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The Cultural Industries and the Legacy
of Article IV GATT:
Rethinking the Relation of Culture and
Trade in Light of the New WTO Round

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The Cultural Industries and the Legacy of Article IV GATT:
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Abstract/Résumé

At the time of its drafting Article IV GATT relating to cinematograph films was designed to recognize the importance of the media for the Contracting Parties' sovereignty, cultural cohesion and identity, as well as their economic force in the stimulation of domestic production. Since its adoption in 1947, however, important technological innovations have taken place, leaving their imprint on the quality as well as the quantity of international trade and commerce. The numerous changes, however, have only been partially recognised in amendments to the GATT, as introduced by the past eight trade liberalisation rounds. Most of all, the issue of the audiovisual media, despite the strong controversy it caused during the Uruguay Round, was left to subsequent negotiations, to be undertaken in a new round of trade liberalisation.

In light of the new negotiation round launched in Doha in November 2001, this note argues that the original reasoning behind Article IV GATT is still valid and that the special, namely dual, quality of the media must be recognized in a future framework of international trade under the aegis of the World Trade Organisation. This recognition, however, may take several forms, some of which Canada and the European Union have exemplified in their experiences on a regional level. Based on these experiences, the author examines the main features of possible case scenarios and offers remarks with respect to their eventual positive and negative effects.

À sa rédaction, l'article IV GATT concernant les films cinématographiques visait à reconnaître l'importance des médias tant pour la souveraineté, la cohésion et l'identité culturelle des parties contractantes, que pour leur force économique dans le processus de stimulation de la production nationale. Toutefois, d'importantes innovations eurent lieu depuis lors, affectant la qualité et l'importance quantitative du commerce international. Les diverses évolutions ne furent que partiellement reflétées dans les amendements du GATT au cours des huit dernières séries de négociations. En particulier, le problème des médias dans le secteur audiovisuel fut à peine traité, malgré l'importante controverse soulevée à ce sujet lors des négociations de Uruguay, et sa résolution dépend toujours d'une nouvelle négociation de libéralisation de commerce.

Au vu de la nouvelle série initiée à Doha en Novembre 2001, cet article affirme que le raisonnement sous-jacent à l'adoption de l'article IV est toujours valide et, que la spécificité du secteur, du fait de sa dualité doit faire l'objet d'une reconnaissance expresse dans un futur cadre juridique du commerce international sous les auspices de l'Organisation Mondiale de Commerce. Dès lors, cette reconnaissance pourrait prendre plusieurs formes, dont quelques unes sont illustrées par les expériences respectives du Canada et de l'Union Européenne dans un cadre d'intégration économique régionale. Sur la base de ces expériences, l'auteur examine les caractéristiques principales des scénarios potentiels et propose certaines réflexions sur leurs éventuels effets positifs ou négatifs.
1. Introduction

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

Y. Tauber, Beyond the Letter of the Law

One conflict that occupied the minds of the “founding fathers” of the GATT, during the negotiations for an International Trade Organization (ITO) more than half a century ago, concerned the treatment of “cinematograph films” under the proposed multilateral trading regime. The conflict’s underlying conceptual problem was whether films, the dominant medium at that time, fall within the regulatory scope of trade or within that of cultural policy. Eventually, the latter perception prevailed, and the compromise reached in Article IV GATT allowed Contracting Parties to establish screen quotas by exempting cinematograph films from the national treatment principle.

In the following years, the world, and with it the patterns of international trade, changed and culminated in the creation of the World Trade Organization (WTO) in 1994. Indeed, the creation of the WTO cured at least some of the initial institutional flaws inherent in the GATT system, which were caused by the failure of the ITO to come into existence. In particular, the WTO expanded its regulatory scope to new areas, such as services, intellectual property rights and investment measures. Nonetheless, the old – if not perpetual – conflict pertaining to the relation between trade and culture persisted within the new order. Under the wider notion of a “culture and trade conundrum”, or, more precisely, the conflict between trade liberalisation and cultural protectionism, the old conceptual problem emerged in new ways, and this time incarnated in the form of newly invented technologies and media, characteristic of the emerging information society. In a narrower sense, the challenge posed by cinematograph films fifty years ago has been transformed into questions related to the appropriate treatment of the various goods and services pertaining to the cultural industries in trade rules.

This last question extensively occupied the negotiating teams of the Uruguay Round prior to the creation of the WTO’s “single undertaking”, but to no avail since the issue was postponed for the next round. In 2001, a new trade liberalisation round was launched in Doha, and the perpetual conflict is likely to come to the fore again. This time, although the old challenge prevails, there are new determinants based on new experiences which deserve due consideration. Consequently, this note argues that the original reasoning behind Article IV GATT is still valid. Moreover, in today’s reading the text and context of Article IV establishes a mandate for the WTO Members to reconsider carefully the cultural industries’ position within the multilateral trading order. This mandate includes an obligation to ponder on the relation between trade and non-trade issues as they find their reflection in the institutional organisation of the international order as a whole, but specifically in light of the need for greater coherence.

Under this aspect, part I of this paper follows the evolution of Article IV from the historical origins in the Havana Charter for an International Trade Organization to the creation of the WTO. Hereby, special weight is given to the institutional setting of the GATT within the wider framework of general international law. Part II lays the foundations for a discussion of the wider implications that the decision of the WTO to stay outside the UN system brings about for Article IV. In addition to this horizontal challenge, it analyses the subsidiary role of regional trade agreements (RTAs) within the multilateral context. A clarification of the status of RTAs and a brief survey of the substantive legal changes following important technological innovations may help to determine the validity of various provisions on culture, or the cultural industries, for the interpretation and amendment of Article IV in the course of a new round. Part III fleshes out two main policy options that compete for the realisation of the mandate in the next trade liberalisation round. The two options depart from different positions that caused a deadlock over the treatment of audiovisuals in the Uruguay Round and reflect practical experiences gained at a regional level in NAFTA and the EU. Finally, a short critical evaluation of new proposals for a specific treatment of culture under trade rules conclude this note.

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2. The Background of Article IV: From the Havana Charter to the Uruguay Round

2.1. The Origins of Article IV in the Havana Charter

The text of Article IV GATT first appeared in the form of Article 19 of the Havana Charter for an International Trade Organization (ITO).\(^2\) In the Havana Charter Article 19 found itself embedded among not only classical provisions on trade policy, such as those concerning the reduction of tariffs and elimination of preferences or quantitative restrictions, but also among those having a wider outreach such as rules on employment and economic activity (e.g. avoidance of unemployment or underemployment, fair labour standards), economic development and reconstruction (e.g. productive use of the world’s human and material resources, promotion of agreements designed to facilitate an equitable distribution of skills, arts, technology, materials and equipment, with due regard to the needs of all Members), monetary questions (e.g. cooperation with IMF), and restrictive business practices (e.g. competition rules).\(^3\) Moreover, in chapter VIII it foresaw a procedure for the settlement of differences.

The project for the creation of an international trade organisation itself built largely on work undertaken in the framework of the League of Nations, or Société des Nations (1920-1946), which was established in Geneva by the Covenant on the League of Nations as a first supranational political organisation claiming universal aims.\(^4\) Article 24 of the Covenant laid down the League’s task to serve as an umbrella under which a more orderly management of all world affairs, political, economic, financial and cultural, would develop.\(^5\) As a part of this task the League also looked for ways to combine consideration of the, at that time, separate fields of trade and politics. The absence of a regulatory framework for trade was mentioned among the main causes that lead to the Great War (1914-18). Even if the precise causal link between trade and politics could not be established, the view crystallised that the “world’s political organisations must keep pace with its economic organisations”.\(^6\)

Similar to the League of Nations’ failure to prevent and survive World War II (1939-45), the ITO never became reality. Instead, the GATT, which was negotiated in parallel to the Havana Charter as a provisional agreement for the time period until the completion of the ratification process of the former, was complemented with some provisions on trade policy contained in Chapter IV of the Havana Charter and then signed.\(^7\) Compared to the regulatory scope of the Havana Charter backed by the institutional support of the ITO, the GATT appeared as a skeletal body focusing principally on the mere reduction of tariffs.\(^8\) The ITO was not only confined to the exclusive free trade principle, but also bore elements of a more comprehensive approach taking into account both economic and social policy objectives.\(^9\) With the institutional and substantial loss, GATT found itself in a legal vacuum in the new framework established under the United Nations Charter.\(^10\) In line with the spirit of the UN Charter, the ITO was obliged to seek a relationship as a specialised agency of the UN in order to guarantee for the effective co-operation and the avoidance of unnecessary duplication in the activities of these organizations, and for co-operation in furthering the maintenance or restoration of international peace and security.\(^11\)

Unlike the ITO, the GATT, however, did not fulfil the strict requirements for a specialised agency as set forth in Article 57 of the UN Charter.\(^12\) The only direct reference to a coordination of trade policy found

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\(^3\) Compare the Articles 2, 3, 7, 8, 11, 24, 46 Havana Charter.


