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The Embedded Liberalism Compromise and Cultural Policy Measures

Maintaining Cultural Diversity alongside WTO Law

Franziska Sucker

INTRODUCTION

This chapter explores the relationship between WTO law regulating trade in "cultural products" and government intervention aiming to protect and promote national cultural identity and diversity of cultural expression, particularly where such intervention contributes to the preservation of domestic stability. Cultural products are goods, services and data,[1] which, while tradable, are also mediums of cultural identities that form part of a nation's embraced culture and can contribute to the formation of individual and collective cultural identities.[2] The cross-border exchange of cultural products can increase cultural offerings within a state and thereby help generate a culturally diverse environment. Simultaneously, the increasingly small differentiation between products in these markets pose a threat to the diversity of cultural products and therefore of cultural expression. In essence, this is the tension between cultural diversity and world trade. Governments attempt to counteract potential homogenization and commercialization of cultural products through the adoption of cultural policy measures.[3] These measures are primarily aimed at protecting and promoting the diversity of cultural expressions and try to strike a more appropriate balance between culture and trade. Such measures can, however, also restrict trade.

[1] On the need to acknowledge trade in data as a subject of world trade (in addition to goods and services), see F. Sucker, "Die Einordnung audiovisueller Medien in das System des Welthandelsrechts. Zugleich ein Beitrag zur Notwendigkeit der Regulierung des Handels mit Daten," *Journal of Public Law* 71, no. 1 (2016): 1.

[2] On the double nature of cultural products, see M. E. Footer and C. B. Graber, "Trade liberalization and cultural policy," *Journal of International Economic Law* 3, no. 1 (2000): 115, 117–118.

[3] Examples include subsidies, quotas, cooperation agreements and restrictions on market access, foreign investment and licenses. For a discussion of commonly adopted cultural policy measures, see ibid, 122–126.

In this chapter, I position cultural policy measures so that they may be examined through the prism of the Embedded Liberalism Compromise. My interpretation of the Compromise is as a reconciliation of market and society in which "practices of domestic interventionism would tame socially disruptive effects of markets without, however, eliminating welfare and efficiency gains derived from cross-country trade."[4] Its core principle "is the need to legitimize international markets by reconciling them to social values and shared institutional practices."[5] Cultural policy measures that promote and protect assets conveying and embodying cultural identity may be understood as antithetical to social disruption, including that triggered by open international markets. From this position, I examine the policy space and regulatory scope for governments of WTO Members[6] to minimize disruption to the diversity of cultural expressions. Elaborating first on the development of the "collective aim" of maintaining cultural diversity, I then explain how the manner of achieving this aim was reconceptualized over time. I thereafter demonstrate the extent to which cultural policy measures can be reconciled with basic WTO obligations and how the concepts of likeness and substitutability can be used to avoid the applicability of the non-discrimination obligations and of certain subsidy-regulating provisions in WTO law. I further indicate the extent to which general exceptions could be invoked to justify potential violations of basic WTO obligations. Finally, I emphasize the flexibilities provided for Members by the GATS list approach and conclude the chapter with some observations.

THE "COLLECTIVE AIM" OF MAINTAINING CULTURAL DIVERSITY

After World War I, divergent approaches among states in relation to the protection of national cultural identity and domestic cultural expressions, in particular of audiovisual media, became apparent, with European states starting to impose import and screen quotas to limit the sudden influx of visual entertainment from US production companies.[7] Fearing both economic and cultural impacts, European states wanted to protect their domestic film industries, and real debates about the relationship between culture and trade began.[8] All efforts taken by US production companies to counter these measures were unsuccessful. Only after World War II

[4] R. Abdelal and J. G. Ruggie, "The principles of embedded liberalism: Social legitimacy and global capitalism," in D. Moss and J. Cisternino (eds.), *New Perspectives on Regulation* (Cambridge, 2009) 151, 153.

[5] Ibid.

[6] In this chapter, the term 'Member' refers to WTO Members, unless otherwise specified.

[7] See, e.g., E. H. Chiang, "The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: A look at the convention and its potential impact on the American movie industry," *Washington University Global Studies Law Review* 6, no. 2 (2007): 378, 380.

[8] See, e.g., M. Burri, "Cultural diversity as a concept of global law: Origins, evolution and prospects," *Diversity* 2(2010): 1059, 1061.

did GATT Members limit the possibility of adopting quotas to screen quotas for domestic films,[9] while agreeing on a general ban on quantitative restrictions on imports and general obligations of non-discrimination. At the same time, France failed in its attempt to include a so-called cultural exception within the GATT 1947, which would have enabled the Contracting Parties to protect their cultural industries from the general, trade liberalizing provisions.[10]

The bid to specially regulate cultural goods (and services) reached its peak during the Uruguay Round (1986–1994).[11] In the end, the parties agreed to disagree about the handling of audiovisual media. While this contributed to the quietening down of the debate, proponents of a cultural exception by no means considered the scope for domestic cultural policy measures as sufficient[12] and criticized the reference to the flexibilities negotiated for audiovisual services in the GATS.[13] Shortly after, the World Commission on Culture and Development was the first to describe the concept of "cultural diversity" as an attempt to counteract a threat that globalized media markets pose in the form of cultural homogenization.[14] Subsequent UNESCO policy documents also drew attention to the rapid concentration of ownership in global media markets, warning that it would lead to control by only a handful of horizontally and vertically integrated media groups.[15]

These developments coincided with the failure of the Seattle WTO Ministerial Conference in December 1999, where several Members, in particular the proponents of a cultural exception, linked the idea of cultural diversity (with particular reference to audiovisual media) to international trade, claiming that "only adequate cultural policies can ensure the preservation of the creative diversity against the risks of a single homogenizing culture."[16] Earlier in 1999, a Canadian group of stakeholders had

[9] GATT, Article IV. On this exception, see "Quotas."

[10] In detail, see P. S. Grant and C. Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Douglas & McIntyre, 2004) 354–356.

[11] See, e.g., Burri, note 8, 1062.

[12] In more detail, see T. W. Chao, "GATT's cultural exemption of audiovisual trade: The United States may have lost the battle but not the war," *University of Pennsylvania Journal of International Economic Law* 17, no. 4 (1996): 1127.

[13] On the flexibility of the GATS list approach, see "The Flexibility of the 'GATS-List' Approach."

[14] UNESCO (ed.), *Our Creative Diversity*, (1995/1996) (Pérez-de-Cuéllar-report), 14–16 and 25–27.

[15] UNESCO, Action Plan on Cultural Policies for Development, adopted by the Intergovernmental Conference on Cultural Policies for Development, (2 April 1998), Objective 3, number 12, www.unesco.org/cpp/uk/declarations/culture.pdf; See also UNESCO (ed.), *World Culture Report 1998: Culture, Creativity and Markets*, (1998) and UNESCO (ed.), *World Culture Report 2000: Cultural Diversity, Conflict and Pluralism*, (2000).

