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Part I

**Emphasizing the specificity
of cultural goods and
services in international law**

Part I.a	The CDCE impact on trade issues – the “trade and culture” debate	25
Part I.b	The CDCE impact on other fields of international law – a systemic approach	95

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1 Effects of the CDCE on trade negotiations

Antonios Vlassis and Lilian Richieri Hanania¹

Introduction

The negotiation of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) has ultimately been pushed for in response to the “trade and culture debate” and the need, expressed by some countries, for States to maintain enough policy space in the cultural sector despite market liberalization resulting from trade agreements. Therefore, a study on the effectiveness of the CDCE requires, among others, an analysis of how this convention has impacted or may impact trade negotiations and support its parties in safeguarding their existing level of policy space in the cultural sector.

The present chapter briefly describes the movement which led to the adoption of the CDCE provisions regarding its relationship with other treaties – and notably trade agreements – the way the “trade and culture debate” evolved from multilateral to bilateral and regional trade agreements and the role the CDCE may play in trade negotiations. As an illustration, it examines some current and particularly strategic negotiations, namely the trade agreements between Canada and the European Union, and the United States and the European Union, as well as the plurilateral initiative on services within the WTO.

I Trade-culture: from opposition to complementarity?

While the exclusion of cultural sectors from trade agreements has been at the heart of the “trade and culture debate” for decades, recent European experience in implementing the CDCE demonstrates that the promotion of cultural exchanges may be addressed independently from trade and market access provisions in the cultural sector, through cultural cooperation mechanisms. Although fundamental risks for cultural diversity still remain in trade liberalization, the historical opposition between economic and cultural interests expressed through the “trade and culture debate” might be evolving towards a rather complementary relationship.

A The CDCE and the “trade and culture” linkage: *je t’aime ... moi non plus?*

The initial *problématique* of the CDCE refers to the international circulation of cultural goods and services and to the treatment of the latter within trade agreements, since the capacity of governments to adopt and maintain cultural policies strongly depends on their international commitments. In the 1990s, a big coalition of actors, driven by France and Canada, has defended “cultural exception” (*exception culturelle*) in order to exclude cultural products and services from the agenda of international negotiations on trade agreements, such as the last period of negotiations on the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) in 1993, the negotiations on a Multilateral Agreement on Investment (MAI) within the Organization for Economic Cooperation and Development (OECD), as well as the negotiations on the free trade agreement (FTA) between the United States (US) and Canada (1989) and on the North Atlantic Free Trade Agreement (NAFTA-1994).

By the late 1990s, however, the term of cultural exception was gradually abandoned and substituted for a more inclusive term – “cultural diversity”. As Jean Musitelli explains (Musitelli 2005: 515), the diversity of cultural expressions is built both on the overrun of a cultural exception from trade negotiations and on the creative diversity, conceptualized by UNESCO. Between 2003 and 2005, during the international negotiations for the adoption of an instrument on the Diversity of Cultural Expressions, UNESCO became the scene of controversial debates between countries in favor of the adoption of a culture-driven international legal instrument and other countries that were reluctant to the perspective of a UNESCO convention as an important balance to the WTO. On the one hand, France, Canada, China and several members of the *Organisation internationale de la Francophonie* and of the International Network on Cultural Policy (INCP)² were in favor of a binding and efficient convention against the trade regime; on the other hand, the US, Japan, Australia,³ New Zealand, Colombia, Israel and Turkey strongly objected. In addition, South Korea and Argentina suggested not including within the CDCE an article regarding the relation with other international instruments and flagging this issue from the general principles of international law. Further, India, a country with a powerful export film industry, especially in Asia and Southern Africa, was very skeptical about this issue; finally, Brazil and Mexico, which export their *telenovelas* worldwide, were also reluctant (UNESCO 2004).

