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*Mira Burri**

In the face of new technological developments triggered by the process of digitization and more recently, the increased importance of data to societies, the European Union (EU) has updated its approach in external trade policy. Key changes have been made in particular in the dedicated electronic commerce/digital trade chapters of free trade agreements (FTAs) and the EU has strived to link its newer commitments on cross-border data flows with the high standards of personal data protection as endorsed by the General Data Protection Regulation (GDPR). Yet, cultural concerns, except for a general carve-out of audiovisual services, appear somewhat left behind in the EU's new digital strategy. The chapter discusses this predicament by tracing the digital trade and culture-related provisions in the framework of EU's FTAs, starting with earlier agreements that include cultural provisions, such as the EU–Cariforum and EU–South Korea FTAs towards more recent agreements, such as the post-Brexit Trade and Cooperation Agreement with the United Kingdom. The chapter analyzes the shift in EU's external trade policy that seemingly now gives primacy to economic considerations and the discrete right of privacy over cultural concerns and suggests ways in which the EU may wish to integrate cultural diversity considerations in a more immediate way in its future trade deals, for instance by including provisions on digital platforms.

Key words: Digital trade, cross-border data flows, personal data protection, audiovisual services, trade and culture, cultural exception, EU FTAs, EU external cultural policy

I. INTRODUCTION: THE DIGITAL CHALLENGE

The transformations in the digital networked environment epitomized by the societal penetration of the Internet have been multi-faceted and over the years, their effects have been captured, although not without contention, by a host of excellent disciplinary and interdisciplinary studies.¹ It is apparent that the far-reaching and ever evolving technological affordances of the Internet and its rise as a global platform have triggered challenges in all regulatory domains and created interdependencies between the chosen

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¹ See e.g. Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006); C. R. Sunstein, *Republic.com 2.0* (Princeton: Princeton University Press, 2007); I. Brown (ed), *Research Handbook on Governance of the Internet* (Cheltenham: Edward Elgar, 2013); M. Graham and W.H. Dutton (eds), *Society and the Internet* (Oxford: Oxford University Press, 2014); L. Edwards (ed), *Law, Policy and the Internet* (Oxford: Hart Publishing, 2018).

legal design and the path of economic, social and cultural developments online.² Legal adaptation has not however been smooth and has occurred at different speeds and with different depth in different areas of law, both domestically and at the international level. This chapter thematizes specifically these idiosyncrasies by exploring the changes that have unfolded in the respective domains of digital trade regulation and external cultural policies with a distinct focus on the European Union (EU)'s positioning in this context. The chapter seeks to unveil that while the EU has undertaken multiple steps to update its external trade policy, these efforts may not have been well coordinated and led to a bias towards the pursuit of economic objectives, while some non-economic values, in particular in the fields of culture, have been somewhat left behind. The chapter tests this conjecture by a careful examination of EU's free trade agreements (FTAs) and the relevance of their rules and undertaken commitments, as well as the carved-out policy space with regard respectively to digital trade and culture. It also traces the evolution of the rule-frameworks over time, in an attempt to pinpoint whether and how the legal adaptation and the EU's repositioning have taken into consideration the digital challenge and the overall fluid technological environment, so as ensure adequate paths towards the attainment of the EU's proclaimed objectives in the area of culture.

The chapter begins with an examination of the culture-related norms, in particular those agreed upon after the adoption of the 2005 UNESCO Convention on Cultural Diversity with a brief preceding excursus on the trade and culture debate, which illuminates the chapter's overall discussion and helps in setting the scene. The chapter's next section moves on to examine the digital trade rule-making in EU's trade deals, again with a short introduction into the overall transformation of trade rules in the digital environment. The last section brings the observations of the previous analyses together and the chapter's research question is squarely addressed, advancing also. The some suggestions on the ways in which the EU may wish to consolidate its external digital trade policies and better integrate cultural considerations in its future trade agreements.

I. CULTURE-RELEVANT RULES IN EU'S FTAS

A. *Setting the Scene: Trade versus Culture*

The pair 'trade *and* culture' has been commonly described also as 'trade *versus* culture', and a plethora of enquiries has attested to the impossibility of mitigating this conflict.³ The early years of this contestation evolved under the dictum of cultural

² See e.g. A. Chander, 'How Law Made Silicon Valley', *Emory Law Journal* 63 (2014), 639–694; H-W. Micklitz et al. (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge: Cambridge University Press, 2022).

³ See e.g. L.L. Garrett, 'Commerce versus Culture: The Battle between the United States and the European Union over Audiovisual Trade Policies', *North Carolina Journal of International Law and Commercial Regulation* 19 (1994), 553–557; J.M. Grant, "'Jurassic' Trade Dispute: The Exclusion of the Audiovisual Sector from GATT', *Indiana Law Journal* 70 (1995), 1333–1365; M.E. Footer and C.B. Graber, 'Trade Liberalisation and Cultural Policy', *Journal of International Economic Law* 3 (2000), 115–144; B. de Witte, 'Trade in Culture: International Legal Regimes and EU Constitutional Values', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2003), 237–255; M. Burri, 'Trade versus Culture in the Digital Environment: An Old

exceptionalism, and were marked by attempts to carve out cultural from other – mostly economic – policies, in particular at the international scene. Although the idea of state protection of cultural identity has existed for many years, possibly going as far back as the origins of sovereignty,⁴ the real policy debates on the relationship between trade and culture began only after World War I, as audiovisual media came to be traded more intensely and Hollywood established its global appeal.⁵ The trade versus culture battle escalated during the Uruguay Round of trade negotiations (1986–1994), in particular because of the round’s special mandate, which not only aimed at dismantling tariff barriers, as had been the convention under the General Agreement on Tariffs and Trade (GATT), but was a much further reaching undertaking that ultimately led to the establishment of the World Trade Organization (WTO) with a new structure that covers intellectual property (IP) (by means of the Agreement on Trade-related Aspects of Intellectual Property Rights, TRIPS) and services (by means of the General Agreement on Trade in Services, GATS), as well as an effective dispute settlement mechanism.

The slogan of the time was ‘exception culturelle’ and its supporters strived to exempt any product or service that is culture-related from the rules of the negotiated WTO Agreements. Still, and this should be kept in mind, the main focus of the efforts was on the exclusion of audiovisual services.⁶ The opinions differed profoundly with a deep chasm between those in favour of free trade and those in favour of shielding (national) culture. While Canada and audiovisual media exporters, such as India, Brazil and Hong Kong were important actors,⁷ it is noteworthy that the greatest clash on media matters was between the then European Community (EC) and the United States.⁸ The EC sought to secure sufficient room for cultural policy measures, as well as keen to make the quotas recently introduced through the 1989 Television without Frontiers Directive (TWFD) permissible.⁹ The EC pursued its goals by relying on a set of arguments

Conflict in Need of a New Definition’, *Journal of International Economic Law* 12 (2009), 17–62; M. Burri, ‘The EU, the WTO and Cultural Diversity’, in E. Psychogiopoulou (ed), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (Basingstoke: Palgrave Macmillan, 2015), 195–204.

⁴ D.S. Petito, ‘Sovereignty and Globalization: Fallacies, Truth, and Perception’, *New York Law School Journal of Human Rights* 17 (2001), 1139–1172.

⁵ Footer and Graber, *supra* note 3, at 116–117; J. Trumbour, *Selling Hollywood to the World: US and European Struggles for Mastery of the Global Film Industry, 1920–1950* (Cambridge: Cambridge University Press, 2007); C.M. Bruner, ‘Culture, Sovereignty, and Hollywood: UNESCO and the Future of Trade in Cultural Products’, *International Law and Politics* 40 (2008), 351–436.; J.P. Singh, *Negotiation and the Global Information Economy* (Cambridge: Cambridge University Press, 2008).