[16] UNESCO (ed.), *Culture, Trade and Globalisation. Questions and Answers*, (2000), 38 (see also 25 and 39).

proposed creating a binding international agreement on cultural diversity.[17] The submission of two further drafts for such an instrument in 2003 by two Canadian NGOs marked the beginning of a swift, two-year drafting process within UNESCO, characterized by intense and heated debates.[18] The resulting Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO Convention) represents the first multilateral, legally binding document in the field of culture, entering into force on 18 March 2007.[19] Thus far, the Convention has been ratified by 145 states, as well as the European Union (EU).[20]

This historical review illustrates how cultural protection has been reconceptualized, from the early and unsuccessful pursuit of a so-called cultural exception in the WTO, to the proclaiming of the concept of cultural diversity by UNESCO. The change took place not in the nature of the aim but in the method of pursuing it. An advantage of this change toward a UNESCO-based approach is that it largely avoids the negative connotations of a "cultural exception rhetoric" that may imply "latent 'anti-Americanism'" and protectionism and provides a wider, more proactive and more positive perspective for the "expressed cultural aspirations"[21] Another consideration is the overwhelming number of UNESCO Convention ratifications, which demonstrates that the majority of WTO Members acknowledge the protection and promotion of the diversity of cultural expressions as a (collective) legitimate regulatory aim.[22]

One consequence of the adoption of the UNESCO Convention is, however, that cultural policy measures that affect international trade may fall within the scope of application of both the Convention and WTO law, and the two may not be particularly consistent with each other. The provisions of the Convention are of a permissive nature, regulating the sovereign right of its members "to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions."[23] However, where such measures restrict trade,

[17] See Canadian Cultural Industries Sectoral Advisory Group on International Trade, *Canadian Culture in a Global World*, (February 1999), 22; see, generally, I. Bernier, "Les exigences de contenu local en tant que moyen de défense de la diversité culturelle," 70 et seq. www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/chronique04-01-04.pdf.

[18] On the negotiation process, see UNESCO, Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of Standard-Setting Instrument on Cultural Diversity, Executive Council, Doc 166 EX/28, Paris (12 March 2003); see, also, Bernier, ibid., 71 (footnote 7) and 74.

[19] See, e.g., R. Bernecker, "The genesis of a convention under international law," *UNESCO heute* 2(2005): 12–18.

[20] As at May 2018.

[21] Burri, note 8, 1063; see, generally, P. J. Katzenstein and R. O. Keohane, *Anti-Americanisms in World Politics* (Cornell University Press, 2007).

[22] As at May 2017, 129 of the 144 UNESCO Convention members are also WTO Members. This is 78 percent of the UNESCO Convention WTO membership.

[23] Article 5.1.

they may be both permitted by one regime and prohibited by another.[24] Complex questions of norm conflicts can arise where disputing parties are both Convention and WTO members, as there will be parallel jurisdiction – conflicts that cannot be easily resolved. They are not merely the contingent or inadvertent by-product of the increasing juridification of international relations but are deliberately created in order to catalyze changes within the WTO. Overall, without the Convention, only WTO law would have been relevant for the evaluation of cultural policy measures.

RECONCILING PROTECTION AND PROMOTION OF CULTURAL DIVERSITY WITH WTO OBLIGATIONS

Reason for Supporting Diversity and the Role of Cultural Policy Measures

Diversity of cultural expressions reflects the coexistence of many and varied cultural identities and practices. It enhances the range of options, ensures the diversity of choice, helps prevent uniform thinking and reduces the risk of audiences being manipulated.[25] It is therefore crucial for forming cognizant individual and collective cultural identities, as well as for building informed individual and public opinions. National or supranational cultural support schemes commonly contain measures to create better competitive conditions for certain areas of cultural industry and to protect and promote the diversity of cultural expression.

Whether a measure contributes or poses risks to such diversity can only be determined on a case-by-case basis. For example, while promoting endangered or underrepresented cultural identities is conducive to the diversity of cultural expression (since it presupposes a variety of cultural identities), supporting only a particular, mostly domestic, cultural identity can result in isolation and one-sidedness. Favoring specific cultural goods may result in competitive advantages that facilitate market dominance and jeopardize the diversity of cultural expressions. Obligations to broadcast a specific share of domestic television[26] or

[24] On the notion of norm conflicts see, e.g., M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. ILC Report of the Study Group A/CN.4/L.702 (18 July 2006) 8 ("two norms, one of which may be permissive, if in obeying or applying one norm, the other one is necessarily or possibly violated"). Similarly, H. Kelsen, *Allgemeine Theorie der Normen* (Manz Verlag, 1979) 79, 99.

[25] See also Human Rights Committee in General Comment No 34 "Article 19: Freedom of opinion and expression" CCPR/C/GC/34 (12 September 2011), para 14. ("As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.")

[26] For example, broadcasting authorities in the EU are required to show a specific share of productions that are European: see Articles 13, 16 and 17 of the Audiovisual Media Services Directive. Similar provisions exist in Argentina, Australia, Brazil, Canada and South Africa: see I Bernier, note 19, 12 et seq.

radio[27] productions, for instance, are directed at increasing the market share of domestic productions. Foreign productions can only compete for the remaining broadcasting time, which is likely to be filled primarily with the most dominant productions (often of US origin). As a result, small and underrepresented competitors could be pushed out of the market. Subsidies can also pose a risk to diversity because the conferral of government benefits can skew competition, distort trade flows[28] and contribute to the isolation of domestic markets from competition by non-subsidized competitors.[29]

Diversity is supported by measures such as minimum quantity rules for endangered and underrepresented cultural identities,[30] building awareness and broadening public understanding of the role of the media, promotion of broad democratic participation and media transparency as well as promotion of diversity of media ownership[31] through regulating broadcasting licenses. Subsidies, similarly, can support diversity by facilitating "transfers of wealth from the general treasury to a particular group of beneficiaries, who, it is believed, could not survive, or at least could not maintain their standing, on the basis of market forces alone."[32] Most governments consider this a legitimate instrument to facilitate growth and the preservation of endangered sectors, and apply it quite extensively to promote diversity of cultural expressions, especially within the media. Such an attempt to counteract dominance by supporting small and underrepresented providers can have pro-trade and pro-competitive effects and may result in their increase and a variety of offerings.[33]

Cultural Policy Measures and WTO Law

In this section, I examine briefly the actual policy space and regulatory scope in relation to quotas, subsidies, cooperation agreements and other examples of commonly adopted cultural policy measures in the light of WTO law, particularly policy measures in the audiovisual sector.

[27] For example, Australia, Canada, South Africa, the Philippines and Uruguay: see, ibid., 10 et seq.

[28] See A. F. Lowenfeld, *International Economic Law*, 2nd edition (Oxford University Press, 2008) 216.

[29] On this aspect see T. Voon, *Cultural Products and the World Trade Organization* (Cambridge University Press, 2007) 230.

[30] German public broadcasters, for example, are obligated to provide content-diversity, a so called basic service (confirmed in numerous cases since BverfG, *Deutschland-Fernsehen-GmbH*, BVerfGE 12, 205, 260 et seq (28 February 1961)). For examples of comparable French and Italian jurisprudence see, E. Barendt, *Freedom of Speech*, 2nd edition (Oxford University Press, 2005) 447 et seq.

[31] E. Komorek, "Is media pluralism a human right? The European Court of Human Rights, the Council of Europe and the issue of media pluralism,"*EHRLR* 3(2009): 395, 397; Klimkiewicz defines external diversity as diversity of autonomous and independent media (B. Klimkiewicz, "Zwei Standards der Rationalität: Über die europäische Debatte um Medienpluralismus," *epd-medien* 42/43(2 June 2007): 27).

[32] Lowenfeld, note 33.

[33] See, e.g., M. Trebilcock and R. Howse, *The Regulation of International Trade*, 3rd edition (Routledge, 2005) 282.