Therefore, the text of the CDCE was negotiated on a deliberately ambiguous consensus (Palier 2003: 163–79), in order to preserve the foundations of a large rallying and to give the most possible universal character to the convention. Thus, French and Canadian delegations realized that the establishment of a binding international instrument prevailing on

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1 the trade regime met with strong resistance from several countries beyond
2 the US – enemies of the text. Therefore, they tried to narrow differences
3 and to establish an effective compromise. Ultimately, article 20⁴ regarding
4 the relation between trade agreements and the CDCE contains two para-
5 graphs which seem to be apparently irreconcilable. They reflect both the
6 willingness of States to exclude any subordination of the CDCE to other
7 treaties and the desire of other countries to not undermine their inter-
8 national commitments, including in the trade sector (Vlassis 2011:
9 495–500).⁵ Through this provision, the CDCE has therefore expressly
10 established a relationship based on equality vis-à-vis other treaties, having
11 from a legal perspective the same meaning as if the CDCE was silent on
12 the matter. Any conflict between the CDCE and another treaty needs
13 therefore to be examined according to the rules of the 1969 Vienna Con-
14 vention on the Law of Treaties (Richieri Hanania 2009: 327–9) and this
15 applies also to WTO agreements.

16 Indeed, the WTO has competence for trade of cultural products and
17 services and the latter are not permanently excluded from WTO negoti-
18 ations, even if the audiovisual services are one of the areas where the
19 number of WTO Members with commitments is the lowest. So far, only 30
20 Members of the organization – in particular developing countries⁶ – have
21 taken some commitments in the audiovisual sector.⁷ In this sense, we are
22 faced with the emergence of a polycentric space (Delmas Marty 2001:
23 63–80): the issue “trade-culture” lies simultaneously on two non-
24 homogenous and non-hierarchical international normative frames (CDCE
25 and GATS). Therefore, the relationship between the CDCE and trade
26 agreements will be illustrated through the practice of the parties and
27 the latter should seek to harmonize the differences between these two
28 contexts.

31 ***B From multilateral to bilateral negotiations: testing the CDCE***

32 Since 2001 (Doha Round), the WTO struggles to conclude a round of
33 trade negotiations among its Members and seeks to prove its legitimacy,
34 demonstrating that “the intrinsic virtues of multilateralism are not enough
35 to ensure the success of negotiations” (Petiteville 2004: 76).⁸ In this
36 regard, since the early 2000s, several WTO Members, including the US,
37 have opted for the bilateral pathway. The US has concluded FTAs with an
38 important number of countries, namely Chile, Singapore, Central America
39 (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) and the
40 Dominican Republic, Australia, Bahrain, Oman, Morocco and Peru, as
41 well as with South Korea, Panama and Colombia, the latter three signed
42 by the G.W. Bush administration and ratified on 12 October 2011. Among
43 these countries, Peru and Guatemala have ratified the CDCE in 2006,
44 Oman, Chile and Panama in 2007, Nicaragua and Australia in 2009, South
45 Korea and Honduras in 2010, Costa Rica in 2011 and Colombia in 2013.

During bilateral negotiations, less developed countries do not have enough resources to require provisions for exceptions that would protect them from a wider opening-up of the domestic market, and therefore, from a very brutal competition in the cultural sector. The lack of human resources and of expertise, the lack of pressure from culture professional organizations – often loosely organized and representing a poorly developed industry – as well as the ability of other more powerful sectors to influence decision-making led developing countries to give in to the demands of trading partners, such as the US, and to not preserve the cultural field. Furthermore, bilateralism also offers a power asymmetry in favor of the US due to lack of mutual support and organization among the least economically developed countries; regarding the “trade-culture” debate, these countries cannot hide behind alliances in favor of cultural policies and the recognition of cultural specificity (Morin 2003: 545).

