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# Culture

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## The Concept of Culture

Culture represents inherited values, ideas, beliefs, and traditions which characterize social groups and their behaviour. Culture is not a static concept but rather a dynamic force, which evolves through time and shapes countries and civilizations. As such, culture has always benefited from economic exchange. International trade in recent times has spurred a more intense dialogue and interaction among nations: thus, it offers unprecedented opportunities for cultural exchange. In parallel, foreign direct investments can promote cultural diversity and provide the funds needed to locate, recover and preserve cultural heritage.

Nonetheless, globalization and international economic governance can also jeopardize cultural diversity and determine the erosion of cultural heritage. While trade in cultural products can lead to cultural homogenization, foreign direct investments have the ultimate capacity to change landscapes and erase memory.

## Culture in International Economic Law

Despite its significant relationship to international economic law, culture receives very limited attention in the text of trade and investment treaties. In the General Agreement on Tariffs and Trade 1947 (GATT), two provisions address cultural matters. Article IV GATT allows WTO member states to establish screen quotas – i.e. policies requiring the exhibition of movies of national origin during a specified minimum proportion of the total screen time actually utilized – by exempting movies from the national treatment principle. Article XX(f) GATT allows member states to adopt or enforce measures to protect ‘national treasures of artistic, historic or archaeological value’, provided that such measures are neither discriminatory nor protectionist in their application.

In international investment law, discussions about a cultural exception – i.e. treating investments in the cultural sector differently than other investments because cultural goods and services allegedly encompass important non-economic values – were pivotal to the Multilateral Agreement on Investment (MAI) negotiations. At the time, France and Canada had pursued the insertion of an exception to enable all parties to protect cultural diversity and enterprises engaged in cultural activities. The United States’ opposition to such a clause, however, could not be overcome and the whole project ultimately failed.

However, this was not the end of ‘cultural exceptions’ in international investment law. Some international investment agreements present ad hoc provisions protecting relevant cultural interests. For instance, in the Annex of the US–Lithuania BIT, Lithuania reserved ‘the right to make or maintain limited exceptions to national treatment’ with regard to, *inter alia*, national parks, biosphere reserves, ‘monuments of nature, history, archaeology and culture as well as the surrounding protective areas’, and the land of the Curonian Spit – a landscape of sand dunes that is a World Heritage site.<sup>1</sup> More recently, the Trans-Pacific Partnership provides that ‘Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or a disguised restriction on trade in goods, trade in

services and investment, nothing in this agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this agreement, including in fulfilment of its obligations under the Treaty of Waitangi'.<sup>2</sup>

Several cases have touched upon the linkage between trade and culture on the one hand and investment and culture on the other. Cases like *UPS v. Canada*,<sup>3</sup> and *Canada Periodicals*<sup>4</sup> show that the existence of a cultural exception can facilitate the consideration of cultural concerns in international economic disputes.

## Protection of Cultural Heritage

Although the United Nations Organization for Education, Science and Culture (UNESCO) has adopted a number of international law instruments to protect different aspects of cultural heritage,<sup>5</sup> their relationships with international economic law instruments remain unclear. In fact, most UNESCO instruments contain a compatibility clause providing that nothing in them is meant to change or alter the existing provisions under other relevant international agreements. Such agreements seem to presuppose a mutual supportiveness between themselves and other instruments of international law and merely require that they be 'taken into account' 'when [parties] interpre[t] and appl[y] the other treaties to which they are parties or when [they] ente[r] into other international obligations.'<sup>6</sup> In *China Audio-Visual*,<sup>7</sup> the WTO panel and the AB referred to the UNESCO Convention on Cultural Diversity, which had been invoked by the defendant, but the influence of the CCD on the final outcome of the dispute remains unclear.

### Selected works

Mira Burri Nenova, 'Trade and Culture in International Law: Paths to (Re)conciliation' (2010) (44) *Journal of World Trade* 49-80

Jingxia Shi, *Free Trade and Cultural Diversity in International Law* (Hart Publishing 2013)

Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014)

Peter Van den Bossche, *Free Trade and Culture* (Boekman Studies 2007)

Tania Voon, *Cultural Products and the World Trade Organization* (CUP 2011)

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<sup>1</sup> Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, signed on 14 January 1998, entered into force 22 November 2001, Annex, para 3.

<sup>2</sup> Transpacific Partnership Agreement (TPP), signed 5 October 2015, Article 29.6.

<sup>3</sup> *United Parcel Service of America Inc v Government of Canada*, UNCITRAL, Award on the Merits (24 May 2007) 46 ILM 922 (2007).

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<sup>4</sup> WTO, *Canada: Certain Measures Concerning Periodicals—Panel Report* (15 March 1997) WT/DS31/R; WTO, *Canada: Certain Measures Concerning Periodicals—Report of the Appellate Body* (30 June 1997) WT/DS31/AB/R.

<sup>5</sup> See eg Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH) 2368 UNTS 3 (adopted 17 October 2003, entered into force 20 April 2006); Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) 2440 UNTS 311 (adopted 20 October 2005, entered into force 18 March 2007).

<sup>6</sup> CCD Article 20(1)-(2).

<sup>7</sup> WTO, *China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products—Report of the Appellate Body* (21 December 2009) WT/DS363/AB/R.