Quotas

Governments often adopt quotas in the form of obligations for broadcasting authorities to hold a specific share of broadcasting time for productions of domestic origin.[34] Such quotas impair competitive conditions for foreign productions,[35] which are treated less favorably than domestic productions. Moreover, governments regularly define productions of domestic origin in such a way that involved foreign individuals are also discriminated against. The same applies to requirements for distributors to add a specific amount of offerings of domestic origin.[36]

Such obligations may also impair competitive conditions for non-domestic content or non-domestic language productions. The more the latter amount to imported goods or foreign services (and domestic content or domestic language productions to non-imported, domestic goods and services), the sooner this would be incompatible with the NT obligation.[37] Accordingly, a domestic language quota in relation to a non-widely spoken language, such as Slovenian, is more likely to result in de facto NT discrimination than a quota in relation to widely spoken languages, such as English, Spanish or Mandarin.[38] The same applies to requirements to perform in the domestic language.

In addition, quotas restricted to a particular region such as Europe or quotas extending to incorporate a specific language area, such as French, would be treating goods or services from some Members less favorably than those outside the nominated area. This would be inconsistent with the MFN obligation. Moreover, limitations on the number of importable movies per year,[39] for example, would be

[34] See notes 26 and 27.

[35] On the classification of film productions (goods and services, depending on what the measure relates to), see, e.g. Sucker, note 1, 1–9.

[36] The Spanish government, for example, adopted a national rule making the granting of licenses to dub foreign films into one of the official languages of Spain subject to a prior contractual undertaking by the distributor to also distribute a specific amount of Spanish films: see European Court of Justice, *Fedicine*, C-17/92 (1993) I-2267, para. 1. Since the distribution of foreign films within Spain appears only to be economically reasonable in its dubbed format, this amounts de facto to a co-marketing obligation for films of Spanish origin. This impairs competitive conditions for foreign films and, depending on what is considered to be of Spanish origin, foreign individuals involved therein. Similarly, the European Court of Justice found such a national rule to be in contravention of "the freedom to provide services": ibid., para. 22.

[37] On this and on the broad *ratio legis* of non-discrimination (confirmed by long-standing AB-case law, starting with Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996).

[38] Many producers worldwide use English as a producing language (on this, see, e.g., T. Voon, "State support for audio-visual products in the World Trade Organization: protectionism or cultural policy?," *International Journal of Cultural Property* 13, no. 2 (2006): 129, 135 et seq). The languages spoken the most worldwide by first and second language speakers are Mandarin (900 (L1) and 190 (L2) million), followed by English (339 (L1) and 603 (L2) million) and Spanish (427 (L1) and 94 (L2) million.

[39] For example, Sri Lanka and India restricted the import of movies to 100 per year for module 3 in "Communication Services – Audiovisual Services – Motion Picture or Video Tape

non-tariff barriers that are not compatible with GATT, Article XI.1.[40] Limitations on the number of foreign film distributors per year,[41] conditions for them[42] or limitations on foreign capital would be incompatible with the prohibition on quantitative restrictions.[43] Qualitative restrictions are as non-tariff barriers prohibited in relation to goods, for example, where licensing depends on the content of the program, but not banned in relation to services.

A specific GATT exception for goods exists for "establishing or maintaining internal quantitative regulations relating to exposed cinematograph films" of an identified origin, in the form of "screen quotas."[44] In other words, Members may support the domestic film industry by reserving screen time for domestic films, subject to meeting the requirements in GATT Article IV.[45] There is little or no interpretive scope in the wording to extend the provision from screen quotas for films to other audiovisual media[46] or to other culturally motivated restrictions. This is exacerbated by the facts that the Appellate Body applies exceptions restrictively[47] and the Uruguay Round negotiating parties eschewed the opportunity to extend the scope of the exception's application. Thus, many Members regard television programs as a service and refrain from entering into any commitments in the audiovisual service sector.[48]

Distribution Services" (CPC 96113): see WTO, India – Schedule of Specific Commitments, GATS/SC/42, 8).

[40] Exceptions are listed in GATT, Articles XI.2, XII, XVIII, IX and XIX. They are all subject to complying with the non-discrimination provision of GATT, Article XIII.

[41] For example, China restricts the distribution of foreign films to twenty per year (see Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ("*China – Audiovisuals*"), WT/DS363/AB/R, (19 January 2010) and in Egypt foreign films can only be distributed with five copies.

[42] For example, in Indonesia, all imported movies from the US and EU need to be distributed via a central Indonesian organization: see European and American Film Importers' Association, WTO Trade Policy Review Indonesia, IV. Trade Policy by Sector, WT/TPR/S/117, 24.

[43] See GATS, Articles XVI.2(a), (c) and (f).

[44] GATT, Article IV read with III.10. In detail, see, e.g., Voon, note 29, 92–96, 159–162. GATT, Article IV(c) contains an MFN exception for contingents established before 10 April 1947 (so called "grandfathering").

[45] A quota of 100 percent for domestic film-productions is not permitted, otherwise the wording "specified minimum proportion of the total screen time" would be legally ineffective. But see, e.g., W. M. Shao, "Is there no business like show business? Free trade and cultural protectionism," *Yale Journal for International Law* 20 (1995): 105, 111.

[46] In detail on TV productions, see Voon, note 29, 94 *et seq*.

[47] See, e.g., Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, ("EC – Hormones"), WT/DS26/AB/R, para. 104, (16 January 1998).

[48] In the audiovisual sector, only thirty-two Members have made some commitments, and as many as sixty-six have registered MFN exemptions. All schedules are available at www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

Subsidies

Many governments adopt cultural funding schemes that include measures conferring benefits to cultural goods and services from specific states.[49] While this is often inconsistent with the NT or MFN obligations, some forms of financial allowance may present a WTO-compliant way to minimize disruptions to the diversity of cultural expressions "without eliminating welfare and efficiency gains derived from cross-country trade."[50] For example, where a funding decision depends on economic success of previous projects,[51] on the artistic value of a good or service or on distribution difficulties of productions, (de facto) discrimination will be quite difficult to prove. Similarly, it would be hard to demonstrate discrimination in compulsory public social security and retirement insurance schemes for self-employed artists and publicists primarily working in that particular country.[52] Firstly, GATS will only be applicable to the measures "if a Member allows [the insurance] to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier."[53] Secondly, the exclusion of (foreign and domestic) artists and publicists who work only infrequently in that particular country from accessing such compulsory insurance (and thereby its social benefits)[54] does not relate to their origin.

Serious consideration should also be given to "cross-financing" measures, referring to internal charges levied independently of nationality, which are then applied in support of domestic goods or services.[55] While such levying measures do not discriminate between foreign/imported and domestic operators, productions or

[49] For example, grants, loans, equity infusions, loan guarantees, tax reduction, incentives for private investments, cross-financing, income and price support.

[50] Abdelal and Ruggie, note 4.

[51] On examples in the French film subsidy system, see, e.g., G. Bossis, and R. Raphaël, *Droit du cinéma* (L.G.D.J. Publishing, 2004) 31 et seq.

[52] Under one such scheme, the artists and publicists have to contribute only half of the required insurance premium (see, e.g., the German *Gesetz über die Sozialversicherung der selbständigen Künstler und Publizisten* (KSVG), adopted 27 July 1981, available http://www.gesetze-im-internet.de/ksvg/KSVG.pdf) while the other half of the premium derives either from the companies using their services or, in the absence thereof, from the government. See, for example, publishing houses, news agencies, theatres, orchestras, choirs, broadcasting authorities, galleries and art-dealers: KSVG, § 24(1). The compulsory "artists-social-security-levy" ("Künstlersozialabgabe") is a percentage of the self-employed artists' and publicists' remuneration: KSVG, § 25.