FTAs negotiated by the US do not aim at challenging the financial support measures of countries for cultural industries (e.g., subsidies for domestic cultural production), but their objective is mainly the restriction of the regulatory capacity of governments in the cultural field, namely restrictions on investment in a country, ownership restriction for some cultural enterprises, as well as the adoption of quotas for the broadcasting sector, movie theaters and other distribution channels for audiovisual products (Vlassis 2012: 100–1). In addition, a clear interest of the US for new opportunities and markets created by the digital era and new information and communication technologies has been demonstrated through strong liberalization commitments regarding digital products and services (Richieri Hanania 2012: 432–4). In this sense, the US FTAs challenge the CDCE objectives, going against a basic principle of the latter, which recognizes the sovereign right of parties to adopt and maintain cultural policies and measures.

Seven countries – Oman, Panama, Bahrain, Guatemala, Honduras, Nicaragua and El Salvador – have not submitted specific reservations within their bilateral agreements with the US regarding the audiovisual sector; therefore, they have significantly limited their capacity to implement public policies in that sector. Likewise, in its FTA signed with the US, Morocco has not submitted any reservations regarding electronic commerce and the adoption of quotas for the audiovisual sector. Thus, it seems to be now deprived of any opportunity for regulatory mechanisms in these areas. Six countries, namely Australia, Singapore, Chile, Costa Rica, Peru and Colombia, have developed some limited reservation lists for the cultural sector: domestic content requirements, national capital requirements for cultural industries and local content requirements for advertising within broadcasting channels. It is worth noting that those countries have also lost the capacity to establish more stringent requirements and measures in the future in those areas. For instance, Chile has succeeded in protecting its 40 percent quota for public traditional

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1 broadcasting channels (not applicable to satellite and cable television),
2 but will not be allowed to increase that quota. Finally, regarding the FTA
3 between the US and South Korea, the Korean government reduced its
4 broadcasting content quota for movies and animations and established
5 quotas in the field of film production and distribution at the least trade
6 restrictive level. Korean films are now supposed to remain in movie
7 theaters 73 days per year, compared to the 146-day requirement existing
8 before the opening of negotiations. The Korean government also allowed
9 US companies with subsidiaries in the country to hold 100 percent of
10 program providers not engaged in multi-genre programming, news report-
11 ing or home shopping (US-South Korea FTA 2007: Annex I, 55).⁹

12 Due to the weak legal wording employed in the CDCE, compared to
13 the usual binding language of trade agreements, combined moreover with
14 its article 20.2 – which establishes that the CDCE provisions shall not be
15 interpreted as modifying rights and obligations of the parties under any
16 other (existing or future) treaties to which they are parties (Richieri
17 Hanania 2009: 210–22) – the political will of the parties to take the CDCE
18 into account when negotiating new agreements becomes fundamental to
19 its implementation.

20 Efforts to implement the CDCE in new agreements have recently been
21 observed in trade negotiations conducted mainly by the EU and Canada.
22 Already before the CDCE was adopted, both Canada and the EU fought
23 for the recognition of the specificity of cultural goods and services in trade
24 agreements. They each had, nevertheless, a particular way of dealing with
25 the trade and culture debate in trade negotiations (Richieri Hanania
26 2012: 423–56; Richieri Hanania 2009: 185–245). In fact, Canada had been
27 employing, in its bilateral trade agreements, a general cultural exception
28 for its “cultural industries”, defined since the NAFTA as:

29
30 persons engaged in any of the following activities: (a) the publication,
31 distribution, or sale of books, magazines, periodicals or newspapers in
32 print or machine readable form but not including the sole activity of
33 printing or typesetting any of the foregoing; (b) the production, dis-
34 tribution, sale or exhibition of film or video recordings; (c) the pro-
35 duction, distribution, sale or exhibition of audio or video music
36 recordings; (d) the publication, distribution or sale of music in print
37 or machine readable form; or (e) radiocommunications in which the
38 transmissions are intended for direct reception by the general public,
39 and all radio, television and cable broadcasting undertakings and all
40 satellite programming and broadcast network services.

