Trade in Culture under WTO Law—
Case Studies of the US, EU and China

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Tianzhu Han
School of Law
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Abstract

Since the inception of the General Agreement on Tariffs and Trade (GATT) in 1947, traditional trade barriers like tariffs and quotas were no longer at the heart of trade disputes under the multilateral trade framework. The economic interdependence trend has brought a number of social issues to the forefront of the international scene, and the conflict between trade values and social values have soon become the new theme of trade conflicts at the current stage. Hence, international trade rules were urged to address issues other than economic concerns, such as environmental protection, cultural value preservation and human rights. Clashes between trade liberalization and social values are harshly criticized for their alleged negative impacts on issues like equality, freedom, social justice, environment and culture. The World Trade Organization (WTO), as the only multilateral trade regime, is arguably extending its competence in dealing with conflicts other than trade issues. However, the conflicts are made more incomprehensible due to the absence of a clear and reconciled order in both substantive and procedure senses. This research is based on the aforementioned concerns, and focuses on the relationship between trade liberalization and a specific spot among the enormous range of social values: Trade in Culture.

Departing from domestic regime, the research is going to critically evaluate domestic state of law and policies under the realm of WTO rules, in order to carry out their interactions with WTO regime. By analyzing to what extent they collide with each other, and the possible alternatives to develop cultural trade, the research considers the development of cultural trade in the way that is more responsive to the real problems of current restraints presented at the domestic level, so that implications to the WTO legal framework can be drawn.
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## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>CAFTA</td>
<td>China-ASEAN Free Trade Agreement</td>
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<td>CARIFORUM</td>
<td>Caribbean Forum of African, Caribbean and Pacific States</td>
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<td>CCD</td>
<td>Cultural Diversity Convention</td>
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<td>CCP</td>
<td>Communist Party of China</td>
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<td>CEPA</td>
<td>Closer Economic Partnership Agreement</td>
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<td>CPC</td>
<td>Provisional Central Product Classification of the United States</td>
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<td>CUSFTA</td>
<td>Canada-United States Free Trade Agreement</td>
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<td>DOP</td>
<td>Department of Publicity</td>
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<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>EC</td>
<td>European Communities</td>
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<td>ECCC</td>
<td>European Convention on Cinematographic Co-Production</td>
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<td>ECFA</td>
<td>Economic Cooperation Framework Agreement</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EHP</td>
<td>Early-Harvest Programme</td>
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<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<td>EU</td>
<td>European Union</td>
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<td>FCC</td>
<td>Federal Communications Commission</td>
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<td>FCS</td>
<td>Framework for Cultural Statistics</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>GAPP</td>
<td>General Administration of Press and Publications</td>
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GATS  General Agreement on Trade in Services
GATT  General Agreement on Tariffs and Trade
GSP  Generalized System of Preferences
ITO  International Trade Organization
LCDs  Least-Developed Countries
MAI  Multilateral Agreement on Investment
MFN  Most-Favored Nations
MII  Ministry of Information Industries
MOC  Ministry of Culture
MPAA  Motion Picture Association of America
MPDDA  Motion Picture Producers and Distributors of America
NAFTA  North American Free Trade Agreement
NPC  National People’s Congress
OECD  Organization for Economic Co-operation and Development
PTA  Preferential Trade Agreement
RTA  Regional Trade Agreement
SARFT  State Administration of Radio, Film and Television
SCM  Agreement on Subsidies and Countervailing Measures
TPA  Trade Promotion Authority
TRIMs  Agreement on Trade-Related Investment Measures
TRIPs  Agreement on Trade-Related Aspects of Intellectual Property Rights
TWF  Television without Frontiers Directive
UNESCO  United Nations Educational, Scientific and Cultural Organization
US  United States
<table>
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<th>Acronym</th>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Chapter I Introduction

1.1 Research background

Since the inception of the General Agreement on Tariffs and Trade (GATT) in 1947, traditional trade barriers like tariffs and quotas were no longer at the heart of trade disputes under the multilateral trade framework. The economic interdependence trend has brought a number of social issues to the forefront of the international scene, and the conflict between trade values and social values have soon become the new theme of trade conflicts at the current stage. Hence, international trade rules were urged to address issues other than economic concerns, such as environmental protection, cultural value preservation and human rights. Clashes between trade liberalization and social values are harshly criticized for their alleged negative impact on issues like equality, freedom, social justice, environment and culture. The World Trade Organization (WTO), as the only multilateral trade regime, is arguably extending its competence in dealing with conflicts other than trade issues. However, the conflicts are made more incomprehensible due to the absence of a clear and reconciled order in both substantive and procedural sense.

There are no agreed legal orders for the aforementioned competing values, neither is there a uniformed authority that can provide binding judgment when conflict occurs. The overlapping of vertical power, including the state, regional and global organizations brings the puzzle to a more complicated direction. In practice, the allocation of the power is either arranged under political mandate (mostly through negotiations) or referred to a specific institution for settlement. Under international

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2 Ibid, the author argued that the overlapping vertical allocation of power, ‘wherein the discrete organs of vertical power, including the state, regional organizations and global organizations, must share power in particularized ways’, and these overlaps must be reconciled.
law, acceptance of almost any treaty would involve a transfer of a certain amount of
decision-making authority away from states to international institutions. Such transfer
brings benefits, and the benefits of cooperative action that a treaty enhances are
greater than the circumstances that exist otherwise.\(^3\) In resolving conflicts between
trade and social values, WTO is deemed as the most important organization at the
multilateral level. As commented by the Appellate Body of the WTO\(^4\):

‘The WTO Agreement is a treaty—the international equivalent of a contract. It is
self-evident that in an exercise of their sovereignty, and in pursuit of their own
respective national interests, the Members of the WTO have made a bargain. In
exchange for the benefits they expect to derive as Members of the WTO, they have
agreed to exercise their sovereignty according to the commitments they have made in
the WTO Agreement.’

WTO agreements are built upon member countries’ consensus. In areas where
consensus is absent, the main legal basis for the judgment made by the WTO judicial
body is the commitments made by member countries under WTO agreements.
However, the commitments are rather limited or incomprehensive in carrying out the
diversified regulatory goals developed by the on-going evolution of the multilateral
trade environment. Given the fact that WTO member countries have different national
policy priorities, the relationship between national interests and the WTO mandate
may collide with each other, especially when dealing with issues between trade and
social values. In the context of international economic law, it is still recognized that
the state is central to the current legal structure. There are strong grounds to believe
that important goals of societies are still best protected by nations instead of
international institutions, because the latter often lack effective mechanisms to
implement common goals, nor can they ensure ‘democratic legitimacy’ from the

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institutional perspective. Other than making effort to construct a more enforceable international legal instrument, it becomes more important to take a step back, shed more light to the states regulatory priorities under the multilateral trading system, focus on how WTO carries out its mandate derived from the commitments made by member countries, and how much room is left to domestic legislations in pursuing their own interest other than trade liberalization.

This research is based on the aforementioned concerns, and focuses on the relationship between trade liberalization and a specific spot among the enormous range of social values: Trade in Culture.

Four key issues about the background of the research are presented as below:

*Cultural products are special*

It is hard to define either ‘culture’ or ‘cultural value’, because the scope and definition of the terms is subject to discerningly different interpretations in different societies. Quote from Jain (2002), ‘culture is the complex and elaborative system of meaning and behavior that defines the way of life for a group or society’. It appears less justified to claim that cultural products are special compared to other commodities in the absence of a concrete definition. Therefore, the research highlights the specificity

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5 Sutherland, P. et al. (2004), supra n.3. p.30.  
based on the *de facto* special treatment on cultural products at national, regional and multilateral levels, rather than addressing some special meaning of a ‘cultural value’ itself. Compared to other commodities, cultural products have their premium functions:

- Commercial function: the most significant commercial value of cultural products exists in their creative content. Once the content has been developed, the carrier with such content (the final cultural products) can be infinitely replicated with decreased costs. Therefore, the more products have been produced, the less per-item cost borne by the producer. Cultural industry has a huge commercial potential, and cultural products cannot be exhausted once the content appeals to the customer. By dint of the development of technology, the significance of cultural products’ commercial function is more and more enhanced.

- Social function: not only is the creative content of cultural products of commercial significance, it also contains meaningful social functions that cannot be measured in monetary terms. Hollywood blockbusters do not only show their advanced technologies, but also publicize the value of democracy, free speech, free religion, etc. A romantic French love movie also reflects the way of life and the tradition of the country. Cultural products are distinguished by their origins. They do not only embody the specific characters of a given society, but also have a function of transmission, so that the specific characters can be inherited by generations, and also shared by other social groups.

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Political function: cultural products transmit their distinctive content from one group/country to another. With their recreational and popular nature, audiences are easily to be influenced by the content therein conveyed. Such influence is considered to be detrimental if a country is governed by a secluded political regime.

Focus on audiovisual products under WTO

Cultural product has a broad epitaxial, and its scope is quite different according to definitions made by different countries. For example, France considers French wine and cuisine as cultural products, while Australia lists TV sets as cultural goods when measuring cultural trade figures. This research is not intent to embrace all cultural products. Instead, it focuses on addressing a group of cultural products that is considered to be the most problematic under WTO negotiations and dispute settlements, audiovisual products. The reason is threefold:

First, they are more commercially-driven compared to other cultural sectors. This research quotes Goodenough’s analysis on the classification of culture which divides culture into three categories: ‘high culture’, ‘ethnic culture’ and ‘popular culture’. The first two categories attract lots of governmental intervention and support while conflicts about these supportive measures are rather rare. By contrast, conflicts abound in the ‘popular culture’ group, because of the great mobility and huge profits of popular cultural products not only at the domestic markets, but also from the

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overseas markets. Audiovisual sectors mostly belong to the popular culture group.

Second, under WTO framework, audiovisual products are mostly negotiated under the GATS agreement. The Audiovisual Service sector is a subsector under Communication Services, which is subject to GATS rules. Because of the flexibility of GATS, there have been few commitments made in the audiovisual sector so far. Therefore, it is controversial to apply non-discriminatory trade rules in this sector.

Third, the audiovisual sector is undergoing rapid and substantial technological changes. The development is leading to increased vertical integration and inter-sectoral (horizontal) integration, such as the inter-relationship between audiovisual services and the distribution service, or with the telecommunication sectors. The commercial importance of the audiovisual sector has been enhanced. It is necessary to clarify the treatment of audiovisual services in order to provide guidance in solving relevant trade disputes.

Physical goods that contain cultural content, such as film and music discs, books, magazines are categorized as cultural goods, and subject to GATT framework. Technology development largely transferred cultural goods into services that customers are able to get access to cultural content via signal transmission and internet service. Therefore, audiovisual services became the major products supplied to vast consumers. Audiovisual services are subject to GATS framework, and the detailed classification relies on the Provisional Central Product Classification of the United Nations (CPC):

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11 Ibid.
13 Source from World Trade Organization, Audiovisual Services, Background Note by the Secretariat, S/C/W/40, Geneva, 1998
a. Motion Picture and Video Tape Production and Distributive Services
   CPC 96111 Promotion or advertising services
   CPC 96112 Motion picture or video tape production services
   CPC 96113 Motion Picture or video tape distribution services
   CPC 96114 Other services in connection with motion picture and video tape produce and distribute

b. Motion Picture Projection Services
   CPC 96121 Motion picture projection services
   CPC 96122 Video tape projection services

c. Radio and Television Services
   CPC 96131 Radio services
   CPC 96132 Television services
   CPC 96133 Combined program making and broadcasting services

d. Radio and Television Transmission Services
   CPC 75241 Television broadcast transmission services
   CPC 75242 Radio broadcast transmission services

e. Sound Recording

f. Other (no categories specified, i.e. contents and multimedia products)

Treatment of cultural products under WTO member countries
Cultural policy measures are widely adopted by WTO member countries for various reasons. As will be discussed in Chapter II, governmental interventions in cultural sectors justify themselves on both economic and social grounds. Domestic cultural products usually are protected by content quotas, financial support, limitations on foreign participation, etc. The protective tools protect both content of the products and the production of domestic industries, while the extent of protection accorded varies from member to member. For example, some WTO members set quantitative measures on the importation of foreign films, and some members impose tax concession policies on domestic cultural industries. The preferable treatments can potentially promote local culture by enhancing the consumption or influence of
domestically produced cultural products, however, chances that the legal measures were in fact motivated by mercantilist interests cannot be ruled out. Therefore, it is extremely difficult to differentiate between protectionist and non-protectionist motives for cultural policy measures. The motives driven by mercantilist interests run against WTO non-discriminatory principles, and shall be targeted either during the trade policy review, or under the dispute settlement mechanism.

The extent of intervention in cultural sectors reflects the state’s intentions in culture-related industries. A liberalized approach usually does not distinguish foreign products, while a protective model does not only limit cultural products with foreign origins, but also controls the content of domestic-produced products. States with liberal approach mostly pursue the commercial function of cultural products, for whom, cultural products are no different from other commodities. In contrast, states intent on protecting cultural sectors are prone to addressing social functions of the cultural content. In addition, because of the political sensitiveness of certain cultural products, member countries whose political regimes are considerably conservative may set barriers to the transmission of certain contents. WTO members present a variety of models in regulating their own cultural sectors. The following chapters are going to discuss three distinctive ones.

Cultural trade law and regulations can be categorized into five groups. First, merchandise trade law on cultural products, such as the sales of goods law and contract law; second, the law on the intellectual property rights of cultural products, such as copyright law, patent law and trade mark law; third, international trade law on trade in services, such as audiovisual service law, rules of cultural performances, etc.; fourth, public law regarding trade in culture, such as foreign trade law, custom law, tariff law, anti-dumping law, anti-subsidy law, government procurement law, competition law, and so forth; and fifth, laws regarding international trade disputes, such as arbitration law, foreign-related civil and commercial litigation law and international dispute settlement mechanisms. The first three groups of law mainly
concern the relationship between parties to sales contracts, and the fourth group relates to the trade regulation of a country. This research is going to focus on the fourth group of law, in order to discover how WTO member countries regulate trade in culture at the domestic level. In addition, the fifth group will also be addressed to a certain extent, so that solutions of relevant trade disputes can be analyzed at the international level.

**Future development under WTO**

The true motives under a particular measure (mostly discriminatory in nature) are almost impossible to discern, \(^{14}\) because different political parties and individual legislators may have various concerns for enacting a particular law. Trade negotiation delegations are widely aware that the toughest bargaining is how to handle the various interest groups domestically, rather than argue with their trade partners before the negotiating table. The proposals and positions they presented at the WTO negotiation table are results produced by complicated decision-making processes eventuated by politicians and interest groups at a domestic level. \(^{15}\) Therefore, the room for bargaining during multilateral trade negotiations is quite limited. As the approaches in regulating cultural trade are different from member to member, and WTO agreements do not clearly address member countries’ concerns in this regard (will be addressed and analyzed in Chapter II), consensus on further cultural trade liberalization is extremely hard to achieve in trade negotiations.

Trade disputes on cultural grounds also put WTO’s dispute settlement under criticism. Due to the lack of jurisprudence in Justifying cultural values, it may not be prudent to rely on DSB to resolve the assorted disputes. It is not clear whether discrimination against foreign cultural products can be legitimately justified or not, and to what extent should the justification be. Doubts about WTO framework do not stop the

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development of cultural trade. The conflicts were transferred onto other international or regional platforms, such as UNESCO, WIPO, and various preferential trade agreements. Further regional integration has a more promising prospect compared to the multilateral one, however, the development under PTAs does not necessarily enhance liberalization level on a multilateral stage. The impact of a preferential trade regime on the WTO remains to be seen.

1.2 Research questions

Based on the research background, this thesis is going to address two questions, and provide insights by examining both domestic and WTO regulatory frameworks in cultural trade. The research questions are:

- What are the cultural policy regimes applied by member countries, and to what extent do they collide with WTO rules?
- Can WTO rules effectively reconcile member countries’ differences and enhance further cultural trade liberalization? If not, is there a better way?

Departing from domestic regime, the research is going to critically evaluate domestic state of law and policies in the realm of WTO rules, in order to carry out their interactions with WTO regime. By analyzing to what extent they collide with each other, the research considers the development of cultural trade in the way that is more responsive to the real problems of current restraints presented at the domestic level, so that implications for the WTO legal framework can be drawn.

The regulatory framework at domestic level is produced by complicated decision-making processes that involve politicians, commercial interest groups and other stakeholders. Under domestic framework, we can tell what the government is trying to protect, and how to protect it from the perspective of the legal tools applied. However, under the WTO, member countries are bound to the obligations they made,
and subject their legal framework to the least-trade-distortive approach. It seems that the more liberal a domestic framework is, the fewer contradictions it encounters under the WTO. By the same token, member countries’ protective approaches run against their WTO obligations should their law and policies affected the fair treatment of foreign cultural products. Given the fact that member countries’ obligations under WTO are decided by their commitments under WTO agreements (especially under GATS), there is no single set of evaluative frameworks in analyzing the contradictions between WTO and member countries’ regimes. From this angle, cultural trade is a very typical topic because few members have made commitments in the area of their respective culture-related service schedules. Instead of judging whether a specific measure is justified under WTO law or not, the more accessible and reasonable research direction is to assess the relationship between individual member’s state of play and WTO law, in order to zoom out from individual cases and draw general implications, if any.

Although WTO obligations are decided by member countries’ commitments, WTO rules and principles cast an influence to domestic regimes where specific commitments are absent. Such influences do not necessarily become applicable law that member countries must comply with, they serve as impetus for member counties to achieve a higher degree of trade liberalization. Scholars have proposed resolutions to address the specificity of cultural products under WTO framework, and ways to encourage cultural trade at multilateral level, including resolutions through dispute settlement mechanism, inserting special provisions within GATT/GATS agreements, constructing another platform for cultural trade, etc. Despite the

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possibility that the new approaches would solve the intensive relationship between trade and cultural values, it is unrealistic to expect member countries’ consensus on those matters. Hence, it is more practical to look back to the domestic regulatory regimes, examine their development under the multilateral trade negotiations as well as other trade platforms, so that this ‘trickle-up’ analysis can reflect the deficiencies of WTO agreements in pursuing cultural trade liberalization, and address member countries’ concerns in engaging further developments under either WTO or PTAs. Through this angle, the comparison between WTO and PTA shall be drawn from each member country’s perspective, and whether PTA is a better way for member countries to develop cultural trade shall be answered based on sample countries’ conditions.

1.3 Research methodology and design
The research mainly relies on qualitative analysis, which departs from the collection of literature contributions in relevant journals, books, articles, cases, websites, etc., analyzing the relevant WTO rules that are affecting cultural trade, and the domestic measures in regulating trade in culture. Given the discrepancies among member countries in regulating cultural trade, three sample members are chosen in order to form the proposed comparative studies.

The goal of case studies is to examine the practices of an individual sample member. From a comparative angle, case studies can arrive at general findings that are applicable to all trade regimes among WTO member countries. In order to achieve this goal, the selection of samples should be carefully done. In this research, the samples are not only of great economic significance (in terms of their economic size and trade volume), but also relate to the rest of member countries, because the findings should contribute to general lessons under the multilateral trading system. Therefore, the samples must be representative in terms of their diverse spectrum in economic, legal, political and cultural realities among all WTO members. In addition, 19

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in order to carry out a credible and meaningful comparative study, the chosen samples should be distinctive, and different among themselves. In order words, the selected cases shall neither be too similar nor completely different from each other.

The research selected the US, EU and China as samples. On the one hand, the three WTO members are the world’s three biggest economies and trading giants under the multilateral trading framework. On the other hand, the three WTO members are so distinctive in cultural trade regulations that they represent the three archetypal approaches among all members: liberal, protective, and controlled model. Politically, their undoubted influence makes their cultural trade regulations as significant decisive factors in shaping the development of multilateral framework. Technically speaking, although their regulatory approaches are different from each other, among the three samples, cultural products enjoy differential treatment compared to other commodities, for commercial, social and political reasons. Culturally speaking, the three WTO members are perfect samples in representing western and oriental cultures, while the US is also a distinctive combination of global integrated model. Bearing the above standards in mind, the overall findings based on the individual sample will contribute to the general knowledge of cultural trade regulation at the multilateral level.

The three samples will be analyzed under a constant and systematic framework, under which, the three cases can be homogeneously accommodated. The analytical framework starts from exploring the development path regarding the evolution of their regulatory framework. The historical review helps to understand their current position either under multilateral or preferential trade regimes. Then, the relevant state of law and policies shall be analyzed, and their interactions with WTO rules can be displayed, in order to find out the controversies and development opportunities. All three samples have heavily engaged in preferential trade arrangements, it is essential to examine cultural trade under PTAs in order to find out whether there is a better way to enhance further cultural trade liberalization, should WTO failed to reconcile member countries’ divergences and concerns.
Therefore, the thesis has six chapters:

The introduction chapter sets up the main research questions, introduces the background of trade in culture at the multilateral level, and brings up the research methods that are applied by the research.

Chapter II focuses on addressing the special treatment of cultural products at domestic level. It revises the idea of ‘culture values’ pursued by cultural policies adopted at domestic level, sets the WTO rules as reference point for the following chapters, bring up the possible alternatives of negotiating platforms of cultural trade, and assesses their influence to the current WTO legal framework. Therefore, this chapter examines how much room is left by the WTO to domestic regulations, and whether other alternatives exist for member countries in developing cultural trade.

Chapter III to V discuss cultural trade regimes of the US, EU and China. While the goal of the case studies is to examine the different regimes adopted by each of the sample jurisdictions, how they collide with WTO law, and how they engage in other trade platforms, comparative case studies aim at arriving at general findings, if there are any, that would be applicable to more trade regimes that are applied by other WTO member countries.

The Conclusion chapter sums up the findings of the research, brings answers to the research questions by offering a comparative angle.
Chapter II Domestic Status of Cultural Products and the Interaction with WTO Law

2.1 Introduction

This chapter has three purposes. First, the chapter revised the idea of ‘cultural values’ pursued by cultural policies adopted at the domestic level. Although the notion of ‘culture’ is ambiguous, ‘national boundary’ has been developed as a practical criterion in defining cultural policies. Before trade globalization, many WTO member countries have engaged in intervening in the free flow of cultural products with various legal tools, in order to ensure the priority of domestic cultural products over the foreign ones. After a careful examination of the legal tools as well as member countries’ regulatory approaches, the following section takes stock of the WTO provisions that affect cultural trade on an agreement-by-agreement basis. In the absence of ‘cultural exemption’ clauses within WTO agreements, as well as member countries’ commitments in audiovisual service sectors, WTO rules will be questioned in terms of whether they can effectively restrain trade-distortive cultural policies, and whether they provide room for member countries to pursue their cultural policies. Hence, the second purpose of this chapter is to set the WTO rules as reference point for the following chapters, in order to analyze their interaction with domestic regulatory policies in the following three case studies. The chapter goes on to evaluate the influential factors of the free flow of cultural products beside the multilateral framework. Preferential trade agreements are generally more flexible and suitable in terms of allowing for deals in sensitive trade sectors to be made. PTAs’ advantage in cultural trade may divert WTO member countries’ efforts in negotiating under multilateral trade framework; however, the extent of such a diversion needs to be analyzed. In addition, the CCD Convention adopted by UNESCO intends to create a counterbalance with trade obligations conveyed by WTO agreements. The real effect of CCD will be assessed to explore whether CCD can empower member countries in
justifying cultural policies with trade-distortive nature. The above two influential factors potentially offer more solutions in balancing trade and cultural values. Therefore, the third purpose of the chapter is to bring up the possible alternatives of negotiating platforms of cultural trade, and assess their influence on the current WTO legal framework. In the final section, four elements that affect cultural trade liberalization under WTO framework will be summed up. Given the divergence of regulatory approaches, WTO commitments and PTA patterns adopted by member countries, this chapter also calls for the necessity of case studies in major WTO members, in order to further address the research question from influential member countries’ perspective.

2.2 Cultural value and national boundaries

2.2.1 Cultural products and cultural values

Cultural products are commodities with cultural content. Compared to other commodities, cultural products are special because they are carriers of cultural values that may have further influences to the consumers than the usage of the commodities itself. Cultural values represent the implicitly or explicitly shared abstract ideas about what is good, right, and desirable in a society, and vise versa. These ideas are imparted to societal members through everyday exposure to customs, laws, norms, scripts, and organizational practices that are shaped and expressed by the prevailing cultural values.¹ The expansion of trade in cultural products increased the exposure of all societies to foreign cultures, and consequently, the exposure to foreign cultural products brings about changes in local cultures, values, and traditions. Many governments have adopted cultural policies in order to provide special treatment to domestic cultural products.

Scholars tended to classify culture into different groups in order to assess their distinctive influences or values respectively. The ‘museum’ or ‘high’ group of culture undisputedly represents the distinctive characters of different societies, but how about the ‘popular’ cultural group or ‘mass culture’ category whose main purpose is to entertain or help pass the time of those who ‘consume’ them on the one hand, and enjoys worldwide resemblance on the other? Would cultural values in the latter group lower than the former one so that no special concerns should be given to the latter? It would be too progressive to give an affirmative answer to the above question. First, popular culture is easier to gain foreign access because of its great mobility and huge profit potentials. Although popular culture enjoys worldwide resemblance, the origin of those products still reflects the specificity of each culture and the values conveyed by each society. Second, culture is a ‘living practice’ that the content of the products only constitutes a part of the value(s) they conveyed. The target of the protective cultural policy is not the content (be it British Shakespeare stage drama or Hollywood blockbuster), but rather ‘an adequate context for participation in cultural, social, and democratic dialogue’. Therefore, provided that the content is legitimate in both countries, country A treats country B’s cultural products differently not because the content of B’s cultural products negatively affects the cultural values of A, but because the aim of A’s cultural product is to ensure sufficient room for its own cultural expressions. After all, cultural values, no matter high or low, classic or popular, represent the implicitly or explicitly shared abstract ideas about what is good, right, and desirable in a society, although the degree may vary according to subjective


interpretations of the general public.

As transportation and communication increase in speed, the process of globalization is becoming more and more apparent that causes everything in the world to be influenced more quickly and thoroughly. Under the digital world, globalization is definitely an ever-expanding process, whether we are in favor of or against it. As stated above, cultural products, especially the mass cultural products can create cultural values, or change them, as well as function to strengthen cultural identity, they can also hasten their disappearance. Therefore, it seems that globalization becomes a problem from the cultural identity perspective. American mass cultural products have invaded all of the world’s markets, affecting people and cultures in other countries that are unable to refuse or to compete. Even in closed societies such as Iran, bookstores are filled with Persian translation of novels by John Grisham and Sidney Sheldon. Previous literatures have claimed that globalization cast influences to cultural identity and bring homogeneity to the diversified world’s culture. However, scholars also suggested that the growth and spread of localized production agglomerations based on cultural-products industries were leading not to cultural uniformity but to greatly increased diversity at the global level. No matter what the result of the debate is, as the race of globalization is speeding, the notion of boundaries of culture is rising simultaneously, notably, the notion of national culture. Is it reasonable to treat the political national boundaries as the delineation line for culture and cultural values?

2.2.2 The notion of culture and relations with national boundaries

Culture is often defined by apparently clear-cut dimensions such as ethnicity, race, class, religion, gender, sexual orientation, exceptionality, etc. We are familiar with

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references to Asian culture, African culture, Muslim culture, feminist culture, and so forth. Delineate culture according to political boundaries neglects the broader foundation of culture that shared by many countries. However, the notion of ‘national culture’ is the basis of cultural policies adopted by governments.

As Benedict Anderson argued that whatever else nations might be, they are fundamentally ‘imagined’ communities. ‘Regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship.’ Accordingly, these essentially imaginary parameters of association carry out one’s sense of national identity. To the degree that language and art endeavor to represent the national culture, they also construct and alter it. Bhabha (2001) used ‘nation as narration’ concept to reveal the fluidity and indeterminacy that emerge in all efforts to articulate what the nation actually is. Although the previous discussion on cultural products indicates that cultural values entailed by cultural products can be traded and shared world widely, especially under the globalization era, the notion of ‘national culture’ stands strong in front of the challenges posted by globalization. National boundary does matter when defining the real meaning of ‘cultural value’.

Many countries adopt protectionist policies to maintain control over indigenous cultural content and to foster a type of ‘nationalism’ through their own cultural products to counter the effects of globalization and cultural imperialism. As the French producer Marin Karmitz stated that ‘sound and pictures have always been used for propaganda, and the real battle at the moment is over who is going to be allowed to control the world’s images, and so sell a certain lifestyle, a certain culture, certain


products, certain ideas’.\textsuperscript{8} ‘National culture’ is not only the ‘common traits’ of the inhabitants of a particular nation, but also a legal and political definition that the domestic rule-makers depend on.

As stated above, national boundary does not necessarily and accurately correspond to the boundary of organically developed, relatively homogeneous societies with a shared or resembled culture. However, within each of the ‘management disciplines’, there is a significant literature which believes that each nation has a distinctive, influential and describable culture type.\textsuperscript{9} Within a nation, there is usually a single dominant language, educational system, army, political system, shared mass media, national symbols, etc. The strong forces towards integration can produce substantial sharing of culture in nations that have existed for some time.\textsuperscript{10} \textsuperscript{11}

National boundary is also a legal and political definition that the domestic rule-makers depend on. Countries impose or contemplate cultural policy measures with an aim to safeguard their national cultural expressions and values. Therefore, domestic rule-makers’ discretion decides to what extent cultural products (domestic and foreign) should be treated. It should be noted that the content of the cultural products is not the only decisive factor of the discretion although the content is the carrier of cultural values. Many countries may find themselves in relatively homogeneous societies with a shared culture, however, national boundaries may distinguish those homogeneous cultural products as foreign products and treat them less favorable compare to domestic ones. Similar logic can apply to mass cultural products. Popular cultural products (represented by audiovisual products) enjoy great worldwide resemblances, while their origin decides what kind of treatment they will have in a specific market.


\textsuperscript{11} Schwartz, S. (1999), supra n.1. p.25
2.3 The state of play of domestic cultural regulations—Case studies on audiovisual products

2.3.1 Justifications for governmental interventions

Through the above discussions, it can be seen that national boundary is the de facto determinacy of distinguishing cultural products. However, under the globalization era, trade distortive policies and practices are under challenge through the ever stringent international obligations of trade liberalization. Arguments for state supports of cultural products from economic and social perspectives may well be justified under certain circumstances that lead this research to explore in order to carry out a comprehensive analysis at the domestic level. Through the discussion of justifications of state supports (why to protect), it is easier to depict the nature of such supports (what to protect).

2.3.1.1 Economic justification

The global trading system is founded on the classic theory of comparative advantage. Under a perfect competition condition, comparative advantage provides a solid theory that underpins free trade. In terms of cultural products, the US has comparative advantage in blockbuster-making and other audiovisual production, the UK has comparative advantage in Shakespearean theater, Italy has comparative advantage in opera, and Japan has comparative advantage in pop music production. Those products enjoy comparative advantage that the ‘like products’ produced by other countries cannot benefit from the competition under a fair and liberalized market environment. Governmental intervention is usually designed to protect the domestic market, mainly because of the special characters of cultural products that have been mentioned before.

Cultural protective measures widely exist in WTO’s member countries, and such measures can be justified from economic perspective.

Governmental cultural protective measures can be justified because many cultural products have positive externalities and public good characters. Beside the commercial values conveyed by cultural products, either goods or services, cultural products also undertake certain social functions, for example, they can enhance the extent of social bonding, promote national coherence and identity, improve the reputation of a country or region at the international sphere, etc. In a competitive market, cultural products with positive externalities are likely to face the under-consumption problem, thus, their distinctive value might be endangered.

Cultural products share an important character of public goods, which can be seen as a specific case of externalities. As public goods, cultural products are non-rivalrous in their nature. Cultural products embody culture, and their existence contributes to the value of cultural diversity. The benefits of cultural products as public goods, and the value of cultural diversity are shared by people all over the world instead of a specific person or country. However, many cultural products are not commercially valuable even though their creation and distribution are of valuable use of social resources. The under-production and under-consumption of certain cultural

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16 Non-rivalry means that the consumption of a good or service by one person does not reduce the amount available for consumption by others.

17 Sauve, P. and Steinfatt, K. (2001) ‘Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?’ in Australian Productivity Commission (eds.) Achieving Better Regulation of Services. The sell of cultural products at high prices would cause the loss of too many customers to be profitable, and the sell of
products cannot be corrected by the market alone, because the general public may reluctant to purchase these products with high cost, even though they are rich in cultural value.\textsuperscript{18} According to Voon, T. (2007)\textsuperscript{19}, ‘To the extent that the amount that an individual is willing to pay for a cultural product fails to reflect its cultural worth to the community as a whole, the market could be said to have failed.’ Cultural and economic values do not correspond to each other in the case of cultural products, and governmental intervention is called when such market failure occurs.

The concept of ‘economies of scale’\textsuperscript{20} provides another economic justification for the governmental intervention in cultural sectors. It can explain the Hollywood’s dominance or the US dominance at the international level. Baker (2000)\textsuperscript{21}, and Grant and Wood (2004)\textsuperscript{22} applied this theory in exploring the US dominance in global audiovisual markets. Economies of scale in free trade usually lead to efficiency gains with greater variety and lower prices. As Baker (2000)\textsuperscript{23} contended that the US audiovisual products were more likely to gain greater universal appeal, because consumers prefer products with big budgets and relatively low prices. Some commentators even argued that the US audiovisual products were dumped to foreign cultural markets, because few countries’ products could actually compete with the cheap prices and good qualities provided by the US’s ones at the global market.\textsuperscript{24}

\textsuperscript{19} Voon, T. (2007), supra n.13. p.53
\textsuperscript{20} ‘Economies of scale’ means the tendency for unit costs to be lower with larger output. It helps a country to shift resources towards the production of a restricted number of goods, which increases output and reduces unit cost. Meanwhile, by engaging in international trade, it creates an integrated market larger than any other countries’ markets. See: Krugman, P and Obstfeld,M. (1997) *International Economics: Theory and Policy*, 4th edition, Massachusetts.
Voon (2007) criticized that the ‘US dominance’ argument failed to provide a clear logic for the protective measures on cultural products. Some economists raised the same concern, and argued that economies of scale were not a reasonable justification to challenge comparative advantages which has been underlined by the world trading system. Instead, the application of domestic and international competition rules in the cultural sectors is a better choice to safeguard cultural values. Under the current WTO legal system, competition rules have not been included within the multilateral trade negotiations, and the relevant proposals encountered obstacles and unpredictable delays. Given the special character of cultural products, policy makers cannot simply implement free trade rules and bear the risk of losing their domestic cultural industries. As a consequence, although the economies of scale viewpoint seem less legitimate in justifying protective cultural measures, it is the target of the measures taken by several governments in a de facto way.

It is by no means suggested that the US dominance is the only case in the global cultural market. I would like to quote the words written by Appadurai (1996) here to prove that cultural products can easily be characterized by economies of scale. It is the special character of cultural products as well as cultural industries themselves that deserves governmental intervention instead of the threats posed by the US cultural industries.

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27 As one important part of the ‘Singapore issues’, competition rules failed to gain support among member countries.
'For the people if Irian Jaya, Indonesianization may be more worrisome than Americanization, as Japanization may be for Koreans, Indianization for Sri Lankans, Vietnamization for the Cambodians, and Russianization for the people of Soviet Armenia and the Baltic Republics’. ‘For Polities of smaller scale, there is always a fear of cultural absorption by polities of larger scale, especially those that are nearby’. ²⁸

2.3.1.2 Social justification and the nature of the protection

The importance of having a strong and sustainable local cultural industry is not only limited in economic terms but also in social aspects. It fosters cultural identity and improve social cohesion, especially in nations that are not culturally homogenous.²⁹

In terms of what to protect, it is quite arguable as whether to protect the origin, or the content of the cultural products. Take Kong Fu Panda, a Hollywood movie about Chinese traditional art, Kung Fu, for example, the movie is produced by DreamWorks Animation and distributed by Paramount Pictures (both US companies), while the content is about Chinese culture. If the threshold of cultural protective measures adopted by Chinese government is subject to the origin of the film, the movie would be categorized under the exported foreign film sector, whose exhibition and distribution would be restricted to a certain extent. However, if the threshold is about the content of the movie, the movie would be less restricted comparatively.

Baker (2000) advocated that the protection should primarily focus on the origin of the relevant cultural community.³⁰ This ‘dialogic conception’ of protection named by Baker gave local cultural ‘speakers’ a chance to express their ideas, and guaranteed their role in cultural markets in front of the international competition. However, the

idea of protecting the creator of cultural products is very likely to neglect the content of the final products. For example, in order to attract a higher viewing rate, many countries copy the American style or British style of talent shows, or soap operas. Even though the creator is from a domestic company, the final products have a weak role in promoting the identity or diversity of cultural values, which are the primary aims for cultural productive measures. On the contrary, another argument claimed that the protection should focus on cultural content itself. Baker (2000) named this sense of protection as ‘museum conception’. \(^{31}\) Under such a conception, ‘a qualify American film on the French Revolution could contribute more to French culture as an accessible representation of French history, even for the French, than a French knock-off of an American game show’. \(^{32}\)

It seems that the second concept of protection is more positive in improving the value of culture, because after all, it is the content that reflects the cultural values. However, the ‘content’ criteria is unrealistic to be implemented alone, even though it is more compatible with the national treatment principle and less trade-distortive in nature compared with the ‘origin’ criteria. First, as culture is a vague terminology, it is difficult for policy-makers to identify what kind of content is justified as national culture, and which is not. As Cowen (2006) asserted that governments are unable to make an appropriate artistic distinctions,\(^{33}\) and rent-seeking is very likely to occur under this protection.\(^{34}\) Second, if the elements of national culture can be specified by expressed terms, the basic freedoms of cultural expression would be threatened.\(^{35}\) In practice, the ‘dialogic conception’ or the origin-specific approach is well accepted and adopted by most cultural protective measures, such as the screen quota taken by South Korea, France, and Canada. According to Mas-Colell (1999), the ‘dialogic conception’

\(^{31}\) Ibid, p.1375.
\(^{32}\) Ibid.
\(^{33}\) Cowen, T. (2006), supra n.13. p.44.
\(^{35}\) Ibid.
is actually protecting ‘national cultural production’. Although the protection of national cultural production discriminates foreign cultural products in a *de jure* manner, those measures can be better justified either on economic terms, or social ones. It is by no means suggested that cultural content is less important in framing cultural policies. By protecting the creator of the cultural products, national cultural content are more likely to be produced and distributed. Governmental support should also address the importance of national content, especially those endangered content. A combination of the two approaches should be adopted that provides local creators sufficient market under the international competition on the one hand; on the other hand, the content of the production should also be listed as a consideration in gaining governmental special treatment.

2.3.2 Specific cultural measures taken at domestic level

Many countries have adopted unilateral measures aimed at protecting and supporting their domestic cultural goods and services under the fierce competition of the exotic products. These unilateral policies include various forms of restrictive instruments that impose obstacles to the international liberal trade. For example, audiovisual sector in EU has been protected by different forms of measures that constitute huge barriers to foreign ‘like products’. The aim of this section is not to give an exhaustive inventory of the regulatory and financial supportive measures, as it is impossible because of the divergence of the domestic backgrounds. Instead, this section introduces some important measures which are the main objects of disputes between WTO Members, in order to explore the approaches taken by member countries in protecting their national culture, and set up the discussion of their compatibility to the WTO rules is in the next section.

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36 Ibid. p.90. The ‘museum conception’ is titled as the protection of the production of national culture.
2.3.2.1 Content requirements

Content requirements have been frequently used to support domestic producers of television programmes, music and films. In order to preserve and improve the cultural and linguistic diversity and media pluralism, governments impose regulations requiring a certain percentage or share of local content in film, television or radio programmes with their nationality or in their languages; or oblige the broadcasters or media owners to invest in films or other audiovisual products with national content. In short, the requirements refer to two aspects: broadcasting quotas and investment quotas. The ‘Television without Frontiers’\(^39\) directive of EU is a good example: it requires the majority of transmission time be devoted to TV programmes of European origin. Accordingly, France requires 60% of all TV programmes broadcasted during the best viewing time (from 6pm to 11pm) should be of Community origin.\(^40\) A similar measure in Australia claims that all programmes broadcasted between 6pm and midnight should guarantee 55% of national origin.\(^41\) Differences should be made between content requirements and import quotas: the latter refers to the market access rules and subjects to prohibitions required by Article XI of GATT\(^42\), while the former relates to screen time arrangements and subjects to Article IV\(^43\) of GATT with a less trade-restrictive nature. The content requirement measures do not limit the choices of audience as they do not directly limit the importation of foreign products; however, they enhance the audience rating\(^44\) and improve the economic and social impact of the

\(^{39}\) It initially adopted in 1989 (Council Directive 89/552/EEC), has recently been updated by the signing of Treaty of Lisbon. It is one of the two cornerstones of EU audiovisual policy, the other one is MEDIA Programmes (Measures to Encourage the Development of the Audiovisual Industry).


\(^{42}\) Article XI GATT prohibits quantitative restrictions of imports including import quotas.

\(^{43}\) Article IV lists special provisions relating to cinematograph films, in the end, it provide that screen quotas shall be subject to negotiation for their limitation, liberalization and elimination.

\(^{44}\) Herold, A. (2010) European Film Policies in EU and International Law, Culture and Trade—Marriage or
domestic films, music and other artistic works.

2.3.2.2 Tariff and non-tariff barriers
Tariff barriers, such as custom duties, financial charges and fees; and non-tariff barriers, such as quantitative restrictions, customs formalities, and technical barriers affect the market access of foreign cultural products. These measures affect the access of foreign cultural products to a country’s domestic film market and restrict the radio or television broadcasting through regulatory or licensing restrictions. Tariff barriers have been brought down dramatically, especially under the GATT framework. However, various measures in the form of regulations other than custom duties constitute major barriers of the market access. The Motion Picture Association of America (MPAA) adopted a rating system to classify the potentially offensive materials in order to regulate the film distribution in the United States. In Spain, the dubbing license for foreign films can only be granted when the film distributors contracted to distribute a certain amount of national films. The criterion of ‘national film’ or ‘national content’ does not enjoy a uniform standard. Therefore, the extent of the barriers is different among countries. For example, the TWF Directive defines that ‘national content’ depends on the nationality of actors, author or producers; whilst the Australian standard primarily concerns about the Australian identity, character and culture, lists the nationality of the actors, author and producers as supplementary elements.

2.3.2.3 Subsidies
Subsidies in forms of direct financial supports, tax exemptions and other financial...
loans, are very popular governmental instruments on cultural products. These direct or indirect subsidies work as incentives to improve the creation of cultural goods or services with domestic content.\textsuperscript{49} They are the most important measures used by the European model in protecting cultural sector. The Eurimages Fund\textsuperscript{50}, settled by the Council of Europe, aims to promote the European film industry by encouraging the production and distribution of films and fostering co-operation between professionals in its 34 Member State. The MEDIA programme granted by the European Union aims at encouraging the development and distribution of European works.\textsuperscript{51} A budget of EUR 755 Million has been invested to this programme to cover the supporting programmes in the period of 2007-2013. In the publication sector, Canada granted interests-free loans and reduced transport charges to the national publishers and other entrepreneurs of books, magazines, sound recording, video production, etc. Some cultural industries would not even survive without the financial support from the national governments, such as some rural opera troupe in China. Even the most active canvasser of liberal trade in cultural sector, the United States entitled National endowment for the Arts to individuals with US citizenship, or permanent resident alien status and non-profit companies.\textsuperscript{52}

2.3.2.4 Tax Incentives

In France, in order to support the local film production taxes on box-office revenues\textsuperscript{53} and receipts of broadcasters\textsuperscript{54} are the main source of the Centre Nationale de la Cinématographie (CNC),\textsuperscript{55} which has been established in 1946 and responsible for

\footnotesize{\textsuperscript{49} Cowen, T. (2006) supra n.13. p.287.}
\footnotesize{\textsuperscript{50} Council of Europe Resolution (88) 15. Setting up a European support fund for the co-production and distribution of creative cinematographic and audiovisual works (EURIMAGES) 26\textsuperscript{th} October, 1988. see: http://www.coe.int/t/dg4/eurimages/About/default_en.asp (accessed on 17th April, 2010)}
\footnotesize{\textsuperscript{51} MEDIA: Measures to Encourage the Development of the Audiovisual Industry. Set up in 1991, see: http://ec.europa.eu/information_society/media/overview/index_en.htm (accessed on 3rd May, 2010)}
\footnotesize{\textsuperscript{52} GATS List of Specific Commitments : http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (accessed on 20\textsuperscript{th} April, 2010)}
\footnotesize{\textsuperscript{53} 11% of the ticket price has been levied.}
\footnotesize{\textsuperscript{54} 5.5\% of the total receipts from broadcasters with a French license, including advertising and license charges.}
\footnotesize{\textsuperscript{55} http://www.cnc.fr/Site/Template/T3.aspx?SELECTID=3472&iid=58&t=2 (accessed on 20\textsuperscript{th} April, 2010)
supporting the domestic film industry, training professionals, regulating media sectors, and promoting cultural industries with French content. In Canada, two programmes on the provision of tax credits for film or video production have been issued by the cooperation of Canadian Audiovisual Certification Office and the Canada Revenue Agency.\textsuperscript{56} One is provided for Canadian film or video production and the other is for the services rendered by Canadian citizens to film or video production in Canada. In Canada-Periodicals,\textsuperscript{57} the US has successfully challenged Canada before the Panel and the AB over the levy of the excise tax, the original tariff code, the commercial postal rates, and the postal subsidy that the government paid to the local producers. In this case, the excise tax on non-split-run magazines with Canadian contents and Canadian advertising had been exempted, while an excise tax of 80\% for the split-run magazines with a US editorial contents and Canadian advertising had been levied.\textsuperscript{58}

\subsection*{2.3.2.5 Restrictions on foreign investment and ownership}

Measures limiting foreign investments or reserving the ownership of cultural industries to its own nationals largely exist in audiovisual sectors. These measures aim at securing the cultural plurality and diversity of opinion through national legislation on radio and television operators, as well as the cable operators. In the US, according to Federal Communications Commission, for instance, the share of one individual television operator in the nation-wide broadcasting market must not amount to more than 35 percent.\textsuperscript{59} In terms of the foreign investment, according to Section 310 (b) (3) of the Communications Act, foreign investors are allowed to possess a share in US companies with broadcasting license, no more than 20\% of the capital share could be owned or voted by them. In addition, a parent company of the license holder must not

\textsuperscript{56} Department of Canadian Heritage, A Guide to Federal Programs for the Film and Video Sector, September 2001. \url{www.pch.gc.ca/progs/ac-ca/progs/bcpac-cavco/index_e.cfm} (accessed on April 1st, 2010)

\textsuperscript{57} WT/DS31/AB/R, June 1997.


be controlled by foreign capital by more than 25%.60 In contrast, some EU members tend to abandon restrictions of media ownership, for example, according to the UK Communications Bill61, the ownership rules have been largely relaxed. Although the current GATS framework has not mentioned whether the restrictions on foreign investment and ownership are trade-distort measures or not, they face challenges in the future negotiations on trade in services.62

2.3.2.6 Others
Besides the regulatory measures mentioned above, there are some other forms of instruments that restrict the free flow of cultural products. Due to the weak regulatory effect of GATT and GATS on cultural goods and services, governments remain free to take measures that have impacts on international trade.63 In terms of measures relating to intellectual property rights, the collecting society, which has been authorized by the government64 levy certain percentage of the revenues from secondary use rights65 to fund the measures for the benefit of domestic cultural production. For example, the French Code of Intellectual Property reserves 25% from the remuneration of the private copying for the promotion of the local artistic productions.66 The governmental authorized collecting societies reserve a total sum of the revenues for their national funds and subsidize the local cultural industry in an indirect way. In addition, some European countries and countries like Australia, Canada, and Israel have signed themselves in bilateral treaties on supporting the

60 Secion 310 (b) (4) Communications Act.
61 www.communicationsbill.gov.uk, (accessed on 14th April, 2010)
65 Such as private copying right, or re-transmission right. Many countries have introduced a private copying levy on blank audio and video recording media, such as black CD-ROMs, because it is not possible for the law to prevent private copying.
cinematographic co-operation. The European Convention on Cinematographic Co-production (ECCC) acts as a multilateral instrument for subsidizing cinematographic products from certain origin.\(^6\)

The list of measures affecting trade on cultural products is non-exhaustive in virtue of the ever-changing cultural industry. Governments justify their regulatory approaches according to their domestic needs by choosing appropriate policy tools from this boundless ‘tool-kit’. The aforementioned tools (as well as the other policies within the ‘tool-kit’) are built on a hypothesis that national cultural products are more preferable than foreign products in terms of the protection and promotion of cultural values. Unfortunately, it may be extremely difficult to evaluate governments’ motives on this matter, be it protecting industrial interests, or protecting cultural values.

