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Vers un droit international économique transatlantique
Towards a Transatlantic International Economic Law

Sous la direction d'Hervé Agbodjan Prince

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Table des matières

Rekindling the Spirit of Washington and Brussels: Introductory Remarks on the Emergence of Transatlantic International Economic Law	309
Hervé AGBODJAN PRINCE	
L'accès au marché des marchandises dans le cadre de l'AECG comme élément constitutif d'un futur espace commercial transatlantique	313
Philippe MUSQUAR	
Services in Transatlantic Trade Deals : Potential for Progress after 2020?	361
Nanette NEUWAHL	
Droit de la concurrence : l'Accord économique et commercial global et son contexte	389
Pierre LAROUCHE	
Les normes de propriété intellectuelle dans l'AECG : une étape importante pour le Canada.....	429
Ysolde GENDREAU	
Environmental Protection in Trans-Atlantic (CETA) and North-Atlantic (USMCA) Megaregional Agreements: Towards Greater Integration and Regulatory Convergence.....	457
Francesca ROMANIN JACUR	
L'Accord économique et commercial global : un pas vers l'établissement d'un droit transatlantique de l'immigration	503
Anaïs CONTAT et Martine VALOIS	
Beyond a Transatlantic Trade Law of Cultural Diversity Towards Inclusive Capitalism : New Narratives for Post-COVID Sustainability in light of CETA and CUSMA	545
Lucia BELLUCCI	
Application provisoire : la variable d'ajustement de la mise en œuvre des traités commerciaux transatlantiques.....	587
Hervé AGBODJAN PRINCE	

Beyond a Transatlantic Trade Law of Cultural Diversity Towards Inclusive Capitalism: New Narratives for Post-COVID Sustainability in light of CETA and CUSMA

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Au-delà d'un droit commercial transatlantique de la diversité culturelle vers un capitalisme inclusif: nouvelles perspectives pour une durabilité post-COVID à la lumière de l'AECG et de l'ACEUM

Más allá del derecho comercial transatlántico de la diversidad cultural hacia un capitalismo inclusivo: nuevas perspectivas para la sostenibilidad post-COVID a la luz del CETA y el T-MEC

Para além de um direito comercial transatlântico de diversidade cultural rumo a um capitalismo inclusivo: novas narrativas para a sustentabilidade pós-COVID à luz do AECG e AEUMC

超越跨大西洋文化多样性贸易法与走向包容性资本主义：《加欧自由贸易协定》和《加美墨协议》视角下的后疫情时代可持续性新论

Résumé

Cet article considère que, pour ce qui est de la protection et de la promotion de la diversité des expressions culturelles, l'*Accord économique et commercial*

Abstract

This article considers that, with regard to the protection and promotion of cultural diversity in bilateral trade, *Canada-European Union Comprehensive Economic*

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global entre le Canada et l'Union européenne (AECG) et l'*Accord Canada-États-Unis-Mexique* (ACEUM) sont les accords les plus importants parmi les récents accords de libre-échange (ALE). Cela se justifie par la portée de ces accords, l'étendue de la protection et de la promotion de cette diversité et les partenaires impliqués. Cet article fait valoir que, malgré leurs limites, l'AECG et l'ACEUM sont des exemples réussis d'un droit économique transatlantique de la diversité culturelle. Il soutient cependant que les pays riches devraient aller au-delà des mesures protectionnistes ouvertes à « quelques heureux » acteurs du commerce mondial pour prendre en compte plus efficacement les besoins des pays en développement en matière de protection et de promotion de la diversité culturelle. Cette action concrète, dont l'importance a été confirmée par la pandémie de coronavirus, devrait s'inscrire dans le cadre d'une réflexion plus large sur un capitalisme inclusif tant pour les pays riches que pour les pays en développement. Elle exige non seulement une attention renouvelée et plus efficace de la part des partisans de la diversité culturelle dans le commerce, mais aussi une nouvelle approche des États-Unis à l'égard des questions culturelles, qui devrait se situer dans le cadre d'un multilatéralisme renouvelé.

Resumen

Este artículo considera que, en lo que respecta a la protección y promoción de la diversidad cultural, el AECG, más conocido como CETA por sus siglas en inglés, y el T-MEC son los acuerdos más importantes entre los recientes TLC. Esto se explica por el alcance de estos acuerdos, el grado de protección y promoción

and Trade Agreement (CETA) and Canada-United States-Mexico Agreement (CUSMA) are the most important agreements among recent Free Trade Agreements (FTAs). This is justified by the scope of these agreements, the extent of the protection and promotion of this diversity, and the partners involved. This article argues that, despite their limits, CETA and CUSMA are successful examples of a transatlantic trade law of cultural diversity. It claims, however, that rich countries should move beyond protectionist measures open to the “happy few” agents of global trade towards more effectively considering developing countries' needs concerning the protection and promotion of cultural diversity. This concrete action, whose importance has been confirmed by the coronavirus pandemic, should be part of a broader reflection on inclusive capitalism both for rich and developing countries. It requires not only renewed and more effective attention by the supporters of cultural diversity in trade, but also a new US approach towards cultural issues, which should be framed in a renewed multilateralism.

Resumo

Este artigo considera que, quanto à proteção e promoção da diversidade cultural no comércio bilateral, o AECG e o AEUMC são os acordos mais importantes entre os TLCs recentes. Isso se justifica pelo escopo desses tratados, a extensão da proteção e promoção dessa diversidade, como pelos parceiros envolvidos.

de esta diversidad y los socios involucrados. Este artículo sostiene que, a pesar de sus limitaciones, el CETA y el T-MEC son ejemplos exitosos de un derecho económico transatlántico de la diversidad cultural. Sin embargo, sostiene que los países ricos deberían ir más allá de las medidas proteccionistas abiertas a los «pocos afortunados» que participan en el comercio mundial para tener en cuenta más eficazmente las necesidades de los países en desarrollo en materia de protección y promoción de la diversidad cultural. Esta acción concreta, cuya importancia ha sido confirmada por la pandemia del coronavirus, debería formar parte de una reflexión más amplia sobre un capitalismo inclusivo tanto para los países ricos como para los países en desarrollo. Ella requiere no solo una atención renovada y más eficaz por parte de los partidarios de la diversidad cultural en el comercio, sino también un nuevo enfoque por parte de los Estados Unidos con respecto a las cuestiones culturales, que debería situarse en el marco de un multilateralismo renovado.

Este artigo argumenta que, apesar dos seus limites, o AECG e o AEUMC são exemplos de sucesso de um direito comercial transatlântico da diversidade cultural. Sustenta, no entanto, que países ricos devem ir além das medidas protecionistas oferecidas para “uns poucos felizardos” entre os atores do comércio global e levar em conta mais efetivamente as necessidades dos países em desenvolvimento no que toca à proteção e a promoção da diversidade cultural. Essa ação concreta, cuja importância foi confirmada pela pandemia do coronavírus, deve ser parte de uma reflexão mais ampla sobre capitalismo inclusivo tanto para países ricos como para aqueles em desenvolvimento. Isto requer não apenas uma atenção renovada e mais efetiva pelos apoiadores da diversidade cultural no comércio, mas também nova abordagem dos EUA em relação a questões culturais, a qual deve ser enquadrada em um multilateralismo renovado.

摘要

本文认为，对于保护和促进文化表达多样性而言，《加拿大-欧盟综合经济与贸易协定》（CETA）和《加美墨协议》（CUSMA）是近期签订的自由贸易协定中最重要协议。这主要体现在两份协议的适用范围、保护和促进多样性的程度以及所涉及的合作伙伴。本文强调，尽管CETA和CUSMA有其局限性，它们仍是跨大西洋文化多样性经济权利的成功范例。但本文主张，富裕国家应当跳出仅对为全球贸易参与者少数幸运儿实施的保护主义措施，更加有效地考虑发展中国家对于保护和促进文化多样性的需求。这种实质性行动的重要性已经通过新冠疫情得到证实，应将其纳入涵盖富裕国家和发展中国家的包容性资本主义这一更广大的命题来思考。这不仅要求贸易文化多样性的支持者给予新的更有效的关注，而且要求美国对文化问题采取新的态度，将其纳入新的多边主义框架。

Table of Contents

Introduction	551
I. A Transatlantic Trade Law of Cultural Diversity: An Analysis of CETA and CUSMA in light of the UNESCO Convention and the New Zealand Case	556
A. CETA, CUSMA and the Protection and Promotion of Cultural Diversity.....	557
1. The Recognition of Culture in CETA Between Innovation and Tradition.....	557
2. CUSMA and the “Coming Back” of the General Cultural Exemption for Canada	560
B. The Recognition of the Unique Nature of Cultural Services: The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Extreme Example of the New Zealand Case	567
1. The UNESCO Convention: Its Reference in the of CETA’s Preamble and its Absence in CUSMA’s.....	568
2. The Liberalisation of Cultural Services and the Loss of Identity Representation: The Extreme Example of the New Zealand Case.....	570
II. The Protection and Promotion of Cultural Diversity in Developing Countries: Boosting Inclusive Capitalism through a New Approach to Protectionism	572
A. Weak vs Strong Protectionism, the Respect of Human Rights and the <i>China Publications and AV Products</i> Case	573
B. The UNESCO Convention’s Limited Support to Developing Countries’ Cultural Diversity: Refocusing on Tools that Enhance their Needs.....	575

1. The UNESCO Convention's Provisions and their Limited Effectiveness in Favor of Developing Countries	576
2. The Brazilian Communication and Cultural Diversity in Trade: Refocusing on Developing Countries' Needs	579
Conclusion	582

Cultural industries depict society and shape its behaviors and values. Public support towards the outputs of these industries, such as films, music and books, is a form of cultural welfare¹ which is rooted in some countries' traditions. It "supports both an artistic expression and a historically fragile industry."² It is a vector of identity and a tool to foster an important economic sector.