⁶ Reflecting this, during the Uruguay trade talks, a Working Group on Audiovisual Services was established with the task of exploring whether the special cultural considerations related to the audiovisual sector demanded its total exclusion from the scope of the services agreement or a dedicated annex to the Agreement could provide a solution. See WTO, Working Group on Audiovisual Services, Communication from the European Communities, Draft Sectoral Annex on Audiovisual Services, MTN.GNS/AUD/W/2, 1990.

⁷ WTO, Working Group on Audiovisual Services, *ibid*.

⁸ Singh, *supra* note 5, at 122–123 and *passim*. It should be noted that the EC was not united in this approach, with France being very proactive and Germany and Britain somewhat reluctant. See e.g. D.A. Levy, *Europe’s Digital Revolution: Broadcasting Regulation, the EU and the Nation State* (London: Routledge, 1999); Singh, *supra* note 5, at 127.

⁹ Burri (2009), *supra* note 3.

relating to the specific qualities of cultural goods and services and argued these demanded specific policies, which can correct the market failures in the relevant markets and ensure welfare.¹⁰ The cultural identity line of defence has also been prominent in the EC tactics – on the one hand, by emphasizing the importance of the audiovisual industry to European identity and unity and by highlighting the harmful effects of Hollywood, on the other.¹¹ The US, strongly lobbied by the entertainment industry,¹² countered the European offensive and was opposed to any cultural exception, regardless of its form. The US' strongest argument was that of disguised protectionism, especially considering the intrinsic difficulty of defining 'national' and 'culture'. It also stressed consumers' freedom of choice, as well as other positive effects of free trade in cultural products.¹³

The cultural exception agenda only partially attained its goals. On the eve of the Marrakesh talks, without striking any concrete deal, the EU and the US basically agreed to disagree on addressing cultural matters,¹⁴ and this is reflected in the design and substance of WTO law, in particular in the rules on trade in services. The GATS framework is malleable and WTO Members can choose the services sectors in which they are willing to make market access¹⁵ and/or national treatment¹⁶ commitments, and can define their modalities. Even the most-favoured-nation (MFN) obligation – that is, the duty to treat equally like foreign services and services suppliers, which is fundamental to the entire trade system, can be subject to limitations.¹⁷ As a result of these flexibilities, almost all Members, with the exception of the US, Japan and New Zealand, have been reluctant to commit in culture-related sectors. Indeed, audiovisual services is the least liberalized sector and most WTO Members can maintain and adopt measures protecting domestic cultural industries and/or discriminating against foreign products and services.¹⁸

The current round of trade negotiations – the Doha Development Agenda – launched in 2001 holds no promise of changes in the status quo for audiovisual services. Although the Doha round is not stalled because of audiovisual services, and the intensity of the trade versus culture clash within the WTO seems to have somewhat

¹⁰ P. Sauvé and K. Steinfatt, 'Towards Multilateral Rules on Trade and Culture: Protective Regulation or Efficient Protection?', in Productivity Commission & Australian National University (eds), *Achieving Better Regulation of Services* (Canberra, AU: AusInfo, 2000), at 323–346.

¹¹ Singh, *supra* note 5, at 132–133.

¹² P.S. Grant and C. Wood, *Blockbusters and Trade Wars: Popular Culture in a Globalized World* (Vancouver, CA: Douglas and McIntyre, 2004), at 352–376; Singh, *supra* note 5, at 134–138.

¹³ See e.g. F.S. Galt, 'The Life, Death, and Rebirth of the "Cultural Exception" in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture's Hegemony', *Washington University Global Studies Law Review* 3 (2004), 909–935.

¹⁴ Singh, *ibid.*, at 135–136; C.B. Graber, 'Audio-visual Policy: The Stumbling Block of Trade Liberalisation', in D. Geradin and D. Luff (eds), *The WTO and Global Convergence in Telecommunications and Audiovisual Services* (Cambridge: Cambridge University Press, 2004), 165–214, at 166–170.

¹⁵ Article XVI GATS.

¹⁶ Article XVII GATS.

¹⁷ Article II:2 GATS.

¹⁸ M. Roy, 'Audiovisual Services in the Doha Round: Dialogue de Sourds, the Sequel?', *Journal of World Investment and Trade* 6 (2005), 923–952.

subsided since the Uruguay Round, the present state of requests and offers for the sector reveals few new commitments and no future-oriented rules-design. Despite the recognition shared by key WTO Members that the audiovisual sector has changed dramatically, in particular in the face of the sweeping transformations caused by the Internet, there is little agreement on the way forward.¹⁹

It is important to underscore that since the Uruguay Round and the charged debates around cultural exception, the regulatory landscape has changed quite a bit, specifically as cultural proponents shifted the forum and the culture and trade debate was taken out of the WTO context with the 2005 Convention on Cultural Diversity.²⁰ The UNESCO Convention was a concerted effort to create an international legally binding instrument on cultural matters as a counterforce to economic globalization and in particular to the highly legalized regime of the WTO.²¹ With the benefit of hindsight and considering the complexities in the matrix of trade, culture, media, intellectual property and human rights²² and the starkly different sensibilities of the negotiating parties,²³ the project was also somewhat doomed from the outset. Now that the hype caused by the adoption²⁴ and the swift ratification of the UNESCO Convention has settled, its flaws are apparent. The Convention has only a weak binding power with almost no obligations for the parties, except for the duty enshrined in Article 16 to grant preferential treatment to cultural goods, services and workers from developing countries. Combined with the Convention's substantive and normative incompleteness, the instrument does not provide for a real advance towards the goal of sustaining a diverse cultural environment.²⁵ The Convention, while giving support to cultural sovereignty politically, also does not change the situation in legal terms. On the one hand, the Convention's own implementation into the law of the Contracting Parties is

¹⁹ Roy, *supra* note 18; M. Burri, 'Telecommunications and Media Services in Preferential Trade Agreements: Path Dependences Still Matter', in R. Hoffmann and M. Krajewski (eds), *European Yearbook of International Economic Law: Coherence and Divergence in Agreements on Trade in Services* (Berlin: Springer, 2020), 169–192.

²⁰ UNESCO Convention on the Protection and Promotion of Cultural Diversity (adopted 20 October 2005; in force 18 March 2007).

²¹ See e.g. C.B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO', *Journal of International Economic Law* 9 (2006), 553–574.

²² See e.g. M. Burri, C.B. Graber and T. Steiner, 'The Protection and Promotion of Cultural Diversity in a Digital Networked Environment: Mapping Possible Advances to Coherence', in T. Cottier and P. Delimatsis (eds), *The Prospects of International Trade Regulation* (Cambridge: Cambridge University Press, 2011) 369–393.

²³ See R. Craufurd Smith, 'The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?', *International Journal of Communication* 1 (2007), 24–55; C. Pauwels, J. Loisen and K. Donders, 'Culture Incorporated; or Trade Revisited? How the Position of Different Countries Affects the Outcome of the Debate on Cultural Trade and Diversity', in N. Obuljen and J. Smiers (eds), *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work* (Zagreb: Institute for International Relation 2006), 125–158.

²⁴ Only Israel and the US voted against the Convention and four states (Australia, Honduras, Nicaragua and Liberia) abstained. Presently, 151 countries have ratified the Convention (see UNESCO, <https://en.unesco.org/creativity/countries>).

