

**CULTURAL POLICIES AND INTERNATIONAL ECONOMIC INTEGRATION:  
THE CASE OF THE EUROPEAN UNION**

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**ABSTRACT**

This paper discusses the institutional options concerning the international governance of the cultural sector, starting from an overview of the main arguments used to justify public intervention in this field.

Most countries try to promote cultural plurality through national policies, which however are increasingly at odds with the principles of the World Trade Organization (WTO) system. The long-standing dispute on audio-visual services is the most important example of this tension. The current round of WTO negotiations offers an opportunity to find a more satisfactory equilibrium in the international governance of cultural productions. WTO members will neither liberalize completely market access, nor introduce rigid forms of cultural exemption. A sectoral annex on cultural products, including a Reference Paper on trade related aspects of competition policies, could help to balance, within the WTO system, the benefits of international economic integration with the protection and the development of cultural plurality.

An alternative approach has led to the adoption of a new international convention on cultural diversity at the United Nations Educational, Scientific and Cultural Organization (UNESCO). The UNESCO convention can play very important functions in the cultural domain, but cannot be a substitute for a proper WTO discipline of the trade and culture quandary. A clear specification of the relations between the two regimes represents an important global governance challenge, which should be seriously addressed by countries that have reached the new international agreement.

Similar problems are visible in the context of regional agreements. This paper analyzes the situation of the European Union, where the approach driving internal integration is sharply different from the policy stance in international institutions. In the single market the trade-off between economic integration and cultural policies fades away, since the removal of trade barriers – among European countries – is seen as a tool for promoting cultural plurality, by enlarging market access for national audio-visual products.

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## **Cultural policies and international economic integration: The case of the European Union**

### **1. Introduction**

The governance of international relations is under stress. The interdependence among national systems is increasing in the economic and social spheres, the worldwide circulation of knowledge is accelerating, but the architecture of global governance appears to many observers unable to face the resulting challenges. A tension between the need for stronger international institutions, with the flexibility required to tackle effectively the problems of global interdependence, and the attractive force of national and local identities is visible in many fields.

The debate about economic globalization and culture is a crucial example. The static and dynamic benefits of international economic integration are widely recognized. At the same time, many people fear that a further progress in this direction, requiring a deeper degree of integration among national systems, may put at risk their cultural identities. Even when the dominant tenet that globalization increases the amount of goods available for consumption is accepted, the problem becomes their quality, since goods are perceived as vehicles of identity. In the words of a recent paper by Janeba (2004: 2), "To risk oversimplification, one might say that economists do not care about what is consumed, but about how much, whereas many globalization critics care about society's pattern of consumption, and rank the amount of consumption as second order."

This tension explains also why there is so much anxiety about the idea of extending to cultural productions the World Trade Organization (WTO) disciplines on goods and services. This paper discusses the institutional options concerning the international governance of the cultural sector, starting from an overview of the main arguments used to justify specific public policies in this field. The proposal of a new international convention on cultural diversity at the United Nations Educational, Scientific and Cultural Organization (UNESCO) is compared to alternative institutional arrangements. The position of the European Union is then analyzed, highlighting the difference between the approach driving the integration of its internal market and the policy stance in international institutions.

Since much of the debate on these issues has been triggered by the dispute on the relation between national policies in the audio-visual sector and the WTO system, this paper will often refer specifically to audio-visual policies. However, its main arguments and conclusions apply also to other sectors of cultural activity, notwithstanding wide differences in their degree of international openness.

### **2. The specificity of cultural products: an overview**

Many arguments have been proposed to justify the special attention that cultural products (goods and services) receive in domestic policies and international institutions. The underlying general idea is that cultural products cannot be seen simply as the output of an economic process, where a set of scarce productive resources is combined in order to satisfy consumer needs, but have an intrinsically different social nature, justifying distinct policy regimes. Even when the economic dimension of cultural production is acknowledged, the market system is often considered unable to generate an optimal social outcome, because of its imperfections. An active public intervention in the cultural domain

is therefore vindicated in order to pursue non-economic social targets, as well as to remedy market failures. But cultural policies face the difficult challenge of being effective in delivering their non-economic results, without generating high losses in terms of productive efficiency.

The tension embedded in the dual nature of cultural products is particularly evident in the international arena, where it takes the shape of a possible conflict between the social value of a plurality of cultural identities and the economic benefits of market integration.<sup>1</sup> The main risk associated with globalization in current debates on cultural activities concerns the homogenization of contents, which stems from the processes of technological convergence and economic concentration (UNESCO, 1995). There is a wide-spread fear that unfettered globalization may lead to a loss of cultural plurality, as is already shown by the contents of television broadcasting all over the world. In the words of Footer and Graber (2000: 131), there has been “a subtle shift away from the international exchange of domestic cultural goods and services to the production and distribution of cultural goods and services for global markets”. As long as these global products extend their influence all over the world, the result could be the decay of local communities: authentic cultural plurality, tied to the geographical and historical factors shaping the civilization of each community, could be replaced by product differentiation, driven by the marketing strategies of global firms. Bhagwati (2000) forcefully explains how the dynamic, open and multicultural nature of the US society may turn into a threat for cultural plurality in other countries. From a more general viewpoint this process, while driving towards more open societies, could change the perception of cultural identities and generate uncertainty and political fragmentation, threatening the stability of democratic systems (Habermas, 1998).

On the other hand, international integration creates new opportunities for the enrichment of cultural life: by increasing the permeability of national boundaries, it enlarges the range of available products and propitiates the development of the global “civil society” (cultural associations and other non governmental organizations acting on a global scale), that is playing an increasing role in shaping the public opinion and in the political sphere (Held, 1991). These social forces are also very active in supporting the reaction against the risks of cultural homogenization, which is unfolding in many countries (UNESCO, 1998).

Cultural policies, practised by regional, national and local authorities all over the world, share the dual nature of instruments for pursuing non-economic goals in the cultural and social spheres, and of industrial policy tools applied to the development of specific sectors.

Alleged objectives of such policies in the cultural domain are, for example, the preservation of local identities from external influence, but also the progress of inter-cultural dialogue and, more generally, the protection and the development of cultural and linguistic diversity, under the assumption that, even when markets are actually contestable and competitive, the plurality of economic agents does not necessarily ensure the variety of contents. Cultural diversity is understood here in a wide sense, encompassing also political principles such as pluralism and the freedom of expression. These play a fundamental role in the design of audio-visual policies, and particularly in the regulation of broadcast systems, where there is the need to protect the public interest with regard to the function of television as a vehicle for the dissemination of information, education, culture and entertainment<sup>2</sup>.

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<sup>1</sup> Sinclair (1996) and Footer and Graber (2000) survey some aspects of the debate about globalization and culture, starting from the Frankfurt School’s radical critique of the concept of “culture industry” (Benjamin, 1936; Adorno, 1970) and going through the political economy approach characterising the Anglo-Saxon literature (Gamham, 1990) and recent controversies about the commercialization of culture. An optimistic contribution to the debate on commercial culture and on the relation between globalization and culture has been offered by Cowen (1998; 2002).

<sup>2</sup> Other social goals assigned to regulations in the audio-visual sector include the respect for privacy and the safeguard of minors and of human dignity.

From an economic standpoint, the general justification invoked for public intervention in the cultural sector is given by market failures, and particularly by the externalities associated to cultural activities (Donaldson, 1996). According to Sauvé and Steinfatt (2000: 329), “a credible case can be made to support the claim that the special features of markets in cultural goods and services can cause markets to fail to provide consumers with appropriate production and distribution of cultural products. Such features include the nature of competition in products with substantial public goods aspects; economies of scale in the production and distribution of cultural goods and services; the impact of externalities on the pricing of cultural products; as well as collective action problems. Because each of these problems arises in the context of international trade, there are strong grounds to believe that free trade in cultural goods and services is unlikely to yield efficient or welfare-maximising outcomes.”

Each of the above arguments will be now discussed, under the following scheme:

- a) market failures stemming from the features of cultural goods in competitive markets (externalities; public goods; collective action problems);
- b) market imperfections leading to an inadequate degree of competition (economies of scale and interdependence of preferences).