Therefore, some countries, like Canada, as well as the European Union (EU) claimed the need to subtract cultural services in whole or in part from commercial logics and the ongoing liberalization process.³ Their claims clashed with the United States (US)' deny of the peculiar nature of cultural services and this country's strong pressures to encourage the liberalization of these services.⁴

The privileged global context within which conflicts and alliances on this topic initially occurred was during the WTO multilateral negotiations. During the "Uruguay Round" (1986-1994), some states, among which Australia, Canada and France,⁵ defended the notion of "cultural exception," according to which cultural services should be excluded from the scope of the *General Agreement in Trade and Services* (GATS). Canada was not new

¹ Lucia Bellucci, "National Support for Film Production in the EU: An Analysis of the Commission Decision-Making Practice" (2010) 16:2 Eur LJ 211 at 212.

² *Ibid.*

³ On the topic, see Lucia Bellucci, *Cinema e aiuti di Stato nell'integrazione europea: Un diritto promozionale in Italia e in Francia* (Milano: Giuffrè, 2006) at 311; Milagros del Corral, ed, *Culture, Trade and Globalisation: Questions and Answers* (Paris: UNESCO Publishing, 2000) at 35-38.

⁴ See Lucia Bellucci, "Un regard européen sur l'AECG entre le Canada et l'UE: enjeux et perspectives pour un droit promotionnel des services audiovisuels" in Hervé Agbodjan Prince, ed, *Accord économique et commercial global entre le Canada et l'Union européenne (AECG): esprit et dynamique d'un bilatéralisme nouveau* (Montréal: Yvon Blais, 2017) 181 at 193; Lucia Bellucci, "'Cultural Diversity' from WTO Negotiations to CETA and TTIP: More than Words in International Trade Law and EU External Relations" (2015) 20:2 Lex Electronica 39 (Dossier spécial: Commerce, Confiance et Protection d'intérêts après l'Accord économique et commercial global entre le Canada et l'Union européenne (AECG)) at 46, online: <http://www.lex-electronica.org/files/sites/103/Lex_20-2.39_bellucci.pdf> [Bellucci, "'Cultural Diversity' from WTO Negotiations to CETA and TTIP"].

⁵ See Christopher Arup, *The New World Trade Organization Agreements: Globalizing Law Through Services and Intellectual Property* (Cambridge: Cambridge University Press, 2000) at 108-09; Catherine Schmitter, "La Communauté européenne et l'Uruguay Round: incertitudes et faiblesses" (1994) 6 Europe 1 at 4.

to a general cultural exemption; this country had already adopted it since the *Canada-U.S. Free Trade Agreement* (CUSFTA) of 1987.⁶ The EU never embraced the idea of cultural exception. It first proposed the notion of cultural specificity, aimed at introducing cultural issues within the GATS but under specific rules, and then proposed the notion of cultural diversity. Opting for the latter was most probably due to the need to accommodate the EU Member States' different traditions of public intervention within the cultural sector, but also to embrace the idea of plurality and promotion of culture rather than of cultural defence.⁷ The decision to federate around the notion of cultural diversity received a broad consensus among both European and non-European states. More precisely, the EU's position shifted to cultural diversity in the mandate that the Council gave to the Commission on 26 October 1999 before the Doha negotiations.⁸ Despite the lexical shift, the EU confirmed in the WTO Doha Round that was launched in November 2001 the policy adopted during the Uruguay Round. During this round, the EU presented a list of exemptions to the most favored nation principle⁹ under Article II GATS (Economic and Social Committee 1994, para. 8.2 and the Annex on Article II Exemptions). Furthermore, with regard to the national treatment principle under Article XVII

⁶ *Canada-U.S. Free Trade Agreement*, 2 January 1988, 22 ILM 281 (entered into force 1 January 1994) <https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusfta-e.pdf> [CUSFTA].

⁷ L. Bellucci, "Cultural Diversity' from WTO Negotiations to CETA and TTIP" *supra* note 4 at 196.

⁸ See EC, "Consultation sur les négociations GATS 2000/OMC portant sur certains services audiovisuels (musique et logiciel de loisirs), ainsi que sur les services culturels" (12 January 2000), online: <http://web.archive.org/web/20050517094340/http://www.europa.eu.int:80/comm/avpolicy/extern/gats2000/ncon_fr.htm>. See also EC, *Council resolution of 21 February 2001 national aid to the film and audiovisual industries* [2001] OJ, C 73/3 at para. 5; EC, *Council resolution of 21 January 2002 on the development of the audiovisual sector* [2002] OJ, C 32/4 at para. 5.

⁹ This principle aims at avoiding the application of a different treatment based on the origin or the supplier of a service for an equivalent service. Countries are not allowed to discriminate between their trading partners. All Parties must apply this treatment to one another. Art. II, para. 1 of GATS is 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".

GATS,¹⁰ it did not make any liberalization commitments. On the contrary, US negotiators argued that cultural services should be considered as all other services and therefore liberalized.

However, neither the notion of cultural exception nor the concepts of cultural specificity and cultural diversity were introduced in the WTO agreements. They never became legal notions.¹¹

The difficulties to find common ground within the multilateral framework of the WTO pushed its Members towards bilateral *Free Trade Agreements* (FTAs).¹² Both Canada and the EU have therefore brought to the bilateral tables of FTA's negotiations the positions on cultural issues that they have defended during the WTO multilateral trade negotiations. They kept a protectionist stance, seeking to limit the power of transnational oligopolies through the promotion of local cultural industries;¹³ on the contrary, as they claimed during the WTO negotiations, US negotiators argued that "cultural services should be considered as any other services and therefore liberalised."¹⁴

¹⁰ According to the national treatment principle "[...] 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, precisely those of another Member of the trade agreement, are treated no less favourably than local services and service providers. It applies only to the services explicitly 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 Giovanna Adinolfi, Claudio Dordi & Angela Lupone), *L'Organizzazione Mondiale del Commercio* (Milano: Giuffrè, 2004) at 102), that is only pertaining to states that have taken liberalisation commitments concerning certain services (Giorgio Sacerdoti, "L'Accordo generale sugli scambi di servizi (GATS): dal quadro OMC all'attuazione interna", in Giorgio Sacerdoti and Gabriella Venturini, ed, *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia* (Milano: Giuffrè, 1997) 1 at 9).

¹¹ On the notions of cultural exception, cultural specificity and cultural diversity in WTO negotiations see also L. Bellucci, "Cultural Diversity' from WTO Negotiations to CETA and TTIP", *supra*, note 4 at 45-48.

¹² See also *ibid.* at 53.

¹³ Lucia Bellucci, "The Notion of Cultural Diversity in the EU Trade Agreements and Negotiations: New Challenges and Perspectives" (2016) 2:2 Italian LJ 433 at 434, online: <<http://www.theitalianlawjournal.it/data/uploads/pdf/2-2016/433-bellucci-444.pdf>>.

¹⁴ *Ibid.* at 437.

The forms of protectionism embraced by Canada and the EU aim to support local industries and limit global cultural homogenization, thus enhancing the protection and promotion of cultural pluralism. They are approached differently by Canada and the EU, according to their different traditions.

The agreements quite recently concluded by Canada and the EU – the *Comprehensive Economic and Trade Agreement* (CETA)¹⁵ and the *Canada-United States-Mexico Agreement* (CUSMA)¹⁶ – are therefore the most interesting FTAs with regard to culture, because they both concern rich agents of the global trade market and consider culture as a topic that deserves a special treatment within trade. In fact, Canada and the EU are strong supporters of cultural diversity within multilateral and bilateral trade. They devoted particular attention to cultural issues in agreements that are extremely broad in scope, and therefore strategically crucial, and found strategies to protect and promote these issues.

This article recognizes that the forms of protectionism adopted by the EU and Canada are very important to support their cultural diversity. Nevertheless, it argues that we cannot keep ignoring developing countries' needs. These countries are caught between the US oligopolies and the European and Canadian subsidized cultural outputs. Forms of protectionism can therefore be interpreted differently according to the countries' interests. Furthermore, the coronavirus pandemic has shown how our globalized world is strongly connected.

We should therefore devote greater attention to the development of inclusive capitalism on a global scale and search for mechanisms that would allow us to move beyond exemptions to free trade conceived as a luxury open to happy few, rich countries. Inclusive capitalism shall guarantee “distributive justice, social equity and intergenerational equity on distributive

¹⁵ See Government of Canada, *Text of the Comprehensive Economic and Trade Agreement*, online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>>; *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, [2017] OJ, L11 at 23 [CETA].

¹⁶ See *Canada-United States-Mexico Agreement*, online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> [CUSMA].

justice”¹⁷ and more generally shall “build inclusive and sustainable economies and societies.”¹⁸ It shall contribute to reversing a global situation in which:

we drifted from *having* a market economy to *being* a market society. [Where the difference is that a] market economy is a tool—a valuable and effective tool—for organizing productive activity. A market society is a way of life in which market values seep into every aspect of human endeavor. It’s a place where social relations are made over in the image of the market.¹⁹

In order to contribute to the development of inclusive capitalism, Canada and the EU should foster proposals that have been already presented at the multilateral levels. In particular, the Brazilian Communication adopted during the Doha Round²⁰ is an interesting document to move towards such a direction. However, the implementation of a new trend that is more attentive to developing countries’ needs would imply not only a renewed and more effective attention to these needs by supporters of cultural diversity in trade (like the EU and Canada), but also a new US approach towards cultural issues, which should be framed in a renewed multilateralism.

In order to support this argument, the first part of this article analyzes the legal techniques and the extent to which CETA and CUSMA protect and promote cultural diversity within cultural industries. This part considers the mentioned agreements in light of the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO Convention) of 20 October 2005.²¹ The second part focuses on the need for

¹⁷ Mike Carney, “Mike Carney: Inclusive Capitalism – creating a sense of the systemic. Speech by Mr Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board” (delivered at the Conference on Inclusive Capitalism, 27 May 2014), online: <<https://www.bis.org/review/r140528b.htm>>.

