauté européenne et l'Uruguay Round: incertitudes et faiblesses”, (June 1994), *chronique 5 Europe* 1, 4.
  14. The European Parliament (hereinafter: the “Parliament”) embraced this notion in a resolution of July 1993 but in another resolution, adopted in September of the same year, it rejected it in favour of “cultural exception.” Cf Serge REGOURD, *L'exception culturelle*, Paris, Presses Universitaires de France, 2002, pp. 78-79.
  15. Cf Anna HEROLD, “European Public Film Support within the WTO Framework”, (2003) 6 *IRIS plus* 2, 6.
  16. It aims at avoiding the application of a different treatment depending on the origin or the supplier of a service for an equivalent service. Countries cannot discriminate between their trading partners. All signatory states must apply this treatment to one another. Article II para 1 GATS constitutes a general obligation. It states that: “With respect to any measure covered by this Agreement, each Member shall 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”.



under Article II GATS<sup>17</sup> and the Annex on Article II Exemptions.<sup>18</sup> Furthermore, with regard to the national treatment principle under Article XVII GATS,<sup>19</sup> the EU did not make any liberalisation commitments.

In the latest round of negotiations, launched under Article XIX GATS in November 2001 at the Ministerial Conference in Doha, the EU did not change its policy on audiovisual services but adopted the notion of “cultural diversity.”

This transition from the notion of “cultural specificity” to that of “cultural diversity” occurred in the mandate given by the Council of the European Union (hereinafter: the “Council”) to the Commission<sup>20</sup> at the occasion of the General Affairs Council meeting of October 26<sup>th</sup>, 1999, and was supported by the Commission and the Parliament.<sup>21</sup> In its mandate the Council declared that, in future negotiations

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17. Cf Additional Own-Initiative Opinion of the Economic and Social Committee on the Effects of the Uruguay Round Agreements [1994] OJ C393/200, para 8.2.
  18. See on the topic Paolo MENGOZZI, “Le GATS: un accord sans importance pour la Communauté européenne?”, (1997) 2 *Revue du marché unique européen* 19, 23–24; Giorgio SACERDOTI, *L'Accordo generale sugli scambi di servizi (GATS): dal quadro OMC all'attuazione interna* in G. SACERDOTI & G. VENTURINI (eds), *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia*, Milan, Giuffrè, 1997, p. 7; Francis SNYDER, *International Trade and Customs Law of the European Union* London, Butterworths, 1998, p. 444, note 19.
  19. According to which “[...] each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers” (para 1). This principle aims to avoid discrimination between foreigners and nationals. It guarantees that foreign services and service providers, specifically those of another Member of the trade agreement, are treated no less favourably than local services and service providers. The national treatment principle applies only in respect to the services expressly listed by Members in the schedules of commitments and the extent to which they may be provided individually on the various modes of supply [Gabriella VENTURINI (with the collaborative work of G. ADINOLFI, C. DORDI & A. LUPONE), *L'Organizzazione Mondiale del Commercio*, Milano, Giuffrè, 2004, p. 102], that is only pertaining to states that have taken liberalisation commitments with regard to certain services. Cf SACERDOTI, prec. note 18, p. 9.
  20. The Council’s mandate made explicit reference to cultural diversity, in particular in its conclusions. *Consultation sur les négociations GATS 2000/OMC portant sur certains services audiovisuels (musique et logiciel de loisirs), ainsi que sur les services culturels*, available at: <[http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon\\_fr.htm](http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon_fr.htm)> (accessed December 5th, 2006)
  21. Pascal LAMY, *Les négociations sur le commerce des services à l'OMC*, Parlement européen, Strasbourg, 10 March 2003, p. 3, available at: <[http://europa.eu.int/comm/commissioners/lamy/speeches\\_articles/sp1a\\_158\\_fr.htm](http://europa.eu.int/comm/commissioners/lamy/speeches_articles/sp1a_158_fr.htm)> (accessed December 5th, 2006); Viviane REDING, *La diversité culturelle*, Parlement européen (March 10th, 2003), available at: <<http://europa.eu.int/rapid/start/cgi/guesten.ks>> (accessed 12 October 2015). The Commission stated that the community approach aims to protect and promote cultural diversity. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and Guidelines for the Community Audiovisual Policy in the Digital Age (14 September 1999) COM(1999) 657 final, para 7. With regard to important consultation exercises on cultural diversity that involved the Commission in view of the negotiations, see Joseph Andrew McMAHON, *Preserving and Promoting Differences? The External Dimension of*

within the WTO, the Community (hereinafter: the “Community”) would ensure, as it did during the Uruguay Round, that both the Community and its Member States would have the opportunity to define and implement cultural and audiovisual policies respectful of their own cultural diversity.<sup>22</sup>