Even assuming perfect competition and no market failures, it could be argued that the amount of cultural products generated by the market is inadequate. In other words, cultural products could be considered as merit goods, justifying policy activism to increase their consumption independently of individual preferences. However, this line of reasoning could be based only on questionable non economic assumptions, and will not be pursued here. On the contrary, in the presence of market failures and/or imperfect competition, public intervention in the cultural sector would be warranted for purely economic reasons, reinforcing the strength of any non economic argument.

Market failures and imperfect competition would justify public intervention in the cultural sector even in the context of a closed economy. The opening to international competition changes the picture by adding new dimensions to the policy problems and to their possible solutions.

The last part of this section will be devoted to reminding the high risks involved in any public intervention on market mechanisms, particularly if it implies discrimination based on the nationality of producers (foreign trade and investment protection).

## **2.1 Market failures**

The first important argument used to justify policy activism in the cultural sector is offered by the positive and negative *externalities* generated by cultural productions, creating a wedge between their prices and the real costs they entail for the society.

Production or consumption of cultural products by one individual is usually considered a source of positive spillovers for its community. This happens both when culture is intended traditionally as a stock of values and knowledge inherited from past generations, and even more when it is conceived as the dialogue of a community, “the integration of a specific heritage into a current behavioral discourse” (Baker, 2000: 1366). In the latter case, it is clear that the social value of culture is deeply rooted in the context where it has been generated, and lies in the collective process nurturing the identity of a specific community.

The presence of such positive externalities implies that market mechanisms are not able to supply an adequate amount of cultural goods, and justifies public intervention. However, and leaving aside any problem of policy effectiveness, the need to correct this market failure does not necessarily justify protection against foreign cultural products.

In principle, imports of cultural products also give rise to positive externalities, inasmuch as they enrich the sources of social dialogue, allowing a better understanding among different cultures. However, assuming that such positive externalities are less

important than those generated by locally rooted products, the net external effects of cultural imports can be negative, if their introduction in the market brings about a displacement of domestic products. This problem is therefore strictly connected to the processes that will be described below, generating the dominance of US productions in international markets.

*Public goods* can be considered as an extreme case of externalities, where individual consumption benefits extend simultaneously to all consumers. Cultural products can be classified as impure public goods, because their consumption, although being generally non-rivalrous (the use by one individual does not preclude its use by others) lacks the requisite of non-excludability, since it is relatively easy to apply a price excluding consumers that are not ready to pay it. Only in the case of goods with an existence value, such as cultural heritage and cultural identity, it can be claimed that both features of pure public goods are present (Serageldin, 1999). Non rivalry in consumption implies that the cost of an additional unit is close to zero. This is particularly true in the audio-visual sector, where additional copies of a product can be made available at a negligible marginal cost.

The problems faced by markets in providing an adequate supply of public goods, even when there is a limited degree of rivalry and/or excludability in consumption, are usually considered a sufficient reason to justify active policies aimed at increasing their production. This argument is reinforced by the fact that cultural products create intergenerational benefits, but market agents are short-sighted and do not give enough weight to the production of such goods.

A related argument mentioned by Sauvé and Steinfatt (2000) to justify cultural policies is based on *collective action problems*. Even if individuals understand that domestic cultural products are socially valuable for their externalities, they have very weak incentives to act consequently, for example by reducing their consumption of foreign products, since their individual choices have a negligible impact on the global result, but may entail a high cost, in terms of individual preferences for foreign products.

The argument for policy activism based on the externalities of cultural activities should not be confused with the idea that cultural goods are *merit goods*. In the first case markets fail to deliver an optimal allocation of resources, and public intervention is required to correct this situation, independently of any non economic implication. In the latter markets do not fail, but compelling non economic arguments show that such goods should be produced and consumed more than what results from market incentives. As already stated, this line of reasoning would completely shift the attention towards non economic arguments, and will not be further pursued here.

## **2.2 Imperfect competition**

Markets for cultural products are far from the ideal of perfect competition. Economies of scale and the interdependence of consumer preferences confer monopoly power to the largest producers. Technical progress and international integration play an ambiguous role, reducing barriers for new entrants, while reinforcing the incentives to market concentration.

New trade theories show that, under imperfect competition and product differentiation, international integration may lead to a 'market defragmentation effect', that is a reduction in the number of active firms in each country, due to the selective action of price competition in the presence of scale economies. Even if this effect can be more than offset by a 'variety effect', that is an enlargement of the range of differentiated products available to consumers, thanks to the entry of new *foreign* producers, the range of *domestic* varieties is bound to shrink in each country, leading to a possible loss in consumer welfare, if preferences show a home bias, as well as to a reduction in cultural variety at the global level.

This argument is strictly connected with the presence of strong *economies of scale*, particularly at the distribution stage of audio-visual productions. Internal scale economies allow large budget products to be sold at low prices, provided that the size of their market is sufficiently large, displacing less expensive products which presumably use lower quality inputs.<sup>3</sup> This size advantage interacted with the home bias of consumer preferences, naturally attracted by products reflecting their domestic culture, in generating the dominance of US-based multinationals in world audio-visual markets (Sauvé and Steinfatt, 2000). In every country, other things being equal, consumers tend to prefer domestic products. But in the US much more than elsewhere, given the size of the market, this preference translated into the possibility to exploit scale economies and gain a competitive edge over foreign rivals (Graber, 1998). External economies of agglomeration, which are particularly important in the ‘Hollywood cluster’, help reinforce this initial advantage. The overall result is that a very small number of large groups strictly controls the world distribution chain of audio-visual products (Hamelink, 1994).

Although technical progress has the potential to weaken market access barriers for new entrants, forces driving towards a higher degree of concentration in cultural productions are very strong, and the trend is further enhanced by the dismantling of obstacles to international trade and investment. The problem is particularly evident in the audio-visual sector, where markets have been experiencing an intense restructuring process, driven by technological changes and characterised by increased concentration and vertical integration, as well as by inter-sector integration, with audio-visual firms becoming parts of wider and diversified groups. On the other hand, the outsourcing of specialised phases of production by large groups has been leading to the development of skill-intensive small and medium sized enterprises. On balance the concentration process, although increasing the productivity of large groups, is raising serious concerns about market contestability (OECD, 1997). Even when vertical integration is not explicit, anti-competitive agreements between producers and distributors can restrain market access for outsiders (Footer and Graber, 2000). Motta and Polo (1997) show that the need for public intervention in the television sector is not diminished by the current wave of technological innovations, although its tools must be adapted to the new circumstances. Competition policies are still important in order to mitigate market concentration, and specific regulations are essential to pursue the public objective of pluralism.

The increase in market concentration, favoured by the process of international economic integration, is not an exclusive characteristics of the audio-visual sector, but affects also other cultural productions, such as the print, although there are considerable differences in the degree of tradability of the various cultural sectors (Schulze, 1999). The huge economies of scale characterising the distribution of audio-visual products confer to this sector a relatively higher degree of international openness.

The trend towards market concentration in the cultural sector can be explained also without making any reference to the role of scale economies. Assuming that consumers shape their preferences considering not only the intrinsic characteristics of different goods, but also the choices of their social group (*interdependence of preferences*), it has been shown that a small initial competitive advantage can easily evolve into a complete dominance on the market (Grilo, Shy and Thisse, 2001). In a model where individual utility depends positively on the number of other individuals making the same choice, collective passions for certain cultural products can lead to a complete displacement of competitors (Grilo and Thisse, 1999). In a similar way, a process of social learning, where individuals base their decisions on the information they get by observing others (informational

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<sup>3</sup> The low marginal cost of cultural products helps understand why price discrimination among different national markets is so wide-spread in the audio-visual sector. This practice has sometimes been named ‘cultural dumping’, although it does not necessarily imply pricing at below cost (Bernier, 1998).

cascades), generates herding consumption behaviour (Bikchandani, Hirshleifer and Welch, 1998).