²⁵ For a detailed critique, see Craufurd Smith, *supra* note 23; Burri 2009), *supra* note 3; M. Burri, 'The UNESCO Convention on Cultural Diversity: An Appraisal Five Years after its Entry into Force', *International Journal of Cultural Property* 20 (2014), 357–380.

of modest or even inexistent significance.²⁶ On the other hand, the Convention will not alter the rights and obligations of the WTO Members – a situation that has been confirmed by the 2009 *China-Publications and Audiovisual Products* case.²⁷

To sum up and as an introduction to the following sections, the discourse on trade and culture is politically charged and legally complex with as yet no clear solutions that duly reconcile the contestation between trade liberalization and the pursuit of cultural policy. As the chapter shows below, the EU has crafted its own way in this landscape and has, on the one hand, strived to secure as much policy space as possible in its trade deals (as discussed in Section B) and on the other hand, engaged in cultural cooperation and forms of preferential treatment, in particular immediately after the adoption of the 2005 UNESCO Convention on Cultural Diversity (as discussed in Section C).

B. Cultural Exception Provisions

Similarly to other countries around the world, the EU has been active in expanding its network of bilateral and regional trade deals that permit the granting of preferential treatment to its partners going beyond the commitments agreed upon under the WTO framework (the so-called ‘WTO-plus’), as well as the adopting entirely new rules that address issues outside those regulated under the WTO and signify a higher degree of regulatory cooperation (the so-called ‘WTO-extra’).²⁸ As earlier noted, against the backdrop of the hard international trade rules, the EU has focused its efforts on safeguarding policy space by using the flexibilities that trade agreements offer, by paying particular attention to trade in services and the audiovisual services more specifically.

With regard to cross-border trade in services, the EU’s traditional approach has been to follow the GATS model and only positively (and relatively conservatively) commit, whereby different services sectors and sub-sectors are listed and the commitments for national treatment and market access specified. The level of commitments has largely mirrored the offers made by the EU during the Doha Round – so unlike the US, the EU has not gone substantially GATS-plus in its FTAs.²⁹ A distinct feature of the EU

²⁶ M. Burri, *The Implementation of the UNESCO Convention into EU’s Internal Policies*, Briefing Note for the European Parliament, IP/B/CULT/IC/2010_066 (2010); Burri (2014), *supra* note 25; M. Burri and K. Nurse, *Culture in the CARIFORUM: European Union Economic Partnership Agreement: Rebalancing Trade Flows between Europe and the Caribbean?*, UNESCO Report (2019).

²⁷ WTO Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/AB/R, adopted 21 December 2009), confirming in most essential points the Panel Report, WT/DS363/R, adopted 12 August 12, 2009; see in particular para. 4.207. See also S. Van Uytzel ‘The CDCE and the WTO: In Search for a Meaningful Role after *China-Audiovisuals*’, in L. Richieri Hanania (ed), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Oxford: Routledge, 2014), 40–53.

²⁸ See e.g. W.H. Cooper, *Free Trade Agreements: Impact on US Trade and Implications for US Trade Policy*, Congressional Research Service Report, RL31356 (2014); L. Corbin and M. Perry (eds), *Free Trade Agreements: Hegemony or Harmony* (Berlin: Springer, 2019).

²⁹ EU FTAs tend to cover more WTO-plus areas while having less liberal commitments. For a detailed analysis, see H. Horn, P.C. Mavroidis and A. Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements* (Brussels: Bruegel Print, 2009).

agreements, when undertaking services commitments, has also been the complete exclusion of the audiovisual sector. Indeed, the EU typically goes at great length in stressing that none of the commitments made apply for audiovisual services. So, taking here the example of the EU–Japan FTA, there are explicit exclusions of audiovisual services in the services chapter, in general and with specific regard to investment liberalization,³⁰ cross-border trade in services,³¹ electronic commerce³² and subsidies.³³ The EU also reserves the right to adopt or maintain any future measure with respect to broadcast transmission services.³⁴ In addition, the Telecommunications Services Section specifies in this regard that it does not apply to measures affecting: (a) broadcasting services as defined in the laws and regulations of each Party; and (b) services providing, or exercising editorial control over, content transmitted using telecommunications transport networks and services.³⁵ In this context, the EU has pursued a clear delineation of the audiovisual sector from neighbouring ones, such as telecommunications, computer and related, or electronic commerce services. This has to do with the processes of convergence spurred by digitization, which triggered the erosion of the previously distinct boundaries between the media, the telecommunications and the information technology (IT) sectors but is by no means reflected in the current WTO services classification, which is still based on the list compiled in 1991.³⁶ Services classification is critical, as each category implies a completely different set of duties and/or flexibilities. For instance, if online platforms and the services they offer were to be classified as computer rather than audiovisual services, the EU and its Member States would lack any wiggle-room whatsoever and would have to grant full access to foreign services and services suppliers and treat them as they treat domestic ones.³⁷

The EU stance to explicitly exclude audiovisual services and the additional sectoral delineation remarks are common to essentially all EU FTAs.³⁸ A somewhat different type of exception has been formulated in the 2017 Comprehensive Economic and Trade Agreement (CETA) with Canada, which is also untypically for the EU based on a

³⁰ Article 8.6(2)(c) EU–Japan FTA.

³¹ Article 8.14(2)(d) EU–Japan FTA.

³² Article 8.70(5) EU–Japan FTA.

³³ Article 12.3(7) EU–Japan FTA.

³⁴ Reservation 11, Annex II: Reservations for Future Measures, Schedule of the European Union, EU–Japan FTA.

³⁵ Article 8.41(2) EU–Japan FTA.

³⁶ WTO, Services Sectoral Classification List, WTO Doc.MTN.GNS/W/120 (1991).

³⁷ For a detailed discussion of classification issues, see R.H. Weber and M. Burri, *Classification of Services in the Digital Economy* (Berlin: Springer, 2012); M. Burri, ‘The International Economic Law Framework for Digital Trade’, *Zeitschrift für Schweizerisches Recht* 135 (2015), 10–72; I. Willems, *Digital Services in International Trade Law* (Cambridge: Cambridge University Press, 2021).

³⁸ See e.g. Articles 8.3(a) and 8.9(c) EU–Singapore FTA; Article 3(2)(a) EU–Mexico Modernised Global Agreement; Articles 8.3(2) (a) and 8.9(a) EU–Vietnam FTA; Article 1(8)(d) EU–MERCOSUR Association Agreement; Articles 123(5)(b), 197(2), 364(7) and 377(5) EU–UK Trade and Cooperation Agreement; Article 1.1(5)(b) EU–Australia FTA; Article 2.1(2) EU–Chile Modernised Association Agreement; Article 3.1 (1) (a) EU–Indonesia FTA; Article X.2(3)(b) EU–New Zealand FTA; Article 1.1 (5)(b) EU–Tunisia FTA.

‘negative list’ approach of committing for services³⁹ and has been largely the approach driven by the US.⁴⁰ The CETA exception is also asymmetrical in scope.⁴¹ For the EU, the exclusion covers, as commonly ‘audiovisual services’, while for Canada, the caveat relates to its ‘cultural industries’.⁴² ‘Cultural industries’ are defined as (a) the publication, distribution or sale of books, magazines, periodicals, or newspapers in print or machine-readable form; (b) the production, distribution, sale, or exhibition of film or video recordings; the production, distribution, sale, or exhibition of audio or video music recordings; the publication, distribution, or sale of music in print or machine-readable form; or (c) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television, and cable broadcasting undertakings and all satellite programming and broadcast network services.⁴³ When compared with the W/120 classification for audiovisual services under the GATS,⁴⁴ which includes motion picture and video tape production and distribution services; motion picture projection service; radio and television services; radio and television transmission services and sound recording, the scope of ‘cultural industries’ is somewhat broader.