¹⁸ Council for Inclusive Capitalism with the Vatican, “Making the World Fairer, More Inclusive and Sustainable”, online: <<https://www.inclusivecapitalism.com/>>.

¹⁹ Michael J. Sandel, *What Money Can’t Buy. The Moral Limits of Market* (London: Penguin Books, 2012) at 10-11.

²⁰ Communication from Brazil, “Audiovisual Services”, S/CSS/W/99 (9 July 2001), online: <<http://www.esf.be/new/wp-content/uploads/2009/01/brazil-audio-visual-services.doc>>.

²¹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, in *Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Paris: UNESCO, 2005) at 8, online: <<https://en.unesco.org/creativity/convention/texts>>.

rich countries to move beyond protectionist measures open to a limited number of rich agents of global trade and instead to consider the needs of developing countries to protect and promote their cultural diversity. Without aiming to propose exhaustive solutions on the matter, this article considers that the UNESCO Convention is in this sense limited and the strategies proposed in the Brazilian Communication presented during the Doha Round may be considered as a starting point for a renewed approach that needs to be encouraged within the framework of a reflection on inclusive capitalism for rich and developing countries.

I. A Transatlantic Trade Law of Cultural Diversity: An Analysis of CETA and CUSMA in light of the UNESCO Convention and the New Zealand Case

As aforementioned, CETA²² and CUSMA are important agreements when it comes to culture. Given the scope of these agreements, the extent to which they protect cultural diversity and the legal techniques they use, they can be considered as the most interesting examples of a transatlantic trade law of cultural diversity. Contrary to the current meaning, in this article, the word “transatlantic” is used to identify both an agreement that rules trade between Europe and North America, such as the one between Canada and the EU, and an agreement that rules trade within the American continent, such as the one between Canada, US, and Mexico. We will focus on cultural diversity within cultural industries. We will analyze CETA and CUSMA in light of the UNESCO Convention, which is the international convention aimed to protect and promote cultural diversity on a global scale. We will analyze if and how these agreements refer to this convention, therefore whether they consider it as a guiding text for their trade relations. In fact, the “Preamble to an agreement normally sets out the aspirations that the parties share and summarizes their objectives. It guides the parties in implementing the provisions of the agreement.”²³ This part will also show the importance of protecting and supporting cultural industries within trade in light of the New Zealand case, which is an extreme example of liberalization of audiovisual services.

²² CETA, *supra* note 15.

²³ Lucia Bellucci, “Un droit promotionnel de la diversité culturelle ‘en montagne russes’: l’Union européenne et le Canada du Cycle d’Uruguay à l’Accord Canada-États-Unis-Mexique (ACEUM)” (2019) 65:1 McGill LJ 29 at 46-47 [translated by the author].

A. CETA, CUSMA and the Protection and Promotion of Cultural Diversity

CETA and CUSMA are worth analyzing because of their scope of application, but also because, for different reasons, they are legally and economically crucial for the protection and promotion of cultural diversity within bilateral trade. CETA's project is even broader and more ambitious than that of the previous *North American Free Trade Agreement* (NAFTA).

Canada and the EU are the most similar trading partners in terms of cultural exclusion from trade agreements, largely differing from the US in this regard. Nevertheless, their respective positions remain different. As noted above, the EU has never supported the notion of a “cultural exception” (a general exemption) and, in trade negotiations, has limited its protection to audiovisual services, while Canada has supported this notion and therefore a broader idea of protection including all its cultural industries and all chapters of its trade agreements. As a result, the issue of cultural industries was among the most debated during CETA negotiations.

CUSMA is meant to renew NAFTA's project. It includes the two strongest economies of the American continent and the strongest economy in the world. Furthermore, it was concluded among one of the strongest supporters of cultural diversity in global and bilateral trade and the champion of trade liberalization within cultural industries. Moreover, it also involves a developing country such as Mexico.

1. The Recognition of Culture in CETA Between Innovation and Tradition

On October 30th, 2016, during the EU-Canada Summit in Brussels, the Canadian Prime Minister Justin Trudeau, European Commission President Jean-Claude Juncker and European Council President Donald Tusk signed CETA. On September 21st, 2017, this agreement entered into force provisionally. It will come into force fully and definitively after all the EU Member States have ratified it. Once it is ratified by its Member States, the EU will conclude it. The EU conclusion will then take the shape of a Council decision.²⁴

²⁴ See EC, Press release, “EU-Canada trade agreement enters into force” (20 September 2017), online: <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_3121>.

On the one hand, CETA refers only to audiovisual services with regards to the EU and to cultural industries with regards to Canada,²⁵ whose definition includes a wide range of sectors and activities and is found in the *Canada-U.S. Free Trade Agreement* (CUSFTA) of 1987²⁶ and NAFTA.²⁷ The scope of application of CETA's cultural clauses changes according to the party benefiting from them. These clauses have therefore been defined as "asymmetrical in scope."²⁸

On the other hand, this agreement does not make use of a general cultural exemption, such as a cultural clause of general application which states "that is applicable to all chapters of the covered agreement,"²⁹ which is specific to Canada's negotiating tradition, nor does it make use of an annexed *Cultural Cooperation Protocol* (CCP), which has characterized certain agreements concluded by the EU.³⁰ It has also been an innovative instrument for the protection and promotion of cultural diversity. In CETA, Parties adopted a "targeted" or "chapter-by-chapter"³¹ exemption approach,

²⁵ *CETA*, *supra* note 15 at Art 1.1.

²⁶ *CUSFTA*, *supra* note 6.

²⁷ *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (entered into 1 January 1994), online: <<https://www.international.gc.ca/trade-commerce/consultations/nafta-alena/toolkit-outils.aspx?lang=eng>> [NAFTA]. For details on NAFTA's definition given at Art. 2017 (a)-(e) of this agreement see note 44.

²⁸ Véronique Guèvremont & Ivana Otaševi, *La Culture dans les traités et les accords: la mise en œuvre de la Convention de 2005 dans les accords commerciaux bilatéraux et régionaux* (Paris: UNESCO, 2017) 20-21 at 56, online: <https://fr.unesco.org/creativity/sites/creativity/files/dce-policyresearch-book1-fr-web_1.pdf> [translated by the author].

²⁹ *Ibid.* at 20.

³⁰ In particular with the Republic of Korea, the Cariforum States (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Dominican Republic, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago) and the Central American States (see *ibid.* at 42-50); Caroline Pauwels & Jan Loisen, "Study Paper 3C: Protocols on Cultural Cooperation" in Germann Avocats (Geneva) and multidisciplinary research team, ed, *Implementing the UNESCO Convention of 2005 in the European Union*, Long Version of the Study for the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education (Brussels: European Parliament, 2010) at 169, online: <http://www.diversitystudy.eu/ms/ep_study_long_version_20_nov_2010_final.pdf>.

³¹ Charles Vallerand & Solange Drouin, "Exemption culturelle: trouver un accord avec les Européens" *Le Devoir* (30 March 2013), online: <<https://www.ledevoir.com/opinion/idees/374574/trouver-un-accord-avec-les-europeens>>.

which introduces an exemption in the chapters in which the Parties have cultural policies and cultural support measures that they intend to protect.

CETA is based on NAFTA's "negative list" approach, which the EU had not adopted prior to CETA. Through this approach, rather than allowing states to make incremental commitments to trade liberalization, these agreements require them to submit a definitive list of restrictions. In CETA, the EU abandoned the "positive list" approach that had historically characterized its external trade relations, while Canada abandoned the general cultural exemption.

In Chapter Twenty-Eight on Exceptions, Article 28.9 provides that CETA's "Parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapters Seven (Subsidies), Eight (Investment), Nine (Cross-Border Trade in Services), Twelve (Domestic Regulation) and Nineteen (Government Procurement)."³² Some chapters include an explicit exclusion of audiovisual for the EU and cultural industries for Canada. Chapter Seven on Subsidies provides in Article 7.7 that: "Nothing in this Agreement applies to subsidies or government support with respect to audio-visual services for the European Union and to cultural industries for Canada."³³ This article is directly relevant to the subject of public support for culture. Chapter Eight on Investment provides in Article 8.2 paragraph 3 that: "For the EU Party, Sections B and C [respectively on Establishment of investments and Non-discriminatory treatment] do not apply to a measure with respect to audiovisual services. For Canada, Sections B and C do not apply to a measure relating to cultural industries."³⁴ Article 9.2 paragraph (2)(b)-(c) excludes from the scope of Chapter Nine on Cross-Border Trade in Services "a measure affecting [...] for the European Union, audio-visual services; [...] for Canada, cultural industries."³⁵ Article 12.2 paragraph 2(b) excludes from the scope of Chapter Twelve on Domestic Regulation "licensing requirements, licensing procedures, qualification requirements or qualification procedures [...] relating to [...] for Canada, cultural industries and [...] for the EU Party, audio-visual services."³⁶

³² CETA, *supra*, note 15.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

CETA introduced new developments with regard to the notion of cultural diversity. They include the fact that the EU abandoned its traditional “positive list approach” in favor of a “chapter by chapter” exemption and a “negative list” approach. Critics have considered the “targeted” exemption adopted by CETA to be a step towards globalisation rather than a tool for fostering cultural diversity. Supporters of this approach have underlined that it could be used in negotiations with the US. They have considered CETA as a “training agreement” for even more complex bilateral negotiations.³⁷

In the area of culture, both the EU and Canada have partially maintained their traditions in CETA, while introducing innovative elements.³⁸ CETA’s negotiators have searched for a balance between the Canadian tradition of trade negotiations and that of the EU “[w]ith the aim of ensuring some protection and promotion of cultural diversity on both sides, CETA provides for a certain exclusion of culture from the ongoing liberalization process.”³⁹

2. CUSMA and the “Coming Back” of the General Cultural Exemption for Canada

On September 30th, 2018, the US, Mexico and Canada announced the end of negotiations of CUSMA.⁴⁰ This agreement was signed on November 2018 in Buenos Aires, during the G20 Leaders’ Summit and entered into force on July 1st, 2020.⁴¹

³⁷ Éric Desrosiers, “Libre-échange Canada-UE – L’occasion de renforcer la diversité culturelle. Le Canada et l’Europe finalisent un texte qui pourra leur servir lors de négociations avec d’autres pays, dit Pierre Marc Johnson” *Le Devoir* (18 October 2012), online: <<http://www.ledevoir.com/economie/actualites-economiques/361669/libre-échange-canada-ue-l-occasion-de-renforcer-la-diversite-culturelle>>.