The interdependence of preferences can also be used to study how a country's cultural identity is affected by trade liberalization. In this framework, "cultural goods differ from other goods in that they create an interdependence among individual consumption decisions, like a network externality, and thus generate cultural identity. ... the more consumers buy the same good the lower is the loss in identity for existing consumers and the more attractive becomes the consumption of such good for other consumers." (Janeba, 2004: 25).

### **2.3 Efficient protection and policy failures**

Although the previous survey was intended to show that the economic arguments justifying policy activism, and even some form of trade protection, in the cultural sector are well-grounded, departing from free trade principles is very risky also in this field.

It is well-known that when the source of market failures is domestic, and cannot be removed directly, protection from foreign competition is usually not warranted, because other policy tools can do the job, creating less distortions. However the preceding discussion has shown that in the cultural sector the source of the problem lies, at least partly, in the features of international competition, which justifies the adoption of some form of 'efficient protection' (Sykes, 2001). In other words "the challenge for policymakers becomes one of devising a hierarchy of domestic support measures able to remedy market failures at source. In doing so, the remedies should, wherever possible, minimise any adverse effects on trade and investment." (Sauvé and Steinfatt, 2000: 329).

According to these authors, the recommended policy mix could include well-designed subsidies to cultural productions, domestic content quotas which "marginally reduce the reach of imports without barring any particular import", and the removal of restrictions to foreign direct investment (FDI). Subsidies and quotas would encourage the undertaking of otherwise too risky projects, reducing their cost and the degree of uncertainty on the level of demand. By doing so, they would enrich the range of differentiated products available for consumption. On the other hand, subsidies and quotas create larger opportunities for wasteful rent-seeking activities as well as anti-competitive practices by protected producers. This risk should be tackled with appropriate pro-competitive measures, such as FDI liberalization.

However, policy failures are always possible, due to a variety of reasons. The inconsistencies and the dubious results of cultural policies have been forcefully shown by Acheson and Maule (1999) in the case of Canada, as well as by Messerlin and Cocq (2004) for the European Union. Policies may fail not only by leading to an excessive amount of economic distortions, but also in their ability to accomplish their cultural targets. Last but not least, any kind of protection for cultural activities relies on a clear-cut definition of culture, which is difficult to agree at international level. Suranovic and Winthrop (2003) quote several examples where culture-based arguments have been used to justify trade protectionism in sectors such as agriculture, insurance and professional services, where there is clearly no justification for discriminatory policies.

Independently from their controversial results, cultural policies, particularly in the audio-visual sector, are put under increasing pressure by recent technological developments. With the outgrowth of a global digital environment, some traditional restrictions on business activities tend to lose legitimacy and effectiveness (OECD, 1997).<sup>4</sup> For example, in a world where an ever-increasing range of multimedia services is easily available through international networks, the ability of local authorities to impose domestic content

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<sup>4</sup> However the scope and the pace of technological changes and their implications for regulation should not be overemphasised: some forecasts made on the consequences of convergence between the telecommunications, media and information technology sectors have not come true yet (Autorités Françaises, 2001, p. 4).

requirements is bound to vanish. The compliance costs of the quotas tend to overcome their potential benefits.

In addition, their discriminatory effects in world markets have often aroused disputes among the main producing countries. The resulting problems for the multilateral trading system will be the subject of the next sections of this paper.

### **3. The cultural sector in the international trading system**

#### **3.1 Cultural policies and the WTO**

There is an evident tension between the goals of the multilateral trading system – progressive liberalisation through a consistent and pervasive application of the principle of non-discrimination – and the aim of protecting and developing cultural plurality through public policies and regulations.

According to Staiger (1995), the basic elements for understanding any international trade agreement are the substantive obligations undertaken by participating countries, the allowable exceptions to those obligations, and the enforcement institutions and incentives set up by the agreement. In our case, the conflict between trade and culture may be characterised as a partially successful attempt of some countries to put cultural policies, and in particular audio-visual policies, under the umbrella of some kind of allowable “cultural exception” from the general obligations of trade liberalisation, in order to escape the dispute settlement mechanism ensuring the enforcement of those obligations.

The conflict between audio-visual policies and international economic integration erupted with particular intensity during the Uruguay Round negotiations about trade in services, but international disputes on this topic have important antecedents, which have been surveyed by Footer and Graber (2000).

The General Agreement on Trade in Services (GATS) incorporates a compromise solution between the US position in favour of a deep liberalisation of market access in the audio-visual sector, and the request for a general exemption of cultural policies from WTO rules, supported with particular energy by Canada. Audio-visual services were not exempted from the general obligations envisaged in the GATS, and in particular from the principle of progressive liberalisation enshrined in article XIX. But the EU and several other countries were allowed to undertake no specific market access and national treatment commitments in this sector, as well as to take exemptions from the most-favoured-nation (MFN) principle (WTO, 1998).<sup>5</sup> In other words, the cultural exception, excluded in principle, was accepted *de facto* on a temporary basis, postponing a neater solution of the problem to the current negotiating round, where countries will be urged to assume new commitments.

In its original formulation the GATS, although marking a fundamental breakthrough by bringing the services sector for the first time under the discipline of multilateral rules, incurs in several limitations, hampering its capacity to promote an effective process of international integration (Hoekman, 1996). Liberalisation commitments are vague and sometimes do not cover the barriers that actually restrict international transactions. Furthermore, they refer only to what is explicitly included in the schedules (the “positive list” approach), instead of stating a general obligation to liberalise and listing the possible exceptions (the “negative list”).

The current round is therefore due to tackle difficult issues. Besides trying to clarify the ambiguities of existing rules, it should induce countries to enlarge the list of sectors where they undertake market access and national treatment commitments, as well as to

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<sup>5</sup> Only 19 countries undertook specific liberalisation commitments in audio-visual services. The list includes important producers, such as Hong Kong, India, Japan, Mexico and the US, but only 2 countries (Central African Republic and the US) committed in every segment of the audio-visual sector. The absence of specific market access and national treatment commitments implies also that the audio-visual sector is not covered by the discipline on domestic regulations provided for by GATS article VI (see *infra*).

deepen the degree of trade and investment liberalisation in each sector. Moreover, the current round should lead countries to agree about some form of discipline on domestic regulations, without unduly intruding into national sovereignty. There is in fact a tight interdependence between liberalisation commitments and rules on domestic regulations. According to GATS article VI, a WTO discipline on domestic regulations may be introduced only in sectors where countries have undertaken specific commitments. On the other side, effective trade and investment liberalisation requires that domestic regulations do not excessively restrain competition: market access may be limited not only by explicit restrictions, but also by general domestic regulations, and even by the lack of pro-competitive policies (Low and Mattoo, 2000).

Countries undertaking specific market access and national treatment commitments in the audio-visual sector will therefore be led to accept also some constraints on their domestic regulations, in order to ensure that they do not constitute unnecessary barriers to international transactions. This process could require deep changes in the instruments of audio-visual policies, as well as in the criteria inspiring their application. The EU and other countries seem determined to defend the margin of manoeuvre for audio-visual policies obtained from the Uruguay Round negotiations (the so-called GATS Community *acquis*), while the US is expected to challenge that result.

In fact the new negotiating round on services is due to consider also the discipline of subsidies and safeguard measures. However the economic desirability and the political feasibility of establishing WTO rules on these topics, similar to those in force for trade in goods (for example, a ban on export subsidies), are doubtful. In particular the hypothesis of allowing countries to introduce countervailing measures, if they feel hurt by the competition of foreign subsidised services, is questionable (Gauthier, 2000). With particular reference to the audio-visual sector, Sauvé (2000) argues that the trade-distorting effects of subsidies are so low that they could be excluded from any WTO discipline on this field.

Besides being potentially one of the most controversial issues of the negotiations on services, audio-visual policies will be impinged by several other elements of the WTO activity, such as: the Information Technology Agreement and its prospective extension; the work programme on electronic commerce; the revision of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), which covers, among other things, copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organisations); the Agreement on Trade-related Investment Measures; the possible negotiations on international investment and competition policies (the so-called Singapore issues).