\(^6\) See e.g. L. Baudin, Free Trade and Peace (Paris: International Institute of Intellectual Co-operation, 1939) at 77-79.

\(^7\) General Agreement on Tariffs and Trade, 30 October 1947, 58 U.N.T.S. 187 (entered into force 1 January 1948).

\(^8\) See e.g. L. Baudin, Free Trade and Peace (Paris: International Institute of Intellectual Co-operation, 1939) at 77-79.


\(^11\) Articles 86 and 87 Havana Charter, supra note 2.

in the GATT relates to the jurisdiction of the IMF. Nonetheless, it must be added that retrospectively the mere contractual character of the GATT from the time of its origin until the creation of the World Trade Organization can also be regarded as having borne some strengths.

In fact, Article 19 of the Havana Charter survived the failure of the ITO in the form of Article IV GATT. The reasons for the survival of Article IV must be sought in the sphere of the various national laws in force during the negotiations. Already in the midst of the Great War many countries had limited the import of, or the screen-time reserved for, foreign films. The reasoning was of a dual nature, reflected in André Malraux’s characterisation of films as an art but also an industry, written in 1939. Thus, the Frères Lumière’s patented cinématographe (a motion-picture camera and projector in one) not only marked the beginning of a new medium, but also established a new art form. In accordance with this dual vocation, films, on the one hand, were recognised as an important medium for the formation of public opinion, and, on the other hand, they provided a major driving force for the curbing of sales of domestically produced goods and services. The combined economic and cultural (or artistic) character of the new media and their wide impact also formed the basis for a critical analysis in social theory which became exemplified in the coinage of the notion of Kulturindustrie (culture industry) in 1947 by Theodor W. Adorno and Max Horkheimer. Finally, coincidence or not, in 1948, the same year that the GATT entered into force, George Orwell published his novel Nineteen Eighty-Four, whose immanent criticism reaches out far beyond the 1940s, and probably even beyond the year 1984.

2.2. The Development of the GATT until the Creation of the World Trade Organization in 1995

GATT 1947 thus entered into force based merely on a provisional agreement and on the will of its Contracting Parties. From the early years, even the institutional support came from the Interim Commission for the ITO (ICITO) which was faded out only with the establishment of the WTO. The GATT rests upon two basic pillars, the Most-Favoured-Nation (MFN) clause and the National Treatment (NT) principle. Both principles aim at guaranteeing the process of further trade liberalisation, mainly with concessions on tariffs contained in the schedules. There are, however, important exceptions foreseen, such as the mentioned Article IV or Article XXIV, which allows for the establishment of free trade areas or customs unions. Backed by further provisions related to antidumping and countervailing duties, quantitative restrictions and subsidies, GATT resums its work.

Between 1948 and the final creation of the WTO eight subsequent trade rounds were held. The first four rounds concerned mere tariff reductions. The next round, the Dillon Round (1960-61) also concerned tariffs, particularly the EEC Common External Tariff, but ended in failure, leading to a new round, the Kennedy Round (1964-67). This round brought a reduction of the customs duties levied by the contracting parties by an average of a third and adopted the Antidumping Code which helped to clarify the application of Art VI (Antidumping) by specifying that for a violation of the GATT, dumping has to be the principle cause of the injury. In the Tokyo Round (1973-79) the principal focus was on the reduction of non-tariff barriers to trade but it also led to the conclusion of different specific agreements,
known under the name of “codes”. The most important of these agreements relate respectively to the liberalisation of certain fields, such as government procurement, subsidies and countervailing duties, antidumping duties, technical barriers to trade, and the definition of customs value. It was also at the end of the Tokyo Round that the possibility of granting preferential trade treatment to developing countries – in derogation of the most favoured nation clause – was definitively recognised. The “codes” however, brought about a GATT à la carte meaning that only those countries that committed themselves to the codes were bound by them, which threatened to erode the MFN principle. Further erosion through fragmentation came from various regional integration movements. In turn, the internal erosion of the GATT, however, was compensated by an expansion of the overall jurisdictional scope.

A true turning point came with the launch of the Uruguay Round in Punta del Este, on September 20, 1986. The Uruguay Round (1986-1993), like the rounds before, left the text and scope of Article IV untouched. This seems surprising, but perhaps provides the best explanation, because the audiovisual sector proved to be one of the stumbling blocks during these negotiations. Nonetheless, already the planned scope for the negotiations, as laid down in the WTO/GATT Ministerial Declaration on the Uruguay Round, left no doubts regarding the significance of the negotiations’ future impact on issues beyond the classical sphere of trade. For instance, already in the Preamble of the Declaration, the Contracting Parties emphasise their determination to “develop a more open, viable and durable multilateral trading system”. The Declaration also lists among its objectives the aim to “bring about further liberalisation and expansion of world trade to the benefit of all countries”, to enhance the “relationship of the GATT with the relevant international organisations” and to foster “concurrent cooperative action at the national and international levels to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development”. For this purpose, the Declaration reiterates the necessity to ensure mutual advantages and increased benefits to all participants and in this context recalls that “balanced concessions should be sought within broad trading areas. Moreover, the outcome of the negotiations shall be treated as integral parts of a single undertaking (principe de globalité).

At least in terms of the substantial questions pertaining to the trading regime within the GATT, the objectives and general principles laid down in the Declaration can be interpreted as a partial return to the spirit underlying the Havana Charter. It is a partial return only, because in the meantime there has been a considerable global shift from the focus on the national/international dichotomy to one concerning distinctions between various trade-related regulatory questions to be addressed on the international plane. Therefore one can say that these goals equally reflect changes in trade patterns and prospects marked by an increased complexity of an emerging information society.

During the seven years of negotiations, the most significant result that crystallised and revived the spirit of the ITO/Havana Charter was the creation of an international organisation for trade which was named the “World Trade Organisation”. The Agreement establishing the WTO created an institutional framework for the “conduct of trade relations among its members” and made all the agreements and associated legal instruments an integral part of its regulatory scope (single undertaking). The Preamble recalls past and present challenges, such as those to increase the standard of living, to ensure full employment, to allow the optimal use of the world’s resources in accordance with the objective of sustainable development and to enter into reciprocal and mutually advantageous arrangements. The

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27 Ibid. at 128 et seq.
28 Ibid. at 131-3.
30 See, for example, Karl Polanyi’s “double movement”, explained by Robert W. Cox as “the initial movement towards dominance of the self-regulating market countered by a second movement arising within society to correct the socially disruptive effects of the market through government regulation”, and John Ruggie’s concept of “embedded liberalism” to show that “the United States eventually promoted an international order that entailed important restrictions to market mechanisms so as to preserve the necessary national autonomy to implement various policies related to the development of the welfare state”; see Grez, supra note 9 at XIII and XXVII-XVIII.
32 Article II:1 and 2 WTO Agreement. Note that paragraph 3 stipulates that the Plurilateral Trade Agreements (Annex IV) are also part of the Agreement but are only binding for those Members that have accepted them.
33 Compare the Preamble of the Havana Charter with the Preamble of the WTO Agreement.
The single undertaking approach is backed by strong institutional support coming from the Ministerial Conference, the General Council, the Secretariat, Councils for Trade in Goods, in Services and for Trade-Related Aspects of Intellectual Property Rights and Trade Policy Review Body, as well as a Dispute Settlement Body.\(^{34}\) The rules governing the work of the Dispute Settlement Body are laid down in the Dispute Settlement Understanding (DSU), which underlines the DSB’s central role in providing security and predictability to the multilateral trading system.\(^{35}\) For this purpose the Members recognise that the DSU serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.\(^{36}\) The reference to the customary rules of public international law raises important questions as to, first, the institutional setting of the WTO within the international legal order, and, second, to the substantive relevance of other sources of international law. As regards the institutional setting, the WTO Agreement obliges the General Council to “make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO” and similar arrangements for “consultation and cooperation with non-governmental organizations (NGOs) concerned with matters related to those of the WTO”.\(^{37}\) Concerning the substantive law aspect, the Appellate Body in the US Gasoline case, the first case it decided, applied the general rules of interpretation of the Vienna Convention on the Law of Treaties and stated that “the General Agreement is not to be read in clinical isolation from public international law”.\(^{38}\)

In the context of the culture and trade quandary, and notably of any attempt at a proper evaluation of the actual value of Article IV, there remains room for clarification. Clarification is needed for which responsibilities of intergovernmental, and to a lesser extent for non-governmental, organisation relate exactly to those of the WTO.\(^{39}\) Linked to the institutional aspect, the same need persists in terms of substantive law, or where to draw a line between the relevance of other sources of international law.

