

# **The Notion of ‘Cultural Diversity’ in the EU Trade Agreements and Negotiations: New Challenges and Perspectives**

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### **Abstract**

This article analyses the notion of ‘cultural diversity’ as adopted within and adapted for the European Union’s (EU) external trade relations. Its law in context approach, underlines the socio-political framework in which the notion of ‘cultural diversity’ has taken shape, and the conflicting interests involved in its negotiation, promotion and protection. This article explains the concept of cultural diversity as first developed within the World Trade Organization (WTO) negotiations and then the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. It argues that CETA brings new perspectives with regard to the notion of ‘cultural diversity’ into EU external trade relations and that the Transatlantic Trade and Investment Partnership (TTIP) negotiations may represent a challenge to this notion. It contributes to furthering our understanding of these agreements and offering a few remarks on their impact on cultural diversity.

### **I. Introduction**

In a 2012 article on cultural diversity and regional trade agreements, Lilian Richieri Hanania underlines the need to avoid ‘falling into the ‘trade and culture debate’ as an opposition between liberalization and protectionism’.<sup>1</sup> It is worth spending some time on this statement, which points to an important debate on the subject of cultural diversity and international trade.

The debate in question has often been oversimplified, ‘trade’ and ‘culture’ have repeatedly been characterized as distant poles of a dichotomy. As I have discussed in previous writings on the subject of state aid to cinematographic works,

‘the Commission (namely the Directorate-General (DG) for Competition) has drawn a sharp distinction between the cultural and

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<sup>1</sup> L.R. Hanania, ‘Cultural Diversity and Regional Trade Agreements – The European Union Experience with Cultural Cooperation Frameworks’ 7:2 *Asian Journal of WTO & International Health Law and Policy*, 423, 453 (2012).

the industrial nature of aid, between cinema as a cultural expression and cinema as an industry'.<sup>2</sup>

Even though the Commission has recognised the crucial role of state aid to cinematographic works in the promotion of cultural diversity, it nonetheless imposes this factious distinction on Member States. The only way to effectively support film as a cultural expression is by fostering the underlying industry.<sup>3</sup>

Nevertheless, I still have not found a theoretical framework for analyzing the relationship between international trade and cultural diversity that is more convincing than liberalization versus protectionism. Following the path developed by C. Edwin Baker,<sup>4</sup> I will explore this relationship in the framework of the notion of protectionism. I draw from the Oxford English Dictionary's definition of protectionism as: 'the theory or practice of shielding a country's domestic industries from foreign competition by taxing imports'. I will try to avoid an ideological approach that considers *a priori* 'liberalization' and 'protectionism' in the cultural sector respectively as the 'bad' and 'good guy'. I argue in fact that the regulation of cultural sectors needs 'doses' of both liberalization and protectionism and its analysis requires taking into account the social, political and economic context in which the regulation takes place. Therefore, this paper examines the notion of 'cultural diversity' through an approach of law in context that acknowledges the socio-political framework in which its meanings have taken shape.

During international negotiations on trade in services held with the World Trade Organization (hereafter WTO), the European Union (hereafter EU) 'defined' the notion of 'cultural diversity'.<sup>5</sup> The EU took a protectionist stance, seeking to limit global cultural homogenization through the promotion of local cultural industries. Its approach tried to limit the power of transnational oligopolies in the cultural sector. At the level of the film industry, for example, cultural diversity refers to the state support of cinematographic production.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter UNESCO Convention)<sup>6</sup> – adopted

<sup>2</sup> L. Bellucci, 'National Support for Film Production in the EU: An Analysis of the Commission Decision-Making Practice' 16:2 *European Law Journal*, 211, 222 and 211 (2010).

<sup>3</sup> Ibid 223.

<sup>4</sup> See C.E. Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press, 2002). Baker is inspired by Oliver Goodenough, whose application of these categories is of a different scope. See O. Goodenough, 'Defending the Imaginary to Death? Free Trade, National Identity and Canada's Cultural Preoccupation' 15 *Arizona Journal of International & Comparative Law*, 203 (1988).

<sup>5</sup> Cf C. Arup, *The New World Trade Organization Agreements. Globalizing Law Through Services and Intellectual Property* (Cambridge: Cambridge University Press, 2000), 97.