Given the increasing judicial activism of the main WTO partners, controversies about trade and culture seem bound to burgeon in the next years. Independently of any quest for cultural exemptions, the huge number of quarrels on audio-visual products submitted to the WTO dispute settlement mechanism shows that, in fact, audio-visual policies are already under the scrutiny of the multilateral trading system (Sauvé and Steinfatt, 2000).

From a more general standpoint, disputes about trade and culture relate also to the possibility of identifying specific cultural contents independently of the nationality of the product carrying such contents, in order to shelter cultural policies from the charge of disguising trade protectionism. One of the aspects of this problem concerns local cultural identities: is it possible – and necessary – to define a *European* or an *Australian* cultural content, independently of its local expressions? Paradoxically Graber (1998) states that “it is cultural diversity which makes the identity of European film”. The implications of this issue go well beyond the cultural sector in its strict definition, and touch for example even trade disputes on alcoholic beverages (Lubkin, 1997).

### **3.2 Options for the international governance of cultural policies**

The tension between the principles of the multilateral trading system and the public goals of cultural policies is similar to other controversial issues concerning the effects of

international economic integration on topics of public interest, such as workers rights, consumer safety, environmental protection and so on (Trachtman, 1998). However, there is an important difference between the trade and culture dilemma and most of the other issues. In the case of social and environmental policies some countries strive for an international harmonisation of domestic standards and therefore try to build a “level playing field” by inducing other countries to *strengthen* their regulations. On the contrary, in the case of cultural policies, some countries resist the US attempt at building a “level playing field” through the *dismantling* of domestic regulations and policies. From this standpoint, the trade and culture conflict may be more easily compared with the debate on agricultural policies, where some countries defend domestic subsidies and regulations in the name of the “multifunctional” role of agriculture. Protectionist policies would be justified by the external effects of agricultural production on other issues of social concern, such as environmental protection, the preservation of rural landscape, civilisation, and gastronomic traditions, whose cultural dimension is self-evident.

From a very general standpoint all these tensions may be characterised as *non-divisible* conflicts between two incommensurable public goals: the economic benefits of an ever deeper international integration *versus* the social value of non-economic principles, such as, in our case, cultural plurality. The notion of non-divisible conflicts is due to Hirschman (1995), who distinguishes between conflicts over the distribution of wealth, which are said to be divisible because they may be compounded through the market, and non-divisible conflicts calling for an either/or choice, which must be solved through the political process. In our case, the source of non-divisibility lies precisely in the fact that the two competing public goals are not commensurable. A monetary evaluation of the benefits of trade liberalization, though difficult to implement, is conceivable, whilst in the case of cultural plurality such an estimate would be difficult to justify and anyway almost impossible to carry on. Therefore, although far from perfect, the political process seems to be the unique available route for solving the dilemma between trade and culture. However it must be reminded that a policy oriented to opening international markets does not necessarily require governments to stop pursuing non-economic objectives, such as cultural plurality. What is required is only that the choice of intervention tools be based on their efficiency, taking into account the need to minimize distortions in international transactions (Bhagwati, 2000).

We will now turn to discuss the main policy options emerging from the debate on audio-visual policies, and their usefulness for the current international negotiations, including the WTO Doha Development Agenda and the debate on a new international instrument on cultural diversity under the aegis of the UNESCO.<sup>6</sup>

### 3.2.1 Options within the WTO framework

The first option to be considered is the plain *liberalisation of international transactions in the GATS context*. WTO members could take specific market access and national treatment commitments for audio-visual services, leading to the dismantling of those protective policies that create obstacles to international trade, investment, and temporary movement of service suppliers. Such a neat choice does not appear to be easily practicable: the idea of applying to the audio-visual sector the same criteria used for liberalising other economic activities clashes with the wide-spread belief that the cultural nature of audio-visual products require specific policies and even some degree of protection from international competition.

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<sup>6</sup> A related issue concerns the choice between rules and standards as institutional devices for regulating the tension between trade and culture. According to Sauvé and Steinfatt (2000), there are important arguments for preferring an explicit international agreement on legislative rules, rather than the current situation, where general standards are applied by WTO panels to adjudicate on disputes about trade and culture.

On the opposite side of the spectrum, the second option is an *unconditional and general cultural exemption* from WTO rules: audio-visual policies would be permanently sheltered from external scrutiny on disguised protectionism, independently of their intentional or incidental effects on international transactions. In its generic formulation, the cultural exemption could allow the adoption of any kind of protective measures, even if they fail to pass necessity or proportionality tests. This is an extreme option, going beyond the general exceptions provided for by GATT article XX, which refers, among other things, to measures protecting health, environment, and “national treasures of artistic, historic or archaeological value”. GATT exceptions, in fact, are not unconditional, being subject “to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”. The feasibility of this option seems very low: previous attempts during the Uruguay Round negotiations were unsuccessful and the hypothesis that the US would accept something less than the compromise embedded in the GATS is highly implausible. Even in the NAFTA agreement, where an exemption for culture is explicitly envisaged, countries hit by the trade effects of cultural policies have the right to adopt compensatory measures (Grady and Macmillan, 1999).

The third option could be defined as a *GATS-consistent, temporary and general cultural exemption*. In line with the compromise solution reached in the Uruguay Round, countries wishing to do so would continue to abstain from making specific market access and national treatment commitments in this sector, and would try to extend the temporary MFN exemptions they have already introduced. In principle, also this option could shelter any kind of audio-visual policies. In practice, the temporary nature of the exemptions could induce governments to prefer less trade-restrictive measures, in order to smooth the time distribution of the adjustment costs imposed by future commitments. In other words, this option could path the way for a gradual dismantling of those protective audio-visual policies that are inconsistent with GATS principles. The feasibility of this option depends crucially on the inter-sector trade-offs which will be accomplished during the negotiations: countries wishing to retain protective audio-visual policies must be ready to offer adequate compensations in other services sectors, in compliance with the principle of progressive liberalisation stated in GATS article XIX. An alternative possibility has been suggested by Acheson and Maule (1999) in the form of a GATS sectoral annex for audio-visual services, similar to those already existing for financial and telecommunications services.

The fourth option could be defined as a *specific cultural exemption*, focused on “art” products, as opposed to “entertainment” products. The distinction is patently arbitrary but, in practice, could be implemented for example through “a de minimis clause, which would exempt films which dispose of a budget lower than 5 million dollars” (Graber, 1998: 18). Cultural subsidies, quotas and regulations should be reformulated in order to comply with such a restricted definition of art audio-visual products.

A variant of this option has been proposed by Messerlin (2000), who advocates the inclusion of audio-visual services in the GATS framework under the umbrella of a *Reference Paper*, that specifies how to discriminate between “cultural” and “industrial” audio-visual services and exempts the former from the WTO discipline on subsidies.<sup>7</sup> Subsidies could be reserved for the first one or two works of each author, assuming that, if they are successful, the following works will be easily financed on the market. Additional subsidies could be allowed, but only within the limits negotiated in an “amber box”. The *Reference Paper* could also be used to strike a balance between the obligations stemming from the TRIPs agreement for the protection of copyrights, and the need to leave room for the development

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<sup>7</sup> The discrimination between cultural and industrial products is the main difference between this proposal and the GATS Sectoral Annex advocated by Acheson and Maule (1999).

of creativity. The degree of feasibility of this option seems reasonable, provided that a balanced compromise is reached also for the industrial sub-sector of audio-visual services.

### **3.2.2 A new international instrument on cultural diversity : the UNESCO Convention on the protection of the diversity of cultural contents and artistic expression**

The options considered so far share the idea that WTO principles and rules establish the relevant international regime for audio-visual policies. Even the quest for a “cultural exception” is based on the assumption that the “general rule” would be given by the international trade discipline. An alternative view underlies the fifth option, namely a *new international instrument on cultural diversity* (NICD), which was proposed by Canada’s cultural industries Sectoral Advisory Group on International Trade (SAGIT), as a response to the increasing limitations of the cultural exemptions approach. In the words of their proponents (SAGIT, 1999) “A new international instrument on cultural diversity would:

- recognize 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 measures that meet the agreed upon rules.”

