

The WTO Doha round: what's at stake culturally

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1. Introduction

Though it might seem surprising – as if the multilateral trade community didn't already have enough on its plate – the interface between trade and culture, a subject as technically complex as it is politically sensitive, may be on the negotiations agenda at the WTO Ministerial Conference at Cancun, in September 2003.

This is not the first occasion for similar discussions. In fact it will soon be ten years – since the curtain fell on the Uruguay round in December 1993 – that these Conferences are an implicit part of a Trade Minister's calendar.

One of the prime objectives for the Cancun Ministerial Conference will be to back pursuit of scheduled negotiations in respect of the development agenda begun by the last WTO Conference, held in Doha, Qatar, in November 2001.

Contrary to popular belief, the General Agreement on Trade in Services (GATS) field of application does extend to cultural industries. In fact, the idea that cultural industries were subject to special treatment during the Uruguay round is a legal red herring. Nothing in GATS distinguishes audiovisual production from technical consulting or provision of train services.

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Of course, this does not amount to saying that the cultural sector is not an exceptional subject, in both social and economic spheres, nor that the logic and "traditional" instruments for trade and investment liberalisation should apply to the cultural sector in a "business as usual" fashion. The fact that a only small minority of countries signing the GATS – 13 out of 105 present at the close of the Uruguay round (of which only three countries from the OECD zone) and just over twenty out of the 143 current members of the World Trade Organisation (WTO) – have agreed liberalising measures for this sector, is a sign of its evident particularism.

However, once the multilateral trade community is of the opinion that "cultural" services are commodities which can be cross-border traded and invested, it is perfectly legitimate that the Trade Ministers put the trade-culture interface on the negotiation table and declare their respective expectations for the sector on the eve of a new round of negotiations. These ambitions will certainly be diverse and contrastive, opposing the resolved offensive of some against the sometimes fearful and sectarian hesitations of others.

What can we reasonably expect from such discussions? Very little given the current state of affairs. In fact, outside of a small number of countries who some years ago initiated the first steps in a thought process which will surely extend for some time within UNESCO (as also within a parallel network of Ministers of Culture) on the constitution of a positive policy for defence and promotion of cultural diversity, the international community as a whole and in particular the trade experts working to prepare the Cancun round, do not seem disposed to consider this policy interface in any detailed or ambitious manner in Seattle. It is striking in this regard that no WTO Member State has yet proposed the appointment of a working group on

relationships between trade and culture (as was the case for investment and competition law at the Singapore Ministerial Conference in December 1996), nor even proposed the idea of an introductory declaration as to the appropriateness of including cultural diversity among the fundamental objectives of the multilateral trade system.

Culture will be on the agenda at Cancun, but undoubtedly from the wrong end of the telescope, the major focus of discussions seemingly bearing on the appropriateness (or not) of extending the range of liberalisation measures subscribed under GATS and keeping a close eye on the programme to dismantle Most Favoured Nation clause exemptions with respect to trade in services (GATS, Section II).

Is this a result to worry countries hoping to push defence of cultural diversity at the WTO? The following analysis attempts to reply to this question by emphasising the need, firstly, to widen the debate on the culture-trade interface beyond its strictly financial and commercial dimension before circumscribing the possible application of new trade rules in the sector. Such an approach would have the primary objective of conferring real political legitimacy on the idea of defending and promoting the notion of cultural diversity. It would also allow clarification of current, hazy, ideas on the subject and supply a credible reply to the suspicions of those who see in such defence an elegant veneer for cultural protectionism.

This approach would also consider the development of a multilateral instrument whose purpose could be integration outside of WTO agreement architecture. For the moment UNESCO seems to offer the most appropriate international forum for development of such an instrument.

2. Premises of the debate

The question of preserving cultural diversity in a context of economic globalisation has gained an importance in recent years that would have been hard to imagine a few years earlier. It is now, on a par with environment, labour regulations, or anti-trust measures, one of the policy interfaces which will have to be taken into account for the future good functioning of the multilateral trade system and its continuing liberalisation of trade and investment.

Although exerting increasing pressure on the international trade system (as exemplified by the higher number of commercial legal disputes observed in recent years) and raising real preoccupations for the general public in a significant number of countries, it is a safe bet that the solution to problems raised by the culture-trade interface will not be solved by the trade system taken in isolation.