2.3.3 Different regulatory approaches adopted by WTO member countries

Cultural policies adopted by individual countries attempt to incorporate both the market and cultural dimensions of cultural sectors. The balance between the two dimensions varies from country to country because of the different regulatory approaches that countries adopted, and the priority of their regulatory preference can also be showed from such a balance. Negotiations on cultural sectors under the WTO, especially in audiovisual services have been dominated by two camps: the liberalized camp and the protective camp. The liberalized camp, represented by the US, does not treat cultural products differently from other consumable products. In terms of international trade, countries in this camp advocate for non-discriminatory trade practices under any trade arrangement. While the protective camp believes cultural products shall be treated differently because they embody the distinctive values of a specific nation/region. If cultural products were subject to nondiscriminatory trade principles, cultural values shall be undermined by the mass produced products which

\(^6\) Graber, C. (2003), supra n.62, p.53
led to the extinct of cultural diversity.

Under the liberalized approach, domestic cultural products and imported ones enjoy fair treatment under the domestic market. Within the domestic markets, there is hardly any restriction on the content itself, and there is also rare regulation on the subjects of the cultural products producers, unless for competition issues. Therefore, like ordinary products, market rules fully apply to the free flow of cultural products. Ashton Hawkins, the former president of American Council for Cultural Policy (ACCP) claimed that the ‘legitimate dispersal of cultural material through the market is one of the best ways to protect it’. 68

In comparison, under the protective approach, laws and governmental measures are enacted in order to ensure space and choice for underrepresented cultural products, especially those regarding national culture. Accordingly, cultural products are treated differently according to their originality and content. In practice, the protective approach works in two ways: first, it encourages the production and consumption of products with national content, or produced by national producers. Many countries have confirmed the legitimacy of cultural supporting measures through legislation. Article 92 of the Maastricht Treaty included cultural related issues for the first time, and empowered the EU to take actions in order to ‘promote culture and heritage conservation’. 69 Through the National Film Act of 1985, Canada improved the authority of the government’s National Film Board to finance and promote Canadian culture. 70 Together with governmental measures such as quotas and subsidies, the protective net set by law and policies provides a sound legal ground for preferential treatment towards domestic produced products. Second, the protective approach discriminate imported cultural products. Traditional trade barriers such as tariff,

69 Article 92 (3)(d), the EU shall provide ‘aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest’. Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J.C 191/1.
import quota and licensing measures used to play an important role in restricting cinematographic reels or other physical cultural goods. As cultural products are traded mostly via service-related channels, new trade barriers such as investment caps, subsidization, and content requirements have significantly affected the treatment of foreign cultural products. Compare to the traditional trade barriers on goods, services trade barriers tend to be more complicated and invisible, while their influence on trade distortion can be enormous.

Given the sensitivity of cultural dimension, some governments apply excessive administrative measures on cultural products, especially on imported ones, such as the censorship mechanism conducted by China, Russia, and some Middle East countries. The excessive administrative measures (for public moral, religion, public security, ethnical, etc. reasons) does not only exert extra burdens on foreign content compare to the trade measures, but also be considered as time-consuming and less transparent barriers. Therefore, the primary market barrier is whether the content of cultural products can achieve the standards set up by the administrative measures. In other words, governmental authorities control the content dissemination, thus, control the market of cultural products.

Before the WTO negotiation table, the three types of regulatory approaches are represented by major players. When it comes to WTO negotiation, either under GATT or GATS, the diversity among them significantly reduces the chance of consensus. As a result, cultural trade-related topics, especially the progress on audiovisual services have not moved any further than the conclusion of Uruguay Round. Audiovisual services, together with the new development in digital and cyber technologies raise new challenges and issues for trade agreements in that a major fact underpinning the limited progress to date is fear that governments may be deprived of freedom to regulate, and worries that regulatory frameworks are inadequate to manage
unrestricted entry and competition. While the liberalized approach is advocating for further trade liberalization at either multilateral or regional level, the other two camps are also arguing for special treatment on cultural products. Asking for consensus would be not realistic, the real question is: what is the impact of trade law on cultural products despite of the protective or control models applied by WTO members?

2.4 Status of cultural products under WTO agreements

2.4.1 Legal status of cultural products under WTO law

The conflicts on the legal status of cultural products have never been solved ever since the GATT 1947, and became fiercer in the Uruguay and Doha round. At the beginning of the Uruguay Round, one view, led by countries like Austria, Peru, Canada, Brazil and Nordic Countries suggested that cultural products were the vectors of national cultural expression that convey cultural identity of a given community. According to this approach, cultural products should be excluded from the international trade agreements due to its special meaning and value. Another view, supported by the US, argued that cultural products had no difference with other commercial products and should subject to the general international trade rules. After Uruguay Round, cultural products have been successfully included in the negotiating schedule. However, the distinction between cultural goods and services generated another round of disputes.

Since the extent of non-discriminatory principle in GATT is stricter than GATS on

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73 Trade Negotiations Committee, GATT, Mid-Term Meeting, MTN.TNC/11, 21st April, 1989.

one hand, obligations of member countries under GATS depend on their voluntary commitments on the other, complainant of a dispute prefers to place their claims under GATT in order to challenge another countries’ trade-restrictive cultural policies. Sadly, there are no explicit rules in the WTO to distinguish services from goods or to establish the extent they have to be differentiated from each other.\textsuperscript{75} The judicial body of WTO provided an approach of interpretation regarding the differences of objects between GATT and GATS. In the \textit{Canada-Periodical} case, the AB ruled that the distinction may focus on the substantive effects of the measures questioned under WTO law and the location of its burden, which component is quantitatively purchased, which is regarded as the end product for consumers, etc. Then, the decisive factor for the distinction is relevant to the ‘attribute’ of a product.\textsuperscript{76} The ruling did not provide a clear answer to the question.

Cinematographic works have been historically treated as goods under the GATT 1947.\textsuperscript{77} Although lack of consensus, films, books, art works and music recordings were discussed under GATT framework;\textsuperscript{78} but the rental services and other derivative activities were considered as services under the European law.\textsuperscript{79} As for TV programmes, GATS Members agreed that trade in television content must be subjected to GATS exclusively. The problem is that in the digital world today, films or other art works are consumed mostly via the internet rather than the traditional physical carriers that they do not trigger cross-border issues any more. Consumers prefer download the film at home than purchase it in the store. The US claimed that downloading films online should be treated as purchasing ‘virtual goods’, and should be regulated by the GATT regime. Although the problem relates to the subject of electronic commerce, which is not covered by this thesis, it is worth to mention that

\textsuperscript{76} Herold, A. (2010), supra n.44. p.283.
\textsuperscript{77} Under the specific clause of Article IV GATT.
\textsuperscript{78} This distinction is subject to arbitrary, as discussed in Herold, A. (2010), supra n.44. p.282.
the development of digital products raise more problems to the complex situation on the distinction between goods and services.

Unless a line is provided between what pertains to trade in services and what pertains to trade in goods, conflicts of the legal status of certain products appear inevitable. Consequently, the application of relevant WTO agreements will be affected.

2.4.2 General GATT rules on cultural products

2.4.2.1 Article IV GATT.

The most important provision regarding cultural products in GATT is Article IV, which introduces the notion of screen quotas, maintains this quantitative regulation for Member countries, and exempted the cinematographic films from the national treatment principle. First, screen quota is the only form of internal quantitative regulations, it is different from the import restrictions. Second, this measure is an exception of the national treatment principle only, it does not affect the MFN principle. Third, this provision does not provide eternal protection for the preference of national film on screen, because it is subject to limitation, liberalization and elimination. Fourth, the screen quotas are only provided for the cinematographic films, while television programmes or other forms of cultural goods are not been covered.

Historically, many countries imposed import quotas and screen quotas after World War I in order to protect their own film industries from the Hollywood dominance. Until 1947, a compromise had been made under Article IV GATT by the initial 23 countries. The advocators of this provision, such as UK, Norway and Czechoslovakia strongly argued that trade rules should not indifferent to cultural policy concerns.

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80 Article XI GATT prohibits quantitative restrictions of imports including import quotas.
81 Article IV (b): Screen time should be reserved for films of national origin; shall not be allocated formally or in effect among other sources of origin.
82 Article IV (d), GATT.
83 GATT MTN.BNS/AUD/W/I, Historical review of Article IV prepared for the Uruguay Working Group on
The US compromised by accepting the flexibility of trade rules in the audiovisual sector.\textsuperscript{84} However, with the development of the technology, the medium of movies no longer only refers to cinematographic works. Instead, online movies, DVDs and television transmissions become the major carriers of movies. This issue was first raised in 1961 when the US claimed for a possible extension for the object of Article IV to television programmes. The US argued that the object of the provision should be extended by the development of technology as it was not foreseeable for the founders of GATT 1947 to list the TV programmes in the provision.\textsuperscript{85} When member countries agreed to negotiate audiovisual sectors under GATS framework, the coverage of GATT seems to be less controversial. After all, the unsettled fundamental issue is to clarify the distinction between cultural goods and services.

2.4.2.2 MFN Principle

According to Article I:1 of GATT 1994, when a country grants trade advantage to any product from or for another country without granting that advantage immediately and unconditionally to all like products or for all other WTO Members, the country shall be challenged under MFN obligation (take \textit{EC-Tariff Preferences} and \textit{EC-Bananas} for example).\textsuperscript{86} ‘Trade advantage’ covers not only the custom duties, but also all kinds of imports and exports charges, administrative fees, internal taxes, regulatory charges on sale, distribution and consumption. There are two situations where preference to cultural goods from certain origin could be immunized: first, when countries share the same language and other cultural properties (take the ‘screen quota’ for example, the screen time could be reserved for ‘films of a specified origin other than that of the contracting party imposing such screen quotas’),\textsuperscript{87} and second, preferences on

\textsuperscript{84} Audiovisual and Related Services, Communication from the United States, S/CSS/W/21, 18 December 2000.
\textsuperscript{86} European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, 1 December 2003; European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R, 22 May 1997.
\textsuperscript{87} Article VI (c), GATT, see: Geradin, D. and Luff, D. (2003), supra n.51. p.226.
cultural supportive policies could be granted to Custom Unions and Free-Trade Areas subject to strict conditions based on Article XXIV of the GATT. The TWF directive of EU is an example to this trade preference. Other cultural cooperation agreements will constitute discrimination to other WTO Members because of the violation of the MFN obligation.88

2.4.2.3 National Treatment

Member countries adopt supportive measures on domestic cultural products which may potentially breach their national treatment commitment under Article III GATT. The provision prohibits any kind of direct discriminatory measures on foreign products, such as internal taxes and subsidies, and creates equal competitive conditions for imported and domestic goods. In terms of cultural goods, various regulatory measures can be imposed on imported products, such as the differentiated taxes levied on books, magazines, box-office revenues, receipts of broadcasters, DVDs which are of foreign origin. In the Canada-periodical case, the US has successfully proved that Canadian’s excise tax for foreign products and the postal subsidy provided for domestic ones run against Article III GATT. In the Turkey-Film case,89 Turkey had to equalize its tax on box-office revenue between foreign movies and domestic movies under the pressure imposed by the US. The different treatments on taxation are equal to provide subsidies to the domestic products, and should be prevented by GATT. However, the national treatment concerns the processes of sale, purchase, transportation, distribution, and usage,90 whether subsidies direct to producers are permitted or not is not clear. Additionally, Article III.8 (b) provides another exemption in terms of subsidies through governmental purchases of domestic products. It has been criticized that the GATT subsidy regulation does not effectively affect the domestic policy instruments and cannot prevent the distortion of

88 As the example of Eruimages given by: Herold, A. (2010), supra n.57. p.298
89 Turkey-Foreign Film Taxation, WT/DS43/3.
90 Article III.1, GATT
international competition.\(^91\)

2.4.2.4 Article XX (a) and (f)

Article XX provides exceptions of general trade obligations under certain circumstances. The most relevant conditions for cultural products are provided by paragraph (a) and (f). The provision reads:

> ‘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, noting in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals;

...

(f) imposed for the protection of national treasures of artistic, historic or archaeological value’.\(^92\)

A cultural policy measure may be motivated by moral concerns other than cultural ones. For example, measures prohibiting violent or pornographic content are based on public moral grounds in almost any cultural societies. However, ‘public moral’ is interpreted variously in different social contexts. In order to justify cultural measures as trade exceptions, the central question about paragraph (a) is whether they are themselves ‘necessary’ to protect public morals. Following AB’s ruling in \textit{Korea-Beef},\(^93\) the ‘necessity test’ is built upon the Panel and AB’s ‘process of


\(^{92}\) GATT, Article XX.

weighing and balancing a series of factors’. In practice, it is quite unlikely for both the Panel and AB to interpret the relation between cultural measures and public moral in a broad way. On the one hand, the considering factors taken by the Panel and AB are factors such as ‘the trade impact of the measure, the importance of the interests protected by the measure, or the contribution of the measure to the realization of the end pursued’. Therefore, the more vital or important the values pursued, the easier it is to fulfill the necessity test. Cultural value does not enjoy priorities compare to human life safety and environmental safety issues, and it has not been officially recognized either by GATT provisions or WTO jurisprudence. On the other hand, in order to fulfill the requirement of paragraph (a), strong evidence is needed in linking cultural measures and public moral. Given the ambiguous nature of ‘public moral’, Panel and AB have less intention of make disputable ruling in justifying cultural measures for public moral protection purposes.

Although paragraph (f) does not require the measure’s necessity for the purpose, it has limited reference to measures imposed on general cultural products, or audiovisual products in specific. First, ‘national treasure’ is a quite specific term that its transportation or usage is subject to strict national law and regulation. Second, tradable cultural products are unlikely to be qualified as the objects of paragraph (f). Therefore, paragraph (f) should be read as export regulation rather than import restrictions.

2.4.3 Treatment of Cultural Goods under Other WTO Agreements
Beside GATT 1994, there are 12 other WTO agreements regulating trade in goods, among which, the Agreement on Subsidies and Countervailing Measures (SCM) and

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96 These 12 agreements are dealing with: agriculture, health regulations for farm product (SPS), textile and clothing, product standards (TBT), investment measures, anti-dumping measures, customs valuation methods, pre-shipment inspection, rules of origin, import licensing, subsidies and counter-measures and safeguards.
Agreement on Safeguards provide closer relevance to measures on cultural goods.

2.4.3.1 Agreement on Subsidies and Countervailing Measures

Under the intricate rules of SCM agreement, subsidies can be categorized according to its effects. Generally speaking, export subsidies are prohibited, and the internal subsidies are permissible unless they cause or threaten to cause material injury to the domestic industry of another Member. Additionally, the injured Member is authorized to impose countervailing duties on the subsidized products to compensate the distortion. Article 1.1 of SCM Agreement defines the scope of subsidy as a ‘financial contribution’ by a ‘government or public body’ that confers a ‘benefit’. The Agreement covers most public financial supports and imposes stricter and more detailed provisions on the use of subsidies compared to the GATT 1994.

In WTO terminology, subsidies in general are placed into different ‘boxes’ which are given by the colors of traffic lights.97 The ‘box system’ vividly describes the attribute of subsidies under WTO agreements:

All prohibited subsidies have been placed in the ‘red box’. According to Article 3.1 (a) and (b) of SCM Agreement, export subsidies and import substitution subsidies are not allowed for goods beside agricultural products. The ‘green box’ contains subsidies which are allowed currently but may not be allowed in the future. Article 8 of the SCM refers to the permissible subsidies. To be qualified, the green box subsidies must not distort trade, or constitute the minimal distortion under certain conditions. This kind of subsidies is allowed, provided they comply with policy-specific criteria, such as assistance in research programmes, regional development and environmental projects. The most controversial category is the ‘amber box’ which embraces almost all domestic support measures that are considered to distort production and trade. They are still ‘actionable’98 but subjecting to the affected Members’ consultation

97 Understanding the WTO’s Box System, Doane’s Agricultural Report, Oct.3, 2006
98 Three main adverse effects are listed in Article 6 of SCM Agreement which makes the subsidies ‘actionable’.
requests or dispute claims. The prohibition of red box subsidies ensures a fair competition environment for domestic and foreign goods in a specific market, but it does not prohibit support to domestic production according to Article 3.1 (b). Financial supports that directly goes to cultural goods producers fall out of the red box, and justify itself in the ‘amber area’. Once the affected Members challenge this kind of subsidy, they have to demonstrate the ‘likeness’ of the subsidized products and their products under Article 15.3 of SCM Agreement, and the existence of adverse effects caused by the subsidization. Despite the fact that subsidization is applied by many of the WTO Members in their film or publication production, no claims has been made under SCM Agreement so far due to its technical difficulties to prove the actual adverse effect and the political sensitivity of the cultural sectors.\(^99\) Even the US, the strongest advocator of liberalization in cultural sector, behaves silently in front of the European subsidization on its film sector.\(^100\) If the cultural supportive measures are provided for research aid, especially for the purpose of development of new technologies and production methods,\(^101\) according to Article 8.3 of the SCM Agreement, these measures belong to the green box\(^102\) and are actionable accordingly.

2.4.3.2 Agreement on Safeguard

The Safeguard Agreement together with Article XIX: 1 of the GATT empowers the Members to take safeguard measures when the surge of importation causes, or threatens to cause serious injury to the domestic industry. Different from countervailing duties, safeguard measures are applied to fair trade conditions. Thus, it is not surprising that the threshold for its application is much higher than measures

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\(^99\) de Witte, B. (2001) supra n.75. p.21

\(^100\) Bernier, I (2003), supra n.38.

\(^101\) Herold, A. (2010), supra n.44. p.300

\(^102\) Provided that its assistance does not exceed 75% of the costs of industrial research or 50% of the costs of pre-competitive development activity, and that it is limited exclusively to personnel, equipment and investment costs, consultancy expenditure and additional costs incurred directly as a result of the research activity, based on Article 8.2 of SCM Agreement.
being used in the unfair competition situations. Article 4.1 of the Safeguard Agreement defines ‘serious injury’ as a ‘significant overall impairment in the position of a domestic industry’, and the ‘threat of serious injury’ is ‘serious injury that is clearly imminent’. Article 4.2 (b) requires that the ‘serious injury’ should have a causal link with the ‘increased imports’ as a result of ‘unforeseeable development’. Once the conditions are fulfilled, safeguard measures can be taken in the form of the increasing of the binding customs duties, and quantitative restrictions. It should be noted that these measures are temporary and may only be applied for ‘such a period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment’. As the most important attribute of the movie products, intellectual content has been inserted in the goods, due to its unique and creative nature. There is no objective standard to judge the injury to the domestic industries. Under the very strict conditions on the application of safeguard measures, it is extremely difficult to prove that the huge importation of US movies (regarded as goods) to European market would cause serious injury to the European movie industry. Therefore, it is not surprising that there is no case until now on the application of safeguard measures in terms of cultural products.

2.4.4 General GATS Rules on Cultural Products

Services play a very important role in economic development nowadays as the modern economies are becoming more service-intensive. The productivity

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104 In US-Wheat Gluten, WT/DS166/AB/R, 19 January 2001, the Appellate Body ruled that the standard of ‘serious injury’ is very high and exacting; it is significantly stricter than the standard of ‘material injury’ of the Anti-dumping Agreement and the SCM Agreement.
105 Unforeseeable has interpreted as ‘unexpected development’. In US-Steel Safeguards, WT/DS259/AB/R, 20 December 2003, the increase in imports must be recent, sudden, sharp and significant.
108 Article 7.1 of the Agreement on Safeguard.
109 There are just few cases on safeguard measure in general. See: http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm, (accessed on May 15, 2010)
performance of service industries differs between countries significantly. Hoekman and Mattoo\(^{110}\) attribute this difference to their status of trade openness. During the Doha negotiation, the achievements of WTO Members under GATS have failed to make significant progresses, especially in the audiovisual services sectors. In comparison to GATT, GATS does not contain any direct provisions to address cultural services. In addition, general principles in GATS are much flexible in application.

2.4.4.1 Scope of Application

Article I: 1 of the GATS states that this Agreement applies to ‘measures by Members affecting trade in services’. Measures taken by central government authorities, regional or local governments and authorities\(^{111}\), or other bodies who exercises the powers delegated by governments or governmental authorities will all be regulated by GATS. The measures refer to law, regulation, rule, procedure, decision or administrative action and so forth.\(^{112}\) And the service includes ‘any service in any sector except services supplied in the exercise of governmental authority’.\(^{113}\) The ‘measure that has an effect on trade’ should be relevant to ‘the conditions of competition in supply of a service’.\(^{114}\) Therefore, in comparison to Article III of the GATT, the scope of the GATS is wider because ‘affecting’ trade in services is broader than ‘regulating’ or ‘governing’ trade in goods that contains in GATT.\(^{115}\)

In the Doha Round negotiation, cultural services, are mainly discussed under the audiovisual sector and the main controversies focus on the differences between multilateral and preferential commitments,\(^{116}\) in terms of how cultural services be


\(^{111}\) Article I:3 (a) GATS.

\(^{112}\) Article XXVIII(a) GATS.

\(^{113}\) Article I: 3(b) GATS.


\(^{115}\) Ibid, para 20.

distributed, traded and consumed. In addition, the commercial interests of trade in services are vary greatly among countries, therefore, larger countries do not input the same level of negotiating pressure on their trading partners in a multilateral context to achieve a general agreement. Beside the MFN, market access and national treatment are obliged in a ‘bottom up’\textsuperscript{117} approach that Members can decide their respective schedules for trade liberalization.

2.4.4.2 MFN Treatment Obligation

MFN treatment is stipulated in Article II, paragraph 1. Unlike the GATT, GATS provides exemptions in paragraph 2 to the MFN obligation.\textsuperscript{118} Members should explicit the exemptions subject to Article II:2 in order to exempt from MFN obligation in service sectors. For example, the \textit{Canada-Film Distribution Services},\textsuperscript{119} EC claimed that the Canadian measures affecting film distribution services to the US were favorable compared to its treatment to the EC. Meanwhile, Canada was bound by the MFN obligation under GATS as it had not taken any exemptions on the respective measures. The case suspended because the European company as the plaintiff had been taken over by its Canadian coterie.

The MFN exemptions lodged by Members are not supposed to exceed ten years,\textsuperscript{120} therefore, all exemptions under Article II: 2 were supposed to expire by January 2005. However, the termination dates in many service sectors have achieved any agreements. The audiovisual service sector is among others possessing a large number of MFN exemptions for various reasons. Generally speaking, these exemptions are reflected in two ways. First, many countries engage in the co-production agreements on

\begin{footnotesize}
(2009) \textit{Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations}, Cambridge University Press. p.113


\textsuperscript{118} Article II, para 2 GATS: ‘Member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex II on Article II exemptions’.

\textsuperscript{119} WT/DS117/1.

\textsuperscript{120} Article II: 6 GATS, in principle exemptions should not exceed ten years.
\end{footnotesize}
audiovisual services in order to grant more favorable treatment to their partners than other Members. Second, the financial support programmes of some Members provide subsidies\textsuperscript{121} to certain States and not to others. In the long run, as the audiovisual service has attracted lots of attention, and the relevant subsidy problems have already been brought to the negotiation mandate under GATS, culture related service sectors\textsuperscript{122} will be pushed to subject to more stringent multilateral regimes.

2.4.4.3 Special Commitments

The objective of the Doha Round in the service sectors are to negotiate further trade liberalization by extending further market access and national treatment to more services sectors and reducing limitations on existing commitments.\textsuperscript{123} Member countries increase market access\textsuperscript{124} and make national treatment\textsuperscript{125} commitments voluntarily. Therefore, if a country has not committed in audiovisual or other cultural service sector, it is free to take measures to favor its own service industries and set barriers to the market access conditions. In terms of audiovisual sector, the majority of Members\textsuperscript{126} have not made any commitment. Members who have committed themselves in certain areas, a variety of limitations still exist. In the ongoing Doha round, commitments in the audiovisual services sector are still less productive, for example, the EU has not made any commitment yet.

Below are the lists of specific commitments taken by US (Table 1) and China (Table 2): (Modes of Supply: 1) Cross-border supply; 2) Consumption abroad; 3) Commercial Presence; 4) Presence of natural persons)

\textsuperscript{121} Such as the EC’s MEDIA and Eurimages, and the Nordic Film and TV fund.
\textsuperscript{123} Article XIX GATS.
\textsuperscript{124} Subject to Article XVI GATS.
\textsuperscript{125} Subject to Article XVII GATS.
\textsuperscript{126} Only 26 Members, including the US have made commitments in audiovisual sector with certain limitations. Only 19 countries made commitments at the end of Uruguay negotiation. See: WTO Secretariat, Audiovisual Services, Council for Trade in Services, S/C/W40, 1998.
Table 1: Sector Specific Commitments, Audiovisual Services. US (GATS/SC/90)
(From: http://www.wto.org/english/tratop_e/serv_e/telecom_e/sc90.pdf)

<table>
<thead>
<tr>
<th>Sector or Sub-sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>02.D. Audiovisual Services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Motion Picture &amp; Video Tape Production &amp; Distribution Services</td>
<td>1) None</td>
<td>1) Grants from the National Endowment for the Arts are only available for: individuals with US citizenship or permanent resident alien status, and non-profit companies.</td>
</tr>
<tr>
<td></td>
<td>2) None</td>
<td>2) None</td>
</tr>
<tr>
<td></td>
<td>3) None</td>
<td>3) Grants from the National Endowment for the Arts are only available for: individuals with US citizenship or permanent resident alien status, and non-profit companies.</td>
</tr>
<tr>
<td></td>
<td>4) Unbound, except as indicated in the horizontal section</td>
<td>4) None</td>
</tr>
<tr>
<td>b) Motion Picture Projection Service</td>
<td>1) None</td>
<td>1) None</td>
</tr>
<tr>
<td></td>
<td>2) None</td>
<td>2) None</td>
</tr>
<tr>
<td></td>
<td>3) None</td>
<td>3) None</td>
</tr>
<tr>
<td></td>
<td>4) Unbound, except as indicated in the horizontal section</td>
<td>4) None</td>
</tr>
<tr>
<td>c) Radio &amp; Television Services</td>
<td>1) None</td>
<td>1) None</td>
</tr>
<tr>
<td></td>
<td>2) None</td>
<td>2) None</td>
</tr>
<tr>
<td></td>
<td>3) None</td>
<td>3) None</td>
</tr>
<tr>
<td></td>
<td>4) Unbound, except as indicated in the horizontal section</td>
<td>4) None</td>
</tr>
<tr>
<td>d) Radio and Television Transmission Services</td>
<td>1) None</td>
<td>1) None</td>
</tr>
<tr>
<td></td>
<td>2) None</td>
<td>2) None</td>
</tr>
<tr>
<td></td>
<td>3) A single company or firm is prohibited from owning a combination of newspapers, radio and/or TV broadcast stations serving the same local market. Radio and television licences may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-US citizen as an officer or director or more than 20 per cent of the capital stock of which is owned or voted by non-US citizens; a</td>
<td>3) None</td>
</tr>
</tbody>
</table>
corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non-US citizens or a foreign government or a corporation of which any officer or more than 25 per cent of the directors are non-US citizens.

4) Unbound, except as indicated in the horizontal section. In addition, US citizenship is required to obtain radio and television licences.

4) None

e) Sound Recording

1) None

1) None

2) None

2) None

3) None

3) None

4) Unbound, except as indicated in the horizontal section

4) None

f) Other Audiovisual Services

1) None

1) None

2) None

2) None

3) None

3) None

4) Unbound, except as indicated in the horizontal section

4) None

Table 2: Sector Specific Commitments, Audiovisual Services, China (GATS/SC/135)

(From: http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm)

<table>
<thead>
<tr>
<th>Sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>02.D. Audiovisual Services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Videos, including</td>
<td></td>
<td></td>
</tr>
<tr>
<td>entertainment software and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(CPC 83202), distribution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Sound recording</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1) None</td>
<td>1) None</td>
<td>Without prejudice to compliance with China's regulations on the administration of films, upon accession, China will allow the importation of</td>
</tr>
<tr>
<td>distribution services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>2) None</td>
<td>2) None</td>
<td></td>
</tr>
<tr>
<td>3) None</td>
<td></td>
<td>3)</td>
</tr>
<tr>
<td>Upon accession, foreign services suppliers will be permitted to establish joint ventures with Chinese partners with foreign investment less than 49 per cent to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products (see footnote 1).</td>
<td></td>
<td>None</td>
</tr>
<tr>
<td>4) None</td>
<td>4) Unbound, except as indicated in Horizontal Commitments.</td>
<td>Unbound, except as indicated in Horizontal Commitments.</td>
</tr>
</tbody>
</table>

- Cinema Theatre Services

| - Cinema Theatre Services | | | |
|---|---|---|
| 1) None | 1) None | |
| 2) None | 2) None | |
| 3) None | 3) None | |
| Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent. | | |
| 4) Unbound, except as indicated in Horizontal Commitments. | 4) Unbound, except as indicated in Horizontal Commitments. | |

From the above tables, it can be seen that the US has made nearly full commitments under both market access and national treatment (limitations only in Radio and Television Transmission Services under Mode 3), while China has made both quantitative (such as the import cap on motion pictures) and qualitative restrictions (China remains the right to examine the content of audio and video products).

2.4.4.4 GATS Article XIV(a)
Similar to GATT, GATS also has its exceptive clause which allows Members to take unilateral measures under certain conditions. Article XIV (a) allows trade-restrictive measures which are ‘necessary to protect public morals or to maintain public order’. The US stated that Article XIV (a) only provides justification for content restrictions in the audiovisual sector. ‘Public order’ varies in time and space, depends upon a range of factors such as social, religious, cultural, etc. According to US Gambling Services, ‘public order’ relates to a ‘condition in which the laws regulating the public conduct of members of a community are maintained and observed’. It is questionable whether the falling of cultural diversity can be qualified as endangering the ‘public order’ when foreign cultural products occupy a dominate market in a country. Cultural diversity has been recognized as a fundamental societal interest under international conventions (i.e. UNESCO conventions), whether such value can be recognized under the exceptive clause or not is uncertain, and it subjects to the ‘weighing and balancing’ process by the judicial body of WTO when conflict occurs.

2.4.5 Cultural products under TRIPS agreement
Culture and trade problems also arise in other WTO agreements such as TRIPS and TRIMS. Due to the significant role of intellectual property right in the cultural products, the remuneration of cultural creators and producers depends significantly on the protection of intellectual property. TRIPS Agreement and its relevance to

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127 In the US-Gambling case, the Panel found ‘the previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS’.
128 Footnot 5 to Article XIV (a) of the GATS states: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
cultural product will be analyzed in this section.

The Agreement on Trade-related Aspects of Intellectual Property Rights introduced intellectual property law into the multilateral trading system. It enlarges the multilateral trade negotiation into intellectual property protection sphere and refers to the already existed international agreements\(^\text{133}\) on the protection of industrial rights and of copyright. Having incorporated these conventions into the WTO system, the protection standard of intellectual property becomes universal and more enforceable through the WTO dispute settlement system. Similar to GATT and GATS, TRIPS also imposes national treatment (Article 3) and MFN treatment obligations (Article 4) to ensure a non-discriminatory competition environment. These obligations are for ‘intellectual property rights’ holders’ instead of ‘like products’. For example, during the Uruguay Round, the US challenged some European countries\(^\text{134}\) measures of investing the revenues from secondary use rights (levied from both domestic and foreign copyright holders) in their domestic artists and works under Article 3 of TRIPS.\(^\text{135}\) Members will exempted from the general obligations when they are not covered by the international agreements that are collaborated by TRIPS. For example, a member is exempted from the obligation of MFN treatment if the Berne Convention allows for differential treatment of foreign nationals based on reciprocity according to Article 4 (b) TRIPS. It should be emphasized that the Members are free to determine the appropriate method of implementing the TRIPS agreement within their own legal system, therefore, in most cases which were bought under TRIPS Agreement, the basis for the complaint was the failure to gain the required copyright and neighboring rights’ protection under domestic law. For example, in 1998, the US complained that a


\(^{134}\) Such as France, the Netherlands, Germany.

large number of television stations in Greece regularly broadcasted copyrighted films and TV programmes without the authorization of the US copyright owners. In the end, Greece granted effective action against copyright infringement of the television stations. In 2009, the US challenged the protection of intellectual property rights of China in terms of its measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products. The rulings by the Panel and the Appellate Body obliged China to change its relevant laws regarding copyright and customs.

2.5 Status of cultural products under preferential trade agreements

The tension between trade liberalization and the value of cultural diversity also exists at regional or bilateral level. However, regionalism presents a different approach in resolving ‘trade and social values’ conflict compared to the multilateralism due to the limited number of countries, the common interests in certain sectors, etc. Therefore, consensus is more likely to achieve in preferential trade agreements (PTA), especially for trade in services, because ‘in regional talks, governments may be more like-minded with respect to the general objectives underlying at least a subset of the regulatory regimes applying to service industries, especially if – as is often the case – the countries involved have similar cultures and per capita incomes and are in

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139 PTA has been used throughout the whole thesis in a generic sense to refer to all forms of regional and sub-regional trade agreements, i.e. Monetary Unions, Common Markets, Customs Unions, Free Trade Areas, and Preferential Trade Agreements. PTA is being used as all forms of regional and sub-regional arrangements involves some degree of preference being accorded to its members without extending such preference to others. However, it is important to note that there are significant differences among these five forms of PTAs. It should also be note that Free Trade Agreement is the most important object for the aim of the research, because audiovisual sectors are mainly covered by those agreements instead of the other four forms.
geographic proximity’. It is easier to internalize the benefits and achieve the outcome of trade liberalization in a smaller group of countries.

2.5.1 The relationship between PTA and WTO agreements
As an integral component of the international trading system, PTAs brought closer economic integration among the participating countries and regions. A fundamental debate concerning PTAs is whether they are compatible with the WTO rules. It is legitimate to argue that there is no hierarchy among international treaties. Therefore, theoretically, the problem about compatibility between PTAs and WTO agreements should not be of a legal concern. Given the fact that WTO embraces the majority of the countries and regions, and each of the member country has engaged in PTA framework or negotiation, it is of practical significance to clarify the sequence of the agreements that each member country participated. Both GATT (Article XXIV) and GATS (Article V) have references to allow the execution of international treaties in the form of PTA as legitimate exemptions of MFN obligation. Combine the meaning of Article 30 and Article 41(1) of the Vienna Convention, it is legally evident to claim that WTO agreements have higher hierarchy than PTAs. In other words, PTAs concluded by WTO member countries have to fulfill certain requirements posted by WTO rules, in order to be legitimate under international law. In practice, the compatibility of PTAs to the WTO agreements has rarely been

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141 Except for the supremacy of the Charter of the United Nations. According to Article 103 of the Charter, ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’.
142 WTO has 159 member countries as of March 2013.
143 Article 30 of the Vienna Convention refers to application of successive treaties relating to the same subject matter.
144 Article 41 of the Vienna Convention refers to agreements to modify multilateral treaties between certain of the parties only.
First, due to the ambiguities of both Article XXIV of GATT and Article V of GATS, the criterion of bringing charges against a specific PTA is too broad to establish. For example, under Article V of GATS, the determination of ‘substantial sectoral coverage’ is difficult to measure, because the value and the volume of trade in services are almost impossible to verify. Second, given the fact that almost all WTO members engaged in various PTAs, if a WTO member decided to challenge a particular PTA, it would not only cast adverse consequences on its own PTAs, but also add unnecessary political cost to develop either preferential or multilateral trade relations. Therefore, the conflict between PTA and WTO is rarely established, and will remain difficult to establish in the near future.

As PTA is a preferable trade platform to fulfill a country’s wish to develop their external trade policies, it is a place where countries negotiate issues that are beyond WTO’s current scope, as well as issues that are covered by WTO but with a further commitment level.

Many issues have not been regulated by the WTO because member countries have not been able to achieve consensus, such as investment and competition issues. However, those issues can be found addressed under PTAs through voluntary agreements between countries. Take competition issue for example, there has been a proliferation of PTAs having competition related provisions, such as EU-Mexico Free Trade Agreement, EU-Singapore Free Trade Agreement, and North America Free

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146 Only one case has been brought up regarding the interpretation of Article XXIV before the Appellate Body: Turkey-Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, 22 October 1999.
150 Annex XV of the Agreement.
151 Chapter 12 of the Agreement
Trade Agreement (NAFTA). For WTO-covered issues, PTAs’ approach is considerably flexible that favorable treatments are provided for preferential trading partners. The favorable treatments not only cover harmonized and eliminated trade barriers, but also dispute settlement and specific provisions, such as subsidies, safeguard clauses, etc. Trade in services is considered as a central aspect of PTAs being negotiated outside multilateral system. Most WTO members are nowadays involved in at least one services PTA, and the PTA commitments on services generally go well beyond those undertaken by the same governments under the GATS framework. This can be seen from the following figure:

Figure 1: Sector coverage in PTAs in comparison with GATS commitments and GATS offers (in mode 1 and 3).

It can be seen that, in general, WTO members have undertaken more and further

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152 Chapter 15 of the NAFTA.
commitments in a much greater proportion of services sub-sectors than they have under GATS (in mode 1 and 3 in specific).

Beside the broader and deeper coverage of specific issues, PTAs have proved themselves as more sweeping compare to the GATS framework. Positive and negative listing are two different legal techniques used by PTAs, while GATS only relies on the former one. Negative list agreements have a deeper liberalization effect compared to the positive one, because everything is liberalized except otherwise listed. Therefore, in certain PTAs, such as NAFTA, US-Australia, CAFTA-DR, etc., the rules are clearer and more liberal compared to multilateral disciplines due to their negative list approach. In addition, according to the examination carried by Latrille and Lee (2012), even though many PTAs follow the positive list approach as GATS does, they tend to use a different scheduling method. While under GATS, one list of commitments made by member countries covering the four modes of delivery for each party, the list under PTAs covers broader issues. Therefore, PTAs are forums that increasing preferential commitments among contracting parties, especially through negative listing scheduling approach.

It can be seen that PTAs enjoy broader coverage and further extent of trade liberalization compare to multilateral trade regime, especially in service sectors. In addition to the aforementioned differences, the enforcement mechanism under PTAs requires diplomatic/political weights rather than legal processes, due to the significant political and strategic linkages between the partners in PTAs. This can be reinforced

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157 Ibid. According to the authors, negative list approach is mostly followed by PTAs conducted among developed countries, and developing countries of Americas, with Mercosur as an exception.

158 Ibid. The authors offered EC-Cariforum as an example. While Cariforum countries have, as in the GATS, one list each covering the four modes, the EU has four lists covering commercial presence including investment in manufacturing activities, cross-border services (mode 1 and 2), mode 4 covered by the third (key personal and post graduates), and the fourth (contractual services suppliers and independent professionals) list.
by the processes of negotiating and implementing a specific agreement, which typically involves significant investment of political capital and goodwill by the contracting parties.\textsuperscript{159} Although there are criticisms regarding PTAs’ lack of a real dispute settlement system,\textsuperscript{160} it should be emphasized that diplomatic and political perception of dispute settlement method is more likely to achieve satisfactory outcome compared to the quasi-legal processes provided by the WTO, especially for sensitive trade sectors, as well as issues whose scope is ambiguous under the multilateral trading regime.

2.5.2 Cultural trade under PTAs

Cultural industries have proved their specificity under PTAs, as annexes, exemptions and side-agreements abound in references to broadcasting, film and publishing sectors. Given the diversities of PTAs, the way to address trade in culture vary significantly among contracting parties. The last section has discussed the advantages of PTAs over WTO framework, while this section is going to analyze the merits of PTAs in liberalizing cultural sectors, and examine the reasons for such merits.

As have already stated in the previous discussion, cultural products are special because of their dual nature (combination of cultural and economic value). Audiovisual products are the most typical examples because of their huge commercial values entailed by the distinctive cultural content. Due to the divergent understandings towards cultural value, it is difficult to incorporate cultural considerations under multilateral trading regime and achieve consensus from member countries. By contrast, countries that decide to start negotiating a PTA are usually like-minded, or at least have strong incentives in achieving concrete results.\textsuperscript{161} It is easier for a small


\textsuperscript{160} Latrille, P. and Lee, J. (2012), supra n.152.

\textsuperscript{161} Formentini, S. and Iapadre, L. (2007) ‘Cultural Diversity and Regional Trade Agreements: The Case of
group of countries, especially neighboring countries with similar concerns and cultures to agree on market opening in a particular area, especially sensitive areas like cultural sectors. PTAs, especially regional trade agreements tend to include declarative provisions in order to state special cultural considerations in liberalizing markets. For example, the Cultural Integration Protocol, approved by the Consejo del Mercado Comun (CMC, the ruling and legislative organ of MERCOSUR) stated that MERCOSUR member states should ‘seek to provide the legal framework for cultural integration within the bloc, and they shall ‘seek to promote cooperation and trade between their cultural institutions and agents’, with priority given to those ventures that ‘express the historical traditions, the common values and the diversity of member-states’.\textsuperscript{162} Similar provisions can be found in EU legislation and South Asian Association for Regional Cooperation (SAARC)\textsuperscript{163} agreements. Through mutual recognition and cooperation, the cultural barriers of cultural trade under PTAs have been significantly brought down compared to the multilateral trade regime.

Services commitments are more important to cultural trade liberalization because cultural products become more and more service-oriented by the development of technology. Under the GATS framework, commitments under audiovisual services are rather rare. Although PTAs have generally made little progress in opening up those services sectors that have to date proven particularly difficult to address at the multilateral level,\textsuperscript{164} the negative list approach applied by PTAs have a sweeping effect in pushing the general liberalization of trade in services. Audiovisual services relate to service sectors like telecommunications, E-commerce, distribution services, etc. Under such a negative list manner, the commitments of those periphery trade

\textsuperscript{162} Article 1 and 2 of the Cultural Integration Protocol, CMC, 11/96.

\textsuperscript{163} Includes Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

sectors pave the way for a further liberalization of audiovisual services, and generate negotiation incentives for contracting parties to include more in their reciprocal deals with their preferential trading partners.

Therefore, generally, PTAs provide a more flexible platform for cultural trade compared to the WTO. When considering possible trade-off between cultural diversity and economic integration, PTAs’ merits, such as narrower agenda, fewer participants in the negotiations, and cultural resemblances are more effective than the multilateral approach offered by the WTO in further trade liberalization. However, PTAs approaches present to be diverse, especially among the major players, such as the US and EU, due to the significant difference in their domestic regulations. The following chapters will further examine three major WTO members’ preferential trade approaches, and will analyze their interactions with WTO law respectively.

2.6 Trade in culture and the UNESCO CCD Convention

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) adopted by UNESCO in 2005 has an ambitious task to fill the lacuna for cultural objectives in public international law. It is deemed as the only international instrument that serves as a cultural counterbalance to the WTO when conflicts between trade and culture occurred.165 Most WTO members are parties to the CCD, while some WTO members vote against the adoption of the CCD, such as the US and Israel. The real effect of CCD’s counterbalance to WTO is doubtful, not only because not all WTO members are parties to the CCD, but also because CCD is a convention comprised mostly by member countries’ rights in protecting cultural diversity, it can hardly affect member countries’ obligations under the WTO.

So far, the Convention has been ratified by 120 States and the EU as a regional

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organization, while most of the contracting parties are WTO members.

2.6.1 UNESCO CCD

During its 33rd General Conference on 20 October 2005, UNESCO adopted the CCD Convention with a vast majority, after a relatively short period of roughly 2 years of negotiating and political bargaining. Based on international law, the Convention aims at developing and supporting conditions of cultural diversity, in the context of globalization and free trade. The relationships between ‘market’ and ‘state’, and between ‘cultural industry’ and ‘cultural policy’ are at the heart of the CCD Convention. The Convention addresses contracting parties’ necessity of applying legitimate national cultural policies and measures even though they are discriminatory trade policies. With the adoption of the Convention, the intrinsic value of culture has been emphasized, and the possibility to protect culture from excessive trade liberalization has been provided. The Convention stands as a reference for contracting parties under the WTO and PTA trade negotiations. Therefore, the relationship between the Convention and WTO is an unavoidable topic among legal and policy scholars.

The façade of the CCD Convention portrays a pragmatic approach in justifying cultural protective policies and measures. Instead of defining what ‘culture’ is, CCD circumscribed ‘cultural diversity’ as ‘the manifold ways in which the culture of groups and societies find expression’ in Article 4. Compared to the previous UNESCO conventions and declarations, this approach links ‘culture expressions’

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168 Ibid.

169 E.g. The 1982 UNESCO World Conference on Cultural Policies in Mexico which defines ‘culture’ as encompassing the ‘whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the
and ‘freedom of thought, expression and information’, emphasizes the human right foundations of cultural policies. Although CCD has no intention to refine ‘cultural expressions’ as audiovisual goods and services, they are the primary focuses, because the Convention is built in the context of markets where cultural expressions represented, while audiovisual products are the main concern of such a context. In line with the theoretical analysis of legitimacy of governmental measures on cultural policies at the beginning of the Chapter, CCD attempts to compensate the endangered diversity of cultural expressions by market failures by providing sources of international law.

The rights and obligations of the contracting parties are specified in Chapter IV of the Convention, from Article 5 to Article 19 respectively. According to Graber (2008), the rights and obligations underlined can be subdivided into three pillars:

1) First pillar: Articles 5 and 6, providing for the Parties’ sovereign right to undertake measures on cultural policy;
2) Second pillar: Articles 7 to 11, providing for incentives for the Parties to engage in the promotion of the diversity of cultural expressions in their territory;
3) Third pillar: Articles 12 to 19, addressing the cooperation of the Parties to create favorable preconditions for the promotion of cultural diversity.

Under Article 6, a non-exhaustive list have been given, enumerating eight groups of fundamental rights of the human being, value systems, traditions and beliefs.’

The aforementioned UNESCO definition is dangerous because some cultural practices of certain social groups refer to gross violation of international human rights standards, such as the ritual killing or physical punishment. In addition, CCD emphasizes that ‘cultural expressions’ need to be protected when the free will of the individual requires for such an access, not because of their own value of existence.


regulatory, institutional and financial measures that may adopted by national states in pursuing the aimed targets. As a quid pro quo for the vast rights stipulated by the first pillar, Article 7 to 11 bring ‘obligations’ to contracting parties, require parties to adopt measures to justify their policy preferences, including promoting access to and dissemination of cultural expressions, preserving cultural expressions that are under threat of extinction, and encouraging an enhanced public awareness and understanding of the need to protect cultural diversity. These provisions lack of binding effect as they are merely incentives that have weak criteria to be enforced. As will be analyze in details later, CCD does not entail substantive obligations for contracting parties that can correspond the rights it invested.

The following parts will address the relationship between CCD and WTO to further analyze the legal conflict between the two genres of international law, and to give a preliminary answer to the question of whether contracting parties (both under CCD and WTO) can invoke their rights under CCD before the WTO disputes when their cultural policies became targets of the non-discriminatory trade principles.

2.6.2 Legal conflict between CCD and WTO

It is essential to define the components of a legal conflict between different provisions of international treaties before examining whether there is a conflict between CCD and WTO agreements. In practice, legal conflicts between different treaties rarely exist because when concluding later treaties, countries are aware of their rights and obligations entailed by earlier ones. Following the principle of pacta sunt servanda expressed in Article 26 of the Vienna Convention, good faith performance has been agreed by WTO members to include subsequent actions that might nullify or impair the benefits reasonably expected to accrue to other parties to the negotiations in question.