### 3. Article IV in the WTO: An Evaluation of the Present

#### 3.1. An Institutional Perspective

**a) The Horizontal Challenge: The WTO and the UN**

Before we come to discuss the legacy of Article IV for the treatment of the cultural industries in the future, we need to cast some light on the pre-existent institutional framework in place. An analysis of the historical evolution of the multilateral trading system, from the Havana Charter to the establishment of the WTO, reveals a striking continuity with regard to the general considerations and objectives they purport. The continuity, if not stagnation, is reflected in the similarity between both the Preambles and provisions of the respective frameworks. From a comparative perspective, each of the two projects have – despite the almost 50 years and the important technological, economic, political, social and cultural changes that separate them – encountered the same principal challenges. In a slightly modified language, both projects reflect the desire to enhance the states’ trading relations to their mutual advantage and benefit. In this context, both projects confronted identical conceptual problems pertaining to life itself. In other words, they faced problems of how to perceive human nature in its entirety, and linked to this, how to accordingly organise society’s legal foundations. For the organisation of a multilateral trading regime in concreto, this challenge often meant having to decide upon the delimitation of politics from economics, or, in other words, between market self-regulation and state intervention.

This last point is where the two projects diverge the most. In the case of the ITO, it was originally planned as a specialised agency under the auspices of the UN Charter providing expertise in the field of trade together with the IMF and the Worldbank. If the ratification of the Havana Charter had not been a failure, the ITO would have found itself today embedded in a wide network of agencies and programmes for development of its member states.\(^{34}\) Article IV and VI WTO Agreement.\(^{35}\) Article 3.2 DSU.\(^{36}\) Ibid.\(^{37}\) Article V WTO Agreement “Relations with other Organizations”; compare Article 87 ITO Charter.


\(^{39}\) The issue of greater involvement of NGOs in the WTO system has also emerged in the context of the dispute settlement system in the form of the admissibility of amicus curiae briefs; see e.g. A.E. Appleton, “Amicus Curiae Submissions in the Carbon Steel Case: Another Rabbit from the Appellate Body’s Hat?” (2000) 3 Journal of International Economic Law 691 and “Issues of amicus curiae submissions: Note by the Editors”, (2000) 3 Journal of International Economic Law 701.
specialised in a great variety of fields under the roof of the UN Charter, which holds a special legal position due to its “status as a constitution for the world community” derived from its structurally homogenous nature, comparable to that of constitutional law. This special position is further underscored by the prevalence of Member States’ obligations arising from the UN Charter over obligations under any other international agreement. Under the umbrella of the UN Charter, by means of its principal institutions, the ITO would have been directly linked with the expertise provided by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Labour Organization (ILO), the World Intellectual Property Organization (WIPO), United Nations Development Programme (UNDP), United Nations Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP) and many more. This short selection of specialised agencies and programmes reflects precisely the agenda of the present “trade linkage debate”, characterised by many “trade and …” problems, such as how to combine trade and development, human rights, environment (and health), labour standards and, last but not least, culture.  

The Havana Charter, however, remained as paper and ink in the archives. The GATT, owing its existence to a provisional protocol, never sought the status of a specialised agency and most probably would not have fulfilled the requirements necessary for recognition as a specialised agency. Therefore, the GATT retained its autonomy and remained, by and large, outside the UN Charter’s direct institutional reach. The WTO decided to do the same and saw no grounds for formal institutional links between the WTO and the United Nations, although it underscored the need for the establishment of cooperative ties between the two organisations. The same position was reiterated in the General Council’s decision to continue to apply the arrangements governing the conditions of service applicable to the staff of the WTO when it noted that the WTO is a “sui generis organization established outside the United Nations system”. Notwithstanding this autonomy vis-à-vis the UN system, the WTO emphasised the need for the WTO to contribute to the achievement of greater coherence in global economic policymaking. It goes without saying that coherence in global economic policymaking first and foremost means cooperation between the WTO and the Bretton Woods Institutions, the IMF and the World Bank. The closer ties with the IMF and the Worldbank, however, do not preclude cooperation with other so-called “relevant organisations”. The Declaration on coherence, however, also highlights the undeniable fact that successful...
cooperation in each area of economic policy contributes to progress in other areas. In the same way it is undeniable that a lack of progress in other areas, such as questions of international security, have a negative impact on global economic performance and policymaking.

Under the present circumstances the WTO has rightly chosen to remain independent from the UN system. It has done so for many reasons, one of which is the static character of the UN system, which has by and large remained unaltered since its creation. In order for the WTO to preserve its expertise and efficiency, it can and should not expand its scope far beyond the issues of trade. In many ways, therefore, criticism of the WTO, and particularly of the reports issued by its panels, must be read like a recognition of the unique efficiency it has been able to establish in a multilateral context. Notwithstanding the room for amendments of the WTO system, much of the criticism is actually a criticism of the inefficiency of the UN system as a whole or at least of some specific organisations.

Although for the moment the WTO has not tied itself to the UN, broader questions centred around coherence, or the unity versus fragmentation of international law, are likely to be asked in the future. Moreover, in an increasingly complex and interdependent world economy, coupled with never-ending international security issues, the need for coherence and consistency in international lawmaking and law-applying will gain further momentum. These questions concern inter alia such as the interpretation of WTO rules and their relation to public international law; the status of the UN Charter; and the scope of coherence in global economic policymaking, or, in other words, where to draw a line between trade and non-trade values. The "major failure of history, the failure of the proposed ITO" has finally been healed. Nonetheless, the flaw repaired, it means that important questions, which could not be addressed properly in 1948, must be addressed now. In this context, it is therefore not surprising that these questions resemble, by and large, the past ones. It is clear that these questions cannot be addressed by the WTO alone, but responsibility is incumbent on the WTO Members, which are at the same time members of the UN or of some of its special agencies, to foster and strengthen coherence.

b) The Vertical Challenge: The WTO and Regional Agreements

A similar challenge for the WTO in the context of the culture and trade quandary comes from the universalism versus regionalism, or centralism versus decentralisation debate, and more precisely in successive questions about the compatibility, utility and significance of various regional economic integration projects for the multilateral GATT/WTO rules. Even the UN Charter, as a model for a strong universal instrument, explicitly authorises for its key area the maintenance of international peace and security. The "social, economic, cultural, civil, political, and economic. (3) The achievement of progressively higher levels of material well-being for ourselves and others."
The central argument in favour of regionalism, as laid down in the UN Charter and the GATT, is thus an argument based on efficiency. Regionalism is thus an option for the achievement of a higher degree of both political and economic integration. It allows a certain number of states to deepen cooperation at the regional level, thus exceeding the standards of the equivalent acquis on the global or multilateral level. In this context, the EU is the most ambitious project. Regionalism, however, also served the United States as an alternative to multilateral trade liberalisation. Next to deeper integration, regionalism also vivifies the idea of subsidiarity and the fact that some tasks can be better achieved on the local level, or, in other words, problems should be confronted simply as close as possible to where they occur. The same idea is exemplified in the subsidiarity principle of Art. 5 TEC, where subsidiarity – assisted by the principle of proportionality – not only advances the objective of efficiency but also that of democracy. The question of subsidiarity can also be applied to the context of the WTO. In fact, Jaques Bourgeois has examined relevant aspects of the subsidiarity principle in the WTO context and found room for positive effects in the division of competences between the WTO and its Members leading to improved efficiency, acceptance and compliance with WTO rules. As such, the subsidiarity principle can serve national
governments and parliaments as an insurance against the threat against national sovereignty; for the citizens of this world – in absence of private individuals’ access to legal remedies either in national courts or the WTO DSB – it could have the effect of healing the democratic deficit attached to international organisations, or of simply smoothing the human fear of “uprootedness”.