The EU’s decision to give priority to the latter notion, “cultural diversity,” rather than to the concepts of “cultural specificity” or “cultural exception,” is primarily motivated by the need to reconcile differing conceptions of public intervention in the sphere of culture held by Member States, and therefore to preserve a unified voice for these states during international trade negotiations. As mentioned in the introduction, for example, the interest of some Member States in supporting cinematography and therefore in protecting cultural services has been in conflict with the music industry’s interest in having open markets to export their products. Whereas the United Kingdom (hereinafter: the “UK”) has a music industry that can easily compete on a global scale and therefore aims to develop its export sector by taking advantage of open markets, France has an important cinematographic industry that cannot compete with the Hollywood oligopolies without state aid, and its industry would be endangered by market liberalization in the audiovisual sector. Since both countries aim to boost their strongest cultural industry, they respectively tend to support and oppose liberalization policies. Through the notion of cultural diversity, the EU fostered a commonality of views among its Member States so as to allow negotiations. The notion of cultural diversity did not pose a threat to Member States’ different traditions in supporting cultural industries and expressions, and their diverging economic interests, but it helped to overcome them for the sake of being able to conduct and conclude negotiations successfully. Arguably, the notion of cultural diversity has also been fostered by the desire to satisfy the need for cultural plurality, rather than that of cultural defence.<sup>23</sup> Although expressions are mainly “verbal stratagems,”<sup>24</sup> this notion seems to lie more on a proactive than on a defensive plan.

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*Cultural Cooperation* in R. CRAUFURD SMITH (ed), *Culture and European Union Law*, Oxford, Oxford University Press, 2004, p. 345. The Parliament has expressed its awareness of the special role that the European audiovisual sector plays in the defence of cultural pluralism, a healthy economy and freedom of expression. Cf European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round (COM(1999) 331 - C5-0155/1999 - 1999/2149(COS)) [2000] OJ C 189/213, paras 24-26; European Parliament Resolution on the Fourth WTO Ministerial Conference [2002] OJ C 112 E/321, paras 21-22; European Parliament resolution on the General Agreement on Trade in Services (GATS) within the WTO, including cultural diversity, 12 March 2003 [2004] OJ C 61 E/289, paras 12-13.

22. Council resolution of 21 February 2001 national aid to the film and audiovisual industries [2001] OJ C 73/3, para 5; Council resolution of 21 January 2002 on the development of the audiovisual sector [2002] OJ C 32/4, para 5.
23. Lawrence ROSEN, “The Integrity of Cultures”, (1991) 34:5 *American Behavioral Scientist* 603.
24. T. WEIR, *Economic Torts*, Clarendon Law Lectures, Oxford, 1997, (Lecture Three: Views from Abroad), cited by Horatia MUIR WATT, “La fonction subversive du droit comparé”, (2000) 3 *Revue internationale de droit comparé* 522.

## 2. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions

While the notion of “cultural diversity” had become a more solid concept as part of the EU’s external relations, at the international level states such as France and Canada, as well as the United Nations Organization for Education, Scientific and Cultural Organization (hereinafter: “UNESCO”), were conducting a significant campaign aimed at obtaining the formal recognition of cultural diversity by means of a legally-binding text. The notion had already been acknowledged in several normative texts, but it had never been recognized by an international convention. A Declaration on Cultural Diversity<sup>25</sup> had been adopted by the Council of Europe in the name of a commitment to freedom and pluralism of the media, while Article 22 of the Charter of Fundamental Rights of the European Union<sup>26</sup> provides that the Union shall respect cultural diversity.

Internationally, the Forum on Globalisation and Cultural Diversity of 2000, which was held in Valencia<sup>27</sup> under UNESCO’s patronage and with the Commission’s support, led to the Valencia Declaration on Globalisation and Cultural Diversity. Even resolution n. 57/249, *Culture and development*, adopted<sup>28</sup> by the United Nations General Assembly on December 20<sup>th</sup>, 2002,<sup>29</sup> gave ample space to cultural diversity. Furthermore, on November 2<sup>nd</sup>, 2001, the 31st section of the UNESCO General Conference adopted the Universal Declaration on Cultural Diversity (hereinafter: “UNESCO Declaration”),<sup>30</sup> which recognizes cultural diversity as “the common heritage of humanity”<sup>31</sup>, as well as the “specificity of cultural goods and services [compared to other] commodities or consumer goods.”<sup>32</sup>

Nevertheless, a legally binding text was still missing at the international level and remained so until October 20<sup>th</sup>, 2005, when the UNESCO Convention was adopted by the 33rd session of the UNESCO General Conference. There are 133 states that are Parties to the Convention. Today, the EU, which joined in 2006,<sup>33</sup> remains the only regional economic integration organisation to be party to this convention.