³⁸ See L. Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP”, *supra* note 4 at 53-54.

³⁹ L. Bellucci, *supra* note 23 at 46 [translated by the author].

⁴⁰ See CUSMA, *supra* note 16. See also Government of Canada, “A New Canada-United States-Mexico Agreement”, online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/index.aspx?lang=eng>>. On this agreement see extensively Bellucci, *supra* note 23 at 56-58.

⁴¹ See Government of Canada, “A New Canada-United States-Mexico Agreement”, *supra* note 40.

CUSMA resumes the support for the general cultural exemption. The Canadian government explains, on its official website, Canada's position on this issue:

In the context of trade agreements, the cultural exception allows Canada to take measures to support and protect its cultural industries, without contravening the terms of the agreement. The Canada-United States-Mexico Agreement (CUSMA) maintains the general exception for Canada's cultural industries, which are integral to the national identity of our country and people. This exception will continue to preserve Canadians' ability to create and have access to a diversity of content, including in the online environment. The general exception for culture further demonstrates that economic liberalization can be achieved while maintaining a strong sense of national identity and cultural sovereignty.⁴²

Article 32.6, paragraph 2 of CUSMA, which concerns cultural industries and is included within Chapter 32 on Exceptions and general provisions, provides that: "This Agreement does not apply to a measure adopted or maintained by Canada with respect to a cultural industry."⁴³ Paragraph 3 of the same article also specifies that: "With respect to Canadian goods, services, and content, the United States and Mexico may adopt or maintain a measure that, were it adopted or maintained by Canada, would have been inconsistent with this Agreement but for paragraph 2." Therefore, this article allows Canada to support its cultural industries.

With regard to these industries, CUSMA replicates the structure of NAFTA, in particular for what concerns the definition of cultural industries and a retaliation clause. Article 32.6, paragraph 1 of CUSMA gives the same, broad definition of cultural industries as Article 2107 of NAFTA.⁴⁴

⁴² Government of Canada, "Cultural Industries Summary" (11 July 2019), online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/culture.aspx?lang=eng>>.

⁴³ "[E]xcept as specifically provided in Article 2.4 (Treatment of Customs Duties) or Annex 15-D (Programming Services)".

⁴⁴ NAFTA's definition of cultural industries focuses on persons engaged in any of the following activities: (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine readable form; or (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all

Besides a limited change,⁴⁵ the definition adopted by NAFTA is the same as that adopted by Article 2012 of CUSFTA.⁴⁶ This shows that Canada's definition of cultural industries is consistent through different trade agreements. CUSMA's definition of cultural industries focuses on a person engaged in the following activities:⁴⁷

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

As already done by CUSFTA (which is suspended) through its Article 2005, paragraph 2⁴⁸ CUSMA also includes a retaliation clause directly related to the cultural exception. Article 32.6, paragraph 4 of CUSMA states that:

Notwithstanding any other provision of this Agreement, a Party may take a measure of equivalent commercial effect in response to an action by another Party that would have been inconsistent with this Agreement but for paragraph 2 or 3.

radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services, *NAFTA*, *supra* note 27.

⁴⁵ In CUSFTA cultural industry meant an enterprise engaged in the specified activities. NAFTA extended the scope of the exemption to individuals. On this extension see also Coalition for the Diversity of Cultural Expressions, "Comments from the Coalition for the Diversity of Cultural Expressions, in the context of the consultation on Canada's Future World Trade Organization (WTO) Negotiations on E-Commerce: Presented to Services Trade Policy Division (TMS) Global Affairs Canada" (25 April 2019) at 6, online: <<https://cdec-cdce.org/wp-content/uploads/2019/04/CDCE-Comments-WTO-E-commerce.pdf>>.

⁴⁶ *CUSFTA*, *supra* note 6 at Chapter 20-Other provisions.

⁴⁷ *NAFTA*, *supra* note 27.

⁴⁸ One can read at Art. 2005, para. 2 of CUSFTA that: "Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1".

The former Minister of Canadian Heritage and Multiculturalism, Pablo Rodriguez, argued that the cultural exception clause is a “general clause that prevails over the rest.”⁴⁹ However, Véronique Guèvremont, holder of the UNESCO Chair on the Diversity of Cultural Expressions established at Laval University, pointed out that:

This clause was never activated because [Canadian] cultural policies had little impact on [American] commercialization perspectives, but digital [which now CUSMA’s cultural exception includes] has been a hot topic in America for at least fifteen years. If [Canada] adopts measures to promote Canadian content on digital platforms – which are mostly American – the economic interests at stake will be greater than [its] small subsidies [to] film. This increases the risk that the retaliation clause will be activated. [...] When the [Canadian] government will be asked to put in place certain policies that would result in discrimination, there may be a reaction from the United States. They have the legal leverage to do so.⁵⁰

Previous agreements, such as CETA and PTP, had raised concerns that the introduction of a general cultural exemption in Canada was no longer in vogue, including concerns that the NAFTA renegotiations would have abandoned this exemption altogether.

CETA was the first free trade agreement since CUSFTA in which Canada abandoned the general cultural exemption in favor of “chapter by chapter”⁵¹ exemptions. This abandonment was later confirmed by PTP, a multilateral free trade agreement aimed at integrating the economies of the Asia-Pacific and Americas regions. On February 4th, 2016, twelve Pacific countries signed this agreement: Australia, Brunei, Canada, Chile, the US, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.⁵² With this agreement, not only was the abandonment of the general cultural

⁴⁹ Guillaume Bourgault-Côté, “Libre-échange: une limite à l’exception culturelle”, *Le Devoir* (26 October 2018), online: <<https://www.ledevoir.com/culture/539928/une-exception-culturelle-avec-des-limites>>.

⁵⁰ *Ibid.* [translated by the author].

⁵¹ See C. Vallerand & S. Drouin, *supra* note 31.

⁵² See Véronique Guèvremont, “La Convention dans les autres enceintes internationales: un engagement crucial” in UNESCO, *Re/penser les politiques culturelles: la créativité au cœur du développement 2018*, Rapport mondial Convention 2005 (Paris: UNESCO, 2017), 143 at 146, online: <<https://fr.unesco.org/creativity/global-report-2018>>.

exemption confirmed, “but the degree of liberalization of the cultural sector has reached an unprecedented level.”⁵³

Canadian media had echoed the political will to maintain the cultural exception with the United States and Prime Minister Justin Trudeau announced that he would not sign a new agreement without maintaining it. He stated that “renouncing exemptions for Canadian cultural industries would be renouncing Canadian sovereignty and identity.”⁵⁴ Nevertheless, Canadian media’s use of both the singular form “cultural exception” and the plural form “exemptions” and Canada’s recent FTAs precedents, did not allow to predict the exact legal technique, and therefore policy choice, that Canadian negotiators would have adopted in the NAFTA renegotiations.

CUSMA restated the importance of the cultural exception for Canada. We know that the development of the idea of cultural diversity is greatly linked in this country to Quebec’s contribution. This province has an interest in protecting and supporting a francophone culture that is a minority in North America. Nevertheless, this idea reflects a rich complexity, which is officially underlined by the Government of Canada.⁵⁵

As countries become more economically integrated, it is increasingly important that nations are able to preserve a strong sense of national identity and belonging. The ability to tell our stories and express our culture in all of its diversity is integral to Canada’s national sovereignty. Canada is home to many Indigenous communities, a vibrant Francophone culture that is unique in North America, and Canadians of every faith, background, and culture shape our country each day.⁵⁶

As communicated by the Canadian press after the US, Mexico and Canada announced the completion of CUSMA’s negotiations on Septem-

⁵³ Véronique Guèvremont, “L’exemption culturelle canadienne dans le partenariat transpacifique ou la destinée d’une peau de chagrin” (2015) 28:1 *RQDI* 83 at 85-86 [translated by the author].

⁵⁴ “ALENA: Trudeau insiste sur le règlement des différends et l’exception culturelle” *Radio-Canada* (5 September 2018), online: <<https://ici.radio-canada.ca/nouvelle/1121846/negociations-alena-trudeau-exception-culturelle-reglement-differends-entente>> [translated by the author]. Although the quote reflects the Prime Minister’s idea, the words are those of Radio Canada.

⁵⁵ See also L. Bellucci, *supra* note 23 at 59.

⁵⁶ Government of Canada, *supra* note 42.

ber 30th, 2018, the cultural community “breathed a sigh of relief,”⁵⁷ as this agreement covered the digital environment as well. It is clear that the digital environment will be one of the most important themes in future FTAs. States need to renew the traditional patterns of cultural governance. They need to adapt them to technological change and to increasingly integrated and globalized markets.⁵⁸ Even though “real challenges lie in the definition of what digital products are,”⁵⁹ “[e]very cultural clause or caveat should apply to the digital environment.”⁶⁰

Without the general cultural exemption, Article 19.4, paragraph 1 of CUSMA on Non-Discriminatory Treatment of Digital products (including books, videos, music, etc.) “would prevent Canada from requiring platforms distributing digital cultural content to offer, promote or introduce local content to their users in Canada, or to set presence thresholds.”⁶¹ In fact, this paragraph provides that:

No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products.

With CUSMA, the support of cultural diversity has found again an explicit and extended relevance in Canadian trade policy. In this agreement, Canada tried to find the “safest” spot possible with regard to the protection and promotion of cultural industries in negotiating with the US, the leading world economy and champion of trade liberalization. This might have had a cost. It has been argued that this cost may be visible in the limitations mentioned in Article 32.10 of CUSMA. In particular, the inability for

⁵⁷ Caroline Montpetit, “Le milieu culturel pousse un soupir de soulagement”, *Le Devoir* (2 October 2018), online: <<https://www.ledevoir.com/culture/538095/alena-exemption-culturelle>>.

