

Culture and International Trade Law: from Conflict to Coordination¹

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Abstract

This work addresses the interaction between trade liberalization, cultural protection, and cultural diversity at domestic, regional, and international levels. Based on anthropological elements, the work conceptualizes culture being utilized in the trade domain. It proposes a spectrum of cultural products and discusses the nuances and difficulty in defining what classifies as a cultural product in the context of international trade law. Further, the work: (i) provides a background to UNESCO and culture; (ii) assesses economic and other reasons to restrict or enhance trade in culture; (iii) analyzes actual culture-related trade policies in a cross-section of countries; and (iv) examines multilateral and preferential trade rules when they intersect with culture. The overall position is that there needs to be a shift from viewing trade and culture "in conflict" to assessing the two subjects "in coordination".

Keywords: trade, culture, trade policies, cultural policies, cultural identity, cultural diversity, protectionism, conflict, and coordination

1. The Research Question and This Publication's Approach

How can policies on trade and culture be coordinated in such a way that both are enabled to flourish? This question is at the heart of this publication.

It is not only a philosophical but also a practical, legal, and policy-oriented question that decision-makers face in trade negotiations and trade disputes. The latest bilateral trade negotiations between the European Union and the United States explicitly underscore the challenges of untangling the issue of trade and culture. Even before officially launching these Transatlantic Trade and Investment Partnership (TTIP) negotiations, some European countries claimed the cultural and audiovisual services should be excluded from the negotiating mandate.

Furthermore, the China-Audiovisuals case shows that the World Trade Organization (WTO) cannot avoid considering its role in the trade and culture debate much longer. The basis for such considerations can be found outside the WTO, and mainly in the developments around the 2005 UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions. One can, however, question the influence the 2005 Convention has had on legal and political considerations of trade and culture.

Governments have been struggling with striking a balance between the protection of culture and the liberalization of trade based on differing domestic policy priorities for decades. Before placing this discussion in the context of the General Agreement on Tariffs and Trade (GATT) / WTO and UNESCO in the 1930s, the League of Nations adopted the 1933 Convention for Facilitating the International Circulation of Films of an Educational Character. The contracting parties of the Convention believed that "the international circulation of educational films is

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desirable for the mutual understanding of people, and it will consequently encourage moral disarmament.” Aiming at achieving this belief, the Convention exempted educational films from import duties, but this was discontinued with the outbreak of World War II. Afterwards, the 1933 Convention was replaced by the UNESCO Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character, also known as the ‘Beirut Agreement’. Although the latter was designed to “facilitate the free flow of ideas by word and image that would promote the mutual understanding of peoples to encourage the aims of the UNESCO”, it was regarded “in effect as a tariff and trade instrument.” Therefore, the discussion on the interaction between trade and culture began before the creation of the GATT.

In the context of trade, the drafting fathers of the GATT 1947 had undergone a series of difficult discussions on the issue of trade and culture, in particular relating to cinematographic films. The outcome of this debate is the still existing Article IV of the GATT 1947 that allows the GATT Contracting Parties, in the case of cinematographic films, not to fully follow one of the basic principles of the multilateral trading system, namely, the national treatment and general elimination of quantitative duties, in favor of national films.

In addition, this issue was the very reason for the delays during the Uruguay Round because the United States and France had difficulties agreeing on the treatment of audiovisual services under the multilateral trading system. During the Uruguay Round, the audiovisual sector had been debated as an “all-or-nothing” issue: while some considered audiovisual services as entertainment products that were in no way different from any other commercial product, others defended audiovisual products were cultural products and vectors of the fundamental values and ideas of a society. The result of these hard negotiations led to the selection methodology in the General Agreement on Trade in Services (GATS), in which members can choose service sectors that they wish to liberalize. In other words, if a member does not wish to liberalize audiovisual services, the member simply does not list the sector in its services schedule. Although more than two decades have passed since this debate on cultural exception, the very same issue re-emerged in the TTIP negotiations.