<sup>6</sup> English text available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (last visited 6 December 2016).

on 20 October 2005 by the thirty-third session of the UNESCO General Conference – contributed to strengthening the notion of cultural diversity at an international scale. The UNESCO Convention considers cultural diversity as a positive response to the trends toward cultural homogenisation. It provides a broad definition of cultural diversity and adopts an interpretation of culture both as artistic expression and as an expression of traditions and customs. It recognises the states' 'sovereign right to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory',<sup>7</sup> including measures to support cultural industries and foster the diversity of media.<sup>8</sup> It therefore enables states to protect and promote their national cultural welfare, for example through state aid to audiovisual<sup>9</sup> works, which was at the heart of the conflict during the multilateral WTO negotiations on trade in services.<sup>10</sup> During these negotiations, WTO Members had diverging opinions about the liberalisation and protection of cultural markets and did not reach a shared position. These negotiations have currently been suspended, but they are crucial to our understanding of cultural diversity as developed in international trade relations.

The difficulties related to the multilateral framework of the WTO pushed its Members towards bilateral Free Trade Agreements (FTAs). Issues involving the protection and promotion of cultural diversity were negotiated within FTAs. Currently, the most relevant FTAs for the EU, and therefore the main challenge to the notion of cultural diversity in the context of external relations, are the Comprehensive Economic and Trade Agreement (CETA),<sup>11</sup> which was concluded between Canada and the EU, and the Transatlantic Trade and

<sup>7</sup> Cf also Art 1 letter h), Art 5 para 1 and Art 6 para 2 letter c).

<sup>8</sup> See, in particular, Art 1 letters a) and h), Art 2 para 2, Art 5 para 1 and Art 6 letters a) and b).

<sup>9</sup> I follow the Commission's understanding of the term 'audiovisual', which includes both cinema and television.

<sup>10</sup> For further details as well as critical commentary on the UNESCO Convention see R. Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication Order' 1 *International Journal of Communication*, 24, 48 (2007); L. Bellucci, *Media, diritto e diversità culturale nell'Unione europea tra mito e realtà* (Pisa: ETS, 2012), 19-32; L. Bellucci and R. Soprano, *The WTO System and the Implementation of the UNESCO Convention: Two Case Studies*, in Germann Avocats (Geneva) and multidisciplinary research team, *Implementing the UNESCO Convention of 2005 in the European Union*, Full Version of the Study commissioned by the European Parliament, Directorate General for Internal Policies. Policy Department B: Structural and Cohesion Policies. Culture and Education (Bruxelles: European Parliament, 2010) 159, 162-164, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT\\_ET\(2010\)438587\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/438587/IPOL-CULT_ET(2010)438587_EN.pdf) (last visited 6 December 2016); [www.diversitystudy.eu/ms/ep\\_study\\_long\\_version\\_20\\_nov\\_2010\\_final.pdf](http://www.diversitystudy.eu/ms/ep_study_long_version_20_nov_2010_final.pdf) (last visited 6 December 2016).

<sup>11</sup> A consolidated CETA text was made public on 26 September 2014, available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last visited 6 December 2016).

Investment Partnership (TTIP), which the EU is currently negotiating with the US. CETA will be subject to legal revision and then transmitted to the Council and Parliament for ratification. It will only become binding under international law once the ratification process is complete. I will show in this article that CETA brings new perspectives with regard to cultural diversity into EU external trade relations and that the TTIP negotiations may represent a challenge to the notion of cultural diversity.

Section II of this article discloses the roots of the notion of cultural diversity as it emerged in the context of EU external trade relations, in particular as a result of the WTO negotiations. Section III focuses on the new perspectives that CETA introduced with regard to cultural diversity. Section IV discusses the impact of the TTIP negotiations on the notion of 'cultural diversity'. Section V concludes the analysis and focuses on the challenges that may affect these negotiations.

## II. The Notion of 'Cultural Diversity' and the WTO Doha Round

The notion of cultural diversity in the EU external trade relations has its roots in the humus of the WTO multilateral negotiations on audiovisual services. The EU adopted it during the Ministerial Conference in Doha launched under Art XIX of the General Agreement on Trade in Services (hereafter GATS) in November 2001. The transition to the notion of 'cultural diversity' occurred in the mandate given by the Council of the European Union (hereafter Council) to the Commission<sup>12</sup> on the occasion of the general Affairs Council meeting of 26 October 1999, and was supported by the Commission and the Parliament.<sup>13</sup> This mandate declared that in future

<sup>12</sup> Cf *Consultation sur les négociations GATS 2000/OMC portant sur certains services audiovisuels (musique et logiciel de loisirs), ainsi que sur les services culturels*, available at [http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon\\_fr.htm](http://europa.eu.int/comm/avpolicy/extern/gats2000/ncon_fr.htm) (last visited 5 December 2006).