⁵⁸ See Michèle Rioux & Destiny Tchéhouali, “La *Convention sur la protection et la promotion de la diversité des expressions culturelles* de l’Organisation des Nations Unies pour l’éducation, la science et la culture face aux enjeux et défis du numérique” (2016) Special issue June 2016 RQDI 185 at 201.

⁵⁹ V. Guèvremont, *supra* note 52 at 147 [translated by the author].

⁶⁰ *Ibid.* at 161 [translated by the author].

⁶¹ Coalition for the Diversity of Cultural Expressions, *supra* note 45 at 10.

one of the Parties to conclude⁶² an agreement with a non-market country without the approval of the other Party might have been part of the price that Canada had to pay.⁶³ In fact, the article in question provides that:

2. At least 3 months prior to commencing negotiations, a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country. 3. Upon request of another Party, a Party intending to commence free trade negotiations with a non-market country shall provide as much information as possible regarding the objectives for those negotiations. 4. As early as possible, and no later than 30 days before the date of signature, a Party intending to sign a free trade agreement with a non-market country shall provide the other Parties with an opportunity to review the full text of the agreement, including any annexes and side instruments, in order for the Parties to be able to review the agreement and assess its potential impact on this Agreement. If the Party involved requests that the text be treated as confidential, the other Parties shall maintain the confidentiality of the text. 5. Entry by a Party into a free trade agreement with a non-market country will allow the other Parties to terminate this Agreement on six months' notice and replace this Agreement with an agreement as between them (bilateral agreement).⁶⁴

The expression “non-market country” implicitly refers to China. We know that Canada has been exploring potential FTA negotiations with this country⁶⁵ and that the Trump administration under which CUSMA was agreed upon often adopted a confrontational, sort of a cold-war approach to the US-China relations, that lead a group of American scholars to sug-

⁶² For the purposes of Art. 32.10 “non-market country” identifies a country “(a) that on the date of signature of this Agreement, a Party has determined to be a non-market economy for purposes of its trade remedy laws; and (b) with which no Party has signed a free trade agreement”. *CUSMA*, *supra* note 16 at Art. 32.10, para. 1.

⁶³ On this topic see “Ils ont tort’: Freeland nie que l’AEUMC lie les mains du Canada” Radio-Canada, based on a text by Elise von Scheel, CBC News with information by La Presse Canadienne and CBC News (20 October 2018), online: <<https://ici.radio-canada.ca/nouvelle/1130964/accord-etats-unis-mexique-canada-libre-echange-commerce>>; Manon Cornellier, “L’AEUMC, une paire de menottes?” *Le Devoir* (4 October 2018), online: <<https://www.ledevoir.com/opinion/editoriaux/538321/aeumc-une-paire-de-menottes>>.

⁶⁴ *CUSMA*, *supra* note 16 at Art. 32.10, paras 2-5.

⁶⁵ See Government of Canada, “Public consultation on a possible Canada-China FTA”, online: <<https://www.international.gc.ca/trade-commerce/consultations/china-chine/report-rapport.aspx?lang=eng#a1>>.

gest the new Biden administration to adopt a renewed US policy towards China.⁶⁶

B. The Recognition of the Unique Nature of Cultural Services: The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Extreme Example of the New Zealand Case

The commitment for cultural diversity expressed by Canada and the EU was also testified by their great support to the UNESCO Convention, whose Parties are at present 148 states and the EU.⁶⁷ This convention gave its Parties a legally binding text⁶⁸ to protect and promote their cultural welfare⁶⁹ and, more generally their cultural diversity, a few years after the UNESCO had adopted the Universal Declaration on Cultural Diversity (UNESCO Declaration)⁷⁰ on November 2nd, 2001.

The UNESCO Convention interprets culture as an expression both of art and traditions, customs.⁷¹ The humus in which the UNESCO Convention sank most of its roots aimed at looking for a constructive response to

⁶⁶ Ryan Hass, Ryan Mcelveen & Robert D. Williams (eds.), *The Future of US Policy Toward China. Recommendations for the Biden Administration* (Washington, D.C.: Brookings Foreign Policy's, John L. Thornton China Center, and Yale Law School's Paul Tsai China Center, 2020), online: <<https://law.yale.edu/sites/default/files/area/center/china/document/future-u.s.-policy-toward-china-v8.pdf>>.

⁶⁷ For the list of Parties in chronological order see *Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Paris, 20 October 2005*, online: <<https://pax.unesco.org/la/cnvention.asp?KO=31038&language=E>>.

⁶⁸ See on the topic UNESCO Executive Board, *Decisions Adopted by the Executive Board at its 166th Session (3-4 April 2003): Preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity (166 EX/28 and 166 EX/47 Part I)*, 2003, at 11 para. 3.4.3, online: <<https://unesdoc.unesco.org/ark:/48223/pf0000130244>>. The UNESCO Executive Board refers to a report written by Ivan Bernier and Hélène Ruiz Fabri on the legal feasibility of an international instrument on cultural diversity (*Étude préliminaire sur les aspects techniques et juridiques relatifs à l'opportunité d'un instrument normatif sur la diversité culturelle*).

⁶⁹ L. Bellucci, "Un regard européen sur l'AECG entre le Canada et l'UE", *supra* note 4 at 200.

⁷⁰ *UNESCO Universal Declaration on Cultural Diversity*, online: <http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

⁷¹ See Lucia Bellucci, "Cinema e diritto nell'integrazione europea: incentivazione economica e promozione della diversità culturale" (2010) 37:3 *Sociologia del diritto* 84 at

the global cultural homogenization,⁷² allowing Parties “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.”⁷³

The UNESCO Convention consolidates the recognition of the uniqueness of cultural services that justifies the choice to somehow exclude these services from the process of global liberalization started within the WTO, which urged Canada and the EU to support the idea of cultural exception, cultural specificity and cultural diversity. Since cultural industries are not only an important economic sector but also a vector of identity, this recognition should avoid the loss of identity representation through cultural industries which occurred in New Zealand as an output of the liberalization adopted during WTO negotiations.

1. The UNESCO Convention: Its Reference in the CETA’s Preamble and its Absence in CUSMA’s

We claimed that CETA accounts for differences and similarities in protecting and supporting cultural diversity. For example, while the EU is invested only as far as audiovisual services are concerned, Canada’s stake in its agreement includes a wide range of cultural sectors and activities.

Despite their differences, the EU and Canada consider the UNESCO Convention a common ground of values within trade. Canada was among the most engaged promoters of this convention within institutions and through NGOs.⁷⁴ The current Canadian Coalition for the Diversity of Cultural Expressions (CDCE)⁷⁵ has played an important role in favor of the

89; L. Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP”, *supra* note 4, 50.

⁷² See M. del Corral, *supra* note 3 at 39.

⁷³ L. Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP”, *supra* note 4 at 50.

⁷⁴ See 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” (2006) 1 IJOC 24 at 26 note 8, 27, 30, 53, online: <<http://ijoc.org/index.php/ijoc/article/viewFile/25/17>>.

⁷⁵ The Coalition was created in 1998 by Quebec’s leading cultural associations following the mobilization against the liberalization in the cultural sector proposed by the negotiations of the Multilateral Agreement on Investment (MAI). See Coalition for the Diversity of Cultural Expressions (CDCE), “About: History and Mission”, online:

adoption of the UNESCO Convention. Canada was also the first country to become a Party to this convention.⁷⁶

The EU, which joined the UNESCO Convention in 2006,⁷⁷ is still the only regional economic integration organization to be a Party to this convention. The EU “stands out [also] as one of the actors most committed to the principles and objectives of the Convention at the international level.”⁷⁸

Expressed in the CETA’s Preamble is this agreement’s debt to the UNESCO Convention.⁷⁹ This Preamble explicitly mentions the Convention (as well as some of its principles and objectives)

RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties’ flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; AFFIRMING their commitments as parties to the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, done at Paris on 20 October 2005, and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support.⁸⁰

<<https://cdce-cdce.org/en/about/#a1>>. For the Canadian Coalition for the Diversity of Cultural Expressions, see <<https://ficdc.org/en/membres/canadian-coalition-for-the-diversity-of-cultural-expressions/>>.

⁷⁶ See *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 21.

⁷⁷ See EC, *Council decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/CE)*, [2006] JO, L 201/15.

⁷⁸ V. Guèvremont, *supra* note 52 at 157 [translated by the author].

⁷⁹ *CETA*, *supra*, note 15 at Preamble, para. 7. See Bellucci, *supra* note 13 at 439. For other bilateral and regional trade agreements containing an explicit reference to the UNESCO Convention, see V. Guèvremont & I. Otaševi, *supra* note 28 at 14. On this topic see also Véronique Guèvremont & Ivan Bernier, *Guide to the Negotiation of Cultural Clauses in Trade Agreements* (Québec: UNESCO, 2020) at 55-56. For a promotion of the UNESCO Convention in the agreements concluded between 2015 and 2016, including those concluded by China, see V. Guèvremont, *supra* note 52 at 146.

⁸⁰ *CETA*, *supra* note 15 at Preamble, paras 6 and 7.

Not only does Article 23, paragraph 6(e) of the UNESCO Convention provide that the Intergovernmental Committee shall “establish procedures and other mechanisms for consultation aimed at promoting the objectives and principles of this convention in other international forums,”⁸¹ but Article 21 of this also provides that: “Parties undertake to promote the objectives and principles of this convention in other international forums.”⁸² This implies, for example, “affirming the principles and objectives of the UNESCO Convention in the new agreements they negotiate.”⁸³

The reference to the UNESCO Convention in the Preamble confirms that Canada and the EU had a special concern for culture in concluding CETA. They wanted to avoid the risks of economic and cultural homogenization coming from a liberalization process.