The Canada-Periodical case fueled the necessity for a non-WTO architect to deal with cultural products issues. In this regard, when Canada and France realized the difficulties for the cultural issue to be resolved in their favor under the multilateral trading system, namely in the WTO, they came to a cooperative endeavor to achieve their goal—culture is different from other sectors—which led them to turn to UNESCO, not the WTO. The victorious outcome for them was the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions, concluded in 2005. This 2005 UNESCO Convention, which came into force in March 2007, has now been ratified by 150 parties. The preamble of the Convention clearly identifies the sensitivities around trade and culture with an underlying preference for culture.

For example, the UNESCO Convention states that Contracting Parties are convinced that cultural activities, goods, and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as having solely commercial value. They further note that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, particularly considering risks of imbalances between rich and poor countries.

The debate thus far has focused on the assumption that trade and culture have a confrontational relationship, with supporters on either side. Whereas some WTO Members (e.g. the United

States) prefer to treat all products similarly, other WTO Members (e.g. Canada and France) are determined to make a clear distinction between cultural and other products when it comes to trade. This book aims to go beyond this contest and explores possibilities to strike a balance between both extremes.

Thus, varying domestic trade policy approaches towards culture are reflected at the multilateral level. The 2005 UNESCO Convention may have contributed to the controversy and has driven a wedge between countries instead of becoming a unifying instrument.

Beyond the domestic and multilateral levels, and particularly because of the stalled negotiations in the Doha Development Round, preferential trade agreements (PTAs) are rapidly growing in importance and in numbers. PTAs increasingly include innovative models for (de)regulating the trade in cultural products.

There may, however, remain considerable potential to discuss the issue of trade and culture at WTO level. The WTO itself may also engage in institutional co-operation with specialized institutions such as UNESCO under the framework of Goal 17 (partnership) of the Sustainable Development Goals (SDGs).

There is much more at stake than discussion of culture in the context of trade, this encompasses the appreciation of what culture entails in a rapidly globalizing and integrating economy. Both trade and investment are the lifeblood of such an economy and culture can, in this context, easily be marginalized. At the same time, the exchange between people and companies from different parts of the world can lead to the exchange and mutual enrichment of cultures. These issues are extremely context-sensitive and can best be considered on a case-by-case basis which respects pluralism. Traditional legalistic approaches with binding dispute settlement leave little room for nuance. In that sense, the opportunities offered by more ‘informal’ types of lawmaking should be explored.

Although there is no widely agreed upon definition of ‘cultural products’, some common features of ‘culture-ness’ can be identified: culture is dynamic, social, and contextual. However, further aid for the identification of the cultural components of cultural products in the context of trade is needed. A practical tool, such as a Spectrum for Cultural Products can be designed to categorize specific cultural goods and services based on the UNESCO Framework for Cultural Statistics.

2. The Significance of the Coordinated Framework Proposed in This Publication

The narrative of literature on trade and culture thus far consists in the opposing views about trade and culture: either culture should ‘get out of the way’ and let trade rule, or trade should be kept at bay to shield culture from the vagaries of economic globalization. This is the antagonistic story usually brought forward in research on trade and culture.² To overcome this divisive reporting, my book is an attempt at harmonizing public policy concerns in the field of trade and culture. In conceptual terms, this publication touches upon the dialectic relationship between the arguments that trade liberalization hampers the protection of culture up to the point that it can wipe out culture (thesis) and the view that trade can enhance the diffusion of culture and promote cultural diversity (antithesis). The main goal of this paper is to explore these opposite paradigms and to merge them through a dialectic process into a compromise or other state of agreement via conflict and tension (synthesis).

² Van Den Bossche P. (2007) *Free Trade and Culture: A Study of Relevant WTO Rules and Constraints on National Cultural Policy Measures*, Amsterdam, Boekmanstudies; Voon T (2007) *Cultural Products and the World Trade Organization*, Cambridge, Cambridge University Press.

My book also goes beyond most legal scholarship on the issue of trade and culture in the sense that it considers the full range of cultural products based on the ‘cultural spectrum’, which means that it leaves the usual narrow view behind that only audiovisual products are relevant to trade. Furthermore, literature thus far has escaped from pondering the ‘culture-ness’ of cultural products in the context of trade. My contribution sets the stage for a working definition of culture and cultural products which is supported by anthropological and moral conceptualizations of culture. This approach is unique in the sense that literature thus far has rushed into the legal substance of trade and culture without thoroughly investigating a subject which clearly has sociological aspects.