Beyond the audiovisual sector exception, some additional steps have been taken to preserve EU’s domestic space for culture-related measures. So, for instance, under CETA, all EU Member States entered a reservation on ‘Recreation, cultural and sporting services’ providing for the non-application of the market access provisions for cross-border trade in services and investment. Several reservations have also been recorded for the entertainment services, including theatre, live bands and circus services and library, archives and museums and other cultural services; the sector with the least reservations is the ‘Publishing and printing sector’.⁴⁵ The domestic policy space is further preserved through the exclusion of subsidies and government support

³⁹ The CETA includes an Annex attached to the services chapter, which softens the impact of the negative committing (Annex 9-B: Understanding on new services not classified in the UN Provisional Central Product Classification (CPC) in its 1991 version as used during the Uruguay Round negotiations). The Understanding specifies that the commitments made do not apply in respect to any measure relating to a new service that cannot be classified under the CPC. Parties have an obligation to notify the other party about such new services and enter into negotiations to incorporate the new service into the scope of the Agreement, at the request of one of the Parties. This can potentially be the case with some new services in the telecom or media context that come to the market as a result of new technological advances.

⁴⁰ While the negative approach does not in itself influence the content or the quality of the obligations undertaken, it may limit somewhat future policy space. It also indirectly tackles the problem of outdated (and politically contentious) classification issues. See R. Adlung and H. Mamdouh, ‘How to Design Trade Agreements in Services: Top Down or Bottom Up?’, *WTO Staff Working Paper* 8 (2013); M. Burri, ‘The Regulation of Data Flows in Trade Agreements’, *Georgetown Journal of International Law* 48 (2017), 408–448.

⁴¹ Article 9.2 CETA. See also L. Bellucci, ‘Beyond Transatlantic Trade Law of Cultural Diversity towards Inclusive Capitalism: New Narratives for Post-Covid Sustainability in Light of CETA and CUSMA’, *Revue Juridique Themis* 55 (2021), 545–586, at 558.

⁴² Article 9.2 CETA and Chapter 28 ‘Exceptions’ CETA.

⁴³ Article 1.1 CETA; also Article 32.6(1) USMCA. Canada uses this definition consistently also in other FTAs, such as for instance in the Bilateral Investment Treaty with Costa Rica and the USMCA.

⁴⁴ See supra note 36.

⁴⁵ Annexes I and II CETA.

for audiovisual services (for Canada: the cultural industries).⁴⁶ This approach has become the standard also in post-CETA agreements, such as the EU–Singapore, EU–Vietnam, EU–Mercosur FTAs and the Trade and Cooperation Agreement (TCA) with the United Kingdom.⁴⁷ Further regulatory space is secured through a broadly defined right to regulate, which includes cultural diversity, and is generally inserted at the start of the Trade in Services chapters.⁴⁸

C. Cultural Cooperation Provisions

As noted earlier, the EU has been at the forefront of the culture and trade debate and has over the years forcefully engaged in the WTO to safeguard cultural policy objectives. It has also been the driving force behind the 2005 UNESCO Convention on Cultural Diversity and the Union itself is a signatory to the Convention. It is only logical in this sense to anticipate that the EU would invest extra efforts to ensure that the UNESCO Convention is properly implemented, despite the lack of enforcement drivers of the Convention itself, as discussed above. Indeed, such steps were taken in the EU external trade policy and found expression in particular in two agreements – the EU–CARIFORUM and the EU–South Korea FTAs, which seek on the one hand to interface trade and culture, which in itself is rare, and provide novel frameworks for cultural cooperation. We discuss these agreements in turn and then explore developments in more recent FTAs that seem to phase out some of the EU culture-related provisions and largely go back to the ‘cultural exception’ rationale.

1. EU–CARIFORUM EPA

The 2008 EU–CARIFORUM Economic Partnership Agreement (EPA) is a ‘deep’ free trade agreement covering all economic sectors concluded between the CARIFORUM States and the European Union (EU).⁴⁹ The EU–CARIFORUM EPA is the first North–South regional trade instrument that takes into account the 2005 Convention’s preferential treatment obligation, in particular under Article 16 and the cooperation for development obligation, under Article 14. In this context and for the first time, with the EU–CARIFORUM EPA, the EU committed to significantly opening its entertainment sector to services and service suppliers from CARIFORUM states.⁵⁰ While market access granted to Caribbean entertainers, artists and other cultural practitioners may be subject to qualification requirements and to economic needs tests (ENTs) and is

⁴⁶ Article 7.7 CETA.

⁴⁷ For a great overview, see A. Vlassis, L. Richieri Hanania and I. Kokinova, ‘Culture in the EU External Trade: Towards Stronger Digital Cultural Cooperation’, *cS Brief* 11 (2021).

⁴⁸ See e.g. Article 1 EU–Mexico Modernised Global Agreement.

⁴⁹ Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St. Kitts and Nevis; St. Lucia; St. Vincent and the Grenadines; Suriname; Trinidad and Tobago. Haiti signed the Agreement in December 2009 but has yet to ratify the EPA. All 28 EU Member States have signed the EPA with Croatia joining in 2017.

⁵⁰ The entertainment sector is typically interpreted to include all entertainment services other than audiovisual, such as theatrical productions, musical groups, bands and orchestra entertainment services; services provided by authors, composers, sculptors, entertainers and other individual artists; circus, amusement park and similar attraction services, ballroom, discotheque and dance instruction services; and other entertainment services. The concessions in the entertainment sector vary depending on the ‘mode of supply’.

dependent on the level of commitment of the individual Member States, this nonetheless can be deemed to be an important and unprecedented step in giving access for the temporary entry of natural persons, especially as it does not include quotas and is legally binding.

The market access granted by the EU for entertainment services is complemented with a new and innovative external trade practice instrument – the Protocol on Cultural Cooperation (PCC).⁵¹ Making an explicit reference to the provisions of the 2005 Convention, the PCC provides for bilateral cooperation on all cultural fronts, such as publications, sites and historic monuments and performing arts, and specifically includes activities particularly relevant to the Caribbean, such as carnivals and costume design. The PCC also has dedicated provisions for the audiovisual sector. In the latter context, the PCC breaks from the EU tradition of outright exclusion of the sector and grants access for Caribbean audiovisual content to the European market, if this is produced in collaboration with EU partners under certain conditions.⁵² Beyond the media sector, the PCC allows artists and other cultural practitioners, who are not involved in commercial activities in the EU, to enter the EU in order to collaborate on projects, to receive training, as well as to engage in production and other activities. In connection to this, they can stay in any EU country for up to 90 days during a 12-month period. The PCC also provides for technical assistance through different measures, such as training, exchange of information and expertise, counselling in elaboration of policies and legislation, as well as in the usage and transfer of technologies and know-how. Article 6 of the PCC seeks to further promote the EU and the CARIFORUM as locations for shooting films and television programmes, in particular by allowing temporary importation of technical material and equipment necessary for shooting from one Party's territory to another.

In this sense, the PCC provides opportunities for collaboration in the broader domain of culture, as well as for some specific opportunities for cultural workers and artists to enter the EU in order to learn, network or receive technical assistance. Moreover, it also provides for the preferential treatment of Caribbean audiovisual productions, which upon compliance with the 'doable' ratio of 80/20 participation, can enter the EU market on an equal footing with other European works.