41 (NAFTA, article 2106)

42
43 The EU had as well been excluding the sector of audiovisual services from
44 the non-discrimination rules of bilateral and regional trade agreements
45 through a horizontal exclusion of that sector under the services chapter of

those agreements. The entry into force of the CDCE has given a new impetus to the traditional positions of both Canada and the EU.

The European Commission has attempted to overcome the historical opposition between culture and trade by proposing the integration of cultural cooperation provisions expressly based on the CDCE into trade agreements, under a “protocol” or an autonomous “agreement” on cultural cooperation (Richieri Hanania 2012: 440–8; Souyri-Desrosier, Chapter 14 of this volume). Despite strong criticism regarding the way new Protocols on Cultural Cooperation were initially negotiated and their capacity to satisfyingly implement the CDCE (Vlassis 2010; Richieri Hanania 2012: 440–52), the EU’s attempt offers an illustration of a relatively strong political influence of the CDCE and a new standpoint regarding the “trade and culture debate”. Based on this experience, cooperation provisions may be seen as allowing for culturally enriching and balanced cultural exchanges, without challenging the need for a specific legal treatment for cultural goods and services in trade agreements and without requiring commercial market access commitments. States may therefore maintain the largest policy space possible for existing cultural measures and the adoption of new ones, while promoting interculturality and cultural dialogue, which are essential components of cultural diversity.

While tensions have certainly been raised among EU Member States and vis-à-vis the European Commission during the negotiations of such protocols or agreements on cultural cooperation, the CDCE has with no doubt directly contributed to discussions and to awareness regarding the need for each Member State to elaborate its position on the “trade and culture debate”. Ongoing negotiations offer further examples of the CDCE capacity to influence new trade agreements.

II Ongoing and future trade negotiations: the CDCE at a turning point

The EU–Canada and EU–US negotiations raise considerable risks but also opportunities for the CDCE implementation. In the EU–US negotiations, the EU will confront the most important opponent to the CDCE, while in the EU–Canada negotiations the greatest promoters of its adoption face each other with different interpretations on the consequences of the CDCE to the trade and culture debate. The extent to which the CDCE may be taken into account at a larger level might also be observable in the plurilateral negotiations on services within the WTO. Moreover, stakeholders are facing a continuing crisis of public deficit, a multilateralism *à la carte* led by the US (see below) and the digital mutation that radically changes the cultural industries landscape. In this regard, they seek, on the one hand, to adjust their strategy and to propose new approaches and, on the other hand, to adopt strategic paths already experienced in the past.

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1 One thing is certain: the issue of the diversity of cultural expressions is at a
2 turning point, entering into a new dynamic and turbulent period.
3

4 ***A An opportunity for the CDCE implementation: the Canada–EU FTA***
5

6 Launched in 2009, the negotiations between the EU and Canada for a
7 Comprehensive Economic and Trade Agreement (CETA) will probably be
8 fulfilled in 2013. Initially, negotiations raised many concerns from the
9 European and Canadian culture organizations, as well as parliamentarians,
10 about the place of cultural industries within the agreement agenda. The
11 sticking point between the EU and Canada dealt with the way to treat the
12 cultural sector, since the Canadian negotiators have been using a broad
13 definition of cultural industries, including many services (telecoms) that
14 the European Commission excludes from the cultural field or cultural
15 sectors that the Members of the EU do not have the tradition of excluding
16 from negotiations. In late February 2013, the Canadian Coalition for Cul-
17 tural Diversity¹⁰ explained Canada’s position by recalling that, although
18 Canada and the EU pursue the goal of cultural exclusion, the EU includes
19 a limited exception to audiovisual services, whereas Canadian exception is
20 “on all cultural industries and on all chapters of trade agreements”.