Finally, if regionalism, and related to it the principle of subsidiarity, is recognised as a strong potential for deeper integration, for a greater trade volume, an increase in efficiency, as well as improved compliance of multilateral trade rules, one might also use the same argument for new challenges, such as new media. Regionalism in the context of the GATT must indeed be interpreted in this way, because Article XXIV reflects the positive view of RTAs that prevailed in 1947. If RTAs are recognised as having achieved a higher degree of integration, as is the case in the NAFTA and most of all in the EU, by applying the argumentum e contrario, one could therefore argue the persuasive or authoritative power inherent in their experiences. For instance, recognised as such, the exemption of the cultural industries in NAFTA, and its relative counterpart in Article 151 par 2 line 3 and par 4 TEC in the EU, have a strong argumentative weight. This weight is intensified through the use of the argumen tum de minore ad maiorem, and consists in the conclusion that if specificities inherent in cultural goods and services (e.g. the cultural industries in Article 2012 NAFTA) or perhaps of culture in general (cf. Article 151 TEC) deserve special treatment on a regional level (i.e. within a limited, both in number and in scope, group of countries whose special ties are either of geographic, historical, cultural, linguistic or other nature), the need for their protection is even stronger on a global level.

3.2. The Substantive Challenge

a) Cinematograph Films or Cultural Industries?

Parallel to the dynamism inherent in the institutional framework(s), a substantial revolution has seized the regulatory scope of Article IV. Article IV GATT allows Contracting Parties to maintain under certain conditions screen quota for cinematograph films. Insofar as such quotas are in place, the content of Article IV means a derogation from the national treatment principle enshrined in Article III. Since its regulatory content does not prohibit the import of films in the territory of a contracting party or does not subordinate them to excessive taxation but only restricts their sale, namely the exhibition in movie theatres, Article IV pertains not to tariffs but to so-called non-tariff measures. This is an early reflection of a later trend which, pushed by technological innovations, moved trade restrictive measures away from the border to internal legislation and regulation. The regulatory aim of Article IV is cinematograph films, the dominant medium at the time of its drafting. As for the teleological reasons for its introduction in the ITO Charter/GATT, I have mentioned above existent national legislation restricting the import of films and reserving screen time for national productions, the recognition of the dual (economic and cultural/artistic) character of films, and the emergence of a critical social theory dealing with the long-term effects of the power of the new medium. John H. Jackson mentions objections of nations to the cinematic films in NAFTA, and its relative counterpart in Article 151 par 2 line 3 and par 4 TEC in the EU, have a strong argumentative weight. This weight is intensified through the use of the argumentum de minore ad maiorem, and consists in the conclusion that if specificities inherent in cultural goods and services (e.g. the cultural industries in Article 2012 NAFTA) or perhaps of culture in general (cf. Article 151 TEC) deserve special treatment on a regional level (i.e. within a limited, both in number and in scope, group of countries whose special ties are either of geographic, historical, cultural, linguistic or other nature), the need for their protection is even stronger on a global level.

72 Ibid, at 44.


74 See e.g. Simone Weil’s arguments and description of the needs of souls in L’Enracinement, first published posthumously in 1949, in S. Weil, The Need for Roots (London: Routledge, 2002).

75 Compare Art. 44 par 1 ITO Charter (“Customs Unions and Free Trade Areas”), which reads as follows: “Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or free-trade area should be to facilitate trade between the parties and not to raise barriers to the trade of other Member countries with such parties”; see also T.N. Srinivasan, “Regionalism and the WTO: Is Nondiscrimination Passé?” in A.O Krueger, ed., The WTO as an International Organization (Chicago: The University of Chicago Press, 1996) 329 at 330, stating that Article XXIV reflects a positive view of CU’s that prevailed at the time of drafting.


An entirely new challenge was introduced by new developments in space technology, particularly
through the launch of the first artificial satellite “Sputnik I” on October 4, 1957 by the Union of Soviet
Socialist Republics (USSR) and later through the first (small) steps of a human being on the moon, on
July 20th, 1969, by the US astronaut Neil A. Armstrong. These innovations not only meant a big step for
humanity, but also a serious challenge to terrestrial culture and laws. The sudden opening of a possible
quest of the sheer infinity of space not only posed serious problems to the intellect, but also raised
practical problems, such as the criteria for the delimitation of space from outer space and questions about
the peaceful use of outer space.87 The first concrete legal steps in this direction were taken not on the
moon, but in the Committee on the Peaceful Uses of Outer Space (COPUOS), an international,
intergovernmental body exclusively concerned with outer space.88 The legal basis of the committee
condoned the common interest of all mankind in the peaceful use of outer space and the necessity to avoid
the extension of national rivalries, the so-called “space race”, into this new field.89 The following conquest
of outer space paved the way for a further major television revolution, namely the broadcast of television
signals via direct satellite broadcasting. Direct satellite broadcasting means the transmission of signals
from the satellite directly to individual home television sets.90 This new possibility has caused serious
concerns among states in the international community, and fears about a loss of sovereignty and an
erosion of government control over information continue until today.91

Despite these changes in the environment, and although Article IV explicitly calls on the Contracting
Parties to subject screen quotas to negotiations for their limitation, liberalisation or elimination, its text has
remained the same.92 With the growing importance of television on the international plane in the 1960s,
however, its scope became subject to renewed discussions. The US stated that restrictions against showing
foreign television programmes were technically a violation of Article III:4, but acknowledged that some of
the principles in Article IV might apply to them.93 A working group and several proposals for draft
resolutions yielded no result.94

In the late 1980s, the adoption of the so-called “Television Without Frontiers” Directive by the EU,
which introduced inter alia a “European content” requirement, further challenged Article IV.95 Against
fierce protests by the US, the EU raised several arguments in its defence: First, it argued that television
broadcasting constitutes a service and not a good and does not, therefore, fall within the scope of the
GATT. Second, the local content requirement is a political commitment and hence not “legally” binding.
Third, the GATT recognises several exceptions, such as for national security, public morals, or the escape
clause for emergency actions.96 Fourth, the Directive falls within the scope of Article IV, and, lastly, an
implicit “culture exception” exists for trade in audiovisuals.97

Only a few years before, negotiations for the Canada-United States Free Trade Agreement were
launched and finally brought to a successful end in 1987.98 During these negotiations the sector of the
cultural industries risked being a major stumbling block and caused much public controversy on the

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87 See e.g. L.B. Malagar & M.A. Magloza-Malagar, “International Law of Outer Space and the Protection of Intellectual Property
88 Established on December 13, 1958 through United Nations General Assembly Resolution 1348 (XIII) and renewed by UN General
Assembly Resolution No. 1472 (XIV) in 1959.
89 United Nations General Assembly Resolution 1348 (XIII) and renewed by UN General Assembly Resolution No. 1472 (XIV) in
1959.
90 See e.g. J.E. Bailey, “Current and Future Legal Uses of Direct Broadcast Satellites in International Law” (1985) 45 Louisiana Law
Review 701.
91 See e.g. the recent example of China and its struggle with the loss of control over the flow of information, discussed in H.
Communication Law and Policy 155.
92 Ibid. at 294.
93 Art. IV lit. d.) GATT.
94 Ibid. at 294.
95 Guide to GATT Law and Practice, supra note 64 at 192.
coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television
97 Articles XXI, XX lit. a) XIX GATT.
98 See J.D. Donaldson, ““Television without Frontiers”: The Continuing Tension between Liberal Free Trade and European
Cultural Integrity” (1996) 20 Fordham International Law Journal 90 at 156.
99 Canada-United States Free Trade Agreement, done at Ottawa, December 22, 1987 and January 2, 1988, and done at Washington,
accelerated consumption, the cultural industries raise important questions about their exact impact on the ever faster consumption. On the other hand, entangled in a vicious circle of increased demand and sectors to converge in order to cope with the increased demand of information which becomes subject to services.

industries is characterised most of all by a drastic intensification in the exchange of cultural goods and services. It is difficult, if not impossible. Finally, they also show cultural values, but also industrial goods and services. Additionally, the clear-cut classification of the cultural industries codifies early predictions voiced by representatives of the Frankfurt School about the synergies between various media and their convergence into the cultural industries. These predictions have since been altogether confirmed.