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25. COUNCIL OF EUROPE, Committee of Ministers, *Declaration on Cultural Diversity*, December 7th, 2000, available at: <<http://wcd.coe.int/ViewDoc.jsp?id=389843>> (accessed October 12th, 2015)

26. In [2000] OJ C364/1.

27. From May 22-24th, 2000.

28. During the 78th Plenary Session.

29. A/RES/57/249, available at: <[www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Res%2057%20249\\_01.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/Res%2057%20249_01.pdf)> (accessed October 12th, 2015)

30. Accompanied by an Action Plan.

31. Art 1.

32. Art 8.

33. Council decision of 18 May 2006 on the conclusion of the Convention on the Protection and

As mentioned in the introduction, the UNESCO Convention identifies cultural diversity as a positive response to the trend toward cultural homogenization, and concerns culture both as an artistic expression and as an expression of traditions and customs.<sup>34</sup> The humus in which the UNESCO Convention sank most of its roots was that of the international negotiations on audiovisual services. This convention was primarily born by the will of some countries to have at their disposal a legally binding text that would enable them to protect and promote their national cultural welfare. In other words, to adopt protectionist policies that support domestic cultural production, thus maintaining and developing not only a national industry, but also a certain cultural diversity on offer and therefore a variety of choices for the public.

The UNESCO Convention treats the principle of sovereignty (Article 2, paragraph 2) as one of its fundamental principles. Both the protection and promotion of cultural diversity revolve around states that have “the sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory,”<sup>35</sup> including measures to support cultural industries and promote the diversity of media,<sup>36</sup> that encompasses public service broadcasters.<sup>37</sup> Therefore, the UNESCO Convention legitimizes state aid to audiovisual works, which has been at the core of the conflicts on cultural issues between WTO Members. Even though the UNESCO Convention is vague in many ways, and displays some arguable weaknesses,<sup>38</sup> it may still have a constructive effect on the interpretation of the already existing international agreements and negotiations over future agreements.<sup>39</sup>

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Promotion of the Diversity of Cultural Expressions (2006/515/CE) [2006] OJ L201/15.

34. Lucia BELLUCCI, “Cinema e diritto nell’integrazione europea: incentivazione economica e promozione della diversità culturale”, (2010) 3 *Sociologia del diritto* 89.
35. Art 1 letter h), Art 5 para 1 and Art 6 para 2 letter c).
36. See, in particular, Art 1 letters a) and h), Art 2 para 2, Art 5 para 1 and Art 6 letters a) and b).
37. Art 6 para 2 letter h).
38. Lucia BELLUCCI, *Media, diritto e diversità culturale nell’Unione europea tra mito e realtà*, Pisa, ETS, 2012, pp.19-22; Lucia BELLUCCI & Roberto SOPRANO, *The WTO System and the Implementation of the UNESCO Convention: Two Case Studies*, in Germann Avocats (Geneva) and multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union*, Full Version of the Study commissioned by the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education, Bruxelles, European Parliament, 2010, at pages 162-163, available at: <[www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT\\_ET\(2010\)\\_438587\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT_ET(2010)_438587_EN.pdf)> and <[www.diversitystudy.eu/ms/ep\\_study\\_long\\_version\\_20\\_nov\\_2010\\_final.pdf](http://www.diversitystudy.eu/ms/ep_study_long_version_20_nov_2010_final.pdf)> (accessed October 12th, 2015)
39. Rachael CRAUFURD SMITH, “The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order”, (2007) 1 *International Journal of Communication* 24, 48; L. Bellucci, préc., note 38, at pages 20-21; L. Bellucci & R. Soprano, préc., note 38, p. 164.

### 3. Cultural Diversity and EU Relations with China: the China-Publications and AV Products case

Although the EU is party to the UNESCO Convention, its external relations take shape within a complex political and legal framework that involves the balancing of competing interests, which affects its role in protecting and promoting cultural diversity. An analysis of the 2009 *China-Publications and AV Products* case about non-trade concerns, which was settled by the WTO Dispute Settlement Body (DSB),<sup>40</sup> supports this supposition while providing greater depth of understanding about the complex nature of cultural diversity and its promotion, monitoring, and protection in a broader international context.

In this case, the US filed a complaint related to a number of Chinese rules regulating activities concerning the importation and distribution of reading materials, audiovisual home entertainment products, sound recordings, and films for theatrical release. According to the US, certain measures violated trading-rights commitments undertaken by China in the Protocol on the Accession of the People's Republic of China to the WTO as well as the Report of the Working Party on the Accession of China to the WTO. The US claimed that these measures limited trading rights to Chinese state-owned companies, thus restricting the right of companies in China and of foreign companies and individuals to import products into China. They also argued that a number of measures were inconsistent with Article XVI GATS and/or Article XVII GATS as well as with Article III.4 of GATT 1994.