<sup>13</sup> Cf P. Lamy, *Les négociations sur le commerce des services à l'OMC*, Parlement européen, Strasbourg (10 March 2003), 3 available at [http://europa.eu.int/comm/commissioners/lamy/speeches\\_articles/sp1a\\_158\\_fr.htm](http://europa.eu.int/comm/commissioners/lamy/speeches_articles/sp1a_158_fr.htm) (last visited 6 December 2006); V. Reding, *La diversité culturelle*, Parlement européen (10 March 2003), available at <http://europa.eu.int/rapid/start/cgi/guesten.ks> (last visited 25 February 2015); Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Principles and Guidelines for the Community Audiovisual Policy in the Digital Age (14 September 1999) COM(1999) 657 final, para 7; J.A. McMahon, 'Preserving and Promoting Differences? The External Dimension of Cultural Cooperation', in R. Craufurd Smith ed, *Culture and European Union Law* (Oxford: Oxford University Press, 2004), 345; European Parliament resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round (COM (1999) 331 - C5-0155/1999 - 1999/2149(COS)) [2000] OJ C 189/213, paras 24-26; European Parliament Resolution on the Fourth WTO Ministerial Conference [2002] OJ C 112 E/321, paras 21-22; European Parliament resolution on the General Agreement on Trade in Services

negotiations within the WTO, the European Community (hereafter Community)<sup>14</sup> would ensure, as it did during the Uruguay Round, that both the Community and its Member States would be able to define and implement cultural and audiovisual policies respecting their own cultural diversity.<sup>15</sup>

Without changing its policy on audiovisual services, the EU considered that the notion of cultural diversity would reconcile the varying interpretations of public intervention on the part of Member States in the sphere of culture as well as their diverging economic interests, and encourage a unified voice for these states during international trade negotiations. Some Member States' interest in supporting their film industry and therefore in protecting cultural services has been, for example, in conflict with other Member States' interest in having open markets to facilitate their music industry's exports. Through the notion of cultural diversity the EU overcame Member States' diverging economic interests with the aim of conducting successful negotiations.

The EU opted for the notion of 'cultural diversity', rather than 'cultural exception' – which would exclude the audiovisual sector from the scope of GATS – or 'cultural specificity'. The Commission itself had supported the latter during the Uruguay Round negotiations, according to which audiovisual services should have fallen under the scope of GATS, despite being subject to a specific legal regime.<sup>16</sup>

The notions of 'cultural exception,' 'cultural specificity' and 'cultural diversity'<sup>17</sup> all represent different degrees of protection granted to the cultural sphere in trade agreements. In sharp contrast, US negotiators argued that cultural services should be considered as any other services and therefore liberalised.

During the WTO negotiations, the Parties failed to reach an agreement on audiovisual services, which have therefore been integrated into GATS without a specific legal regime. None of these notions was legally recognised in the WTO agreements. Nevertheless, the EU presented a list of exemptions to the most favoured nation principle<sup>18</sup> under Art II GATS and the Annex on

(GATS) within the WTO, including cultural diversity, 12 March 2003 [2004] *OJ C* 61 E/289, paras 12-13.

<sup>14</sup> It was not yet called 'European Union' (EU).

<sup>15</sup> Cf Council resolution of 21 February 2001 national aid to the film and audiovisual industries [2001] *OJ C* 73/3, para 5; Council resolution of 21 January 2002 on the development of the audiovisual sector [2002] *OJ C* 32/4, para 5.

<sup>16</sup> Cf A. Herold, 'European Public Film Support within the WTO Framework' 6 *IRIS plus*, 2, 6 (2003).

<sup>17</sup> For details on these notions or the negotiations on audiovisual services held during the Uruguay Round see L. Bellucci, '“Cultural Diversity” from WTO Negotiations to CETA and TTIP: More than Words in International Trade Law and EU External Relations' 20:2 *Lex Electronica*, 39, 45-48 (2015) available at: <http://www.lex-electronica.org/en/s/1413> (last visited 6 December 2016).