This claim may be made for three reasons. Firstly because culture is above all an identity resource in most societies, an anchorage point that unifies a society's different composite parts and nourishes the sentiment of belonging to a community of values, customs and ideas. As the Lalumière-Landau report observed (prepared in 1999 for the French Ministry of Economy, Finance and Industry, on what was at stake in the next round of multilateral trade negotiations), this need for identity, solidarity and thus for propinquity among the members of a same cultural community is expressed today more forcefully. The issue has become acute precisely because it is running against, in the context of market globalisation, a tendency towards increasing homogeneity in behaviour, consumer habits, and lifestyles. A careful management of the tensions provoked by this confrontation is essential. Without such management the advances in efficiency and well-being that are the fruit of a growing financial integration could find themselves threatened.

A second reason for taking account of the interface between culture and trade in a more enlarged ambit than that of strictly commercial policies results from the fact that normal market regulators do not visibly lead to a social optimisation in terms of cultural diversity. In fact, market deficiencies occasioned by the combination of a mass production economy and an oligopolistic market structure in terms of production and distribution of cultural products (in particular with respect to audiovisual products, but also in certain sectors of the publishing market) do not forcibly maintain diversity of cultures or cultural products. These failings justify, in addition, the almost universal strategy of resorting to government aid measures to support national artistic creation and creative artists.

It would be appropriate for the multilateral trade system to acknowledge this reality and to shelter a number of cultural industry aid measures from its powers of sanction, whilst at the same time subjecting the sector to rules of good

commercial practice founded on the traditional principles of transparency, non-discrimination, minimising distorting effects on trade and investment where such is possible.

A third reason to extend the debate results more fundamentally, concerning the interface between trade and culture, from the need to see the political order achieve a position of priority with respect to commerce and finance. Such political ascendance should allow the affirmation – and recognition by the international community – of the legitimacy of defending and promoting the idea of cultural diversity at both the national and global levels. It is in fact only by such prior acknowledgement (and its practical implementation by each of the Member States subscribing to this approach) that one can envisage more enlightened and productive discussions as to the appropriateness, character and limits of possible multilateral trade agreements touching on cultural industries.

In the current state of international thought on the subject, there are no reasons to believe that this dialogue can be usefully undertaken or fruitful in the context of a forum as naturally reductive as that of the WTO. It would seem then to be important, for those members of the international community who wish to defend the idea of cultural diversity, to see to it that a wider debate on these questions takes place. UNESCO, from this point of view, appears to offer the most appropriate organ for taking into account the plurality of perspectives which are surely subjacent to such a debate, and for bestowing universal political legitimacy. "Petit-à-petit" could be the watchword.

The basic problem posed by the interface between trade and culture regards the treatment to be adopted for cultural products in international trade agreements. For the time being their place in existing agreements is characterised by a very clear ambivalence. In principle treated just like any other product, they often benefit, depending on the context and the subject, from waiver or restriction clauses. The debate on this subject is far from finished and, considering the numerous disputes in this context since the end of the Uruguay round, will very certainly raise its head in the next WTO negotiations.

Two radically opposed visions of cultural products underlie this debate. One considers cultural products as entertainment products similar, from a commercial point of view, to any other products and thus entirely subject to

international trade rules. The other considers cultural products as assets which convey values, ideas and meaning, which is to say as instruments of social communication contributing to fashioning a grouping's cultural identity. They should thus be excluded on this head from the application of international trade agreements.

Neither of these two visions is honestly acceptable in every respect. Before, however, proceeding with a critique and exploration of possible reconciliatory approaches, it is necessary to briefly resume cultural products' status in international trade agreements.

3. Cultural products viewed as trade goods

As trade goods, cultural products may only with difficulty be completely excluded from the application of international trade agreements. As soon as they are utilised for commercial profit and are articles of international trade, they implicate diverse and often opposing interests which can only be reconciled in an appropriate legal context.