21 Canada’s proposal was to adopt a new approach to cultural exception
22 including three elements: (i) the preamble of the Agreement would expli-
23 cally mention the CDCE and the grounds on which the two trading part-
24 ners agree to a cultural exception; (ii) Canada would include its traditional
25 large definition of cultural industries; and (iii) cultural exception would
26 be required in each of the agreement chapters considered relevant for
27 Québec’s and Canada’s cultural policies and support measures to protect
28 culture. In accordance with previous strategies,¹¹ Canada intended to build
29 explicit pathways between international culture law and international
30 trade law, inspired by an established practice within environmental law.
31 The inclusion of explicit references to the CDCE and to cultural diversity
32 in the FTA between the EU and Canada seems to be a considerable pro-
33 gress in terms of the strengthening of international culture law and
34 account for the cultural development of societies in the trade regime.

35 Such inclusion may now be used as a precedent in future agreements.
36 This new approach could be requested by the EU and Canada when
37 dealing with trade partners who would oppose a general cultural excep-
38 tion, such as in the negotiations for the Trans-Pacific Strategic Economic
39 Partnership (TPP), the trade agreement between the US and the EU or
40 the negotiations for a plurilateral agreement on trade in services within
41 the WTO. From this perspective, the solution proposed by Canada for its
42 FTA with the EU may be seen as an opportunity for an effective imple-
43 mentation of the CDCE and the cultural sector. Such an FTA should allow
44 stakeholders to be oriented towards practices that are more compatible
45 with the CDCE objectives and to reinforce the visibility of the latter within

international trade law. Further, the inclusion of the CDCE in a bilateral FTA is also supposed to build normative bridges between international and bilateral levels in order to mitigate a major problem in the regulation of cultural industries, namely the gap of normative evolution in different temporal and spatial scales (Young 2002).

B Challenges to the CDCE implementation: negotiations with the US, multilateralism à la carte and digital mutation

As mentioned before, the deceleration of multilateral negotiations within the WTO has contributed to fostering bilateral, regional and plurilateral initiatives. Ultimately, the strategy of promoting bilateralism and plurilateralism provides a picture of confusion and dispersion of the trade system in which each actor, and especially the most powerful, finds in trade agreements *à la carte* what suits them. In his second term and in view of the persisting crisis of public debt in many countries, the Obama administration is well positioned to stimulate the opening of transcontinental markets and to adopt the pathway of a multilateralism *à la carte* as the best strategy for promoting US trade interests. In early 2013, the US and the EU agreed to strengthen their economic relationship by opening negotiations for the conclusion of a comprehensive bilateral agreement on trade and investment. In addition, 18 rounds of negotiations on the TPP have already been conducted and the Obama administration also intends to promote the plurilateral trade negotiations in the services sector within the WTO.

The development of the three above-mentioned negotiations in respect to the cultural sectors will also depend on the economic context of those countries in those sectors and, consequently, the economic interest they may have in promoting commercial exchanges of those particular goods and services. Taking the audiovisual sector as an example (WTO 2012: Section 4.8.1), a first observation is the existence of an unequal exchange between the EU and the US. In 2010, the EU imported more than it exported, and it is still the most significant gateway for US audiovisual services (55.4 percent of total US exports in the audiovisual sector, with a value of nearly US\$7.5 billion). On the other hand, the US remains an important destination for audiovisual services from EU-27, but their value only reached US\$1.7 billion that same year (15.8 percent of exports from the EU-27 in that sector). Similarly, Canada, Japan, Australia, Mexico, South Korea, Switzerland, Norway and New Zealand are major markets for US audiovisual services and, in 2010, they represented 27.8 percent of total US audiovisual exports, with a value of more than US\$3.7 billion. Finally, the EU and the US, with Canada, Norway, South Korea, Hong Kong and Australia, are major exporters of audiovisual services for a total value of US\$27 billion.