<sup>18</sup> Which aims at avoiding the application of a different treatment based on the origin or the supplier of a service for an equivalent service. Countries are not allowed to discriminate

Art II Exemptions.<sup>19</sup> Furthermore, with regard to the national treatment principle under Art XVII GATS,<sup>20</sup> the EU did not make any liberalisation commitments. It adopted this policy during the Uruguay Round and confirmed it during the Doha Round.

Since the Doha Round, the EU refers to the notion of cultural diversity. Nevertheless, media, stakeholders, artists and the general public in Europe often refer to the concept of 'cultural exception'. Broadly speaking, 'cultural exception' means excluding cultural services from the liberalisation process and therefore from a commercial logic.<sup>21</sup> The term is still preferred by the media and public opinion, in Europe generally speaking and most particularly in France, which has the biggest film production industry in Europe and the strongest support system in the continent. France, it should also be noted, was among the proponents of the notion of 'cultural exception' during the Uruguay Round.

### **III. The Notion of 'Cultural Diversity' and the New Perspectives Introduced by the Comprehensive Economic and Trade Agreement (CETA)**

As previously mentioned, given the lack of success within the WTO's multilateral context, commercial partners turned to bilateral agreements,

between their trading partners. All Parties must apply this treatment to one another. Art II para 1 GATS constitutes a general obligation. It states that: 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

<sup>19</sup> Cf Additional Own-Initiative Opinion of the Economic and Social Committee on the Effects of the Uruguay Round Agreements [1994] *OJ* C393/200, para 8.2.

<sup>20</sup> According to the national treatment principle '(...) each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers' (para 1). The principle aim is to avoid discrimination between foreigners and nationals. It guarantees that foreign services and service providers, precisely those of another Member of the trade agreement, are treated no less favourably than local services and service providers. It applies only to the services explicitly listed by Members in the schedules of commitments and the extent to which they may be provided individually on the various modes of supply (G. Venturini (with the collaborative work of G. Adinolfi, C. Dordi and A. Lupone), *L'Organizzazione Mondiale del Commercio* (Milano: Giuffrè, 2004), 102), that is only pertaining to states that have taken liberalisation commitments concerning certain services. Cf G. Sacerdoti, 'L'Accordo generale sugli scambi di servizi (GATS): dal quadro OMC all'attuazione interna', in Id and G. Venturini eds, *La liberalizzazione multilaterale dei servizi e i suoi riflessi per l'Italia* (Milano: Giuffrè, 1997), 9.

<sup>21</sup> Cf L. Bellucci, *Cinema e aiuti di Stato nell'integrazione europea. Un diritto promozionale in Italia e in Francia* (Milano: Giuffrè, 2006), 311 and M. del Corral ed, *Culture, Trade and Globalisation: Questions and Answers* (Paris: UNESCO, 2000), 35-38, available at <http://unesdoc.unesco.org/images/0012/001213/121360e.pdf> (last visited 6 December 2016).

the FTAs. These agreements did not adopt the so-called ‘positive list approach’ that has shaped the EU’s international trade negotiations, that is to say sectors that a Party to the FTA wants to liberalise are listed in a schedule of commitments. Only those that are explicitly mentioned are liberalised. Instead, they have adopted the so-called ‘negative list approach’, used, notably, in the North American Free Trade Agreement (hereafter NAFTA), concluded between Canada, Mexico and the United States (hereafter US). According to this approach, an agreement covers all service sectors and measures, except for those expressly included in a list of reservations.

CETA negotiations have resulted in a ‘redefinition’ of the notion of ‘cultural diversity’. Expressed in the Preamble is this bilateral trade agreement’s debt to the UNESCO Convention.<sup>22</sup> The EU is the only regional economic integration organization to be Party to this Convention,<sup>23</sup> while Canada was among the most engaged promoters of the Convention. It was also the first country to become Party to it. This commitment shared by Canada and the EU speaks to their shared views on cultural diversity. The CETA agreement accounts for these similarities. Nevertheless, it also makes room for some of the differences. For instance, while the EU is invested only as far as audiovisual services are concerned, Canada’s stake in the agreement includes a wide range of cultural sectors and activities.<sup>24</sup>

Other particularities include the so-called ‘negative list approach’, by which Parties establish a definitive list of restrictions. They are therefore prevented from making gradual, liberalising commitments. Furthermore, CETA has adopted an innovative approach of ‘targeted’ exemption; that is, an exemption ‘chapter by chapter’.<sup>25</sup> The subsidies chapter is one such example where, as noted, nothing ‘in this Agreement applies to subsidies or government support with respect to audio-visual services for the EU and to

<sup>22</sup> The CETA’s Preamble recognises that the provisions of this agreement ‘preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity, (the EU and Canada affirm) their commitments as Parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. (They recognize) that states have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.’