⁵¹ For a detailed analysis of the CPP, see X. Troussard, V. Panis-Cendrowicz and J. Guerrier, 'Article 16: Preferential Treatment for Developing Countries', in S. von Schorlemer and P.-T. Stoll (eds), *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Berlin: Springer, 2012), 441–455.

⁵² Audiovisual co-productions involving European and Caribbean creative teams can benefit, when the contribution of the CARIFORUM partner(s) is no less than 20% and no more than 80% of the total production cost. When the co-production satisfies this requirement, it qualifies as a 'European work' under EU media law. The EU Audiovisual Media Services Directive (AVMS) provides that all audiovisual media providers in the EU must show a majority (more than 50%) of European works. Therefore, by qualifying as 'European works', CARIFORUM co-productions receive privileged market access to the European audiovisual market. It also stipulates that when co-production agreements have been completed between individual EU Member States and Caribbean States, Caribbean audiovisual producers can access additional funding for creative projects.

In terms of legal design, the PCC is innovative and has gained attention for its direct link to the 2005 Convention.⁵³ As the very first PCC, it was also taken as a sign of what to expect from the 2007 European Agenda for Culture⁵⁴ and its external relations dimension. The rhetoric following the EPA's adoption underpinned these perceptions. The European Commission referred to the Protocol as a 'showcase of implementation' of the 2005 UNESCO Convention and stressed the wish to 'move early' in order to signal Europe's commitment to the Convention and reinforce its international standing.⁵⁵ CARIFORUM stakeholders were even more enthusiastic and framed the PCC as an historic concession on the part of the EU that could create unprecedented opportunities for the Caribbean's cultural producers.⁵⁶ Yet, more than a decade after the PCC adoption, the story is much more varied, complex and somewhat less positive in terms of actual market entry. It appears that implementation on the ground has suffered due to the lack of engagement of the pertinent EU Member States' institutions, the lack of dedicated funding, administrative and organizational setbacks both at the EU and the Member States' level, as well as the intricacies of collaboration in the cultural domain across multiple countries.⁵⁷ It should be noted that despite the optimistic rhetoric around the EPA, in legal terms only the market access provisions for entertainment services as part of EPA's Title II 'Investment, Trade in Services and E-commerce' are binding and directly applicable but not all EU Member States have listed commitments and some have inserted additional conditionalities.⁵⁸ The

⁵³ See e.g. J. Loisen Jan and F. de Ville, 'The EU-Korea Protocol on Cultural Cooperation: Toward Cultural Diversity or Cultural Deficit?', *International Journal of Communication* 5 (2011), 254–271; L. Richieri Hanania, 'Cultural Diversity and Regional Trade Agreements: The European Union Experience with Cultural Cooperation Frameworks', *Asian Journal of WTO and International Health Law and Policy* 7 (2012), 423–456; C. Souyri-Desrosier, 'EU Protocols on Cultural Cooperation: An Attempt to Promote and Implement the CDCE within the Framework of Bilateral Trade Negotiations', in L. Richieri Hanania (ed), *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (Oxford: Routledge, 2014), 209–224; E. Psychogiopoulou, 'The External Dimension of EU Cultural Action and Free Trade: Exploring an Interface', *Legal Issues of Economic Integration* 41 (2014), 65–86; J. Loisen, 'The Implementation of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in EU External Relations', in E. Psychogiopoulou (ed), *Cultural Governance and the European Union. Protecting and Promoting Cultural Diversity in Europe* (Basingstoke: Palgrave Macmillan, 2015), 210–224.

⁵⁴ European Commission, Communication on a European Agenda for Culture in a Globalizing World, COM(2007) 242 final.

⁵⁵ B. Garner, 'Towards a European Strategy on Culture and Development: Learning from the CARIFORUM–EU Economic Partnership Agreement', *L'Harmattan* 2 (2017), 146–168, at 154, referring to the Trade DG's explanation of the Protocol in a hearing on the implementation of the Convention at the European Parliament, 27 February 2008.

⁵⁶ See e.g. K. Nurse, A. Francis and K. Niles, 'The EPA and Beyond: The Case for Industrial and Innovation Policy', *Journal of Eastern Caribbean Studies* 33 (2008), 70–104.

⁵⁷ For details, see Burri and Nurse, *supra* note 26; also S. Silva Sacha, Monitoring the Implementation and Results of the CARIFORUM–EU EPA, Final Report, EUROPEAID/129783/C/SER/multi; Garner, *supra* note 55; A. Vlassis, 'European Commission, Trade Agreements and Diversity of Cultural Expressions: Between Autonomy and Influence', *European Journal of Communication* 34 (2016), 1–16.

⁵⁸ Burri and Nurse, *supra* note 26.

provisions in the PCC are not legally binding on the other hand and represent a set of best practices that the EU and the EU Member States should pursue.

2. EU–South Korea FTA

The EU's cultural cooperation approach found a continuation in the FTA with South Korea (EUKOR) concluded in 2010. This agreement is important, as on the hand and in contrast to the Caribbean states, Korea is a developed country with a relatively sophisticated and internationally successful entertainment industry; on the other hand and similarly to the EU, South Korea has sought to protect its audiovisual sector by applying, amongst others, high screening quotas, which have also been under political pressure by the US.⁵⁹

Against the backdrop, the EUKOR is an important example in attempting to interface trade and cultural policies but also because of this, it was intensely contentious during the negotiations of the agreement and after its adoption.⁶⁰ In terms of design, while the EUKOR has an explicit cultural exception for the audiovisual services sector in the horizontal provisions regarding all services, it also includes a tailored cultural cooperation instrument embedded in the trade agreement in the form of a PCC.⁶¹ With the PCC, the EU specifically sought an impact of the 2005 Convention and made the PCC application conditional upon South Korea's ratification and adequate implementation of the Convention – especially as at the time South Korea was negotiating with the US and about to enter a far-reaching trade agreement that also curbed some of South Korea's cultural protection measures.⁶²

The EUKOR PCC, while building upon the EU–CARIFORUM template, is also very different from it. First and importantly, the PCC operates on a reciprocal basis. The cooperation is also institutionalized and Article 3 of the PCC foresees the establishment of a Committee on Cultural Cooperation (CCC)⁶³ intended to oversee the implementation and assume dispute settlement functions through mutually agreed upon

⁵⁹ See e.g. W.-M. Choi, 'Screen Quota and Cultural Diversity: Debates in Korea-US FTA Talks and Convention on Cultural Diversity', *Asian Journal of WTO and International Health Law and Policy* 2 (2007), 267–286.

⁶⁰ Loisen and de Ville, *supra* note 53, referring to statements by the European Coalitions for Cultural Diversity, France and interviews with stakeholders.

⁶¹ Article 1.2 EUKOR PCC states that '[t]he exclusion of audio-visual services from the scope of Chapter Seven (Trade in Services, Establishment and Electronic Commerce) is without prejudice to the rights and obligations derived from this Protocol'.

⁶² As a result of the US–South Korea Free Trade Agreement (KORUS), Korean screen quota was reduced from 146 to 73 days. KORUS also protects against increases in the amount of any domestic content required and ensures that new platforms, such as online video, are not subject to these legacy restrictions.