This is an ambitious proposal, which builds on a matching of cultural plurality with other social values such as bio-diversity, and aims at tackling the problems of global governance and intersecting jurisdictions, by giving an autonomous source of legitimacy to domestic public intervention in the cultural sector.

The proposal was vaguely echoed in the Council of Europe Declaration on Cultural Diversity in 2000, and was introduced more explicitly in the UNESCO Universal Declaration and Action Plan on Cultural Diversity, in November 2001, which mentioned the objective of “taking forward notably consideration of the opportunity of an international legal instrument on cultural diversity.”. In the last few years the process has been gaining momentum. A large group of non-governmental actors, organized in the International Network for Cultural Diversity (INCD), has sustained the NICD proposal, and a similar informal co-ordination institution, the International Network on Cultural Policy (INCP), gathers the culture ministers of 63 countries, including the members of the European Union, that has favoured the establishment of the new instrument.

Recent theoretical developments on the notion of “global public goods”, defined as those goods whose benefits are non-excludable, non-rival and cut across countries, population groups and generations (Kaul, Grunberg and Stern, 1999), seem to support the option of an international agreement on cultural plurality and help understand its wide-ranging implications. However, the possible relations between such agreement and the WTO system are still controversial. The experience of disputes concerning trade and environment shows that the overlapping of two different international regimes raises serious problems for adjudicative authorities, such as the WTO Dispute Settlement Body. This is one of the reasons leading Acheson and Maule (1999) to prefer that the international discipline for cultural policies be clearly rooted within the WTO system, through the above mentioned GATS sectoral annex.

On the other hand, one could argue that a GATS sectoral annex, or any specific discipline on cultural products in the WTO system, would not give the necessary insurance against the risk that the objective of cultural diversity be overcome by the needs of

international integration. This worry has seemed to inspire the idea that the new agreement should be reached outside the WTO, the UNESCO being the obvious alternative.

In 2003 the INCP presented at its 6<sup>th</sup> annual ministerial meeting a draft convention (updated in 2004), which has been criticized because of the vagueness of the ‘cultural diversity’ concept, the non enforceability of the provided rules, and the unclear relationship with the existing WTO rules (Acheson and Maule, 2004). As stressed by the INCP itself, this text had not any link to UNESCO, and it was “not intended to impose responsibilities on this or any other organization” (INCP, 2003a). Anyway, as all INCP member countries are UNESCO members as well, it is useful to bear in mind this draft (and the remarks moved to it) in analysing the UNESCO Convention.

For its part, the UNESCO started in 2003 to elaborate a ‘Convention on the protection of the diversity of cultural contents and artistic expression’ (hereafter, the Convention). The process, divided in two steps (meetings of independent experts and intergovernmental negotiations), led, in August 2005, to the approval of a ‘Preliminary draft convention on the protection and promotion of the diversity of cultural expressions’, as well as the recommendation to the General Conference to adopt it without changes at its 33<sup>rd</sup> session, held from October 3 to October 21, 2005. The draft was first reviewed by the Culture Commission, that approved it without any change and submitted it to the Plenary. The US, after having vainly proposed a number of amendments, voted against, joined by Israel, while Australia and Kiribati abstained. The General Conference finally adopted the Convention on October 20, with an overwhelming majority: on 154 Member States represented, 148 voted for. The US and Israel renewed their adverse vote, and Australia, Honduras, Liberia, and Nicaragua abstained.

US’ critical position on the draft text, repeatedly expressed as negotiations went on, became a net opposition. The US government officially expressed its worries, engaged in bilateral discussion with many countries at senior levels (INCD, 2005), and asked for the vote being reported “to take more time to address serious concerns raised by the draft Convention”, especially with regard to respect for free trade and for human rights (US Mission to the UN, 2005).

Before discussing the problems and concerns related to the Convention and to its adoption, we present its core features.

The sovereignty of States to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory is the underlying theme of the whole section on the objectives pursued under the Convention.

Guiding principles to establish the framework in which national sovereignty should operate are provided. Among them, principles of international solidarity and cooperation, of equitable access, and of openness and balance appear as fundamental guidelines. The first principle refers to encouraging cooperation on cultural matters, through a wide range of measures, including dialogue on cultural policy, professional and international cultural exchanges, sharing of best practices, partnerships with and among civil society, non-governmental organizations and the private sector, promotion of new technologies, co-production and co-distribution agreements. Explicit reference to the integration of culture in sustainable development has been introduced, and cooperation with developing countries is stressed as vital.

The principle of equitable access “to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination” is intended to enhance cultural diversity and encourage mutual understanding.

The concepts of openness and balance should regulate the action of States, in the sense that measures adopted to support the diversity of cultural expressions should be aimed at promoting not only national cultures, but openness to other cultures of the world as well. In other words, there should be a “balance between the sovereign right of States to

adopt measures to protect and promote diversity of cultural expressions within their territory and their obligations to protect and promote it at the international level also”.

With regard to the definitions, concerning terms useful in the correct interpretation of the Convention (that is, cultural diversity, cultural expressions, cultural activities, goods and services, cultural industries, cultural policies, cultural content, protection and interculturality), during negotiations an overall accord was reached, but consensus on all of the definitions was not achieved. Notably, the US made a formal objection to most of the definitions. This position, consistent with the US critical view on behaviours and instruments susceptible of maintaining or reinforcing protectionism in cultural sectors, resulted in an open conflict when discussing the final text. In the explanation of the vote of the US, “the document’s ill-defined terminology” (Oliver, 2005) has been recalled once again as a major problem, as it could lead to misinterpretation of the Convention.

The list of measures that may be adopted at the national level to protect and promote cultural expressions is explicitly non exhaustive, and often refers to “all appropriate measures”, thus leaving room for broad interpretation of the rights and obligations of parties.

At the international level, special focus is put on cooperation with developing countries, aiming at enabling developing countries to create and strengthen their means of cultural expression at the local, national and international levels. Means to foster the emergence of a dynamic cultural sector include capacity-building, technology transfer, financial support, collaborative arrangements, mutual assistance in situations of serious threat to cultural expressions, and the provision for “preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries”.

Provisions concerning the mechanism for the settlement of disputes have been a major controversial topic during negotiations. The independent experts stressed that it would be the key to the effectiveness of the convention, and “wished the convention to have such a mechanism so that disputes might be settled from a strictly cultural point of view. The experts made it clear that this was a useful precautionary measure, to which States might turn if necessary” (UNESCO, 2005), given that no sanctions were being provided for in the text of the convention.

Governmental experts generally accepted the idea that the Convention should have a mechanism for the settlement of disputes, but strong divergences arose on the type of mechanism (arbitration or conciliation), and on whether it should be binding or non-binding in nature. Notably, with regard to the first aspect, “some experts disagreed on recourse to arbitration, even if jointly sought, because of its legal implications. Others were opposed to unilateral recourse to conciliation and preferred that such a procedure be set in motion at the request of both Parties” (UNESCO, 2005). An informal working group was set up to reconcile the various positions. The compromise solution finally adopted, on India’s proposal (then joined by the European Union), provides for unilateral recourse to conciliation, accompanied by an opting out clause, enabling a State to declare its intention not to be bound by the provision.

The relationship to other instruments has been as a most contentious issue as well, and stays as such. In the independent experts meetings this question gave rise to two alternative versions: “either the convention does not affect the rights and obligations of the States Parties under other international instruments, or it may affect them if the exercise of those rights and observance of those obligations would cause serious damage or threat to the diversity of cultural expressions, except in the case of international legal instruments relating to intellectual property rights” (UNESCO, 2004). Both options were retained in the

text submitted for the Member States' consideration, while all other articles were put to the Member States in a single version.

At the third session of the intergovernmental meeting of experts, this article was the subject of long and intense debate, and an informal working group was set up. It proposed a compromise solution, in terms of "mutual supportiveness, complementarity and non-subordination". This new wording was endorsed by a large number of delegations. However, the US requested to submit two texts for this article for subsequent consideration by the General Conference, but failed to win support. The US then made a formal objection to the text of the article as adopted. A number of other delegations reserved their position on this article expressing their right to propose amendments to this text when presented before the General Conference.