<sup>23</sup> The EU joined the UNESCO Convention in 2006. See Council decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/CE) [2006] OJ L201/15.

<sup>24</sup> Canada has embraced a broad definition of cultural industries since NAFTA. For the definition see Art 2107, letters a) - e) NAFTA.

<sup>25</sup> C. Vallerand, ‘Exemption culturelle - Trouver un accord avec les Européens’ *Le Devoir* (30 March 2013), available at [www.ledevoir.com/international/actualites-internationales/374574/trouver-un-accord-avec-les-europeens](http://www.ledevoir.com/international/actualites-internationales/374574/trouver-un-accord-avec-les-europeens) (last visited 6 December 2016).

cultural industries for Canada.'<sup>26</sup>

#### **IV. The Notion of Cultural Diversity and the Transatlantic Trade and Investment Partnership (TTIP)**

Negotiations for the TTIP, a bilateral trade agreement between the EU and the US, were launched at the G8 summit at Lough Erne in June 2013. That these economies account for almost half of the global gross domestic product (GDP) and nearly a third of world trade,<sup>27</sup> and that the US is the largest economy in the world goes a long way to explaining the importance of this agreement.

TTIP has encountered a degree of criticism in Europe, and is considered to epitomize the harsh, neo-liberal policies adopted by the EU. That the public protests toward the negotiations were so widely publicized with so little reference to their actual content made it very hard for citizens, including scholars, to develop an informed opinion. The most controversial issue concerning TTIP, disclosed to the general public by the media, was over the Investor State Dispute Settlement (ISDS): the possibility for investors to bring proceedings against governments that are Parties to the treaty and how this in turn affects their freedom to determine public policies if they might be sued by corporations. The crux of the conflict had long and largely to do with the choice of dispute settlement body.

Much less is known about the conflict over the audiovisual sector. This conflict is not new and has economic, socio-political and cultural roots. As previously mentioned, during the negotiations with the WTO, the EU had defended the support of audiovisual services through government-funded incentives such as state aid. The US, instead, pushed for the liberalisation of these services which would have undermined this form of support. The TTIP is therefore an extremely delicate agreement. If, as discussed earlier, negotiations between Canada and the EU on issues pertaining to the protection and the promotion of cultural diversity were particularly complex due to the partially differing views of the Parties, it is easy to imagine that the TTIP negotiations on the matter are even more complex. The power of the US cultural industries and the position historically held by the US during international trade negotiations led many people (including the audiovisual sector) to believe that the TTIP could weaken the instruments put in place in Europe to protect the audiovisual industry.

The Federation of European Film Directors/*Fédération Européenne des*

<sup>26</sup> Consolidated CETA text, n 11 above.

<sup>27</sup> Cf D. Webb, 'The Transatlantic Trade and Investment Partnership' Briefing paper, no 06688, 4 December 2015, House of Commons (3), available at [www.parliament.uk/briefing-papers/sno6688](http://www.parliament.uk/briefing-papers/sno6688) (last visited 6 December 2016).



*Réalisateurs de l'Audiovisuel* (FERA) and other organisations belonging to the audiovisual sector supported the exclusion of this industry from TTIP negotiations. The feeling of insecurity that had spread in the European audiovisual sector regarding its potentially diminished ability to defend its achievements in film was largely due to the contradictory approach adopted by the Commission on this issue. The Trade Commissioner, Karel de Gucht, opposed the idea of an exclusion of the audiovisual sector from the TTIP negotiations. In his view the EU must avoid 'red lines' in its mandate so as not to limit the scope of its negotiations. This approach was clearly stated by the US Ambassador to the EU, William Kennard, who affirmed that a mandate that constrains negotiators because of a red line (a carve-out, an exception) is not a clean mandate and would increase the pressure on the US side to introduce the same. It would have been a natural consequence to have a price to pay.<sup>28</sup> In response to de Gucht's stance, many European filmmakers presented a petition in favour of the so-called 'cultural exception',<sup>29</sup> which was signed by more than seven thousand professionals.<sup>30</sup> On the other hand, the Commissioner for Education, Culture, Multilingualism and Youth, Androulla Vassiliou, underlined<sup>31</sup> the importance of ensur(ing) that an agreement with the US does not jeopardize the ability of the EU and its Member States to maintain their commitment to cultural diversity and fully implement and adapt their policies and instruments to the rapid evolution of the environment. (According to Vassiliou ...), protecting and promoting cultural diversity in the up-coming trade negotiations with the US means respecting three clear red-lines: The existing EU policies and instruments and corresponding measures at member States' level (... as well as ...) the existing national measures to regulate the audiovisual sector and support domestic and European content shall not be touched. (... Furthermore, ...) the ability to continue adapting and developing meaningful policies for cultural