One could not reasonably expect recognition of the UNESCO Convention in CUSMA’s Preamble. In fact, the US participated in the UNESCO Convention’s negotiations, but later opposed this convention and never became a Party to it.⁸⁴

2. The Liberalisation of Cultural Services and the Loss of Identity Representation: The Extreme Example of the New Zealand Case

The measures adopted by Canada and the EU in the WTO rounds and in FTAs like CETA and CUSMA were important to avoid the situation that extreme liberalization can cause and that is exemplified by the case of New Zealand. New Zealand has been one of the few countries to embrace a strong liberalization of its audiovisual services through the earliest WTO negotiations, in the framework of “a radical neoliberal programme that included the deregulation, corporatisation and partial privatisation of public broadcasting [and through] an offer [that] was hailed by the US as exemplary.”⁸⁵ The result of this choice was that by “1999, the level of New Zealand content on television was the lowest in the OECD.”⁸⁶ Trying to

⁸¹ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 21 at Art. 23, para. 6(e).

⁸² *Ibid.* at Art. 21

⁸³ L. Bellucci, *supra*, note 23 at 46.

⁸⁴ On this topic see Craufurd Smith, *supra* note 74 at 26.

⁸⁵ Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Abingdon: Routledge-Cavendish, 2008) at 232.

⁸⁶ *Ibid.*

find a remedy to this situation, a “[l]abour government was elected with a mandate to introduce compulsory local content quotas for radio and free-to-air television.”⁸⁷ Significantly, as a sign of the will to change the existing situation in the field of audiovisual services, the Prime Minister was also the Minister of Culture. However, his statement clearly synthesized the dangers of New Zealand’s choice: “We have unilaterally disarmed ourselves on trade but very few others have been so foolish.”⁸⁸

CUSMA has shown that keeping culture somehow protected from extreme liberalisation is very difficult, in particular when the negotiating partner is the US, the main global actor on the cultural industries market, which has a strong interest in multiplying free trade areas in the world and thus increase the possibility of exporting its services. This agreement has shown that defending the idea that culture is not a product or a service like others may have “a cost” even for rich countries such as Canada. Protectionist measures adopted in the field of cultural industries may oblige the negotiating countries to sacrifice other areas and therefore somehow limit their freedom and the full scope of their sovereignty.

Trade actors like the EU and Canada that have been supporters of cultural diversity in the global arena, therefore of protectionist measures respectively in the audiovisual sector and more broadly within cultural industries, have concentrated their efforts on being able to keep supporting their cultural industries in a global market. This “campaign” was also conducted because of the positive pressures coming from francophone areas like France and Québec. For the Canadian province and the EU Member State, the defence of their cultural industries has always been, long before CETA and CUSMA, part of a broader policy that, also based on the protection of the francophone languages and cultures, has considered cultural industries not only as an important economic sector but also as a vector of identity. Québec has tried to protect itself from the influence of the anglophone culture coming not only from the US but also from the rest of Canada; France has tried to protect the strongest film production industry in Europe and its cultural identity through a broad policy of both internal support to culture and strong external cultural diplomacy. They both consider the *francophonie* a tool against globalisation mechanisms that have an anglophone “brand”. Québec and France have succeeded in respectively federating

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at 232-233.

the rest of Canada and the other EU Member States in an external trade policy that would consider as an *acquis* the possibility to support respectively cultural industries as a whole and the audiovisual sector. This achievement was built during the WTO negotiations on cultural services and consolidated through the FTAs. However, their success in supporting culture through the FTAs went through mixed fortunes; the metaphor of the rollercoaster that has been used to picture their results seem appropriate.⁸⁹ CETA and CUSMA are among their best results on the matter, but the aim of considering their achievements is far from being reached.

II. The Protection and Promotion of Cultural Diversity in Developing Countries: Boosting Inclusive Capitalism through a New Approach to Protectionism

As aforementioned, measures defending and supporting cultural diversity in multilateral and bilateral trade can be considered as a form of protectionism. In the cultural field, C. Edwin Baker distinguishes between weak protectionism and strong protectionism, drawing from the earlier reflections of Oliver Goodenough.⁹⁰ Baker believes that non-supporters of limits to free trade “typically invoke [...] a ‘museum,’ ‘commodity’ or ‘artifact’ conception of culture. [They conceive it as] relatively static, largely *backward*⁹¹ looking and very much *content-oriented*.”⁹² Supporters of these limits have on the contrary a ‘discourse’ or ‘dialogic’ conception of culture. [This view] makes participants, rather than content, central to culture [since in a] discourse, it matters who the speaker and who the audience are [...].”⁹³

Non-supporters do not accept forms of weak protectionism, while supporters consider them justifiable. According to supporters, the protection

⁸⁹ See L. Bellucci, *supra*, note 23.

⁹⁰ Oliver R. Goodenough, “Defending the Imaginary to Death? Free Trade, National Identity, and Canada’s Cultural Preoccupation” (1998) 15:1 *Ariz J Int’l & Comp L* 203. This scholar, “however, provides a different scope of application of these categories.” Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP,” *supra* note 4 at 56.

⁹¹ Italics appear in Baker’s text.

⁹² C. Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press, 2002) at 249-250.

⁹³ *Ibid.* at 250-251.

of culture aims to guarantee that members of cultural communities have important chances to be cultural speakers. “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.”⁹⁴

According to Baker, weak protectionism fosters cultural pluralism, while strong protectionism prevents it. This analysis, although important, does not shed enough light on the needs of developing countries. Sticking within the boundaries of this dichotomy has prevented Western countries from searching and supporting effective tools that would conform to developing countries’ needs and allow these countries to effectively protect and promote their cultural industries.

The implementation of these tools requires systemic choices focusing on a combination of legal and economic instruments and cooperation among Western countries. Therefore, this article argues that rich countries should shape a new approach to cultural diversity that goes beyond the current situation. In fact, nowadays, even if trade actors such as Canada and the EU can differently protect and promote their cultural diversity “depending on the negotiations or the agreements, and sometimes within the negotiations of the same agreement”⁹⁵ and therefore can never take their *acquis* for granted, they are still members of “a happy few club” that can adopt protectionist measures within cultural industries because of their economic situations and bargaining power.

A. Weak vs Strong Protectionism, the Respect of Human Rights and the *China Publications and AV Products Case*

According to Baker, weak protectionism enhances choices, while strong protectionism carries an exclusionary aim.⁹⁶ Concrete examples of weak protectionism are quotas and state aid introduced by EU Member States in support of the European audiovisual production on the global film market. The EU policy aims to protect and promote a certain cultural diversity

⁹⁴ *Ibid.* at 251.

⁹⁵ See L. Bellucci, *supra* note 23 at 34 [translated by the author].

⁹⁶ C.E. Baker, *supra* note 92 at 267. On this topic see also extensively L. Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP”, *supra* note 4 at 51, 56, 57.

and therefore a variety of choices for the public, guaranteeing a wide cultural offering in the cultural industries' market which is characterized by an oligopolistic structure.

On the contrary, according to Baker, strong protectionism limits cultural offerings and the possibility for consumers/users to choose, thereby hindering cultural pluralism and freedom of expression. Baker believes that the discriminant between the analyzed forms of protectionism lies in the respect of human rights. Therefore, he thinks that strong protectionism cannot be accepted because it does not protect these rights. Among them, one can consider, in particular, the right to access culture, which "is far from being only a mere aspirational good; it appears, on the contrary, to be necessary for the existence of a vivid democracy."⁹⁷

One may argue that, according to Baker's perspective, the 2009 *China-Publications and AV Products* case,⁹⁸ which was settled by the WTO Dispute Settlement Body (DSB),⁹⁹ is an example of strong protectionism. In the 2009 *China-Publications and AV Products* case, the US filed a complaint concerning a number of Chinese rules regulating activities related to the importation and distribution of reading materials, audiovisual home entertainment products, sound recordings, and films for theatrical release. The US claimed that the measures in question 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. According to the US,

⁹⁷ Céline Romainville, "The Right to Access Culture under EU Law" in Evangelia Psychogiopoulou, ed, *Cultural Governance and the European Union* (New York: Palgrave McMillan, 2015) at 165.

⁹⁸ WTO Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (12 August 2009), online: <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20Symbol=%20wt/ds363/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#>](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20Symbol=%20wt/ds363/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#>)>; WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (21 December 2009), online: <[https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20Symbol=%20wt/ds363/ab/r*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#>](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20Symbol=%20wt/ds363/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICchanged=true#>)>.

⁹⁹ On this case see also Tania Voon, "China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products" (2009) 103:4 *AJIL* 710.

these measures restricted trading rights to Chinese state-owned companies: they limited the right of companies in China, of foreign companies and individuals to import products into China. Moreover, the US claimed that several 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 also highlighted the peculiar nature of cultural goods and services, referring to the UNESCO Convention and the UNESCO Declaration. China underlined that cultural goods and services 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 fundamental role in “the evolution and definition of [...] societal features, values, ways of living together, ethics and behaviours.”¹⁰⁰ They need to be considered beyond commercial aims. China’s defence in the 2009 *China-Publications and AV Products* could therefore be considered as an example of the reason why the US opposed the UNESCO Convention and never ratified it. The US “was concerned by the potential of this convention to be misinterpreted in ways that might impede the free flow of ideas and affect areas like trade, justifying protectionism.”¹⁰¹

B. The UNESCO Convention’s Limited Support to Developing Countries’ Cultural Diversity: Refocusing on Tools that Enhance their Needs

Both Canada and the EU looked at developing countries for potential partners to spread and therefore consolidate their position in favor of the protection and promotion of cultural diversity in a global market. The idea that cultural services need to be considered as unique and therefore withdrawn from the liberalization process found its consecration in the UNESCO Convention, which formally includes the support to developing countries’ cultural industries among its aims. However, this convention does not reach much further than rhetorical provisions in favor of developing countries, without giving instruments that would effectively allow their cultural diversity to flourish.