173 International Court of Justice, Report of 1957, Right of Passage over Indian Territory (Portugal v. India), p.142.
174 Article 26 of the Vienna Convention: ‘every treaty in force is binding upon the parties to it and must be
Marceau (2001) concluded two preconditions of a legal conflict. First, the parties to the dispute must be bound by the two treaties. And second, the two treaties deal with the same subject matter.\textsuperscript{175} When the two preconditions have been fulfilled, the choice between narrow and broad definition of conflict is a subject discussed by international law scholars. Under the narrow approach, a legal conflict arises only if the obligations under different treaties exclude each other,\textsuperscript{176} whilst under the broad approach, the condition is when a right granted by one treaty contravenes an obligation entailed by another treaty.\textsuperscript{177} In the case of CCD and the WTO agreements, they fulfill the second precondition but fail to satisfy the first one. Article 4.3 defines the ‘cultural expression’ as ‘expressions that result from the creativity of individuals, groups and societies, and that have cultural content\textsuperscript{178}, such as books, movies, theatre, music CDs, digital broadcasting, and Internet and other technologies are all covered by the Convention. Most of the aforementioned products are also objects of trade under the WTO agreements. The first precondition is that the parties to the disputes should be covered by both the CCD and WTO agreements. Although most WTO Members have signed the UNESCO Convention, the ratification procedure following the signature of the Convention has not been concluded by all signatories of the Convention. Meanwhile, of the 148 countries which have signed the Convention, 23 countries\textsuperscript{179} are not members of the WTO yet. As the US opposed the adoption of


\textsuperscript{177} Pauwelyn, J. (2003) Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, Cambridge University Press. p.10, 169. The author writes: ‘…in the end, conflict must be narrowed down to a conflict between two given norms: more particularly, the rights and/or obligations set out by these norms as they apply between particular states.’

\textsuperscript{178} In Article 4.2, Cultural content refers to symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities; Article 4.1 states that cultural identity is the way in which a culture finds its expression, which includes diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.

\textsuperscript{179} Countries including: Afghanistan, Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and
CCD, any dispute between the US and another WTO member who is also a member of the CCD, will not raise legal conflicts between the two instruments. Even if both of the preconditions have been fulfilled, it is still doubtful whether the conflict exists or not. As CCD is only comprised by rights, if the narrow approach of defining conflicts had been applied, there is no legal conflict between the two legal instruments, and the value of the CCD would be undermined, especially in the dispute settlement process under the WTO.

It can be seen that legal conflicts between CCD and the WTO agreements can rarely be established, and the problem of deciding which agreement should prevail is less important on this regard. Most of the academic appraisals of the CCD, and its influence in bridging trade and culture gaps are quite negative. Craufurd Smith (2007) stated that the CCD ‘is a document that evades controversy, which establishes general objectives and frames them in purely exhortatory terms’. Burri (2010) concurred this view and argued that CCD is peculiar because it lacks criteria and/or mechanisms which would make the cultural measures that aim at protecting cultural values workable, and it also cannot separate the licit from the illicit cultural policy measures from the CCD’s non-exhaustive list contained in Article 6(2). However, the influence of the CCD does exist, and it is mostly being referred from political perspective. With limited legal substance, the CCD is a political manifesto at its best. Such a political instrument may have indirect influence on WTO agreements during the process of their interpretation. In addition, the political context has the potential to change the power-plays in the WTO negotiations, and eventually shape

Herzegovina, Cape Verde, Ethiopia, Eritrea, Kazakhstan, Lebanese Republic, Uzbekistan, Syrian Arab Republic, Lao People’s democratic Republic, Democratic People’s Republic of Korea, Serbia and Montenegro, Seychelles, Somalia, Sudan, Tajikistan, Yemen, and Vanuatu. The list depends on statistics from WTO official website (Members until 23 July, 2008). Noting that some of these countries are observers of the WTO and have already conducted the accession negotiations.

2.6.3 The role of CCD in WTO dispute settlement

When legal conflicts arise, it is for the dispute settlement body to decide which law prevails if the parties decided to settle the dispute under the WTO. Article 20 (b) of the CCD says that ‘nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.’ From the WTO side, there is neither exception clauses, nor rights or obligations to protect cultural values under the WTO agreements, the judicial body of WTO does not have the competence to justify a violation of a WTO obligation according to the CCD, because according to Article 3.2 as well as 19.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the DSB ‘cannot add to or diminish the rights and obligations provided in the covered agreements’. As advocated by Marceau (2001) and Trachtman (1999), the Panel or AB may not provide rulings in light of public international law in their reports. However, Pauwelyn (2001) argued that, ‘the fact that the substantive jurisdiction of WTO Panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO Panel is necessarily limited to WTO covered agreements’. As a branch of public international law, the Panel and AB may apply other international law to decide claims properly before them. According to Pauwelyn (2004), Article 3.2, Article 7.1 and Article 11 of the DSU imply that the Panel

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184 Article 3 General Provisions, and Article 19, Panel and Appellate Body Recommendations.
189 Article 7.1 of the DSU requires the Panels to ‘make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)’. 
and AB may make their findings on international law resource outside the WTO agreements.\textsuperscript{191} The research agrees more on the Pauwelyn’s side, and agrees that the DSB are bound to concern other source of international law, even if they imply conflicts with trade values, otherwise, WTO would be isolated from the public international order. In the case of the application of CCD in the WTO’s dispute settlement, there are few cases being brought so far, and the current rulings state that the CCD’s impact on the WTO rulings is quite limited.

From the previous rulings of the WTO dispute settlement body, cultural reasons have rarely remain any stance in the Panel and the AB’s decisions. \textit{Japan-Measures on Imports of Leather}\textsuperscript{192} was the leading case for the tension between culture and trade. In this case, the US complained about the quantitative restrictions adopted by Japan on some leather products. In defense, Japan argued that this measure was taken in order to protect a cultural minority community, the Dowa. The Panel concluded that the special cultural policy argued by Japan could not be justified under the relevant GATT provisions and the import licensing system constituted a violation according to Article XI of GATT. In \textit{Canada-Certain Measures Concerning Periodicals},\textsuperscript{193} the Panel as well as the Appellate Body supported the US petition and contended that ‘cultural products’ with the same ‘end use’ are ‘like products’ and ruled that the Canadian domestic tax measure on the split-run editions of foreign periodicals violated Article III of GATT.\textsuperscript{194} Furthermore, the Appellate Body stressed that the ‘ability of any member to take measure to protect its cultural identity was not at issue

\textsuperscript{190} Article 11 requires that ‘a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.’


\textsuperscript{192} BISD/31S, May 15, 1984


in the present case’. The two cases listed above indicate that there is little room for the Panel or the Appellate Body to give special consideration to cultural goods or services.

As CCD addresses rights of member countries merely from culture perspective, the positive effects of trade liberalization might be undermined in pursuing cultural values. However, there is no explicit conflict between CCD and the WTO, and the legal conflict between them is hardly being established. Relying on the CCD, member countries may restrict their offers in the GATS negotiations, or add political weight to their protective cultural measures. Nevertheless, their current obligations under the WTO cannot be compromised by their rights imposed by the CCD. In addition, in the dispute settlement process, the real effect of the CCD is doubtful. At least, the DSB is not likely to justify the rights entailed by the CCD with a price of overriding members’ WTO obligations.

2.7 Indications to the WTO legal framework

2.7.1 Member countries’ autonomy in cultural sectors

Globalization, assisted by borderless technologies like satellite TV and the Internet, has seemingly rendered governments who want to aid their space and choice for national culture helpless, at least in popular culture sphere. Multilateral trade rules do not take cultural considerations as exceptions of general trade principles. Under such circumstances, traditional trade barriers are easy to avoid, and governments arguably cannot be involved in regulating cultural industries without breaching their international trade obligations (in the case of cultural goods). However, in practice, governments usually take relevant measures to sustain the diversity of thought and expression essential to their societies’ resilience, adaptation, regeneration and growth,

such as supporting public broadcasting, marking reasonable scheduling or expenditure requirements of private broadcasters, supporting the creation of national works through subsidies or tax incentives, limiting foreign ownership in certain sectors, and enforcing competition policies to ensure the prosperity of the markets.\textsuperscript{196} The effectiveness of the regulatory rules is often subject to criticism. As national culture is a distinctive notion, which toolkit is appropriate and effective to one country may be quite different from what is relevant in another. Therefore, when we advocate for a further extent of trade liberalization on cultural products by challenging the effectiveness of the domestic trade-distortive laws and policies, it is unrealistic to apply a uniform meter.

How much autonomy do WTO member countries enjoy in regulating cultural trade? In other words, to what extent should member countries engage in regulating cultural trade without breaching their WTO commitments? According to the above analysis, it can be seen that WTO rules do not provide much room in justifying protective measures on cultural grounds. However, because of the flexibility of WTO rules, especially GATS rules, trade-distortive measures against foreign cultural products can be taken in two forms:

First, quotas, subsidies and ownership restrictions explicitly discriminate the treatment of foreign products, and create an unfair competition environment under domestic markets. Given the low commitment level of audiovisual services, governmental measures in those sectors are subject to no restriction, even though the measures have significant trade-distortive effect. For service sectors in which member countries have made no national treatment commitment, national treatment obligation is not required. By the same token, market access works in the same way. Given the numerous MFN exemptions made by member countries, cultural co-operative agreements grant favors to specific member countries or regions that make the playing

ground unfair to the others.

Second, the ‘behind-the-border’ regulatory policies and industrial policies, such as product regulation, licensing requirements, certification and conformity assessment procedures, data reporting and border management procedures have spillover impacts of discrimination, even though they are often apply equally to local and foreign firms and products. Those policies generally increase extra cost for foreign products and suppliers, because foreign firms are subject to a multiplicity of requirements that are redundant, and the transparency of domestic regulations often calls into question. Such measures are not discriminatory in intent; however, they result in additional trade barriers.

The GATS structure and principles ensures sufficient space for member countries to pursue their national cultural policy objectives. Judging from the status quo, the multilateral rules have gone too far in favor of member countries’ autonomy in cultural sectors. The repercussions of such favor lead to the divergent positions among WTO members, and there are no motivations to fill the gaps. Should the current situation maintained, consensus on cultural trade liberalization is unrealistic.

2.7.2 Problems with WTO legal framework


198 Foreign suppliers find themselves more difficult to get access in relevant rules or regulations because of the duplicity of the rules and also because of language problems. Article VI:2 ensures the review and appropriate remedies for administrative decisions affecting trade in services. Members have engaged in communications about transparency issues for quite a long time. See: Communication from the United States, Transparency in Domestic Regulation, S/CSS/W/102, 13 July 2001.

199 Such measures cannot be ‘negotiated away’. The way to reduce the effect of trade discrimination is to enhance the transparency of domestic regulation, and engage in more supervision efforts. See: Hoekman, B. (2013), supra n. 193.
Section 2.4 outlines the relevant WTO agreements that apply to cultural goods and services, and critically evaluated their relevance with domestically applied cultural policies. Through the examination, three problems can be summarized as below:

First, Article IV, the most relevant provision that justifies cultural protective measures under GATT cannot reflect the reality of the market, and cannot justify many culture-based protective measures under the current situation. Given the background of the provision, the limitation can be reflected from twofold. On the one hand, the provision was stipulated by negotiation bargaining between initial contracting parties, who are also very important players under the current multilateral trading system, i.e. the US and EU. The primary aim of Article IV was to protect cinematographic films with domestic origin from international competition. The rational of such a provision was rather based on industrial considerations, thus falls short in providing cultural grounds to the ‘internal quantitative regulations’. On the other hand, by the time of drafting GATT 1947, cinematographic films were considered as goods. However, the nature of films, or other similar cultural products are mostly considered as services rather than goods, especially for the case of digital products. As has been discussed before, WTO members hold divergent views on the subject of classification, while Article IV GATT itself barely shields any light on such a dispute because the interpretation of ‘cinematographic films’ cannot be extended to the new forms of cultural products after 1947. Article IV GATT is most likely to be circumvented or ignored under the current digital environment, and it falls short in providing legal grounds to cultural protective measures adopted by member states.

Second, the uncertain exceptive clauses for cultural products contained in the WTO

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200 Responding to the European countries’ various protective measures towards the cinema market after the Second World War, the MPAA pushed the US government to make appropriate strategies for political or trade negotiations in order to get access to more foreign markets. As an epitome of Article 19 of the Havana Charter, Article IV had been kept by contracting parties of the GATT 1947. Many countries, especially European countries had enacted various law and regulations to limit the import of foreign films after the First World War. By the time of negotiating, film sector was treated differently because the abolishment of such national law was unrealistic.
agreements invited conflicts in interpretation. Under the general exception clauses of GATT Article XX as well as GATS Article XIV, exceptions have been in order to protect public moral and national treasures\(^{201}\). As have been analyzed before, they are not sufficient to justify discriminatory cultural policy measures because they are neither closely related to cultural concerns, nor are they supposed to be interpreted in that manner under the DSB. In order to invoke the ‘public moral’ exception, the measure at the stake needs to be proved that it is ‘necessary’ to protect public morals. According to the jurisprudence of the DSB, a ‘process of weighing and balancing’ would be followed subsequently.\(^{202}\) Under such a process, a series of factors will be examined, such as ‘trade impact of the measure’, ‘the importance of the interests protected by the measure’, and ‘the contribution of the measure to the realization of the end pursued’.\(^{203}\) It can be seen that the more vital the values that are pursued, the easier it is to fulfill the test of ‘necessity’\(^{204}\). In the case of protective cultural measure, it is upon to the Panel and AB to balance the weight of ‘cultural values’ that are embodied by such measures, and to rule that it is necessary to take such protective measure in order to pursue the embodied values, because they affect ‘public morals’ of a given society. According to the previous rulings\(^{205}\), both the Panel and the AB showed their reluctance in judging ‘the standards of right and wrong conduct’ which is considered as an accepted understanding of ‘public morals’.\(^{206}\) Therefore, the link between ‘cultural value’ and ‘public morals’ is too weak to be established under the WTO law, and measures to protect such values are also found themselves insufficient in fulfilling the ‘necessity test’ set up by the WTO judicial body. By contrast, Article

\(^{201}\) Exceptions for the protection of national treasures only exist under Article XX (f) of GATT, and there is no equivalent exception exists under GATS.

\(^{202}\) AB Report, Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB, para.161; Also see: AB Report, Dominican Republic-Imports and Sale of Cigarettes, para.70; and Thailand-Cigarettes, para.,75, 81.

\(^{203}\) Ibid.

\(^{204}\) Ibid, Korea-Beef, para.162.


XX (f) does not require the ‘necessity’ test, because it merely postulates the measure to be ‘imposed for’ the purpose specified. However, the major objects of cultural policies adopted by governments (mostly refer to audiovisual products) are unlikely to be of historic or archaeological value. In addition, the criterion of ‘national treasure’ entailed by this provision is also too high to define the majority of cultural products that often attract protective trade policies.

Third, given the flexible GATS design, further commitments on cultural services are less guaranteed, and it encouraged member countries to do forum shopping in seeking preferable commitments in various trade sectors. Given the political sensitivity of cultural services, member countries generally refrain from making commitments on audiovisual service sectors even though they are allowed to list limitations along with the commitments. For service sectors in which member states have made no national treatment or market access commitments, cultural protective measures at national level shall be kept intact, even though they are in a trade-distortive manner. Quotas are the most popular measures adopted by member states which include broadcasting quota (limitations on screens) and investment quota (limitations on investors). Together with subsidy and other financial measures, domestic cultural industries enjoy preferable treatment over foreign suppliers, while GATS rules have no legal ground to draw a line for trade-distortive practices. It shall also be noted that with the limitations in market access commitments for Mode 4 (presence of natural persons), working aboard would be restricted which is considered to be a significant trade barrier, given the fact that temporary working aboard is so frequent for audiovisual workers. Therefore, cultural reasons or not, protective measures on audiovisual services widely exist without causing legality problems. Similar rational shall apply to the MFN exemptions on audiovisual services under GATS. Such exemptions not only encourage discriminatory trade practices over other member

countries, but also contribute to the fact that member countries’ forum shopping in liberalizing trade in audiovisual services. Therefore, co-productive film or television programmes are well justified either under PTAs, or under a specific agreement signed by certain member countries over audiovisual issues.

2.7.3 PTA’s advantage in cultural trade

PTAs present more flexible and satisfied approaches when dealing possible equilibrium for the trade-off between cultural diversity and international/regional economic integration. The advantages of PTA shall first attribute to the special nature of cultural products. The extent to which foreign cultural products will permeate another market, and exert influence on another domestic culture will apparently depend on the degree of cultural proximity between trading partners, such as languages, values, beliefs, institutions, and behavioral patterns. Coordination of cultural policies in audiovisual sectors is an important instrument among others in many bilateral or regional trade agreements. As major regional integrated entities, both EU and MERCOSUR stipulated in their legislations that member-states will seek to promote cooperation and trade between their cultural institutions and agents, and shall give priority to support ventures that express the historical traditions, the common values and diversity of member-states. Therefore, cultural goods and services are allowed to be free circulated, and cooperative cultural deals are normally available between trading partners. However, ‘cultural proximity’ encounters difficulties in justifying itself as a universal rational in promoting preferential trade liberalization in cultural sectors. Under NAFTA, cultural sectors were exempted from general schedules, and Canada reserved limitations in liberalizing audiovisual related goods and services, even though Canada and the US share cultural proximity. In addition, cultural cooperation between US and EU seems to be unlikely despite the


210 Article 1 and 2, The Cultural Integration Protocol, CMC 11/96, MERCOSUR.
fact that they share cultural proximity. Such possibility remains low in spite that the trans-Atlantic trade pact is on the way.  

PTAs’ legal structures bring more opportunities in liberalizing cultural sectors compared to the GATS framework. Under the ‘negative list’ approach, all parties are bound in all sectors of services except to the extent that they have inscribed reservations or exceptions in their list or schedule. Therefore, the pressure of negotiating lies on the parties who may wish to retain limitations upon full liberalization, and they may encounter political cost by doing so. In practice, Canada explicitly excluded cultural industries from the scope of its PTAs, even under NAFTA. However, it would be practically impossible for other US preferential partners to follow the Canadian approach, mainly due to the political impetus imposed by the US. Therefore, by appraising the advantages that PTA enjoys in further liberalizing cultural trade, two repercussions need to be noted. First, for many developing countries where negotiating capacity is significantly insufficient in such complex and far reaching areas (four different modes, many different types of trade barriers, etc.), explicitly reserving limitations tends to be a tough job, especially under the pressure of countries who are active in liberalization. Accordingly, PTA does not seem like a fair playground in negating cultural trade liberalization, and even if the liberalizing extent is deep in legal context, the real effect is not promising because the political impetus often drives the execution of the agreement as well as the dispute settlements. Second, despite the proliferation of regional agreements, there are no PTAs between any of the major players of international trade, such as the US, EU, China, Brazil, Japan, etc. As a result, when it comes to international disciplines on cultural trade,

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211 The United States has repeated on several occasions that it expects all areas of trade to be included in the negotiations for a Free Trade Agreement with the EU, while the EU stressed that “the cultural issue is not up for discussion in the framework of these discussions.” See: http://www.globalpost.com/dispatch/news/afp/130610/eu-ring-fence-audiovisual-sector-us-free-trade-talks-report (accessed on 12 July 2013).

212 The result of the US-EU FTA remains to be seen. The EU has already showed its reluctance in including cultural sectors in the negotiation packs.
especially cultural services, it is still their WTO commitments that define the rules of the game. Given the fact that commitments in audiovisual services remain the lowest, there is barely any reason to believe that major players are going to engage in reform and liberalizing talks under the multilateral regime, in spite of the fruitful achievements made by the PTAs.

The legality of PTAs has never been successfully accused under the WTO although PTAs run against the principle of MFN. Under the current situation, it seems that PTA is a better framework for cultural trade, not only because of their given advantages (narrower negotiation agenda, political preference, negative-list approach, etc.), but also because they help to divert the tensions raised by the multilateral trade negotiations, and the unsolved disputes regarding the key issues (legal status of cultural products, the commitments on audiovisual-related services, etc.). It by no means implies that PTA is a perfect substitute of WTO on the matter of cultural trade liberalization. However, PTAs present a better order to reconcile cultural values and trade liberalization, at least for major WTO players who have clear agenda in cultural sectors.

2.7.4 Conflict with other international instruments.

The necessity to protect cultural values and expressions found limited relevance under WTO agreements. However, the CCD Convention recognized governments’ sovereign cultural rights and emphasized the specificity of cultural goods and services. As more than 120 UNESCO members have ratified the Convention (most of them are also WTO members), relationship between CCD and WTO responded to the lacuna left by the WTO agreements in terms of the conflict between cultural value protection and trade liberalization. At the rights side, CCD granted member countries rights to undertake measures to protect domestic cultural products, while at the obligation side, CCD failed to entail substantive obligations for member countries that can correspond the rights it invested. Therefore, both the rights and obligations under the two
international instruments do not exclude each other, even though the efforts encouraged by the CCD (Parties should engage in the promotion of the diversity of cultural expressions in their territory) may have a trade-distortive effect.

Given the fact that WTO has limited relevance in cultural value protection, when conflict occurred, would the DSB take the CCD as legitimate consideration in interpreting member countries’ rights and obligations, or in other words, could the respondent rely on the UNESCO Convention as a defense to a claim that a cultural policy it adopted violates its WTO obligation? From the legal context of CCD per se, the Convention is not to be ‘interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.’\(^{213}\) While from the WTO DSB’s perspective, applying other international instruments in a WTO dispute is much more controversial and problematic than using it to interpret WTO provisions. Article 1.1 of the DSU explicitly states that both the Panels and the Appellate Body are restricted to hearing claims under the WTO Agreements. Although this provision does not preclude other sources of international law, it also does not give any room for other sources. Voon (2007) believes that the DSB is bound to apply certain limited aspects of international law even though these may not be expressly incorporated in the WTO agreements, because ‘without this possibility, these bodies would not be able to fulfill the functions that the drafters of the agreements assigned to them’.\(^{214}\) Although the chance of directly applying other international instruments in a WTO dispute is slim, the DSB are allowed to reach other sources in interpreting WTO provisions, especially in some area where WTO agreements have limited resources. There is no case referring CCD before a WTO dispute yet, reasoning from the previous cases, both the Panel and the AB are cautious in citing other international laws. Using CCD as a defense of WTO-inconsistent measures may not be considered as an effective method of justifying trade-distortive cultural measures, because, first, the real legal conflict between the two instruments do not exist, because the rights and

\(^{213}\) Article 20(2), CCD.

\(^{214}\) Voon (2007), supra n.13. p.205
obligations respectively do not exclude each other, there is no need to judge which agreement prevail should the conflicts arise. Second, given legal texts of CCD and WTO DSU, the DSB may not be bothered to extent its capacity of interpreting WTO provisions in light of CCD.

There is no legal conflict does not mean the conflict between the two instruments does not exist at all. Cultural products are mostly be dealt with under audiovisual services under GATS negotiations. The rights granted by the CCD provide member countries a sound political bargaining position in making their offers under GATS schedules. Although the DSB has quite passive attitudes in referring to CCD, the CCD contracting parties have their rights to resort to other dispute settlement bodies, i.e. preferential trade frameworks. When their rights have been secured under other dispute settlement bodies, CCD member countries shall be encouraged to negotiate cultural sectors through other frameworks, while leaving WTO isolated.

2.8 Conclusion

Protective cultural policies have existed for quite a long time. Different from other trade barriers that have been dramatically brought down by the trend of globalization, protective measures pertinent to cultural products survived the various trade negotiations. Protection of cultural values is often linked to the protection of ‘freedom of speech’ or ‘freedom of expression’. Cultural products are also grounded on non-rivalry character in a sense that they are viewed as a specimen of public goods. The specificity of cultural products calls for special treatments. However, under WTO framework, there is no sign of consensus in the foreseeable future about how cultural products should be treated, and whether cultural measures shall be allowed to pursue cultural ends when they are trade-distortive. After a careful examination of the relevant WTO provisions, it can be seen that cultural products do not benefit from the exceptional clauses provided by GATT and GATS, and they are largely subject to the core obligations of national treatment and MFN treatment. However, the flexibility of
GATS leaves WTO member countries sufficient manoeuvring policy space to pursue their own protective measures. Given the difficulty in distinguishing the nature of cultural products, which agreements should be applied remains ambiguous. Can WTO rules effectively address trade-distortive cultural measures adopted at domestic levels? Is there a chance to re-open the audiovisual talks in the near future, and is there any motivation for member countries to make further commitments in this trade sector in the current or next negotiation rounds? The current legal framework leaves all questions unanswered. Under such circumstances, what we can do, besides proposing reforms for WTO law itself, is to go back to the member countries’ state of laws, evaluate their interaction with WTO rules in terms of whether they can be adequately affected, left completely unaddressed, or whether they are in a grey area so as to be likely affected by the ongoing negotiations and development. This domestic regulation-oriented approach is intended to evaluate the real impact of WTO rules on trade-distortive law/policies pertaining to cultural products, and then offer observations on future development. In turn, WTO rules shall be reformed to address the common problems reflected from domestic regulations to avoid unnecessary trade-distortive practices.

Preferential trade agreements and UNESCO’s CCD Convention are two possible instruments to develop cultural trade. PTAs divert the tensions raised by the multilateral trade negotiations by offering narrower negotiation agenda, political preferences, and a tailored reciprocal schedule for contracting partners. Cultural co-operation agreements widely exist in PTAs or specific cultural arrangements. Through co-operation, the relevant service sectors (including audiovisual services, distribution services, telecommunications, etc.) would enjoy whole package benefits of liberalization. Different from the WTO, PTA contracting parties are not entangled in legal problems of cultural goods or services, they tend to set flexible conditions for specific cultural product, based on reciprocity. Overall, PTAs have showed their supremacy over the WTO in that member countries of the latter prefer forum shopping via PTAs, rather than to engage in multilateral commitments made to
unspecific trading partners. It is worth researching member countries’ preferences under PTAs in cultural trade, and their patterns of opening cultural markets to preferential trading partners, in order to find out whether PTA provides an effective methodology for cultural trade liberalization, and whether such methodology can eventually help to solve the stalemate under the WTO framework.

CCD Convention intended to justify domestic cultural measures (especially in a trade distortive manner) by offering international legal sources. However, it failed to counterbalance member countries’ trade obligations imposed by the WTO rules. Therefore, the proposal and efforts of solving trade and culture conflict by constructing another international forum have failed miserably. When conflict occurs, the ability of the DSB to interpret WTO rules in light of the CCD provisions is rather low. By the same token, member countries’ rights under the CCD are too weak to compromise on their obligations under the WTO. Although the CCD serves as a political tool to balance negotiating powers under the multilateral trade negotiations, its legal impact, either on the WTO or the member countries themselves is marginal. The following chapters will not address this element in case studies.

The following chapters focus on addressing regulatory approaches adopted by selected sample member countries, in terms of their WTO compatibility and their preferential arrangements. It will be found that the three samples are of significant difference. Valuable lessons shall be drawn for the development of WTO rules from their experiences.
Chapter III Trade in Culture Regime—The US

3.1 Introduction
From the US perspective, cultural policies are best left in the hands of the free-market forces. The free-market ideology permitted US film and other popular cultural industries to develop as commercially sponsored and private enterprises. Such privatization trends also cover the US broadcasting industry.¹ The US government has strongly pursued liberalization in many countries to support the cultural industries, especially by means of international trade negotiations. The huge global dominance of the US cultural industries and the well-designed trade negotiating strategies have greatly influenced not only the multilateral trade rules, but also the preferential trading relationship.

Previous legal studies on the US cultural trade issues put emphasis on either analysing how American cultural industries expand under the international legal frameworks², or stretch to explain the collision between the new emerging cultural sectors and the current trade rules.³ Few works have bridged the gap in linking the relationship between the US domestic regime and the WTO rules in cultural trade topics. Given the significance of the US role in shaping the WTO agreements, the interaction between the US domestic regulatory framework and the relevant WTO law, in terms of whether they are inclusive or in collision with each other, and whether WTO law can provide an efficient solution in related trade conflicts, is of profound research value. In addition, as PTA is becoming an important platform for the US in negotiating on cultural trade, the advantages of PTA compared to the WTO from the US perspective are also a high-valued criterion in order to carry out an in-depth,

critical and comprehensive study into WTO cultural trade case analysis. Therefore, this chapter is going to address the aforementioned angles with an intent to echo the research questions of the thesis.

This chapter is organized as follows. Part 2 provides an historical background of the development of the US cultural industries, and its influence on the early negotiations of the GATT framework. Part 3 to 5 will analyze and evaluate the domestic regulatory framework and its interaction with the WTO rules, in terms of whether they are inclusive or conflicting with each other. The US cultural trade approach under PTAs will be followed on to further examine the US cultural trade policy regimes and also to form comparisons between multilateral and preferential trade frameworks. Findings shall be summarized in the conclusion.

3.2 Historical overview of trade in culture regime of the US

3.2.1 The beginning of the US cultural industries prosperity

Four driving-forces attributed to the prosperity of the US cultural industries at the beginning of 1990s, namely, the industrial design, the legal system, the favourable policy framework, and the diplomatic preference from the government. Films, as the earliest medium of popular cultural products, are in themselves typical examples of a mass-produced commodity, fully accommodating the principles within modern business. In order to provide increased stability and to forestall further competition of the US cultural market, nine leading manufactures and the major distributors of foreign films together announced the formation of the MPPC. Through licensing system, the MPPC monopolized the production of motion pictures. Between 1909 and 1914, the US film production market was controlled by the MPPC and the national film exchange system established by the monopolies. The situation paved the way for the standardization of the US film market, and prompted the production of blockbuster films, as the investment was concentrated within the productions made by the MPPC giants. Even though the intense conspiratorial rivalry of the MPPC had forced the movie production centre from New York to California,

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4 The nine leading manufactures includes seven domestic ones, Edison, Biogragh, Vitagraph, Essanay, Selig, Lubin, Kalem, and two French companies, Melies and Pathe.

the monopoly situation had not been affected but enhanced.

The introduction of federal export legislation was extremely important for the promotion of American film exports after the First World War. The enactment of the Export Trade Act (also called Webb-Pomerene Act) enabled exporters to fight foreign cartels by permitting them to cooperate in exports which the Sherman Antitrust Act would have made illegal. Following the Webb-Pomerene Act, the American film companies were allowed to cooperate in exports under the leadership of the MPPDA and the State Department, so that they can avoid competition with each other in foreign markets. Although the intention of this Act was to help small companies launch combined export campaigns, it was big business groups gained the most in the reality. Therefore, the Act gave big entertainment production companies the right to use monopolistic practices in foreign markets, even though such practice was illegal at the domestic market. Jack Valenti, the former director of the MPAA stated that:

‘without the embrace of the Webb-Pomerene, the US film and television industry would have been seriously, perhaps fatally, crippled in its effects to win the admiration and the patronage of foreign audiences...We face daily a panoply of obstructions designed to shrink the American share of the cinema and television world market...The American film industry is peculiarly vulnerable to unfavourable action by foreign governments and by combinations of foreign private interests, by industry cartels, and by an avalanche of non-tariff trade barriers that are both endless and ingenious...Without the canopy of Webb-Pomerene, under which we operate, we would be powerless to counter these restrictions and aimless in our attempts to increase our trade... We face, in some countries, exhibitor monopolies or combinations, where theatres are municipally or government-owned or otherwise bound together in a tightly controlled entity, sealed against intrusion. Webb-Pomerene provides us legally the ability to jointly negotiate and take action where necessary. Without this congressional authority we would stand no chance at all to survive. ’

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6 Ibid, p.49.
The trade policy of the US at large had the effect of maintaining Hollywood exports. For American legislators and policy-makers, the most important trade issue was the tariffs. However, the strong pressure to increase tariffs throughout the world in the 1920s ended up with the 1930s’ world economy depression. The Underwood Act of 1913\(^8\) moderately reduced the tariff, and endorsed the principle of reciprocal tariff reductions. Although the following governments raised the tariff rate especially in the 1920s,\(^9\) the export policy of the US was to accept foreign tariffs unless they discriminated against American products. Overall, the policy framework favours exports, while liberalize the domestic market based on the principle of reciprocal tariff reductions.

The final driving force of the early prosperity of the US cultural market was the active support of the diplomatic services. The State Department was preoccupied with commercial treaties that it helped American businessmen to engage in commercial ventures from which other countries tried to exclude them from their markets. Therefore, their policies or decisions arose from specific incidents or problems brought by business groups. The American commercial cultural policy was especially well organized in foreign markets, especially in European countries at the beginning of 1920s. The MPPDA enjoyed government support at the highest executive level. The diplomatic efforts included special funds to operate a Motion Picture Section in the Department of Commerce specifically to collect and publish information concerning the motion picture situation abroad.\(^{10}\) The Foreign Department of the MPPDA was to gather, correlate and disseminate accurate information to the producer members.\(^{11}\) It can be seen that the diplomatic efforts on the promotion of motion pictures export were perfectly taken by the association of State Department, the

\(^8\) The purpose of the Underwood Tariff Act in 1913 was to reduce levies on manufactured and semi-manufactured goods and to eliminate duties on most raw materials. To compensate for the loss of revenue, the act also levied a graduated income tax (made legal by ratification of the Sixteenth Amendment earlier that year) on U.S. residents.

\(^9\) During the Republican administrations in the 1920s, the Fordney-McCumber Tariff (1922) and the Smoot-Hawley Tariff (1929) substantially increased the tariff rate, raised average tariffs to 59%, which represented the high-water mark of protectionism for the US. See: Ulff-Moller, J. (2001), supra n.5, p.49.

\(^{10}\) A special fund of $15,000 was appropriated for the creation of a Motion Picture section in the Bureau of Foreign and Domestic Commerce at the last session of Congress 1925-1926. US Department of Commerce, Motion Pictures Abroad (Washington, D.C. 1926).

\(^{11}\) Ulff-Moller, J. (2001), supra n.5, p.54.
Department of Commerce, the American embassies all around the world (especially in European countries at that time), and the MPPDA.

The industrial design of the US cultural sectors was in no difference with other commercial sectors at the beginning of the 20th century in terms of their business models, when the major American movie companies started to expand, and gained their global dominance. On the other hand, suffice to say that cultural industries were special compare to other commercial sectors because when it came to export, favourable law, policies and diplomatic efforts had been granted so that they could enhance their competition in foreign markets. The domestic US market was also liberal which moderately reduced the duty rates, and followed unconditional MFN principle unless foreign tariffs discriminated against American products. The export-oriented strategy developed from the early 20th century paved the way for the US global trade strategy, and the GATT negotiation after the Second World War appeared just in time for the US cultural sectors’ further global marketing.

3.2.2 The US under the GATT/GATS negotiation

The trade in culture debate had started long before the Uruguay Round negotiation. The tension was mainly focused on the relationship between the US and European countries. In 1909, the Motion Pictures Patent Company (MPPC) urged the US government to establish the Edison trust, in order to monopolize the American market and restrict their European competitors. At that time, patent was the weapon for the US to win this battle in the film market. Forty years later, the US film industry dominated the world market with its mature industry chain and advanced technology, it was the European countries’ turn, especially for France, to fight against this market monopolization, however, the weapon for them was the value of ‘cultural diversity’. In 1947, US asked the EC to abolish restrictions on the importation of cinema films in the GATT negotiation, with a failed result that cinema films were explicitly excluded

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from the National Treatment principle\textsuperscript{13} and screen quota had been retained in Article IV GATT. When television became popular in 1960s, the US started to question the European market access issues for TV programs under GATT 1947\textsuperscript{14}, but failed because of the same ground as film. Hence, before the start of the Uruguay Round, the US had failed to conquer its major overseas market under the multilateral trade negotiations, because the framework was so insubstantial that the US had no bargaining power beside the basic GATT principles\textsuperscript{15}.

When services began to be negotiated in the Uruguay Round, the EC and some other big economies realized that the liberalization of trade in services would benefit their economic development, although the extent of liberalization was different.\textsuperscript{16} The US tenaciously asked for an inclusion of the audiovisual sector in the multilateral services liberalization schedule. In respond to the US persistent pressure, the EC adopted ‘Television without Frontiers’\textsuperscript{17} in 1989 to protect their audiovisual sectors.\textsuperscript{18} The TWF Directive included screen quotas and content requirements aimed at supporting European works. The US Trade Representative challenged the instruments contained in the Directive under GATT for the violations of MFN and national treatment provisions in Article I and III respectively.\textsuperscript{19} Although the US exerted political pressure\textsuperscript{20}, and even caused a diplomatic crisis, the EC adopted the Directive eventually and explicitly freed the audiovisual sector outside from the GATT framework, while making no commitment in the GATS schedule at the same time. It


\textsuperscript{15} Shao, W (1990), supra n.13.


\textsuperscript{18} The enthusiasm of the protective instruments, such as quotas, were diverging among Members. France was the major advocator for these instruments. See: Pauwels, C. and Loisen, J. (2003) ‘The WTO and the Audiovisual Sector, Economic Free Trade vs. Cultural Horse Trading?’ European journal of Communication 18(3).


\textsuperscript{20} The Directive was denounced by the US House of Representatives by a 342 to 0 vote. House of Representatives 257, 1st session, 135 Cong Rec. H7, 326, 23 October 1989.
was the US persistent efforts in liberalizing the audiovisual sector helped the adoption of the TWF Directive because of its stiff negotiation strategy.\textsuperscript{21}

The draft of GATS\textsuperscript{22} indicated the discord among negotiators in terms of ‘cultural exception’\textsuperscript{23}, especially for Article XIV. The US entangled in eliminating quotas and other barriers for market access, and persuading EU and other countries to make more commitments in audiovisual services. At the end of the Uruguay Round, neither side won the whole battle. Under the US pressure, the ‘cultural exception’ advocated by EU failed to gain a stance in GATS provisions, and the audiovisual sector was fully subjected to GATS principles. With the voluntary liberalization schedule, audiovisual services gained fewer commitments compare to other sectors.\textsuperscript{24} However, the US did influence the negotiating history of audiovisual services, because the obsolete cultural exception approach had been abandoned from then on, while a ‘cultural specificity’ negotiating strategy had been established instead. The US listed audiovisual liberalization as an important issue for the subsequent multilateral rounds, however, its strategy was no longer stuck to GATT/GATS principles, a more flexible approach had been drawn.

\section*{3.3 Existing law and policies on cultural trade}

\subsection*{3.3.1 General overview of US cultural policy}

Does cultural policy exist in the US? Most Americans believe that it is not necessary to make any cultural policy because the government should not have any ambition in the cultural sector.\textsuperscript{25} Deregulation is the theme of the US cultural regulation. The

\begin{enumerate}
\item \textsuperscript{21} ‘the American pressure was so intense that it irritated many European countries’, ‘we have a Directive today, thanks to the Americans’. See: ‘Agreesive U.S. Stance on Quotas May Have Hurt More than Helped’ and ‘EC Adopts Quota Directive: To Take Effect in 18 Months’, Variety, 4-10 October 1989.
\item \textsuperscript{22} Draft: Multilateral Framework for Trade in Services, GATT doc.MTN.GNS/35, July 1990.
\item \textsuperscript{24} Only 15 countries made commitments at the end of Uruguay Round. EU made no commitment.
\item \textsuperscript{25} On the roundtable discussion on ‘Culture and Democracy’, March 1982, Librarian of Congress Daniel Boorstin stated that: ‘The countries that have cultural policies are, of course, totalitarian countries’; Don Adams and Arlene Goldbard summarized three distinguish points for the anti-cultural-policy argument: first, the articulating coordinated policy would damage the individual agencies; second, the policy-making mechanism would lead to undue state interference in cultural development; third, there is no need to elaborate public policy
\end{enumerate}
theory of Marketplace of Ideas metaphor and the Principle of Diversity are the foundation for the development of the cultural sectors, especially in publishing, film, and other audiovisual industries.

The ‘Marketplace of Ideas’ metaphor is one of the most important principles in communications regulation and has been discussed and analyzed by both practitioners and policy makers. The metaphor has two dimensions originating from democratic and economic theories. It first appeared in John Milton’s work in 17th century, and it was described as: ‘the truth is being achieved via the free exchange of ideas, and emerging from the free expression of opposing ideas’. John Stuart Mill and Meiklejohn developed this idea from a democratic perspective, and argued that the free flow of information was the foundation for a self-governing society and it could facilitate effective political decision-making. The democratic manner of interpreting this principle also has judicial evidence. In Whitney v. California, Justice Brandeis ruled that: ‘the freedoms to think as you will and speak as you think are means indispensable to the discovery and spread of political truth’. In Associated Press v. United States, Justice Black stated that: ‘the First Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society’. From the economic perspective, ‘the ultimate good because the government’s cultural mission is to follow the trend of the private sector instead of setting goals in the realm of culture. Adams, D. and Goldbard, A. (1987) ‘Cultural Democracy: A New Cultural Policy for the United States’, available at http://www.wwcd.org/policy/US/proposals/US_policy.html (accessed on 10 May 2010)


274 U.S. 357 (1927), p.375
desired is better reached by free trade in ideas, that the best test of truth is the power of thought to get itself accepted in the competition of the market’. This neoclassical economic approach enhanced the importance of efficient exchange of ideas, and believed that ‘there is a market in which information and entertainment, intellectual goods, are bought and sold’. Compared to the democratic dimension, the economic one focuses on market efficiency and consumers’ satisfaction, while the former one advocates the promotion and encouragement of minority opinions, which leads to broader political ends. Thus, the metaphor can be used to support either deregulation or regulation of cultural industries. Napoli analyzed the use of the metaphor by FCC during mid-1965 and mid-1998, and concluded that the economic theory dimension has dominantly been interpreted and it has been typically used to support deregulation. The Principle of Diversity is a derivate of Marketplace of Ideas metaphor. The First Amendment emphasized freedom of speech, and the importance of having different ideas. This leads to the diversity of the origin, content and disclosure methods of information, which is a true situation in the US publishing, film and other audiovisual industries nowadays.

Joseph Nye first indicated that ‘soft power’, which comprises culture, way of life, value, etc., is much more influential than ‘hard power’, which comes from economic and military strength. The wide spread of the American standards through its publishing and audiovisual industries has enormous global influence. The following of this section will introduce the successful US cultural sectors as well as the supportive framework built by law and policies.

3.3.2 US cultural sectors

33 From Abrams v. United States, 250 U.S. 616, 1919, Justice Oliver Wendell Holmes’s famous dissent.
Cultural sectors, especially audiovisual industries, are powerful engines in the US economy. Hollywood dominates global cinema film screens, and its hard-to-resist dramas flood the world local television. The US publishing industry is also a powerful economic sector. In 2000, the total domestic book sales amounted to 25.3 billion US dollars, accounting for 30% of the annual global total sales.  

Although deregulation is the theme of today’s US cultural policy, the prosperity of the cultural industries has benefited from the old time regulations. At the beginning of the 20th century, French movies occupied 70% share of the US film market and had a huge influence all over the world. The American capitalists pushed the government to create a series of measures to discriminate against their French competitors, and successfully expelled them from the American market during the First World War. After the war, Hollywood became the centre of global film production, with numerous audiences all over the world. Now, the American film industry is a nationwide economy engine that brings new jobs and economic opportunities across the country. According to Motion Picture Association of America (MPAA), the film industry supports a national community of 2.4 million workers and contributes more than 180 billion US dollars annually to the US economy. The US film industry does not only have a powerful domestic market, it also dominates the global markets. The international box office made up 64% of the whole profits, brought $ 19.3 billion revenue in 2009.

The radio and television industry used to be strongly controlled and regulated by the government in its early period. Due to the scarcity of the electromagnetic wave, Radio Act 1912 and 1927 required all business radio operators to be licensed. The Act

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40 Measures were mostly regarding to the protection of intellectual properties. For example, In December 1908, the motion picture inventors and industry leaders organized the first great film trust called the Motion Picture Patents Company, designed to bring stability to the chaotic early film years characterized by patent wars and litigation. The Edison Film Manufacturing Company, the Biograph Company, and the other Motion Picture Patents members ended their competitive feuding in favor of a cooperative system that provided industry domination. By pooling their interests, the member companies legally monopolized the business, and demanded licensing fees from all film producers, distributors, and exhibitors
41 See: http://www.mpaa.org/policy
42 From MPAA, http://www.mpaa.org/Resources/091af5d6-faf7-4f58-9a8e-405466c1c5e5.pdf
prohibited them from transmitting over the main commercial and military wavelengths; besides, the Act 1927 emphasized the importance of the public interests in radio broadcasting activities.

In 1980s, deregulation of the media industries had been widely advocated, ‘market’ became the only determinant of radio and television programs. The Communication Act 1996 overhauled the American telecommunication laws for the last 60 years and was designed to further open the US market to competition. The Act removed unnecessary barriers for new competitors to enter the market. It caused a concentration merging of media ownership and the emerging of super monopolies in both film and TV industry. The American film market is dominated by seven of the biggest corporations, namely, Warner Brothers, Walt Disney, 20th Century Fox, Paramount, Columbia, MGM (Metro-Goldwyn-Mayer), and Universal. These corporations monopolize the production and distribution of the Hollywood film market; constituting more than 70% of the market share for the last 20 years. As the members of the MPAA, these monopolies keep a close relationship with the US politicians. As a huge donator to presidential campaigns and other political activities, Hollywood influences Washington with its glamour and economic power. The US government acts as a representative of Hollywood in international trade negotiations, removing trade obstacles and fighting for more favorable conditions for its domestic film industry. In TV-related sectors, the combination of Hollywood production companies and the TV networks enhanced their market share in the fierce competition. For example, Walt Disney and ABC combined into the Disney/ABC Television Group in 1995, the Group manages all of the Walt Disney Company’s entertainment and news television programmes, with large market share in both film and television industries. The giant American media monopolies realized that their domestic radio and television market has become quite saturated while the non-American markets are growing rapidly with the development of technology. The mature media industry

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43 In order to further conquer the global market, networks, corporations and Hollywood studios combined together through mergers and acquisitions.


chain of America can provide low-cost high-quality TV programs attracting huge audiences from all over the world. As some countries’ domestic content cannot fill in the increasing broadcast hours, the US media companies’ low-cost but high-quality programmes became very popular. Besides the audiovisual sectors, a monopolistic tendency also exists in the publishing industry. Gannett, Knight Ridder and Tribune are the preeminent newspaper media groups with the largest number of readers and circulation. The top six periodical publishers who are dominating the whole periodical publishing business at the present, constitutes more than 1/3 of the total circulation, and the top 500 magazines account for roughly three-fourths of the industry's total revenues.

3.3.3 Elements of the US measures on cultural products

Financial support and other regulatory measures applied by governments help to promote the development of cultural industries. Tax incentives and governmental subsidies are the main forms of financial support. In addition, states have regulatory frameworks to manage the ownership types, investment restrictions and competition issues. The legal issues arising from intellectual property aspects are also important concerns of cultural regulation, especially in the US. The analysis below is not going to depict the very detailed measures; instead, the rationale of these measures and their development will be focused on. Film and other audiovisual industries are the main objectives as they are more subjected to policies and regulations.

3.3.3.1 Tax incentives and governmental subsidies

The rational for state aid in the cultural industry is quite weak in the US compare to the European Union. Jack Valenti, leader of MPAA from the 1960s to 2004 articulated that:


48 See: http://www.referenceforbusiness.com/industries/Printing-Publishing-Allied/Periodicals-Publishing-or-Publishing-Printing.html#ixzz12qKijic8 (accessed in September 2011)
'Our (the US) market is totally open, absolutely free. There are no restrictions, no barriers, and no quotas of any kind. What is in our marketplace, however, is the fiercest kind of competition to win the eyes and ears of those who go to the cinema and/or watch TV.'

Cultural industries, especially film and television-related ones have significantly attracted economic development targets because of their ‘creative’, ‘clean’ and knowledge-intensive nature which bring additional benefits to the economy with multiplier effects, such as the spillover benefits to tourism and side-products. Although deregulation is the theme of the US cultural market, tax incentives and subsidies are commonly applied to film producers and media corporations. A very important character of the US supportive policies is that they are designed by industry lobbyists, lead by MPAA, and they engage policy makers at the national, state and city levels, making significant claims on public revenues.