Furthermore, it is important to point out that digital technologies have been progressively playing an essential role; they are perceived both as an

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1 engine of economic growth in the US and as an instrument for the reaffir-
2 mation of the US soft power. Because of the economic growth potential of
3 information and communication technologies and the US comparative
4 advantage in this field, one of the major US priorities is now to include
5 non-linear audiovisual services in the agenda of trade negotiations. A
6 linear service is an audiovisual media service passively received by the user,
7 such as conventional television programs, while a non-linear service is a
8 non-programmed audiovisual media service requested by the user, such as
9 video-on-demand (Malaret Garcia 2010: 29–52; Libert 2010: 97–110).
10 Thus, the Obama administration is no longer seeking to challenge the fin-
11 ancial and regulatory capacity of governments in the field of traditional
12 linear services (movie theaters, DVD, conventional television), but it aims
13 to prevent the implementation of regulatory measures in the new technol-
14 ogies field, on internet service providers and new audiovisual services
15 which represent the future of the sector. A characteristic example is the
16 American company Netflix, which offers films through online streaming
17 in many countries, as well as flat rate DVD by mail in the US. In May 2013,
18 the service had about 37 million subscribers and was available in the US,
19 Canada, Mexico, the United Kingdom, Ireland, Sweden, Finland,
20 Denmark and Norway.

21 The substantial economic interest of the US in new opportunities
22 brought by the digital era should be a decisive factor in the negotiation
23 processes mentioned above. As regards particularly the EU–US negoti-
24 ation, the bargaining process on this matter should also be influenced
25 and/or complicated by a certain number of issues.

26 On the one hand, the “EU–US Trade Principles for Information and
27 Communication Technology Services” (Transatlantic Economic Council
28 2011), signed in April 2011 in the framework of the Transatlantic Eco-
29 nomic Council (TEC) and aiming to establish non-binding trade-related
30 principles to support the development of international technology net-
31 works and services, will likely be put forward by the US in order to
32 promote market liberalization in the digital sector. Despite the indication
33 that those principles are without prejudice “to the policy objectives and
34 legislation” of the parties, covering inter alia “the enhancement of cultural
35 diversity (including through public funding and assistance)”, the different
36 interpretation the parties have regarding cultural diversity and how it
37 should be enhanced can be a stumbling block for practical effects of this
38 clause (Richieri Hanania and Ruiz Fabri 2014).

39 On the other hand, in mid-June 2013, 27 Members of the EU agreed on
40 the exclusion of audiovisual services from the European Commission
41 mandate for negotiations with the US. However, during the transactions
42 and according to the offers to be made by the Obama administration, the
43 European Commission could reconsider the mandate if the European gov-
44 ernments authorized it unanimously. Moreover, there is no strong consen-
45 sus within the EU regarding such cultural exception and the current

debate highlights a gap between two divergent positions, already present in the 1993 GATS negotiations: a position in favor of public intervention in the cultural sector, and a position encouraging economic regulation of the sector (Littoz-Monnet 2007; Vlassis 2013). We find indeed 14 ministers of culture, including those of France, Germany and Spain, who support a total exclusion of audiovisual services from the negotiations agenda and are backed by professional organizations in the cultural field – powerful actors within the EU, often getting media coverage – and the European Parliament. In opposition, the majority of ministers of economy and trade of the Member countries, and especially Germany, the United Kingdom and the Netherlands, are primarily inspired by commercial considerations about the audiovisual sector. They argue that the Commission should not exclude many commercial areas of its mandate in order to strengthen its negotiating position and to ensure reciprocity with the US. In addition, the majority of the commissioners¹² and of the new players in the audiovisual sector, such as telecommunications operators and big internet companies, are in favor of including the audiovisual sector in the agenda.

In the context of such a global negotiation, addressing many interdependent areas, there will likely be a strong pressure from one area to another and a potential risk for the audiovisual sector to be an element of concession. According to European negotiators, cultural exception significantly reduces the negotiating capacity in other sensitive industrial sectors, such as aviation and maritime transport. Considering that the major priority of the European trade negotiators is to maximize trade efficiency, they could in the future request a review of the European Commission mandate. In this regard, the negotiations will be subject to the strength and determination of the current alliance in favor of cultural exception, the political willingness of other powerful European countries, the attitude of the trade negotiators of the European Commission, as well as how the US pressures will be tackled. Therefore, for the alliance of actors in favor of cultural exception, it is essential to move from a so far largely defensive posture to a more inclusive, proactive and positive approach, *inter alia* based on the principles and standards prescribed by the CDCE.