[53] Annex to GATS on Financial Services, para 1(c). The Annex is applicable because "[f]inancial services include all insurance and insurance-related services" (Annex to GATS on Financial Services, para. 5(a)).

[54] This is a benefit from the public retirement and health insurance, irrespective of the actual contribution.

[55] For example, compulsory levy (§ 66.2 and 3 of the German *Filmfördergesetz* (FFG)), to be used to subsidize German films, and compulsory levy (FFG, §§ 67a–68a), systems of compulsory collective administration of copyrights, according to which the government withholds a percentage of revenues and uses it to support domestic artists (for an overview of various

copyright holders, the disposition of the revenue raised is based on nationality/origin and, thus, amounts to de jure discrimination between domestic and imported productions (as well as between domestic and foreign artists). The latter may be justified by GATT Article III.8(b), which contains an exception to the NT obligation, but as the exception applies only to direct money transfers from a public authority to a beneficiary, all other allowances (by charges or regulation) are governed instead by GATT's NT provisions (Articles III.2 or III.4).[56] Moreover, GATS may apply if the revenue from the levy is applied to domestic public broadcasting and that public broadcasting operates in competition with one or more private broadcasters. If, from the perspective of consumers, substitutable broadcasters exist,[57] funding of public broadcasting services cannot be regarded as within the exception of an "exercise of governmental authority."[58] However, domestic and foreign private broadcasting authorities are usually treated the same and the differentiation between private and public broadcasting authorities is usually neither de facto nor de jure based on nationality/origin.[59]

Subsidies that relate to goods are also subject to the Agreement on Subsidies and Countervailing Measures (SCM Agreement), irrespective of whether their subsidization is permissible by way of exception to the basic WTO obligations.[60]

schemes see *Collective Administration of Copyright and Neighbouring Rights*, (WIPO, 1990)) and fee-funding of domestic public broadcasting services (Public service broadcasting is regarded as the most important pillar of the European media landscape and as a necessary supplement to commercial television for the promotion of diversity of opinions, information and culture: see Amsterdam Protocol of Public Service Broadcasting Service, 1997-C-340, (10 November 1997), 109).

[56] See Appellate Body Report, *Canada – Periodicals*, 33–34; Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, (*"Indonesia – Automobile Industry"*), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 5.39, (2 July 1998); GATT Panel Report, *US – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, BISD 39S/206, paras. 3.21–3.22 (19 June 1992) ("*US – Malt Beverages*") and *obiter dictum* in GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, BISD 37S/86, paras. 37–38 (25 January 1990) *("EEC – Oilseeds I")*.

[57] They may exist only in some categories, such as local news coverage.

[58] See GATS, Articles I.3(b) and 1.3(c).

[59] Of course, while the differentiation between domestic and foreign public broadcasting services is based on nationality/origin, public broadcasters generally do not operate within another states' territory, and NT has to be accorded only in relation to internal measures, that is, after the broadcaster or its services have crossed the border. In cases where foreign public broadcasters do provide their services within another WTO Member's territory, the obligation to accord NT depends on the specific commitments made by the respective Member. In the sector of "Radio & Television Services" the United States, for example, has committed itself to grant NT in all four services modes without any limitation (see United States of America, Schedule of Specific Commitments, GATS/SC/90, 47, 48 (15 April 1995)), while the EU has not undertaken any commitments. See European Communities and their Member States, Schedule of Specific Commitments, GATS/SC/31 and all subsequent commitments.

[60] The SCM provisions and GATT, Article III.8(b) are complementary.

Accordingly, export subsidies[61] and import substitution subsidies[62] constitute "prohibited" subsidies,[63] requiring the subsidizing Member to withdraw them[64] or face appropriate countermeasures.[65] Alternatively, where subsidies are specific[66] and cause adverse effects to the interests of another Member, they are "actionable" subsidies and require justification and rectification[67] or the payment of compensation.[68]

Note that, while culturally motivated subsidies will often not be significant enough in economic terms to cause injury to the domestic industry of another Member, they might undercut improved market access deriving from tariff concessions or cause serious prejudice to like imports.[69] Film funding programs, for example, often aim at countering the dominance of US productions within a Member's territory. While the comparable low allowances to domestic producers seldom affect this US dominance, they may incidentally affect programs from other Members.[70]

Cooperation Agreements

Many governments conclude cultural cooperation agreements with countries with which they are affiliated at a regional, language or political level, in order to intensify bilateral relations, enhance mutual understanding and raise their reputation abroad. Bilateral cooperation agreements are generally directed at treating

[61] For example, governmental grants to domestic film producers aimed at facilitating and promoting the exportation of domestic film productions and their sales abroad.

[62] For example, income tax reductions to cinema operators, to the extent that they show more domestic than imported films.

[63] SCM, Article 3.1(a) and (b). In relation to least developed countries, SCM, Article. 3.1(a) is not applicable: SCM, Article. 27.2(a), Annex VII. For other developing countries, SCM, Articles 27 and 29 include transitional periods.

[64] SCM, Article 4.7.

[65] SCM, Article 4.10.

[66] A subsidy is specific when it is not widely available within an economy, and for example, dedicated to the film industry, limited to certain producers or targeted at producers in specific regions of its territory: SCM, Articles 2.1 and 2.2.

[67] SCM, Article 7.8.

[68] SCM, Article 7.9. In contrast to compensation under the DSU, this compensation would be a permanent alternative for bringing the measure into line with WTO law.

[69] SCM, Article 6.3(a) and (b). Displacement or impediment includes any case in which there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product: SCM, Article 6.4.

[70] Furthermore, the purpose of most funding programs is to increase market share in the domestic market, which can impact on the world market share and result in serious prejudice. See, e.g., MEDIA 2007 Program (terminated 2013), which had been, inter alia, aimed at "increas[ing] the circulation and viewership of European audiovisual works inside and outside the European Union, … strengthen[ing] the competitiveness of the European audiovisual sector in the framework of an open and competitive European market": Decision No. 1718/2006/EC of the European Parliament and of the Council of 15 November 2006 concerning the implementation of a program of support for the European audiovisual sector, L327/12, (24 November 2006), Article 1(2) sentence 2 and sentence 3(b) and (c).

cultural productions and artists from specific countries "like" domestic productions and artists. This translates to according them NT outside the Member's territory and, more precisely, to granting them access to the respective national funding systems.[71] Multilateral cooperation agreements usually aim at collaboration between their parties.[72] Also in this case, cultural productions and artists from WTO Members outside the agreements do not benefit from the relevant funding systems and are thus discriminated against in relation to MFN.[73] Should the favorable treatment not be based on nationality, the question of de facto discrimination would also arise.[74] However, while GATT Article III.8(b) is not applicable mutatis mutandis to MFN violations,[75] a Member may invoke GATT Article XXIV or GATS Article V to justify MFN violations in pursuit of economic integration among parties to a preferential trade agreement (PTA), namely in pursuit of the effective enforcement of the provisions therein.[76] In relation to preferential treatment of cultural goods from developing countries, WTO Members may invoke the Enabling Clause to justify MFN violations,[77] provided that they meet the requirements in paragraphs 3 and 4 of the Clause and do not discriminate between similar developed countries.[78]

Intellectual Property Rights

Some Members grant exclusive rights for artists beyond the minimum level of intellectual property protection prescribed by the TRIPS agreement, in an attempt to incentivize cultural works. Regardless of the fact that overprotection can be as

[71] In more detail on coproduction agreements see F. Sucker, "The movies of others. Tension between culture and trade. The example of the audio-visual co-production agreement between South Africa and Germany," in E. T. Laryea, N. Madolo and F. Sucker (eds.), *International Economic Law. Voices of Africa* (Siber Ink, 2012) 55.