Further, the Convention does not solve the knot concerning the interaction with WTO *corpus*. The major alarm raised by critics of this instrument is that provisions on sovereignty and on measures available in the name of cultural diversity could be used to not comply with WTO rules. This because, in the lack of an unambiguous provision on the non interference with other international obligations, Member States could invoke the Convention as the legal framework allowing the circumvention of other specific 'uncomfortable' commitments – notably in the WTO context.<sup>8</sup>

On the other hand, as already stated with regard to the INCP draft, the UNESCO text "seems to recognize that existing trade rules may not be altered through the new convention, which implies that national cultural policies would not be sheltered from the risk of being challenged under the WTO dispute settlement mechanism for their trade restrictive effects" (Iapadre, 2004). As the INCP states "the GATS does indeed have a certain flexibility ... providing WTO Members with the ability to ensure that domestic cultural policy objectives are reflected in their commitments or absence of commitments in their GATS schedules.", but warns that "it is not just the GATS that could affect cultural policy measures. With WTO consideration of such issues as investment and competition on the horizon, both of which could affect cultural policy measures, it is clear that the challenge of maintaining cultural policy space extends beyond the services disciplines of the GATS and into other WTO agreements. Indeed, the same challenges are present for other regional and bilateral negotiations and agreements. A Convention would provide an international point of reference on cultural policy that could be put to use to determine the appropriate treatment for cultural goods and services as the rules-based international trading system evolves through bilateral, regional and multilateral agreements." (INCP, 2003b: 7).

The NICD proposal, therefore, seemed more inspired by the fear of what could happen in the future, with a further deepening of international economic integration, than by the possible consequences of the current WTO regime for cultural policies. With regard to the Convention, no specific reference to the WTO rules is explicitly made, nor there is any commitment to avoid allowing unnecessary protectionist measure. So, the question of the priority between different international regimes remains open. According to Acheson and Maule (2002) the NICD could never be used as a substitute of a general "cultural exception", because existing WTO agreements would leave any country the right to retaliate against discriminatory trade policies based on cultural targets. Anyway, representatives of some countries, such as France and Canada, have already affirmed that the Convention establishes supranational rules, which may oppose WTO law (Libération, 2005).

Adopting the framework of analysis proposed by Acheson and Maule (2004), we can develop some assessments on the Convention. As a matter of fact, main concerns raised about the INCP draft remain valid. As we have just seen, the unclear relationship to other instruments is a major problem in the UNESCO Convention<sup>9</sup>, made even more critical by the

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<sup>8</sup> Wouters and De Meester (2005) point out under which provisions major conflicts between the two regimes could rise.

<sup>9</sup> The US has indicated it as one of the main reasons for its reject of the Convention, claiming that it may be misused by governments to inhibit international trade. For instance, its explication of vote states that there

fact that some main players on the cultural ground, such as the US, will not be a Party of it, arising serious jurisdiction difficulties.

With regard to definitions, despite the disagreements we have mentioned on this issue, cultural diversity and other related concepts are more clearly defined in the UNESCO than in the INCP draft, apparently solving part of the problems raised by Acheson and Maule about the non enforceable nature of the instrument. Nonetheless, the lack of enforceability stays largely untouched. What appears to be the relevant matter is the failure to establish specific obligations among the parties. As a consequence, the gains generated for each member are not sufficient high to bind them to respect the convention, nor to accept the provision for an efficient dispute settlement mechanism (Acheson and Maule, 2004). Moreover, the vagueness of these 'soft obligations' makes it impossible to find clear criteria for adjudication, so implying that potentially all protective measure could pass the inspection of the dispute settlement mechanism.

We have already pointed out that this issue has been a most contentious one in all discussion held in order to prepare the Convention (and these difficulties clearly show the non adequacy of the benefits created by the Convention for the members). The hybrid solution adopted raises a further significant concern. The provision for the opting out clause weakens even more the dispute settlement mechanism, because it establishes a legal basis to hamper any concrete intervention. In addition, it is plain that this provision seriously damages the credibility of the mechanism.

Thus, given its non enforceable nature, the UNESCO Convention seems to remain a declarative instrument, more than being a binding standard-setting text (even if it is officially defined as such). As stressed by Acheson and Maule, this character raises questions as to the role of the Convention. However, statements expressed during UNESCO negotiations point to the positive contribution of the text to the development of international law. With specific regard to the WTO law, the Convention could influence the future evolution of the international trading system. It could act upon both the bargaining game among trade negotiators, and the underlying strategic interaction between governments and different domestic sectors, by strengthening the relative position of vested interest groups in the cultural sector in their confrontation with other import-competing and export-oriented groups (Iapadre, 2004). Those effects could be even more relevant than in the general case of an instrument promoted by other organizations, as UNESCO is broadly recognized as having the wider legitimacy to operate in the cultural domain, and its initiatives are susceptible of being much more influent than similar steps carried on in other fora.

Nonetheless, the refusal by the US to sign the Convention could lead to tougher contrast on cultural policies between the US and the countries supporting the Convention in other contexts, and especially in WTO negotiations. Notably, the US could decide to boost the recourse to bilateral trade agreements including clauses on cultural sectors, both to guarantee free trade for its cultural goods and activities, and to slow down the ratification process.

This policy has already been put in place, and what has happened during the vote on the adoption of the Convention, where the countries who have signed such agreements (Honduras and Nicaragua) have abstained, has showed the potential outcomes of this strategy. From this standpoint, there could be a real danger of moving towards further polarisation in dealing with the "trade and culture dilemma"<sup>10</sup>.

### **3.2.3 Complementary options**

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have already been "disturbing statements by some government leaders of their intent to use this convention to block the import of agricultural and other products" (Oliver, 2005)

<sup>10</sup> Some commentators have already formulated the hypothesis of the US exiting again the UNESCO, even if US authorities have expressed their clear denial in that regard.

The sixth option, which could be combined with any of the others, is an *international co-ordination of competition policies* in the audio-visual sector. It could increase market contestability, while at the same time offering a shelter against the risk of homogenisation, which is feared by many supporters of protective cultural policies. Large audio-visual firms are sometimes accused of implementing anti-competitive marketing and distribution practices, and their price discrimination strategies are often perceived as a form of dumping. Current WTO rules do not envisage anti-dumping measures for services and, more generally, cannot cope explicitly with market access limitations arising from the behaviour of private firms<sup>11</sup>. A more effective application of national competition policies would help solve these problems, but would probably be insufficient.

The audio-visual sector seems a case in which the external effects of competition policies – or of their lack – are so important, that an international co-ordination of national authorities appears as a minimum prerequisite for enhancing the credibility of their role in the strategic interaction between governments and private sectors. A more effective alternative would be an international agreement on trade related aspects of competition policies, but at present the chances of putting this issue in the agenda of the WTO negotiating round seem very low, in spite of the open conclusion reached on this point in the fourth Ministerial Conference in Doha. The mercantilist bias of WTO negotiations does not help to give competition policies the importance they should have in the agenda of negotiators (Hoekman and Holmes, 1999).

More generally, the desirability and the feasibility of any attempt at increasing the effectiveness of competition policies in the audio-visual sector depend on how it is combined with the other options. For example, one might devise a trade-off between a substantial dismantling of protective audio-visual policies and some kind of international agreement on competition policies, which would possibly reassure those fearing the excessive market power of large audio-visual transnational corporations. However, as has already been stressed, even if market access were actually free for all producers, it may not be given for granted that the plurality of ownership would be enough to warrant also cultural diversity. Therefore the room for protective audio-visual policies would not be completely suppressed by the adoption of effective competition policies on a global scale.

The last option that is worth mentioning, *unilateral regulatory reforms*, is also not necessarily an alternative to the previous ones, although it is sometimes presented as such. Referring generally to the services sector, Hoekman and Messerlin (2000) claim that unilateral domestic liberalisation is more suitable than cumbersome WTO negotiations for allowing a country to reap the benefits of international integration. Specific complementary policies could pursue other social goals, better than protectionism. Multilateral agreements could perform the ancillary function of helping governments overcome domestic resistances and lock in liberalisation commitments.