⁶³ The Committee has exclusive jurisdiction over the Protocol and can exercise all functions of the Trade Committee as regards the Protocol, where such functions are relevant for the purpose of its implementation. The CCC is not merely a joint committee under the Agreement but is also linked to domestic structures, part of the national administrations, which serve as a Domestic Contact Point. The CCC must work together with domestic advisory groups, comprised of cultural and audiovisual representatives active in the fields covered by the Protocol and is open for dialogue and consultations regarding any matter of mutual interest arising under the PCC.

arbitrators, who have knowledge and experience in cultural matters.⁶⁴ Similarly to the EU–CARIFORUM EPA, the EUKOR PCC includes a provision that seeks to facilitate the entry into and temporary stay in the parties' territories of artists and other cultural professionals, who are not engaged in commercial activities and who are either involved in the shooting of cinematographic films or television programmes; or are otherwise involved in cultural activities such as, for instance, the recording of music or contributing an active part to cultural events, such as fairs and festivals. Such cultural practitioners can enter the EU zone and stay for a period of up to 90 days in any 12-month period.

In addition, both the EU and South Korea are encouraged to facilitate the training of, and increased contacts between, artists and other cultural professionals and practitioners. Next to this broadly defined commitment, there are more specifically detailed provisions with regard to fostering joint productions in the fields of performing arts; the development of international theatre technology standards and the use of theatre stage signs (Article 8); fostering the dissemination of publications of the other Party through appropriate programmes, such as fairs, seminars, literary events and co-publishing and translations; and training for librarians, writers, translators, booksellers and publishers (Article 9) and cooperation in the context of the protection of cultural heritage site and historic monuments (Article 10).

Admittedly, all these provisions of the PCC are of a soft law nature. The provisions on the preferential market access granted to audiovisual co-productions go beyond these best endeavour duties. Article 5 of the PCC provides importantly for the possibility for finished audiovisual works co-produced by European and Korean partners to qualify as 'European' and 'Korean' works in accordance with the legislation in place in the Partners' countries, which basically connotes substantial market advantage vis-à-vis third parties' content. A set of predefined set of criteria must be met however.⁶⁵ Without going in detail of the different thresholds, it should be noted in this context that the requirements are more difficult to pass than under the EU–CARIFORUM, demanding for instance participation of two EU Member States, at least 30% contribution from the EU producers and at least 30% contribution from Korean producers, and an even more stringent test for animation works, where admittedly South Korea has a competitive advantage. Interestingly, producers from third countries can benefit from the co-production schemes as well, if they come from a country that has ratified the 2005 UNESCO Convention and their part of the production costs and the artistic technical contribution does not exceed 20% – there again observing a clear push for the Convention's ratification.

⁶⁴ The ultimate remedy for non-compliance with the terms of the PCC is the suspension of rights arising from it, until compliance is assured. Rights under the PCC cannot however be suspended on a dispute on matters not falling under the scope of the Protocol.

⁶⁵ The first two sets of criteria relate to the ownership and management of production companies and aim to prevent that the system established by the Partners to the PCC is circumvented to the advantage of third partners. The third and fourth criteria determine the respective participation of the parties and ensure that a balance is maintained between financial and technical/artistic contributions of the Parties. The final criterion strictly frames the conditions for recognition of co-productions where a third party participates. There are various options considered to address the specificity of the animation sector.

Due to the highly contentious character of these commitments and their potential impact on domestic media markets, some safeguards are embedded, including: (1) the possibility to review the co-production scheme after an initial period of three years and assess whether the scheme meets the objectives stemming from the 2005 UNESCO Convention of fostering the circulation of works to the mutual advantage of the parties; (2) the possibility for supervision of the PCC implementation by the CCC as a body distinct from the Trade Committees ensuring that there is no logic of inter-dependence between trade provisions and those on cultural cooperation and that there is a forum discussing cultural and audiovisual issues with a focus on their specificity; and (3) the possibility for involvement of cultural and audiovisual stakeholders in the process of implementing and adapting the PCC through the Domestic Advisory Groups. Finally, the EUKOR PCC foresees in its Article 5 the possibility to withdraw the granted preferences/advantages, if it appears that there are changes to the system of cultural content preferences operated in the other party. This is meant to ensure that reciprocity is maintained and also encourage both partners to preserve and develop their systems of promotion of national content rather than reduce it, which may be the case due to external pressure, such as from the US.

Beyond the importance of the legal design of the EUKOR PCC, its impact on the ground has been somewhat marginal – with some interesting collaboration developments beyond market access but almost no actual EU–Korean co-productions. This can be attributed from the EU side, above all to the lack of Union competence on co-productions and the restricted so far activity from individual Member States to enter into co-production agreements, mostly due to budgetary reasons. The Korean side has faced some challenges with regard to the PCC high hurdles for co-productions (such as the need for three participating EU countries for animation productions), as well as the fact that the benefits of the co-productions are not specific enough to offset these challenges.⁶⁶

3. Later Developments

The EUKOR PCC appeared to have been a hard pill to swallow for some stakeholders in the EU worrying that such arrangements brought ‘the offer of improved market access for culture into the sphere of trade negotiations as a “bargaining chip” to gain access in other sectors, particularly where this involves countries with relatively developed cultural sectors that might actually threaten the position of European firms in Europe’.⁶⁷ This led to a shift in the Commission’s strategy after 2009 and while later agreements on cultural cooperation were in fact negotiated, these were deliberately taken out of trade agreements – through a standalone Agreement on Cultural Cooperation in the case of Colombia and Peru (2012) and a protocol attached to the Association Agreement with Central America (2012) but not to its trade part.⁶⁸

⁶⁶ M. Burri and H. J. Yoo, *Implementation of Article 16 and its relation to Article 21 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in the Free Trade Agreement between the European Union and its Member States and the Republic of Korea (EUKOR)*, draft unpublished study for UNESCO, on file with the author (2018).

⁶⁷ Garner, *supra* note 55, at 159; see also Loisen and de Ville, *supra* note 53.

⁶⁸ Garner, *supra* note 55, at 159–160; Souyri-Desrosier, *supra* note 53.

It should also be mentioned that while the later agreements cover a broad range of issues in the cultural sector, they involve no market access and/or preferential treatment commitments. In this sense, '[t]he objective was to establish a framework to promote cultural cooperation among the partner countries based on "pure" cultural cooperation, rather than market liberalization measures that would crystallize commitments and rigidify the scope and form of potential cultural policies and measures in the sectors concerned'.⁶⁹ There is also a clear move away from the audiovisual sector and more attention paid to the mobility of and exchanges amongst artists and cultural practitioners, performing arts, publishing and the protection of cultural heritage and historic monuments.⁷⁰ Overall, the trade and culture interfacing seems to be somewhat interrupted and these domains operate in an isolated manner in EU external policies again. A proof of this is that more recent trade deals do not include any cultural cooperation provisions⁷¹ and this is true also for the 2016 CETA, which is somewhat disappointing as both Canada and the EU have been the drivers of the 2005 UNESCO Convention.

II. DIGITAL TRADE RULE-MAKING IN EU'S FTAS

D. Introduction

Against the backdrop of the proliferation of preferential trade agreements sketched above, important for this chapter's discussion is the fact that an increasing number of these agreements tackle 'electronic commerce' or 'digital trade',⁷² as it is now more frequently referred to, in a straightforward manner. Out of the 360 plus PTAs entered into between 2000 and 2022, 203 contain provisions relevant for digital trade and 95 have dedicated electronic commerce chapters.⁷³ Although the pertinent rules are heterogeneous as to scope, level of commitments and bindingness, it is evident that the move towards more, more detailed and more binding provisions on digital trade has

⁶⁹ L. Richieri Hanania, *Trade, Culture and the European Union Cultural Exception*, *International Journal of Cultural Policy* 25 (2019), 568–581, at 576; in the same sense, Garner, *supra* note 55, at 159–160.