Los Angeles and New York are considered to be the centers of the cultural industry. New York State, where the media industry has existed and developed since the early 20th century, passed legislations to offer massive tax incentives to major media corporations in order to attract local film and television production. In August 2010, the New York State enacted an additional pool of funding for the State Film Production tax credit program. The legislation allocates $420 million funding per year for the 2010-2014 and provides up to $7 million per year to the newly created, separately administered NY State Post production credit. By 2009, over 40 states offered tax-based incentives or rebates to film or TV producers. In order to develop their own film and television-related industry, different states of the US became very

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53 See: http://www.nylovesfilm.com/tax/
aggressive in fighting against each other by providing cost reduction opportunities and offering direct financial subsidies. For example, New Mexico instituted a programme of interest-free loans to producers of approved projects in exchange for participation in the TV producing proceeds. New Jersey and Vermont offered loan guarantees which made their investment tax credits on production costs ‘transferable’. It can be concluded that tax-based subsidies play significant roles in developing film and television industries outside Los Angeles and New York.

The initial rational for policy-makers’ tax incentive and subsidy measures is the pursuit of cultural oriented economic strategies. However, the effects of these policies have been criticized. There are three defects of the cultural subsidy legislation that the policy-makers should reevaluate. First, since states operate under balanced budget rules, increase tax-based subsidies to film and television production would reduce the limited state funds that are usually allocated for other areas. Secondly, in order to keep competition in film and television industry, states may continually enact attractive financial policies. A race-to-bottom mentality may be fostered in the end. Thirdly, from the taxpayers’ perspective, the subsidies benefit a few citizens who are in the related industries, while leaving the tax burden to other industries that are not subsidized.

3.3.3.2 Ownership regulations and foreign investment rules
The Supreme Court stated that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is essential to the condition of a free society’. The ownership regulation in cultural industries, especially in the media field, has a significant impact on cultural

54 Christopherson, S and Rightor, N. (2010), supra n. 52.
57 Christopherson, S and Rightor, N. (2010), supra n. 52.
58 See: http://sanders.senate.gov/legislation/issue/?id=ec55b16dd-e6e5-4ae5-aba-0b9f5c30a243
content and distribution in a certain market. The concentration of media ownership means a small number of people or parties who own, control or influence a certain medium; or who are exposed to, affected by or influenced by that medium. It is a fact that the US film and media markets are dominated by a few large multinational media conglomerates. Researchers have criticized the unprecedented consolidation in these industries, however, the deregulation theme advocated by these conglomerates still prevail in terms of the FCC’s related regulations.

Between 1985 and 2001, merger and acquisition transactions swept the American cultural industries with a result that a vertical integration had been formed from the production to the distribution sectors of cultural products. The rationale behind the integration is that the major entertainment companies have to guarantee wide outlets for their production of content, in the forms of movies, TV, music publishing, merchandising, theme parks, internet sites, etc. Most of the major entertainment companies now own US broadcast networks or have shares in the major TV networks.

In 2003, the FCC approved new media ownership laws as an amendment of the Telecommunication Act 1996, which removed many of the restrictions imposed to limit ownership of cross-medias in a local area. The new rules allowed the nation's networks to own stations constituting no more than 45 percent of the nation, rather than the 35 percent allowed under previous caps and this opened more markets for example allowing the same company to own two television stations. The new rules also opened the door for joint ownership of a newspaper and a television station in more markets than allowed under previous rules. However, the decision was overturned by the United States Court of Appeals for the Third Circuit in 2004, in Prometheus Radio Project v. FCC. The major entertainment companies and media conglomerates never stop their lobbying to the government for a looser regulation on the ownership rules.

59 Candeub, A. (2008) ‘Media Ownership Regulation, the First Amendment, and Democracy’s Future’, University of California Davis Law Review, vol. 41. The author in this article argues that the FCC has justified the media ownership regulation on a wrong metaphor, which cannot ensure the citizen’s basic political rights.


61 Prometheus Radio Project v. FCC, 373 F. 3d 372 (3d Cir. 2004)
Foreign investment in the US cultural industry has significant influence on the US cultural industrial structures. For example, in 1985, 20th Century Fox was bought by Australia-based News Corp.; and in 1989, Columbia Pictures was bought by Japan-based Sony Corp. These corporations are the biggest market players in the current entertainment market. Below is the rate of foreign ownership in the US related industries:

- Sound Recording Industries: 97%;
- Motion Picture and Sound Recording Industries: 75%;
- Motion Picture and Radio Industries: 64%;
- Book Publisher: 63%.

With a huge foreign dominance in the cultural industries, the Securities and Exchange Commission has been requested to prevent the overall level of foreign ownership of the American cultural and entertainment companies from surpassing 50% in order to safeguard the domestic industry. However, the legislation has never been enacted. The US entertainment market is still open and attracting more foreign investment. Furthermore, most Hollywood executives welcome foreign money to finance their films and other products because ‘the American market is tapped out’. Are there literally no restrictions for foreign ownership in the US cultural industry? In history, the Radio Act 1927 prohibits foreign nationals from holding office in licensee companies and limits foreign ownership of stock in licensee companies to 20% because of national security concerns. As the development of technology, national security is no longer a major concern for policy-makers, public interests became an important element when evaluating foreign investment in the entertainment sectors. Under Article 202 (h) of the Telecommunications Act of 1996, the FCC shall ‘repeal or modify any regulation it determines to be no longer in the public interest’.

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FCC International Bureau laid out a new, competition-friendly application of Section 310 of the Communications Act of 1934 providing flexibility and potential for foreign entities with discretion ‘to allow higher levels of foreign ownership unless it finds that such ownership is inconsistent with the public interest’.\textsuperscript{65} In practice, the FCC focuses more on promoting competition in the international market\textsuperscript{66}. This shows that ‘public interests’ have been undermined by a desire to attract more foreign investment for its own competition in global market.\textsuperscript{67}

3.3.3.3 Application of competition rules to cultural sectors

Competition law in US is usually used as ‘antitrust law’. There are two basic statutes: Sherman Act and Clayton Act, both are enforced by Antitrust Division of the Department of Justice, Federal Trade Commission and private persons. Federal Trade Commission Act and Robinson-Patman Act also are utilized by the three entities. Additionally, there are some specific statutes applicable in certain industries or types of transactions, which lead to the likely antitrust consequences for economic conduct in those areas, such as: National Cooperative Research Act of 1984, Export Trading Company Act, McCarran-Fergusen Act, and Local Government Antitrust Act of 1984.

The merger and acquisition transactions between big Hollywood studios and the emergence of the media conglomerates have been challenged by antitrust laws for a long time. In 1921\textsuperscript{68}, the FTC first questioned the major Hollywood studios’ anticompetitive practices in the face of their theatre monopolies. By 1928, the FTC had finally brought Paramount Pictures and the other major nine studios to court. As a result, these major studios were declared guilty of monopolization. However, the

\begin{itemize}
  \item \textsuperscript{65} Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses, Available at: http://www.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf.
  \item \textsuperscript{66} The FCC made it clear that they would exercise discretion and embrace a policy of allowing higher levels of foreign ownership. See: Market Entry and Regulation of Foreign-affiliated Entities, Report and Order, 11 F.C.C.R. 3873, para. 183, 1995.
  \item \textsuperscript{68} In a complaint filed on August 30 of 1921, the FTC charged Famous Players-Lasky with restraint of trade by forcing exhibitors to buy unwanted films. Though the case focused on block booking, the investigation also brought studio-ownership of theaters under fire, and accused Famous Players-Lasky of using theater acquisition to intimidate exhibitors into block booking arrangements for Paramount movies.
\end{itemize}
effects of the court decision had been nullified by the Roosevelt administration during the Great Depression. After the Depression, the major Hollywood studios became even more powerful. With the increase of independent producers, the federal government finally brought the big Hollywood studios into the US Supreme Court in 1948\(^69\). The ruling of the case changed the way of production, distribution and exhibition of Hollywood movies, because the previous scheme was in violation of the antitrust law. Accordingly, certain exclusive dealing arrangements had been prohibited. After the case, Paramount Pictures Inc. was forced to split into two companies: Paramount Pictures Corp. (the film company) and United Paramount Theaters (the theater) Chain, which merged with the American Broadcasting Company); more independent producers and studios emerged without interference by the major ones. The verdict remains an influential decision in vertical integration cases nowadays.

Market definition is the first concern in competitive analysis.\(^70\) In order to create a pro-competition market environment, there are three major questions for the antitrust enforcers to be concerned with. These questions are: which sellers offer attractive choices for customers; are there enough attractive sellers to provide effective competition in the market; are there significant barriers to the new sellers to enter? These questions have been addressed in the Horizontal Merger Guidelines\(^71\) issued by the US Department of Justice and Federal Trade Commission. The analytical approach of the Department of Justice and FTC focused primarily on consumers’ welfare and the efficiency of the media market. By contrast, the FCC’s regulatory approach is a ‘democracy model’\(^72\) which emphasizes the importance of diverse voices and public interest. However, in the Time Warner Entertainment Co. v. FCC,\(^73\) the court declared that the FCC’s media ownership rules would need to be carefully justified on the basis of actual market evidence rather than anecdote or theory\(^74\). Since


\(^{71}\) DOJ/FTC Horizontal Merger Guidelines, issued on April 2, 1992; revised on April 8, 1997.


\(^{73}\) 240 F.3d 1126 (D.C. Cir. 2001)

\(^{74}\) In Fox Television v. FCC, 280 F.3d 1027 (D.C.Cir.2002), the court found that the FCC failed to provide any basis for retaining either the national television station ownership limit or the cable/broadcasting cross-ownership
the ‘content diversity’ is believed to be an impractical goal by the FCC, the Commission practices antitrust law as mass media regulation, which potentially duplicates the mission of Department of Justice\textsuperscript{75}. Therefore, the antitrust agencies are more important monitors in the significant media transactions. Compared to the FCC’s traditional approaches in terms of media regulation, the antitrust authorities advocates a further deregulation approach for the development of the major media enterprises.

3.3.3.4 A comprehensive protection for intellectual property
The prosperity of the US cultural industry, especially its global dominance in the film market relies on comprehensive protection of intellectual property rights. Intellectual property, as the ideas and creativity behind the film, TV programs, books and music products, is the lifeblood of the cultural industry. The protection of the IP rights both at home and abroad, is one of the most important tasks for the whole industry, and it has been specially addressed by the MPAA.\textsuperscript{76}

The US has the most comprehensive and strict legislation systems in terms of the intellectual property rights protection. The Copyright Act 1976 and its predecessor Copyright Act 1909 provide primary basis for the development of the cultural industry. Under section 102 of the Act, copyright protection extends to ‘original works of authorship\textsuperscript{77}’ fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’ The protection is for a static seventy-five years term (dated from the date of publication) for anonymous works, pseudonymous works, and works made for hire; and ‘a term consisting of the life of the author and 50 years after the author's death.\textsuperscript{78} The Sonny prohibition. Also, the FCC did not take into account recent data on the number of stations in operation.

\textsuperscript{75} Owen, B (2003), supra n.70.

\textsuperscript{76} Testimony of Dan Glickman, Chairman and CEO of Motion Picutre Association of America, Before the Subcommittee on Government Management, Organization, and Procurement, December 9, 2009, see: http://www.mpaa.org/Resources/c17accfd-2abc-4e82-921d-6ed3877940e9.pdf

\textsuperscript{77} The Act defines eight categories of ‘works of authorship’: literary works, musical works, including any accompanying words, dramatic works, including any accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.

\textsuperscript{78} Copyright Act 1976, Section 302.
Bono Copyright Term Extension Act 1998 further extended the term of protection to the duration of the author’s life plus seventy years or ninety-five years for works made for hire. In order to recuperate the deficiency of Copyright Act 1976 in the digital era, the Digital Millennium Act 1996 has been enacted to prevent the copyright infringement in the digital environment. The comprehensive coverage and the longer term of protection encourage the production of creative works. In addition, the enforcement of intellectual property rights protection embraces several important agencies with different functions, such as: The United States International Trade Commission, the US Customs and Border Protection, the National Intellectual Property Law Enforcement Coordination Council, the Federal Trade Commission, the Library of Congress Copyright Office, office of the United States Trade Representative, etc.

In the international market, fighting piracy overseas is the principle task for the US cultural industry as well as the federal government. The Trade Representatives have never stopped their efforts to negotiate stricter intellectual property rights protection with other governments, either through bilateral or multilateral trade negotiations. The introduction of TRIPS has helped the US successfully challenge several WTO members’ national law through the dispute settlement mechanism of the WTO, and enhanced the enforcement of several international conventions.79 Beside the WTO dispute settlement body, there is a broad interagency team to question foreign governments’ protection of the US intellectual property through the special 301 process annually, which identifies deficiencies in foreign markets and serves as the Administration’s critical tool for the overseas IP protection agenda. There are also some other methods adopted by the federal government to enforce the IP protection internationally. For example, in April 2010, fifteen new Assistant U.S. Attorneys and twenty FBI Special Agents joined the U.S. Department of Justice’s intellectual property protection task force to expand its ability to respond to intellectual property rights violations80, as a result of lobbying by Hollywood studios.

Comprehensive legislation for the protection of intellectual property has helped the

79 For example, the Berne Convention and the WIPO Copyright Treaty.
US to promote a higher international intellectual property standard, which eventually enhanced the market dominance of US cultural products.

### 3.4 Interaction with WTO law

#### 3.4.1 US commitments under the WTO

The US made the most significant commitments to apply liberal trade principles under audiovisual services among all WTO member countries. Under its GATS schedule, most of the audiovisual services have no limitations in granting free market access and national treatment to foreign services.

The only limitation regarding market access exists in ‘radio and television transmission services’:

‘A single company or firm is prohibited from owning a combination of newspapers, radio and TV broadcast stations serving the same local market. Radio and television licenses may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-US citizen as an officer or director or more than 20% of the capital stock of which is owned or voted by non-US citizens; a corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25% of whose capital stock is owned by non-US citizens or a foreign government or a corporation of which any officer or more than 25% of the directors are non-US citizens’.  

This limitation on market access aims to ensure the diversity of publicity voices in the cultural market by breaking down the ownership of different kind of media companies. Through the restrictions on distribution channel, the reservation also deprives the engagement of foreign entities in obtaining transmission activities over the US market, either foreign public entities or private ones. Such limitation on market access does not affect the import of cultural services, and it does not set barriers for foreign services’ production on cultural products. Therefore, foreign service suppliers shall subject themselves to the transmission decisions made by the US entities, which can be better managed by the US government and domestic interest groups.

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The reservation of national treatment states that, grants from the National Endowment for the Arts are only available for: individuals with US citizenship or permanent resident alien status, and non-profit companies. Since the inception of the National Endowment for the Arts in 1965, the fund has encouraged creativity through support of performance, exhibitions, festivals, artist residencies, and other art projects throughout the country. Different from the MEDIA fund provided by the EU, the Endowment only serves for supporting excellence in arts, and providing leadership in arts education. The endowment only serves creation and production processes by granting funds to distinguished individuals and institutions, while leaving projection and marketing out of its main concern. Therefore, the endowment reservation has less market-distorting effect compared to the MEDIA programmes of EU, which directly subject to projection and marketing promoting.

There is no MFN exemption on audiovisual services in the US schedule. Trade principles and other specific regulations on cultural sectors equally apply to other WTO members.

3.4.2 The role of the US in establishing the relevant WTO rules

The US cultural industries, notably the motion picture industry has long dominated the world markets, and its increasing potential is still dramatic at the present time. Hollywood’s current share of the world film market has doubled since 1990s, which amounts to 90%. The dominance results from the industry’s special domestic business structure, as well as a progressive strategy towards international market. The US advocates liberalization in cultural sectors and plays a significant role in shaping the multilateral rules. After examining the US obligations under the WTO in the last section, especially its GATS schedule, this part analyzes the US influence over WTO agreements.

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82 ibid
3.4.2.1 GATT

The motion picture industries have been covered by GATT rules for over half a century, ever since the establishment of the GATT in 1947. The most relevant provision in GATT is Article IV, which authorizes the continuation of existing screen time quotas; because members realized that domestic film producers could not find adequate screen time to exhibit their films in the immediate post World War II period. The numerous changes after the past eight negotiation rounds have only been partially recognized in the amendments to GATT, while the audiovisual sector, which embraces the production, distribution and exhibition of motion picture, radio and television products, has mainly been negotiated under the GATS framework. The Ministerial Declaration adopted on 14 November 2001 in Doha paves the way for a broad reconsideration of various trade-related and non-trade-related issues. However, cultural diversity and other specific cultural issues have not been explicitly mentioned. Thus, the legacy of Article IV, as the major term of reference for the conduct and scope of these negotiations, consists mainly in a political mandate to negotiate.

Article IV GATT allows Members to maintain screen quotas for cinematographic films under certain conditions, and entitles them to refrain from the national treatment principle underlined in Article III. However, the provision does not prohibit the import of films of Members, and does not subordinate them to excessive taxation measures. Instead, the only effect of this provision is the restriction on film exhibition processes. Another character of this provision is that, the regulatory objective is only for cinematograph films, which is the most important medium at the time of GATT drafting. Giving the narrow approach of interpretation adopted by the DSB, the provision is quite controversial as the development of technology has turned film from solid goods into virtual products and related services. The question regarding the scope of Article IV was first raised by the US in 1961, with a statement that

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85 Communication from United States, Audiovisual Services, S/C/W/78, 8 December 1998
87 ibid
88 ibid
'restrictions against the showing of television programs were technically a violation of the principles of the Article III:4, but that some of the principles of Article IV might apply to them'. Canada responded that the provision should cover the issue, because TV products were not foreseeable in 1947. The WTO working group was unable to reach a consensus on this subject, whereas the US finally pointed out that the provision that it should apply exclusively to cinematographic films as the ‘form of Article IV was shaped by the awareness of its time’. Until now, there is no explicit statement regarding the scope of Article IV. It should be noted that the establishment of GATS regime distracted the scope conflicts, because cultural products have been largely categorized under the service sectors.

The DSB’s decision in Canada-Certain Measures Concerning Periodicals has special meaning for the application of Article III GATT on cultural goods, which is especially important to the US. In 1965, Canada adopted Tariff Code 9958 to prohibit the importation of split-run magazines in the Canadian magazine market and to protect the Canadian advertising market. In 1993, Time Warner and its owned magazine, Sports Illustrated, had successfully circumvented the Tariff Code 9958 by transmitting the magazine’s content to its Canadian version electronically. In response, Canada imposed an 80% excise tax on all of the advertisement in split-run magazines. The US challenged the 80% tax measure as well as the Tariff Code 9968 mainly based on Article III of GATT. After challenged this incompressive finding by the Panel, the Appellate Body decided to proceed the examination by judging whether the

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89 WTO Analytical Index: GATT 1994, p.192
93 Split-run magazine is defined as Canadian editions of foreign magazines that contain advertising directed at the Canadian market and include little or no Canadian editorial content. See: Macrory, P. et al. (eds.) (2005) The World Trade Organization: Legal, Economic and Political Analysis, vol. II, New York: Springer. p. 757.
94 There were two other measures been challenged in the case: the imposition of higher postal rates on imported magazines, and measure concerning a postal subsidy programme for Canadian magazines.
two products were ‘directly competitive or substitutable products’ according to the second sentence of Article III:2.⁹⁵ The AB found that the imported split-run and domestic non-split-run periodicals were directly competitive and substitutable products, hence, they were part of the same segment of the Canadian periodical market.⁹⁶ From this case, it can be seen that cultural grounds only play a small role in judging the likeness of products. Both the Panel and the AB did not take cultural goals into account in determining the ‘likeness’, and did not provide a tool for allowing legitimate discrimination because of cultural elements.⁹⁷ After got a favourable judgment in determining ‘like products’ of cultural goods, the US got a better foothold not only in Article III, which deals with national treatment principle, but also in Article I (Most-Favored Nations)⁹⁸ and Agreement on Subsidies and Countervailing Measures(SCM) (as for how to judge ‘like products’ of cultural goods).

Given the fact that many countries’ audiovisual industries are still depending on governmental supports, in the communication on audiovisual services, the US argued that the WTO does not prevent governments from continuing to fund existing systems to finance domestic film production. The future provision should prohibit the trade-distorted subsidies and discriminatory practices.⁹⁹ Subsidies subject to the SCM can be categorized into three kinds: prohibited subsidies, non-actionable subsidies and actionable subsidies. Challenges to a cultural subsidy could be raised under actionable subsidies (Part III of the SCM), or under a domestic countervailing law, both of these situations are affected by the norm ‘like products’, which are facing the same problem as discussed above in Article III GATT. In 2001, the Film and Television Action Committee, the Screen Actors Guild and other US film and television unions filed a petition with the US Department of Commerce and the International Trade Commission by asking for an investigation of whether Canada was subsidizing US

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⁹⁵ WT/DS31/AB/R, June 30, 1997
⁹⁶ ibid
⁹⁷ Voon, T. (2007) Cultural Products and the World Trade Organization, Cambridge University Press p.75. However, some scholars have pointed out that according to this reasoning, the American films are not ‘directly competitive or substitutable’ products with foreign films on American markets, because there is no real competition between them in the domestic market. See: Macrory,P. et al (2005) supra n.93. p.758
⁹⁸ Conflicts regarding to cultural goods have never been raised in the context of Article I, but the potential of the conflict is still obvious due to the ‘like products’ test.
⁹⁹ Communication from United States, 1998. supra n.90.
film production in Canada through tax credit and other incentives measures, and discussed the imposition of countervailing tariffs on such US films produced in Canada.\textsuperscript{100} Although the petition was temporarily withdrawn, in 2002, the Film and Television Committee released a legal memo regarding trade remedies with the US Trade Representative in response to film and television subsidies provided by the Canadian federal and provincial governments according to Section 301\textsuperscript{101}. As a lot of countries are not ready to view audiovisual products as goods, the US is less interested in the SCM regime, instead, the GATS is the most controversial framework, and is of significant importance to the US trade strategy in cultural sectors.

3.4.2.2 GATS

In comparison to GATT, GATS is less restricted in applying trade rules and more flexible in making exemptions, because it allows member countries to commit voluntarily. The US has made full commitments on audiovisual services under GATS (with few reservations mentioned above), while most of the members have reserved this sector as non-compromised. Nevertheless, the liberalization trend in services is irreversible, and the treatment of audiovisual services under multilateral trade rules has evolved, mainly due to the persistent efforts made by the US, especially in MFN treatments, specific commitments in national treatment and market accesses. In addition, subsidies on cultural services have also been discussed.

Although the GATS does not contain any provision on cultural ground, as Article IV in GATT, the GATS framework is more flexible in applying non-discriminatory trade principles compared with the GATT. Take the MFN treatment for example, which is the first basic obligation for Members, Article II: 1 paragraph 2 stipulates that: ‘Member may maintain a measure inconsistent with paragraph 1 provided that such measure is listed in, and meets the conditions of, the Annex on Article II exemptions’. Unlike GATT, the GATS has a special element that allows countries to temporarily choosing not to apply the MFN principle of non-discrimination. Accordingly, 33 members have made MFN exemptions on audiovisual services\textsuperscript{102} before the Doha

\textsuperscript{100} See: Petition on ‘Runway’ Productions Filed, Los Angeles Times, December 5, 2001.
\textsuperscript{101} See: \url{http://www.ftac.net/html/2-ftacstewart.html} (accessed on 20 January 2010).
\textsuperscript{102} The 33 exemptions covering audiovisual services are by: Australia, Austria, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Columbia, Cuba, Cyprus, Czech Republic, Ecuador, Egypt, European
negotiation. For example, exemptions taken by the EU include co-production agreements, financial support programs, the EU Television Broadcasting Directive, and other existing and future measures.\textsuperscript{103} The US questioned the fact that the MFN commitments were not clear, dependable and predictable enough\textsuperscript{104}, because the maximum ten years period is non-mandatory in eliminating the specific exemptions as discriminatory behaviour still widely exists at the current stage. As the development of technology, the efficiency of the MFN exemption has been challenged. For example, the internet became an important medium for audiovisual services with the development of E-Commerce. The US has been working on expanding the GATS framework to cover these new technological developments.\textsuperscript{105} Thus, the old exemptions will fade away over time.

Part III of the Agreement deals with the specific commitments of members. The GATS provides a negotiating stage for members to negotiate specific commitments in sectors in terms of their national treatment and market access. Few commitments have been made in audiovisual sector, and members are reluctant to undertake obligations in this area. Once commitments had been made, they cannot easily been withdrawn.\textsuperscript{106} For example, New Zealand has been challenged by the US for the violation of commitments under GATS, because the introduction of format-specific quotas for local content for radio and broadcast television violate its commitment of not having recourse to quantitative restrictions in the audiovisual sector in 1993.\textsuperscript{107} Many members availed themselves of the opportunities inherent in the GATS to maintain limitations on their exposure to the trade liberalization in the audiovisual sector.\textsuperscript{108}

\textsuperscript{103} Communication from the United States, Audiovisual and Related Services, S/CSS/W/21, 18 December 2000.
\textsuperscript{104} Although Article XXI admittedly provides for modification or withdrawal of any commitment in Member’s schedule, compensation should be made at the same time.
\textsuperscript{105} Arup, C. (2000) \textit{The New World Trade Organization Agreements: Globalizing Law Through Services and}
Article XV of the GATS recognizes that some subsidies may have the effects of trade-distortion, and member governments should negotiate and develop multilateral rules to avoid this distortion. However, to what extent the disciplines of subsidy to service sectors should be different from the goods sectors have not been explicitly underlined in this provision\textsuperscript{109}. The development of multilateral rules on subsidy to service sectors will be quite impossible, as many governments would refuse to give up their rights to support their own cultural industries. According to a background note prepared by the WTO Secretariat for the Working Party on GATS Rules, subsidies for services sectors, aids to the audiovisual industries are the most frequently mentioned type of subsidies.\textsuperscript{110} Despite the fact that it remains unpredictable to what extent a consensus by members will be achieved on this subject, subsidies to cultural services are not totally free out of GATS but subject to MFN treatment and national treatment. For example, the regional support arrangements and co-production agreements, which are frequently used by the EU have been questioned as violations of MFN obligation of Article II, paragraph 1, GATS. Even the US, who made full commitments in audiovisual sector, explicitly mentioned grants from the National Endowment for the Arts were only provided for individuals with US citizenship or permanent resident alien status\textsuperscript{111} in its MFN exemptions. The US has been challenging the legitimacy of several subsidy programmes adopted by the EU\textsuperscript{112}, such as the TWF directive and the MEDIA programmes, as such measures threaten the MFN principle, and create substantial barriers for a further liberalizing commitment.

The conclusion of GATS Annex on Telecommunications provided the US a technical stage to liberalize cultural industries globally. Telecommunications services enjoy a global market worth over US$ 1.5 trillion in revenue.\textsuperscript{113} 108 WTO members have


\textsuperscript{111} GSTS/SC/90, p.46.


\textsuperscript{113} See: http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (accessed in January 2013)
made commitments to facilitate trade in telecommunications services, which includes the establishment of new telecoms companies, foreign direct investment in existing companies and cross-border transmission of telecoms services. 114 In the post-Uruguay Round Negotiations from 1994 to 1997, members negotiated on basic telecommunications services which excluded measures affecting the cable or broadcast distribution of radio or television programming under Paragraph 2(b) of the Annex. The commitments were annexed as the Fourth Protocol on basic telecommunications in the end. 115 In the current Doha Round negotiations, additional market opening and the binding of recent reforms in telecommunications are the objectives of many of the negotiating requests made by WTO members to their trading partners. The agreement has significant influence, especially for the US on trade in cultural services because it affected the content requirements and investment control measures. The US gradually negotiated the opening of other countries’ national markets for its telecom services suppliers. Although the mission was not expressed on the Fourth Protocol, the US pushed the targeted countries to sign specific agreements to limit their domestic content restrictions, such as US-Mexico Satellite Agreement 116 and US-Argentina Framework Agreement and Protocol for Direct-to-Home Satellite Services and Fixed-Satellite Services 117, thereby increasing opportunities for US program content producers. In terms of investment improvements, the US exerted pressure for the elimination of investment controls in the telecommunication sector from the beginning of the basic telecommunications negotiations. As a result, Canada increased the level of foreign investment in this sector substantially. 118 The US also made selective requests for other countries to

114 ibid
115 The commitments entry into force on 1 January 1998. WTO Focus, no. 16 February 1997. The commitments included the permit of competitive supply on voice telephone service, on data transmission services, on leased circuit services; a further access for mobile telephone markets and other commitments in satellite related communications or regulatory disciplines.
118 Under the US strong pressure, the content requirement and investment control approach in broadcasting services have been threatened that some Canadian observers declared that ‘Canadian content is something in the past’. United State Mission-Geneva, Press Releases 2002, US Proposals for Liberalizing Trade in Services, under ‘Commercial Presence’.
remove unclear, discriminatory or market-restricting procedures and investment barriers.\textsuperscript{119}

With the development of the Internet, the increasing convergence between traditional and digital communication media (such as telecommunications and other services) is leading to a further convergence of policies and regulations among audiovisual services, electronic commerce, online trading, etc.\textsuperscript{120} Further liberalization of GATS seems to be irreversible partially because trade barriers to the free flow of content in digital products are not effective at all, because the content can be easily spread via digital medium or Internet. The treatment of electronic commerce has gained enormous attention by the US, and its further development will affect the whole GATS framework inevitably, especially for cultural services. The US free trade agreements with Chile and Singapore have already listed electronic commerce in their schedule, which are a ‘breakthrough in achieving certainty and predictability in ensuring access for products such as computer programs, video images, sound recordings, and other products that are digitally encoded’.\textsuperscript{121}

3.4.2.3 TRIPs

Cultural products and intellectual property rights are tightly associated, because the essence of these products is creative content. The establishment of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) during the Uruguay Round established a multilateral enforcement mechanism for intellectual property rights production\textsuperscript{122}, which was significant to the US cultural industry. WTO members are free to determine the appropriate way of implementing the TRIPs agreement within their own legal systems.

\textsuperscript{119} ibid


\textsuperscript{122} Intellectual property covers a range of issues: copyright, trademarks, geographical designations, industrial drawings and models as well as inventions for which rights or patents could be granted. For cultural products, like books, films and other audiovisual products, copyright is the most important right which needs to be protected.
Different from the audiovisual services under the GATS, in the agreement concerning copyright of the creative works, the EU stood in the same bloc with the US. From the industrial countries’ perspective, the primary task is to find an efficient way under the multilateral trade framework to fight against piracy in developing countries. The US cultural industries have been attacked by piracy in some developing countries, mainly in India and China\textsuperscript{123}, either physical products or in cyberspace. The influence of TRIPs as an instrument in protecting intellectual property rights in the cultural sector can be seen from the number of complaints brought before the WTO dispute settlement body (See Table 4 below). No fewer than ten complaints had been formally brought to the dispute settlement process, eight of them by the US. The basis for the US in most cases was the failure to grant the required copyright and neighbouring rights protection under domestic law.

At a special request from the US, Article 9 of TRIPs stipulated that the members shall comply with Articles 1 to 21 of the Berne Convention (1971) and the Appendix thereto, with an exception of Article 6b of the Convention which aimed at protecting authors’ moral rights. Moral rights in Article 6b\textsuperscript{124} of Berne Convention entitle the authors to take clear precedence over the interests of the economic party, such as the producer. Exception means that there are no objections for interrupting a movie for television commercials, or for the producer interfering or changing the final cut of the movie as seen by the scriptwriter or director. It can be seen that TRIPs puts the economic party’s interests before the creative party’s, which enhances the benefits of the economic party, especially for the US film producers and big media owners.

\textsuperscript{123} China accounts for nearly two-thirds of counterfeit goods, including movie DVDs, music CDs, prescription drugs, Budweiser beer, designer handbags, motorcycles, etc. on the estimated $512 billion worldwide counterfeit market. See: Balfour, F. (2005) Counterfeiting’s Rise, Business Week, 7 February, 2005.

\textsuperscript{124} Moral right forms part of a more cultural approach in the continental droit d’auteur philosophy, which is in opposition to the Anglo-Saxon copyright tradition. See: Pauwels, C. and Loisen, J. (2003), supra n,18. p.303
Table 3: Cases Regarding Copyrights and Related Rights.

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Case</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>DS28 Japan—Measures Concerning Sound Recording</td>
<td>9 February 1996</td>
</tr>
<tr>
<td>EC</td>
<td>DS42 Japan — Measures concerning Sound Recordings</td>
<td>28 May 1996</td>
</tr>
<tr>
<td>US</td>
<td>DS82 Ireland — Measures Affecting the Grant of Copyright and Neighbouring Rights</td>
<td>14 May 1997</td>
</tr>
<tr>
<td>US</td>
<td>DS115 European Communities — Measures Affecting the Grant of Copyright and Neighbouring Rights</td>
<td>6 January 1998</td>
</tr>
<tr>
<td>US</td>
<td>DS124 European Communities — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs</td>
<td>30 April 1998</td>
</tr>
<tr>
<td>US</td>
<td>DS125 Greece — Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs</td>
<td>4 May 1998</td>
</tr>
<tr>
<td>EC</td>
<td>DS160 United States of America — Section 110(5) of US Copyright Act</td>
<td>26 January 1999</td>
</tr>
</tbody>
</table>

(From WTO website: [http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#selected_subject))

3.3.2.4 WTO Investment Rules

The Uruguay Round did not conclude a genuine agreement on investment despite the initial attempts by the US to introduce a comprehensive agreement on investment protection within the WTO framework. The resistance was considered mainly from
developing countries. The Agreement on Trade-Related Investment Measures (TRIMs) introduced some rudimentary rules on investment in WTO with limited scope, affecting trade in goods only. The failure of the OECD negotiations on a multilateral agreement on investment (MAI) transferred the problem to the WTO as part of the so-called ‘Singapore issues’. However, frustrations remained and it has been eventually dropped from the WTO negotiation agenda.

The TRIMs could be used to challenge investment measures related to trade in cultural goods which are inconsistent with the national treatment principle in Article III: 4 of GATT 1994, or with requirement to quantitative restrictions elimination in Article XI: 1. For example, the obligations imposed by many EU states on broadcasters to invest in the local film industry, and local content measures making the nationality of films conditional on a set of criteria which are defined in domestic terms could be theoretically challenged under the TRIMs Agreement. By the same token, Investment Canada Act and the Canadian Broadcasting Act have been identified by the US as barriers to US exports. However, investment liberalization through GATS is far behind the progress made in the GATT framework, especially in audiovisual industries. Because the US has long-standing restrictions on the foreign ownership in the broadcasting sector, full liberalization in the investment field lacks a powerful impetus. Although there is no explicit solution on how to address investment problems in cultural services, there are certain lessons from the MAI negotiations.

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126 Ministers from WTO member-countries decided at the 1996 Singapore Ministerial Conference to set up three new working groups: on trade and investment, on competition policy, and on transparency in government procurement. They also instructed the WTO Goods Council to look at possible ways of simplifying trade procedures, an issue sometimes known as “trade facilitation”. see: http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

127 In May 2004, EU confirmed its agreement on dropping the issues of investment, competition and transparency in government procurement from the Doha Round negotiation table, see: http://trade-info.cec.eu.int/doclib/html/119454.htm

128 An Illustrative List annexed to the TRIMs Agreement identifies certain measures that would fall under challenge: local content requirements, trade-balancing requirements, foreign exchange balancing requirements and restrictions on exportation.

129 Herold, A (2010). supra n.112. p.322

130 According to which, investment may not be implemented unless it is likely to benefit the country. See: Macrory,P. et al (2005) supra n.93. p.775
which can be influential. Two approaches had been proposed. The first proposal suggested by France, indicated that there should be a culture exception in the investment measures, as ‘nothing in this agreement shall be construed to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activities of these companies, in the framework of policies designed to prevent and promote cultural and linguistic diversity’.\footnote{OECD, Doc. DAFFE/MAI/NM(98), 126} The second proposal suggested that cultural issues can be addressed through country-specific reservations. All delegations involved in the OECD negotiations have submitted a preliminary list of specific reservations, although cultural issues were not the object in most of the reservations. WTO members, including the US, Italy, Turkey have reserved the right to maintain foreign investment restrictions in the media and broadcasting sectors.\footnote{De Witte, B. (2001), supra n.125.} The US strongly against the cultural exception proposal, the proposal neither gained supports during the MAI negotiations. Therefore, the possibility for this proposal is too slim in WTO investment rules. As for the second proposal, although the US did reserve certain restrictions regarding cultural sectors, it remains to be seen whether the US would have accepted country-specific reservations that excluded cultural services altogether. As a result, the US will not push too hard for a full liberalization in investment rules, especially when cultural services are at issue.

3.4.3 The US strategies and the development of the WTO rules

From ‘cultural exception’ to ‘cultural specificity’, WTO rules tended to apply stricter non-discriminatory trade principles over cultural sectors. The US strategies in liberalizing cultural trade, especially in audiovisual service sector serve as the most important impetus during the progress. From the above analysis, it can be seen that the US made full commitments under its WTO schedule, while other WTO members have not made equivalent schedule. Under the voluntarily enforced GATS framework, the US strategies run far ahead of the current multilateral legal system, and the development of multilateral rules does not always towards the direction of further trade liberalization which is pursued by the US. Therefore, interactions between the US strategies and the development of the WTO rules deserve a further examination.
Below is a table that summarizes the achievements and obstacles of the US under WTO agreements, and further analysis about the interactions between the domestic framework and the WTO rules:

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Achievements</th>
<th>Obstacles</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GATT</strong></td>
<td>Succeed in challenging Canadian's discriminatory measures on split-run magazines. The ruling from DSB implied that cultural reasons did not play an influential role in judging the 'likeness' of cultural products.</td>
<td>1. Whether screen quotas can be applied to TV programmes was not clear because of the vague scope of Article IV; 2. SCM Agreement cannot effectively address the discriminatory subsidies on cultural products.</td>
</tr>
<tr>
<td><strong>GATS</strong></td>
<td>1. The fruitful achievements in Telecommunication Agreement led to the brought down of market access conditions as well as investment controls; 2. E-Commerce also came under GATS framework.</td>
<td>1. Many countries took MFN exemptions; 2. Most WTO members absent from making commitments under the specific schedule; 3. No subsidy rules to restrict trade-distortive subsidies.</td>
</tr>
<tr>
<td><strong>TRIPs</strong></td>
<td>1. An efficient way to fight against piracy under multilateral trading system; 2. The Agreement takes the economic beneficiary's interests ahead of creative parties, enhances the benefits of the economic parties. It is especially important for the US film producers and big media owners.</td>
<td></td>
</tr>
<tr>
<td><strong>TRIMs</strong></td>
<td>Trade-related investment measures, such as local content requirements that are inconsistent with basic provisions of GATT 1994 will be challenged.</td>
<td>Failed to gain supports for further negotiation from WTO members.</td>
</tr>
</tbody>
</table>
(Table 4, Achievements and Obstacles for the US under the WTO. Prepared by the author)

3.4.3.1 Interactions that are most problematic

The US pointed out that the traditional classification of audiovisual services under GATS no longer reflects current realities and technologies in the audiovisual sector. Given the fact that internet is becoming the main medium for film and music consumption, it is in the US interest to categorize digital products under ‘goods’ column. The US has gained jurisprudence preference on this matter from *Canada-Periodicals* case, according to which, editorial content and advertising content can be viewed as having services attributes, but they combine to form a physical product, hence, GATT 1994 shall apply. The ruling implies that audiovisual products, especially electronic transmitted products should not be dealt with exclusively under GATS framework. However, the debate under current WTO framework inclines to keep the controversy within GATS framework, mainly due to the opposite members such as the EU. More generally, an interest in finding a trade-off between the US and EU is not clear enough at the current stage, while the significant consumption of digital audiovisual products made implied more trade conflicts under the multilateral framework.

Another most problematic issue of the treatment of cultural products under WTO from the US perspective is the low commitment on audiovisual services sector. Although GATS schedule is based on voluntary basis, the contrast between the US (Japan as another league of the US) and other members in terms of level of

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133 As the US is a strong advocate in further liberalizing cultural trade under the WTO, it has significant influence in the shaping of multilateral rules. Therefore, the analysis on the relationship between WTO and US should focus on the mutual interactions. In comparison, the analysis on relationship in the next two chapters will focus on the collisions between domestic and multilateral frameworks, in order to examine whether WTO rules can effectively address trade distortive measures or not.


136 WTO, Council for Trade in Services, Audiovisual Services: Background Note by the Secretariat, S/C/W/40 (15 June 1998).
commitments has created unbalanced obligations among all WTO members. Such imbalance encourages the circumvention of WTO rules and forum shopping. Therefore, the low level of commitments under GATS schedule is of significant concern from the US perspective.

3.4.3.2 Interactions that are less problematic but nevertheless warrant further attention
So far, most of the WTO members still retain their MFN exemptions on audiovisual services. As stated above, the US has no reservation regarding MFN exemption, and the sharp comparison creates unbalanced obligations among all members. However, compare to specific commitment on market access and national treatment, MFN concern is less problematic, because the preferable treatments have been granted to specific trading partners either through PTAs or other cultural cooperation agreements. As a result, the necessity of removing MFN exemptions on audiovisual services does not seem so urgent from the WTO perspective. From the US perspective, as will be referred to in the next section, commitments and special treatment to preferential trading partners widely exist in their PTAs. The ten years validity period for MFN exemption has already passed (due by the end of 2005). The exemptions need an up-to-date review, even though it is less problematic at the current stage.

Unlike audiovisual services, telecommunication services are more liberalized under the WTO framework. However, the controversy about ‘content-related’ telecommunication services and the ‘technology-neutral’ approach pursued by the WTO left limited room for the US to develop a high-technology cultural trade strategy. To avoid future trade conflicts, the definition of telecommunications services and the distinction with audiovisual services need to be revised in view of the convergence between both sectors.137

3.4.3.3 Interactions that are the least problematic at the current stage
Overall, the least problematic issue under the WTO framework is the investment issues. Although the foreign ownership of the cultural industries within the US is high, and the domestic interest groups do enjoy significant commercial interests from

overseas market, the restrictive ownership rules of the US audiovisual industries and the premature multilateral investment rules do not seem to conflict with each other at the current stage.

In addition, the subsidy rules under the GATS framework are also quite premature to bring up under the current situation, even though the US strongly against subsidies to cultural services and their distortive effects to international cultural trade. The fundamental problem still lies in the flexible GATS schedule. Unless more countries make specific commitments, WTO members retain the freedom of subsidize their cultural industries.

3.5 The US approach under Preferential Trade Frameworks

3.5.1 The US preferential trade agreements: a general analysis

From economic perspective, the intention to form a preferential trade agreement (PTA) usually suggests that forming PTA is a step for further global trade liberalization, or the FTA could complement the WTO process. During the Bush Administration, the US trade policy-maker (Office of the United States Trade Representative) adopted the ‘competition in liberalization’ strategy among US trading partners so that trade reform in one market begets similar favourable treatment in other markets. The US has engaged in bilateral and regional PTA negotiations with many of the WTO member countries in an aggressive pursuit of its interests. Until May 2012, it involved 18 countries as its preferential trading partners. PTAs have been used as part of the liberalization strategy which is designed to enhance the US leverage in

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global negotiations, as with the Canadian and Mexican accords.\footnote{142} Below is the list of US PTAs\footnote{143}.

**Table 5: FTA Signed by the US**

<table>
<thead>
<tr>
<th>FTA</th>
<th>Coverage</th>
<th>Date of Entry into Force</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Israel</td>
<td>Goods</td>
<td>19 Aug 1985</td>
<td>In force</td>
</tr>
<tr>
<td>NAFTA (US, Canada and Mexico)</td>
<td>Goods and Services</td>
<td>01 Jan 1994</td>
<td>In force</td>
</tr>
<tr>
<td>US-Jordan</td>
<td>Goods and Services</td>
<td>17 Dec 2001</td>
<td>In force</td>
</tr>
<tr>
<td>US-Chile</td>
<td>Goods and Services</td>
<td>01 Jan 2004</td>
<td>In force</td>
</tr>
<tr>
<td>US-Singapore</td>
<td>Goods and Services</td>
<td>01 Jan 2004</td>
<td>In force</td>
</tr>
<tr>
<td>US-Australia</td>
<td>Goods and Services</td>
<td>01 Jan 2005</td>
<td>In force</td>
</tr>
<tr>
<td>US-Morocco</td>
<td>Goods and Services</td>
<td>01 Jan 2006</td>
<td>In force</td>
</tr>
<tr>
<td>US-CAFTA-DR</td>
<td>Goods and Services</td>
<td>01 Mar 2006</td>
<td>In force</td>
</tr>
<tr>
<td>US-Bahrain</td>
<td>Goods and Services</td>
<td>01 Aug 2006</td>
<td>In force</td>
</tr>
<tr>
<td>US-Oman</td>
<td>Goods and Services</td>
<td>01 Jan 2009</td>
<td>In force</td>
</tr>
<tr>
<td>US-Peru</td>
<td>Goods and Services</td>
<td>01 Feb 2009</td>
<td>In force</td>
</tr>
<tr>
<td>US-Korea</td>
<td>Goods and Services</td>
<td>15 Mar 2012</td>
<td>In force</td>
</tr>
</tbody>
</table>


\footnote{143} Only cover FTAs at this section, because FTAs include comprehensive negotiation and trade framework regarding cultural trade.
<table>
<thead>
<tr>
<th>Agreement</th>
<th>In force</th>
</tr>
</thead>
<tbody>
<tr>
<td>US-Colombia (Goods and Services)</td>
<td>15 Man 2012</td>
</tr>
<tr>
<td>US-Panama (Goods and Services)</td>
<td>Agreement signed on 21 Oct 2011</td>
</tr>
<tr>
<td>TPP (Trans-Pacific Partnership)</td>
<td>Next negotiation is 02 Jul 2012</td>
</tr>
</tbody>
</table>


The US PTAs placed the bilateral or regional elimination of remaining industrial tariffs and the acceleration of the issues that may be anticipated to occur under multilateral trading system as their central concern. Under such a strategy, ‘these elements of liberalization are then qualified (Rules of Origin, safeguards, sectoral exemptions) and new elements added to these agreements going beyond tariffs on industrial products and commitments in services (intellectual property and competition)’. Therefore, efforts made by the US, either unilaterally or in conjunction with its PTA partners, provide supplementary conditions to the efforts within the WTO, especially for those trade sectors that encountered frustrations under the multilateral trade negotiations.

Countries have different negotiating strategies under different trade forums. ‘Significant conceptual complexities arise when even a single new party is added to

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two-party negotiations: coalitions can now form’. As the numbers of parties arise in a negotiation forum, so does the challenge of reaching an acceptable agreement, because in most trade forums, consensus is required for the final decision. Therefore, WTO is deemed to be the most complex trade negotiation forum, not only because a single party could halt the process, for example, India nearly blocked the launch of Doha negotiation in 2001 over concerns about foreign investment measures and other issues, but also because numerous of other parties, like NGOs and powerful industrial lobbying groups could also insert their interests into the discussions. The US Congress enacted the ‘Bipartisan Trade Promotion Authority Act of 2002’ due to the fear of losing out in the race for preferential trade agreements. Thus, in parallel with the ongoing Doha trade negotiation, the Trade Promotion Authority (TPA) provided impetus to conclude several bilateral and regional trade agreements, which have significantly offset the inefficient multilateral trade liberalization progress, and the unsatisfied trade strategies, especially in the audiovisual related sectors.

In the US preferential trade agreements, annexes, exemptions and side-agreements are provided for broadcasting, film and publishing products. Each PTA has its own way of reconciling the tension between economics and cultural interests with different legal instruments, and this leads to variations in the outcome. As the largest exporter of audiovisual products, the US trade balance in audiovisual products is largely positive so that elimination of trade barriers in this sector has always been a major target in the American foreign trade agenda. However, the approaches to achieve this goal vary from the multilateral trade framework. This section will explore the treatment of cultural products under the US bilateral and regional trade arrangements; and their influences to the multilateral trade framework.