The foremost cultural product exporter-countries would, in particular, be opposed to an exemption for such products from the legal framework regulating international commerce. Heading exporter-countries is of course the United States, for whom all cultural goods and services constitute an important exportation sector, in addition to other countries such as Brazil, Mexico, and Japan. Several of these countries have, furthermore, advanced progressive liberalisation proposals for the sector with respect to current GATS-related negotiations. These countries would certainly be little pleased to see that their exports could be called into question for regulation-free cultural reasons. Several countries to have developed a significant presence in the international cultural products market – including countries like Canada or France, who lead the struggle to have cultural industries' distinct nature acknowledged in international trade – could also be less than receptive to such a development. Even developing countries, whose cultural products circulate increasingly throughout the world, would have more to gain from a largely open cultural market.¹

Furthermore, countries with an internal market unable to supply diversified cultural products and who require foreign cultural products to tender to internal demand, also have a

vested interest in an non-discriminatory access to foreign cultural production. However this access will not be guaranteed if cultural products are totally excluded from the legal context governing international trade. Even a non-discrimination principle as fundamental as that of the Most Favoured Nation clause could perhaps no longer apply in such circumstances.

Over and above these strictly economic considerations, it is necessary to emphasize that completely exempting cultural products from international trade agreements leaves the door dangerously ajar, in a legal respect, to restrictions founded more on commercial protectionism or even ideology (which are very likely to run counter to cultural diversity) than on cultural imperatives. Even an exception such as that of section XX (b) GATT, 1994, which concerns restrictions implemented to protect national treasures of "artistic, historic or archaeological value" is subject to limitations concerning its use for arbitrary or unjustified discrimination, or as a disguised international trade barrier. It would be highly surprising from this point of view to benefit cultural products with an exemption whose extent and application would be in the sole hands of the parties availing themselves of such exemption.

But if completely exempting cultural products from international trade regulations does not seem a realistic solution, this does not imply that a strictly commercial vision must be adopted. Such a vision would, on the contrary, be risky. In fact, for several years, cultural industry domination of cultural production has become more and more pronounced. This phenomenon of industrialisation and commercialisation in cultural production, though significantly widening access to cultural products, has also, paradoxically, restricted the scope of the cultural product offer to the industry's commercial standards of profitability. This could be considered a serious threat for the preservation of cultural diversity.

4. Cultural products viewed as instruments of social communication

Cultural products cannot be considered as just any other product. They are first and foremost creative works which convey information, ideas, values, a message, which call on

an individual's intellectual, aesthetic and emotive faculties. Even when they repose on physical media, they differentiate themselves from other goods in that one can clearly distinguish their physical and symbolic dimensions. The creator of cultural products will typically have copyright, signifying individual ownership of an idea or a concept, in other words – intellectual property.

With the aim of justifying state intervention in this sector, several broadly economic arguments have been put forward concerning the specificity of cultural products. Some arguments are linked to intrinsic product characteristics. One such is the argument whose premise is that cultural products should be considered differently from other commodities because they constitute public rather than private goods. The most current definition of a public good is one whose use by a particular party does not call into question its availability for others.

Other arguments are linked to market failings. The most well-known and the most widely accepted is that baptised the "externalities" argument: justifying state intervention by the fact that cultural goods producers benefit the community with freely-provided goods and services in excess of remuneration received. These non-remunerated contributions or externalities are for example the prestige bestowed on a Nation by its cultural production; the fact that a dynamic cultural production influences investment decisions and attracts tourists; or the fact that cultural products play an important role in societal integration of individuals, etc. A second argument concerns anticompetitive practices, more precisely the misuse of a position of dominance. This argument has often been used concerning the cinematographic industry to justify "cultural exception" clauses. It is emphasised that such measures are necessary in countering unfair practices by producers who misuse a position of strength in the cinematographic distribution sector to impose favourable conditions with independent cinema owners, thereby disadvantaging other producers.