In its defence, China underlined the unique nature of cultural goods and services by referring to the UNESCO Convention and to the UNESCO Universal Declaration on Cultural Diversity (hereinafter: the "UNESCO Declaration").<sup>41</sup> China argued that cultural goods and services go beyond commercial aims. They are "vectors of identity, values and meaning" (Article 8 of the UNESCO Declaration; see also Article 1(g) of the UNESCO Convention) and play a crucial role in "the evolution and definition of [...] societal features, values, ways of leaving together, ethics and behaviours."<sup>42</sup> China also referred to the UNESCO Declaration because it was adopted by all UNESCO Members, including the US. In contrast, however, while China is a party to the UNESCO Convention, the US is not. The US had returned to UNESCO

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40. On this case see also Tania VOON, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products", (2009) 104-4 *American Journal of International Law* 710.

41. On 2 November 2001 the 31st session of the UNESCO General Conference adopted the Declaration on cultural diversity (UNESCO Declaration), which was accompanied by an Action Plan. This declaration recognizes cultural diversity as a common heritage of humanity as well as the peculiarity of cultural goods and services as compared to other goods. See Arts 1 and 8.

42. WTO, Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, préc. note 6, paras 4.276 and 7.751.

as a Member in 2003 after a long period of absence<sup>43</sup>, and it had participated in the UNESCO Convention negotiations, but it was one of two countries that opposed this convention and never became a Party to it. Therefore, the UNESCO Convention is not binding for the US,<sup>44</sup> a country which articulated some consternation at the convention's potential "to be misinterpreted in ways that might impede the free flow of ideas and affect areas like trade, justifying protectionism."<sup>45</sup>

China made the connection between cultural goods and the protection of public morals, arguing that it was in its interest to protect public morals through an appropriate content-review mechanism that prohibited any cultural goods with content<sup>46</sup> that could have a negative impact on such morals. As underlined in the UNESCO Convention, cultural goods have a major influence on societal and individual morals. Therefore, the regulations in question were necessary to protect public morals, and totally justified under Article XX(a) of the GATT and its chapeau.<sup>47</sup>

The EU (then EC) supported the US complaint,<sup>48</sup> taking the opportunity to underline its position on services.<sup>49</sup> Nevertheless, in contrast to other third Parties, it referred neither to the UNESCO Convention nor to the UNESCO Declaration. The EU did not make statements in support of cultural diversity, even though they would have reinforced the effectiveness of its position on services and strengthened the role of the UNESCO Convention "in the interpretation of existing international agreements and negotiations over their future development."<sup>50</sup>

The EU position in this case is arguably inconsistent with the support of cultural diversity expressed within the WTO negotiations and its role of party to the UNES-

43. See for details C. Edwin BAKER, *Media, Markets, and Democracy*, Cambridge, Cambridge University Press, 2002, pp. 271-274.

44. Cf Art 34 of the Vienna Convention on the Law of Treaties.

45. L. BELLUCCI & R. SOPRANO, prec., note 38, p. 159.

46. These contents ranged from violence or pornography to the protection of Chinese culture and traditional values.

47. WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, supra note 6, paras 4.109 ff, 4.276 ff, 7.714 and 7.753. The chapeau of Art XX is its introductory clause and it indicates the general requirements that the measure must meet in order to comply with it. On this paragraph cf also L. BELLUCCI & R. SOPRANO, préc., note 38, p. 159.

48. China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363). First submission of the United States of America, 13 May 2008, available at: <[www.ustr.gov/archive/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file221\\_14895.pdf](http://www.ustr.gov/archive/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file221_14895.pdf)> (accessed October 12th, 2015)

49. DS363 China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products. Third Party Written Submission by the European Communities, 4 July 2008, 16 ff, available at: <[http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc\\_140292.pdf](http://trade.ec.europa.eu/doclib/docs/2008/august/tradoc_140292.pdf)> (accessed October 12th, 2015)

50. L. BELLUCCI & R. SOPRANO, prec., note 38, p.165.

CO Convention. Nevertheless, it is consistent with the Commission's position expressed in the Communication of 2006 concerning the EU-China partnership.<sup>51</sup> In this particular communication, the EU opposes barriers to market access<sup>52</sup>, and therefore discrimination against foreign cultural goods, supporting the development of trade relations.<sup>53</sup> It also encourages "full respect of fundamental rights and freedoms in all regions of China."<sup>54</sup>

The EU's policy with regard to China hinges on the idea that cultural diversity cannot become a justification for a lack of respect of human rights. The relationship between the protection of cultural diversity and the respect of the rights in question is a very complex one which will be explored more in depth in Section six.