3.5.2 US trade in culture regime under PTAs

For the US, progress in cultural trade liberalization appears clearer under PTAs than in the WTO. Each of the US’s PTA partners (Canada as an exception) has undertaken further commitments in the cultural sectors, especially in audiovisual sectors, even

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though they had no audiovisual commitments at the WTO. The US approach under PTAs provides a double-edged solution\(^{149}\) in dealing with trade in culture. The double-edged solution can be fully reflected by the North American Free Trade Agreement (NAFTA). The NAFTA contains two important bi-national relationships for the US, namely, US-Canada and US-Mexico. In the cultural sectors, different provisions have been agreed according to different trade partners. Between the US and Canada, Canada succeeded in excluding cultural industries from the final NAFTA agreement. The exception of cultural industries had already been stipulated in Article 2005 of the Canada-United States Free Trade Agreement (CUSFTA)\(^{150}\) in 1989. Then, the NAFTA agreement inherited the exclusion.\(^{151}\) Canada adopted a ‘cultural off the table’ policy when dealing with PTAs as well as the multilateral trade negotiations\(^{152}\) because it claimed that cultural products have specific non-economic features and should be dealt with under other dedicated regimes.\(^{153}\) Although the US agreed to exclude the cultural sector from the free trade agreement, paragraph 2 of Article allows a party to take retaliatory measures ‘of equivalent commercial effect’ in response to cultural protectionism policies.\(^{154}\) It indicated that the US did not give up the right to find juridical support to ensure the free flow of US cultural goods and services from other regimes, such as the WTO. Accordingly, the US brought the Canada-Periodical case under the WTO, and successfully challenged some protective measures on cultural products from the Canadian side.


150 Article 2005 of the Canada-United States Free Trade Agreement: ‘1. Cultural industries are exempt from the provisions of this agreement…’; ‘2. Notwithstanding any other provision of this agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this agreement but for paragraph1’.

151 Article 2107, and Annex 2106 of NAFTA.


153 Canada is a major advocator for the adoption of the UNESCO CCD convention.

different from the US-Canada one. In the case of Mexico, cultural industries are subject to NAFTA general provisions. Different from GATS, the NAFTA takes the negative-list approach, or the ‘list it or lose it’ approach. 155 Under such an approach, Mexico only maintains few exceptions on cultural industries, such as the obligation to use Spanish language or subtitles in broadcasting, a 49% foreign investment cap for cable television enterprises and 30% content quota for Mexico films in the annual screen time (the quota decreased to 10% following the amendment of the film legislation in 1997). 156

Other US’s PTA partners took a similar approach as the one adopted in US-Mexico under NAFTA agreement. Countries like Australia, Singapore, Chile, Colombia, Morocco, Peru, Coast Rica, etc., have undertaken commitments in various areas of audiovisual services, even though they have made no commitments under GATS. Most of the commitments refer to movie-related (include production, distribution and projection) and sound recording services, while TV and radio-related services still confront restrictions. 157 It is worthwhile to mention that all of the US’s PTA partners (Canada as an exception) have removed the restrictions on the number of cinema theatres and the level of foreign equity participation. 158 In addition, several partners have made a commitment to remove the current restrictions, notably in TV-related services within the near future. 159 Commitments on cultural sectors, especially in audiovisual services under US’s PTAs provided significant value-added for the US, although the same topic is still facing resistance under the multilateral trading negotiations.

3.5.3 Implications to the WTO
From the above examination, it can be seen that the US negotiating strategies are

157 Among all the US’s RTA partners (beside Canada), only Morocco, Colombia, Peru, Dominican Republic, and Costa Rica have maintained market access restrictions in movie-related services.
159 For example, Colombia guaranteed that the existing restrictions on certain concessions for subscription television would be ceased after 31 October 2011.
more specific and accessible to achieve under the PTA framework. The Trade Promotion Authority (TPA) posits a set of ambitious negotiation strategies in terms of audiovisual trade, according to which, a set of rules and trade concessions are called to eliminate tariffs on physical media carriers, liberalize trade in telecommunication, entertainment services, and electronically deliverable services, and also call to stronger protection on intellectual property rights, especially in an online environment. Most of these trade strategies are far beyond the commitment levels under the WTO, especially in GATS and TRIPs agreements. Therefore, the US trade negotiators took trade forums either bilaterally or regionally, among which, two bilateral agreements resulting from the TPA (US-Chile and US-Singapore) have almost completely carried out all US audiovisual strategies. The most important progress compared to GATS is that trade commitments on audiovisual services have been scheduled under a negative list approach. Hence, limitations to the basic three principles (MFN, market access and national treatment) are not allowed unless otherwise specified. Unlike the full policy flexibility provided by GATS with respect to audiovisual services, the two bilateral agreements opened the liberalization door to this sector with only few limitations. Take US-Chile for example, Chile agreed to provide full market access and national treatment obligations for all audiovisual services transmitted by electronic delivery modes. Additionally, the e-commerce sector which was marginalized by the multilateral trade forum has been scheduled under bilateral frameworks. Both Chile and Singapore agreed to impose permanent duty-free moratorium on e-commerce. Therefore, the two bilateral trade agreements, having made full commitments in audiovisual sectors, are considered as test-beds for the new US approach to a wider trade liberalization of audiovisual services.

Although in the NAFTA agreement, Canada has succeeded in excluding cultural

160 ibid. This trade agenda can also been called ‘second generation of high-tech trade policy’.

161 The United States-Chile Free Trade Agreement entered into force on January 1, 2004. Under the Agreement, the Parties eliminate tariffs on 87 percent of bilateral trade immediately and will establish duty free trade in all products within a maximum of 12 years.


163 For example: Annex I of the US-Chile Agreement.

industries from the agreement, the cultural exemption clause was the subjects of debates among academics, politicians and industry representatives on both sides given the fact that the US trade representatives have imposed various pressures on their Canadian partners in terms of the liberalization of cultural markets. Nevertheless, cultural products, especially audiovisual products have been treated as more specifically under PTAs. At the same time, the US ambitious strategies have been successfully carried out in several agreements, which have paved the way for further achievements on a wider forum in the future.

Compared to the WTO, the trade obligations under PTAs are easier to be enforced. Therefore, the US makes more efforts in pushing the liberalization of trade in culture under PTA instead of under the multilateral trading system. To enforce a reciprocal multilateral trade agreement means to maintain a balance between the short-term temptation to deviate unilaterally from an agreed trade policy and enjoy the corresponding terms-of-trade benefits, and the long-term penalty loss of non-cooperation\textsuperscript{165}, such as the cost of future retaliatory trade wars. PTAs do not require this balance because they alter the market conditions of a given country, and eventually affect the level of multilateral cooperation that can be enforced.\textsuperscript{166}

Compared to the great achievements of the US in US-Chile and US-Singapore FTAs, the over-flexible GATS mechanism is a disadvantage for US to open more overseas markets. The ‘self-enforcing’ commitments in GATS undermined the mandatory of the basic principles, because most of the WTO members tend to protect their cultural industries. The reluctant attitude as well as the voluntary commitment mechanism has influenced the balance between the short-term benefits and the long-term loss which has been mentioned before. Therefore, the enforcement of a reciprocal multilateral trade agreement on audiovisual sector has been frustrated and undermined. PTAs, on the other hand, provide a more foreseeable coalition on specific issues which could enable the US to maximize the benefit on a given market, are much easier to be

\textsuperscript{165} ibid
carried out, with the temptation of having better implementation mechanism.

The US is still aiming to open a broader global market for its audiovisual products. However, the multilateral trading system, which is the optimal framework for the US cultural policies, is problematic in attracting more commitments in trade liberalization. Although the US have achieved greater success in developing trade in culture under its PTAs, it is extremely difficult to transfer this success into the multilateral level. The double-edged solution within the NAFTA agreement reflects that the trade-off between international integration and cultural values does not exist,\textsuperscript{167} because Canada claimed that cultural values can only be realized by taking it out from the international economic integrations, while the US insisted that the ‘liberalization of cultural products is the best way to promote cultural diversity’.\textsuperscript{168} Instead of trade creation, the US’s PTA approach in cultural trade aims at enlarging its coalitions on trade liberalization and combating with the other camp of the debate. The flexible WTO legal framework is too weak to push cultural trade liberalization forward, while the US’s double-edged approach made the problem even more excursive. In addition, the enforceability of the US PTAs runs differently with the WTO agreements. Although the US PTAs tend to have greater enforceability compare to the EU and China ones,\textsuperscript{169} most of the PTAs do not resort to dispute settlement mechanism should breach of trade obligations occurs. Non-formal enforcement of the agreements remains the major method in resolving trade disputes.\textsuperscript{170} Given the US dominant weight in the preferential trade relations, the compliance pull mainly comes from political and economic perspectives. Most of the US preferential trading partners have taken further commitments in audiovisual sectors compare to their GATS schedule, and most of them have made no reservation in WTO-plus issues, such as cultural cooperation, investment in cultural-related production, etc. Therefore, with a strong enforceability, the US does not only secure their interests dropped by multilateral trade framework, but also explore more chances in fully liberalize audiovisual

\textsuperscript{168} WTO (2005), Council for Trade in Services, Communication from Hong Kong China, Japan, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and United States, TN/S/W/49, 30 June, 2005.
\textsuperscript{170} Ibid.
markets under PTAs. However, due to different methods of enforceability, the fruitful achievement of the US at preferential level can hardly be deemed as a sign of success at the multilateral level.

3.6 Conclusion

It can be seen that the use of foreign policy and legal instruments to liberalize foreign markets has been one of the distinctive US cultural policies, either under multilateral or preferential trade frameworks. The interplay of power in cultural trade between the US and other countries (especially European countries) has occurred unabated ever since the beginning of 20th century. While emphasizing openness and deregulation in its domestic market, the US has implemented its law and policies for cultural products by utilizing its strong national power to support Hollywood (or MPAA in a more general sense) in the global cultural market. For domestic cultural industries, the tax-credits schemes, ongoing public subsidies, and liberal antitrust legal environment have played proactive roles for their vertical integration and profits enhancement. The state involvement through cultural and foreign trade policies has significantly assisted the rapid growth of the US cultural industries, and built a firm foundation for their global expansion.

As discussed in Chapter II, WTO agreements contain vague rules on either promoting cultural trade liberalization or affording protection for cultural products. As the most important player in the WTO, the US seeks to liberalize cultural trade by influencing the rules and their interpretations. From the above discussions about the mutual interactions, it can be concluded that the application of GATT and GATS on the new emerging products, i.e. online movies, is subject to the most intensive controversies. Given the low commitment rate of audiovisual services under the GATS schedule, the imbalanced obligation gives the US no other choice but to engage in a forum shopping from other trade platforms. This can be seen from the fruitful achievements in an audiovisual service from the US PTAs. Although the current WTO framework failed to attract significant offers in liberalizing cultural trade, especially trade in services, the US has gained proactive footsteps in pushing the liberalization of multilateral trade rules. For example, in challenging Canada’s discriminatory measures on split-run magazines, the favourable ruling implied that cultural reasons did not play an influential role in judging the ‘likeness’ of cultural products, therefore,
the ‘cultural specificity’ approach supported by many WTO countries failed to gain judicial countenance under the DSB. In addition, telecommunication sectors provide technical assistance in further negotiating audiovisual services, the fruitful achievements in Telecommunication Agreement led to the toppling of market access conditions as well as investment controls. Overall, not departing from the deregulation approach adopted at the domestic level, the US is leading the liberalization processes of the multilateral rules. Under such a progress, ‘cultural specificity’ concerns have been largely avoided or marginalized. The development of the WTO rules is more coincidental with this direction led by the US. Considering the opposite side among the WTO members, consensus in further trade liberalization lacks foundation, especially in classification and subsidy issues.

Compared to the multilateral trade framework, PTAs provide the US with a more flexible and diversified platform for negotiating trade in culture. Different from GATS, a negative-list approach has been taken if a party intended to reserve a specific sector under the US PTAs. Under such a stiff approach, cultural sectors have been greatly included under the liberalization schedule. Most preferential trading partners of the US made few commitments under the multilateral trade framework, while having offered significant openness to the US cultural co-operation or trade. It should also be noted that protective partners of the US, such as Canada and the EU, still retain their position under PTAs as well as under the WTO. Therefore, the success of the US in PTAs is difficult to be transferred to the multilateral platform, because of political and enforceability reasons. Instead of trade creation, the US PTA approach in cultural trade aims at enlarging its coalition on trade liberalization, and combating the protective counterparts under the multilateral trading system.
Chapter IV   Trade in Culture Regime—The EU

4.1 Introduction

While global audiences are enjoying the blockbusters produced in the US, people have already forgotten the fact that Europe was the birthplace of cinema. After the Second World War, European cultural sectors, especially audiovisual services fell far behind their US competitors, even though the EU’s annual film production is higher than that of the US. The EU adopted various protective measures which included quotas and direct subsidies for both economic and cultural protection reasons. The cultural goal is expressed in Article 151 of the Treaty on the Functioning of the European Union (EU Treaty) that ‘The community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore’. ‘Cultural value’ is the basis of EU cultural policies. Accordingly, the EU has built a liberalized internal cultural market, but the external approach taken by the EU is quite protective.

Under the WTO, the EU has made no commitments in terms of audiovisual services. In addition, the EU’s position is opposite to the US regarding certain legal terms of the WTO rules, such as the distinction between cultural goods and services, the content of telecommunication sectors, etc. The opposition between them is rooted in their conflicts long before the inception of the multilateral trading system. Hence, this chapter will address the controversies between the EU and the US in a historical review. The EU represents the ‘cultural conservative’ approach that had been adopted by several WTO members, who are also important players in cultural trade, such as Canada, Australia, and the Republic of Korea. This chapter is going to discuss the role of cultural value in EU’s cultural policies (focusing on the external policies), and the various legal instruments adopted by the EU in order to achieve cultural and economic goals. Then the discussion about the interaction between the state of play in


2 Article 151 (4) of the EC Treaty.
EU’s and the WTO rules will further test the collision between the domestic level and the multilateral level. EU’s regional and bilateral trade arrangements will be addressed in the end, which will display another side of the EU’s regulation on cultural trade.

4.2 The evolution of EU law and policy in cultural sectors

Compared to the deregulation approach of the US, heavy interventions from member states and the EU level have been imposed to cultural sectors since the inception of the common European market. The privileged treatments on cultural products seem to leave enough space in the EU’s constitutional frames for the protection of legitimate social and cultural interests. This section is going to explore the role of ‘culture value’ within the relevant EU legislations, and also address the competence of EU over cultural sectors in its external relations.

4.2.1 EU law and cultural values

The EU’s intention to intervene in the cultural field had been expressed earlier in a number of high-profile reports, with political and social objectives. For example, the 1975 Report on European Union presented at the European Council by Leo Tindemans, concluded that ‘the EU had to make itself felt in education and culture, news and communications. It must be manifest in the youth of our countries and in leisure time activities.’ This expression certainly had influenced the development of the EU’s integration, especially in cultural areas.

The competence of EC in regulating cultural affairs experienced a controversial development process. Such competence decides whether or not the EC has a legal basis to take actions in cultural matters. The turning point of the development was the introduction of Article 151 of EC Treaty in 1992, which brought culture within the Union’s sphere of interest and empowered the EU institutions to take ‘cultural aspects into account in its actions under other provisions of this treaty, in particular in order to

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respect and to promote the diversity of its cultures.’ 5 However, the EC had ‘profoundly affected, through its free movement, competition and fiscal rules, national traditions, and ways of life and the cultural sectors as such even before the introduction of Article 151, when there was an absence of a explicit legal basis for EU to act in the cultural field.6

Article 30 (Article 36 EEC)7 and Article 182 (Article 131 EEC)8 of the EU Treaty were the only provisions touching upon cultural affairs. Both of the articles did not actually aim at extending the EC’s competences in the cultural field. However, by the integration of the Community in the economic and political spheres, culture harmonization, which helped to promote solidarity and social cohesion,9 was needed. From the late 1960s, member states made declarations10 claiming that the Community was not a purely economic institution. In 1975, the Tindemans Report on European Union11 advocated a greater Community involvement in people’s daily life, especially in the education, cultural and communications areas. Following the Report, several research programmes12 were set up to explore the implications of the Community law on cultural goods, services and practitioners. The results clarified that due to the lack of competence of the Community in the cultural sector, the Community cultural intervention would be aimed at facilitating the trans-border circulation of cultural products, rather than coordinating domestic cultural policies. At the end of the 1980s, the formulation of a European ‘common value’ and the importance of a European ‘common heritage’ became very appealing to the Commission. Although the Single European Act did not convey culture to the

5 Article 151(4), ECT
6 Craufurd-Smith, R. (2004), supra n.3. p.19
7 Article 30 allows EU Member States to restrict imports and exports in order to protect national treasures possessing artistic, historic or archaeological value.
8 Article 182 concerns the EC’s association with third countries, intended to assist their cultural development.
11 Tindemans, L. (1976) supra n.4. para.IA3
Community powers, economic-driven objectives were used by the Community in managing cultural affairs. This can be seen from the ECJ’s approach in the Italian Art Treasures judgment. It held that the principle of the free movement of products should also apply to art works, and the attempts to escape internal market obligations for cultural protection reasons would not be successful. The judgment suggested a strict application of the economic rules of the Treaty to cultural products. Hence, member states were bound to abolish or amend measures that could impede the integration of a common cultural market.

The advent of the Television without Frontiers Directive in 1989 demonstrated that cultural products, especially audiovisual content should be freely exchanged within the European common market. The economic-based approach in the cultural market did not mean that the adverse effect of market liberalization on cultural diversity had been ignored by the European legislators during market integration. Certain national cultural preoccupations, such as promoting the national language and encouraging the provision of quality television services, were retained at the national regulatory level. It can be concluded that before the EC had the competence to regulate cultural affairs, it had operated a de facto cultural policy mostly towards economic objectives during the market and policy integration. However, the actions that were taken were far from coherent.

One criticism is that the original desired distinction between economic and culture values in cultural affairs had been blurred by the early Community intervention. In order to improve the coherence of regulation, the introduction of Article 151 EU enriched the Community’s competences from a cultural dimension, responding to the national’s fear about cultural homogenization. The Article establishes the Community competence in the cultural field for the first time, and gives an explicit legitimacy to

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13 Commission v. Italy [1968] ECR 423
14 See: Groener v Minister for Education and the City of Dublin Vocational Education Committee [1989] ECR 3967.
15 See: Commission v the Netherlands [1991] ECR 4069
17 Psychogiopoulou, E. (2006), supra n.9
18 Ibid
both domestic and supranational cultural policies with a goal of cultural diversity within the EU context. The cross-sectional clause of Article 151(4) specifically addresses the ‘constitutional resources’\(^{19}\) in cultural and audiovisual sectors, namely to strike a balance between economic and cultural values during the economic integration of audiovisual industries. Finally, cultural diversity became a legitimate goal not only in cultural affairs, but also in other economic policies in the European integration process.

On the one hand, member countries may have hoped that Article 151 would enable the EC institutions, either legislative or judicial, to afford cultural issues greater weight when balancing cultural and economic interests,\(^{20}\) in order to secure the national and regional cultural identities, especially for some cultural protectionist countries. On the other hand, they also had good reasons to expect cultural initiatives at the EC level, such as financial assistance provided by the Community to help develop their cultural industries. Depart from these concerns, cultural competences have been granted to the EC in developing its industrial policy with regard to the MEDIA programmes, as well as internal market policy such as TWF Directive and its successor AVMS Directive.\(^{21}\) At the EC level, respecting and promoting cultural diversity did not only mean to preserve the expression of endangered cultures, but also mean to create a common and open cultural ground where cultures could be freely accessed and appreciated. Therefore, Article 151 provided potential basis for the EU to redress any negative consequences on culture during market liberalization, at the same time, facilitate actions that could bring economic benefits.

4.2.2 Cultural mainstreaming clause of Article 151 EU Treaty

Audiovisual services are special because of the cultural, political and social importance.\(^{22}\) The audiovisual sectors have been largely affected by the European


\(^{20}\) Craufurd-Smith, R. (2004). supra n.3. p.52


\(^{22}\) Audiovisual Services and GATS Negotiations, EBU Contribution to the Public Consultation on Requests
integration process, and EU law fully applies to these sectors, without exception to all profitable activities with an economic, cultural or social nature. Therefore, a common market for cultural goods and services (mainly for audiovisual products) had been created within the EU. In addition, the freedom to exchange audiovisual services has also gained jurisprudence from the ECJ. However, the measures taken in this sector were from an internal market or industrial policy point of view rather than from a cultural one. Therefore, the proper balance between economic and cultural values has not been embodied within the EU legal order directly.

In Article 151 of the Treaty of Maastricht, the EU added for the first time an article on culture to its legal structure. It reconciled the idea of a ‘common cultural arena’ that built on a shared history and heritage, with the intention of fostering a European Cultural Identity on the one hand, and safeguarding the concept of its Diversity on the other. Cultural value is highly deemed as ‘a fundamental element in personal development by member countries.

In order to protect cultural values, the EU and its institutions have to play a key role culture-related activities, by enacting proactive policies to ensure the formulation of European identity as well as to maintain, preserve and encourage the diversity of culture in the face of a globalization that risks bringing uniformity in its wake. Pursuant to Article 151(4), culture values enjoy a horizontal dimension with other Community policy and activity objectives. As a transversal concern, respecting and promoting cultural diversity should be underpinned by all related Community actions.

Before the EU had the competence to interfere in its member states’ cultural sector, it

24 Public Prosecutor v. G.Sacchi, Case 155/73, [1974] ECR 426
26 Signed on 7 February 1992 and entered into force on 1 November 1993
27 In 2006, a qualitative Eurobarometer study on cultural values of Europeans researched about how Europeans view culture and its contribution to develop a sense of European citizenship, in the end, the’ Eurobarometer’ concluded many finding. See: http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.htm (accessed on May 12, 2011)
28 In addition, Article 22 of The Charter of Fundamental Rights of the European Union, and Article 6 of the Treaty on European Union also highlighted the concern of respecting member countries cultural diversity and identity. See: Psychogiopoulou, E.(2006), supra n.9. p.576
had operated a *de facto* cultural policy through its market and policy integration. The evidence can be found in some high-profile documents, ECJ’s rulings, and relevant directives enacted by the Community. As discussed before, the *de facto* cultural policy had influenced the EU’s judicial and regulatory actions. The EC had a number of actions in support of culture and the arts in its early period.\(^{29}\) The Tindemans Report on European Union in 1975 advocated that the Community should be involved more in people’s daily life, especially in education, culture, news and communication sectors.\(^{30}\) The European Commission reaffirmed that the Community’s interference in cultural sectors aimed at facilitating the trans-frontier trade of cultural goods on the one hand, improving the living and working conditions of cultural operators on the other.\(^{31}\) In 1980s, Ministers of culture from member states became accustomed to meet in the Council to discuss cultural issues.\(^{32}\) After the meetings, the adoption of the resolutions\(^{33}\) provided the Community with a soft law approach in regulating cultural affairs. It should be noted that, during the market and policy integration of the European Union, both the soft power exercised and the legislations enacted by the Community aimed primarily at avoiding market fragmentation, with a consideration of national interests.\(^{34}\) Some ECJ rulings also demonstrated the fact that during the European integration, member states’ attempted to set barriers in the internal market in the name of cultural protection were not successful, take the case of the *Italian Art Treasures judgment*\(^{35}\) for example.


\(^{30}\) Tindemans L. (1976), supra n.4. para.IA3


\(^{32}\) On June 19th 1983, the Heads of State or Government signed the Solemn Declaration on European Union in Stuttgart, advocated for more Community engagement in cultural cooperation actions.

\(^{33}\) E.g. Resolution of the Council and of the Ministers responsible for Cultural Affairs meeting within the Council of 18 December 1984 on greater recourse to the European Social Fund in respect of cultural workers, [1985] OJ C 2/2; Resolution of the Ministers responsible for Cultural Affairs meeting within the Council of 13 June 1985 concerning a European sculpture competition, [1985] OJ C 153/3; Resolution of the Ministers responsible for cultural affairs meeting within the Council of December 20th 1085 on special conditions of admission for young people to museums and cultural events, [1985] OJ C 348/2, etc.


During the process of internal market integration, member states were unable to deter the Community’s intervention in cultural sectors despite the fact that the Community lacked a de jure competence to do so. Article 151 EC Treaty reflected the desire of member states in terms of preservation and promotion of domestic cultural distinctiveness. The Article empowered the Community to have an autonomous cultural policy. The policy emphasized the importance of respecting member states’ cultural diversity, encouraging cultural cooperation both within the Community and with outside countries. In addition, paragraph 4 integrated the sensitiveness of culture in all Community policies and activities, which is generally regarded as a cross-cutting, horizontal EC policy principle, and had both judicial and legislative influences on Community practices. Following this provision, the Council, the European Parliament and the Commission are under an obligation to take reasonable consideration in launching Community initiatives, and the Court of Justice is also responsible to interpret the Community law with due consideration for culture. However, it has been criticized that the actual impact of the cultural cross-sectional clause in the Community’s judicial and legislative spheres is quite slim. For example, in Bosman case, the ECJ did not support the argument put forward by the German Government but stated that Article 128(1) (now Article 151 (1)) could not cover the sport sector. In this case, the ECJ relied on Article 48 (now Article 39) and ruled that the sport had limited relevance to the cultural considerations underlined by Article 151, and should be subject to free movement principles within the Community system.

The internal market legislation kept the objective of eliminating obstacles as its priority, and pursued cultural policy goals subordinately. Efforts have been primarily made by encouraging the production and distribution of diversified cultural products as well as enhancing the protection of heritage and management. However, these

36 Article 151(1) EU Treaty
37 Article 151(2) EU Treaty
38 Article 151(3) EU Treaty
39 Psychogiopoulou, E. (2006), supra n.9. p.583
40 Ibid. p.588
42 Ibid, para.78
efforts could only be permitted when it does not alter trading conditions and competition in the internal market.

4.2.3 EU as an actor in WTO and its competence in trade in culture

The European Union (EU) as a WTO member, exercises all rights and fulfils almost all obligations under WTO law in its own name, like its 27 member states. Therefore, the EU and its member states make up 28 WTO members altogether. The dual membership sometimes troubles the EU external trade relations with other WTO members as well as the division of powers within the EU legal system. Since 1 December 2009, the name of ‘European Union’ has officially replaced ‘European Communities’ to appear in the WTO as well as in the outside world after the Treaty of Lisbon entered into force. However, the EC continues to be mentioned in earlier materials.

The EU is recognized as being one of the most important actors in WTO negotiations. Its economic power and political influence can decisively affect the multilateral negotiation outcomes. How the EU uses its power and influence depends on its capability of negotiating and concluding an international agreement. Two dimensions need to be addressed in terms of the nature of the EU policies: autonomy and cohesion.

The EU common commercial policy is based on uniform principles according to Article 133 of the ECT, now known as Article 207 of the EU Treaty. The intention

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44 See: [http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm)


46 TFEU Part 5, Title II, Article 207(1): The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.
of the common commercial policy is to create a common market and to form a single voice when negotiating trade policies either bilaterally or multilaterally. However, the construction of a common commercial policy is difficult to achieve, and provokes internal tensions in European policy-making. The decision-making institutions in terms of commercial policy, the Commission, Council, and the European Parliament, play different roles in the policy-making process, whilst, they face criticisms in terms of their controversial mandates and incapability of negotiating with one voice.  

Whether the EU is an autonomous actor depends on the agent relationship between member states and the Commission.  

As member states are involved in the decision-making progress through Article 133 Committee in forming of negotiation strategies, it is believed that the Commission’s autonomy has been undermined. However, according to Woolcock (2010), as other countries’ autonomy would considered to be restricted under domestic processes seeking to control negotiators more or less, the test of autonomy should focus on whether the EU’s common policy weighs more than the sum of the member state policies. In 1960s, the EEC’s trade policy was the sum of the various national preferences, and the most protectionist national policy would prevail in the end. The EU initial agricultural negotiation under GATT was a good example of such preferences. The evolution of the common commercial policy enabled the Commission more reliance in external trade negotiations.

The EU trade policy-making involves various agencies and combines different interests. The cohesion of these agencies calls for a solid set of rules and procedures that impose clear discipline on each actor. The evolution of the EU trade policy-making mechanism contributed to the construction of a more cohesive framework. Under such framework, trade policies had been efficiently produced and effectively be used to defend the status quo. Therefore, during the Uruguay Round, the EC was effectively pursuing its own interests in trade in services, government

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49 ibid

procurement and other topics,⁵¹ among which, audiovisual services were completely avoided. The adoption of the Treaty of Lisbon significantly improved the cohesive framework by unifying procedures and granting more competence to the EU institutions.

Cultural values, or cultural diversity to be more specific, have been given constitutional recognition in the EU legal order when the Treaty of Maastricht entered into force.⁵² According to Article 151(4) of the ECT,⁵³ cultural specificity covers not only the internal measures of harmonization, but also external trade policies. During WTO negotiations, the EU was bound to make sure that its ‘single voice’ contributed to the preservation and promotion of cultural values of member countries. It should be noted that EU’s competence was differentiated by trading subjects. Article 133 was the legal basis for trade in goods, according to which, the EU had exclusive competence. However, the EU’s competence of trade in services was shared by member states, which meant that every single member of the EU had a veto right to block the Council in concluding the WTO agreements. The joint competence was ruled by the ECJ in Opinion 1/94⁵⁴ during the Uruguay Round. The ECJ held that the ‘Community and its Member States are jointly competent to conclude GATS and TRIPs’. The situation has been changed by the adoption of the Lisbon Treaty. Article 207(1) of the Treaty confirms that all key aspects of trade, including goods, services, trade related intellectual properties as well as foreign direct investment are of the EU’s exclusive competence. However, according to Article 207 (4), audiovisual services need unanimity in the negotiation. It seems that although the EU has exclusive competence in the topic of audiovisual services, the unanimity requirements would still grant the member countries a veto right to a certain extent.⁵⁵ Therefore,

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⁵¹ Ibid.
⁵³ Article 151(4)ECT: ‘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.’
the exclusive competence of the EU in the audiovisual sector should still rely on member states’ considerations.

As McGoldrick (1997) pointed out, the EU could not be treated as a single member of the international community as it could not be entitled to the same sovereign equality as other states. During the WTO negotiation, it is the Commission’s responsibility to ensure that there is no fragmentation of the EU position. In order to do that, the Commission consults with member states mostly through the regular meetings of the Article 133 Committee in Brussels. The Committee is technically a working group of the Council in order to keep consistency of the intra-EU trade policy. It directs the Commission to represent before the WTO negotiation table on behalf of the EU within the guidelines concluded by the Committee, in terms of what issues should be under the negotiating schedule and how far EU member states are willing to go. In the case of audiovisual services, the EU and its member countries has not made any commitment in service trade liberalization. Therefore, a ‘conservative’ approach has been adopted by the Council’s direction for the Commission to present in the multilateral negotiations. Among EU member countries, France is the strongest advocate for ‘cultural protectionism’, while other states are mostly silent on this issue.

The adoption of the Treaty of Lisbon transferred more competence from member states to the EU level. It helps the Commission to find consensus over controversial issues and to achieve unity of representation. Liberalization in audiovisual services would be easily voted out because of the unanimity requirement stipulated in Article 207 (4). Even if, as the development of the EU’s competence in the audiovisual services sector, the internal decision-making would follow the qualified majority voting module, the ‘conservative approach’ on audiovisual sector would still be

58 Unlike France as the most active country, the other 26 member countries have not expressed strong views on this sector. However, no supportive views have been taken by any member countries
retained. First, Article 151 ECT imposes a duty on the EU institutions to respect and promote cultural diversity. This Article is believed as a legal basis for the justification of the EU’s trade restrictive measures on cultural and audiovisual sectors. From this angle, the Commission is not going to risk the fundamental constitutional values in its external trade relations. Second, the chance to have qualified majority emerge within the Council on audiovisual liberalization is quite low. Although most of the EU member countries behave quite inactive compared to France, they certainly would not compromise their rights in regulating cultural sectors and meet the American demands under the international trade environment. Third, it is nearly impossible to vote France and its alliances out in this sensitive trade sector. The ‘single voice’ presented by the Commission in the WTO negotiation could not be produced if such an influential country stood by the opposite side.

4.3 Elements of EU cultural law and policy

The EU cultural law and policies include both regulatory and financial support measures. The set of privileged treatments on cultural sectors protect both the content of the products, and the production of the EU cultural industries. In addition, the ownership regulation also came into the regulatory regimes, although it is quite immature at the current stage.

4.3.1 Content requirement

On 25th May 1983, the Commission adopted its interim report on ‘realities and tendencies in European television: perspectives and options’. The report examined the scope for creating a European television channel. Following this report, a Green Paper on the establishment of a common market in broadcasting had been established,

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60 Herold, A. (2010) supra n.1. p.253
61 ibid
and the ‘Television without Frontiers’ Directive (TWF) had been launched by an overwhelming majority.\textsuperscript{64} The directive provoked a debate among member states and the European institutions. When the approved draft was transferred to the Parliament, the rate reserved for programming with a Community origin was raised from 30\% to 60\%, as recommended by the Commission.\textsuperscript{65} However, the rate was changed to 50\% (‘a majority proportion’) after the second reading in the Parliament. The Council finally agreed the final text in October 1989, but the controversy still stood after the adoption of the Directive. For example, although Germany stood for the adoption of the Directive, it declared that Article 4 and Article 5 were not legally binding but merely ‘political obligations’.\textsuperscript{66} But France argued that European identity needed to be legally protected from American cultural imperialism,\textsuperscript{67} and the quota system could serve the industrial policy objective by promoting ‘markets of sufficient size for television productions in the member states to recover necessary investment’.\textsuperscript{68}

The legality of Article 4 and 5 of the Directive have been challenged from three aspects: first, they lack legal basis in the Treaty; second, they violate Article 10 of the European Convention of Human Rights; and third, they breach the relevant international obligations.\textsuperscript{69}

The two articles stipulate the addressees of the EU quota requirements. Article 4 introduced the so-called transmission or broadcasting quotas, while Article 5 concerned independent production quotas. Article 4 of the TWF (as well as the new AVMS) Directive requires that member states shall ensure that broadcasters reserve for European works a majority proportion of their transmission time, excluding news, sports events, games, advertising and tele-text services. Therefore, the rule focuses

\textsuperscript{64} Only 2 out of 12 member states vote against this measure, Belgium and Denmark.
\textsuperscript{65} OJ 1988 C 49/64. Legislative resolution embodying the opinion of the European Parliament delivered at the first reading pursuant to Article 149(2)(a) of the EEC Treaty, on the proposal from the Commission of the EC to the Council for a directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities.
\textsuperscript{68} Recital 20, Directive 89/552/EEC.
\textsuperscript{69} Herold, A. (2010), supra n.1. p.72
directly and exclusively on fictions, which are the most commercial kind of creation that foreign imports can most easily be licensed for a fraction of their cost.\(^{70}\) In addition, competition from Hollywood and other major audiovisual industries is quite intense in these sectors. As for what are European works, the definition does not only refer to works originating from the member states. *Article I (1) (n)* defines that,

‘European works’ means the following:

(i) *works originating in Member States*;
(ii) *works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of paragraph 3*;
(iii) *works co-produced within the framework of agreements related to the audiovisual sector concluded between the Union and third countries and fulfilling the conditions defined in each of those agreements*.

The definition has several interpretation problems. First, the works must be ‘originated’ in and made by creators who reside in the eligible states. The nationality of the creator does not naturally link with the European culture.\(^{71}\) The criterion of the workers’ residence cannot guarantee the production of audiovisual content with European culture. Second, as the implementation of the Directive relies on member states, due to their different financial conditions, countries may enact different laws to attract foreign productions, take the tax-incentive law for example. As a result, co-production works between a member state and the US can be called ‘European’ work as well. The involvement of ‘third countries’ has limited relevance with the protection of cultural identity. Therefore, the broad interpretation of ‘European works’ drives the European audiovisual industry merely from an economic perspective. The quota system cannot sufficiently embody the cultural agenda which was originally considered by the legislators.

Although the transmission quotas are useful instruments to ensure the majority quantity of ‘European works’ on screens, the quality of such works cannot be

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\(^{71}\) Ibid. p.139
guaranteed. Therefore, Article 5 of the AVMS Directive, as another safeguard method, obliged the broadcasters to reserve at least 10% of their transmission time for European works created by producers who are independent producers. Alternatively, member states can implement 10% investment quota for such producers. The aim of supporting independent producers is to foster a thriving and competitive European audiovisual industry and cultural diversity in the European market. Although the notion of ‘independent producer’ has been left to the member states to interpret, certain criteria are provided by recital 49 of the 2007 Directive (recital 31 of the 1997 Directive), such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights. As the products of independent producers entail more ‘European elements’ than the ‘European works’ produced by multinational production and distribution chains, some proposals suggested that the broadcasters could replace the majority transmission quotas by an investment of at least 25% of their budgets on European works. Despite the fact that no changes had been made by the new Directive, it reflected legislators’ intention on promotion of cultural identity and diversity. Article 4 and Article 5 ‘would appear to be, at best, an intuitive thrust in the direction of a culture policy’.

4.3.2 Financial supports

Compared to content requirement, financial supports to the cultural sectors have gained more approbation. ‘Subsidies have the advantage of transparency over quotas. As budgeted transfers, they are more likely than quotas to be the subject of continuing evaluation’. With insufficient support, the European financial aid in the audiovisual sector started from 1980s. During the last three decades, the consensus on financial supports was a continuous debatable topic among member countries, especially
between France\textsuperscript{76} and other important members, such as Germany and UK.\textsuperscript{77} The most important financial support programme at the EU level is MEDIA series.

\textit{MEDIA I}

After the failure of the ambitious proposal, the Commission became cautious about its audiovisual policy projects. The MEDIA I programme had gained sufficient support in early 1990s. The programme aimed primarily at enhancing the circulation of national audiovisual productions among member states, instead of encouraging transnational co-productions which was mentioned in the failed proposal. The focus of this programme was the creation of a European film distribution system, by which member states’ national productions could move more freely within the Community.\textsuperscript{78} It arose out of the internal market regime with merchandized drives while had no reference to cultural policy, as it was beyond the EU prerogative at the time.\textsuperscript{79} Therefore, the objective of the MEDIA I programme was ‘to strengthen and promote the European film and television industry by increasing its competitiveness, especially focusing on small and medium-sized enterprises’.\textsuperscript{80} The programme lasted for five years from 1991 to 1995.\textsuperscript{81} Several policy instruments had been established under the programme, such as:

\textbf{g.} European Film Distribution Office (EFDO): provide loans to European feature films which had to be distributed in at least three member states.

\textbf{h.} Broadcasting Across the Barriers of European Language: regulate dubbing and translation techniques.

\textsuperscript{76} Such as: European Commission, Proposal for a Council regulation on a Community aid scheme for non-documentary cinema and television co-productions, COM (1985) 174 final. This proposal failed ultimately because of the strong opponents.


\textsuperscript{78} After the failure of the last proposal, the new proposals had focused on a less ambitious goal. Facilitate the free circulation of national audiovisual works was the primary goal. Such as: European Commission (1986), Action Programme for the European Audiovisual Media Products industry, COM (1986) 255 final, and European Commission (1987) A Fresh Boost for Culture in the European Community, Bulletin of the EC supplement 4/87, COM (1987) 603 final.

\textsuperscript{79} Herold, A. (2010), supra n.1 p.50


\textsuperscript{81} Council Decision of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (MEDIA) (1991 to 1995).
i. EURO-AIM: assist independent producers in marketing their output.

j. GRECO: promote independent European producers on the international market

k. Euromedia Guarantee: provide credit guarantees on bank loans for European co-productions.

It can be seen that the aforementioned financial instruments were focused on the facilitation of circulation of audiovisual works within Europe. There was no intention to create cultural leveling of national programming formats. The financial instrument provided by the European institutions was to make ‘the market available to audiovisual producers rather than focusing on the style and content of their productions’. At the end of the five-year programme, MEDIA I had assisted the building of European audiovisual business networks and the networks between European producers, while left the content of cultural products untouched.

Article 128 of the Maastricht Treaty (now Article 151) brought culture into EU’s policy-makers consideration. In 1995, a new MEDIA programme, MEDIA II, was launched for a period of the following five years. The new programme was ‘a continuation and cautious expansion of existing programmes’. However, with the new Treaty came into force, MEDIA II which was more elaborate and solid. Compared with the previous programme, the new one was more recognizably cultural driven. The reason for the Commission to rely on the industrial policy provision of Article 130 (now Article 157) was mainly due to the reluctance of member states to fund projects under the cultural policy provision Article 128. It was believed that the cultural policy provision had a potential to override the national cultural competence, and was politically impossible following the lessons from the first programme. The content of MEDIA II comprised both funding to development and distribution and professional training, while left the production part to national mechanisms. Therefore, similar to the first programme, the primary aims of MEDIA

83 Herold, A. (2010), supra n.1 p.52
84 Theiler, T. (1999), supra n.82. p.17
85 Herold, A. (2010), supra n.1 p.53
86 Craufurd-Smith, R. (2004), supra n.3. p.64
II remained as increase the circulation of national audiovisual products within the EU and encourage training networks among institutions and companies. In addition to MEDIA II, the Commission proposed a European Guarantee Fund to offer financial guarantees for private investors who wished to invest in European audiovisual productions. However, the proposal failed to attract member states’ consent in the end. It further reflected the reluctance of member states to the expansion of the EU common cultural policy.

The third generation of the MEDIA programmes includes the MEDIA Plus Development, Distribution and Promotion programmes, and the MEDIA Training Programme. The new generation was justified by the industrial policy provision of Article 157(3). Although the new programme expressly indicated its objective as ‘respect for and promotion of linguistic and cultural diversity in Europe’, the Council continued to justify the new generation upon the industrial policy provision of Article 157(3) instead of Article 151(4), as the former had the ‘attraction of not requiring Council unanimity’. Similar to MEDIA II, the EU’s role in the new programme remained as encouraging the creation and distribution of audiovisual works. The actual production process still relied on national funding. This funding provided sources to the EU film industry to create networks, partnerships and structural integration between producers. In addition, the training funding would indirectly improve the development and production quality of European works and ‘prevent the gap between Europe and the US in terms of screenwriting and new technologies from...
The current MEDIA programme had been announced in 2004 by the Commission for the 2007-2013 periods. The new programme combined the MEDIA Plus and MEDIA Training into a single package and focuses on small and medium size enterprises. With a more expressive cultural motivation, Article 151 of the EC Treaty had been taken into account although the new programme was built on the legal basis of Article 157(3), the same as its predecessors. Below is a summarization of the four generations of the EU financial supports:

Table 6: The EU’s MEDIA Programmes

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<tr>
<td><strong>Objective</strong></td>
<td>Enhance the circulation of the national audiovisual production between member states. Create a European film distribution system.</td>
<td>Targeted the weak spots of Europe's audiovisual industry, especially for professional training, products development and distribution.</td>
<td>Encourage the creation and distribution of audiovisual works, enable professionals to make the most of the European and international dimension of the market and to use new technology in the production and distribution processes.</td>
<td>Concentrate on the processes before production, such as training, professional development, etc. And after production, such as distribution, promotion, pilot projects in digital technologies, etc.</td>
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<tr>
<td><strong>Amount of Funding</strong></td>
<td>200 Million ECU</td>
<td>310 Million Euro (265m for development and distribution, 45m for training)</td>
<td>400 Million (350m for Plus and 50m for training). The funding increased in 2006 (453.6m for Plus, 59.4m for Training).</td>
<td>750 Million Euro. (the original Commission proposal was 1.055 billion Euro)</td>
</tr>
<tr>
<td><strong>Legal Basis</strong></td>
<td>Article 308 (old Art.235) EC Treaty. Out of the internal market regime, no reference to cultural policy.</td>
<td>Rely on the industrial policy of Article 130 (the new Art.157)</td>
<td>Based on industrial policy of Article 157(3)</td>
<td>Article 157(3), and Article 150(4) for vocational training. Also take Article 151 into account.</td>
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94 Henning, V. and Alpar, A. (2005), supra n.80, p.246
### Process of Adoption

The first Commission proposal which involved an ambition to improve audiovisual productions had been opposed by many member countries. The commission surrendered its initial ambitious objective and gained support from the Council in the end.

In order to improve the poor European audiovisual market in the face of the US dominance, the Commission proposed a more decisive plan to finance the audiovisual distribution network as well as the transnational coproduction. However, the European Guarantee Fund which was supposed to be paralleled failed to gain consent in the Council and failed to achieve the Commission's initial target.

Created by two Council decisions. As the legal basis for the two decisions is Article 157, the Council passed the decision without a unanimity requirement, which is required by the cultural policy of Article 151.

The Council unanimously achieved a political agreement, and only neglected the financial proposal adopted by the Commission.

### Effects

The programme had built networks for business and industry organizations. However, with limited budget, the Commission failed to allocate the resources to the most-needed activities.

With an increased budget and a more detailed programme plan, the fund went to training, development and distribution categories more effective and flexible.

Ensured a better production quality, which was more suited to international market standards. However, the inadequate funding did not fundamentally change the weak position of the EU audiovisual industry as a whole.

The new programme includes an obvious cultural motivation, although the implementation is complicated. It helps to finance the industry needs. However, as it has a clear focus on small linguistic and cultural areas, the industrially-oriented objective has been limited, and the competitiveness of the European audiovisual market cannot be strengthened.

(Prepared by the author)

It can be seen from the chart that the amount of funding increased from the 1st to the
4th generation. The legal basis of the four programmes is based on either internal market regime or industrial policy. Only the most recent generation has a clearer cultural motivation. The objectives of the four generations all focused on the pre and post-production processes, and left the actual production process to the national level. Through the MEDIA programmes, the EU was able to provide smoother chains for the distribution of the audiovisual works within its territory. In addition, from the second generation, the EU started to invest in training programmes, which facilitated the professionals in terms of communication and quality improvement. Although the Commission tried to pursue an ambitious plan by adding production process into the funding scheme, the Council failed to get enough supports from member countries. After all, the EU financial supports could only play a supplementary role to the national ones. Till the fourth generation, the Council achieved a political agreement to build the fund on a more cultural driven legal basis. However, the implementation was more complicated considering that Article 151 (4) required a unanimity voting. Although the latest programme had an obvious cultural motivation, it focused on small linguistic and cultural areas. Facing the US dominance in audiovisual market, the new financial mechanism of the EU would not result in shaping a strong EU audiovisual industry that can compete with the Hollywood giants at the global market.

4.3.3 Ownership regulation

Compared to the US, the ownership regulation in the EU seems rather inadequate. Media pluralism has a potential impact on cultural diversity as it relates to the freedom of expression and it can ensure the plurality of voices in a society. As a result, the EU legislation does not entail any specific rules to regulate media ownership. The regulation of media plurality is preserved at the national level. However, there are still a political will to bring media ownership regulation into the EU legislation. The European Parliament had requested the Commission to propose measures to safeguard pluralism in the light of the media industries’ mergers and acquisitions. The Green paper drafted by the Commission analyzed the need to take potential acts in this area. Even though the European Parliament and the Social Committee requested the Commission to pass specific legislation on the concentration

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95 Herold, A. (2010), supra n.1 p.90
of media sectors, the Commission did not response actively in the end.\textsuperscript{97}

There is no actual legal instrument to protect and promote media pluralism at the EU level at the current stage. The situation is very likely to change in the next few years. The Commission is making efforts to assess media pluralism in the EU member states,\textsuperscript{98} and the introduction of Article 151(4) will push the adoption of ownership regulation because media concentration has a potential effect of diminishing the diversity of culture, which leads to intervention at the EU level.

### 4.4 Interaction with WTO law

It can be seen that heavy interventions in supporting ‘European works’ widely exist under the EU regulatory regime. In the context of international trade law, any state intervention in the market, as soon as it gets a transborder dimension, becomes a potential distortion to trade and competition, and may run against the WTO principles on non-discrimination. Even though the EU cultural sectors are subject to all economic laws in the same way as any other goods or services, some ‘protective waivers’ have been designed not only within the EU’s legal order, but also within the WTO contexts. This section is going to address the collision between EU and WTO in cultural trade regulation, with an intention to distinguish the most problematic issues that are potentially bring both the EU and WTO under challenges.