<sup>28</sup> P. Spiegel, 'US warns EU against exempting film industry from trade talks. Brussels insists it is not breaking vow to avoid excluding any issue' *Financial Times*, 11 June 2013, available at <https://www.ft.com/content/8a2b759e-d2b1-11e2-aac2-00144feab7de> (last visited 6 December 2016).

<sup>29</sup> 'The Cultural Exception is Non-Negotiable', 18 April 2013, available at <https://www.lapetition.be/petition.php/THE-CULTURAL-EXCEPTION-IS-NON-NEGOTIABLE/12826> (last visited 6 December 2016).

<sup>30</sup> Cf also Federation of European Film Directors/Fédération Européenne des Réalisateurs de l'Audiovisuel, 'The Cultural Exception VS TTIP' *Newsletter*, July 2013, available at [http://www.filmdirectors.eu/wp-content/uploads/2013/07/FERA-Newsletter-July-2013\\_English.pdf](http://www.filmdirectors.eu/wp-content/uploads/2013/07/FERA-Newsletter-July-2013_English.pdf) (last visited 6 December 2016).

<sup>31</sup> A. Vassiliou, 'Cultural Diversity and the Transatlantic Trade and Investment Partnership, European Commission Press Release', available at [http://europa.eu/rapid/press-release\\_SP-EECH-13-429\\_en.htm](http://europa.eu/rapid/press-release_SP-EECH-13-429_en.htm) (last visited 6 December 2016). See also A. Vassiliou, 'Cultural Diversity, global politics and the role of Europe, European Commission Press Release', available at [http://europa.eu/rapid/press-release\\_SPEECH-14-165\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-14-165_en.htm?locale=en) (last visited 6 December 2016).

diversity, both at the EU and Member States' level' (shall be maintained).

The conflict between two Directorate Generals (DGs) over the audiovisual sector is not unusual within the Commission. For example, as I have shown elsewhere, with regard to the conflict between the DG Information Society and Media and the DG Competition over State aid to film,<sup>32</sup> the DGs expressed two forces having different orientations. Their different aims were a source of a conflict, even if *latent* (as opposed to *declared*).

The Commission President, José Manuel Barroso, supported the idea that the EU must avoid 'red lines', but at the same time claimed that the cultural exception would remain untouched, which made the audiovisual sector even more suspicious with regard to the outcome of the TTIP negotiations.<sup>33</sup> On the contrary, the Parliament clearly supported the exclusion of the audiovisual sector from the negotiations of the agreement. In its resolution of 23 May 2013 on EU trade investment negotiations with the United States of America, the Parliament<sup>34</sup> stressed that TTIP 'should not risk prejudicing the Union's cultural and linguistic diversity, including in the audiovisual and cultural services sector (it also considered) essential for the EU and its Member States to maintain the possibility of preserving and developing their cultural and audiovisual policies, and to do so in the context of their existing laws, standards and agreements; (it called), therefore, for the exclusion of cultural and audiovisual services, including those provided online, to be clearly stated in the negotiating mandate.'<sup>35</sup>

Finally, in the mandate given to the Commission, the Council excluded audiovisual services from the negotiations. In fact, in the directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America of 17 June 2013, it stated that audiovisual services would not be covered by the chapter on trade in services and establishment.<sup>36</sup>

As indicated by these directives, the 'Commission, according to the Treaties, may make recommendations to the Council on possible additional negotiation directives on any issue.'<sup>37</sup> However, without hiding that 'the US has a strong interest in gaining access to markets for services related to films and television',<sup>38</sup> the Commission affirmed that the EU position on cultural diversity would not change during the TTIP negotiations. It reassured

<sup>32</sup> See L. Bellucci, n 2 above, 222 and 231.

<sup>33</sup> Cf Federation of European Film Directors/Fédération Européenne des Réalisateur de l'Audiovisuel, n 30 above.