As regards the TPP negotiations, among the 12 participating countries, namely Australia, Brunei Darussalam, Canada, Chile, the US, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, the US, Brunei, Japan, Singapore and Malaysia have not ratified the CDCE, while seven countries, namely the US, Japan, Singapore, Malaysia, New Zealand, Vietnam and Mexico have already undertaken commitments in the audiovisual sector in the WTO. The impact of the CDCE on those negotiations, even from a political standpoint, will thus probably be quite limited.

Finally, the WTO plurilateral negotiations in the services sector demonstrate that the sustained lack of progress in the negotiations within the WTO does not reflect the overall deployment of the most dynamic and

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1 influential economic actors. Plurilateral negotiations offer more autonomy
2 and flexibility to negotiators compared to the bureaucratic burden and
3 the continuing disagreements within international institutions such as the
4 WTO (Deblock 2010: 152–70). Based on reciprocity of economic interests,
5 this type of negotiation allows the major economic powers to go much
6 further in terms of content and commercial discipline and to marginalize
7 other countries (e.g., Brazil, China, and India) which do not participate in
8 the negotiations.

9 The current plurilateral services negotiations include 21 developed and
10 developing economies, namely the US, Australia, Canada, Chile, Colomb-
11 bia, Costa Rica, the EU, Hong Kong, Iceland, Israel, Japan, Mexico, New
12 Zealand, Norway, Pakistan, Panama, Peru, South Korea, Switzerland,
13 Taiwan and Turkey. Among those 21 economies, 11 have already signed
14 and ratified a FTA with the US, namely Australia, Canada, Chile, Israel,
15 Singapore, Mexico, Panama, Peru, Costa Rica, Colombia and South Korea,
16 and their negotiation flexibility might be restricted by previous positions
17 or commitments undertaken with the US. The same may be said regarding
18 nine of those economies, which have already undertaken trade commit-
19 ments in the audiovisual sector within the WTO, namely Hong Kong,
20 Israel, Japan, South Korea, Mexico, New Zealand, Panama, Taiwan and
21 the United States.

22 Some countries might however wish to elaborate and politically
23 strengthen their position in the new negotiations on the basis of the
24 CDCE. Indeed, 14 out of the 21 “Really Good Friends of Services” have
25 already ratified the CDCE, namely Australia, Canada, Chile, Colombia,
26 Costa Rica, Iceland, the EU, Mexico, New Zealand, Norway, Panama, Peru,
27 South Korea and Switzerland. Moreover, as in the case of the Anti-
28 counterfeiting Trade Agreement (ACTA), it is possible that an agreement
29 arising from plurilateral negotiations lacks the recognition, legitimacy and
30 authority needed for an effective implementation. The ambition of negoti-
31 ators and the confidentiality of the negotiating process will probably also
32 raise the discontent of societal groups and associations which are
33 traditionally skeptical about the real utility of such agreements. Cultural
34 concerns based on the CDCE should hopefully be raised by those groups
35 as well.

37 **Conclusions and recommendations**

38 The above overview of trade negotiations and their articulation with cul-
39 tural diversity unveils risks and opportunities for an effective implementa-
40 tion of the CDCE. The following proposals aim to promote the CDCE
41 influence on trade negotiations and the recognition of the specificity of
42 cultural goods and services, allowing the CDCE parties to make the most
43 of ongoing and future negotiations. CDCE parties should, from this
44 perspective:
45