#### 4.4.1 The conflict between the EU and US under WTO

At the multilateral level, the EU position on cultural trade was insistently protective but it has evolved over the years. The European countries strongly rejected the US requests for the abolishment of the restrictions on the import of cinema films in 1947. They took the same position in 1960s when the US asserted that the European

\textsuperscript{97} In 1996 and 1997, the Commission drafted some proposals in response to the Parliament’s request, but these proposals were strongly been opposed, and no effort had been made since then.

limitations on the import of television programmes contravened the principles of GATT. When services became the target of the multilateral trade negotiation at the end of the Tokyo Round in 1979, the European Economic Community (EEC) was not enthusiastic as it was apprehensive that the multilateral regulations would focus on the agricultural liberalization. By the development of trade negotiations, many topics, such as the international transaction in the services sectors, the protection of intellectual property rights, particularly the protections of patents and more free and secure opportunities for their investors were considered to be of immense importance for domestic economies, especially for the industrialized countries.\textsuperscript{99} Before the negotiation of GATS, the US argued for the inclusion of the audiovisual sector in the global liberalization schedule, but no agreements had been achieved in the end. With diverging sector-based interests,\textsuperscript{100} the GATS framework started to be established.

In 1982, the US urged GATT contracting parties undertake an examination of their respective service sectors, and negotiations on trade in services were needed in order to improve the world trade environment.\textsuperscript{101} The Ministerial Declaration on the Uruguay Round in September 1986 recognized that several major issues would have to be addressed quickly in order to lay the foundation for further negotiations. Contracting parties presented a significant divergence of views on several issues, such as the coverage of the framework, the structure of the agreement, contracting parties’ obligations and exemptions, as well as developing countries’ special treatment, etc.\textsuperscript{102} The EC proposed that certain GATT principles, such as national treatment, should be implemented progressively by some of the parties, and in addition, there should be an annotated list of certain service sectors for either exemption from the provisions of the GATS, or for clarification and negotiation on a multilateral basis at a later date.\textsuperscript{103} On August 28 1990, the Working Group on audiovisual services met and considered whether the special ‘cultural considerations’ of this sector could be adequately addressed in a special annex or whether the sector should be excluded altogether from

\textsuperscript{100} ibid. p.76
\textsuperscript{102} Uruguay round 341.57/S68 p.2378
\textsuperscript{103} GATT (1989), Communication from the European Communities, The Basis for the Progressive Liberalization Process, GATT Doc.no.MTN.GNS/W/66 (July 20 1989), at 1-3
the coverage under the GATS. The EC advocated for a general or exemption or a special annex by claiming that this sector provided an important function in promotion of indigenous languages, national histories, and cultural heritages. Along with the EC, India, Egypt and Canada made the same claim as well. Although the July Text\textsuperscript{104} provided an exception for the protection of cultural values, the final draft of GATS did not include this element in its general exceptions, left the audiovisual service as a controversial sector.

The final GATS framework includes special schedules in terms of market access and national treatment commitments, and lists of exemptions from the MFN treatment submitted by the parties to the Agreements. Following the flexible approach, the EC member states still retained the right to regulate their audiovisual services, even if the measures were in a trade-distortive manner. Because of this recognition and the agreed mechanics of making national commitments in the market access area, it has long been accepted by participants that there was neither need nor value in excluding any sector from the agreement.\textsuperscript{105} As a result, the EC dropped its insistence on excluding the audiovisual sector from the GATS framework accordingly.

In the Doha round negotiation, negotiation positions on audiovisual matters still diverged at both sides of the Atlantic. The EU remained firm on carrying out its external mandate to ensure that the Union and its member states maintain the possibility to preserve and develop the capacity to define and implement their cultural and audiovisual policies for the purpose of preserving cultural diversity.\textsuperscript{106} Although the GATS framework remains flexible and the EU have made no special commitment so far, the EU’s reservations made in the Uruguay round appeared to be incompatible with the Article XIX (progressive liberalization of trade in services) as well as Annex on Article II Exemptions (MFN exemptions should not exceed a period of 10 years in principle) of GATS.

As the development of technology after the Uruguay round, the US did not so much

\textsuperscript{104} GATT (1990), Draft Multilateral framework for Trade in Services, GATT Doc.No.MTN.GNS/35 (July 23, 1990)

\textsuperscript{105} Peter Sutherland Response to Debate on Audiovisual Sector, NUR 069, 14 October 1993.

\textsuperscript{106} See: http://europa.eu.int/comm/trade/services/index_en.htm
try to convince the EU to make commitments on audiovisual services, but pushed the problem further by referring to new technologies, such as e-commerce, online services, telecommunication services, etc. The complexities of the changed ground for cultural products (from offline to online and from analogue to digital) have put some traditional national policies’ efficiency under challenge. Under the changed ground, what adjustments are needed, and how feasible the national policies are in terms of cultural diversity regulation should be explored by the EU policy-makers. Although the EU was no longer insist in the ‘cultural exception’ approach, the new approach lead to an extreme narrowing of the focus of cultural diversity policy strategies. One of the narrowing strategies is that cultural diversity is mobilized as a national competitiveness argument, especially against the US competitors. The EU High Level Group on Audiovisual Policy stated in 1998 that ‘at the heart of the matter is the question of whether the predicted explosion in demand for audiovisual material will be met by European productions or by imports. […] The danger is that the channel proliferation brought about by digital technology will lead to further market fragmentation, making it more difficult for European producers to compete with American imports’.

The EU’s intention to promote national competitiveness can also be reflected from the review of the Television without Frontiers Directive, especially the review of the rules on advertising and product placement. The European Commission stated that a clearer framework for product placement would secure new revenues for the European audiovisual industry, and the new rules on product placement will ‘help to boost our creative economy and thus reinforce cultural diversity’.

The relevant EU provisions reflected the protective intention of the EU in terms of external policies on audiovisual sector. ‘Cultural diversity’ became a reasonable outfit for protectionism in cultural market, especially in front of the US competition.

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During the Doha round negotiation, debate about audiovisual sector between the US and EU had been complicated by the introduction of the UNESCO CCD Convention. The EU is one of the strongest advocators of this convention since the very beginning. Through such an international agreement, the EU recognized the distinctive nature of cultural goods and services, and affirmed that states have the rights to apply policies and other measures to support their domestic cultural sectors. In the Communication to the UNESCO issued in November 2004, the EU stressed the importance of the dual nature of cultural goods and services, and recognized the importance of international cooperation to respond to cultural vulnerabilities. By setting up a new international instrument to protect cultural diversity, the EU needed to ‘ensure coherence between internal and external EU policies and multilateral agreements, notably under the auspices of the WTO and the World Intellectual Property Organization (WIPO)’. However, the EU internal and external policies have significant divergences. Within the internal market, the regulative approach is: barriers to the circulation of European audiovisual works and to the provision between member states of film-making services should be removed in order to promote cultural diversity, and to take full advantage of the benefits of the internal market.

At the multilateral level on the other hand, EU had taken an opposite way of evaluating economic integration and cultural policies. The Commission openly stated that its mandate to negotiate trade in culture would not be affected and be without prejudice to the international legal framework applicable to exchanges of cultural goods and services, especially on the trade and intellectual property rights aspects. The ‘double standard’ policies applied by the EU would be difficult to justify when further negotiation took place, especially under the US pressure.

4.4.2 EU cultural law and policies under WTO: compatibility issues

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At the end of the Uruguay round negotiation, a cultural exception approach has been proposed by the EU. The approach of the EU remains protective in the Doha round, and seeks to ensure that the EU and its member states maintain the power to preserve and develop the capacity to implement their cultural policies for the sake of cultural diversity preservation. However, the flexibility and regulatory room for the EU and its member countries to take cultural policies have been influenced by the ongoing negotiations and the implementation of WTO provisions and principles.

4.4.2.1 GATT
According to Article III:10 GATT, members are entitled to set up quantitative regulations on cinematographic goods, provided that they fulfill the requirements under Article IV where ‘screen quotas’ has been introduced. The only provision in terms of cultural products has its limitations. On the one hand, the ‘quota’ only refers to ‘cinematographic goods’. Although Canada tried to extend the interpretation, it was unable to reach a conclusion on this matter. On the other hand, screen quotas, although ensuring the minimum screen-time for domestic content, are different from import restrictions, because Article XI does not exempt any cultural goods, even for cinematographic products that have been mentioned under Article IV, from the general obligation to eliminate quantitative restrictions. Therefore, the US claimed that the TWF Directive could not be covered by Article IV, as its object was beyond cinematographic works. In addition, the restrictions on non-European programmes violate Article XI of the GATT. However, as the legal nature of cultural products is questionable, and most products have been discussed under audiovisual services under GATS, the EU has never been challenged by other WTO members with regard to its TWF Directive or other quotas provisions.

The financial supports provided by the EU or national governments grants the

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114 ibid
domestic cultural products an advantage in international competition, such as the MEDIA programmes. The National Treatment obligation under Article III prohibits all discriminatory measures against imported products. However, Article III:8(b) exempts financial supports flowing directly to domestic producers from the general obligation. Hence, the EU fiscal tools aimed at boosting the domestic cultural industries would be permitted. These subsidies are often understood as internal policy instruments adopted by internal authorities. It seems that the various financial supports provided by the EU and national governments should not be challenged under GATT. The Agreement on Subsidies and Countervailing Measures (SCM) is capable of judging the admissibility of state aid with stricter discipline on the use of subsidies. Article 3.1(b) does not restrict aids to domestic production, thus, subsidies to cultural industries are either ‘permissible’ (permissible subsidies have been enumerated in Article 8) or ‘actionable’ (they are permissible as long as they do not adversely affect the interests of other GATT members) under the SCM. The ‘actionable’ category allows the European subsidy schemes a great deal of room to justify themselves when challenge arises.

Cultural cooperative agreements of the EU, such as the Eurimages Co-production Fund are potentially be challenged by the MFN principle as they provide preferential treatments to contracting parties on market access and national treatment other than all WTO members. As mentioned before, the targeted measures affect cultural services more than goods. GATT-violations in terms of MFN principle have been less concerned with by other WTO members.

4.4.2.2 GATS

National treatment and market access obligations under GATS take a ‘positive-list

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117 Grant, P. and Wood, C. (2004), supra n.70. p.296


119 Council of Europe, Resolution (88)15, 26 October 1998.
approach’. They only apply to sectors or sub-sectors once members have committed themselves to their respective schedules. The EU made no commitments under audiovisual services, thus, remains free from adopting or maintaining favorable regulations to its audiovisual industries.

MFN principle under GATS is also more flexible compared to GATT. Annex II on Article II provides exemptions to the general obligation. During the Uruguay Round, the EU made numerous exemptions to the MFN clause in accordance with Article V GATS, and now, all EU member states are enjoying MFN exemptions in audiovisual services. Therefore, even though the European co-production arrangements for audiovisual products discriminate non-European goods and services over the European origins, no GATS violation can be charged. Under the MFN exemptions, EU and its member states are allowed to impose favorable measures, which include support programmes, domestic content requirements and a right to retaliate against unfair conditions abroad. It should be noted that the reservation of the Exemptions should not last for a period of ten years in principle. The European preferential measures are facing pressure to be challenged in the long run. However, as discussed in Chapter III, the negotiation of the elimination of MFN exemptions is foreseeable to be difficult and time-consuming.

The GATS does not have an analogous mechanism like SCM, which regulate direct subsidies from governments. Although the Working Party on GATS Rules indicated that state aid to services was not prevalent, cultural products enjoy large-scale subsidies, especially in the EU and its member countries. Further negotiations on discipline of subsidies under GATS have not come to a conclusion, and lack sufficient

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122 Grant, P. and Wood, C. (2004), supra n.70. p.304
123 In accordance with Article XIX, Part IV of GATS.
support from WTO members. Therefore, from the EU perspective, GATS is more tolerant of trade-restrictive cultural policies than GATT, as it has not made any specific commitments under audiovisual sector, subsidies are free to be granted to develop its own audiovisual industries. In addition, because of the exemptions it has made under MFN obligation, subsidies can also be legally granted to cooperative countries when necessary.

4.4.2.3 Others

Beside GATT and GATS, trade in culture is also relevant in other contexts of the WTO agreements, such as TRIPs and TRIMs to some extent. As audiovisual services have developed rapidly from technological perspective, the EU cultural policies are facing more challenges under these ‘ancillary’ regimes.

From the protection of intellectual property rights perspective, the EU has allied with the US and other industrial countries to improve the enforcement level of IP protection at the international sphere through the TRIPs agreement. All the member states of the EU agreed to extend equal treatment to foreign copyright holders during the Uruguay Round. The main beneficiaries are the audiovisual producers who have a significant impact on the structure of the European audiovisual market. However, divergences still exist between the EU and the US. Take the authors’ moral rights for example. Article 6b of the Berne Convention is exempted from the TRIPs signatories under the US specific requests, so that the producers’ economic interests are superior to the creator of the content, such as the author. However, the European legal tradition relies on it being the other way. As a result, the revenues of European cultural productions may be discriminated against in the global market.

126 Only the US, Switzerland and Brazil expressed their interests on this matter. See: Bernier, I. Content Regulation in the Audio-visual Sector and the WTO, p.231.
127 Grant, P. and Wood, C. (2004), supra n.70,p.311
128 Including the business groups that controlling the communications and entertainment industries as well as the wealthy investors who have influenced the structure of the audiovisual market. Towse, R. (2001) Creativity, Incentive and Reward, An Economic Analysis of Copyright and Culture in the Information Age, Cheltenham: Edward Elgar Publishing.
compared to some US works, which are dominated by commercial interests.

The Agreement on Trade Related Investments Measures (TRIMs) is also relevant to cultural products. The annexed Illustrative List points out several measures that are inconsistent with Article III(4) or Article XI(1) of GATT 1994, among which, local content requirements may potentially be challenged by the TRIMs. Take the EU investment quota of European works stipulated in Article 5 of the Audiovisual Services Directive (AVMSD)\textsuperscript{130} for example. The European broadcasters have to reserve 10% of their programming budget to independent productions for their works of a European origin. The provision demonstrates the potential of the EU to respond to the needs of cultural diversity.\textsuperscript{131} Such measures would be questioned under the WTO investment rules. However, the Agreement is concerned only with the discriminatory treatment of imported and exported goods, and keeps foreign legal or natural persons or services out of its regulatory regime. As most audiovisual products have been qualified as services (although conflicts exist) under the WTO law, the investment rules are hardly applied to the EU relevant measures at present.

4.4.3 Commentaries on the future development

The current Doha round talks started in Doha in 2001 aiming at achieving a more liberal global trade deal, but a breakthrough has not emerged as yet, as most members are sticking with their old demands. As one of the most important players in WTO, the EU’s negotiating priority has four main mandates: first, the EU advocates for better trade conditions for market access for the industrial goods sector. In addition, the EU attempts to improve and clarify the WTO rulebook on subsidies that distort the production of industrial goods.\textsuperscript{132} The negotiation applies to both developed countries and the growing emerging economies such as China, Brazil and India. Second, in the agriculture sector, the EU is committed to offer a 60% farm tariffs cut and an 80%  


\textsuperscript{132} See: \url{http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/} (Accessed on 10 October 2011)
trade distorting farm subsidies reduction, together with the elimination farm export subsidies. 133 Third, for developing countries, the EU expects the Doha round to set up a new global package of ‘aid for trade’ assistance to help the poorest countries to build the capacity to trade, and advocates for an extension of unlimited market access to all LDCs by as many as possible. 134 Fourth, for trade in services, the EU seeks real market opportunities for business as well as to the consumers all over the world. However, EU did not commit to deregulate trade sectors where principles of public interest are at stake. 135 In particular, the EU did not make any commitments about the audiovisual services, under the mandate of protecting member states’ right to promote cultural diversity.

Given the EU’s negotiating tactics, the European Common Audiovisual Policies are highly protective, even though these policies have already lost supports among the general public, large audiovisual firms and regulatory agencies 136 that have strong contacts with the market. Under the multilateral trade framework, although it is unreasonable to expect EU’s significant change, for both legal and institutional reasons, EU is likely to review its external policies and drop some trade-distortive policies off from the negotiating mandate.

First, the dual membership complicated the EU’s external trade relations with other WTO members as well as to the division of powers within the EU legal system. Before the Treaty of Lisbon, the ECJ ruled in Opinion 1/94 137 during the Uruguay Round that the Community and its member states were jointly competent to conclude GATS and TRIPs. Following the ruling, member states had been granted a veto right

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134 See: http://ec.europa.eu/trade/wider-agenda/development/ (Accessed on 10 October 2011)
135 EU Statement on Doha Negotiations at the WTO Trade Negotiations Committee, by Angelos Pangratis, EU Ambassador to the WTO, Geneva, 31 May 2011. The Ambassador stated that, given the unfortunate political realities, the EU is ready to set aside the market access components of the non-agricultural market access issues, agriculture and service negotiations. However, the EU does insist on preserving negotiations in terms of the above listed issues, with the understanding that they will be revived as soon as political conditions will allow for progress to be made. See: http://ec.europa.eu/trade/creating-opportunities/economic-sectors/services/ (Accessed on 10 October 2011).
137 Opinion 1/94.
in services trade negotiations. The external competences of the EC were of an evolutionary nature according to the developing progress of the internal market. After the Treaty of Lisbon, Article 207(1) of the Treaty confirms that all key aspects of trade, including goods, services, trade related intellectual properties as well as foreign direct investment are under the EU’s exclusive competence, which brought the mixed agreements to the end. However, negotiations on audiovisual services need to meet unanimity according to Article 207(4), when the results ‘risk prejudicing the Union’s linguistic and cultural diversity.’ Although mixed competence has been replaced, and the final agreements do not need the ratification of member states parliaments any more, the audiovisual sector is still a sensitive sector where the single voice of the EU is rather conservative at the multilateral trade negotiation table. Even if a qualified majority vote take place on the audiovisual sector, the Commission would still be unlikely to gain the mandate to make commitments in this sector, because the EU cannot meet the American demands in the international trade environment, and it is impossible to vote France and its alliances out on audiovisual issues.

Second, the flexible approach adopted by GATS can hardly impose any substantial obligation on the EU and affect its audiovisual policies. Unlike GATT, the GATS has a set of exemption lists for countries to ‘temporarily’ disregard the MFN principle of non-discrimination. The EU had made respective exemptions under GATS. These exemptions include measures needed to respond to unfair pricing practices, measures that discriminate in the application of national treatment to the audiovisual products of other EU member states, and supportive programs for the supply of audiovisual programmes that meet European origin criteria. Although the MFN exemptions under GATS are ‘temporary’, and they should be removed in no longer than ten years, the EU characterized its cultural exemptions to MFN as ‘indefinite’. Besides, the EU’s decision to offer increased market access or national treatment in the GATS is reflected in the list of positive commitments been proposed. Until now, the EU has

140 Messerlin, P. Siwek, S. and Cocq, E. (ed.) supra n.136, p.22
141 ibid, p.28
made no specific commitments under audiovisual services sector. Consequently, the EU’s market access restrictions in audiovisual markets, such as the broadcast quotas, remain intact today.

The positive sign can be showed from EU’s divergent approaches to internal and external markets over audiovisual sector. Although EU maintains a negative stance on undertaking liberalization commitments for the audiovisual sector under the GATS, it explicitly states that, when dealing with the intra-European market, ‘barriers to the circulation of European audiovisual 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’. From this statement, it can be seen that enlarging market access for national audiovisual products is a tool to promote cultural diversity among the EU members. The EU audiovisual policies encompass a system of rules in terms of the transmission and the contents of audiovisual services, with the assistance of a wide range of supportive subsidies. In addition, the EU competition policy considers the special features of the audiovisual sector, and makes contribution to foster diversity in these markets. According to Article 87 of the EC Treaty, 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 interests. Thus, within the European market, the audiovisual sectors have been fully covered by the liberalization of the internal market. As for the objective of these audiovisual policies, the European Parliament underlined that the aim of the EU cultural initiatives is to encourage the creation of a ‘European cultural area’. Facing the huge deficit emerging in the trade balance with the US, the consequences of specific commitments would shake the traditional measures which are deeply rooted in the history, culture and other peculiarities of the member states. It should be noted that progress has been made during the past decade, and some member states have changed their view on the traditional protectionist audiovisual policies, such as

Germany and the UK. Furthermore, integration in some large firms has weakened their incentives to lobby for the maintenance of trade barriers. These changes have a potential to erode the traditional attitude of the EU and to lead to more fruitful negotiations under WTO contexts.

4.4.4 An analysis on the collisions between EU and WTO

The analysis on the collisions between EU and WTO adopts a similar approach as in the previous chapter. Collisions that are most problematic sector concerns the most trade-distortive measures that raised or potentially raise conflicts under the WTO framework. The second group addresses EU measures that are not in line with WTO law, but cannot be sufficiently addressed by the current WTO law. The last group brings up cultural measures that are considered to be safe under the WTO law, although they are themselves discriminatory in nature.

4.4.4.1 Collisions that are most problematic

EU cultural policies involve affirmative obligations in the form of local content quotas and investment quotas, which are considered as the most problematic collisions between the EU and WTO. Although Article IV GATT allows screen quotas to be allocated to domestic content, the legality of the provision is subject to debate because the provision only concerns cinematographic films in goods nature. Such an exception cannot justify trade-distortive quotas under trade in services.

The TWF Directive and the AVMS Directive impose minimum local content on domestic screens. The definition and measures stipulated by the directives failed to demonstrate the relationship between the required quotas and the aim of European culture value preservation which is pursued by the EU Treaty. The quotas affect the distribution of audiovisual products the broadcasting (or reception) of foreign-made productions. Hence, foreign products (both goods and services) were treated unfairly within the EU market. They are considered as a form of non-tariff barriers to trade, and are more detrimental to free trade than price-based measures like direct financial

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subsidies or taxes from an economic point of view.\textsuperscript{146}

4.4.4.2 Collisions that are less problematic but nevertheless warrant further attention

As discussed before, subsidies in trade in services are not subject to strict rules as trade in goods under the WTO. Financial support measures in support of domestic content industries in force in the EU and its member states are a significant feature of the European audiovisual model. Although subsidies in trade in services are not subject to strict rules as trade in goods under the WTO, their existence is not completely unquestionable. As discussed in Chapter II, proposals on service subsidies have gained support at the WTO level, the heavy subsidies provide by EU institutions shall under the pressure of reviewing the aim and conditions of the fund, to make sure the financial measures are granted under ‘safety waivers’ provided by both EU and WTO law in a least trade-distortive manner.

The EU and its member states adopted a very wide range of exemptions from the MFN principle for the audiovisual sector, and did not make any commitment on market access. Although GATS schedule is subject to member countries’ voluntary commitments, the absence of EU in participating in audiovisual sector does not mean that the sector was not subject to the general GATS rules. During the Uruguay Round negotiation, EU failed to win any lasting ‘cultural exception’ argument, and there was no special provision relating to cultural policy or to audiovisual services under the GATS Agreement. Accordingly, audiovisual services are subject to general GATS rules. EU’s absence in this sector is under challenge for two reasons. First, the advanced technology has divided the audiovisual services into other service sectors, such as distribution services, E-commerce, telecommunications, etc. Obstacles in opening the EU audiovisual services market can be mitigated even without the EU’s special commitments. As the US strategy under multilateral regime has tended to develop cultural cooperation through emerging technologies, the EU’s reluctance in opening audiovisual services seems to be less problematic as before. Second, Part IV GATS\textsuperscript{147} requires member countries to enter into negotiations towards progressive

\textsuperscript{146} Herold, A. (2010), supra n. 1. p.286.

\textsuperscript{147} Article XIX, GATS.
liberalizations. Under the US pressure, it is politically sensitive to remain absent from committing in audiovisual services in the future trade negotiations.\footnote{The EU-US Free Trade Agreement is now under negotiation. Already, audiovisual services became one of the most debatable topics between the two parties. See: EBU calls for EU-US Free-Trade Agreement to Exclude Audiovisual Content, available at: http://www.abu.org.my/Latest_News-%26-EBU_calls_for_EU-U%26S%26_free-trade_agreement_to_exclude_audio-visual_content.aspx (accessed in October 2013).}

### 4.4.4.3 Collisions that are the least problematic at the current stage

The ownership regulation in EU seems rather inadequate, and shall subject to less problems. There is a concern that Article 151(4) may push the EU institutions to intervene more in media concentration issues, such measures are only subject to potential requests in further negotiations aiming at progressive liberalization of service sectors.

In addition, cultural co-production agreements are also frequently used by EU cultural policies. By granting a preferential and privileged treatment to specific partners instead of all WTO members, such agreements potentially run against the MFN principle. However, the EU has developed a mature and sustainable framework in looking for preferential partners in cultural sectors. These agreements are in line with the EU’s pursuit of cultural aims. In addition, the agreements are also beneficial for international exchanges, therefore, are considered to be less problematic under the WTO law.

### 4.5 Trade in culture under EU PTAs

Different from the US preferential trade relationships, the EU developed preferential trade partners under comprehensive considerations from economic, political and development perspectives. Commercial values are not the only objective pursued by the EU PTAs. Cultural trade agenda under EU PTAs also follows the general logic.

#### 4.5.1 The EU PTAs: a general analysis
The EU network of preferential trade agreements (PTA) is the largest in the world (33 agreements are now in force\(^{149}\)). According to their primary motives, the EU’s PTAs can be categorized into four groups: agreements with future EU members or close neighbors, agreements with bordering or near-bordering countries, agreements with developing countries\(^{150}\) and agreements with distant countries and regions\(^{151}\). Compare to the US standardized model for PTAs, these agreements have been negotiated in a flexible way according to the EU and its partners’ trade liberalization agendas\(^{152}\).

First, the EU engages in preferential trade agreements with geographically close neighbors. For example, the creation of the European Economic Area (EEA) in 1994 enlarged the EU’s internal market to the other non-EU countries, Iceland, Liechtenstein and Norway\(^{153}\). The EU has also engaged in PTAs with ‘potential candidate countries’ for EU membership, such as Albania, Bosnia and Herzegovina, Serbia and Montenegro. The FTAs with these countries have entered into force as part of the broader Stabilization and Association agreements with Western Balkans countries. In addition, the EU started accession negotiations with Turkey in October 2005, and the EU-Turkey Customs Union established in 1995 remains. Second, free trade agreements involve countries with EU bordering countries to promote economic prosperity as well as the surrounding political stability. These countries include Mediterranean countries\(^{154}\), Gulf States\(^{155}\) and Ukraine\(^{156}\). Third, the agreements

\(^{149}\) 33 agreements are now in force, and 9 agreements have made early announcement. See: http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=918&lang=1&redirect=1 (accessed on 30 September 2013).

\(^{150}\) The agreements comprise PTAs with 71 small and the least developed countries in Africa, Caribbean and the Pacific, the so-called ACP countries.


\(^{153}\) The original European Free Trade Association (EFTA) was established in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom.

\(^{154}\) Their trade relationship has been governed by the Euro-Mediterranean Partnership. Now, EU has concluded Association Agreements with all its Mediterranean partners except Syria. (Mediterranean partners are: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority, Syria, Tunisia, Turkey and Libya as an observer).

\(^{155}\) The EU and Gulf Cooperation Council (GCC) established a customs union in 2003, with the GCC adopting a unified customs tariff of 5%. A further trade negotiation had been carried on in terms of government procurement,
with developing countries are mainly with the ACP countries, which were formerly colonies of the EU’s member states. These agreements aim to enhance cooperation in trade, support development and poverty reduction in all ACP countries. In addition, the EU’s Generalized System of Preferences (GSP) provides non-reciprocal duty-free accesses to the EU market for 176 developing countries, which has been renewed in 2008 and will last until December 31, 2011. Fourth, trade agreements with remote countries and regions are mostly based on commercially oriented interests. Compared to the other groups of PTAs, these agreements are deeper, wider, and more reciprocal in nature. These agreements include regional agreements, such as the ones with ASEAN, Mercosur; and bilateral agreements, such as the ones with Canada, Chile, Mexico, Republic of Korea, etc. The categories of EU PTAs is showed as below:

Table 7: FTA Signed by the EU

<table>
<thead>
<tr>
<th>Group</th>
<th>Parties</th>
<th>Nature of Agreements</th>
<th>Date of Entry into force</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Andorra</td>
<td>Customs Union</td>
<td>July 7, 1991</td>
<td>Exchange of letters</td>
</tr>
<tr>
<td>A</td>
<td>San Marino</td>
<td>Customs Union</td>
<td>December 1, 1992</td>
<td>Interim agreement, pending entry into force of Customs Union also signed on December 16, 1991. MFN exemption for customs regime with Italy recognized by the GATT Havana Conference.</td>
</tr>
</tbody>
</table>

intellectual property rights, competition policy, dispute settlement, rules of origin and certain political issues, such as human rights, immigration and the fight against terrorism. However, the negotiations suspended in December 2008, mainly because the growing concern from EU in terms of climate-related carbon issues.

The negotiations started in early 2008, aiming to achieve a comprehensive FTA which will embrace political, social and sectoral cooperation. It should be noted that unlike the other former Soviet states, Ukraine is to be considered as an EU candidate, although its accession subjects to debate within the EU.


<table>
<thead>
<tr>
<th>Country</th>
<th>Region</th>
<th>Type of Agreement</th>
<th>Date</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Iceland, Liechtenstein and Norway</td>
<td>European Economic Area</td>
<td>January 1, 1994</td>
<td>EEA replaces previous FTA agreements</td>
</tr>
<tr>
<td>B</td>
<td>Algeria</td>
<td>Association Agreement</td>
<td>September 1, 1995</td>
<td>Euro-Mediterranean Agreement replaces cooperation agreement</td>
</tr>
<tr>
<td>A</td>
<td>Turkey</td>
<td>Customs Union</td>
<td>December 31, 1995</td>
<td>Decision 1/95 of the EC-Turkey Association Council</td>
</tr>
<tr>
<td>A</td>
<td>Faroe Islands</td>
<td>Free Trade Agreement</td>
<td>January 1, 1997</td>
<td>Replaces the 1991 trade agreement</td>
</tr>
<tr>
<td>B</td>
<td>Tunisia</td>
<td>Association Agreement</td>
<td>March 1, 1998</td>
<td>Euro-Mediterranean Agreement replaces cooperation agreement</td>
</tr>
<tr>
<td>B</td>
<td>Russia</td>
<td>Partnership and Cooperation Agreement</td>
<td>1997</td>
<td>New agreement negotiations commenced in 2008</td>
</tr>
<tr>
<td>B</td>
<td>Palestinian Authority</td>
<td>Association Agreement</td>
<td>July 1, 1997</td>
<td>Interim Euro-Mediterranean Agreement</td>
</tr>
<tr>
<td>B</td>
<td>Ukraine</td>
<td>Partnership and Cooperation Agreement</td>
<td>1998</td>
<td>Negotiations launched in March 2007 on a new Association Agreement</td>
</tr>
<tr>
<td>B</td>
<td>Israel</td>
<td>Association Agreement</td>
<td>June 1, 2000</td>
<td>Euro-Mediterranean Agreement. Trade provision initially applied under the 1995 Interim Agreement</td>
</tr>
<tr>
<td>D</td>
<td>South Africa</td>
<td>Trade, Development and Cooperation Agreement</td>
<td>January 1, 2000</td>
<td>The parties aim to establish an FTA by 2012</td>
</tr>
<tr>
<td>B</td>
<td>Morocco</td>
<td>Association Agreement</td>
<td>March 1, 2000</td>
<td>Euro-Mediterranean Agreement</td>
</tr>
<tr>
<td>D</td>
<td>Mexico</td>
<td>Economic Partnership, Political coordination and cooperation Agreement which included an FTA</td>
<td>July 1, 2000</td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>Jordan</td>
<td>Association Agreement</td>
<td>May 1, 2002</td>
<td>Euro-Mediterranean Agreement signed on November 24, 1997</td>
</tr>
<tr>
<td>Region</td>
<td>Agreement</td>
<td>Date</td>
<td>Details</td>
<td></td>
</tr>
<tr>
<td>--------</td>
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</tr>
<tr>
<td>B Lebanon</td>
<td>Interim Agreement</td>
<td>May 1, 2002</td>
<td>Euro-Mediterranean Agreement signed on June 6, 2002 replaces cooperation agreement.</td>
<td></td>
</tr>
<tr>
<td>D Chile</td>
<td>Association Agreement which includes an FTA</td>
<td>February 3, 2004</td>
<td>Full implementation of FTA expected by 2013</td>
<td></td>
</tr>
<tr>
<td>A The former Yugoslav Republic of Macedonia</td>
<td>Stabilization and Association Agreement</td>
<td>May 1, 2004</td>
<td>Provisions first applied under Interim Agreement</td>
<td></td>
</tr>
<tr>
<td>B Egypt</td>
<td>Association Agreement</td>
<td>June 1, 2004</td>
<td>Euro-Mediterranean Agreement replaces cooperation agreement</td>
<td></td>
</tr>
<tr>
<td>A Croatia</td>
<td>Stabilization and Association Agreement</td>
<td>February 2, 2005</td>
<td>Provisions first applied under Interim Agreement</td>
<td></td>
</tr>
<tr>
<td>A Albania</td>
<td>Stabilization and Association Agreement</td>
<td>December 1, 2006</td>
<td>Provisions first applied under Interim Agreement</td>
<td></td>
</tr>
<tr>
<td>A Montenegro</td>
<td>Stabilization and Association Agreement</td>
<td>January 1, 2008</td>
<td>Provisions first applied under Interim Agreement</td>
<td></td>
</tr>
<tr>
<td>A Bosnia and Herzegovina</td>
<td>Stabilization and Association Agreement</td>
<td>July 1, 2008</td>
<td>Provisions first applied under Interim Agreement</td>
<td></td>
</tr>
<tr>
<td>C SADC (Botswana, Lesotho, Namibia, Mozambique, Swaziland)</td>
<td>Interim Economic Partnership Agreement</td>
<td>Partially signed on June 2009</td>
<td>Negotiations on a more comprehensive EPA is ongoing</td>
<td></td>
</tr>
<tr>
<td>C Pacific (Papua New Guinea, Fiji)</td>
<td>Interim Economic Partnership Agreement</td>
<td>Signed on July 30 and December 11, 2009</td>
<td>Negotiations on a more comprehensive EPA is ongoing</td>
<td></td>
</tr>
<tr>
<td>Country</td>
<td>Agreement (Including States)</td>
<td>Status</td>
<td>Remarks</td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------------------------------------------</td>
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<td>--------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>C</td>
<td>ESA (Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe)</td>
<td>Interim Economic Partnership Agreement</td>
<td>Partially signed on August 29, 2009</td>
<td>Negotiations on a more comprehensive EPA is ongoing</td>
</tr>
<tr>
<td>A</td>
<td>Serbia</td>
<td>Interim Agreement on Trade and Trade-related Matters</td>
<td>February 1, 2010</td>
<td>Interim agreement, pending entry into force of SAA</td>
</tr>
<tr>
<td>D</td>
<td>Republic of South Korea</td>
<td>Free Trade Agreement</td>
<td>July 1, 2011</td>
<td>Both sides still need to ratify</td>
</tr>
<tr>
<td>C</td>
<td>CARIFORUM States</td>
<td>Economic Partnership Agreement</td>
<td>Pending</td>
<td>Haiti signed on December 11, 2009</td>
</tr>
<tr>
<td>D</td>
<td>Mercosur (Argentina, Brazil, Paraguay, and Uruguay)</td>
<td>Association Agreement</td>
<td>Pending</td>
<td>Negotiation suspended since 2004, but discussions to resume are ongoing</td>
</tr>
<tr>
<td>D</td>
<td>India</td>
<td>Free Trade Agreement</td>
<td>Pending</td>
<td>Negotiations launched in June 2007</td>
</tr>
<tr>
<td>D</td>
<td>ASEAN</td>
<td>FTA</td>
<td>Pending</td>
<td>Negotiations launched in June 2007, suspended in December 2008. EU announced bilateral negotiations with Singapore and Vietnam subsequently</td>
</tr>
<tr>
<td>D</td>
<td>Andean Community (Bolivia, Colombia, Ecuador, and Peru)</td>
<td>Association Agreement</td>
<td>Pending</td>
<td>Regional negotiations suspended in 2008, bilateral agreements with Colombia and Peru reached on March 1, 2010</td>
</tr>
<tr>
<td>D</td>
<td>Canada</td>
<td>Comprehensive Economic and Trade Agreement</td>
<td>Pending</td>
<td>Negotiations launched in October 2009</td>
</tr>
<tr>
<td>D</td>
<td>Singapore</td>
<td>Free Trade Agreement</td>
<td>Pending</td>
<td>Negotiations launched in 2010</td>
</tr>
<tr>
<td>Group</td>
<td>Region</td>
<td>Agreement Type</td>
<td>Status</td>
<td>Source</td>
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<td>-------</td>
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<tr>
<td>C</td>
<td>West Africa (Ghana)</td>
<td>Interim Economic Partnership Agreement</td>
<td>Pending</td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>Central America (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua)</td>
<td>Association Agreement</td>
<td>Pending</td>
<td></td>
</tr>
</tbody>
</table>

4.5.2 EU trade in culture approach under PTAs

In the mid of 1980s, there were two facts that led to the European institutions efforts in reinforcing national policies on audiovisual sector. First, as the development of the technology, the performance of the European audiovisual industry had been weakened, and it led to the rapid increase of the deficit with the US in audiovisual trade. Second, the Uruguay round negotiation extended the GATT principles into trade in services, which would accelerate the increase of the deficit once the European market been opened. Therefore, Article 151 of the ECT introduced a specific statement for the audiovisual sector that provided a legal basis for the EU institutions to maintain regulatory measures in order to intervene in cultural trade.

Within the EU market, ‘balancing economic integration and cultural diversity was not

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159 Langhammer, R. (2005), supra n.144
problematic because liberalization of audiovisual services within the EU would bring the common European heritage to the fore, and thus create a single European audiovisual space’. By creating a single European audiovisual market, the competitiveness of the European audiovisual works would be enhanced in front of the competition with the US media conglomerates, both within and outside the European territory. According to the integration strategy, barriers to the circulation of European audiovisual 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, and therefore, should be removed.

Under the preferential trade frameworks, the EU undertook further commitment compared to GATS, although most of the EU trade and association agreements provide for cooperation in the audiovisual field. As Wunsch-Vincent stated when examining the EU-Chile Association Agreement that, ‘while making pledges to reinforce cultural cooperation, cultural services are excluded from the chapter on trade matters’. It is believed that this statement tells the true story of the EU preferential trade arrangements on culture matters. However, certain differences exist between preferential and multilateral negotiations.

First, to certain countries, especially the bordering or near-bordering countries, audiovisual services have not been excluded from the trade talks. In March 2007, the EU and Ukraine announced bilateral negotiations of a free trade agreement as a replacement of the Partnership and Cooperation Agreement that dates from 1998. The coverage of the trade package has been exceptionally broad, including a wide range of services, public purchasing and competition. Thus, the new FTA has been described

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161 Ibid.,
as ‘deep and comprehensive’ (DCFTA).\footnote{De Gucht, K. (2011) ‘EU-Ukraine Trade Negotiations: A Pathway to Prosperity’, INTA Committee Workshop, Brussels, 20 October 2011.} During the negotiation in 2008, the European Commission expressed its intention of not excluding audiovisual services under the new free trade agreement. As a response, the Europe’s Coalitions for Cultural Diversity expressed concerns with respect to the negative consequences on cultural diversity in the EU. The Coalitions stated that the proposal made by the European Commission was ‘in complete contradiction with the position defended by the European Union in its multilateral trade negotiations’ on the one hand, and undermined the UNESCO CCD Convention which had been strongly supported by the EU on the other. The European Commission defended the decision of not excluding culture from bilateral trade relations. First, the ‘new enhanced agreement’ with Ukraine consisted of a ‘global political and economic integration agreement fundamentally different’ from other FTAs. Second, although Ukraine is not considered as a candidate for EU membership in the near future, certain preferential treatment should be granted as the EU’s position on audiovisual policy is based on the content of European-origin in a broad sense. As a result, EU did not make any commitments with respect to the trans-border provision of services (Modes 1 and 2), but Modes 3 and 4 have been reserved for a further commitment. The EU-Ukraine FTA made a breakthrough in the EU’s external cultural relations. Whether it can constitute a precedent for other FTA negotiations remains to be seen. As an exceptional step in EU-Ukraine FTA, the EU put itself in a passive position in future preferential or multilateral negotiation.

Second, the EU leads its external cultural policy in the form of protocols on cultural cooperation under preferential trade frameworks. The first protocol was concluded in the framework of the Economic Partnership Agreement with the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM) in 2008. The signature of the EU-CARIFORUM Economic Partnership Agreement (EPA) drew a curtain on thirty years of preferential access to European markets enjoyed by Caribbean producers. The protocol was the first time that the EU specifically included the cultural sector into a trade agreement, which aimed at increasing trade and cultural exchanges between the EU and the CARIFORUM countries.\footnote{KEA European Affairs (2011) ‘Implementing Cultural Provisions of CARIFORUM-EU EPA: How do They} The detailed provisions can be...
divided into two categories. The first one relates to market access provisions for the entertainment services, which enables CARIFORUM artists and cultural professionals to have access to the EU market to provide services (Mode 3). The second one sets a framework for cultural cooperation between both parties to facilitate exchanges of cultural activities, goods and services. The market access provisions are legally binding, and the commitments made by EU and its member states are directly applicable. By contrast, the cooperation provisions are not legally binding but best endeavor clauses.167

The favorable cultural trade conditions can also be reflected from EU’s engagement with remote trade partners. However, this kind of favorable treatment has generated much more concern and discussion among European stakeholders. The Protocol of the EU-Korea FTA sets a framework for both parties to engage in policy negotiation on culture and audiovisual matters in terms of facilitating exchanges of cultural activities, such as performing arts, publications, protection of cultural heritage sites and historical monuments, and audiovisual sectors. Different from the EU-CARIFORUM protocol, the one with Korea was strictly based on reciprocity and balance.168 The protocol has encountered criticism at the very beginning. The critics focus on two points. First, the protocol undermines the role of EU as a strong advocator for the UNESCO CCD Convention. French government stated that the protocol ‘which have been negotiated up to the present time, do nevertheless run the risk of allowing a de facto reintroductio

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167 To which extent the provisions of the Protocol could create certain obligations for the EU Member States still needs to be clarified. At the moment only the provisions allowing the Cariforum audiovisual sector to benefit from the broadcasting quotas for co-productions are binding. The officials of the European Commission have indicated that in their view the provisions are “politically” binding.


be detrimental to European cultural industries, especially in animation sectors.\(^{170}\) In addition, the protocol runs against Article 16 of the UNESCO Convention, as the preferential treatment should be awarded only to developing countries accordingly.\(^{171}\)

The recent preferential trade agreements, especially the cultural cooperation protocols, signed by the EU reflected that the EU is practicing its external cultural trade policy in a new fashion. Since the conclusion of the EU-Korea protocol on cultural cooperation, two new cultural cooperation frameworks have been agreed. First, between the EU and Andean countries, like Peru and Colombia, an agreement on cultural cooperation is still being negotiated but is not annexed to the trade agreement because of the contentious issue of the co-production of television programmes.\(^ {172}\) Second, in the Central America case, cultural cooperation provisions are attached to the cooperation provision with respect to cultural and audiovisual matters under the trade Association Agreement.\(^ {173}\) Therefore, the approaches to carry out cultural cooperation between EU and third countries are flexible, due to the specific negotiations and bargaining positions.

4.5.3 Implications to the WTO

From the above analysis, it should be noticed that most of the EU’s preferential trade partners are individually small and constitute a small share of the EU exports or provide the EU with small overseas markets. The recent EU-Korea and EU-Canada FTAs have provided a new dimension for the EU’s potential trade partners as they are much larger trading partners.\(^ {174}\) However, as the EU does not have a fixed trade


\(^{171}\) Article 16 CCD– Preferential treatment for developing countries: Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.

\(^{172}\) Loisen, J. and De Ville, F. (2011), supra n.170 p.265

\(^{173}\) Ibid.

agreement pattern as the US does, whether the new agreements could generate more trade diversion remains unclear. EU’s future PTAs need to address more comprehensive scope on the one hand, and deeper commitment than the current standard on the other.\textsuperscript{175} The EU-Korea FTA appears to fulfill this comprehensive requirement in terms of its wide coverage.\textsuperscript{176} At a later stage, the EU will face more comprehensive and deep PTAs with other trading partners, such as the longstanding trade negotiation with MERCOSUR and the Gulf Cooperation Council, and FTA negotiation with India, ASEAN, and Canada. However, such development does not lead to a more promising multilateral trade relationship from the EU perspective.\textsuperscript{177} The spread of competing regulatory structures makes business more complicated and uncertain under the multilateral trade environment. The EU aims to use the preferential trade framework to extend its rules and regulations, especially on the matters of food safety, environment standard, cultural values, etc.\textsuperscript{178} By the same token, the US practices in the same way. Therefore, the multilateral trading system encounters conflicts between the two trade dragons, but it lacks a ground scheme to reconcile the two camps.\textsuperscript{179}

Trade in services is much more liberal under the EU’s preferential trade framework. Following the provisions set out in GATS Article V:1, the EU preferential trade agreements have a ‘substantial sectoral coverage’. WTO-Plus provisions can be seen from many agreements. For example, the FTAs with Mexico and Chile include significant provisions on liberalization, including the financial services sector. In addition, further telecommunications commitments can also be found in the EU-Chile FTA. In the cultural sector, although it has been explicitly exempted in some agreements, such as the EU-Mexico Global Agreement,\textsuperscript{180} the EU has proved

\begin{footnotesize}
\begin{itemize}
  \item\textsuperscript{176} The EU-Korea FTA broadly parallels the EU-Korea FTA on matters like comprehensiveness, trade coverage and WTO-plus provisions.\textsuperscript{176}
  \item\textsuperscript{178} Ahearn, R. (2011). Supra n.158. p.29
  \item\textsuperscript{180} Council Decision of 28 September 2000 concerning the conclusion of the Economic Partnership, Political
\end{itemize}
\end{footnotesize}
willingness to either cooperate with or provide better market access conditions to its bilateral or regional trading partners. This openness to certain trade partners showed that the EU audiovisual industry has developed a stronger interest in gaining access to wider non-EU markets. However, to make commitments under the WTO seems too far away for the EU and its member countries. First, under the multilateral trade regime, the EU’s protective audiovisual policies, such as quotas and subsidies, would face challenges once the EU made specific commitments under GATS. This will hurt not only the industrial interests, but also the fundamental values of the EU audiovisual regulation. Second, the EU has advocated other international frameworks to counterbalance the WTO during the past two decades of trade in service negotiation, such as the UNESCO CCD Convention. Liberalize cultural market will isolate these instruments which the EU has already made efforts for. Third, given the fact that there are several controversies existing under the WTO framework, such as the classification of cultural products between goods and services, the coverage of telecommunication services and so on, the EU has significant controversies with the US. The EU would prefer to take an easier approach to extend its rules and regulations under preferential trade regimes rather than fighting against the US under the multilateral regime.

Therefore, although the EU has showed its willingness to open audiovisual talks with its preferential trade partners, it does not affect its protective attitude under WTO framework in a foreseeable future. As the EU audiovisual industry has realized the necessity to explore foreign cooperation and markets, the existing coalition between industrial interest and cultural diversity supportive values will eventually break up, and the EU will be forced to adjust its audiovisual policy to find new equilibrium.\footnote{Formentini, S. (2007), supra n.164.}

4.6 Conclusions

Article 151 EC Treaty brought culture within the European sphere of responsibility by adding culture value to its legal structure. The importance of the principle of cultural diversity was reinforced by a ‘cross-sectional’ clause that requires ‘the Community

Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part; OJ L276 of 28/10/2000, p.44
shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and promote the diversity of its cultures’. This chapter has given a close examination of the cultural mainstreaming clause of Article 151. It showed that within the EU context, an explicit legitimacy of the goal of cultural diversity does exist, and it casts influence over the EU’s economic policy, either under the internal economic integration, or in the external trade relationships. The EU has succeeded in building a free internal market without sacrificing cultural values that have been of a marked concern by member countries. Cultural policy issues have been largely subjected to the intervention of EU institutions during its market integration, especially in audiovisual-related policies. The intervention can be reflected by regulatory measures (content requirement, ownership regulations, etc.) and financial supportive mechanisms (subsidies, tax incentives, etc.). The EU abstains from making specific commitments under the GATS schedule on audiovisual services. Such abstemiousness enables the EU to competently distinguish foreign cultural products from domestic ones, and grant privileges to domestic products. Through the examination of the collision between the EU and the WTO, the most trade distortive financial measures widely adopted in the EU are not going to be further challenged under the WTO law, while the quotas imposed on the cultural content are subject to more controversies. Overall, EU’s coherent and systematic protection of culture value has gained legal basis in developing either internal or external trade relations over cultural sectors.