<sup>34</sup> P7\_TA(2013)0227.

<sup>35</sup> Paras 10-11.

<sup>36</sup> Cf para 21.

<sup>37</sup> Para 44.

<sup>38</sup> European Commission, *TTIP and Culture*, 1, available at [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152670.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf) (last visited 6 December 2016).

stakeholders and the public opinion that fostering ‘cultural diversity will remain a guiding principle for TTIP, just as it has been in other EU trade agreements’.<sup>39</sup>

## V. Conclusion

Even though the protection the EU opted for is limited to the audiovisual sector and was never conceived as a general exemption, the EU is one of the few socio-economic actors to have strongly supported cultural diversity in international trade. During the WTO Doha Round, it adopted the notion of ‘cultural diversity’ as a means of preventing liberalisation in the audiovisual sector and, as a result, found common ground despite the Member States’ diverging economic interests.

The EU fostered the idea that the notion of ‘cultural diversity’ should be recognised by a legally-binding text, the UNESCO Convention. That this notion leans more toward cultural promotion rather than cultural defence has appealed to many developing countries, which embrace and now adhere to the proactive stance of the Convention.

CETA introduced new developments surrounding the notion of cultural diversity. Among these developments includes the EU’s abandoning of its traditional ‘positive list approach’ in favour of a ‘chapter by chapter’ exemption.<sup>40</sup> Critics have considered the ‘targeted’ exemption adopted by CETA to be a step toward globalisation rather than a tool for fostering cultural diversity. Supporters of this approach have underlined that it could be used in negotiations with the US, whose position on the liberalisation of cultural sectors is much more pronounced than those of the EU and Canada.<sup>41</sup> They have also underlined that CETA is the first trade agreement to mention the UNESCO Convention in its Preamble. CETA has been perceived as a ‘training agreement’ for even more complex bilateral negotiations.<sup>42</sup>

If CETA introduced important changes with regard to cultural diversity, it is evident that TTIP – whose two actors hold very different positions on cultural diversity and international trade – is a major challenge for the *acquis* related to Member States’ support of cultural works, like state aid to film. Even though the Commission currently allows a ‘red line’ with regard to the audiovisual sector, thus preventing TTIP from negatively affecting the European status quo, future negotiations on this agreement will show whether

<sup>39</sup> Ibid 6.

<sup>40</sup> Cf Vallerand, n 25 above.

<sup>41</sup> Ibid.

<sup>42</sup> Cf Coalition pour la diversité culturelle, ‘Libre-échange Canada-UE – L’occasion de renforcer la diversité culturelle’ (18 October 2012), available at <http://cdc-ccd.org/Libre-échange-Canada-UE-L-occasion?lang=fr> (last visited 6 December 2016).

the EU Member States will be united by the notion of cultural diversity despite their different cultural policies.

Member States' different and competing interests with regard to liberalisation in the audiovisual sector will play a major role in future TIPP negotiations. To enable the Commission to negotiate for the EU on culturally sensitive issues, these states will need to find some common ground with respect to their disparate cultural policies and economic interests. The Member States' unity may be undermined by the economic crisis affecting most of them, which may induce even the states that have cultural welfare to exchange it for commercial benefits. This unity is also threatened by a general tendency toward disaggregation developing within the EU.

Furthermore, since the Second World War, some Member States have stronger political and economic ties with the US than others and therefore may be inclined to support liberalisation to fulfill the obligations related to their 'alliance'. Another crucial factor may be the long-running tendency of the EU and many of its Member States – irrespective of proclamations on the welfare state and equal access to services – to adopt neo-liberal policies that will negatively impact those sectors including health, education and culture, that for many Member States have long and heavily relied on public funding.

With regard to CETA, and TTIP to an even greater extent given that negotiations are still in progress, a crucial role will be played by the so-called Brexit, the UK's choice to exit the EU, which has not been legally formalised by the UK yet but will be the subject of future negotiations with the EU. On the one hand the UK's exit could make the CETA's signature more complex if managed post Brexit. On the other hand, the UK is one of the Member States whose music industry can compete on a global scale, and can thus stand to benefit from market liberalisation in the audiovisual sector. Its absence at the negotiation table could therefore reduce the conflict over liberalisation policies. Indeed, the issue of cultural diversity in the EU external trade relations seems to be a good example of the uncertainty that citizens currently perceive within the EU itself.