## 4. EU-Canada Relations and CETA

Given the general lack of success within the WTO's multilateral context, commercial partners turned to bilateral agreements: the FTAs. As previously explained, the mechanism used in these agreements is straightforward. Through the so-called "negative list approach" these negotiations require states to establish a definitive list of restrictions rather than enabling them to make gradual, liberalizing commitments. For CETA, the negotiations on cultural issues have been among the most controversial. CETA is broader in scope and ambition than NAFTA, and it is expected to come into effect in 2016 if approved by the Council and Parliament.

Canada and the EU are commercial partners that share very similar views on cultural diversity in international trade, thus diverging notably from the US. Nevertheless, their positions on the matter are different. The EU has never, for example, advocated the concept of "cultural exception" and has, historically, limited the exclusion of cultural sectors from trade agreements to audiovisual services. Canada has instead supported the notion of "cultural exception," considering it as a value

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51. Cf Communication from the Commission to the Council and the European Parliament: EU - China: Closer partners, growing responsibilities (24 October 2006) COM (2006) 631 final. On the relations between the EU and China and cultural diversity, see Delia FERRI, *An Investigation on the (Desirable) Role of Cultural Diversity in the EU-China Partnership* in F. SNYDER (ed), *Europe, India and China: Strategic Partners in a Changing World. L'Europe, l'Inde et la Chine: partenaires stratégiques dans un monde en mutation*, Bruxelles, Bruylant, 2008.

52. Communication from the Commission to the Council and the European Parliament: EU - China: Closer partners, growing responsibilities, préc., note 51, para 3.3.

53. On trade relations between the EU and China see Denise PREVOST et al, *EU-China Trade Relations*, Study commissioned by the European Parliament, Directorate-General for External Policies of the Union, Directorate B. Policy Department, Bruxelles: European Parliament, 2011, available at: <[www.europarl.europa.eu/committees/en/inta/studiesdownload.html?languageDocument=IT&file=48598](http://www.europarl.europa.eu/committees/en/inta/studiesdownload.html?languageDocument=IT&file=48598)> (accessed October 12th, 2015)

54. Communication from the Commission to the Council and the European Parliament: EU - China: Closer partners, growing responsibilities, préc., note 51, para 3.1.

extending to all cultural industries and applying it to all chapters of trade agreements.

A consolidated CETA text was made public on 26 September 2014<sup>55</sup> only for informational purposes; it will be subject to legal revision and then transmitted to the Council and Parliament for ratification. It will only become binding under international law after the ratification process will be completed. I will therefore refrain from citing specific article numbers because they may be subject to change after the legal review.

The text of the CETA document reveals that both the EU and Canada have preserved part of their tradition in terms of defining the notion of cultural diversity, but they have also introduced innovative elements concerning the scope of its application. On the one hand, this agreement refers only to audiovisual services with regard to the EU, but with regard to Canada, which has embraced a broad definition of cultural industries since NAFTA,<sup>56</sup> it employs a broader concept of cultural industries,<sup>57</sup> including a wide range of cultural sectors and activities. On the other hand, CETA has adopted an approach of “targeted” exemption; that is, an exemption “chapter by chapter.”<sup>58</sup> This has introduced an exemption in the chapters where the Parties have cultural policies and measures supporting culture that they wish to protect.

This agreement is inspired by NAFTA’s “negative list approach” that the EU has never adopted before now. For CETA, the EU abandoned the “positive list approach” which has always characterized its external trade relations.

In the Chapter on Exceptions, for example, the Parties “recall the exceptions applicable to culture as set out in the relevant provisions of Chapters on Cross-Border Trade in Services, Domestic Regulation, Government Procurement, Investment, Subsidies [...]” thus summarizing the chapters of the agreement that are mostly concerned with the present analysis. Within its Chapter on Subsidies, CETA states

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55. Available at <[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)> (accessed October 12th, 2015)

56. For the definition see Art 2107, letters a)-e) NAFTA.

57. In the Chapter on Exceptions, CETA defines cultural industries by reference to “a person engaged in: (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, except when printing or typesetting any of the foregoing is the only activity; (b) the production, distribution, sale or exhibition of film or video recordings; the production, distribution, sale or exhibition of audio or video music recordings; the publication, distribution or sale of music in print or machine-readable form; or 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.” Letters following b) seem to actually be missing in this version of CETA.

58. Charles VALLERAND, “Exemption culturelle - Trouver un accord avec les Européens” *Le Devoir*, March 30th, 2013, available at: <[www.ledevoir.com/international/actualites-internationales/374574/trouver-un-accord-avec-les-europeens](http://www.ledevoir.com/international/actualites-internationales/374574/trouver-un-accord-avec-les-europeens)> (accessed October 12th, 2015)



that nothing "in this Agreement applies to subsidies or government support with respect to audio-visual services for the EU and to cultural industries for Canada." This article in particular concerns the internationally controversial issue of public support to culture, including state aid to film production.<sup>59</sup> In the Chapter on Investment, the agreement states the following: "For the EU, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to Audio-visual services. For Canada, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to cultural industries." The Chapter on Cross-Border Trade in Services excludes from its scope of application measures affecting, for the EU, audiovisual services, and, for Canada, cultural industries. CETA also states that the chapter on domestic regulation "does not apply to licensing requirements and procedures and to qualification requirements and procedures [...] relating [...] for Canada [to...] cultural industries [and for] the European Union [to...] audio-visual services." Even with regard to government procurement, the agreement takes into consideration issues related to the protection and promotion of cultural diversity.