[72] See, e.g., IberMEDIA (8 Latin-American countries, Spain and Portugal (www.programaiber media.com/) or EURIMAGE (European productions) (www.coe.int/t/dg4/eurimages/default_en.asp).

[73] GATT, Article I.1 and GATS Article II.1.

[74] See the discussion in this chapter on quotas and de facto discrimination, in the section headed "Quotas."

[75] A reversal conclusion from the fact that GATT, Article I merely refers to paragraph 2 and 4 of GATT, Article III.

[76] While the preferable treatment in the European Audiovisual Media Services Directive, for example, is granted within a PTA (the EU), it is worth noting that this does not apply, for instance, to the preferable treatment granted among parties to the European Convention on Transfrontier Television from 1989, since it includes non-EU Members such as Norway and Turkey: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132/signatures?p_auth=tUQCvu6O. The EU has, however, registered respective MFN exemptions: see European Communities and their Member States, GATS/EL/31, (15 April 1994).

[77] GATT Decision of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT-Doc 26S/203, L/4903.

[78] See Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ("*EC – Tariff Preferences*"), WT/DS246/AB/R, para. 160, (7 April 2004).

harmful as underprotection – and can even be a disincentive[79] – for the stimulation of creativity and innovation,[80] the implementation of more extensive protection in their laws is permitted by TRIPS Article 1.1, subject to complying with the NT and MFN obligations.[81] Moreover, allowing public libraries to digitalize publications for public access would not discriminate based on nationality, neither in a de jure nor de facto manner, but could jeopardize the normal exploitation of the works and constitute an unreasonable prejudice to the legitimate interests of the copyright holder.[82]

Miscellaneous

Four further things are worth noting. Firstly, while generally difficult to prove, retrospective acknowledgments such as awards or prizes restricted to nationals might influence consumer preference and thereby affect internal sales.[83] This would be inconsistent with the NT obligation. Secondly, since measures aimed at countering media concentration (for purposes of protecting media diversity), such as limitations of property shares on broadcasters to a certain percentage, are incompatible with WTO law when making reference to nationality, many Members have registered limitations in their schedules of commitments. Thirdly, if an institution that supplies cultural services (such as a broadcaster, museum, theater, library, opera or orchestra) happens to be a monopoly because, for example, other suppliers do not want to or do not find it economically feasible to provide these services, the respective Member has to ensure that this monopoly supplier "does not, in the supply of the monopoly service . . . act in a manner inconsistent with" that Member's non-discrimination obligation.[84] Lastly, preferential treatment of cultural services and goods from minorities is neither based on nationality nor does it constitute de facto discrimination.

[79] See, e.g., M. Boldrin and D. K. Levine, "Perfectly competitive innovation," *Journal of Monetary Economics* 55, no. 3 (2008): 435.

[80] See, e.g., W. Shi, *Intellectual Property in the Global Trading System. EU-China Perspective* (Springer, 2008) 39 et seq. Lessig, for example, argues that IP systems, though established as incentives for innovation, "paradoxically become a weapon for safeguarding the multinational corporations, attacking cutting-edge creativity and ultimately harming public interests" and provides evidence for numerous harms caused, such as, by extensive patent protection: L. Lessig, *The Future of Ideas. The Fate of the Commons in a Connected World*, (Random House, 2001) 259. Boldrin and Levine argue that "economic theory shows that perfectly competitive markets are entirely capable of rewarding (and thereby stimulating) innovation, making copyrights and patents superfluous and wasteful": ibid., 439.

[81] TRIPS, Article 3 and Article 4.

[82] See, e.g., Panel Report, *United States – Section 110(5) of US Copyright Act*, ("*US – Copyright* "), WT/DS160/R, paras. 6.220–6.229, (15 June 2000). Accordingly, the requirement of unreasonable prejudice to the legitimate interests of the copyright holder is fulfilled when the limitations or exceptions cause an excessive loss of financial income.

[83] In relation to several US film prizes, such an influence might be easier to prove, but they are mostly not the consequence of a state measure: e.g., the Oscars are awarded by the Academy of Motion Picture Articles and Sciences, a private collaboration.

[84] GATS, Article VIII.1.

THE POTENTIAL OF THE CONCEPTS OF "LIKENESS" AND "SUBSTITUTABILITY"

All of the above potential problems of non-compliance with WTO law can only arise between "like" (or "substitutable") goods or services. It is solely between "like" goods or services that the non-discrimination obligations apply and that discrimination within the meaning of the relevant provisions may occur. Similarly, the adverse effects of subsidies only have to be removed in relation to "like" products. In this context, Van den Bossche argues that "it can be argued that cultural goods and services using the national language(s) are not 'like' cultural goods and services using another (e.g. English)."[85] He regards the concept of likeness as a flexible interpretation mechanism, enabling Members to adopt a variety of cultural policy measures. Similarly, Bernier suggests that domestic and imported cultural goods and services are to be "characterized by their artistic and intellectual content, and for that reason cannot easily be compared one to another."[86] He, too, is inclined to use the language (or even the origin) of cultural goods and services as a key criterion for individualization.[87] This raises the question of whether and to what extent the concepts of "likeness" and "substitutability" can be used for cultural purposes to avoid the application of the non-discrimination obligations and the SCM.

The Concept of Likeness

Neither GATT nor GATS includes a definition of the concept of likeness, but the SCM stipulates that, for purposes of that Agreement, likeness "shall be interpreted to mean a product which is identical, that is, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[88] This provides panels and the Appellate Body with a wide

[85] P. Van den Bossche, *Free Trade and Culture. A Study of Relevant Rules and Constraints on National Policy Measures* (Boekmanstudies, 2007) 135. He highlights that "there is good cause to think that WTO panels and the Appellate Body would *not* consider books written in English and books written in Spanish to be 'like products.'" Nevertheless, he remains reserved regarding a definitive prediction since "'likeness' must be assessed case by case in the light of the relevant facts": ibid., 22.

[86] Bernier, note 19, 121.

[87] Ibid., 116.

[88] Footnote 46 in the SCM. Similarly, the Appellate Body suggests that the dictionary meaning of "like products" is products that share a number of identical or similar characteristics: Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, ("*EC – Asbestos*"), WT/DS135/AB/R, para 91 (12 March 2001). Services "should be considered 'like' . . . to the extent that the service suppliers concerned supply the same service": Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas III (Article 21.5, Ecuador)*, ("*EC – Bananas (Article 21.5)*"), WT/DS27/RW, para. 7.322, (12 April 1999).

discretion when determining the meaning of likeness. While the Appellate Body held that the determination of likeness is, "fundamentally, a determination about the nature and extent of a competitive relationship between and among products on the market of the importing country"[89] to assure a level playing field, [90] the criteria established by the GATT Council, GATT Panels, WTO panels and the Appellate Body for such a determination illustrate that it requires more than the presence of direct competition. The criteria are characteristics (e.g., physical properties, nature and quality), end use,[91] consumers' tastes, preferences and habits[92] and tariff (UN-CPC)[93] or service (SSCL)[94] classification.[95] In light of the intangible nature of services and the fact that the SSCL is not as precise as the UN-CPC, some scholars suggest that a more market-oriented approach be applied to the determination of like services.[96] All these criteria, applied cumulatively, provide an informative basis and constitute the analytic framework.[97] Their weighting depends on the circumstances of the particular case and the spirit and purpose of the provision in question.[98] Accordingly, if (non-trade related) cultural aspects of goods and services, such as provenance, language and high- or low-budget production,[99] are likely to influence consumer tastes and habits, they could have an impact on the determination of likeness. This would depend on the weighting of each criterion in the particular case and on whether the impact was or was not the result of long-

[89] Appellate Body Report, *EC – Asbestos*, 99.