During the Uruguay Round negotiations, the same arguments over the treatment of audiovisuals and their relation to Article IV in general, and, particularly, their inclusion into the GATS regime prevailed. In the course of the negotiations no agreement - apart from that to disagree - could be reached between the US and the EU positions. As a result the EU (as well as Canada) did not make any commitments linked to the audiovisual sectors and took most-favoured-nation exemptions for certain cultural services. The visible outcome of this “disagreement” in the Uruguay Round is found in Article XIX GATS, which calls for further negotiations with respect to sectoral commitments.

b) A Short Summary of the Arguments

The short survey of the principal stages in the institutional development of the multilateral trading system from the GATT to the WTO revealed the parallel process of technological change, which left its imprint on the organisation of international trade as a whole. Paradoxically, despite, or perhaps, because of, stronger international specialisation based on the idea of comparative advantage the international economic interdependency is growing. The latter often results in vertical and horizontal integration of various industries. This process was partly confronted in the Uruguay round and is today reflected in the expansion of multilateral trading rules to services, intellectual property rights, subsidies, or trade-related investment measures. In this process the cultural industries are pioneers due to their dual nature, recognised in Adorno and Horkheimer’s preference for an oxymoron. They are not only transmitters of cultural values, but also industrial goods and services. Additionally, the clear-cut classification of the cultural industries in goods and services is difficult, if not impossible. Finally, they also show characteristics of both “public” and “private” goods. Accordingly, the change in trade with the cultural industries is characterised most of all by a drastic intensification in the exchange of cultural goods and services. This acceleration, on the one hand, created strong incentives for the various cultural industries’ sectors to converge in order to cope with the increased demand of information which becomes subject to ever faster consumption. On the other hand, entangled in a vicious circle of increased demand and accelerated consumption, the cultural industries raise important questions about their exact impact on the

90 For a lengthy discussion of the negotiation process, see A. Baker Fox, The Canada–United States Free Trade Agreement and the Cultural Industries (Washington: Georgetown University, 1998).
91 Article 2005 and 2012 CUSFTA.
92 Unlike book printing and cinema, for television and following innovations it becomes more difficult to isolate a sole event or a sole inventor; see e.g. R.W. Burns, A history of the printing industry (London: The Institution of Electrical Engineers, 1998) mainly at 6; see also J. Tytler & E.J. Kelm, New Media in Europe: Satellites, Cable, VCRs and Videotex (London: McGraw-Hill, 1986) mainly at 159-178.
93 See e.g. Adorno & Horkheimer, supra note 19 at 163, explaining how former differences between the different sectors of the culture industry, such as books, music, radio, film, television, have a tendency to merge and to make up a system as a whole, resulting in the “assembly-line character” of the culture industry.
94 See N. Garnham, “Public Policy and the Cultural Industries” in N. Garnham, Capitalism and Communication: Global Culture and the Economies of Information (London: SAGE, 1990) 154 at 167, suggesting that these various media sectors must be considered and treated like a single problem; see also F. Benhamou, L’économie de la culture (Paris: La Découverte, 2001) at 82-89, stating that new technologies, in particular the advent of digital technology, equally show an impact on the production side, particularly the tendency for distinct industrial sectors to converge.
97 For a general survey of present challenges in international economic law, see e.g. J.H. Jackson, “International Economic Law in Times That are interesting” (2000) 5 Journal of International Economic Law 3.
99 This drastic acceleration has been called the “communications revolution”, see Ph.M. Taylor, Global Communications, International A Flair and the Media 1945 (London: Routledge, 1997) at 2.
human mind and subsequently their ability to influence human behaviour. In this context, the evolution of arguments, past and present alike, support those of Philip Taylor, which call for a shift of the burden of proof from those who assume a causal link between media influence and human behaviour to those who deny it.

These principal features require a closer inquiry into the historical meaning of the notion of “cinematograph films” enshrined in Article IV for the present context in the WTO. For this hermeneutical challenge of extracting the meaning of texts laid down in the past for their application in the present, several rules of interpretation exist. Different approaches include (separate or combined) investigations in the ordinary meaning of the words, the historical context or intentions of the parties, as well as the teleological reasons or aims for the adoption of the text. Each of these theories is reflected in the Vienna Convention on the Law of Treaties, which calls for treaty interpretation “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In addition, paragraph 4 stipulates that “a special meaning shall be given to a term if it is established that the parties so intended”. Still if the application of this rule leaves the meaning ambiguous, obscure, or leads to absurd results, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

Despite this plethora of interpretative tools, the relevance of the term “cinematograph films” for the present context, and particularly its applicability to various audiovisual services, is hard to establish. The difficulty is due to the dynamic evolution of the subject area as well as the overall shift from the GATT as a contractual bargain (although initially intended to be embedded in the ITO) to a more comprehensive “constitution for international trade” under the WTO. The overall dynamic evolution of international trade is also reflected in the comparison of the GATS with the GATT in its initial stage in 1947. As a further aggravating element, the initial teleological reasoning behind Article IV seems to have been superseded by reality. In the new context of an interdependent global economy with penetrable borders, the imposition of screen quota is unlikely to fulfil expectations with regard to its efficiency and utility.

Finally, the major significance of Article IV for today can be derived from a literal interpretation taking into account the (objective historical) context, as it is found in the so-called Versteinerungstheorie (petrification theory) used by the Austrian Constitutional Court to shed some light on the meaning of constitutional norms. According to this theory, an attempt at extracting the meaning of a term for the present context requires a closer investigation of the meaning which was attributed to it at the time of its adoption. From this method of interpretation it derives that Article IV reflects the original drafters intention to exempt certain sectors from free(r) trade in order to leave some space for domestic cultural policy objectives. However, given the incompleteness of the current WTO system, based on the generally dynamic character inherent in law, and most of all the dynamism inherent in theories of economic integration (e.g. the bicycle theory), the legacy of Article IV constitutes no more than a political mandate to reconsider the issue of the media in light of new challenges for their future regulation. This mandate is further strengthened by the experiences gained in the course of regional arrangement, which in some cases have carried the degree of integration beyond the multilateral acquis thus far agreed in the WTO single undertaking.

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102 Ph.M. Taylor, Global Communications, International Affairs and the Media since 1945 (London: Routledge, 1997) at 6 (his response to the sceptical call “prove it” is “prove it didn’t work”).


105 Article 32 loc. cit.

106 WTO Secretariat, Guide to the Uruguay Round Agreements (The Hague: Kluwer Law International, 1999) at 161-2 (“Each government’s schedule of liberalization commitment for trade in services is also only by a first step, comparable not with its GATT schedule of 1944, but rather with the initial limited tariff-cutting undertaken when the GATT was launched half a century ago”).

107 See e.g. C. Hyun-Kyung Kim, “Building the Korean Film Industry's Competitiveness: Abolish the Screen Quotas and Subsidize the Film Industry” (2000) 9 Pacific Rim Law & Policy Journal 353.

4. The Legacy of Article IV for the Future: “Sleeping Beauty” or “Damocles’ Sword”

4.1. General Remarks

The first guidelines to reconsider the framework of the political mandate provided by the legacy of Article IV are laid down in the Ministerial Declaration adopted on 14 November 2001 in Doha (Qatar) which launched a new round of negotiations (The Doha Round). The Declaration reaffirms the principles and objectives set out in the Marrakesh Agreement and reiterates how important it is to “maintain the process of reform and liberalization of trade policies, thus ensuring that the system plays its full part in promoting recovery, growth and development”. Comparable to the comprehensive spirit that governed the ITO negotiations, the Declaration explicitly recognises that in a rapidly changing international environment imminent challenges from poverty alleviation, the protection of the environment and the promotion of sustainable development, the protection of human, animal or plant life or health, to labour standards and the social dimension of globalisation cannot be addressed through measures taken in the trade field alone. It equally establishes a multifaceted work programme comprising issues and concerns related inter alia to implementation, agriculture, market access, trade-related aspects of intellectual property rights, trade-related investment measures, the interaction of trade and competition policy, electronic commerce and services. It also puts emphasis on the seriousness of the concerns of least-developed countries, which is a logical extension of the recognition of “the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates”.