¹⁰⁰ WTO Panel Report, *supra* note 98 at paras 4.276, 7.751.

¹⁰¹ Lucia Bellucci & Roberto Soprano, “Study Paper 3A: The WTO System and the implementation of the UNESCO Convention: two case studies”, in Germann Avocats (Geneva) and multidisciplinary research team, *supra* note 30 at 159.

1. The UNESCO Convention's Provisions and their Limited Effectiveness in Favor of Developing Countries

The UNESCO Convention mentions among its aims “[s]ustainable development policies and international assistance programmes [that] integrate culture as a strategic dimension.”¹⁰² Many of its articles consider enhancing developing countries’ cultural diversity, formally placing this goal at the heart of the UNESCO Convention’s preoccupations. For example, Article 13 considers the integration of culture into development, providing that

Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.¹⁰³

Moreover, Article 14 provides for a rich list of means by which

Parties shall endeavour to support cooperation for sustainable development and poverty reduction, especially in relation to the specific needs of developing countries, in order to foster the emergence of a dynamic cultural sector.¹⁰⁴

Furthermore, Article 16 of this convention provides for preferential treatment for developing countries:

Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.¹⁰⁵

One of the main instruments delineated by the UNESCO Convention to foster cultural diversity in developing countries is the International Fund on Cultural Diversity, provided for in Article 18 of this convention. The Operational Guidelines of the UNESCO Convention state that:

The main objective of the IFCD is to invest in projects that lead to structural change through the introduction and/or elaboration of policies and strate-

¹⁰² *The Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 21.

¹⁰³ *Ibid.* at Art. 13.

¹⁰⁴ *Ibid.* at Art. 14.

¹⁰⁵ *Ibid.* at Art. 16.

gies that have a direct effect on the creation, production, distribution of and access to a diversity of cultural expressions, including cultural goods, services and activities, as well as through the reinforcement of institutional infrastructures deemed necessary to support viable cultural industries at the local and regional levels. IFCD projects demonstrate the value and opportunities that the cultural industries bring to sustainable development processes, in particular to economic growth and the promotion of a decent quality of life.¹⁰⁶

This fund's scope of application concerns all the developing countries, since it embraces "Parties to the UNESCO 2005 Convention on the Protection and the Promotion of the Diversity of Cultural Expressions that are recognized by UNCTAD as developing economies, economies in transition and least developed countries."¹⁰⁷ This fund should be one of the main tools to guarantee financial support to cooperation aimed at sustainable development and poverty reduction and tailored to the specific needs of developing countries, in order to enhance the emergence of a dynamic cultural sector.¹⁰⁸

However, the final version of the UNESCO Convention provides that the "resources of the Fund shall consist of [...] voluntary contributions made by Parties."¹⁰⁹ Rich Parties are therefore not obliged to contribute to this fund. This provision shows that Western countries championing cultural diversity never introduced a significantly "revolutionary approach" in their relationship with developing countries in order to effectively support these countries' cultural diversity. Through Article 18, the UNESCO Convention fails to reach beyond rhetoric in its aim to foster developing countries' cultural diversity.

Because of their economic interests, rich countries supporting cultural diversity never questioned the actual system of global trade in the cultural sector. In this system, they are allowed to introduce limitations to free trade, exemptions that permit them to protect and promote their cultural industries both as an economic sector and vector of identity and

¹⁰⁶ "Operational Guidelines", in *Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 21 at 68, paras 2-3, online: <<https://unesdoc.unesco.org/ark:/48223/pf0000370521.page=66>>.

¹⁰⁷ *Ibid.* at 68, note 8.

¹⁰⁸ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 21 at Art. 14, para. d(i).

¹⁰⁹ *Ibid.* at Art. 18, para. 3(a).

values, while developing countries cannot afford these luxury policies, within the actual economic and legal structure of the trade system.

However, the coronavirus pandemic has shown that Western countries do not always control the negative effect of globalisation as much as they wish, and they cannot guarantee the wellbeing of their citizens without really worrying about the wellbeing of the rest of the world. Therefore, we cannot keep considering a shallow form of sustainability that cares only formally about developing countries. We need to find strategies to significantly diminish inequalities in the world from a moral standpoint as well as to preserve economic and health interests of rich countries. The improvement of developing countries' living conditions influences, among others, natural resources exploitation and an improvement of global health. If we help developing countries boost their economies, they would probably exploit their natural resources more sustainably. Instruments to help them improve their trade in services, including cultural ones, could therefore be an important contribution in this sense.

As it occurs in the field of agriculture, where subsidies allow European countries to have stronger exports and healthier products, in the field of cultural industries, developing countries are “caught between a rock and a hard place [...] that is, between the Hollywood majors' marketing hammer, on one side”¹¹⁰ and the state aid supported productions like the European ones on the other. As a European, I am delighted to know that European films and TV productions can benefit from state aid that allow us to watch different European cultural outputs instead of US blockbusters, enjoying the fact that cultural diversity is still represented on the screens. However, as a scholar involved in the field of law, culture and development I need to admit that what is so nice for me is not so nice for someone else, for example in Africa.

So far, limited attention has been devoted to developing countries' needs, in the cultural sector among others. Even with NAFTA, which successfully consolidated for the first time the cultural exemption in favor of

¹¹⁰ Germann Avocats (Geneva) & multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union*, Short Version of the Study for the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education (Brussels: European Parliament, 2010) at 68, online: <http://www.diversitystudy.eu/ms/est32024_eng_study_short_final_08_10.pdf>.

Canada with a “difficult” partner in cultural negotiations as the US, Mexico obtained “only a few specific protections.”¹¹¹ We should therefore go beyond forms of protectionism conceived for the “happy few”, searching for innovative approaches based on a broader cooperative vision that truly takes into consideration developing countries’ needs. The bargaining power of a country should not only be based on its economic power.

2. The Brazilian Communication and Cultural Diversity in Trade: Refocusing on Developing Countries’ Needs

Developing countries’ needs were already evident in the Communication that Brazil adopted in the framework of the Doha Round of 2001¹¹² in response to the US Communication,¹¹³ in particular its Annex B.

Under the title of “The International Scope of the Audiovisual Sector: An Indicative Listing”, Annex B of the US Communication states:

In an apparently neutral manner, the United States lists a number of companies engaged in global activities in the audio-visual sector and therefore supposed to have a natural interest in trade liberalisation. However, the list cannot truly qualify as being exhaustive.¹¹⁴

The Communication represents the US will to re-launch international negotiations on services that, in its perspective, did not achieve a constructive conclusion on the previous WTO round, nor did it make progress in the liberalization of markets around the world. In this framework, Annex B has been considered a “subtle wake-up call for those developing countries possessing expanding export industries in the area of audio-visual

¹¹¹ See Coalition for the Diversity of Cultural Expressions, *supra* note 45 at 6. This document refers to *NAFTA*, *supra* note 27 at Annex I.

¹¹² Communication from Brazil, *supra* note 20.

¹¹³ Communication from the United States, “Audiovisual and Related Services”, S/CSS/W/21, 18 December 2000, online: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=1776&CurrentCatalogueIdIndex=0&Full-TextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True>.

¹¹⁴ Christoph Beat Graber, “Audio-visual policy: the stumbling block of trade liberalization?” in Damien Geradin & David Luff, eds., *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Cambridge: Cambridge University Press, 2004) 165 at 168.

services, which is particularly the case of Brazil, India and Mexico.”¹¹⁵ The list mentions, among others, Mexico’s Televisa or Brazil’s Globo.

Brazil adopted in response a Communication. According to the Brazilian Communication:

The question that should be considered is [...] how to promote the progressive liberalization of the sector in a way that creates opportunities of effective market access for exports of developing countries in this sector without affecting the margin of flexibility of governments to achieve their cultural policy objectives as they find appropriate [with the aim] to provide appropriate tools for achieving liberalization without losing the autonomy to regulate in order to promote cultural policy objectives.¹¹⁶

The Brazilian Communication mainly focuses on three tools: subsidies, antidumping and competition disciplines. It proposes in particular to consider:

mechanisms for subsidies in the audiovisual sector aimed at achieving cultural policy objectives. [In this sense] it would be important to ensure that they have the least trade distortive effect, given the disparities in Members’ capacity to subsidize. Special needs of developing countries must be appropriately addressed in this regard.¹¹⁷

The communication in question considers that in the audiovisual sector “the global market is generally characterized by an oligopolistic structure, dominated by a few major companies.”¹¹⁸ Some companies could recoup most of their cost of production in their home market and therefore place audiovisual products:

at ‘dumping’ levels in foreign markets¹¹⁹ [...]. This situation would seem to require the development of appropriate trade defense mechanisms (e.g specific antidumping disciplines) for the audiovisual sector. [...] Alternatively, or complementarily, competition disciplines could be considered.”¹²⁰

¹¹⁵ *Ibid.*

¹¹⁶ Communication from Brazil, *supra* note 20 at paras 7-8.

¹¹⁷ *Ibid.*, para. 9.

¹¹⁸ *Ibid.*, para. 10.

¹¹⁹ On this topic see also L. Bellucci, “‘Cultural Diversity’ from WTO Negotiations to CETA and TTIP”, *supra* note 4 at 58.

¹²⁰ Communication from Brazil, *supra* note 20 at paras 10-11.

Brazil federated around its Communication the interests of a few developing countries that have already developed cultural industries but need time and the means to consolidate them. As an example of the outputs of these industries, we can think for example of Mexican TV productions, Brazilian *telenovelas* and series, or Argentinian cinematographic films. Therefore, the Brazilian Communication seems to implicitly represent the interests of countries that wish to export their services, but also protect their markets to enhance cultural diversity. If these seem to be the types of countries to which this communication gives voice, on the other hand, the issues mentioned in this text seem to be an interesting starting point for a discussion on developing countries' needs more generally. Even though developing countries strongly differ from each other and it would therefore be superficial to consider their needs in a homogenous way, focusing on this communication could at least remind us that developing countries deserve a "tailored made" attention to their needs.