[90] See Appellate Body Report, *Japan – Alcoholic Beverages II*, 16 et seq.

[91] The first two criteria relate to ground work by the GATT Council (see Working Party Report, Border Tax Adjustments (2 December 1970) 18) and were resumed by many GATT panels: see, e.g., GATT Panel Report, *EEC – Oilseeds I*.

[92] See, e.g., Appellate Body Report, *Japan – Alcoholic Beverages II*, 20; and Appellate Body Report, *Indonesia – Automobile Industry*, 14.109 et seq; Appellate Body Report, *EC – Asbestos*, 130.

[93] UN, Central Product Classification System (CPC), version 1.1 UN Doc ST/ESA/STAT/SER.M/77 (30 July 2008).

[94] WTO Secretariat, Service Sectoral Classification List (SSCL), WT/MTN.GNS/W/120 (10 July 1991).

[95] See, e.g., GATT Panel Report, *EEC – Oilseeds I*; and see steady case law starting with Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ("*US – Gasoline*"), WT/DS2/AB/R, (29 April 1996).

[96] See, e.g., Van den Bossche, note 105, 100 and A. Mattoo, "MFN and the GATS," in T. Cottier and P. C. Mavroidis (eds.) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, 1999) 51.

[97] Since (at least) Appellate Body Report, *EC – Asbestos*, 102.

[98] See, e.g., ibid.; see, also, D. H. Regan, "Regulatory purpose and 'like products' in Article III:4 GATT (with additional remarks on Article III:2)," *Journal of World Trade* 36, no. 3 (2002): 443, 444 et seq.

[99] Graber, for example, argues that high (mainstream)- and low (arthouse)-budget productions do not belong to the same market segment and therefore do not compete with each other: C. B. Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung* (Stämpfli, 2003) 158.

established, protectionist measures.[100] The cultural dimensions of production methods may also impact "likeness" given their ability to influence the characteristics of a product or service, that is, their end use, consumer tastes and habits or the tariff or service classification.[101]

The Concept of Substitutability

Cultural aspects might also influence the determination of whether goods are "directly competitive and substitutable" in terms of GATT Article III.2, sentence 2.[102] The Appellate Body considers this to be the case when goods are interchangeable or offer "alternative ways of satisfying a particular need or taste."[103] In line with the object and purpose of Article III – described by the Appellate Body as "protecting expectations of equal competitive relationships"[104] – the focus of sentence 2 lies on the competitive conditions in the relevant market, evaluating whether a good is "part of the same segment."[105] In *Canada – Periodicals*, for example, the Appellate Body stated that not "all periodicals belong to the same relevant market, whatever their editorial content. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine."[106] It is arguable that the language of a work could demarcate a market segment and thus influence the determination of directly competitive and substitutable goods. This would depend, for example, on how different the (targeted) readerships, listenerships or audiences and their interests (that is, the consumer expectations) are and must ultimately be decided on a case-by-case analysis.

[100] See Appellate Body Report, *Japan – Alcoholic Beverages II*, 20, where consumer tastes and habits were not considered because they developed on the basis of a discriminatory tax regime.

[101] In the GATT Panel Report, *United States – Restrictions on Imports of Tuna*, for example, the panel rejected such an impact in relation to fishing methods (environmentally friendly or harmful), stating that most consumers supposedly have a "limited social or environmental 'conscience,'" and concluding that their purchase decisions are determined primarily by the price: GATT Panel Report, *United States – Restrictions on Imports of Tuna*, ("*US – Tuna*"), DS21/R, *BISD* 39S/155. On the product/process doctrine see, e.g., S. Charnovitz, "The law of environmental 'PPMs' in the WTO: Debunking the myth of illegality," *Yale Journal for International Law* 27, no. 1 (2002): 59.

[102] Sentence 2 contemplates a broader category of goods than sentence 1 in relation to likeness (see Appellate Body Report, *Canada – Periodicals*, 25). Like goods are a subset of directly competitive or substitutable goods (see Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, para. 118, (18 January 1999).

[103] Appellate Body Report, *Korea – Alcoholic Beverages*, 109.

[104] Ibid., 120.

[105] Appellate Body Report, *Canada – Periodicals*, 21–29.

[106] Ibid., 28.

Aims-and-Effect Test

The GATT Panel in *US – Alcoholic Beverages* introduced the aims-and-effect test as an additional criterion for the determination of likeness in the context of GATT Article III.[107] Under this test, likeness "should be analyzed primarily in terms of whether less favourable treatment was based on a regulatory distinction taken so as to afford protection to domestic production."[108] The WTO panel in *Japan – Alcoholic Beverages II* rejected this test on the basis that GATT Article III.2, sentence 1, includes no reference to the wording the test is grounded in ("so as to afford protection" in GATT Article III.1).[109] Taking account of the conceptual design of GATT Article III, a better approach would be to view the otherwise non-binding aim in paragraph 1 as an additional requirement of sentence 2 to not apply internal charges relating to substitutable goods "so as to afford protection." The decisive factor here is not the subjective, non-verifiable intent of the legislator but the "measure's objectives or purposes as revealed or objectified in the measure itself."[110] Put differently, the benchmark for WTO panels is not the legislators wish to protect domestic cultural industry (and be responsive to their constituents) or to protect the diversity of cultural expressions, but an objective overlay distanced from the cultural context.

In sum, the purpose of cultural policy measures has to be considered only in the context of internal charges for substitutable goods, and that is when determining whether a measure is of a protectionist nature. The latter would apply to internal charges directed at protecting domestic cultural industries (and result in inconsistency with GATT Article III.2 sentence 2) but not be true for a charge merely aimed at maintaining diversity of cultural expressions.

GENERAL EXCEPTIONS TO WTO OBLIGATIONS

If cultural policy measures are inconsistent with WTO law obligations, a Member might invoke one of the general exceptions in GATT and GATS to justify these measures, notwithstanding that none of the exceptions explicitly refers to culture or cultural diversity.

National Treasure

The most relevant of the general exceptions in GATT, Article XX(f), applies to measures "imposed for the protection of national treasures of artistic, historical and

[107] See GATT Panel Report, *US – Malt Beverages*, para. 5.6.

[108] GATT Panel Report, *United States – Taxes on Automobiles*, DS31/R, paras. 5.9–5.10 (1 October 1994) (not adopted), in departure from two previous GATT Panel judgments rejecting the test.

[109] Appellate Body Report, *Japan – Alcoholic Beverages II*, 115. Furthermore, it would be inconsistent with the rule/exception relationship between GATT, Article III and XX.