As such the Declaration paves the way for a broad reconsideration of various trade-related and non-trade-related issues alike. There is, however, no explicit mention of either general cultural concerns (e.g. cultural diversity) or specific cultural issues (e.g. the audiovisual sector, or cultural industries). This lacuna is the principal reason why the legacy of Article IV consists mainly in a political mandate to negotiate. Thus, so far, backed by the persuasive weight of both legal and factual developments on the national and/or regional level, Article IV remains the major term of reference for the conduct and scope of these negotiations. Nevertheless, there already exist other references that allow for a brief overview of the major questions that will have to be addressed.

4.2. The Mandate and its Alternatives: Policy Options for Canada and the European Union

The references I referred to are provided by the respective experiences gained by Canada and the European Union. The Canadian example is found in NAFTA and its predecessor, the CUSFTA. The value of the Canadian experience rests in the direct involvement of the United States as a major exporter in the audiovisual sector, as well as its long tradition in multiculturalism. Moreover, the Canadian experience with the cultural industries has been exported to other bilateral or regional free trade agreements. The European Union’s experience is relevant, because of its global economic weight and the cultural dimension intrinsic to the project of integration of so far 15, and perhaps soon up to 28 Member States. It is clear that other states, even the United States themselves, have a strong interest in the exploitation of these experiences for their own domestic policies. It is too often forgotten that the United States have also built several barriers to trade in audiovisuals, such as ownership restrictions in the
television sector or restrictions for live performances based on immigration laws.\textsuperscript{116} Equally, questions based on the causal link between the media and human behaviour and about how US domination in the audiovisual sector negatively affects a particular country’s cultural integrity can also be turned around so that it becomes interesting for the US to examine the US domination of the audiovisual sector on its own internal market. Given the many uncertainties that surround the cultural industries, I believe there is no country which has no interest in this issue and is not looking for tested models of efficient regulatory approaches.

During the Uruguay round two principal approaches to the trade and culture conundrum crystallised. For reasons of continuity, and due to the impasse reached during the negotiations, these approaches are still the major options for the next round, the Doha Round. The two approaches are (a) a cultural exception, and (b) a cultural specificity clause.\textsuperscript{117} It must be added, however, that a third approach, one of a cultural exclusion, was mentioned, but was – perhaps except for tactical purposes – never seriously pursued during these negotiations.\textsuperscript{118} Cultural exclusion would be the most radical approach to the culture and trade conundrum, and, in this respect, the history of trade tells us in many episodes that trade cannot be regarded in total isolation from culture.\textsuperscript{119} Moreover, the extreme elasticity of the concept of culture does not allow for a strict definition of “culture”, and therefore a cultural relativism would threaten to erode the foundations of the entire multilateral trading order. Finally, the dual nature inherent in the cultural industries provides an intellectual challenge for their combined consideration. Just as economic characteristics of the cultural industries have an impact on culture, culture also determines economic value. A final argument against total exclusion is the spirit of Article IV itself and notably paragraph d.), which calls for further negotiations on the subject matter. For these reasons cultural exclusion is dismissed here as unrealistic, and priority is given to the two major options. This, of course, does not preclude the possible outcome of a third entirely new option, combining elements of the former two.

\textit{a) Cultural Exception}

A model for cultural exception is provided by the CUSFTA, whose relevant provisions were carried over in almost identical wording to NAFTA.\textsuperscript{120} The definition adopted in Article 2107 NAFTA seems to be sufficiently broad to cover successfully the various sectors making up the cultural industries. There exist suggestions to include in the concept of cultural industries the sectors of tourism and architectural services, as well as the supporting industries, such as various hardware providers like manufacturers of television sets, HIFI equipment, cameras, sound or video recorders. Most of all, the definition seems to possess sufficient terminological elasticity to cope with the rapid process of convergence. At the same time, the wording is precise enough to provide the necessary degree of certainty and consistency. This is particularly important in light of future negotiations, whose successful conclusion often depends on the availability of sufficiently commensurable statistical data about specific markets of cultural goods and services.\textsuperscript{121}

The main problem of Article 2107 and the negative experiences in the past relate not to the wording but the negotiation process, as well as certain institutional inconsistencies. A first problem that appears is the confusion that derives from the fact that NAFTA incorporates the relevant provisions of CUSFTA by virtue of article 2106 and annex 2106. This means that the provisions relating to the cultural industries in CUSFTA continue to be valid between Canada and the US. For Mexico, the provisions only apply in its virtue of article 2106 and annex 2106. This means that the provisions relating to the cultural industries in CUSFTA become interesting for the US to examine the US domination of the audiovisual sector on its own internal market. Given the many uncertainties that surround the cultural industries, I believe there is no country which has no interest in this issue and is not looking for tested models of efficient regulatory approaches.


\textsuperscript{117} See S. Cahn & D. Schimmel, “The Cultural Exception: Does it Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS? (1997) 15 Cardozo Arts & Entertainment Law Journal 281 at 293.

\textsuperscript{118} Ibid. at 293.


\textsuperscript{120} Cf. Articles 2005 and 2012 CUSFTA and Articles 2106, 2017 and Annex 2106 NAFTA.

\textsuperscript{121} Unfortunately, at the present this is not the case. The difficulty is most acute in the sphere of the cultural industries and partly due to private enterprise and the absence of state-controlled levy of data and partly due to definitional problems; see eg. N. Gamm, “The Economics of the US Motion Picture Industry” in N. Gamm, Capitalism and Communication: Global Culture and the Economics of Information (London: Sage, 1990) 169 at 170-171, R. Towsie, Creativity, Incentive and Reward: A New Economics of Copyright and Culture in the Information Age (Cheltenham: Edward Elgar, 2001) at 30, 33, and D. Throsby, Economics and Culture (Cambridge: Cambridge University Press, 2001) at 114.

\textsuperscript{122} Last sentence of Annex 2106 NAFTA.
in the context of the Canada Periodicals case, where the outcome was largely determined by the question about the competent dispute settlement authority.\textsuperscript{123} Although Article 103 NAFTA stipulates that in the case of any inconsistency with other agreements, NAFTA prevails, Article 2005 allows for the settlement in either forum at the discretion of the complaining party. Since the GATT recognises no equivalent to the cultural industries exception under NAFTA, the US as a complainant chose the WTO and this choice weakened the starting point for Canada as a defendant.

Finally, another problem is found in the divergent interpretations of the CUSFTA exemption of cultural industries by the two parties. The discord applies mainly to the right for each country to respond to the introduction of new measures affecting trade to the cultural industries as laid down in article 2005 paragraph 2 CUSFTA (“Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph 1”). According to the Canadian reading of the relevant article, the right of the US to retaliate is limited to measures inconsistent with the FTA and not NAFTA, and restricted to the sector of the cultural industries.\textsuperscript{131} The United States, on the other hand, sees its right to retaliate as unlimited by sectors. In the end, there remains considerable room for future uncertainty in the procedure, functioning and scope of the exemption.\textsuperscript{132} This uncertainty was strengthened during the implementation of the Appellate Body’s ruling in the Canada Periodicals case. In fact, Canada complied with the Appellate Body’s recommendations but introduced the controversial Bill C-55: A n A d Respecting A dvertising Services supplied by Foreign Periodical Publishers, which changed the situation de iure but not de facto.\textsuperscript{125} This has the effect that further doubts remain as to whether Canada is violating its obligations under international trade law.\textsuperscript{127} In the meantime, the Canadian Government has restated its firm conviction that it will not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established.\textsuperscript{128}

From an empirical perspective it is not clear whether this goal could be successfully achieved through a cultural exception in the form of the clause in NAFTA, or whether a new instrument is needed. Before pondering this question further, however, it is necessary to discuss briefly another clause that deals with the issue of culture. This clause is found in the context of the European Union.

b) Cultural Specificity

Another approach to culture, different from the exception above, is provided by the Treaty Establishing the European Communities (TEC) in Article 151 (\& 128).\textsuperscript{129} The article was only introduced in 1992, during the amendment of the TEC by the Treaty on the European Union (TEU).\textsuperscript{130} Long before this moment, however, the European Communities bore a cultural dimension without explicit mention of the concept of culture.\textsuperscript{131} One important exception was found in Article 36 (now 30) TEC, which – using the identical wording to Article XX lit. f) GATT – allows Member States to adopt restrictive measures on imports, exports or goods in transit, on the grounds of protection of “national treasures possessing identical wording to Article XX lit. f) GATT – allows Member States to adopt restrictive measures on the concept of culture.