Pierre Marc Johnson, Québec's negotiator for CETA, has argued that the UNESCO Convention inspired the negotiations of this agreement.<sup>60</sup> For the first time, using an innovative approach, a bilateral trade agreement has made reference to this convention. Recognizing in the CETA's preamble that the provisions of this agreement "preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity, [the EU and Canada affirm] their commitments as Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. [They recognize] that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support."

As already mentioned in Section 3, the EU is the only regional economic organisation to be party to the UNESCO Convention. As for Canada, it was among the most engaged promoters of the Convention, both at level of the institutions and NGOs. Canada was also the very first country to become a party to it. Its national Coalition for Cultural Diversity (CCD) played an important role in the adoption of the UNESCO Convention.

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59. This issue has been a source of conflict not only internationally but even within the EU. For details on this topic see L. BELLUCCI, *prec.*, note 2, at pages 211-212.

60. Information obtained from Pierre Marc Johnson during the conference, "LAECG et le juriste canadien et québécois" (Faculty of Law, Université de Montréal, 30 March 2012) as part of the answer to my question on CETA's approach to culture and, more particularly, the audiovisual sector.

## 5. The Notion of “Protectionism”, the TTIP and Other Challenges with regard to Cultural Diversity

As can be concluded from the previous Section, the CETA makes frequent use of the term “preserve.” This term is linked to the concept of protection and, by association, to protectionism, which the Oxford Dictionary defines as: “The theory or practice of shielding a country’s domestic industries from foreign competition by taxing imports.”

While this paper is not the forum to explore this concept from an economic standpoint, in terms of protectionism and cultural diversity, it is useful to bear in mind the distinction made by C. Edwin Baker between weak protectionism and strong protectionism. Baker draws from the earlier reflections of Oliver Goodenough,<sup>61</sup> who, however, provides a different scope of application of these categories. Essentially, Baker concludes that non-supporters of trade restraints “typically invoke [...] a ‘museum’, ‘commodity’ or ‘artifact’ conception of culture. [They conceive it as] relatively static, largely *backward*<sup>62</sup> looking and very much *content*-oriented.”<sup>63</sup> Supporters of these restraints instead have a “‘discourse’ or ‘dialogic’ conception of culture.” [This view] makes participants, rather than content, central to culture [since in] discourse, it matters who the speaker and who the audience are [...].<sup>64</sup> Non-supporters disallow forms of weak protectionism, while supporters deem them justifiable. According to the latter, the protection of culture aims at assuring that members of cultural communities have relevant chances to be cultural speakers. According to Baker: “Culture as dialogue emphasizes both a past as context and a present as an arena for affirming, critiquing and transforming individual and collective identity. [...] Its goal is to maintain (or create) a dynamic local cultural discourse.”<sup>65</sup> It could therefore be surmised that weak protectionism facilitates cultural pluralism, guaranteeing a wide cultural offering even in an oligopoly market. Prime examples are the quotas and state aid introduced by EU Member States in support of the European audiovisual production, justified by the influence of the powerful oligopolies of the Hollywood entertainment industry on the global film market.

As already mentioned, in all of its negotiations with the WTO, the EU has defended the support of audiovisual services through government-funded incentives such as state aid. During its negotiations, the US, instead, pushed hard for the lib-

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61. Oliver GOODENOUGH, “Defending the Imaginary to Death? Free Trade, National Identity and Canada’s Cultural Preoccupation”, (1988) 15 *Arizona Journal of International & Comparative Law* 203.

62. Italics appear in Baker’s text.

63. C. BAKER, *prec.*, note 43, pp. 249-250.

64. *Id.*, pp. 250-251.

65. C. BAKER, *prec.*, note 43, at pages, p. 251.

eralization of these services, thereby denying the possibility of this kind of support. From this point of view, in cultural terms, the TTIP is an extremely delicate agreement. Negotiations between Canada and the EU on issues pertaining to the protection and the promotion of cultural diversity were particularly complex due to the partially differing views of the two parties, as stated before, but it is easy to imagine that the TTIP negotiations on the matter will be even more complex.