Unlike the US, in terms of preferential trade agreements, the EU did not make any further commitments to cultural services with its trading partners, as opposed to the GATS, although most of the agreements provide cooperation in the audiovisual sectors. The recent developments in the EU bilateral cultural trade relations lead to an adoption of a cultural cooperation protocol with partners at different levels of development in the area of cultural policy, take the cooperation clause in EU-CARIFORUM and EU-Korea agreements for example. The more comprehensive scope between the EU and its preferential trading partners is another advantage compared to the WTO regime. WTO-Plus provisions on cultural sectors can be seen from many free trade agreements, such as the EU-Mexico and EU-Chile. In addition, under the EU-Ukraine FTA, EU included audiovisual services under the trade negotiation for the first time. The openness to certain trade partners showed that the
EU audiovisual industry has developed a stronger interest in gaining access to wider non-EU markets. However, it is premature to take the regional cultural openness to multilateral level, given the importance of cultural value under the EU legal system, as well as the fundamental conflicts between EU and US on cultural trade-related issues that have been mentioned before.
Chapter V Trade in Culture Regime—China

5.1 Introduction
This chapter analyzes trade in culture from China’s perspective. The first section introduces China’s regulatory framework as well as detailed measures regarding cultural sectors. As this sector has been controlled by the State for a long time, and the related industries were in the hands of state-owned enterprises, where state scrutiny widely existed, challenges to the whole regulatory framework after China’s WTO accession are reshaping the cultural sectors and the relevant regulatory measures in order to be more WTO-consistent. An analysis of the compatibility of China’s measures to carry out its WTO obligations is set out to appear in the subsequent section. In the China-Audiovisual case, the US for the first time challenged China’s trade-restrictive measures on audiovisual products under the WTO. Based on this case, the compatibility analysis displays the influence of the WTO law at a domestic level as well as the barriers for China being more WTO-consistent and more liberal in this sector. The last section focuses on China’s engagement in preferential trade arrangements in the audiovisual sectors. China’s strategy for developing preferential trade relationships is based on the Pan-Asia Cooperative Framework. Deeper commitments, especially in trade in services have been greatly achieved compared to the WTO framework. The advantages of preferential trade arrangements in the audiovisual sectors and the implications for the WTO will be further discussed.

Different from the EU, China has made national treatment and market access commitments under audiovisual services a schedule of GATS. However, protective measures such as content quotas and financial support widely exist in China’s regulatory framework. Unlike the EU, cultural value cannot be reflected from the relevant law and regulations, and cultural measures mainly exist in the rules of competent authorities. They cannot form a consistent and comprehensive regulatory framework. Therefore, there are many obstacles for China to further liberalize cultural sectors. A more consistent legal framework is called in order to fulfill China’s WTO obligations, which is also the case for other developing countries.
5.2 The evolution of China law and policy in cultural sectors

Researches on China’s trade policy have been contributed enormously since China’s accession in WTO, when the country’s economic influence started to rocket at the global level. However, cultural industries are still new commercial sectors to China and its legal framework. Therefore, the regulatory framework over cultural trade is still on its way of developing, and far from coherent and rule-based.

5.2.1 China’s trade policies after Opening-up revolution and its position under WTO

In 1978, Deng Xiaoping launched China’s great economic ‘Opening-up Reform’. Since then, China’s reform had largely depended on the gradual shift from a command and closed to market-oriented economy. The political and ideological pressure either from the Party or from the society negatively affected the real effect of the reform. China’s economic transfer swung from planned economies and market economies for the following two decades. It was not until 1993, when the Third Plenary Session of the 14th National Conference of the CPC declared that the reform should toward ‘socialist market economy’. Such expression still widely exists in the current documents.¹ It showed that the economic reform was never gained fully support from the Party and the society, the state (mostly refer to the Party) is still playing significant roles by engaging in commercial sectors. The incomplete reform constituted a big problem for Chinese negotiator in preparing the accession of the WTO. It remains problematic in the contemporary trading system.

China has experienced a dramatic economic development period since its transition from a planned economy to a ‘socialist market economy’ which started at the end of 1978. During the last three decades, China had tremendous reforms in terms of trade liberalization, which included opening-up an export-oriented processing segment, implementing a unilateral trade liberalization process and joining the WTO in 2001,

just in time for the Doha Round.

As a new WTO member, China has become ‘a leader of diplomacy, with a potential for coalition-seeking’.\(^2\) China has been described as ‘a constructive member working to pursue its interests which for the most part correspond to the organization’s goal of greater multilateral liberalization’.\(^3\) The size of China’s trade and economy has always made China the focus of attention. Therefore, China should ‘assume a level of global responsibility that matches the huge impact it is having on world trade, security and environment’.\(^4\) During the mini-ministerial conference on July 29 2008, China became a key decision maker as it was included in the G-7 Group\(^5\) which replaced the Quad (US, EU, Japan and Canada).

Compared to trade in goods, China has not been equally active in the trade in service negotiations.\(^6\) Shortly after its accession to the WTO, the Chinese government presented proposals regarding several reform measures and submitted to the Council for Trade in Services.\(^7\) These measures aimed to strengthening the legal framework, building up a regulatory capacity, and providing breathing space for the reform of state-owned enterprises.\(^8\) China’s comprehensive and deep commitments made during its accession helped to accelerate the speed of the aforementioned three reforms. However, several litigations have been brought against China by the US and EU counterparts, and further liberalization requests have been made as well during the past ten years. China endeavors to make new efforts to improve its current


\(^5\) G-7 include Australia, Brazil, China, the EU, India, Japan and the US.

\(^6\) Lim, C. and Wang, J. (2010), supra n.4. p.1313

\(^7\) TN/S/W9, December 18, 2002.

\(^8\) ibid
commitments, especially in service subsectors.\(^9\)

The participation in the WTO involves China in state responsibility when non-compliance to its obligations occurs.\(^10\) China’s compliance with WTO law has been criticized mainly due to the problem of ‘internal barriers’\(^11\), such as the slow reform of Chinese legal, economic and financial orders, the unstable rules to define the powers or competence of different state organs, etc. Cultural industry enjoys high specificity as it is not only a new term in the economy, but has also raised conflicts at the international level. As a major player in the WTO as well as an important trader in cultural products, China’s role in the trade and cultural debate, and the compatibility of China’s relevant legal framework to the WTO context has significant influence over the global flow of cultural products, and will be analyzed in the following section.

5.2.2 The status quo of Chinese cultural industries and the regulatory framework

The national cultural industry started to develop after the establishment of the People’s Republic of China in 1949. Over the past six decades, the development of the cultural industry had experienced two periods. From 1949 to 1978, China had undergone political movements and societal chaos for nearly thirty years. During this period, culture was widely seen as a form of ideology and it was strictly controlled by the Communist Party of China (CCP) for social and political stability and societal harmony. All forms of cultural goods and services were strictly planned and

\(^9\) Statement by Ambassador Sun Zhenyu on behalf of G-20 at the Informal Trade Negotiations Committee Meeting: ‘In spite of our very extensive commitments in our services schedules, we are trying to make new efforts, we are going to give signals to consider, on condition that others will reciprocate, some new subsectors, and some improved offers. Eventually the level of openness of our service markets will be roughly at the same level as some developed countries. So that will be our contribution’. See: [www.mofcom.gov.cn](http://www.mofcom.gov.cn)


distributed for the aforementioned ambitions, and they were seldom related to economic factors. At that period, the idea of ‘commoditized culture’ was viewed as a decadency of capitalism.\textsuperscript{12} ‘Cultural construction’ was completely in the hands of the government through state-owned cultural institutions in the form of public service work units. Therefore, there was no private participation in the cultural market, not to mention foreign engagement. The situation got even worse during the ‘Cultural Revolution’ decade, when the propaganda regime nearly decomposed the whole nation’s cultural heritage, either historical or spiritual.

The second period started from 1978 when China decided to start the opening-up reform. From then on, cultural goods and services were incorporated into part of the market economy and finally became commercialized. Along with the changed attitude towards culture and cultural market, the whole structure of cultural regulatory framework altered dramatically. The cultural public service units were allowed to engage in commercial activity, meanwhile, private sectors were encouraged to participate in the cultural market as competitors to state-owned enterprises. However, until now, government interference in the cultural market remains significant. This can be seen from the ‘dual system’ adopted by the regulators.\textsuperscript{13} The system permitted the coexistence of cultural undertaking (cultural institutions which are managed by the government) and commercial cultural industries. As the economic potential of cultural industries became more and more significant at the international level, China adopted a series of measures in order to improve cultural trade with other countries. The private sectors as well as foreign competitors have reshaped the cultural market during the past three decades, meanwhile, governmental intervention in this sector has decreased.


Cultural trade has increased dramatically since China’s accession to the WTO. Since the opening-up reform, the cultural trade of China has suffered a huge trade deficit.\textsuperscript{14} Export of Chinese cultural products accelerated greatly during the ‘11\textsuperscript{th} Five Year Plan’ which started in 2001. From 2001 to 2010, export of cultural goods and services increased by 8.7 times.\textsuperscript{15} Chinese culture products became more and more internationally competitive as a result of the promotion of cultural exports. However, as this trade sector is still heavily influenced and intervened by the government, several legal issues have already been brought either under WTO or other trade contexts.

Before asking the question of how did the Chinese government construct and adjust its laws and policies on cultural industry under the WTO context, it is necessary to understand the distinctive characteristic of cultural products in China and the special structure in terms of regulation.

Given the unusual route that China has taken during its economic development, the history of China’s cultural industry is much shorter compared to the European and US counterparts, whose mature industry had mainly been constructed by the forces of market economy. In the first thirty years of the new People’s Republic of China, culture was tightly controlled by the Chinese Communist Party (CCP) that any cultural activities and programs had to be made to serve the interests of socialism. Commercial value has been debatably\textsuperscript{16} attached to cultural products after China’s economic reform started from 1978. Now, the cultural industry is defined as ‘the aggregation of activities and related activities that aim to provide to the public with cultural entertainment products and services’ according to an official document

\textsuperscript{14} For example, the ratio of book copyright trade deficit in 2005 was 15:1.
\textsuperscript{16} The commercial attribution of cultural products has been criticized in modern Chinese literatures regarding to cultural industries. See: Zou, G. and Xu, Q. (2006), supra n.12.
released by the National Bureau of Statistics of China.\textsuperscript{17} Generally speaking, there are two main branches that in charge of the administration and law: the National People’s Congress (NPC) and the State Council. The NPC is the highest organ of state power that holds legislative, decision-making and supervisory powers. In terms of the execution of state power, the State Council is the highest level reporting body for all China’s Ministries and governmental bureaus. The Chinese cultural market regulatory infrastructure involves several governmental agencies. Their responsibilities and relationships shall be discussed as below.

The Department of Publicity (DOP) has a prior position in the whole regulatory framework. The DOP sets all general guidelines for all other relevant organs in terms of how the Party message should be disseminated and enforced via various cultural expressions, such as TV, film, printing, and Internet. In addition, the DOP reports directly to the Central Committee instead of the State Council. It can also supervise certain ministries of the State Council, such as the Ministry of Culture, and the State Administration of Radio, Film and TV, etc. Within the State Council, it is the State Council Information Office that deals with foreign entities, especially media corporations in terms of the approval of the establishment of representatives.

The Ministry of Culture (MOC) is an agency of the State Council that is responsible for setting out guidelines for cultural and art-related policies and principles, and to draft cultural and art-related laws and regulations. In addition, the MOC exercises industrial supervision power over cultural and art-related commercial operations and guides comprehensive law enforcement in cultural markets.\textsuperscript{18} In terms of audiovisual market, the MOC is responsible for the supervision and administration of import, wholesale, retail and rental of audiovisual products. The State Administration of

\textsuperscript{17} The Notice on Cultural and Related Industries Classification. The document classified cultural industries in China for the first time. See: http://www.stats.gov.cn/tjbz/lyflbz/xgwj/t20040518_402154090.htm (accessed on 20 November, 2011)

Radio, Film and TV (SARFT) is an institution directly under the State Council. It is responsible for setting and executing policy for the production, exhibition and distribution of domestic, co-produced and foreign radios, films and television programs. The SARFT directly controls not only state-owned radio and television enterprises, but also movie and television studios and other non-business organizations that produce audiovisual programmes. It also provides censorship over any broadcasting materials in terms of their compatibility with Chinese cultural standards. Similar to the SARFT, the General Administration of Press and Publications (GAPP) has responsibilities for regulating publishing industry. It should be mentioned that the Ministry of Information Industries (MII) is the specific regulator in the telecommunications and electronics industries. As the new technology develops, China has not set an explicit regulatory framework in its new media sectors, one example is, the IPTV. In practice, the MII, GAPP and SARFT often encounter disagreements over their regulatory territories. The regulatory structure can be seen from the Chart below:

Regulatory Agencies

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5.3 Elements of law and policy in Chinese cultural sectors

Cultural sectors are still under heavy state intervention in China. Important legal and policy measures include, content requirement (both quantitative and qualitative), financial supports and ownership restrictions.

5.3.1 Content requirement

China limits the import of foreign content by setting up import quotas for the film, television and other audiovisual sectors. Beside the quantitative restrictions, which can be easily found in various law and regulations, qualitative requirements are also imposed on imported audiovisual products. Different from the quantitative quotas, the qualitative requirements are more delicate. They are regulated by government organs as well as certain state-owned enterprises. For example: the content review power belongs to two state-owned corporations: the China Film Import and Export Corporation and Huaxia Film Distribution. Only the two corporations have the right to import films.

Quantitative restrictions have been widely imposed on films, television programmes and other audiovisual goods or services. In the film sector, the Article 44 of the Regulation on the Administration of Films stipulates that:

‘Article 44 The ratio of time spent on the projection of domestic films and that spent on the projection of imported films shall be consistent with stipulations.'

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20 For example: film quotas, the content review power belongs to two state-owned corporations: the China Film Import and Export Corporation and Huaxia Film Distribution. Only the two corporations have the right to import films.

The time spend every year by a film projection unit on the projection of domestic films may not be less than two thirds of the total time spent annually by the same projection unit on film projection.

Accordingly, foreign films share a maximum of one third of the annual cinema screenings. As for the number of foreign films, China listed under GATS specific schedule that China imports maximum of twenty films per year on a revenue sharing basis.\(^\text{22}\) Over the past ten years, the quota has not increased although there is continuing pressure from the US and EU.\(^\text{23}\) It should be noted that, films that are classified as ‘only digital theatres’ are not subject to the foreign film quota system. However, the low amount of digital screenings limited the import of digital films. Till the end of 2010, China has 4,312 digital screens compared to 15,774 of the US, and most of them are in the developed cities like Beijing, Shanghai and Shenzhen. In the television sector, the quota system varies from broadcaster to broadcaster. Broadcasters in China can be classified according to different administrative hierarchies. At the provincial level, a quota of 20 hours per year of imported foreign TV drama programmes has been allotted. Exceptions are made for several major channels, like Beijing TV, Shanghai TV and Hunan TV, for they can import up to 50 hours per year. In addition, there are some other screen time restrictions. For example, no foreign animation programmes can be shown from 17.00 to 19.00, and no foreign

\(^{22}\) Sector 2.D of China’s GATS Schedule additional commitments: ‘Without prejudice to compliance with China’s regulations on the administration of films, upon accession, China will allow the importation of motion pictures for theatrical release on a revenue-sharing basis and the number of such importation shall be 20 on an annual basis’.

\(^{23}\) Hollywood’s chief lobbying arm and federal trade officials are laying the groundwork for negotiations with China that could substantially increase the number of American films allowed in the country after the China-Audiovisual case. The negotiation is not only focus on the power of import rights, but also trying to increase the annual quota from 20 to 40 films. See: [http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/05/hollywoods-chief-lobbying-arm-and-federal-trade-officials-are-laying-the-ground-work-for-negotiations-with-china-that-could-s.html](http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/05/hollywoods-chief-lobbying-arm-and-federal-trade-officials-are-laying-the-ground-work-for-negotiations-with-china-that-could-s.html) (accessed on 11 December 2011); EU also expressed its concerns on the negative effect of the film quota system of China on the Fourth EU Film Festival which was held in Shenzhen, China in October 2011.
TV series or movies can be shown from 20.00 to 22.00. Compared to the film and TV sectors, quotas for foreign content on home video products are less burdensome.\textsuperscript{24} According to Ministry of Culture, the administrative organ for the import of audiovisual materials, there is no quota on the number of hours or titles in terms of importation. However, the imported products are subject to strict censoring standards, which will be analyzed in the next section of this chapter.

Qualitative requirements mostly refer to the censorship or content review mechanism. All the authorities mentioned in the last section practice censoring powers in different cultural sectors respectively. There are three issues worth to be mentioned here:

First, the review standard: compared to the quantitative quotas, the qualitative requirements are more delicate. In the Regulation for the Administration of Films, the State Council stated that without passing the content review, films are not allowed to be distributed, projected, imported or exported.\textsuperscript{25} Article 25 listed ten types of content that should be prohibited:

\begin{enumerate}
\item That which defies the basic principles determined by the Constitution;
\item That which endangers the unity of the nation, sovereignty or territorial integrity;
\item That which divulges secrets of the State, endangers national security or damages the honor or benefits of the State;
\item That which incites the national hatred or discrimination, undermines the solidarity of the nation, or infringes national customs and habits;
\item That which propagates evil cults or superstition;
\item That which disturbs public order or destroys public stability;
\item That which propagates obscenity, gambling, violence or instigates crimes;
\item That which insults or slanders others, or infringes upon the lawful rights and interests of others;
\end{enumerate}

\textsuperscript{24} UNESCO (2007). Supra n.19. p.33
\textsuperscript{25} See: Chapter III of the Regulation for the Administration of Films, adopted at the 50th executive meeting of the State Council (No. 342) on December 12, 2001, came into force on February 1, 2002.
(9) That which endangers public ethics or the fine folk cultural traditions;
(10) Other contents prohibited by laws, regulations or provisions of the State.

China does not apply a motion picture rating system like the US, Hong Kong, or Singapore, but the implementation of which provided by relevant authorities vary from case to case. These standards focus on the content that has negative effects to public morals, the unity of the nation, national customs and habits, ethical cultural traditions, etc. The standards also apply in television programmes\(^{26}\) as well as other audiovisual products\(^{27}\). The room for interpretation of the standard is quite big, and subjects to the discretion of competent authorities.

Second, the review authorities: in the last section, several governmental authorities and their respective responsibilities have been discussed. Although they have different roles in different cultural sectors, they all have censoring powers. These authorities serve as the central censorship mechanism and decide what kind of content can be imported to China, through various mediums like newspapers, magazine, TV programmes, theatrical released movies, online content, etc. In addition to the government bodies, certain business entities also have the power to review the imported cultural products. For example, the China Film Import and Export Corporation and Huaxia Film Distribution are the only two corporations that have trading rights of films. In order to be imported, foreign films must obtain an approval certificate from these two wholly state-owned enterprises. This practice has been challenged by the US in the *China-Audiovisual* case\(^{28}\), which will be analyzed in the second part of the Chapter. It is worth mentioning that the practice of including certain state-owned enterprises into the censorship mechanism has undermined the

\(^{26}\) See: Article 19 of the Measures for the Administration of the publication of Audiovisual programs through the Internet or Other Information Network, promulgated by the State Administration of Radio, Film and Television on June 15, 2004, came into force on October 11, 2004.

\(^{27}\) See: Article 6 of the Measures for the Administration of Import of Audiovisual Products, the Ministry of Cultural and the General Administration of Customs, No. 23, 2002. Entered into force on June 1, 2002.

predictability and transparency of the whole content review system, as corporations have biases.

Third, the review procedures: as mentioned before, the content review mechanism does not have a practical review standard, and the power division within the competent authorities is rather unclear. Therefore, the review procedures are time-consuming. As the development of technology, the speed of dissemination of content has been greatly improved via Internet or other digital mediums. During the restrictive censoring period, movies, books, or other audiovisual products would have already been widely circulated in the pirated markets. The situation has not only affected the interests of foreign cultural producers and business operators, but also damaged China’s market order on cultural products.

5.3.2 Financial supports

The provision of subsidies or other financial support to domestic cultural products producers would indirectly treat imported cultural products less favorable than domestic ones. The Chinese cultural sector has undergone a huge shift from ideology to industry as a subsequent result of the opening-up reform initiated from 1978. Cultural industry as an official industrial classification was inaugurated in 2001. Since then, the differentiation between ‘public cultural institutions’ and ‘commercial cultural enterprises’ were physically separated in order to clarify their different missions, means and ends of development. However, the standard of public cultural institutions and commercialized cultural enterprises differ from sub-sector to sub-sector. Therefore, until now, there were no uniform or explicit rules and

29 UNESCO (2007), supra n.19, p.33
30 For example, regulations grew more complex in the commercialized, monopoly cultural sectors of news, broadcasting, and television sectors. Capital entry into those sectors are highly contested and unstable because of policy fluctuations. State capital is authorized to monopolize media heavyweights but told to exit from medium and small media companies. Therefore, size does matter in the transition period of cultural sectors. See: Wang, J. (2003) ‘Framing Policy Research on Chinese ‘Cultural Industry’: Cultural Goods, Market-State Relations, and the International Free Trade Regime’, Critical Policy Studies of China International Workshop, MIT Center for
guidelines to distinguish the different treatment of the aforementioned two categories.

On the 17th Conference of the CCP, cultural development was referred to as a source of creativity and a driving force for the construction of national solidarity. The development of cultural industries shall aim at enhancing ‘cultural creativity’ through building ‘the soft power of the Chinese Culture’. Accordingly, new and specific policy measures were proposed echoing the China’s 11th five years guideline. These measures include the establishment of cultural organs, the training of a group of core cultural entrepreneurs and the introduction of strategic investors into cultural industries. During the 11th Five-Year, significant financial support was put into the cultural sector. In 2005, national expenditure on culture, sport and media was 60 billion Yuan (about 6 billion pounds), while the figure rocketed to 154 billion in 2010, with an increase rate of 20.9% annually. In 2006, the Ministry of Finance and the Department of Publicity jointly issued a document named Several Economic Policies Regarding Further Support of the Development of Cultural Undertakings, according to which, the implementation of several preferable economic policies regarding movie industries were called for. ‘Special Fund for Quality Films’ has been set up for the production of qualified domestic films. Intriguingly, there were no additional provisions to explain the criteria of ‘quality movie’ and of the eligibility of commercial entities. In practice, the interpretation and implementation of the documents relies on competent authorities at different levels. Due to the ambiguous classification of both the commercialized and non-commercialized sectors, the


The Five-Year plans established by the CCP contain a series of economic development initiatives, which have been playing a leading role in shaping economic development strategies, setting growth targets and implementing reforms. The 1st Five-Year-Plan was launched in 1953. The 11th Five-Year-Plan covered the period from 2006 to 2010; it emphasized the importance of development in service sectors, where cultural industries gained significant support for the first time.


Agreed by the General Office of State Council, Decree no. 43, June 9, 2006.
authorities implement the relevant provisions on a case-by-case model.

In addition to the direct fund provided by the government, tax incentives are also regarded as important financial support measures. In order to encourage the development of cultural industries, the government adopted various taxation incentives. In the Notification of Tax Policy Issues in Supporting the Development of Cultural Industries jointly issued by the Ministry of Finance, General Administration of Customs and State Administration of Taxation, three main taxation measures were granted to cultural industries. First, the newly established cultural enterprises can enjoy an exemption from corporate income tax for three years. In the appendix, the Notification gave an inventory list regarding the types of cultural enterprises that can enjoy this tax concession policy. Book publication, film, television broadcasting and other audiovisual industries are all covered accordingly. It should be noted that enterprises that engage in import and export of cultural goods or services are also within the scope of the favorable treatment. Second, in order to encourage the export of cultural goods and services, cultural enterprises are entitled to enjoy the export tax rebate policy. Accordingly, the revenue obtained abroad is exempted from operation tax as well as enterprise income tax. Third, the tax incentive measures have significantly lightened the burden of the domestic film industries, because for film industries, the value added taxes from the income of selling the film copies, and the operation tax from the revenue gained by the film distributors from projectors constitutes their major taxation burden. The Notification waived the aforementioned two types of taxations, and greatly enhanced the profit of the related domestic enterprises.

36 According to Article 1 of the Notification (ibid). The exemption starts from the day of registration. ‘Newly established cultural enterprises’ refer to enterprises which registered after January 1, 2004.
38 Article 3 and 4 of the Notification.
39 Article 8 and 9 of the Notification.
5.3.3 Foreign participation and ownership regulation

Due to the ambiguous distinction between commercialized cultural industries and non-commercialized cultural undertakings, the degree of private and foreign participation in cultural industries varies among different sectors.

For a long time, film production, distribution and projection had been dominated by state-owned enterprises. Along with the opening-up reforms, film industries have experienced significant changes. In film production, the Regulation on the Administration of Films issued in 1996\(^{40}\) stated that ‘the state encourages official organs, enterprises, institutions and other social organizations and citizens to participate in film production by investing or giving financial aid’.\(^{41}\) In addition, the Regulation granted permission to the Sino-foreign joint productions. However, a production approval for the joint production was essential, and the permission was only valid for the ‘present application’.\(^{42}\) The 2001 amendment of the Regulation retains this requirement and the related administrative procedures. Although joint production of films had been permitted, the establishment of a joint film production company had not been allowed until the enactment of the Interim Provisions on Operation Qualification Access for Movie Enterprises\(^{43}\) in 2004. It should be noted that the proportion of foreign capital among the registered capital shall not exceed 49%.\(^{44}\) Following this provision, the first joint film production company was


\(^{41}\) Article 17, ibid.

\(^{42}\) Article 19, ibid.

\(^{43}\) Examined and adopted at the executive meeting of the State Administration of Radio, Film and Television on June 15, 2004, and promulgated together with the Ministry of Commerce. Entered into force on November 10, 2004. Article 6 stated that: ‘The establishment of a movie production company of a company, enterprise or other economic organization inside China with an overseas company, enterprise or other economic organization in the form of equity joint venture or cooperative joint venture is permitted. To apply for establishing a joint venture company, the Chinese party shall file an application to the SARFT.’

\(^{44}\) Article 6(3), SARFT (2004), ibid.
established by China Film Group, and Time Warner and Hengdian Group.\textsuperscript{45} Independent film production company run by foreign entities are still not allowed even though the market access barriers have been brought down dramatically. In terms of right and obligation, the same treatment has been granted to the joint film production companies compared to domestic ones.\textsuperscript{46} Foreign ownership of theatre chains has been granted, but subjected to strict scrutiny. After the revisions in China’s Joint Venture Law in 2005, a foreign majority in cinema chains was allowed. However, the majority ownership by foreign entities does not give them the privilege to take precedence of the projection of foreign movies. The sequence of film showing should be subjected to the provisions in the Regulation on the Administration of Films and the censorship taken by the State Administration of Radio. At the distribution side, the entitlement to establish a distribution company is limited to companies, enterprises and other economic organizations inside China, excludes foreign-funded enterprises from its entity catalogue.\textsuperscript{47}

China’s television broadcasting infrastructure does not allow either domestic private or foreign investment in any forms. The broadcasting sector remains strictly in the government’s hands, although in the new media sectors, private and foreign ownership regulations are comparatively loose. For example, there are very few restrictions on private ownership in new media content creation companies. It can be seen that as long as ‘content’ is concerned, the regulations are very strict in terms of the production, distribution and projection stages. As will be discussed in the following sections, the most trade-restrictive measures come from the strict censorship mechanism. China is under no obligation to amend its content review standards and procedures regarding cultural products under either WTO or any other trade frameworks. Therefore, it is unlikely that China will allow private or foreign investment into its broadcasting infrastructure or engage further in other

\textsuperscript{45} Warner China Film HG Corporation, registered in December 2004, right after the adoption of the Interim Provisions.

\textsuperscript{46} Article 7, SARFT (2004), supra n.32

\textsuperscript{47} Article 10, SARFT (2004), supra n.32.
content-related industries in the near future.48

5.4 Interaction with WTO law

5.4.1 Impact of WTO rules on China’s cultural law and policies

The examination of the compatibility of China’s cultural policy and the WTO law will be taken under GATT and GATS frameworks respectively.

5.4.1.1 GATT

In terms of trade in goods, China has dramatically brought down its tariff rate, and improved its quota and licensing policies regarding cultural products according to its concession schedule.49 However, there are several national measures whose compatibility with WTO is under challenge, especially the trading right problem and the related content review mechanism.

The liberalization of trading rights is a commitment made by China in its Accession Protocol. In terms of cultural goods, trading rights have been controlled by certain state-owned enterprises. The US has successfully challenged China on this issue in China-Audiovisual case. Both the Panel50 and the AB51 ruled that China acted inconsistently with its trading rights commitments. However, the implications of the WTO decisions were rather limited. Even though trading rights had been granted to other entities other than certain nominated state-owned enterprises, cultural goods are still subject to a strict content censorship mechanism imposed by Chinese authorities. Therefore, the censorship mechanism is the actual barrier for the trading of cultural goods.

48 UNESCO (2007), supra n.19, p.42
49 See: Section IA and IB of the Annex 8 of the Protocol on the Accession of the People’s Republic of China.
As part of the accession commitments, China agreed that within three years of its accession, ‘all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this protocol. Such right to trade should be the right to import and export goods.’

Accordingly, trading rights of cultural goods, such as reading materials (e.g. books, periodicals, newspaper and electronic publications), AVHE products (e.g. videocassettes, VCDs and DVDs), sound recordings and films for theatrical release should be granted to all enterprises, either domestic or foreign-owned ones. The US claimed that China forbid any foreign enterprises or foreign individuals to import cultural products through a variety of measures, and only grants the trading right to certain wholly state-owned enterprises. These measures can be found in several regulations enacted by competent authorities, such as *The Catalogue for Guidance of Foreign Investment Industries by the Ministry of Commerce* and *The Several Opinions of the Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, National Development and Reform Commission and the Ministry of Commerce on Introducing Foreign Investment into the Cultural Sector*. These regulations explicitly prohibit non-state capital from engaging in the importing of cultural products. Cultural sectors are deemed as sensitive domains. The government has maintained strict control even though China’s media and cultural sectors have become increasingly commercialized over time.

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52 Accession Protocol, para.5.1 and 5.2; According to paragraph 83 of Report of the Working Party on the Accession of China (WT/MIN(01)/3, November 10, 2001), all foreign enterprises and all foreign individuals shall have the right to import the products into China following a transition period. That transition period shall end in 2004. Paragraph 84 of the Report provides that China would grant the trading right in a ‘non-discriminatory and non-discretionary way.’


54 Order [2005] No.19 of the Ministry of Culture, July 6, 2005

The content control of cultural products is carried out by the Content Review Mechanism that can be seen from a combination of internal guidelines of the Party’s propaganda authorities. Only a small group of state-owned entities whose management personnel are controlled by the government are deemed as competent entities in introducing foreign content. At the managerial level, anyone who breaches or misjudges the internal guidelines would risk the loss of their position and other internal punishment according to Party discipline. It can be seen that the policy is driven by political concerns rather than economic ones. The content review mechanism imposed on cultural products is considered as anti-competitive, and it discriminates against the trading rights of foreign entities. China defended itself against the US claim by invoking Article XX (a) GATT in the dispute. The reservation of trading rights is part of the content review mechanism, which is a gateway to protect public morality according to China’s argument. However, the dispute settlement body found the argument was weak in itself.

Both the Panel and the AB held that in order to protect public morals, China has the right to monitor the content of the cultural products and prohibit their importation if prohibited content is contained. However, the measure adopted by China—the

56 Ibid. p.41
57 Ibid. p.42
59 The issue of whether China could use GATT provision to defend a violation under its Accession Protocol is not going to be discussed in this thesis.
60 Panel Report, supra n.58, para.7.766
exclusion of all foreign-invested enterprises and non-state-owned entities from engaging in importation activities was not necessary to protect public morals. In reaching this conclusion, the AB applied the necessity test from previous jurisprudence. In Brazil-Retreaded Tires\textsuperscript{61} Case, a ‘weighing and balancing’ process had been developed in measuring whether a measure is necessary to invoke the exceptional clause of Article XX (a). Three elements is showed as below:

\begin{enumerate}
  \item the relative importance of the interests or values furthered by the challenged measure;
  \item the contribution of the measure to the realization of the ends pursued by it;
  \item the restrictive impact of the measure on international commerce.
\end{enumerate}

After consideration, the Panel was ‘not persuaded’ that the reservation of trading rights made a ‘material contribution’ to the protection of public morals.\textsuperscript{62} The Panel had no doubt in establishing the relationship between content review and the protection of public morals,\textsuperscript{63} the real problem was that the Panel was ‘not convinced’ that only state-owned enterprises could conduct content review properly, as argued by China.\textsuperscript{64} The Panel did recognize that the alternative measures to carry out the content review functions would require China to invest additional human and financial resources.\textsuperscript{65} As China had not proved that the alternative ways would impose an undue burden that it could not afford, the Panel denied China’s defense under Article XX (a). China’s measures were ruled inconsistent with its trading right commitments under its Accession Protocol. The AB upheld the Panel’s finding and filed against China on this regard.

\textsuperscript{61} Brazil—Measures Affecting Imports of Retreaded Tires, WT/DS332/AB/R, December 3 2007.
\textsuperscript{62} Panel Report, supra n.58, para.7.863.
\textsuperscript{63} ibid, para.7.816-7.819.
\textsuperscript{64} ibid, para.7.858.
\textsuperscript{65} ibid, para.7.903-7.906.
China made amendments based on the WTO rulings on the *China-Audiovisual* case.\(^{66}\) The State Council presented amendments for several governmental regulations in March 2011.\(^{67}\) In the amendments, state-owned enterprises no longer monopolize the imports of cultural products. Pursuant to the amended provisions, any entities may engage in the importation of cultural products once they have been approved by the government.\(^{68}\) The removal of state-owned enterprises as the only importers demonstrated China’s intention to comply with its commitments under WTO law. However, until now, neither private nor foreign entities have been approved as importers of cultural products after the amendments. The real influence of this ruling on foreign entities and foreign cultural products remains to be seen. Pauwelyn (2010)\(^{69}\) argued that the ruling cannot challenge the fundamental issue at the state, as the most important question is what can be traded, instead of who can trade.

China has made amendments in order to be more WTO-consistent. However, the liberalization of trading rights alone cannot guarantee a liberal trade environment for cultural goods. It is the content review mechanism that imposes strict restrictions on what can be imported into China. If China centralizes its censorship power and nominates certain government agencies to conduct content review tasks instead of nominating state-owned enterprises,\(^{70}\) the market access of cultural products may get worse, because the more centralized the review body is, the more red tape and delays occur. The WTO decisions cannot affect China’s political censorship or the censorship criteria. The elimination of state-owned enterprises as the only eligible entity to import cultural products cannot fundamentally shake the content review

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\(^{68}\) See: Article 41, 43 of the Regulation on the Management of Publications, and Article 27 of the Regulations on the Management of Audiovisual Products.

\(^{69}\) Pauwelyn, J. (2010), supra n.21.

\(^{70}\) The General Administration of Press and Publication approved 42 wholly state-owned entities to import reading materials into China; for finished audiovisual products, only one entity has been approved; for films, two entities have been approved.
mechanism. Therefore, the US may win the case, but pushing China to be more WTO-consistent on its trading rights commitment has brought limited benefits to the US cultural industries. The case did successfully put China’s opaque and arbitrary content review process under question. However, there are also some positive signs. According to Article X GATT, members are required to publish all of its laws, regulations, judicial decisions and administrative rulings of general application pertaining to trade in goods. China’s content review mechanism is very likely to be challenged because it lacks transparency and due process. In addition, China promised to carry out transparency and due process of laws, regulations, judicial decisions and administrative rulings in the accession protocols. China was recently involved in a WTO dispute in this regard. In China-Wind Power Equipment, the US claimed that China acted inconsistently with the obligations under Accession Protocol because China failed to provide full copies of its domestic relevant rules in translated version. Therefore, the content review mechanism would be a potential target if it remained a bottle neck that significantly restricted the free flow of cultural products.

WTO may have its hands tied in challenging the political censorship imposed by the government. However, the legitimacy of the content review mechanism has already raised concern under GATT framework. The mechanism needs to be more transparent and explicit to provide a due legal basis for foreign products. Therefore, solving the question of who can import is only the first step. It is the pre-condition to solve the second question of what can be imported.

5.4.1.2 GATS

China has been challenged on its GATS-inconsistency under Article XI and XII in the China-Audiovisual Case. The US claimed that certain Chinese law and regulations

71 China-Measures Concerning Wind Power Equipment, Request for Consultation by the US, WT/DS419/1, January 6, 2011. The US claimed that China was in violation of its obligation under the Accession Protocol because it had not made available a translation of relevant measures into one or more of the official languages of the WTO.
have violated its market access and national treatment obligations under GATS. Most of the complaints referred to distribution services. In the Accession Protocol, China has made market access and national treatment commitments under distribution services and audiovisual services sectors in its Services Schedule. Therefore, China is bound to by market access and national treatment obligations on the distribution services of audiovisual products. Measures which were relevant to the dispute include: master distribution (the sale of audiovisual products exclusively by a single distribution); distribution (includes master distribution, wholesale, retail, leasing, and exhibition for sale); sub-distribution (includes wholesale and retail); master wholesale (which is synonymous with master distribution); wholesale (the sale of products to businesses that are not ultimate consumers), and retail (the sale of products to the ultimate consumers).  

The arguments of the case raised several questions regarding the compatibility between Chinese measures and its GATS obligations. The rulings from both the Panel and the AB provided valuable standards in judging the legitimacy of China’s cultural trade policies. In order to analyze the compatibility of Chinese measures to its WTO obligations, the relevant part of China’s Services Schedule regarding distributions services is provided as below:

Table 8: Sector Specific Commitments, Distribution Services, China

<table>
<thead>
<tr>
<th>Sector or Sub-Sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
<th>Additional Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Distribution Services (as defined in Annex 2)</td>
<td>...</td>
<td>...</td>
<td>Foreign-invested enterprises are permitted to distribute their products manufactured in China, including the market access or sector or sub-sector</td>
</tr>
<tr>
<td>...</td>
<td>(3) None, within three years after accession, except for chemical fertilizers, processed oil and crude oil within five years after accession</td>
<td>(3) None</td>
<td></td>
</tr>
<tr>
<td>B. Wholesale Trade Services (excluding salt, tobacco)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Panel Report on China-Audiovisual, para.4.15
column, and provide subordinate services as defined in Annex 2. Foreign services suppliers are permitted to provide the full range of related subordinate services, including after sales services, as defined in Annex 2, for the products they distribute.

(Source: WTO website)

**First,** the distribution services of reading materials and audiovisual products in physical forms provided by foreign entities have been treated less favorably compared to domestic ones. In terms of the distribution of reading materials, there are several prohibition rules over foreign-invested enterprises. For example, several regulations listed imported books, newspapers and periodicals as ‘limited distribution category’. As a result, foreign-invested wholesalers were not allowed to engage in the importation of reading materials. As China has made no limitations on Mode 3 supply under its GATS schedule, the measures that prohibit commercial presence are inconsistent with China’s obligations under Article XVII of the GATS. In addition to the less-favourable treatment on the distribution of imported products, there were also

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73 Article 3 of the Imported Publications Subscription Rule (issued by the General Administration of Press and Publication on December 31, 2004) listed all imported newspapers and periodicals in the ‘limited distribution category’ to be distributed under subscription to subscribers. Article 4 of this Rule stated that only certain GAPP-designated publication importers were permitted to distribute items under the ‘limited distribution category’.

74 Article 42 of the Publications Regulation (issued by GAPP on December 31 2001) provided that only wholly Chinese state-owned enterprise are permitted to import reading materials.
some distribution activities where foreign-entities have been restricted, such as the master distribution.\textsuperscript{75} China defended this by stating that Chinese legislation clearly distinguished two separate distribution channels, and Zong Fa Xing (master distribution referred by the US) is a separate and unique concept, corresponding to a separate activity in a distinct discipline.\textsuperscript{76} The distinction already existed in 1999, before China’s accession in the WTO. Therefore, Zong Fa Xing does not correspond to wholesaling as defined in Annex 2 of its Service Schedule, and China is under no obligation to grant national treatment of such services to foreign entities. However, both the Panel and the AB ruled that the distinguished concept of the mode of distribution under Chinese law could not waive China’s obligations under GATS commitments. As China did not list any limitations under its national treatment column, China is bound to grant national treatment to all foreign enterprises.

Beside the prohibition provisions contained in certain Chinese measures, there are also some less-favorable requirements on foreign-invested enterprises regarding the registration and operation processes. The US alleged that the registration capital of foreign-invested reading materials wholesaler (RMB 30 million, approximately US$4 million)\textsuperscript{77} was much higher than a wholly Chinese-owned wholesaler (RMB 2 million, approximately US$ 286,000). As China has not listed any national treatment limitations with respect to the wholesaling of reading materials via Mode 3 in its GATS schedule, the fifteen-fold capital difference has significantly affected foreign investors’ interests in the wholesaling market. In terms of the operating terms, Article 7.5 of the Publications (Sub-) Distribution Rule\textsuperscript{78} stated that the operating term for foreign-invested wholesalers was limited to 30 years, while there was no such requirement imposed on wholly Chinese-owned enterprises. The US argued that the time limitation had a chilling effect on business opportunities and the commercial

\textsuperscript{75} The restrictions contained in the Catalogue of Industries for Guiding Foreign Investment, Foreign Investment Regulation, and Several Opinions Regarding Foreign Investment in Cultural Sectors.
\textsuperscript{76} Panel Report on China-Audiovisual. para. 7.1007
\textsuperscript{77} Article 7.4 of the Publications (Sub-) Distribution Rule.
\textsuperscript{78} ibid
relations of foreign-invested companies. In defense, China argued that the limitations for foreign-invested enterprises had the effect of guaranteeing foreign-invested enterprises’ business activities within the approved business scope and operating terms, and China had the sovereign right to determine which sectors of its economy should be open to foreign investment. Both the Panel and the AB denied the arguments provided by China and ruled that the limitations were inconsistent with Article VII GATS. It can be seen that China has set many discriminatory measures on the distribution services of reading materials, due to the specificity of content-related products; however, China failed to list relevant limitations in its GATS schedule and made these measures WTO-inconsistent thereafter.

Second, the question of whether China’s GATS commitments extend to the distribution services in electronic forms has also raised concerns. The US claimed that China took measures to prohibit foreign-invested enterprises from engaging in the electronic distribution of sound recordings. China asserted that it only made national treatment commitments on sound recording distribution services in the audiovisual sector to hard copy sound recordings. Both the Panel and the AB rejected China’s assertion, and ruled that the ‘sound recording distribution services’ extended to the electronic distribution of sound recordings. Therefore, China is under pressure of changing the relevant measures and grant national treatments to foreign-invested distributions in electronic forms. Although the ruling makes clear that GATS obligations can apply to the distribution of intangible products, especially...

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79 Panel Report on China-Audiovisual, para.7.1122
80 ibid, para.7.1125
81 The prohibition measures can be found in the Internet Culture Rule, the Circular on Internet Culture, the Network Music Opinions, and the Several Opinions Regarding Foreign Investment in Cultural Sectors.
82 Panel Report, para.7.1144, ‘China rejects the US claims, contending that the services at issue are network music services, a new type of service totally different from the sound recording distribution services listed in China’s Schedule. According to China, sound recording distribution services only covers the distribution of sound recordings embedded in physical media.’
the electronic distribution of sound recordings, the question regarding the distinction between cultural goods and services remains to be solved. The US used to argue that cultural products in electronic forms should be regarded as goods instead of services,\textsuperscript{84} which proposal has met strong objections from the EU and Canada.\textsuperscript{85} In this case, the US did not bring the issue up again and sued China under Article XVII GATS. The implication of this ruling has not contributed to the dispute of distinction, instead, challenging China’s national treatment under GATS has put the US in a passive position, because WTO members like the EU have made great reservations on audiovisual services, it became even more complicated with the US trying to convince the EU to grant national treatment to audiovisual products in electronic forms.

5.4.2 Compatibility between China’s cultural regulatory framework and WTO obligations

It seems that the US has achieved significant success in challenging China’s inconsistency with its WTO obligations through the China-Audiovisual case. China therefore, has made relevant amendments on the WTO-inconsistent measures. There are several problems existing in the current regulatory framework on trade in culture, which are also barriers for China to develop a more coherent and consistent cultural trade legal system at the multilateral level.

The first problem exists in the design of the current regulatory framework. The birth of ‘Cultural Industry’ as a policy category and as an economic sector only occurred a decade ago, since the Tenth Five Year Plan in 2001.\textsuperscript{86} As the cultural sector used to be treated as only as ideology before the opening reform and even in the transition period, the characters of the old system remained in most of the current law and

\textsuperscript{84} Communication from United States, Audiovisual Services, S/C/W/78, 8 December 1998


policies that are governing cultural sectors. China has made significant liberalization commitments especially in services sectors. There are few limitations regarding cultural services, or audiovisual services as specified under the GATS schedule. In contrast, the domestic reform in the relevant law and policies falls far behind. Therefore, controversies widely exist between the domestic regulatory framework and China’s WTO obligations. The current legislation on cultural industries mostly refers to administrative measures and divisional regulations. Those measures and regulations protect their own divisional interests, and there is no legal instrument at a higher level to reconcile the whole cultural system. Consequently, problems like administrative monopoly, barriers for market access and the dominance of state-owned enterprises in cultural sectors have significantly affected China’s further involvement in the international economic order. The amendments in relevant law and regulations cannot fundamentally resolve the above mentioned problems. Instead, a systemic reform which involves changes to the regulatory framework, a better implementation of international conventions regarding culture values at the domestic level is needed.

The second problem comes from the structure of the regulatory framework on cultural sectors. The current regulatory framework has not fundamentally changed compared

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87 At the publication sector, there are three administrative law (i.e. Regulations on the Administration of Audiovisual Products, Regulation on the Administration of Publication, Regulations on the Administration of Printing Industry) adopted by the State Council and 37 divisional regulations adopted by relevant departments that cover publication, distribution, the protection of copyright, the import and export of publications, etc. At the film and broadcasting sectors, there are three administrative law (i.e. Regulations on Broadcasting and Television Administration, Regulations on the Administration of Films, and Provisions on the Ground Receiving Installations for Satellite Television Broadcasting) and 49 divisional regulations that cover the areas of the production of TV programs, the cooperation of international production, the content review of films and TV programs, etc. In terms of the foreign investment on cultural sectors, the Ministry of Culture issued the Investment Guidelines on Cultural Industries.

with the one under the planned economy when the government took all responsibilities for the ‘cultural construction’ of creating arts and cultural programmes, distributing cultural goods, and subsidizing nonprofit arts organizations, through state-owned cultural institutions. Therefore, the government was not only the player but also the referee. Under the current system, state-owned cultural enterprises still occupy a major part of the domestic cultural market.89 The state-owned cultural enterprises are not only regulated by the governments, but also subject to the control of the Party message. As cultural products are deemed as a combination of the carrier of ideology and products with commercial values, the non-government cultural enterprises are also controlled by both the government and the Party, as they have to ensure that any cultural activities and programmes were created to serve the interests of socialism, and keep society in harmony. The Department of Publicity within the Central Committee supervises the whole regulatory framework by controlling the content-review mechanism, and provides guidelines and directions for the development of cultural industries. As the Department of Publicity is situated higher than the ministerial level, the relevant organs within the government have to implement detailed rules in order to carry out these guidelines and directions. Compared to other industries, the dual regulatory framework of the cultural industry has significantly been affected by ideology instead of market forces. As a result, the relevant ministries have tied hands in developing cultural industries according to the market demands, nor can they effectively manage cultural trade. Foreign cultural products are subject to strict and complicated censorship imposed by this regulatory framework. Even though China has made great liberalizing commitments under the WTO, censorship is not going to be affected. Under the current environment, China needs to readjust its regulatory framework. The first step would be the Party and the government switching their role from controller to administer who only provides

89 According to China Appraisal Society, till the end of 2010, the capital of domestic cultural enterprises was over 1,000 billion Yuan, while the capital of state-owned enterprises constitute more than half of the total amount. See: http://www.cas.org.cn/zgpglt1/gnpgh/sctzypjs-2011n/38161.htm (accessed on January 20, 2012)
procedural assistance.\textsuperscript{90}

Third, different from EU and Canada, ‘cultural exception’ strategy has never been officially announced by China. However, according to the analysis above, cultural markets in China is not as open as other trade sectors. The content-review mechanism sets an implicit barrier for foreign content’s market access. The US did succeed in challenging China’s inconsistency with WTO obligations, while the implicit barrier remains intact. It should be noted that the current censorship mechanism is imposed by several administrative measures. These measures can be seen in different cultural sectors, such as publications, films, broadcasting, etc. The ambition of such measures mostly refers to the stability of the society and the fine order of public morals,\textsuperscript{91} However, the value of cultural identity and diversity are not explicitly expressed, despite the fact that the CCD have been ratified at the 25\textsuperscript{th} session of the 10\textsuperscript{th} standing Committee of the National People’s Congress in 2006.\textsuperscript{92} China needs to re-design the regulatory framework to further state the national culture and cultural value it intends to protect and promote. By doing so, the rights imposed by the CCD can be more appealing in defending disputes invoked by other WTO members against China when conflicts between trade and culture are at stake.