During the amendment of the TEC by the Treaty on the European Union (TEU),\textsuperscript{131} the European Communities (TEC) in Article 151 (\& 128).


125 See supra note 18 at 9, see generally D. Brownie, The Culture Trade Quandary: Canada’s Policy Options (Ottawa: Centre for Trade Policy and Law, 1998).


artistic, historic or archaeological value”. Other exceptions concerned the field of education and vocational training. The introduction of Article 151 has introduced significant changes in the field of culture and, together with other provisions, contributed to a change of the overall structure of the EC Treaty.

Under the present pillar structure of the EU, however, Article 151 is currently embedded in a relatively coherent “constitutional” framework of norms dealing with issues beyond the domain of the four freedoms. Further references to culture in the TEU and the TEC complement the regulatory scope of Art. 151. Coherence, however, is likely to improve with the idea of a European Constitution pursued through the ongoing works of the Laeken Convention on the Future of Europe. Until further progress is made in the convention, Article 151 asks the Community to “contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. There is strong contention that article 151 was drafted in order to restrict Community action in the field of culture. This argument is backed by paragraph 5, which sets forth the prohibition of harmonisation in the field of culture, thus practically barring the possibility of recourse to other provisions for harmonisation (Art. 94, 95, and 308 TEC) if the central content of such a measure is cultural. There is, however, strong evidence that this prohibition does not preclude harmonisation bearing cultural aspects under other Treaty provisions. In any event, the apparently contradictory wording of paragraph 1 must be read in light of the functional spirit underlying EU law as a whole. Moreover, it must be recognised that part of the regulatory difficulty encountered lies in the elasticity of the concept of culture itself. Already, Adorno recognised the difficulty of regulating culture and warned of its possible detrimental effects, because the essence of culture itself may be negated when subjected to administration and planning, since culture is particularly nurtured by concepts such as autonomy, spontaneity and criticism.

The supportive and supplementary role played by the Community is specified in paragraph 2 which stipulates that action shall aim at encouraging cooperation between Member States inter alia in the area of “artistic and literary creation, including the audiovisual sector”. In terms of seeking ways for reconciling culture and trade, the most interesting provision in Article 151 is contained in the cross-section (or integration) clause of paragraph 4, which reads as follows:

The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.

The emphasis on cultural aspects for other provisions in the treaty means an important step towards cultural sensitivity, on the one hand, and coherence, on the other. Thus, despite putting limits on the Community action in the field of culture, Article 151, and most of all its cross-section clause, has established a formal recognition of culture in the context of the law governing the European Union. Besides the recognition, the said article also makes a clear statement about the importance of cultural diversity. Additionally, paragraph 3 enshrines the Community and the Member States’ joint obligation to foster cooperation with third countries and the competent international organisations in the sphere of

132 Ibid.
135 Preamble of the TEU (“DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions”); Article 3 par. 1 lit. q. TEC (“the activities of the Communities shall include a contribution to education and training of quality and to the flowering of the cultures of the Member States”); and Article 87 par. 3 d. TEC declaring that “aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest” may be considered as compatible with the common market.
140 Th. W. Adorno, “Culture and Administration” in Adorno, supra note 19 at 123.
141 Note that the wording of paragraph 4 was changed with the Amsterdam Treaty revision to the effect that “respect and the promotion of cultural diversity of its cultures” was added.
culture. In sum, Article 151 creates an obligation for the Community to take cultural aspects into account and to promote cultural diversity. This obligation also applies to the Community’s exclusive competence for trade based on Article 133 (ex 113) laying the foundations for a common commercial policy.\textsuperscript{142}

c) A Combined Approach: An International Agreement on Cultural Diversity

Similar to the drafters of Article IV GATT, Canada and the European Union’s Member States have both felt that the respective regional trade agreements they have entered into should take into account cultural aspects of international trade. In the case of Canada’s bilateral free trade agreement with the US, the solution found was a clause that exempts the cultural industries from (most of) the provisions on free trade in goods and services.\textsuperscript{143} The EU, on the other hand, was established as a customs union, but over several decades developed a broader formula that obliges the Community to take cultural aspects into account. During and following the Uruguay Round negotiations, Canada and the EU have repeatedly emphasised the need for clarification with regard to open questions in the culture and trade conundrum. Moreover, Canada and the EU are bound partly by policy statements or by treaty obligations (EU) to achieve more coherence in economic policy-making in order to equally enhance the cultural sensitivity of the multilateral trading regime.

In the tradition of Article IV, this need is felt to have grown with the creation of the WTO and the establishment of an efficient multilateral dispute settlement mechanism. Linked to this, concerns about coherence have arisen in the context of the WTO system and are expressed in the form of a wider constitutionalisation debate.\textsuperscript{144} For the relation between culture and trade, the question is no longer “whether” but instead “how” their reconciliation should be realised.\textsuperscript{145} This question, might in part be answered by examples given above. On the one hand, a clause similar to the exemption of the cultural industries in NAFTA could be introduced into the WTO system. There would still remain important questions about the exact wording of such a clause, and its position within the architecture of the WTO single undertaking. The exact position is of major importance due to the many aspects of trade touched upon by the cultural industries. The principal question concerning the position is how to combine cultural aspects of trade in goods (GATT) with those in services (GATS), and furthermore with existent issues like intellectual property rights (TRIPS), subsidies, investment (TRIMS), or future issues like competition laws and investment rules. An interesting proposal to bridge these different areas of trade is presented by Chi Carmody which – by way of a waiver for the cultural industries to the WTO agreement – aims at reconciling cultural concerns with international trade obligations.\textsuperscript{146}

In a long-term perspective, the EU’s general approach to culture and use of an integration clause is perhaps, in accordance with its high degree of economic and political integration, which clearly goes beyond a mere customs union, a more appropriate model. Without a doubt, such a model could help to bridge the gaps between different areas of trade, such as the (diminishing) difference between goods and services plus those of related measures. On the other hand, the multilateral trading order under the WTO has not even reached the state of a free trade area yet, and despite its expansion in many new areas of trade, remains fragmented in character. Therefore, the principal question to ask is whether there exists a causal link between the degree of integration and the significance of culture in the trade context. A comparative analysis of the GATT 1947 with the GATS 1994, and the GATT 1947 with its regional “offspring”, such as the EU and the NAFTA, would suggest an affirmative response. This means that the multilateral trading order, as a part of the international legal order, requires a different, i.e. more general,

\textsuperscript{142} Please note that Article 133 was amended with the Nice Treaty, which added that inter alia agreements relating to trade in cultural and audiovisual services fall within the shared competence of the Community and the Member States and shall be thereupon be concluded jointly by the Community and the Member States.

\textsuperscript{143} Articles 401, 1607 par. 4, 2006, and 2007 CUSFTA.


approach. Such an approach would re-establish the equilibrium between culture and trade that was achieved with the introduction of Article IV in the GATT but lost to subsequent changes in technology as well as the overall structure of the international trading regime while leaving the text and scope of Article IV unaltered.

One interesting example for a broader solution to the culture/trade problem that could resume the role of Article IV for the future comes from a recent Canadian initiative proposing a draft text for An International Agreement on Cultural Diversity (IACD). This proposal means a continuation of earlier work, which suggested the prime role for a new instrument is to:

- recognise the importance of cultural diversity;
- acknowledge that cultural goods and services are significantly different from other products;
- acknowledge that domestic measures and policies intended to ensure access to a variety of indigenous cultural products are significantly different from other policies;
- set out rules on the kind of domestic regulatory and other measures that countries can and cannot use to enhance cultural and linguistic diversity; and
- establish how trade disciplines would apply or not apply to cultural measure that meet the agreed upon rules.

These principal goals have been well addressed in the IACD. It also recognises the importance of cultural pluralism and freedom of expression. At the same time it avoids an uncritical bias towards culture and mirrors a careful awareness of the significance of economic aspects for the cultural industries. In this context, I would like to recall the precedent of the 1948 UNESCO Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character ('Beirut Agreement'). The Beirut Agreement is a positive example of inter-institutional cooperation, because a first draft prepared by the UNESCO Secretariat was submitted to a meeting of the Contracting Parties to the General Agreement of Tariffs and Trade (GATT), where it was revised. The IACD also seems to achieve a balance between the interest in creating and preserving local cultural content and the interest in intercultural exchange and dialogue. The definition of "cultural content" is precise, yet at the same time broad enough to combine certainty with dynamic technological change and convergence of the various cultural industries. Finally, Annex I provides a useful illustrative list of measures that parties to the agreement may take.