But though these arguments have the merit of showing that state cultural intervention can sometimes be justified from a strictly economic point of view, it is not herein that lies the most emphatic justification for particular measures as to cultural products. The fundamental argument in favour of an acknowledgment of cultural product specificity is based

more on a view of culture valuing above all the importance, for individual and societal development, of goods which convey values, ideas, tastes and meaning. These goods constitute in some ways a form of cultural capital. Cultural industries themselves, from this standpoint, are perceived as offering "the terms and symbols which shape our thought and our discourse concerning social differences, diverse groups' needs for recognition, affirmation and negation of social values and finally the experience of social change²". On a par with education, cultural production thus constitutes an essential instrument in the emancipation of individuals, allowing the citizen which is every individual to adapt and participate in the group and community life within which he or she moves.³

This last argument, transposed to an international context, naturally leads to a preoccupation for preservation of cultural diversity. But, from the evidence, it is only through a recognition of the dual character of cultural products, as both trade goods and language of social communication, that a global solution is likely to be found.

5. Principles of a solution: towards a multilateral instrument for promotion of cultural diversity?

It is not so much cultural products in themselves that create problems from an international trade regulation viewpoint, but rather the national measures concerning these products. Several different means may be considered in order that such products benefit from differentiation: a wider use of the reservations mechanism, already used in GATS, for instance. These reservations may be closed, which is to say valid for past instances only and for specific measures, or open, which is to say valid for past and future issues and for a given sector.

But the ideal solution, the only one in the long term likely to supply a response to the current dispute over the position accorded cultural products in international trade agreements, would be a specific arrangement relative to international exchange in the cultural sector. Such an arrangement would clearly set out the justifications and limits of an exception applied to cultural products whilst insisting on the need to preserve cultural diversity. Such an instrument could be negotiated in a context distinct from that

of the WTO – UNESCO could be considered in particular. As a last resort however, to reply to problems raised in a WTO context, the instrument should have a place in this organisation.

5.1 What could be the objectives of such an instrument ?

Turning to diplomatic efforts, the principal obstacle consists in welding an alliance between countries sharing similar cultural policy preoccupations in order to influence the course of decisions taken in forums such as the WTO, OECD, Free Trade Area of the Americas, or the European Union. The same would also apply to bilateral trade relationships, and the promotion of an approach to international relations favouring cultural diversity.

With respect to intrinsically cultural issues, the objective should be to force recognition of the importance of cultural and linguistic diversity and acceptance of the need for differentiated treatment of cultural goods and services in international trade agreements. On top of these general objectives should be more explicitly added a reference to the freest possible dissemination of cultural products. It is necessary to avoid cultural diversity becoming too closely linked to a logic of exclusive and restrictive measures affecting trade or investment in the cultural sphere. If such were to occur this initiative would rapidly be forgotten. Cultural diversity, in fact, cannot be envisaged without an opening to products, ideas, values, production methods and distribution networks from other cultures.

5.2 What forms could such an instrument take ?

Several hypotheses could be imagined, ranging from an essentially declaratory text such as the Rio Declaration to enforceable and legally binding agreements such as those of the WTO. Our own choice, excluding for the time being the hypothesis of an agreement in the context of the WTO, tends more towards a supple instrument binding on parties but not legally enforceable as such. This kind of agreement would resemble OECD codes. Such an approach would have the advantage of facilitating easy acceptance of the instrument politically, whilst awaiting transfer of its principles and terms to a WTO context.

The governmental organisation most obviously suitable for the development of such an instrument would be UNESCO,

whilst associating the technical expertise of the WTO secretariat. In addition to the fact that UNESCO is already concerned by the issue, its multilateral character and its strong presence in developing countries confer important advantages of which universality is not the least (absence of universality seriously undermined the political legitimacy of the OECD Multilateral Agreement on Investments (MAI) negotiations.

There is also of course the possibility of an international instrument that is not attached to any organisation in particular, such as one finds in the environmental sphere. For such an approach to function, it would need to count from the beginning with a large number of signatories, including a majority of developed countries. The instrument in question would have to incorporate provisions establishing a monitoring committee. This last scenario should not be dismissed if envisaging a later affiliation with the WTO.

The hypothesis of an affiliation with the WTO is without doubt the most interesting from the point of view of efficiency. But it's also the most difficult in terms of accomplishment insofar as it implicates fundamental legal provisions (Most Favoured Nation, national status, etc) and adopts a position in the context of trade negotiations confronting rival interests in a more strictly economic perspective.

Consensus in such a context would not be easy, and would only be achieved at the cost of concessions as to rigorous control over State action in the cultural sphere. These would almost certainly not be present in an out of WTO agreement. Nevertheless a WTO instrument would probably command significantly more political legitimacy from the better balance between trade rule implementation on one hand and necessary cultural policy flexibility which would probably be generated on the other.