⁷⁰ L. Richieri Hanania, *Trade, Culture and the European Union Cultural Exception*, *International Journal of Cultural Policy* 25 (2019), 568–581, at 576.

⁷¹ See e.g. EU–Singapore FTA; EU–Mexico Modernised Global Agreement; EU–Vietnam FTA; EU–MERCOSUR Association Agreement; EU–UK Trade and Cooperation Agreement; EU–Chile Modernised Association Agreement; EU–Indonesia FTA; EU–New Zealand FTA.

⁷² The OECD has pointed out that, while there is no single recognized and accepted definition of digital trade, there is a growing consensus that it encompasses digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments. Critical is that the movement of data underpins contemporary digital trade and can also itself be traded as an asset and a means through which global value chains are organized and services delivered. See J. López González and M.-A. Jouanjean, 'Digital Trade: Developing a Framework for Analysis', *OECD Trade Policy Papers* 205 (2017), <https://doi.org/10.1787/524c8c83-en>

⁷³ This analysis is based on a dataset of all data-relevant norms in trade agreements (TAPED). See M. Burri and R. Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset', *Journal of International Economic Law* 23 (2020), 187–220 and for updated data: <https://unilu.ch/taped>

intensified significantly over course of the past few years.⁷⁴ Indeed, it can be maintained that digital trade regulation has become one of the most dynamic areas of international rule-making in both multilateral and preferential venues.⁷⁵ In recent years, we have also seen the emergence of distinct templates that cover important WTO-extra issues in the domain of digital trade. Especially critical in this context are the far-reaching set of provisions endorsed by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States Mexico Canada Agreement (USMCA), as well as the emergence of entirely new dedicated digital economy agreements (DEAs), such as the Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand and Singapore through the Digital Economy Partnership Agreement (DEPA). This regulatory push in the domain of digital trade can be explained with the increased importance of the issue over time, as well as with the proactive role played by the United States, which has sought to implement its ‘Digital Agenda’⁷⁶ in more than a dozen agreements since 2001. These endorse a liberal set of rules that seek to reduce barriers for digitally-driven trade and include a number of beyond-the-border provisions that ensure that domestic regulation, for instance in the area of privacy protection, will not impede trade.⁷⁷ In more recent US-led trade deals, such as the USMCA and the Digital Trade Agreement with Japan, distinct features have been the ban on data localization measures and a hard provision of free data flows, including personal data.⁷⁸

For the regulation of digital trade, particularly critical are the rules found in: (1) the dedicated e-commerce or digital trade FTA chapters; (2) the chapters on cross-border supply of services (in particular in the telecommunications, computer and related, audiovisual, financial services sectors); as well as in (3) the chapters on IP protection.⁷⁹ The focus of this chapter is on the e-commerce/digital trade chapters, which have been the main source of new rule-making and particularly on the EU’s positioning in this landscape.

⁷⁴ Burri and Polanco, *ibid.*; I. Willemyns, ‘Agreement Forthcoming? A Comparison of EU, US, and Chinese RTAs in Times of Plurilateral E-Commerce Negotiations’, *Journal of International Economic Law* 23 (2020), 221–244.

⁷⁵ M. Burri, ‘A WTO Agreement on Electronic Commerce: An Enquiry into its Substance and Viability’, *Trade Law 4.0 Working Paper* No 1/2021 (forthcoming *Georgetown Journal of International Law* 53 (2022)).

⁷⁶ US Congress, Bipartisan Trade Promotion Authority Act of 2001, H. R. 3005, 3 October 2001; S. Wunsch-Vincent, ‘The Digital Trade Agenda of the US’, *Aussenwirtschaft* 1 (2003), 7–46; H. Gao, ‘Regulation of Digital Trade in US Free Trade Agreements: From Trade Regulation to Digital Regulation’, *Legal Issues of Economic Integration* 45 (2018), 47–70.

⁷⁷ See e.g. Burri (2021), *supra* note 75.

⁷⁸ See M. Burri, ‘Data Flows and Global Trade Law’, in M. Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 11–41.

⁷⁹ For analysis of all relevant chapters, see M. Burri, ‘The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation’, *UC Davies Law Review* 51 (2017), 65–132; for telecom and audiovisual services, see Burri (2020), *supra* note 19 and M. Burri, ‘Trade in Services Regulation in the Data-Driven Economy’, *Trade, Law and Development* 12 (2020), 208–240.

E. EU's Approach to Digital Trade

The EU has been a relatively late mover on digital trade issues and for a long time had not developed a distinct strategy. Although EU's FTAs did include provisions on electronic commerce, such as the 2002 agreement with Chile, the language tended to be cautious and limited to soft cooperation pledges in the services chapter⁸⁰ and in the fields of information technology, information society and telecommunications.⁸¹ In more recent agreements, such as the EU–South Korea FTA (signed in 2009), the language is more concrete and binding, imitating some of the US template provisions – for instance, by confirming the applicability of the WTO Agreements to measures affecting electronic commerce and subscribing to a permanent duty-free moratorium on electronic transmissions. Cooperation is also increasingly framed in more concrete terms and includes mutual recognition of electronic signatures certificates, coordination on Internet service providers' liability, consumer protection, and paperless trading.⁸² The EU, as particularly insistent on data protection policies, has also sought commitment from its FTA partners to compatibility with the international standards of data protection.⁸³

The 2016 CETA goes a step further. The CETA provisions concern commitments ensuring (a) clarity, transparency and predictability in their domestic regulatory frameworks; (b) interoperability, innovation and competition in facilitating electronic commerce; as well as (c) facilitating the use of electronic commerce by small and medium sized enterprises.⁸⁴ The EU has succeeded in deepening the privacy commitments and the CETA has a specific norm on trust and confidence in electronic commerce, which obliges the parties to adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce in consideration of international data protection standards.⁸⁵ Yet, there are no deep commitments on digital trade; nor there are any rules on data and data flows.⁸⁶

Only recently did the EU make a step towards such rules, whereby parties agreed to consider in future negotiations commitments related to cross-border flow of information. Such a clause is found in the 2018 EU–Japan Economic Partnership Agreement (EPA),⁸⁷ and in the modernization of the trade part of the EU–Mexico Global Agreement. In the latter two agreements, the Parties commit to 'reassess' within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty. This was the start of the process of EU's

⁸⁰ Article 102 EU–Chile FTA. The agreement states that '[t]he inclusion of this provision in this Chapter is made without prejudice of the Chilean position on the question of whether or not electronic commerce should be considered as a supply of services'.

⁸¹ Article 37 EU–Chile FTA.

⁸² Article 7.49 EU–South Korea FTA.

⁸³ Article 7.48 EU–South Korea FTA.

⁸⁴ Article 16.5 CETA.

⁸⁵ Article 16.4 CETA.

⁸⁶ See e.g. R. Wolfe, 'Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP', *World Trade Review* 18 (2019), s63–s84.