As such the IACD, together with the UNESCO Universal Declaration on Cultural Diversity (to which it makes explicit reference), not only provides a successful attempt to frame the open question of how to successfully combine culture and trade, but also a useful model for discussion. The most problematic element is found in Part IV and concerns institutional matters and dispute resolution. According to the explanatory introduction to the IACD and despite the early stage in the consultation process, the drafters seem to favour a solution of a separate agreement outside of a particular institutional setting and notably the WTO system. Part IV sets up its own dispute resolution system, a so-called Cultural Dispute Resolution Body (CDRB). For the alternatives with regard to possible forms of

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149 Preamble and Part I ("Principles and Objectives").
150 Intend 5, 8 and 9 of the Preamble IACD.
153 Art. I par. 4 and 7 IACD.
154 Article V par. 2 lit. b) IACD.
156 But see the Government's announcement to seek a multifaceted strategy which keeps all options open and a maximum flexibility in international agreements; IACD, supra note 147 at 1.
157 Article X-XIV IACD.
dispute settlement, the International Network for Cultural Diversity has compiled a list of prototypes in its proposal for a Draft Convention on Cultural Diversity, from the Council of Europe to the WTO.  

This last point, the question of the institutional framework for a new instrument on cultural diversity, is of major importance. Priority should clearly be given to a solution of the problem within the WTO single undertaking. The reasons are manifold. The first is the legacy of Article IV as a “Sleeping Beauty” for the new multilateral trading order under the auspices of the WTO. Precedents serve first and foremost as a reminder of important elements to consider and to help us to improve the present situation for the future. Article IV has the status of a precedent and has perhaps largely contributed to the overall success of the GATT during the past 40 years. A second reason is that in order to increase the credibility of the WTO on the international plane, the incorporation of a clause or instrument dealing with either culture, or more specifically the cultural industries, would help to enhance the WTO’s efficiency through greater coherence. Otherwise the “Sleeping Beauty” might well turn into “Damocles’ Sword” hanging over the future of global trade liberalisation. Moreover, it would clearly reflect the holistic spirit and foster the vocation to bring mutual benefits to all Contracting Parties, as it is enshrined in various legal texts from the Havana Charter, the Punta del Este Declaration, the Marrakesh Agreement, to the Ministerial Declaration in Doha. Indeed, cultural concerns relate to every Member (and non-Member) of the WTO and therefore should also be included in the negotiations, next to services, intellectual property, and investment. Third, a solution for the culture and trade conundrum outside the WTO would also mean a great loss in terms of the efficiency of the dispute settlement system combined with the geographical outreach and largely universal scope of currently 145 Members, including China. This is a dimension that a separate agreement would – I strongly believe – never achieve. Moreover, the present problem in international law is less the availability of legal instruments than their coherent and efficient use, and their application as well as accessibility.

Given the above, a separate agreement should only be pursued on a subsidiary basis, for instance, in the case of a failure to reach an agreement during the Doha Round. A further reason for the pursuit of a separate agreement would be a significant change in the structure of the UN system, which would guarantee a better institutional balance and division of labour between its different agencies and programmes, including, in one way or the other, the WTO. Then, eventually, cultural problems in the sphere of trade could be delegated (e.g. by a panel established in the WTO) to UNESCO, which in turn could use all its resources to further its principal goals. At the same time, UNESCO could again rely on the economic expertise of the WTO for a more efficient and hence successful implementation of its own activities.

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158 It mentions the Council of Europe, the Optional Protocol to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UNESCO Conciliation and Good Offices Commission, the NAFTA (Side agreements on Labour and Environment, Chapter 19), domestic remedies and the WTO DSB; The International Network for Cultural Diversity (INCD), Draft Convention on Cultural Diversity, online: INCD Homepage, http://www.incd.net/draft.html (date accessed: 15 October 2002).

159 "The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations"; Article 1, par. 1 of the Constitution of the United Nations Educational, Scientific and Cultural Organization, adopted in London, 16 November 1945, 4 United Nations Treaty Series 275.

160 See also the EU-Position on the reform and development of UNESCO, online: UNESCO Homepage http://www.unesco.org/webworld/taskforce21/documents/eu_reform_en.shtml (date accessed: 8 May 2002) mainly points 3, 6, 9, 25, 27, stating that UNESCO has suffered from a proliferation of programme activities and thus lost some of its unique profile. Therefore UNESCO should self-limit itself to its core mandate and abandon programme activities for which other members of the UN family have comparative advantage and seek or renew cooperation or partnership with other competent UN and other international organisations wherever appropriate to avoid overlapping and duplicating of activities of other such organisations.
Conclusion

The letter of the law laid down in Article IV, allowing for the establishment of screen quotas for cinematograph films, may have been largely rendered obsolete by technological and legal innovations that affected the patterns of trade from the 1940s until today. Its spirit, however, has definitely not ceased to exist. In the context of the planned creation of an International Trade Organization, Article IV GATT (Art 19 Havana Charter) has established an authoritative precedent for the relation between culture and trade. From this authoritative precedent derives the political mandate to take into account the prior reasoning that led to the decision to include Article IV in the GATT for a new negotiation round. Its authority is backed by continuous institutional efforts in international trade law to render the organisation of world trade more coherent and mutually beneficial. These efforts are reflected in various declarations that have accompanied the many negotiations rounds. These efforts have yielded important results, such as the final creation of the WTO, but nevertheless still require further measures for the proper implementation of the main principles and objectives governing international trade liberalisation.

Further support for the persuasive authority of Article IV comes from experiences gained on the regional level. In the international context of both the UN and the WTO, regionalism is widely accepted as a possibility to further the global goals through stronger regional ties. In economic terms, the main criterion is the trade creative effect that derives from either a free trade agreement, such as NAFTA, or a customs union, such as the EU. It is widely accepted that a customs union, due to its common external customs tariff and the absence of complex rules of origin, is more likely to foster the multilateral objectives than a free trade agreement. Nonetheless, with regard to culture, it is interesting to note that in the dynamic evolution of economic integration projects, trading partners often felt the need to include provisions on the cultural industries, or culture in general, in order to mitigate or compensate for negative side-effects of freer trade. This need was felt by particularly Canada in CUSFTA/NAFTA, and the various Member States of the EU. Although the multilateral trading system under the WTO has not achieved the degree of economic integration of either the NAFTA or the EU, it has still advanced considerably since the entry into force of the GATT in 1948.

A last element that advocates the idea of Article IV as an obligation for WTO Members to consider the issue of culture within the next round is the evolution of media itself. Through an objective historical lens, the regulatory scope of Article IV, as “petrified” in 1947, would correspond to a waiver for the cultural industries from the current WTO agreement as a whole. The advent of transnational television via satellite, further innovations in the media sector from video, to various new data media such as CD and DVD, as well as the computer sector, have contributed to the convergence between formerly separate sectors pertaining to the cultural industries. This convergence renders it more difficult to distinguish between the classical categories of goods and services. Here, the technologically induced increase in complexity between goods and services is paralleled by a gradual expansion of the free trade rules in the framework of the WTO to services, intellectual property rights and other trade-related measures. Thus, the same balance between economic and cultural policies achieved in 1947 could only be established through a wider instrument introducing culture into the entire WTO single undertaking.

This is the legacy of Article IV for the entire family of members, present and future ones. As such it provides a unique opportunity for members to rethink the linkage between culture and trade to their mutual advantage. This opportunity should not pass unnoticed. Unfortunately, it is impossible to evaluate the role of Article IV in the success story of the GATT 1947 between the Havana Charter and the Marrakesh Agreement. Perhaps it has fulfilled the useful role of a safety net for domestic producers and legislators tormented by cultural concerns. Moreover, in a highly interdependent globalised world, the necessity of such a safety net, or in Simone Weil’s words the “Need for Roots”, is drastically increasing. At the same time, the national division between states is decreasing through the exchange of information in real time across the globe. This in turn increases the preservation and promotion of cultural diversity on an international level. How this goal can finally be achieved is part of the responsibility of the Members of the international community. The final outcome of multilateral negotiations, a multi-player game, cannot be determined in advance. There are, however, interesting model clauses available which can help to lay the foundations for new rules reconciling two apparently opposite features of life.
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