- maintain the largest cultural policy space as possible in the cultural field, by excluding commitments in cultural sectors from new trade agreements; 1
- make sure that such an exclusion covers new sectors which may have an impact on cultural diversity and particularly those brought by information and communication technologies; 2
- refer explicitly and as much as possible to the CDCE in order to legitimize its position regarding the specificity of cultural goods and services vis-à-vis other goods and services; 3
- contribute to cultural exchanges through cultural cooperation provisions, and not through market access commitments; 4
- ensure transparency of negotiations and account for reactions from the civil society and representatives of the cultural sector; 5
- promote discussions with other CDCE parties regarding the way the CDCE should be applied to the “trade and culture debate”, particularly regarding the digital sector. 6

Notes

- 1 The authors wish to thank Magdalena Ličková for her careful reading and comments on this chapter. 17
 - 2 Instigated by Canada in June 1998, the International Network on Cultural Policy (INCP) was an informal, international venue where national ministers responsible for culture explored and exchanged on new and emerging cultural policy issues and developed strategies to promote cultural diversity. The last meeting of the INCP took place in 2007. 18
 - 3 The Australian conservative government adopted a very reluctant attitude vis-à-vis the establishment of an international legal instrument on cultural industries. In this regard, Australia is one of four countries that abstained from the adoption of the CDCE. However, since 2007 and the arrival of the new Labor Party government, Australia has broadly changed its strategy, by ratifying the CDCE in 2009 and by contributing to the International Fund for Cultural Diversity in 2011. 19
 - 4 The inclusion of article 20 largely reflects the particularity of the CDCE vis-à-vis other legal texts of UNESCO. The CDCE object does not refer to cultural diversity in the broadest sense of the term, but to a specific aspect of the latter regarding cultural goods and services distributed by cultural industries. 20
 - 5 Article 20 CDCE reads: 21
- 1 Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, 22
 - a they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and 23
 - b when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention. 24
- 2 Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties. (UNESCO 2005) 25

- 1 6 Armenia, Cape Verde, Central African Republic, China, Dominican Republic,
2 El Salvador, Gambia, Georgia, Hong Kong, India, Israel, Japan, Kenya, South
3 Korea, Kyrgyzstan, Lesotho, Malaysia, Mexico, New Zealand, Nicaragua, Oman,
4 Panama, Saudi Arabia, Singapore, Jordan, Taipei, Thailand, Tonga, the United
5 States and Vietnam.
- 6 7 An interesting point that reveals the US pressures in favor of the audiovisual
7 sector liberalization within the WTO is that 18 governments out of 134 found-
8 ing Members of the WTO undertook some commitments in the audiovisual
9 sector in 1995, while in the period 1996–2011, 12 governments out of 21 new
10 Members of the WTO adopted commitments in audiovisual services.
- 11 8 Translated by the authors.
- 12 9 In the 1990s, the Korean government established a system of subsidies and
13 screen quotas giving a considerable boost to Korean film production (63.8
14 percent market share in 2006 compared to 30 percent of Hollywood produc-
15 tions) (Korean Film Council 2009: 23).
- 16 10 The Canadian Coalition for Cultural Diversity represents the members, artists
17 and creators of 33 leading Canadian associations of cultural professionals and
18 has a leading position within the International Federation of Coalitions for Cul-
19 tural Diversity, which totals 43 national coalitions.
- 20 11 It should be noted that, during the debate about the host organization of an
21 international instrument on the diversity of cultural expressions in the early
22 2000s, the Liberal government of Canada encouraged the establishment of an
23 autonomous instrument hosted by the International Network on Cultural
24 Policy, as the Kyoto Protocol in the global environmental governance. However,
25 the French President, Jacques Chirac, and the French government favored the
26 negotiations on this instrument within the United Nations system, and particu-
27 larly within UNESCO.
- 28 12 It is important to stress that three European commissioners, namely Androulla
29 Vassiliou, Commissioner for Education and Culture, Michel Barnier, Com-
30 missioner for Internal Markets and Services, and Antonio Tajani, Commissioner
31 for Industry and Entrepreneurship, came out against the inclusion of sensitive
32 areas such as culture and audiovisual in the European Commission mandate.

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