5.4.3 An analysis on collisions between China and WTO

China’s case is special compare to the previous two samples. Both China’s cultural industries and China’s WTO membership are much younger than the US and EU. Considered that China has just transferred from planned economy for three decades, the legal framework is far from completed. In addition, political intervene in cultural sectors plays quite an influential role in China’s cultural trade regulation framework, which is considered to be problematic under the WTO law.

\textsuperscript{90} There are several proposals already made to the Central Committee Meeting. For example, at the Sixth Plenary Session of the 17th CCP Conference on October 15, 2011, delegations were discussing about how to deregulate cultural sector and promote the competitiveness of Chinese cultural industries at the global level. See: http://www.china.com.cn/policy/zhuanti/17jlzqh/node_7128674.htm (accessed on January 20, 2012)

\textsuperscript{91} e.g. Article 25 of Regulation for the Administration of Films.

\textsuperscript{92} UNESCO Cultural Diversity Convention Ratified, Xinhua News Agency December 30th 2006.
5.4.3.1 Collisions that are most problematic

Different from the EU case, certain China’s cultural policy measures have been successfully challenged by the US. Although China has incorporated the ruling from the AB, the changes did not fundamentally solve the most problematic collisions between China and the WTO.

First, as China still retains the characters of planned economy, the privileges enjoyed by state-owned enterprises (SOEs) significantly restricted other commercial entities’ rights in certain businesses. The trading rights of cultural products were strictly controlled by the state, only business entities nominated by the state were allowed to import cultural goods and services, such as reading materials, AVHE products, films for theatrical release, and related services. The restrictions significantly discriminate both domestic private businesses and foreign participated business entities, and run against China’s commitment under its Accession Protocol. In the amendments after the *China-Audiovisual* case, the state still maintain the control of import rights, although the nominated SOEs no longer enjoy the monopolized privilege. China’s strict control over trading rights of cultural products put foreign business entities in a passive position. No foreign enterprise has ever engaged in this business till today, it is foreseeable that foreign businesses are hardly be considered as eligible entities in the near future, not only because the administrative procedures are more complicated for them, but also because of political sensitive reasons.

Second, many service areas relating to cultural products are not open to foreign businesses. Similar to the last point, for political and administrative reasons, foreign service suppliers do not enjoy the same competition conditions in distribution and audiovisual service sectors. SOEs are still heavily involved in those service businesses that foreign suppliers cannot fairly participate in. Such de facto discrimination breach China’s obligation under its GATS commitments, and will surely be targeted more often by other WTO members.

5.4.3.2 Collisions that are less problematic but nevertheless warrant further attention

Although the content review mechanism significantly discriminate foreign cultural
products by imposing opaque review procedures and substantive rules on products from foreign origin, the mechanism itself is not subject to the WTO rules. WTO has limited competence in challenging the political censorship imposed by the government. However, according to Article X GATT, China is required to make its internal rules (including laws, regulations, judicial decisions and administrative rulings) more transparent and less disputable. China’s content review mechanism is very likely to be challenged accordingly because it lacks transparency and due process. The mechanism need to be more transparent and explicit to provide a due legal basis for foreign cultural goods and services. Future development shall address the collision in a more least-trade-distortive manner.

In addition, the quantitative commitments made by China under its GATS schedule have been complained as not sufficient. Only 20 foreign movies were promised according to China’s commitment. Such limitation does not raise compatibility problem under WTO law, however, it becomes a target of criticism because the quantity cannot meet the demands in China’s film market. The quota shall be increased in the near future because more political pressure has been imposed on the issue.93

5.4.3.3 Collisions that are the least problematic at the current stage

Among China’s regulatory measures, financial measures are least problematic at the current stage, although the measures are discriminatory in nature. China’s cultural industries are heavily subsidized by the state. Many cultural enterprises are not private, but formed by governmental agencies. They do not considered as normal business entities, instead, they perform cultural undertaking functions that provide special goods or services to the general public. Therefore, those subsidies cannot be targeted under the WTO current subsidy rules. The more urgent issue is to reform China’s cultural regulatory regime, strike out certain SOEs from the competition of cultural industries, and engage more participation by private sectors both in domestic and foreign origin.

93 During President Xi Jinping’s visit to the US, the MPAA filed a petition to ask China increase its import quotas under the multilateral trade framework.
5.5 Trade in culture under China PTAs

5.5.1 An Overview of China’s PTAs

China began to participate in regional and bilateral trade cooperation during the negotiation process of WTO accession, started with the negotiation with ASEAN.\(^{94}\) On November 4, 2002, China and ASEAN started a Framework Agreement on Comprehensive Economic Cooperation, which is the premise for the ASEAN-China Free Trade Area (ACFTA). China has basically developed a landscape of ‘focusing on Asia-Pacific and reaching out globally’\(^{95}\) in its PTA participation. Altogether, by the end of 2011, there were nine bilateral or regional trade agreements in force, and five has been made early announcements (see Table 10). These PTAs involved 29 countries and regions and amount to one-fourth of China’s foreign trade.

Table 9: FTA Signed by China

<table>
<thead>
<tr>
<th>PTA</th>
<th>Country/Region</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notified RTA in</td>
<td>Mainland-Hong Kong</td>
<td>Took effect in January 2004, supplementary agreements signed.</td>
</tr>
<tr>
<td>Force</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>China-ASEAN</td>
<td>The Agreement on Trade in Goods was signed in November 2004 and took effect in July 2005. The Agreement on Trade in Services was signed in January 2007. The Investment Agreement was signed in August 2008</td>
</tr>
<tr>
<td></td>
<td>China-New Zealand</td>
<td>The Agreement was signed in April 2008, took effect on October 1, 2008</td>
</tr>
</tbody>
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\(^{94}\) The Association of South East Asian Nations, comprised by 11 member countries: Indonesia, Laos, Brunei, Cambodia, Malaysia, Philippines, Singapore, Thailand and Vietnam and China. As China’s first FTA, the ACFTA took effect on July 20, 2005.

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>China-Pakistan</td>
<td>Signed in November 2006 and took effect on July 1, 2007. The Agreement on Trade in Services was signed in October 2008</td>
</tr>
<tr>
<td>Asia Pacific Trade Agreement</td>
<td>The agreement was signed in April 2001. From September 2006, China was entitled to preferential tariffs from India, Korea, Sri Lanka and Bangladesh</td>
</tr>
<tr>
<td>China-Chille</td>
<td>The first Agreement was signed in November 2005, the Agreement in Goods was entered into force in October 2006, and the Agreement in Services was entered into force in August, 2010.</td>
</tr>
<tr>
<td>China-Australia</td>
<td>Negotiations started in May 2005</td>
</tr>
<tr>
<td>China-Costa Rica</td>
<td>Negotiations started in January 2009, the agreement has been signed in April 2010</td>
</tr>
<tr>
<td>China-The Association for Relations Across the Taiwan Straits, The Straits Exchange Foundation</td>
<td>The early announcement signed in June 2010.</td>
</tr>
<tr>
<td>China-Switzerland</td>
<td>Negotiations started in January 2011.</td>
</tr>
<tr>
<td>China-India</td>
<td>Study started in April 2005</td>
</tr>
<tr>
<td>China-Republic of Korea</td>
<td>Study started in November 2006</td>
</tr>
</tbody>
</table>


The trade between China and its Asian neighbors constitutes more than 60% of
China’s foreign trade in financial terms.\textsuperscript{96} China has been developing a comprehensive Asian Economic Integration framework through the regional cooperation plan, such as the preferential trade agreements with Southeast Asia (ASEAN), Northeast Asia (Japan and Korea), Central Asia (Shanghai Cooperation Organization)\textsuperscript{97} and South Asia (with India and Pakistan). China is playing a central role in the Asian Economic Community. Domestically, Mainland China speeded up the process of cooperation between Hong Kong, Macau and Taiwan to establish a ‘Greater China Free Trade Area’.\textsuperscript{98} In addition, China is also developing its preferential trade arrangements with developing countries like Chile in South America, Southern African Customs Union in Africa, and developed countries like Australia and New Zealand. It can be seen that the overall strategy for China’s preferential trade arrangement is to ‘build a free trade rim encompassing most adjacent countries and regions and a global free trade area network covering the major countries across the five continents’.\textsuperscript{99} Besides the construction the ‘Pan-China Economic Area’, China is also seeking an equal dialogue with the most developed world like the EU and North America in order to promote economic development and prosperity.\textsuperscript{100}

To some extent, China’s regionalization approach is greatly motivated by political or geopolitical considerations rather than economic ones. It has been described as a non-market-led cooperative regionalism which could lead to diversion instead of trade creation.\textsuperscript{101} Compared with the multilateral trading system, China has more motivation to participate in the regional trade arrangements. First, regional arrangements serve China’s overall interests not only at an economic level, but also

\textsuperscript{96} ibid. p.26
\textsuperscript{97} The Shanghai Cooperation Organization is an intergovernmental mutual-security organization established in 2001 by China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan.
\textsuperscript{98} Refers to the economic integration of Hong Kong, Macao, Mainland China and Taiwan.
\textsuperscript{99} Chen, T. (2009), supra n.95. p.36
\textsuperscript{100} Ibid. p.37
reduce uncertainties and enhance credibility within a certain region.\textsuperscript{102} China’s ‘good neighboring’ policy strategy serves both the economic and political interests of China. Second, considering China’s special regulatory framework, certain sectors, especially service sectors have been heavily intervened by the state. The liberalization of such sectors is time-consuming and delicate. As PTAs involve few countries, domestic policy can be coordinated easily and the costs of negotiation are relatively low,\textsuperscript{103} given the fact that China has significant divergence with the US and EU, especially on human rights and environment issues.

5.5.2 China trade in culture approach under PTAs

In the audiovisual sector, China has made much further liberalization commitments under preferential trade arrangements in comparison with the WTO. However, the degree of commitments varies from one sector to another. This section examines three different kinds of preferential trade agreements that China participated in. The Closer Economic Partnership Agreement (CEPA) among Mainland China, Hong Kong and Macau; the trade agreements negotiated with neighboring countries, and the agreements between China and remote countries, such as New Zealand and Chile.

First, the CEPA is the most sophisticated free trade agreement negotiated by Mainland China so far. In terms of goods, mainland China has applied zero tariffs to all imported products produced in Hong Kong and Macau since 2006. In terms of audiovisual services, China has affected improvements in all subsectors. The detailed commitments can be seen from the table below:

\textsuperscript{103} Chen, T. (2009), supra n.95. p.31
<table>
<thead>
<tr>
<th>Services</th>
<th>Measures</th>
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| Videos, Sound Recording Products Distribution Services | 1. To allow Hong Kong Service suppliers to provide, in the form of joint ventures, videos and sound recording products (including Motion picture products) distribution services in the Mainland.  
2. To allow majority shareholding, not exceeding 70%, for Hong Kong service suppliers.  
3. To allow Hong Kong service suppliers to construct or renovate cinema theatres for the operation of film screening business on a wholly-owned basis.                                                                                                                                                                                                                      |
| Cinema Theatre Services               | 1. To allow Hong Kong Service suppliers to construct, renovate and operate cinema theatres on an equity joint venture or contractual joint venture basis.  
2. To allow majority shareholding, not exceeding 75%, for Hong Kong services suppliers.                                                                                                                                                                                                                                                                                                             |
| Chinese Language Motion Pictures      | 1. Chinese language motion pictures produced in Hong Kong maybe imported for distribution in the Mainland on a quota-free basis, after vetting and approval by the relevant Mainland authority.  
2. Chinese language motion pictures produced in Hong Kong refer to those motion pictures made by production companies which are set up or established in accordance with the relevant laws of the Hong Kong Special Administrative Region, and which own more than 75% of the copyright of the motion pictures concerned. Hong Kong residents should comprise more than 50% of the total principal personnel in the motion pictures concerned.  
3. To allow motion pictures co-produced by Hong Kong and the Mainland to be processed outside the Mainland after obtaining the approval of the relevant authorities in the Mainland.  
4. To allow Hong Kong service suppliers to establish wholly owned companies in the Mainland on a pilot basis to engage in the distribution of Mainland produced motion pictures after obtaining the approval of the relevant authorities in the... |
Mainland.
5. The import of Chinese language motion pictures made by production companies which are set up in accordance with the relevant laws of the Hong Kong Special Administrative Region and own more than 50% of the copyright of the motion pictures concerned is exempted from quota restrictions for distribution in the Mainland.

| Motion Pictures jointly produced | 1. Motion pictures jointly produced by Hong Kong and the Mainland are treated as Mainland motion pictures for the purpose of distribution in the Mainland. Translated versions of the motion pictures in languages of other Chinese ethnic groups and Chinese dialects, which are based on the Putonghua (mandarin) version, are allowed to be distributed in the Mainland.
2. For motion pictures jointly produced by Hong Kong and the Mainland, there is no restriction on the percentage of principle creative personnel from Hong Kong, but at least one-third of the leading artistes must be from the Mainland; there is no restriction on where the story takes place, but the plots or the leading characters must be related to the Mainland.
3. The Cantonese version of motion pictures co-produced by Hong Kong and the Mainland is permitted to be distributed and screened in Guangdong Province, after obtaining the approval of the relevant authorities on the Mainland. |
| Jointly Produced Television Dramas | Television dramas co-produced by the Mainland and Hong Kong should be subject to the same standard on the number of episodes as that applicable to Mainland domestically-produced television dramas. |

(Source: Film Service Office, Hong Kong. [hkso.com/doc/Audio/pdf](http://hkso.com/doc/Audio/pdf))

From the list above, it can be seen that under the CEPA, the ratio of foreign participation of movie projection and sound recording can be achieved as high as 100%, which is a significantly favorable condition compared to the 49% under the GATS framework. For movie distribution, the CEPA permits foreign equity
participation up to 70%. The commitment also covers the distribution of certain movies, while China’s GATS commitment excludes movie from the distribution of audiovisual products. China also undertakes some limited commitments on services relating to TV transmission and production, e.g., regarding jointly produced TV dramas, in contrast, there was no GATS commitment in the relative sectors.

‘Political considerations will inevitably feature in decisions to establish regional trading arrangements’. With regard to China’s PTA approach with neighboring countries, such as China-ASEAN, China-Pakistan and China-Singapore, political factors are no less significant compared to the economic considerations. Under the China-ASEAN Free Trade Agreement (CAFTA), a Early-Harvest Programme (EHP) was introduced which aimed to reap the immediate concessions regarding agricultural and manufacturing products offered by the parties, mainly China. Through the EHP, ASEAN products can be exported to China ‘at a significant concessionary rate so that ASEAN countries can actually benefit from the benefits of a free trade agreement even before the agreement itself is finalized’. Therefore, the enforcement of the CAFTA is much stronger compare to both the WTO and other regional trade agreements. However, in terms of trade in services, the CAFTA does not provide a mandatory time schedule for negotiations. Instead, the negotiations seek to progressively eliminate discrimination and prohibit new types of discriminatory measures. Five priority sectors have been identified for strengthened cooperation, which include agriculture, information and communications technology, human

107 Wang, J. (2004), supra n.86.
108 Ibid.
109 Article 4(a) of the CAFTA.
resources development, investment and the Mekong River basin development. In addition, eleven activities have been specifically enhanced, although the final agreements of free trade in services have not been concluded.\textsuperscript{110} Cultural sectors have not been explicitly mentioned under the CAFTA; however, the flexible approach provided for other service sectors indicated that negotiation and cooperation can be specified in detailed sectors, and progress can be made in a more flexible way (subject to specific countries in specific sectors) compared to the multilateral trade framework.

As for the remote countries like Australia and New Zealand, which are part of the Western world and long-term US allies, trade in service is a major topic because of their significant advantage in these trade sectors. In the China-New Zealand FTA, the two countries have agreed to ensure that their domestic measures affect trade in services are ‘administered in a reasonable, objective and impartial manner’.\textsuperscript{111} In order to facilitate trade in services, barriers should be eliminated, such as, the ‘different rules or requirements for foreign companies compared to Chinese companies that are designed to give local companies a competitive advantage’, and ‘requirements for foreign companies to employ a certain percentage of locals or to enter into a joint venture with a local company’.\textsuperscript{112} The scope of the PTA has already covered tourism, education, construction and transport. Cultural goods and services in China have received significant financial and policy supports from the government, and the content review mechanism is operating in a non-transparent way. The PTA directly targeted the administration rules which might have a negative impact on trade, and will surely provide a more specific and transparent basis for the trade in culture negotiation compare to the multilateral approaches.

\textsuperscript{110} Annex 4 of the CAFTA. The eleven activities include standard mutual recognition and harmonization, electronic commerce, technology transfer, and specific projects such as the acceleration of the railway project linking Singapore and China’s southern city Kunming.

\textsuperscript{111} See: China-New Zealand FTA regarding services, \url{http://www.chinafta.govt.nz/1-The-agreement/1-Key-outcomes/2-Services/index.php} (accessed on April 12, 2012)

\textsuperscript{112} Ibid.
5.5.3 Implications for the WTO

It has been argued that countries use PTA as a defensive strategy in order to avoid being ‘left-out’ by the proliferation of other PTAs. For example, the formation of NAFTA was spurred by the proposition of the EEC, and the proliferation of Asia-Pacific free trade arrangements were also responses to the economic integration of European countries, and North American countries. Therefore, PTAs are ‘the maintenance of given levels of welfare and state power through access to resources, finance and markets’. As a matter of fact, China’s PTA approach is hardly to be understood as purely economically driven. From the CEPA and the CAFTA, it can be seen that China made immense unilateral concessions which lead to few immediate or short-term economic benefits. Therefore, geopolitical considerations play a more important role compared to the economic ones in China’s PTA strategy. Geopolitical considerations also constitute the most important difference between China’s PTA and multilateral trade approaches. Under the unique strategy, China’s approaches in developing trade in culture under the PTAs vary from agreement to agreement, according to its geopolitical and economic relationship with the countries or regions.

The extent of liberalization in audiovisual sectors under the CEPA is much deeper than China’s commitments under the WTO agreements. Unlike the quantitative restrictions set by China under GATS schedule, motion pictures produced in Hong Kong or Macau can be imported for distribution on a quota-free basis. The investment quotas under the CEPA are also higher than the GATS commitments. Even the TV

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transmission and production industries are open for Hong Kong and Macao counterparts. China’s special offers to Hong Kong and Macau proved the long-term goal of a closer economic integrated ‘Greater China Economic Circle’.\textsuperscript{116} It is foreseeable that, the Economic Cooperation Framework Agreement (ECFA) between mainland China and Taiwan signed in 2010 would be benefited from such a strategy in the near future. Under the ECFA, the economic, trade and investment cooperation have been greatly enhanced across the straits, and Early Harvest Programmes have been set for both trade in goods and services, in order to accelerate the realization of objectives.\textsuperscript{117} China opened audiovisual service sectors for Taiwanese service providers,\textsuperscript{118} and committed to bringing down the trade barriers according to the Early Harvest provision under Article 8 of the ECFA. Therefore, within the ‘Greater China Economic Circle’, China made significant unilateral offers in cultural sectors, especially audiovisual services, which are much deeper compare to the GATS schedules. However, the situations under CEPA and ECFA are different from other PTAs. First, because of the common culture and language shared by Mainland China, Hong Kong, Macau and Taiwan, cultural products are easily accepted by the audience from Mainland China.\textsuperscript{119} Second, as a geopolitical concern, cultural cooperation within Circle provides roots for a further economic integration as well as political

\begin{flushright}  
\textsuperscript{117} Article 7 and 8 of the Cross-Strait Economic Cooperation Framework Agreement. Available at: http://www.bilaterals.org/spip.php?article18166&lang=en (accessed on 14 April, 2012)  
\textsuperscript{118} See: Article V of the ECFA. Along with audiovisual sectors, another 10 service sectors have been opened for the Taiwanese service providers including banking, accounting, aircraft maintenance, insurance,etc. see: Commentary: Beyond the Political: ECFA’s International trade Implications, available at: http://www.amcham.com.tw/content/view/3052/467/ (accessed on 14 April, 2012)  
\end{flushright}
understanding. Despite these special situations, trade in culture between Mainland China and the other three WTO members indicates that China is gradually opening its cultural markets, and it has specially meanings to the reform of the content-review mechanism imposed by the government, which in turn, will influence the future cultural trade with other WTO members.

Under the PTAs between China and neighboring countries as well as remote countries, China either made specific commitments under audiovisual services,\(^{120}\) or excluded audiovisual services from the specific schedule.\(^ {121}\) China’s commitments are deeper compared to its WTO schedule. For example, China committed under both PTAs and WTO that ‘without prejudice to compliance with China’s regulations on the administration of films, China allows the importation of motion pictures for theatrical release on a revenue-sharing basis and the number of such imports shall be 20 on an annual basis.’\(^ {122}\) It means that China agrees to import maximum 20 movies per year from Singapore only, whilst China’s GATS commitments only allow maximum 20 movies being imported from all WTO members. The situation has raised concern from both the US and EU, and China is under pressure to raise the importation cap under the WTO. Besides the advantages from the quantitative perspective, the qualitative restrictions set by the Chinese government are also more flexible under the PTAs. The administrative rules under PTAs are to pursue a ‘reasonable, objective and impartial manner’, and it is easier for PTAs compare to the WTO because the negotiations involve few countries with common interests. Add to this the fact that China’s cultural sectors have received significant financial and policy supports from the government, and the content review mechanism is operating in a non-transparent way, trade in culture under PTAs would receive better treatment compare to the WTO. In turn, the development under PTAs targets the qualitative restrictions imposed by the government, and pushes them to be more transparent, which will eventually benefit other WTO members in negotiating further liberal commitments under GATS framework.

\(^{120}\) Such as China-ASEAN, China-Singapore, and China-New Zealand free trade agreements.

\(^{121}\) Such as China-Chile Free Trade Agreement.

\(^{122}\) See: Annex 5 of China-Singapore FTA, Annex 8 of China-New Zealand FTA, and GATS Specific Schedules.
5.6 Conclusions

Compared to the US and the EU, China’s cultural industry has a short history. Cultural goods and services used to be strictly planned and distributed for propaganda functions, and they were not seen as part of a commercial sector. Since the opening-up reform of China, cultural industries were incorporated into being a part of the market economy. A ‘dual system’ has been designed for cultural sectors, which allowed for the coexistence of cultural undertakings and cultural industries. Governmental interventions exist in both of the systems.

China limits the imports of foreign content by setting up import quotas for film, television and other audiovisual sectors. In addition to quantitative restrictions, which can be easily found in various laws and regulations, qualitative requirements, or content review mechanisms are also imposed on the imported audiovisual products. The review mechanism is largely subject to discretion of competent authorities. Therefore, it lacks clarified review standards as well as a stable and reliable review process, which significantly affects the importation of foreign cultural products.

Cultural industries enjoy governmental subsidies in China. As ‘cultural industry’ has a relatively short history, and it used to be strictly controlled by the state, the differentiation between ‘public cultural institutions’ and ‘commercial cultural enterprises’ is not clear. Financial measures inherently cover both categories, so that domestic cultural goods and services are more competitive compared to the imported ones. The unclear distinction between ‘public cultural institutions’ and ‘commercial cultural enterprises’ also leads to restrictions on foreign participation. In the film sector, film production, distribution and projection had been dominated by state-owned enterprises for a long time. Although changes have been made, foreign participation still encounters restrictions mainly in forms of an investment cap. The broadcasting sector remains strictly in State hands, although in the new media sectors, private and foreign ownership regulations are comparatively loose.
China’s trade barriers for cultural products have been comprehensively reflected by the *China-Audiovisual* case brought about by the US. First, China has made substantial changes in order to be more WTO-consistent. However, certain cultural sectors are still controlled by the State and some state-owned enterprises, such as broadcasting, film trading rights, and wholesaling services for audiovisual products. Foreign participation is not allowed in these sectors. Therefore, the market condition for cultural products is still not liberal. Second, the content review system of China remains intact after the case, even though it was the main item in the rationale behind the treatment of foreign cultural products. The content review mechanism needs a reform to be more clarified and stable. However, the reform shall be done through negotiation or political strength, rather than challenges under the dispute settlement body of the WTO. Third, cultural industries in China are not fully commercialized because of the unclear distinction between ‘public cultural institutions’ and ‘commercial cultural enterprises’. Besides pushing China to be more WTO-consistent by challenging inconsistent measures under the DSB, more efforts should be undertaken to reform China’s cultural market. As cited before, the most important question is not who can trade, but what can be traded.

China’s regional approach is greatly motivated by political or geopolitical considerations rather than economic ones. Political considerations will inevitably be featured in decisions to establish regional trading arrangements. In the audiovisual sector, China has made much further liberalization commitments under preferential trade arrangements in comparison with the WTO. Under the ‘Greater China Economic Circle’, special trading conditions have been granted to Hong Kong, Macau, and Taiwan. Mainland China opened certain cultural sectors that it had reserved under the WTO to the three trading partners, such as broadcasting services, as well as a majority share in motion picture productions and distribution services. For other preferential trade partners, although fewer commitments have been made compared to the WTO, better market access conditions are available between China and its preferential trading partners because the administrative rules under the PTAs are negotiated and
interpreted in a more reasonable, objective and impartial manner. Compared to the WTO framework, regional and bilateral trade regimes are more ideal in improving China’s cultural market commercialization, as well as engaging in more cultural trade negotiations.
Chapter VI Conclusions

Given the divergences in beliefs and interests in economic, societal and political stakeholders among member countries on the subject of cultural trade, as well as the ultimate authority of national governments in framing their domestic regulatory policies, WTO member countries presented a variety of approaches in dealing with trade in culture. Among them, cultural liberalism, represented by the US, argued that trade in culture should be treated no differently from other goods and services, hence, non-discriminatory trade principles should be fully applied. All the while cultural protectionists, the other camp of the debate, represented by the EU and Canada, advocated for specific treatments for cultural products because of the cultural values that they entail. Considering the political sensitiveness invested in cultural products, a controlled regime has also been developed by WTO members, such as China. This thesis explored cultural trade regulations adopted by the biggest trading powers under the multilateral trading framework, the US, EU and China in a comparative manner, in terms of their respective collisions with WTO law, and developments under other trade frameworks, not only because of their economic and political significance, but also because of their distinctive characters in regulating cultural trade.

This chapter summarizes important findings from previous chapters, and concludes the research by addressing the answers to the research questions. In addition, recommendations for further improvement for both the WTO and its member countries in terms of the regulation of cultural trade will be made.

The conclusions are drawn from the following four key aspects:

**Domestic regimes: What to protect**

In the international economic law context, it is still recognized that state is central to the current legal structure. National governments have the ultimate authority over the
shaping of their trade policies although they defer to international rules by making commitments in international agreements. Through the examination of domestic regimes in the three sample jurisdictions, what the governments are trying to protect, and how they protect it from the legal tools they apply shall be answered.

Deregulation is the theme of the US cultural regulations. Incentive policies are mainly designed and advocated by the MPAA, pursuing cultural economy oriented strategies, such as job creation, community building, skill development, etc. Industries’ welfare, consumers’ free choice, and the efficiency of audiovisual markets are the main objectives in designing either financial support schemes, or evaluating the cultural industries’ ownership rules. For domestic cultural industries, the tax-credits schemes, ongoing public subsidies, and liberal antitrust legal environment have played proactive roles for their vertical integration and profits enhancement. The state involvement through cultural and foreign trade policies has significantly assisted the rapid growth of the US cultural industries, and built a firm foundation for their global expansion. Under such a regime, foreign cultural products are treated no differently in the US market, and their participation is mainly affected by market choices.

The EU model is in sharp contrast with the US one. The principle of cultural diversity was reinforced by the EU Treaty. The constitutional recognition of ‘cultural value’ directs both social policy and economic policy within the internal economic integration as well as in developing external trade relationships. Cultural policies have been largely subjected to the intervention of EU institutions during the internal market integration, especially in the audiovisual-related policies in the form of regulatory measures (content requirement and ownership regulations), and financial supportive mechanisms (subsidies, tax incentives, etc.). The privileged measures distinguish European content from others. Although the criteria in determining ‘European content’ are arguable, the EU has succeeded in building a well-functioning free internal market without sacrificing cultural values that have been a concern of member countries. The EU cultural policies have been implemented in a coherent and systematic manner.
Although there is no clear statement made by either the competent authorities or a judicial judgment that cultural value prevails when conflict occurs, cultural value should be primarily considered in the EU’s internal and external trade relationships, and the necessity to protect EU’s cultural identity and diversity should not be neglected, in order to safeguard the coherence of the EU regulatory framework.

China’s cultural industry has a short history, and it used to be strictly planned and controlled by the government (mostly through Party messages and plans). After three decades of an opening-up reform and 12 years of WTO membership, the regulatory tradition has not been fundamentally changed. Under the controlled regime, China limits the imports of foreign content by setting up import quotas for film, television and other audiovisual products. In addition to the quantitative market access restrictions and financial support for domestic products, the content review mechanism imposed by competent authorities has significantly affected the market of foreign cultural products not only because of the unclear and opaque review standards, but also because of the tedious administrative procedures. Under such an incoherent regulatory framework, cultural value can hardly be reflected, and it has affected the fair treatment of foreign cultural products and foreign participation in China’s cultural market.

The three regulatory regimes focus on different priorities. In pursuit of commercial interests, the US model is the most liberal one that can best fit into the WTO framework, while the EU and China model, being protective in the content of cultural products for social and political reasons, imposes discriminatory policies on foreign products, and runs against the general principles of trade liberalization.

**Collision between member countries and WTO: an overall review**

WTO law impinges upon domestic cultural policies, especially those that operate in a trade-distortive manner, although the real effect of WTO rules is predicated on
member countries’ commitments. Through the analysis of the treatment of cultural products under the WTO law in Chapter II, it can be seen that although WTO primarily pursues commercial interests, it endeavors to incorporate considerations regarding cultural values in its legal context. However, such incorporation is rather fragmentary due to the lack of clear recognition of ‘cultural specificity’. The divergences among WTO members rendered the possibility of consensus on key issues deadlocked. Collisions between the three sample members’ regimes and WTO law are significantly different from each other in terms of the urgencies, and the extent to which they distort trade. Such divergences negatively affected WTO’s role in reconciling trade and cultural values, and in providing a promising effective negotiation platform for future development.

The traditional classification of audiovisual services under GATS can hardly reflect the current commercial realities and technologies in audiovisual sector. Such classification renders almost all culture-related products as services. Hence, more flexible GATS rules apply. In addition, the contrast between the full commitments made by the US, and rare commitment made by other WTO members has created unbalanced obligations among WTO members. The imbalance diminishes the legitimacy of WTO rules, and encourages members to engage in forum shopping. Whereas for the EU and China, the low commitment level of audiovisual services seems less problematic in terms of their multilateral approaches, and it is considerably difficult for both the EU and China to make further commitments under their schedules due to their domestic conflict of interest.

In addition to the general problems of the WTO law itself, collisions between each sample country and WTO law also demonstrate the difficulties of liberalizing cultural trade under the WTO legal framework, as the collisions appear in different countries seem difficult to reconcile in the current WTO context. Overall, the collisions mainly focus on four problems: the commitment level (market access and national treatment), MFN exemptions, subsidy rules in trade in services, and other relating issues, such as
investment regulations and telecommunication services.

The US made full commitments under four modes of audiovisual services, while the EU retains this sector from commitment. Given the controversies of the traditional classification of audiovisual services, the US pushes to negotiate digital audiovisual products under GATT in order to avoid the commitment vacuum under GATS framework. However, this approach seems less productive under multilateral trading framework, because both GATT and GATS were provisioned before 1994, the newly emerged digital products do not rightly fit in any category without controversy. The only jurisprudential interpretation made by the AB in Canada-Periodical case also leaves the core problem unsolved. Therefore, preferential measures by both EU and China (although China made commitments under audiovisual services) are deemed as free-riders of non-discriminatory trade rules. EU’s measures, i.e. both content regulation and investment quota have significant trade-distortive potential. However, under the current WTO law, the quotas imposed by several EU directives can be proved as a potential violation of WTO rules only when Article IV GATT applies. As most cultural products are treated as audiovisual services, the article is not efficient in targeting the EU’s protective measures. In China’s case, privileged treatments is enjoyed by SOEs. Foreign products seek to get access to China markets usually encounter non-transparent and more complicated administrative or review processes. In addition, China retains broadcasting and majority ownership of cinema chains from foreign participation. The current GATS discipline leaves room for discriminatory practices, and the chance in raising the commitments level in either EU or China is too low given the status quo.

MFN exemptions are also common in audiovisual services. The EU made a wide range of MFN exemptions, and co-operation agreement in audiovisual services between EU and preferential trading partners became EU’s main platform in promoting cultural trade. The ten years validity period for MFN exemptions has already passed (due by the end of 2005), while no agreement has been made in
eliminating the exemptions. Such exemptions give freedom to EU and China in forum shopping in cultural trade. Hence, a multilateral regime is hard to achieve.

Subsidy rule under the GATS framework is another thorny topic in cultural trade topics. So far, no binding provisions have been made in targeting discriminatory subsidies in trade in services. Article XV GATS calls for negotiations in developing necessary disciplines to avoid trade-distortive subsidies. However, no concrete proposal has been accepted till now. Subsidies widely exist in cultural productions in both EU and China. In the EU, subsidies are mostly granted by EU institutions in order to promote cultural identity and diversity. The privileged subsidies do not aim to compete with foreign products, but nevertheless enhance the competitiveness of subsidized products over others. China’s subsidy to cultural products is far less coherent than the EU model. Most of the subsidy goes to SOEs, and the majority of the productions are considered as less cultural-motivated. China’s subsidies are in a more trade-distortive manner. Without subsidy rules in trade in services, the subsidies provided by EU and China remain in safe harbor, and such privileges discourage member countries in seeking trade conditions in the WTO forum.

Audiovisual services relate to other trade topics under the multilateral trade framework, such as telecommunication services, investment rules, and competition issues. As this research focuses on fundamental disputes regarding cultural products, i.e. the nature of audiovisual products, the commitment level of audiovisual services, the relevant topics seem too vast to discuss in their entirety at the current moment. The research did bring up the related topics of the three member countries’ concerns. In order to research cultural trade in a more comprehensive manner, further discussions are highly desirable in analyzing the application of investment and competition rules on cultural products.

**Prospects of development under multilateral trade regime**
For the purpose of further developing cultural trade under multilateral trade regime, WTO is expected to provide a rule-based negotiation platform, as well as an efficient dispute settlement mechanism where trade conflicts can be solved. The above examinations reflect the difficulties and barriers in achieving this purpose.

First, the divergences among member countries are not easy to bridge given the historical evolution of trade and culture conflict planted in different jurisdictions. EU’s cultural goal has been accommodated by, rather than surrendered to, its commercial goal under the EU’s economic law framework. It is almost impossible to breach the current balance built by the EU order either in the internal market, or the external one. China’s political control over cultural products has proved to be incontestable under the WTO law. There are positive signs to believe that the authorities would take one step back from engaging in cultural trade, and loose the control over market access regarding foreign cultural products, the evolution of such a reform is time-consuming given the status quo.

Second, under the WTO dispute settlement, the judicial body can only address issues explicated by WTO agreements. The absence of cultural exception clause significantly limits DSB’s competence in solving trade and culture conflicts. The previous ruling made by the DSB, such as how to interpret Article IV, Article XX GATT, and the relationship between the WTO and other international agreements, leave the core issue of whether cultural value prevails over trade value unanswered. Many members may pursue a diplomatic way rather than judicial in such a context. The ongoing EU-US FTA raised the issue only bilaterally instead of making reference to WTO framework. Similarly, the US pushed China to increase its film import quota by negotiating during diplomatic visiting rather than filing a petition under the WTO negotiation.

Therefore, the conflict between trade and culture remains predictably static under the multilateral trade framework, while the breakthrough point may exist in new
emerging technologies and culture derivative businesses.

**A better platform for cultural trade?**

All three sample countries have made more commitments under PTAs compared to their WTO schedules. It can be seen that PTAs can provide a more flexible approach in developing cultural trade. In the US-Mexico, EU-Ukraine, China-Hong Kong/Macau agreements, commitments in cultural sectors are much deeper. Comparisons between PTA and WTO in the respective sample members proved that preferential partners are intent on further engaging in cultural exchanges and co-operations. However, they have differences over developing their preferential trade relations.

For the US, audiovisual services are mandatory trade sectors under its preferential trade negotiations. The US preferential trading partners (beside Canada) are mostly pushed to provide extra commitments in order to achieve success in other trading areas. Most issues on the agenda require the trading partners to give unconditional market access to the US cultural products, or dramatically reduce the current barriers. The US has achieved great success in PTA negotiations, and it is still actively participating in finding more collations. Compare to the multilateral trade agenda, the new strategy adopted by the US does not only shield light on digitalized products which have not been clearly provisioned under GATT or GATS, but also sets political objective in order to counter preferential trading partners’ attempts in excluding cultural sector from their trading package. The US suggests not only a change of approach in negotiating concessions, but also a change of priority in the type of concessions researched. The new approach clearly puts the emphasis on the free circulation of digital content, and makes digital products subject to the same basic obligations as other electronic supply of services. The new strategy, assisted by political efforts, has represented a landmark achievement on market access and national treatment for the cultural industries in trading partners such as Chile,
Singapore, Central America, Australia, and Morocco. However, from the perspective of the United States, the EU and China seem to be too far away from its cultural agenda while the US has tremendous commercial interests in the two markets. The newly proposed Transatlantic Trade and Investment Partnership between the US and EU has not been finalized yet, while the EU explicitly stated that audiovisual products should be treated differently from other goods and services during negotiations. The bilateral trade relationship between the US and China is not going to develop beyond the multilateral level. Therefore, WTO is the only platform for both parties to discuss the treatment of audiovisual products at the current stage. The US will keep advocating further trade liberalization under the WTO, as PTAs cannot fulfill its trade agenda. Only multilateral trade framework can further strengthen the commercial interests of cultural industries pursued by the US regulatory regime.

The current EU regulatory framework gives considerable weight to culture value. EU’s PTA progress in cultural trade also highlights the importance of the preservation of cultural identity and diversity. Therefore, many cultural co-operation agreements were signed between the EU and its preferential trading partners, whereas no GATS-plus provision on audiovisual sectors has been obtained in any of the EU’s PTAs. It means that no obligations have yet been provided by the EU for market access and national treatment in the free trade framework. Similar to EU’s multilateral approach, audiovisuals are often subject of broad exemptions in its PTAs, i.e. the EU-Mediterranean Partners Associations Agreement. The ‘open frontiers within, protectionism from outside’ approach seems coherent in EU’s external trade policies. The recent PTAs also show that the EU is intended to opening up more market in order to materialize the growing commercial interests. The existing trade-off between industry interests and cultural value supporters urges the EU audiovisual policy to find a new equilibrium, which pushes the EU to develop a more concrete trade agenda mostly on audiovisual services. Such new agenda has already showed its contour in the EU-Korea and EU-Ukraine agreements. Although the main clauses of cultural trade are still largely under political mandate, concessions to obtain inter-sectoral
liberalization have been covered, and the trade barrier of cultural goods and services has been brought down. On the other hand, the new equilibrium shall not be interpreted as the EU is progressively liberalizing cultural trade with more trading partners. The EU has a shared competence with member countries in cultural field, and it is bound to take cultural aspects into account in its action, in particular in order to respect and to promote diversity of its cultures. The bottom line prevents the EU from enlarging cultural trade liberalization even with preferential trading partners, and urges the EU to carefully negotiate market access issues on cultural products, especially with remote countries, due to cultural identity and diversity issues, and also widespread concerns on politically sensitive issues such as employment, tradition, national prestige. Hence, the negotiation between EU and US, or EU with China on cultural trade liberalization, if ever, seems to be far too immature. Due to the EU’s coherent and systematic regulatory framework on cultural trade, PTA seems more compatible with the core value pursued by the EU law, while the multilateral trade framework may damage the mature regulatory framework that has already been developed.

China’s case is the most debatable one among the three samples. China’s geopolitical trade agenda does not allow for much room for further commitments under the WTO. Cultural sectors are mainly dealt with under a political mandate during China PTA negotiations. Trade sectors are open to preferential trading partners while foreign participation is not allowed under the WTO schedule. In addition, the regulatory framework largely involves governmental authorities. They are not only the referees of cultural trade, but also participated as players at a commercial level. Such a framework has been successfully challenged under the WTO dispute settlement, and massive changes in law and policies have been carried out accordingly. Therefore, China has to bear enormous political and judicial costs under the multilateral framework. By contrast, it can enjoy the benefits of cultural cooperation under the PTAs not only commercially, but also by political means. It is fair to say PTA is a better framework for China to further engage in cultural trade with its trading partners.
Although substantive progress can be shown in China’s PTA concession schedule, different from the EU, the fundamental issues that impede further cultural trade liberalization remain intact. Public sectors, together with some SOEs, intervene in cultural sectors not only by setting up content review standards, but also by controlling the quantity of imports, and market access conditions in specific cultural sectors. Compare to multilateral trade platform, the advantages of PTA can be shown from three aspects. First, the administrative rules under the PTAs are negotiated and interpreted in a more reasonable, objective and impartial manner. Second, some cultural sectors that were not open to foreign participates have been lifted available for preferential trading partners, such as broadcasting services, and majority ownership in cinema chains. And third, the concession schedule between China and preferential trading partners is quite specific. Different from the GATS classification which is quite broad, the detailed schedule encourages negotiating parties to commit. Overall, the content review mechanism adopted by China remains as the most important tool in intervening cultural trade. However, China’s PTA approach marginalizes the delicate complicated administrative processes, and optimizes the trade environment for cultural products. The concession shall be only provided for limited trading partners, given the sensitiveness of cultural products. Therefore, the special offers in PTAs have more political conditions than economic or cultural concerns.

**The contribution of this thesis can be summed up in two aspects:**

First, the research sets forth from the specificity of cultural products and the motivation behind protection from economic and social perspectives. Protective law and policies have been widely adopted by WTO member countries. This thesis assesses special treatment of cultural products on an agreement-by-agreement basis under the WTO framework. Extensive examination is also delved into with regards to PTAs and the UNESCO CCD Convention. Through the examination, the thesis analyzed the interaction between the WTO and the other two platforms in order to see
whether they can be viewed as the better alternatives in dealing with cultural trade regulation at an international level. Following due examination, a space for further cultural trade regulation at a domestic level is presented.

Second, the thesis looks into the domestic regulation instead of proposing a better solution for the WTO in addressing balances between trade and cultural values. It examines in a systematic manner the regulatory approaches adopted by sample member countries, evaluates their law and policies according to WTO rules as well as their trade obligations thereafter, and analyzes their preferential offers under PTAs from a comparative angle. Through the systematic examination, the research lays its contribution by taking stock of the three sample member countries’ state of law, the potential challenges to their status quo in further multilateral trade negotiations and PTA engagement. Through examination and comparison, the answer of whether to go multilateral or foray into preferentialism in terms of further cultural trade liberalization is presented.

**Link to future research**

As indicated in the introducing chapter, the conflicts between social values and trade values are now at the heart of trade disputes under the multilateral trade framework. Trade in culture is one typical example representative of the clashes between the two camps: trade liberalization v trade protectionism. As the state is central to the current legal structure in terms of policy-making, more insights are needed in addressing domestic regulatory regimes and their interactions with international institutions in order to explore the chances for further global integration. Therefore, future researchers can explore domestic regimes from more perspectives. Substantively speaking, more social values can be addressed in line with the potential collision with trade obligations, such as environmental protection and labor rights protection. Procedurally speaking, the research can be taken from the decision-making perspective, exploring the battles among domestic politicians, lobbying groups and interest stakeholders, thus further explaining the implications of a specific policy and
its development. In addition, the topic of trade in culture is far from comprehensive at the current stage. Further research can address related legal issues that can be considered as derivatives of cultural trade, such as cyber-space regulation, competition law, and immigration policies mostly in the realm of trade in services.
Bibliography:

Official Documents:

12. Communication from United States, Audiovisual Services, S/C/W/78, 8 December


17. Council of Europe Resolution (88) 15, Setting up a European support fund for the co-production and distribution of creative cinematographic and audiovisual works (EURIMAGES), 26th October, 1988.


certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.


36. Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses, Available at:

38. GATS List of Specific Commitments: http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm


42. GATT Focus, No.73, 1990

43. GATT MTN.BNS/AUD/W/I, Historical review of Article IV prepared for the Uruguay Working Group on Audiovisual Services, 4 October 1990.

44. GATT, Services Sectoral Classification List-Note by the Secretariat, MTN.GNS/W/120, July 10, 1991


47. Market Entry and Regulation of Foreign-affiliated Entities, Report and Order, 11 F.C.C.R. 3873


58. Regulation for the Administration of Films, adopted at the 50th executive meeting of the State Council (No. 342) on December 12, 2001, came into force on February 1, 2002.

59. Rome Convention on the Protection of Neighboring Rights


61. Sector Specific Commitments, China (GATS/SC/135)
62. Sector Specific Commitments, US (GATS/SC/90)
69. Supreme People’s Court of China (2002), Provisions on Several Issues concerning the Adjudication of Administrative Cases Relating to International Trade, entered into force on October 1, 2002.
70. The Berne Convention for the Protection of Literary and Artistic Works
71. The Geneva Convention on the Protection of Phonograms
73. Trade Negotiations Committee, GATT, Mid-Term Meeting, MTN.TNC/11, 21st April, 1989.


78. US Proposal on Telecommunication Services, S/CSS/W/30, 18 December 2000

79. WTO (2005), Council for Trade in Services, Communication from Hong Kong China, Japan, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and United States, TN/S/W/49, 30 June, 2005.


89. WTO, Council on Trade in Services, Communication from Canada, 14 Mar, 2001: Doc.S/CSS/W/46
91. WTO, World Trade Report 2004: Exploring the linkage between the domestic policy environment and international trade.

**Books and Journal Articles:**


Policy Research.


Collected Courses of the Academy of European Law, European University Institution, Florence.


67. Ernst & Young (2009a) ‘Economic and Fiscal Impacts of the New Mexico Tax
68. Ernst & Young (2009b), ‘Estimated Impacts of the New York State Film Credit’, New York: Motion Picture Association of America.


Economics, Cheltenham: Edward Elgar.


130. KEA European Affairs (2011) ‘Implementing Cultural Provisions of
CARIFORUM-EU EPA: How do They Benefit the Caribbean Cultural Sector?’


pe.119-140.


Springer.


**Working Papers and Other Resources:**


INTA Committee Workshop, Brussels, 20 October 2011.