The power of the US cultural industries and, therefore, the position historically held by the US during international trade negotiations justify the fears of those who maintain that the TTIP could weaken the instruments put in place in Europe to protect the audiovisual industry. Nevertheless, and not hiding the fact that "the US has a strong interest in gaining access to markets for services related to films and television,"<sup>66</sup> the Commission has excluded that the EU position on cultural diversity will change during TTIP negotiations. It has reassured that promoting "cultural diversity will remain a guiding principle for TTIP, just as it has been in other EU trade agreements."<sup>67</sup> The extent of the implementation of this notion in the TTIP will hinge greatly on the EU's negotiation power and the unity of its Member States, unity which, as we know, has never been a given and which risks being undermined even more in these times of economic crisis and limited cohesion among the Member States. Another crucial factor will be the long-run tendency of the EU and many of its Member States to adopt, irrespective of proclamations on the welfare state and equal access to services, neoliberal policies that have impacted sectors, including the health, education and cultural sectors, that in many Member States have historically relied heavily on public funding.

Returning to Baker's distinction, strong protectionism limits cultural offerings and the possibility for consumers/users to choose, thereby hindering cultural pluralism and freedom of expression. In summary, weak protectionism promotes choices, while strong protectionism has an exclusionary aim.<sup>68</sup> Baker deems that the discriminant between the two forms of protectionism lies in the respect of human rights. Because it fails to protect such rights, strong protectionism is, according to Baker, unacceptable. For him, fundamental rights are the least common denominator, the discriminant between the kind of protectionism that is acceptable and the kind that is not. In this sense, the 2009 *China-Publications and AV Products* case could be (and has been) considered an example of a limitation of cultural offering and, therefore, as the exemplification of a kind of protectionism that strongly limits Chinese citizens' exposure to forms of cultural expressions different to those offered by the Chinese public cultural industry.

66. EUROPEAN COMMISSION, *TTIP and Culture*, at : <[http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152670.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf)> (accessed October 12th, 2015)

67. *Id.* p. 6.

68. C. BAKER, *prec.*, note 43, p. 267.

On the other hand, however, it is true that, historically, in countries where certain industrial sectors were still under development, forms of protectionism were often used in an effort to limit foreign competition and nationalise the industry until it was sufficiently developed. Post-war Italy, for instance, achieved growth in part thanks to state-run industries considered strategic for the country's industrial and cultural development, from the hydrocarbon industry to the television industry. These forms of protection lead to the concentration of power and corruption, and make it very difficult for the future development of competitiveness, a key factor in driving innovation and productivity. Nevertheless, in the short term, this strategy enables a level of growth not otherwise possible.

The 2001 Communication on audiovisual services presented during the Doha Round by Brazil,<sup>69</sup> a country politically and economically very different from China, brought attention to the need for developing countries to find a balance between liberalization and protection in order to gain economic advantages in trade exchanges and defend their cultural diversity. This, especially considering that the oligopolies of "Western" countries can afford to place audiovisual products at "dumping" levels in foreign markets, since they can recoup their costs in their home market, is a practice which creates unfair competition. The products are sold cheaply until what I would venture to call a "cultural addiction", and therefore a market, is created. The prices are then raised when the cultural addiction is consolidated. One can therefore argue that, considering the situation of unfair competition, the least common denominator of human rights is only in appearance an easy tool by which to distinguish between what is acceptable and what is not.

The EU and others must come to terms with the complex scenarios of countries that have differing needs and priorities rooted in different socio-economic, political and cultural landscapes. In order to maintain a constructive dialogue with countries that are still in the process of developing their cultural industries, it will therefore be necessary to learn to adopt non-Western centered points of view in terms of international trade and cultural diversity.

From the standpoint of China, the need to strengthen an industry that is not yet internationally competitive so that it may become increasingly open should be considered a crucial one. China is a transition economy and, in less than a decade, the development of cultural industries, for example the film industry, has undoubtedly accelerated. However, it is undeniable that, by acceding to the WTO, China has taken commitments that it cannot violate. Therefore, WTO membership may help transform China, because, as Liying Zhang and Xiaoyu Hu observe, it seems quite

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69. S/CSS/W/99 of 9 July 2011. For details on this communication, see Christoph Beat GRABER, *Audio-visual policy: the stumbling block of trade liberalization*, in Damien GERADIN and David LUFF, *The WTO and Global Convergence in Telecommunications and Audio-Visual Services*, Cambridge, Cambridge University Press, 2004, pp. 167-169.

difficult for the Chinese government to comply with WTO rules and, at the same time, maintain its control over cultural diversity intact.<sup>70</sup>

## CONCLUSION

During the Uruguay Round, the Commission privileged the idea of “cultural specificity,” according to which audiovisual services should be included in the scope of GATS, but also be subject to a specific legal regime.<sup>71</sup> During the Doha Round, the Commission chose to adopt an analogous but different notion of “cultural diversity.” It acknowledged an idea of cultural promotion rather than of cultural defence and searched for a concept that could accommodate all Member States’ traditions of cultural policy.