[110] Appellate Body Report, *Chile – Alcoholic Beverages*, 71. See also Appellate Body Report, *Japan – Alcoholic Beverages II* and Appellate Body Report, *Canada – Periodicals*, 28 and 31.

archaeological value." Neither GATT nor any other international treaty contains a definition of "national treasures."[111] The original purpose of the provision was to prevent illicit import, export and transfer of ownership of cultural property, as experienced during World War II. This indicates that the term relates to cultural goods,[112] with the word "treasure" specifying that the goods must be of paramount importance. The term national treasure invites an evolutionary approach to interpretation and should be read "in the light of contemporary concerns of the community of nations,"[113] as reflected in declarations, recommendations and international treaties.[114] The UNESCO Convention[115] illustrates that the international community recognizes not only "discrete items of tangible cultural property"[116] but also "the value of, and the need for protection for, a much broader category of cultural goods than pictures from Rembrandt and van Gogh,"[117] namely the diversity of cultural expressions – that is, expressions that result from the creativity of individuals, groups and societies, and that have cultural content (UNESCO Convention Article 2.3). Previously, the scope of protection under the UNESCO had even been extended to the protection of intangible or living heritage.[118] Overall, UNESCO members have gradually adopted a "holistic approach to the protection and safeguarding of cultural heritage in all its forms, tangible and intangible."[119]

Contemporary cultural goods may be of sufficient artistic value to be national treasures. However, while a measure under GATT, Article XX(f) merely needs to be "imposed for" the purpose specified rather than "necessary" for it, as required in other general exceptions, the Appellate Body's "strict reading of the *chapeau* may limit the significance of this distinction."[120] Also, no equivalent exception exists under GATS.

[111] This provision has not yet been subject to interpretation in WTO dispute settlement.
[112] In the German translation, it even reads "nationales Kulturgut" (national cultural good).
[113] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Product*, ("*US – Shrimp Products*"), WT/DS58/AB/R, para. 129, (12 October 1998), where the Appellate Body adopted an evolutionary approach to interpretation of the term "exhaustible" in relation to natural resources.
[114] For examples for the many international laws that apply to cultural products and culture more generally outside the WTO-system, see Voon, note 34, 143 et seq.
[115] As of 26 June 2017, the UNESCO Convention had been ratified by 144 states, of which 128 are WTO Members.
[116] C. Charmody, "When 'cultural identity was not at issue': Thinking about *Canada – Certain Measures Concerning Periodicals*," *Law and Policy in International Business* 30 (Winter 1999): 231, 256.
[117] Van den Bossche, note 105, 54.
[118] UNESCO (ed.), *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).
[119] UNESCO (ed.), *Draft Programme and Budget 2006–2007, General Conference, Thirty-Third Session – Paris* (2005), 04004.
[120] Voon, note 34, 105.

Public Morals and Public Order

Members may justify trade restrictive cultural policy measures aimed at the protection of public morals by invoking GATT Article XX(a) or GATS Article XIV(a). The panel in *US – Gambling* has defined public morals as "standards of right and wrong conduct maintained by or on behalf of a community or nation,"[121] which "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."[122] Therefore, it is left to each Member's discretion to determine its level of protection.[123] Cultural policy measures can have multiple purposes and might even intrinsically reflect standards of public morality. Switzerland, for example, has adopted an import ban for movies that glorify violence or are pornographic in nature.[124] Saudi Arabia and Pakistan have banned imports of books on religious grounds.[125] However, since cultural motives beyond the standards of right and wrong do not fall within the scope of this exception, it does not provide the possibility to "take into account the special cultural qualities of the [audiovisual] sector,"[126] as was suggested by the US government. Moreover, the necessity of a measure for achieving that level can be challenged by other Members.[127]

In relation to cultural services, Members might justify trade restrictive cultural policy measures aimed at the protection of public order by invoking GATS Article XIV(a), provided that the cultural consideration arises from concerns relating to public order. In *US – Gambling*, the Appellate Body held that "[p]ublic order refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality."[128] In the 2001 (non-binding) Universal Declaration on Cultural Diversity, the UNESCO Members unanimously recognized cultural

[121] Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ("*US – Gambling*"), WT/DS285/R, para. 851.

[122] Ibid., 847. And see Panel Report, *Brazil – Certain Measures Concerning Taxes and Charges*, ("*Brazil – Taxation*"), WTO Doc. WT/DS472/R.

[123] Panel Report, *US – Gambling*, para. 847.

[124] Article 36.4 of the custom regulation of Switzerland.

[125] US Trade Representative, *The 2004 National Trade Estimate Report on Foreign Trade Barriers*, (2004), 179, 360, www.ustr.gov/archive/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/Section_Index.html.

[126] WTO, Council for Trade in Services, Communication from the United States – Audiovisual and Related Services, S/CSS/W/21 (18 December 2000), 8.

[127] In detail, see Voon, note 34, 106–107. See, e.g., Appellate Body Report, *China – Audiovisuals*, paras. 148, 312–335, 415(e). The Appellate Body rejected the necessity of China's system for reviewing the content of imported publications and audiovisual material and, in particular for permitting only state-owned companies to import prohibited items due to a less trade-restrictive alternative measure being reasonably available.

[128] Appellate Body Report, *US – Gambling*, 853.

diversity as a fundamental interest of society.[129] Further, according to the UNESCO Convention Members, "cultural diversity is a defining characteristic of humanity."[130] It "forms a common heritage of humanity[,] … should be cherished and preserved for the benefit of all"[131] and "creates a rich and varied world, which increases the range of choices and nurtures human capacities and values."[132] Therefore, if, for example, a significant number of imported cultural services were to pose "a genuine and sufficiently serious threat" (as required by GATS, footnote 5) to cultural diversity, a fundamental interest of the society, the public order in terms of GATS Article XIV(a) might be disrupted.

Securing Compliance with Domestic Laws

Lastly, Members may justify trade restrictive cultural policy measures necessary to secure compliance of its subjects[133] with WTO-consistent domestic laws, whether or not these laws derive from international obligations,[134] by invoking GATT Article XX(d) or GATS Article XIV(c). These exceptions enable the incorporation of the UNESCO Convention into domestic law[135] in a WTO-consistent way and the adoption of a WTO-inconsistent measure designed to ensure compliance of its subjects therewith.[136] A government of a Member with a small (and threatened) language area, such as Slovenia, could, for example, adopt an internal tax on periodicals published in languages other than the Slovenian language in order to secure compliance with a domestic law comparable to the WTO-consistent Lisbon Treaty Article 167(1) and (4).[137] This would be sufficient for GATT Article XX(d) or

[129] For example, Article 4: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms."

[130] UNESCO Convention, Preamble, recital 1.

[131] Ibid., recital 2.

[132] Ibid., recital 3.

[133] Members may not impose countermeasures against another state: see Panel Report, *Mexico – Soft Drinks*, paras. 8.175–8.179.

[134] See Panel Report, *Mexico – Soft Drinks*, paras. 8.194, 8.197; Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff*, ("*EC – Trademarks*"), WTO/DS290/R, (15 March 2005); and Appellate Body Report, *India – Certain Measures Relating to Solar Cells*, ("*India – Solar Cells*"), WT/DS456/AB/R, (16 September 2016).

[135] Alternatively, it provides the possibility to give direct effect to the UNESCO Convention within a domestic legal system. The domestic law may relate to cultural goods because the lists provided are non-exhaustive. See, also, Voon, note 34, 166.