The reasons for reforming audio-visual policies have been already reminded in this paper. According to many observers their results are unsatisfactory and perhaps even detrimental for the development of cultural activities. Moreover, independently of the results achieved so far, audio-visual policy instruments need to be adapted to current rapid changes in technology and market structure (Acheson and Maule, 1999). These arguments were valid even if current audio-visual policies did not raise any problem for international economic integration. But the tension between trade and culture is evident, and adds urgency to the need for reforms.

#### **4. The European Union and cultural diversity**

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<sup>11</sup> Even if specific market access commitments in the context of GATS negotiations could increase foreign participation in existing enterprises, this would not necessarily ensure a higher degree of competition, and could even be harmful in certain circumstances (Low and Mattoo, 2000).

#### 4.1. European cultural policies

European cultural policies are based on article 151 of the Treaty establishing the European Community, which states that “Action by the Community shall be aimed at encouraging co-operation between Member States and, if necessary, supporting and supplementing their action” in several areas, among which “artistic and literary creation, including in the audio-visual sector”. This article also gives a wider relevance to the target of protecting cultural plurality, by stating that “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.” In the audio-visual sector the objective to promote cultural diversity is explicitly intertwined with industrial policy targets.<sup>12</sup>

This special focus on the audio-visual sector is due both to its economic relevance and to its key social and cultural role. Cultural industries are an important source of employment, as well as a vehicle for spreading identity and cultural diversity.

In the European context, where national markets remain segmented because of the plurality of languages and the fragmentation of distribution networks, audio-visual policies aim at offsetting such disadvantages, that do not allow the exploitation of scale economies, as well as at promoting the development of a competitive entertainment industry. At the same time, these policies are assigned to the purpose of encouraging the creation of specific European contents, different from the national ones. The development of common institutional frameworks in the cultural domain is considered to be helpful for strengthening cohesion and favouring political integration among European peoples. As the European Parliament underlined in its resolution of 5 September 2001 on cultural cooperation in Europe, the aim of EU cultural initiatives is to encourage the creation of a “European cultural area”.

Specific intermediate objectives of European audio-visual policies include supporting independent producers and distributors, ensuring that European films are actually distributed in the cinemas, protecting cinemas from the competition of TV-channels, and encouraging international co-operation in cultural production and distribution.

The need to reinforce national policies with a European strategy for the audio-visual sector arose in the first half of the Eighties. Technological developments were beginning to threaten the effectiveness of national support tools and the relative performance of European audio-visual industry appeared to weaken, especially in television programmes, as shown by the huge deficit emerging in the trade balance with the US. In the subsequent years a number of actions were undertaken in order to promote the development of the European audio-visual industry, integrate national markets, harmonize distribution rules and technical standards, contrast piracy, support innovation.<sup>13</sup>

European audio-visual policies encompass a system of rules concerning the transmission and the contents of audio-visual services, as well as a wide range of support tools, which complement national subsidies. Besides, other policies cope with the specificity

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<sup>12</sup> The Treaty provisions related to audio-visual policies entered into force only in 1993, with the Treaty on European Union, while originally the Treaty of Rome did not assign any explicit competence on audio-visual matters to the Community's institutions. The scope of European integration principles concerning the freedom of establishment and of providing services was extended to the audio-visual sector by a sentence of the European Court of Justice. The *Protocol on the System of Public Broadcasting in the Member States*, attached to the Treaty of Amsterdam, defines the prerogatives and the limitations of national autonomy in regulating and financing public broadcasting services.

<sup>13</sup> A *Green Paper on the establishment of a Common market in broadcasting* was published in 1984 [COM (84) 300 final]. An explicit mention of a “European audio-visual policy” was made for the first time in the Council Directive on television broadcasting [COM (86) 146 final]. Subsequent important documents of European audio-visual policy include the *Television without Frontiers* Directive (Council of the European Communities, 1989), the *Green Paper on the convergence of the Telecommunications, Media and Information technology Sectors* (CEC, 1997), and the Communication on *Principles and Guidelines for the Community's Audio-visual Policy in the Digital Age* (CEC, 1999).

of the cultural sector as well, and integration of dimensions related to different policies in dealing with audio-visual matters has been explicitly stressed as a core goal by the Council of Ministers (resolution of 21 January 2002).

For instance, competition policy takes into account the particular features of this sector, notably in the matter of State aid. Supply of aid in any form by a State entity to an economic operator is prohibited where it threatens to affect trade between member States, putting certain firms or certain types of production at an advantage. However, State aid to promote culture and heritage conservation is considered compatible with the internal market, provided that it does not influence internal trade to an extent that is contrary to the common interest (article 87).

Moreover the European Commission deals with the external aspects of audio-visual policy, including WTO negotiations, which have been examined in the previous section of this paper.

Till present, the position of the European Union concerning the WTO negotiations clearly respects the cultural imperatives of audio-visual policies (Herold, 2003). As we have already stressed, the Uruguay Round has been emblematic of this attitude.

From what precedes, it stems plainly that EU audio-visual policy “is the arena for divergent interests and arguments, both economic and cultural, European and national” (de Smaele, 2004).

Conflicts arise from two main tensions. On one hand, at the internal level, audio-visuals are a main example of the imperfect stage of integration in service trade in European Union. As stated by Langhammer (2005), “given the remaining national sovereignties in regulating service trade against other EU Member States also, the EU is not yet even a free trade area”. So, we could argue that the above quoted statement on the creation of a “European cultural area” could be interpreted as a call for a “European cultural free trade area”, leading to full implementation of the single market.

More in detail, if generally speaking the existence of a ‘not-so-perfect single market’ concerning trade in services is determined by differences in national policies against non-Member States, in the case of audio-visual services national policies differ also between Member States, because of the shared competence between the Community and the Member States. In this sense, the cultural sector appears as a playground on which overlaps and divergences between European and national policies are extremely palpable.

As for the likeness of a rapid implementation of the single market, Langhammer (2005) stresses that a major barrier is in that many of the national measures are deeply rooted in the history, culture and other peculiarities of the Member States, which is indeed the case for audio-visuals. Moreover, the author raises the point of the “discrepancy between EU Member State governments concerning the perception of Anglo-Saxon dominance in some services, e.g. in audiovisual services” (p. 323). If this dominance is seen as a challenge to cultural identity, the single market is more likely to be considered as a threat.

A secondary remark on the internal tensions concerns the fact that the search for a single European cultural identity, through opening up cultures, could collide with national and local struggle to safeguard and promote specific cultural activities and expressions. Nonetheless, a balance could be reached between European and local identities, affirming – as already mentioned - the impossibility to build the former without the latter.

On the other hand, at the international level, this search of European identity leads to protect the audio-visual sector, thus clashing with opposite interests for liberalization in international negotiations. This conflict may be emphasized by the parallel quest for protection and promotion of their own cultural diversity by the single Member States. As a matter of fact, the EU asserts that its intervention on international arenas aims to help open up European cultures whilst at the same time enhancing the common heritage which Europeans share, and to preserve a room for manoeuvre with regards to the international

commitments as far as EU's and Member States' policies and measures in the audio-visual sector are concerned.

Nonetheless, Messerlin (2000) observes, since the late 1990s, major changes in the attitude of EU countries towards audio-visuals policies, notably with regard to WTO negotiations. First, public opinion appears increasingly sceptical on their efficiency. Moreover, according to the author, some Member States are changing their view on the opportunity of highly protectionist audio-visual policies, thus eroding the coalition lobbying for protection. Furthermore, the shift of main European audio-visual firms towards new strategies, integrating different sectors and activities, contributes to the setting of a new equilibrium in the coalitions supporting the WTO negotiations. As stressed by Messerlin and Cocq (2004), integration in larger firms should lead to an internal perception of the advantages of reciprocal trade by the firms, because of their broader field of activity, weakening the incentives to lobby for the maintenance of barriers against import competition. In the authors' view, this diversification process, accompanied by reforms of European audio-visual policies, such as elimination of quotas, revision of subsidies regime and introduction of adequate regulation for patronage, could lead to more fruitful multilateral negotiations.