These issues are mentioned concerning cultural industries, but they could be extended to different economic sectors. They can therefore contribute to explain why a large part of developing countries did not consider the Doha Round an advantageous round of negotiations. We know that this round of negotiations has come to a halt and, usually, the analysis of its demise has focused on the lack of rich countries to reach consensus, in particular the US and EU. However, even a large part of the developing world did not agree to proposals on the table:

Many developing country negotiators claim that the potential benefits of the Doha Round were relatively small while the potential costs in terms of a loss of sovereignty to deploy effective development policies were significant. [...] [D]eveloping countries took a respite from the negotiations because the possible gains from market access were not large enough to trade for giving up domestic policy space for development policy.¹²¹

Thinking about the Brazilian Communication, therefore, means questioning effective policies that could allow developing countries to strengthen their cultural industries or to start developing them, finding a balance between their need to be on the market and their need to sell off their cultural diversity. This analysis should be placed in a broader narrative applying to different fields, such as the agricultural and environmental fields.

¹²¹ Kevin P. Gallagher, "Understanding developing country resistance to the Doha Round" (2007) 15:1, *Rev Int Polit Econ* 62 at abstract.



The decision to include culture in CETA negotiations raised criticism since it could lead to a stronger liberalisation in cultural sectors.¹²² For example, criticism in Québec referred to the book and, more generally, the publishing sector.¹²³ Nevertheless, CETA aims to partially exclude cultural services from the liberalisation process and thus, from a commercial logic.¹²⁴ Its negotiators tried to find common ground: they tried to “mediate” between the EU and Canadian traditions of commercial negotiations to guarantee a certain protection and promotion of the cultural diversity of the two Parties.¹²⁵

Through CUSMA, Canada was able to keep the general exemption that completely excluded the liberalisation of its cultural industries, even though it probably had to accept in exchange to reduce its capability to autonomously conclude a future agreement with China. This achievement was not obvious and cannot be taken for granted, since the US has been the champion of the liberalization process in the cultural sector. Despite their limits and the compromises they required, CETA and CUSMA drew the lines of a transatlantic trade law of cultural diversity. These agreements are successful examples of how negotiations and diplomatic work can allow constructive agreements with regard to the protection and promotion of cultural diversity.

However, the coronavirus pandemic has shown us that our planet is interconnected, not only because trade globalization seems to meet very few limits, but also because if people are suffering or in danger somewhere on one side of the planet, people on the opposite side of the planet can also be affected. Therefore, although important, protectionist measures for a

¹²² Christian Rioux, “Libre-échange – Les inquiétudes de Louise Beaudoin. N’aurait-il pas fallu exclure la culture des négociations entre le Canada et l’UE?”, *Le Devoir* (27 March 2013), online: <<https://www.ledevoir.com/politique/canada/374258/les-inquietudes-de-louise-beaudoin>>; Claude Vaillancourt, “Partenariat transpacifique: bombe sur la culture”, *Le Devoir* (6 June 2016), online: <<https://www.ledevoir.com/opinion/idees/472648/partenariat-transpacifique-bombe-sur-la-culture>>.

¹²³ V. Guèvremont, *supra* note 53 at 85.

¹²⁴ See M. de Corral, ed, *supra* note 3 at 35-38; Bellucci, *supra* note 3 at 311.

¹²⁵ See L. Bellucci, “Un regard européen sur l’AECG entre le Canada et l’UE”, *supra* note 4 at 46.

“small club” of rich countries are not enough anymore. Without encouraging forms of protectionism that Baker would consider as human rights violations, we need to search for economic and legal tools that can reach beyond these measures and that consider developing countries’ needs. If the impossibility for rich countries to reach an agreement during the Doha negotiations is often underlined as the reason why these negotiations were not successful, we need to remember that the lack of attention to developing countries’ needs was also part of the *échec* of the Doha round negotiations.¹²⁶

In order to give new attention to these countries’ needs, it is crucial that global agents engaged in support of cultural diversity, like Canada and the EU, do not feel constantly in danger with regard to the possibility to keep supporting their cultural industries. Therefore, not only a stronger commitment from the EU and Canada, but also a renewed position from the US, which should be part of a renewed multilateralism, is needed. This position should therefore differ from the one that the US took during the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the US, which were launched at the G8 Summit at Lough in June 2013¹²⁷ and later suspended.¹²⁸ During these negotiations the US ambassador to the EU, William Kennard argued that: “If a mandate is released that constrains the negotiators – whatever you want to call it, a carve-out, a red line, an exception – if it’s not a clean mandate, it will increase the pressure on our side to do the same [...]. That’s only natural. There’s a quid pro quo here, and there will be a price to pay.”¹²⁹

The outcome of the *China-Publications and AV Products* case seems to confirm that, as Liying Zhang and Xiaoyu Hu observe, WTO membership

¹²⁶ See K. Gallagher, *supra* note 121.

¹²⁷ See Dominic Webb, “The Transatlantic Trade and Investment Partnership”, Briefing paper n. 06688 (4 December 2015), House of Commons Library at 3, online: <https://commonslibrary.parliament.uk/research-briefings/sn06688/>.

¹²⁸ The Council of the European Union declared that the directives for the negotiation of TTIP have become obsolete. See Council of the European Union, *Council decision authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods*, Brussels (9 April 2019) at Article 3, online: <<https://www.consilium.europa.eu/media/39180/st06052-en19.pdf>>.

¹²⁹ See Peter Spiegel, “US warns EU against exempting film industry from trade talks”, *Financial Times* (11 June 2013) at 1, online: <<https://www.ft.com/content/8a2b759e-d2b1-11e2-aac2-00144feab7de>>.

may help transform China because it seems quite difficult for the Chinese government to comply with WTO rules and, at the same time, maintain its control over cultural diversity intact.¹³⁰ Furthermore, in a few decades, Chinese cultural industries have enormously developed, such as the film industry.¹³¹ China might soon develop in the field of cultural industries a system that is not democratic, yet smoothened enough to be accepted internally because it will probably be accompanied by a more equal distribution of wealth and an ability to be economically and culturally hegemonic. One may therefore argue that rich Western countries should also consider creating relationships with developing countries that are not embedded in an imperialist and post-colonialist approach to counterbalance the hegemonic power of China, which is rising towards being the world-leading economy. However, a renewed multilateralism should not nurture narratives that focus on a polarised world and search for the enemy.

The reflection on cultural diversity within cultural industries in transatlantic trade needs to be placed in the framework of a discussion that aims to shape the narratives of inclusive capitalism both for rich and developing countries. In order to do so, we need to challenge the idea embedded in the orthodox development project that free trade will automatically generate development and that “countries will become richer by producing the things that they can produce most efficiently in their current condition and by selling those things in the global marketplace.”¹³² We know that “the current rules favor rich countries—by allowing them to protect their markets and subsidise exports through quotas, tariffs, anti-dumping

¹³⁰ Liying Zhang & Xiaoyu Hu, “Liberalization of Trade and Domestic Control on Cultural Products. The Application of Public Morals Exception in China – Audiovisual Services” (2011) 45:3 RJT 403 at 428.

¹³¹ See Media Consulting Group (Paris, Brussels and Beijing), *The Potential for Cultural Exchanges between the European Union and Third Countries: The Case of China*, Study for the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education (Brussels: European Parliament, 2009), online: <[https://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/419097/IPOL-CULT_ET\(2009\)419097_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2009/419097/IPOL-CULT_ET(2009)419097_EN.pdf)>.

¹³² Sundhya Pahuja, “Global Poverty and the Politics of Good Intentions” in Ruth Buchanan & Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford: Hart, 2014) 31 at 39. Pahuja’s sentence needs to be contextualized within a broader critique to the heterodox approach to development.

duties, export credits and subsidies to domestic producers.”¹³³ The global structure of development provides for rules and institutions that

impose and support conditions which oblige poor countries to open their markets and liberalise their investment rules. [The] borders of poor countries are opened to subsidised products [and services] from the North, destroying [or not allowing to build] local industries which cannot compete with artificial cheap imports [...]. [The current institutionalised development system] justifies the imposition on the South of legally enforceable conditions which open borders and prevent defensive policy making.¹³⁴ [However, p]oor countries cannot match these subsidies, not only because they often cannot afford to, but also because they are prohibited from doing so by international law. This prohibition arises both from trade negotiations in the context of unequal bargaining power and perhaps more insidiously, from conditionalities contained in international agreements with the World Bank and the International Monetary fund.¹³⁵

It is commonly known that cultural industries have a double nature as they are creative and artistic expressions as well as historically fragile economic activities, yet it has also been noticed that “[t]his distinction is actually factious, because the only way to truly support a film as a cultural expression is by fostering the underlying industry.”¹³⁶ Therefore, the identity and economic natures of cultural industries cannot be separated, not for rich nor developing countries.

A renewed attention to global protection and promotion of cultural diversity as a vector of identity and output of an economic sector should be at the heart of the preoccupations of the G20 next year as part of a global focus on inclusive capitalism. This will lead the three pillars of the 2030 Agenda for Sustainable Development, people, prosperity and planet,¹³⁷ beyond rhetoric enunciations and will show rich countries’ engagement

¹³³ *Ibid.* at 40.

¹³⁴ *Ibid.* at 41-42.

¹³⁵ *Ibid.* at 40-41.

¹³⁶ L. Bellucci, *supra* note 1 at 211.

¹³⁷ UN General Assembly, “Transforming our world: the 2030 Agenda for sustainable development”, Resolution A/RES/70/1 (25 September 2015), <[https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E;)>; United Nations, “Transforming our world: the 2030 Agenda for Sustainable development”, A/RES/70/1, online: <<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>>.

for future sustainability. It will enable multilateral diplomacy to become a concrete tool in order to reverse global inequalities.

These considerations should guide rich countries. They will contribute to improving the living conditions of millions of people, helping them to achieve better economic standards and adopting policies that are less harmful to the planet. If we do not take concrete action towards these goals, we cannot pretend to be worried about systemic violations of human rights.