The legal and procedural approach which I adopt is important amidst a clear lack of conciliatory efforts from both institutions and most governments. However, legal, and procedural considerations are no panacea for the political and economic challenges posed by special interests, protectionist popular sentiments, and the prioritization of other unresolved trade issues.

The existing antagonistic approach to trade and culture does not recognize the WTO as an organization which is already equipped with tools to harmonize trade and culture. Not only from the legal perspective—detailed overview of the WTO legal provisions which could have an influence on cultural products, and an explicit identification of culture-related/specific provisions. This publication further shows non-legal instruments which can positively aid the discussion on the relationship between trade and culture. From the WTO negotiations perspectives, this publication further analyses the cultural areas of trade negotiations not only through the example of audiovisual services, which are usually interchangeably used for any cultural issue under the WTO without thorough justification, but also other subjects, such as geographical indications and traditional knowledge and folklore. My exploration does not stop at the multilateral level but goes beyond that by examining the potentials of preferential arrangements as a testing ground for finding a healthy equilibrium between trade and culture.

Critically, the book balances the ways forward in future discussions on trade and culture by showing the opportunities which ‘informal international lawmaking’ can offer. Based on its sociological conceptualization of the ‘culture-ness’ of cultural products, the book emphasizes the dynamism of culture which brings to question the suitability of the rigid nature in traditional legalistic approaches towards trade and culture.

Lastly, from an institutional point of view, the coordination between WTO and UNESCO has surprisingly been ignored for a long time. In this regard, this book requires institutional coordination.

3. Key Elements of the Book

This study has sought to answer the following question: How can policies on trade and culture be coordinated in such a way that both are enabled to flourish? To answer that question, a working definition of culture was needed to set the tone for the entire study. This publication thus started by providing three dimensions of ‘culture-ness’ as key cultural characteristics that can be a filter for cultural products in the context of trade, notably that:

- i. Culture is social,
- ii. Culture is dynamic (evolutionary and constantly changing), and
- iii. Culture is contextual.

Further, the Spectrum for Cultural Products was based on these three common features and aided the identification of 'cultural products' in the context of trade. Additionally, cultural products were differentiated on scales based on the 'strength' of their culture-ness.

Chapter 2 focuses on the standard-setting instruments of UNESCO to compare the widely known 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions with other UNESCO standard-setting instruments. The Chapter demonstrates that in contrast to a successful example of the UNESCO World Heritage Convention, the 2005 UNESCO Convention does not yet reach the desired level of protecting cultural diversity. Consequently, the Chapter reflects upon whether the 2005 UNESCO Convention should have taken the incremental approach which had been identified as one of the reasons why other UNESCO standard-setting instruments, such as the World Heritage Convention, are widely supported by the international community. Given that the life of the 2005 UNESCO Convention is still evolving since its entry into force in 2007, the Chapter suggests that the 2005 UNESCO Convention continuously undertake the incremental approach in its implementation. In this context, the Chapter suggests the 2005 UNESCO Convention be renewed to better safeguard the collective spirit of the international community in protecting cultural diversity.

Chapter 3 explores the landscape of domestic cultural policies of key WTO Members that can impact their trading partners. The Chapter points to certain weaknesses in the different economic rationales that argue cultural products are economically different from other products. Clearly, there is no single tendency or trend that one can identify among the diversified approaches by these key WTO Members in terms of protecting their cultural products. Such difficulty in detecting a trend was more challenging for tariff measures than for non-tariff measures. The reason for this could be the lack of a common definition of cultural products which further results in the lack of an established scope for cultural goods. Chapter 3 also identifies certain similarities in key WTO Members' non-tariff measures, particularly in the audiovisual sector.

As Chapter 3 shows, a major challenge is to clearly draw the line between disguised trade protectionism and bona fide cultural concerns. Although this challenge may arise at the national level, the deficiency of international level co-operation on agreed standards in this regard further accelerates the domestic challenges. The fact that there is currently no international or regional institution that is explicitly mandated to tackle the dilemma between trade protectionism and legitimate cultural concerns calls for co-operation at international level.