The relevant link between participation in multilateral negotiations and the implementation of the single market is made clear by Langhammer (2005). Moving from what happened during GATT negotiations on industrial goods (the Dillon and the Kennedy rounds), when the formation of the EEC as a customs union was helped by the multilateral process, and from restrictions dismantled in relation to the Doha Development Agenda, the author argues that international pressures on the EU can trigger the removal of remaining trade barriers within the Union.

However, and despite the analysis calling for a more WTO oriented approach to audio-visual matters, the EU is currently participating to actions on cultural diversity proposed by other international institutions than the WTO, and has supported the UNESCO Convention.

#### **4.2. The European Union and the UNESCO Convention on cultural diversity**

The European Union supported the UNESCO Universal Declaration and Action Plan on Cultural Diversity of November 2001, which was the official starting point of the process aimed at establishing a new international instrument on cultural diversity, and decided to play an active role in the negotiations to that purpose. The objectives of the new agreement include, as we have mentioned, consolidating cultural rights, promoting international co-operation, debating cultural policies, and monitoring cultural diversity.

The position of the European Commission on the new instrument is contained in a Communication to the Council and the European Parliament (CEC, 2003). A more general view by the EU and its Member States can be found in the Communication to the UNESCO issued in November 2004. The latter underlines that the Convention "should in particular affirm the specific and dual (cultural and economic) nature of cultural goods and services, recognize the role of public policies in the protection and promotion of cultural diversity and recognize the importance of international cooperation to respond to cultural vulnerabilities" (CEC, 2005).

For its part, the 2003 Communication focuses on the new instrument's relationship with existing agreements, and notably with the WTO rules. After recognizing the growing importance of cultural diversity in the international arena, and its role in Europe, the Communication indicates the criteria that the new instrument should meet in order to be acceptable. Moving from the need "to ensure coherence between internal and external EU policies and multilateral agreements, notably under the auspices of the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO).", the Communication recalls its official negotiating mandate for the current round of WTO

negotiations, as set by the General Council in 1999: “During the forthcoming WTO negotiations, the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audio-visual policies for the purpose of preserving their cultural diversity.” At the same time, it states that the new instrument “should neither interfere nor prejudice with on-going discussions notably within the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore/Traditional Cultural Expressions.” With a similar wording it argues that “such instrument would not affect and be without prejudice to the international legal framework applicable to exchanges of cultural goods and services – in particular as regards their trade and intellectual property rights aspects.”

The latter argument is particularly important, showing clearly that in the Commission’s view the new instrument would not interfere with the functioning of the international trading system. In other words, the new instrument would not even try to shield cultural policies from WTO discipline, and the tension between the two policy spheres would remain unchanged.

Predictably, this view has been heavily criticized by organized interest groups. For example, the European Council of Artists (ECA), a member of the INCD representing multidisciplinary artists’ councils from 24 European countries, quoting a rather obvious statement of the Thessaloniki meeting of EU culture ministers in May 2003 (“*The basic international forum for cultural policies cannot be the WTO*”), insists that the new instrument “will have to include trade regulations, if it wants to be more than lip-service” (ECA, 2003). It is interesting to note that, according to the ECA, the threat to cultural plurality comes not only from WTO rules, but also from competition policies, with a clear reference to the Commission’s action to foster European integration.

In the words of the Commission “the aim of the Community’s audio-visual policy is to increase the circulation of European works, to strengthen the structure and competitiveness of the European audio-visual sector, and to promote cultural diversity, both within and between the Member States” (CEC, 2001a: 4). Since these targets are perceived to be partly in conflict with each other, the determination of their relative weights in the preferences of policy-makers is a very sensitive issue. In their comments to CEC (2001a), for example, the French authorities denounce what they see as the implicit hierarchy in the Commission’s approach: a special emphasis on the aim of the free circulation of works, at the expense of a more specific attention to the needs of the audio-visual sector competitiveness and of cultural diversity (Autorités Françaises, 2001).

In fact the European Commission, although maintaining a negative stance on undertaking liberalization commitments for audio-visual services in the GATS, when dealing with intra-European trade explicitly states that “barriers to the circulation of European audio-visual works and barriers to the provision between Member States of filmmaking services ... hinder the promotion of cultural diversity and prevent the sector from taking full advantage of the benefits of the Internal Market.” (CEC, 2001a: 3). In this case the trade-off between economic integration and cultural policies fades away, since the removal of trade barriers – among European countries – is seen as a tool for *promoting* cultural plurality, by enlarging market access for national audio-visual products.<sup>14</sup>

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<sup>14</sup> All the issues which have been so far examined in the context of the multilateral trading system are relevant also for regional agreements, and the relation between those two levels adds complexity to the dilemma between international economic integration and cultural plurality (Galperin, 1999; Guerrieri and Scharrer, 2000).

The tension among the different functions performed by the audio-visual system in the cultural and economic spheres is evident, for example, in the Treaty establishing the European Community. Article 87, concerning aids granted by States, concedes that “aid to promote culture and heritage conservation” may be considered to be compatible with the common market “where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest”. A similar language is used in the Protocol on the System of Public Broadcasting in the Member States, attached to the Treaty of Amsterdam. National autonomy in defining the targets and the features of public broadcasting service and

As we have mentioned, the same approach surfaces in the context of the Commission's competition policy, notably with respect to the treatment of national support policies to cinematographic works. The Commission recognises the right of Member States to subsidise national film industries in the pursuit of cultural and economic targets, but aims at avoiding that such policies become an additional source of fragmentation in the internal market, jeopardising the exploitation of its benefits. Evaluation criteria have to be adapted to the specific features of each national cinema sector, paying special attention to the needs of countries with a limited cultural or linguistic area. It is understood that the goal of supporting national film industries requires aids to be targeted on productive units actually existing within the territory of the country. However "a territorialization level going beyond what is strictly necessary to ensure cultural creation in a Member State unduly fragments the Internal Market, thereby preventing the sector from taking full advantage of the benefits that increased competition could bring to technical filmmaking activities, where at present there is competition between Member States." (CEC, 2001a: 18).<sup>15</sup>

This 'double standard' of the Commission about the effects of international integration on cultural diversity can be justified, considering that the US dominance on world audio-visual markets has no equivalent within the internal EU market. It can also help understand its cautious approach to the problem of the priority between international trade rules and the UNESCO Convention. However, it is clear that if the new convention will not affect the WTO system, it will not be able to tackle the problems motivating its establishment.

## 5. Conclusions

Imperfect competition and market failures would justify policy activism in the cultural sector, even in the absence of non economic objectives. Increasing returns of scale and the interdependence of consumer preferences create mighty forces driving towards the concentration of market power. Even if competition were perfect, the intergenerational externalities associated to cultural products would call for public intervention to prevent their undersupply. International integration complicates the picture.

The plurality of cultural identities is a valuable global public good. Most countries try to promote it through national policies, which however are increasingly at odds with the principles of the WTO system. The long-standing controversy on audio-visual services is the most important example of this tension. The current round of WTO negotiations offers an opportunity to find a more satisfactory equilibrium in the international governance of cultural productions. WTO members will neither liberalize completely market access, nor introduce rigid forms of cultural exemption. A sectoral annex on cultural products, including a *Reference Paper* on trade related aspects of competition policies, could help to balance, within the WTO system, the benefits of international economic integration with the protection and the development of cultural plurality.

The UNESCO Convention can play very important functions in the cultural domain, but cannot be a substitute for a proper WTO discipline of the trade and culture quandary. A clear specification of the relations between the two regimes represents an important global governance challenge, which should be seriously addressed by countries that have reached the new international agreement.

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in providing the necessary funding is clearly recognised, but it is requested that "such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account".

<sup>15</sup> The Commission has further clarified its position on State aids in a Communication (CEC, 2001b).

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