Conclusion

The preceding analysis suggests that in the next round of WTO negotiations cultural issues could be relatively minor. The multilateral trade community as a whole does not in fact yet seem ready to debate the culture-trade interface in a researched and balanced way, and to recognise the dual

character of cultural products as both trade goods and as instruments of social communication.

It is not impossible however to imagine, even at this late hour, that the Trade Ministers gathered next September at Cancun devote a little of their precious time to the idea of admitting, even if only for an instant, in an introductory manner, the notion of cultural diversity as one of the fundamental objectives pursued by the international community within the context of the WTO. A declaration of this type could usefully support – and legitimise – work suitably and preferably first begun at UNESCO. Everything is still possible in this respect as long as a dynamic of support for the idea can durably appear and be heard.

Despite the logic developed by this analysis in favour of an instrument anchored primarily with UNESCO, WTO Member States who wish to defend the idea of cultural diversity should still confront the requests addressed at the next round of negotiations. These requests will principally aim at the qualitative (and sometimes quantitative) improvement of liberalisation agreements subscribed, under GATS, relative to cultural industries. Since the liberalisation procedure of this agreement operates through an approach known as "positive list", WTO Member States shall continue to enjoy complete liberty in this respect in the forthcoming round. Nothing, in fact, authorises anyone to concede anything in this matter.

Having said that, the attention brought to bear on the "pre-established" agenda in the next round will require a certain vigilance from protagonists of the idea of cultural diversity if they wish to maintain a large radius of independence in their dealings at UNESCO.

Vigilance would seem necessary in the light of what the next round of negotiations could reserve MFN derogatory clauses as to audiovisual co production agreements. These departures from GATS Section II should in principle be abolished in 2004, but it might be appropriate to stall this abolishment until an out of WTO multilateral instrument has had the chance to be developed.

Similarly, as and when cultural products are governed by GATS provisions, discussions in the next round on possible subsidies and safeguarding measures provisions with respect to trade in services will directly affect future WTO treatment of cultural industries. It is thus better that these negotiations take account of such provisions' possible

effects on national cultural policy formulation.

Another area worthy of vigilance concerns the declared intentions of certain important WTO members to widen the field of results obligations prohibited under the Agreement on Trade-Related Investment Measures (TRIMs Agreement). Such vigilance seems even more necessary since these measures offer a way of putting the objective of cultural diversity into operation, whilst permitting legitimisation of stronger investment liberalisation with respect to national cultural industries.

Concerning WTO provisions on Trade-Related Intellectual Property Rights (TRIP's Agreement), in addition to the major interest that a better implementation of the TRIP's agreement by WTO members represents for artistic creation, the next round of negotiations could provide the opportunity to incorporate provisions negotiated in 1996 with the World Intellectual Property Organisation (WIPO) on copyright protection in the information age. Particular attention should also be devoted to possible implications, for cultural industry support policies, of the WTO working programme on e-business. Though the idea may seem intuitively seductive, given the technological dynamism of the sector and the growing convergence between the telecommunications sector and audiovisual products, the current state of thought mitigates any conclusions that a "laissez-faire" approach in terms of e-business is necessarily compatible with the idea of promoting cultural diversity.

Finally, despite lack of immediacy in multilateral trade system introduction of detailed competition provisions, a lack of immediacy from which the culture-trade interface also benefits, it would be useful that the WTO working group on trade and competition, which will perhaps be given a formal negotiation mandate at Cancun, devotes particular attention in future work to the issue of anticompetitive behaviour by cultural sector operators as well as the best means of remedying problems created by misuse of a dominant position in the sector.

Notes

- 1 In this respect consult David Throsby, "Le rôle de la musique dans le commerce international et le développement économique", UNESCO, Rapport mondial sur la culture 1998, pg. 215.
- 2 SINCLAIR, J. "Media and Cultural Industries: an Overview", CIRCIT Newsletter, Vol. 4, N° 5, August 1992. pg. 3-4.
- 3 This conception is clearly very close to that promoted by UNESCO in proclaiming the "World Decade for Cultural Development".

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