In contrast to France and Canada, the EU has never embraced the notion of cultural exception, which implies a general exemption concerning cultural sectors. Furthermore, it has focused only on the audiovisual sector, rather than on cultural industries more broadly.

Within the framework of WTO negotiations, the EU adopted the “positive list approach.” As part of CETA, it has kept its traditional focus on audiovisual services but abandoned the above-mentioned approach in favour of a “chapter by chapter” exemption,<sup>72</sup> which introduced cultural exemptions in chapters where Parties have cultural policies and measures in favour of culture that they wish to protect. This approach has been criticized because it could potentially lead to stronger liberalization in areas that are culturally sensitive; and yet, it has been welcomed by some because it allows for clearer protection of relevant cultural sectors while excluding areas like intellectual property. Supporters of this approach have underlined that it could be used in the negotiations with states, in particular the US, whose position on the liberalization of cultural sectors is distant from EU and Canadian positions.<sup>73</sup> In this sense, CETA has been considered a training field for even more complex bilateral negotiations.<sup>74</sup> Supporters have also highlighted that CETA is the first trade agreement that mentions the UNESCO Convention in its Preamble.

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70. Liying ZHANG and Xiaoyu HU, “Liberalization of Trade and Domestic Control on Cultural Products. The Application of Public Morals Exception in China – Audiovisual Services”, (2011) 45:3 *Revue juridique Thémis* 405, 428.

71. A. HEROLD, prec. note 15, at 6.

72. C. VALLERAND, prec., note 58.

73. *Id.*

74. During a telephone interview given to the Québec daily newspaper *Le Devoir*, Pierre Marc Johnson underlined the fact that CETA could provide an opportunity for Canada and the EU to develop more effective legal terms and means to be used in view of future negotiations, such as those with the US or Japan, whose positions are much more distant from those of Canada and the EU. Cf Coalition pour la diversité culturelle, “*Libre-échange Canada-UE - L’occasion*

Even though the protection exerted by the EU is traditionally limited to the audiovisual sector and was never conceived as a general exemption, it is evident that the EU is one of the socio-economic actors that have most strongly supported cultural diversity in international trade. The EU has fostered a promotional law<sup>75</sup> in culturally-sensitive, socio-economic areas. Its Member States spoke with a common voice in relation to the notion of cultural diversity, thus finding a shared concept in order to prevent liberalization in the audiovisual sector, despite different cultural policies and economic interests.

At the international level, the notion of “cultural diversity” was recognized by a legally-binding text: the UNESCO Convention. The EU reaffirmed its position on cultural diversity through its accession to this convention. Nevertheless, as it emerged from the 2009 *China-Publications and AV Products* case, its support for the UNESCO Convention is potentially limited by a complex set of interests that shape EU external relations. In this case, the interests involved pertain to the development of trade relations, which excludes barriers to market access and discrimination of foreign cultural goods, and the respect of fundamental rights and freedoms in China.

Future trade negotiations, in particular those of the TTIP with the US, will show whether EU Member States will converge toward the notion of cultural diversity as they have in the past, despite their different traditions of cultural policies, or abandon it altogether. This convergence may be undermined in particular by the economic crisis affecting most EU Member States – which may induce those that are usually inclined to protect local cultural industries to support liberalization in exchange of commercial benefits, thus reproducing the scheme that can be observed in other FTAs – and by the neoliberal tendencies of the policies of the EU and its Member States, even the ones that consider major public funding essential to certain services.<sup>76</sup> These negotiations will demonstrate whether or not the “targeted” exemption adopted by CETA will be a *passe-partout* for liberalizing markets that have been hitherto protected, or, if they will become an effective tool to support cultural diversity.

The possible interpretations of the notion of protectionism multiply if the notion is analyzed from a non-Western perspective, in other words from the viewpoint of the countries that have yet to develop their cultural industries in the hope of promoting their cultural diversity. From this vantage point, equilibriums and challenges emerge that are different to the ones found if our scope of analysis were limited

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*de renforcer la diversité culturelle*” (October 18th, 2012), available at: <<http://cdc-ccd.org/Libre-échange-Canada-UE-L-occasion?lang=fr>> (accessed October 12th, 2015)

75. On the literature of promotional law and positive sanction, see the first chapter of my book, *Cinema e aiuti di Stato nell'integrazione europea. Un diritto promozionale in Italia e in Francia*, supra nota 12.

76. See, for example, the US-Korea FTA (KORUS FTA).

to “Western” countries, whose policies are shaped by markedly different socio-economic, political and cultural scenarios. Finally, it behooves me to recall the very enriching conversation I recently had with a colleague and friend whom I hold in very high esteem who concluded that cultural diversity is not identified in an abstract concept, but in a people.