Chapter 4 and Chapter 5 aim at responding to this call. While Chapter 4 focuses on enhancing the prospective for the WTO to serve as a forum for discussion on trade and culture, Chapter 5 addresses a new era of preferential trade agreements (PTAs) which is quietly being paved as a complementary tool for the linkage between trade and culture.

Chapter 4 demonstrates the existence of implanted tools in the WTO for the co-operation between culture and international trade law from the legal, negotiation, administrative, and WTO accession perspectives. This Chapter emphasizes the importance of a tightly connected pivot across these four functions of the WTO for addressing WTO Members' cultural concerns. Additionally, the point which Chapter 4 tries to make is that, in contrast with the general perception, the WTO could well offer a credible venue for discussing the relationship between trade and culture. In this regard, I identified and emphasized the non-dispute settlement functions of the institution as the appropriate tools for the coordination between culture and international trade law, beyond the already well-recognized dispute settlement function of the WTO. This argument is based on the inherent nature of culture which is identified in Chapter 1 of the study.

Similarly to Chapter 4, Chapter 5 considers fora that could play a role in the general treatment of cultural products, namely PTAs. This Chapter examined the PTAs of the leading countries which have been active in the discussion on trade and culture, either at the UNESCO or WTO level, in particular. Thus, Chapter 5 distinguishes major PTA models useful in treating cultural products in PTAs.

Surprisingly, the 2005 UNESCO Convention's impact on PTAs was marginal, except for the EU model, which utilized the 2005 UNESCO Convention in the Protocol on Cultural Co-operation annexed to its preferential trade agreements. This may also suggest the necessity for better collaboration between these two communities: trade and culture. China and New Zealand were identified as culturally conscious and as pursuing innovative cultural policies in the context of PTAs.

Chapter 5 also explains that bilateral investment laws have in a way been more developed in embracing a segment of culture (cultural heritage) than international trade law thanks to the limited scope of culture that international investment law thus far needed to deal with. In my *Spectrum of Cultural Products*, cultural heritage is one of the six key segments, which is identified as the least controversial.

Chapter 6 presents specific suggestions for ways forward on how to better coordinate the treatment of cultural products in the context of international trade law. Finding a culture-friendly way in the trade context is emphasized broadly in two ways: the first according to a dispute settlement approach, and the second according to a non-dispute settlement approach. Within the dispute settlement approach, I first identify classical trade dispute settlement, particularly in the WTO dispute settlement system—but still not conservative in the sense that the classical dispute settlement aims at an evolutionary interpretation approach; and second, informal international lawmaking based on the nature of culture itself is identified as innovative and complementary. Within the non-dispute settlement approach, monitoring, negotiations, and institutional coordination are argued to have a positive effect at multilateral level.

Due to its dynamic nature, culture may not fully match with any rigid form of legality, which is why my preferred way of considering the issue of trade and culture, as presented in Chapter 6, is in non-dispute settlement-oriented, i.e. monitoring/surveillance, negotiations, or institutional co-operation which are not geared towards conflict. However, my ways forward also include the dispute settlement-oriented approach, such as evolutionary treaty interpretation, and informal international law making.

Additionally, for the scenario in which a new agreement could be designed specifically for the issue of trade and culture in the realm of the WTO, a Plurilateral Agreement, or like-minded Members' Initiatives on Cultural Products, is suggested as an appropriate form. Chapter 6 further suggests the APEC (covering the Asia-Pacific region) and the Council of Europe (covering the European region) as appropriate regional forums for developing a working agenda on the relationship between trade and culture.

The aim of this book is to analyze the phenomenon of the inter-relationship between trade and culture. The publication underlines the extensively divisive opinions which revolve around the relationship between trade and culture, and their impact on each other. Nonetheless, when elaborating the possible new approaches in an attempt to contribute to the debate on this issue, what I pursued was the design of those approaches in a constructive way and not in a conflicting way so that policies on trade and culture can be coordinated.

I fully recognize the complexity of the issues I address and hope that this book will facilitate deeper conversation about the ways in which culture and trade move from conflict and shape meaningful coordination and dialogue, which are intrinsic to culture itself and the very purpose of its existence.

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