[136] See, also, T. Voon, "UNESCO and the WTO: A clash of cultures," *International & Comparative Law Quarterly* 3, no. 53 (2006): 635, 648–649.

[137] In relation to the Lisbon Treaty, such an interpretation is not possible due to Article 34 (free movement of goods).

GATS Article XIV(c), where the internal tax was designed at least to contribute[138] to the enforcement of domestic laws.[139] Coercion is not a necessary component,[140] nor is having absolute certainty to achieve compliance required.[141] Yet, the measure must be necessary and is subject to meeting the strict requirements of the *chapeau* to GATT Article XX.

THE FLEXIBILITY OF THE "GATS LIST" APPROACH

On its face, GATS appears to provide considerable flexibility for most WTO Members. In relation to services, market access and NT, obligations only apply to the extent specified in each Member's relevant schedule (GATS Article XVI.1 and XVII.1). Thus, for service sectors in which Members have made no commitments, NT and market access are not required. Moreover, under the Annex on Article II Exemptions, each Member had a once-off opportunity at the GATS' entry into force in 1995 or, if later, the date of the Member's WTO accession, to register in their schedules exemptions from MFN obligations. It is thus no surprise that, in relation to the highly contested sector of audiovisual services, many Members have listed extensive MFN exceptions of indeterminate duration and have made little to no concessions in relation to NT and market access obligations.[142] This amounts to a de facto exception.

While this so-called GATS list approach thus provides Members with more flexibility than they enjoy under the GATT, in relation to sectors in which they did not register exemptions or concessions, GATS does not go as far as to enable them to respond to unexpected developments or new findings and to implement, for example, changes of direction in policies by adopting measures which subsequently become necessary. For example, "[a]ny new exemption applied for after the date of entry into force of the WTO Agreement" requires a decision of the Ministerial Conference taken by a three-fourths majority of the votes cast.[143] Moreover, modifying or withdrawing existing commitments is normally not economically feasible since such action usually requires compensation in the form of concessions in other sectors that have comparable benefits. In summary, the GATS list approach appears more flexible than it actually is, with its built-in agenda of progressive liberalization

[138] GATT Panel Report, *European Economic Community – Regulations on Imports of Parts and Components*, BISD 37S/132, paras. 5.14–5.18, (16 May 1990).

[139] As opposed to merely securing attainment of their objectives, as argued by Canada in *Canada – Periodicals*: Panel Report, *Canada – Certain Measures Concerning Periodicals*, ("*Canada – Periodicals* "), WT/DS31/R, paras. 3.5, 5.11 (14 March 1997).

[140] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, ("*Mexico – Soft Drinks* "), WT/DS308/AB/R, para. 74, (6 March 2006).

[141] Ibid., 74.

[142] See note 57.

[143] Annex on Article II Exemptions, Paragraph 2, read together with Article IX.3 of the Marrakesh Agreement.

and the in-principle ten-year limit on MFN.[144] The objection that a Member might not, or might only partly, apply a listed exemption[145] has no bearing on the flexibility assessment. Such a practice is not binding and can be modified at any time and therefore does not provide other Members with sufficient assurance regarding the non-application of an MFN exception.[146]

CONCLUSION

This chapter illustrates how tensions may arise from the fact that cultural policy measures can restrict trade. The preservation of cultural identity and diversity of cultural expressions is crucial for forming cognizant cultural identities, as well as for building informed opinions and is thus an important element of social harmony. Domestic measures to protect and promote them can be necessary to "tame social disruption effects of markets."[147] While the protection of cultural products and industries was a live concern in the debates that took place during the negotiation of GATT 1947,[148] the WTO-conformity of a domestic cultural policy measure remains unpredictable and will turn on many factors. For example, quotas favoring domestic cultural goods or services may infringe the non-discrimination disciplines in GATT or GATS, and the exception in GATT Article IV is too narrow to be useful. Subsidy programs may be similarly non-compliant with GATT or GATS disciplines unless they are carefully constructed to avoid discriminating on the basis of nationality and conform to the SCM requirements. Cultural cooperation agreements between countries face MFN-based challenges (unless they fall within PTAs or special exceptions for developing countries). In addition, cultural policy measures will only raise non-compliance issues where they relate to "like" (or "substitutable")

[144] Annex on Article II Exemptions, Paragraph 6. On the problem of registering MFN exemptions as "indefinite," see Sucker, note 92, 77–80.

[145] See, e.g., A. Mukherjee, "Audio-visual policies and international trade: the case of India," in P. Guerrieri et al. (eds.), *Cultural Diversity and International Economic Integration: The Global Governance of the Audio-Visual Sector* (Edward Elgar, 2005) 218, 231, 245.

[146] For example, at the GATS' entry into force, the New Zealand government made extensive concessions in the broadcasting sector following the course of the then-pursued policy of deregulation and the free market. A few years later, representatives of the New Zealand Ministry of Foreign Affairs and Trade proposed the adoption of local content quotas: Ministry for Culture and Heritage, Post-Election Briefing to the Minister of Broadcasting, (December 1999), Appendix B: "Local Content in New Zealand Broadcasting." However, a subsequently obtained legal opinion held that such quotas were incompatible with New Zealand's GATS commitments: ibid., para. 86. The US government pointed to the GATS-incompatibility of such quotas; their introduction was dropped and replaced by voluntary agreements. See Ministry for Culture and Heritage, *Broadcasting in New Zealand: A 2003 Stock Take* (2003), 11, para. 36: "Although compulsory quotas are widespread internationally, a range of factors, including New Zealand's international trade commitments, restrict the scope for such an approach."

[147] Abedal and Ruggie, note 4.

[148] See Grant and Wood, note 10.

goods or services, and there is wide scope for debate on those very questions. To summarize, even though cultural policy measures may be of considerable importance to domestic social stability and, hence, might be understood to play a similar role to economic factors like plentiful employment in the Compromise, they are not obviously treated as different under GATT (or GATS) disciplines.

Cultural policy measures represent an interesting illustration of the Embedded Liberalism Compromise, and it is arguable whether or not there is sufficient policy space and regulatory scope for Members to minimize disruptions to the diversity of cultural expressions and not to isolate national cultures from foreign influences. Admittedly, these flexibilities are by no means obvious, since culture or cultural diversity is not explicitly mentioned.

Nevertheless, the fact that governments have as yet not sufficiently tested and utilized existing flexibilities is not a reflection of problems with the contents of their "tool-boxes," but in their imagination about how to use them. Members should be reminded, for example, about the possibility of cross-financing, and of the fact that the Embedded Liberalism Compromise in its contemporary expression embraces the possibility of an evolutionary interpretation of exceptions. This allows the inclusion of contemporary concerns of the community of nations and the fundamental interests of a society, the diversity of cultural expressions being one of them. And while it is true that, if trade liberalization continues within the GATS, the flexibilities in the cultural service sector may be insufficient because many exceptions do not apply to services but only to goods, "the signs are not encouraging that Members are prepared to engage in real negotiation on this issue in the Doha Round."[149]

It may also be that many Members have never considered the regulatory scope for the adoption of cultural policy measures as sufficient. This is supported by the reconceptualization of the manner of achieving the objective of protecting and promoting the diversity of cultural expressions alongside WTO law without having to pursue the controversial concept of a so-called cultural exception within the scope of the WTO. Rather they proclaim the concept of cultural diversity within the realm of the UNESCO. In other words, there has been no shift in the interest, but a shift in how to pursue it.

[149] Voon, note 34, 254.