⁸⁷ Article 8.81 EU–Japan EPA.

repositioning on the issue of data flows, which is now fully endorsed in the EU's currently negotiated deals with Australia and Tunisia, as well as in the adopted agreements with New Zealand and the UK. These include in their digital trade chapters norms on the free flow of data and data localization bans but the commitments are also linked with the high data protection standards of its General Data Protection Regulation (GDPR).⁸⁸

The EU follows a distinct model of endorsing and protecting privacy as a fundamental right. On the one hand, the EU and its partners seek to ban data localization measures and subscribe to a free data flow but on the other hand, these commitments are conditioned: first, by a dedicated article on data protection, which clearly states that: 'Each Party recognises that the protection of personal data and privacy is a *fundamental right* and that high standards in this regard contribute to trust in the digital economy and to the development of trade',⁸⁹ followed by a paragraph on data sovereignty: 'Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards'.⁹⁰ The EU also wishes to retain the right to see how the implementation of the provisions on data flows impact the conditions of privacy protection, so there is a review possibility within three years of the entry into force of the agreement, and parties remain free to propose to review the list of restrictions at any time.⁹¹

In addition, there is a broad carve-out, in the sense that: 'The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity'.⁹² This 'right to regulate' exception is commonly included also in the Trade in Services chapter⁹³ and

⁸⁸ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1 [hereinafter GDPR]; see also European Commission, Horizontal Provisions for Cross-Border Data Flows and for Personal Data Protection in EU Trade and Investment Agreements, February 2018, available at: https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf

⁸⁹ See e.g. Article 6(1) draft EU–Australia FTA (emphasis added). The same wording is found in the draft EU–Tunisia FTAs.

⁹⁰ See e.g. Article 6(2) draft EU–Australia FTA. The same wording is found in the draft EU–Tunisia FTAs.

⁹¹ See e.g. Article 5(2) draft EU–Australia FTA. The same wording is found in the draft EU–Tunisia FTAs.

⁹² See e.g. Article 2 draft EU–Australia FTA. The same wording is found in the draft EU–Tunisia FTAs. EU–New Zealand FTA is slightly different with a potentially broader scope: 'The Parties reaffirm the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, the promotion and protection of cultural diversity, and in the case of New Zealand the promotion or protection of the rights, duties, interests and responsibilities of Māori'.

⁹³ See e.g. Article 1 of the Trade in Service Chapter of the EU–Mexico Modernised Agreement.

oftentimes also in the FTA's preamble.⁹⁴ It is very broad in scope, as the list of legitimate objectives is merely exemplary and is also fundamentally different than the objective necessity test known from WTO law.⁹⁵ The EU reserves therewith ample regulatory leeway for its current and future measures in diverse policy areas, including cultural diversity.

The new EU approach has been confirmed by the post-Brexit Trade and Cooperation Agreement (TCA) with the United Kingdom,⁹⁶ which replicates all the above provisions, except for the explicit mentioning of data protection as a fundamental right – which can be however presumed, since the UK incorporates the European Convention on Human Rights (ECHR) through the Human Rights Act of 1998 into its domestic law. The recent agreement with New Zealand⁹⁷ goes back to including the fundamental rights language and includes some additional safeguards, especially with regard to safeguarding Māori.⁹⁸

The rest of the EU digital trade template seems to be including the issues covered by the CPTPP/USMCA model, such as software source code,⁹⁹ facilitation of electronic commerce,¹⁰⁰ online consumer protection,¹⁰¹ spam¹⁰² and open government data;¹⁰³ not including however a provision on non-discrimination of digital products and excluding audiovisual services from the scope of the application of the digital trade chapter.¹⁰⁴

III. CONCLUDING OBSERVATIONS: HAS CULTURE BEEN LEFT BEHIND?

Culture is critical for EU external policies, as highlighted by a slew of Commission's documents, more recently with the 2016 Strategy for International Cultural Relations by the European Commission and the High Representative of the Union for Foreign

⁹⁴ See e.g. Preamble, EU–New Zealand FTA.

⁹⁵ S. Yakovleva, 'Privacy Protection(ism): The Latest Wave of Trade Constraints on Regulatory Autonomy' *University of Miami Law Review* 74 (2020), 416–519, at 496.

⁹⁶ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L [2020] 444/14.

⁹⁷ The agreed upon but not yet finalized and properly numbered text is available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en

⁹⁸ See in particular ARTICLE X.4 on cross-border data flows and therewith listed exceptions.

⁹⁹ Article 207 TCA. Again with notable safeguards, specified in paras. 2 and 3 of Article 207, including the general exceptions, security exceptions and prudential carve-out in the context of a certification procedure; voluntary transfer of source code on a commercial basis, a requirement by a court or administrative tribunal, or a requirement by a competition authority pursuant to a Party's competition law to prevent or remedy a restriction or a distortion of competition; a requirement by a regulatory body pursuant to a Party's laws or regulations related to the protection of public safety with regard to users online; the protection and enforcement of IP; and government procurement related measures.

¹⁰⁰ See e.g. Articles 205 and 206 TCA.

¹⁰¹ See e.g. Article 208 TCA.

¹⁰² See e.g. Article 209 TCA.

¹⁰³ See e.g. Article 210 TCA; not included in the EU–New Zealand FTA however.

¹⁰⁴ See e.g. Article 197(2) TCA.

Affairs and Security Policy¹⁰⁵ and well-illustrated in practice by the EU's role in the adoption of the 2005 UNESCO Convention on Cultural Diversity. This chapter's enquiries do signal however that in the domain of international trade law, EU's cultural policy is still fragmented and may not be duly taking into consideration the transformations triggered by digitization. On the one hand, it is apparent that the EU has scaled down its cultural cooperation approach after the EUKOR, which, also while being innovative in legal design, has yet to generate tangible results, especially in terms of access to the European market. The EU has above all relied upon the exclusion of the audiovisual sector, essentially in all trade venues and making also sure that the exclusion is clear under the conditions of digital environment.¹⁰⁶ This might make sense from the perspective of safeguarding EU's policy space and the permissibility of EU's media law instruments but it may also be missing the target of protecting and promoting cultural diversity in the digital age and engaging in an effort to design a new generation of cultural policy toolkits.¹⁰⁷ It appears in this sense that the EU has struggled to 'find a way of offering meaningful commitments on areas such as international cooperation and market access without alienating Member States and the European cultural lobby',¹⁰⁸ especially as culture remains largely a competence of Member States. As some authors have pointed out in this context, the EU seems 'united in diversity'¹⁰⁹ and is not fully equipped to navigate the complex and technologically and geopolitically fluid landscape.¹¹⁰

The digital trade chapters of the newer generation of FTAs discussed above reveal that the EU is willing to open its digital markets and ensure a functioning data-driven economy, primarily dictated by considerations that the EU might otherwise lose in

¹⁰⁵ European Commission, Towards an EU Strategy for International Cultural Relations, JOIN(2016)29 FINAL.

¹⁰⁶ As discussed above; see also M. Chochorelou, 'The European Identity Rationale in the EU Free Trade Agreements: Economic rather than Cultural Objectives?', *Deusto Journal of European Studies* 2 (2019), 227–249; Vlassis, Richieri Hanania and Kokinova, supra note 47.

¹⁰⁷ See in particular M. Burri, 'Discoverability of Local, Regional and National Content', A Thought Leadership Paper written for the Canadian Commission for UNESCO and Canadian Heritage, February 2019 and M. Burri, 'Cultural Diversity Policies in the Age of AI', *AI in the Audiovisual Sector*, IRIS Special Report (Strasbourg: European Audiovisual Observatory, 2021), 69–84; see also M. Burri, 'Cultural Protectionism 2.0: Updating Cultural Policy Tools for the Digital Age', in A. Candeub and S. Pager (eds), *Transnational Culture in the Internet Age* (Cheltenham: Edward Elgar, 2011), 182–212; M. Burri, 'Global Cultural Law and Policy in the Age of the Ubiquitous Internet', *International Journal of Cultural Property* 21 (2014), 349–364; M. Burri, 'Exposure Diversity as a New Cultural Policy Objective in the Digital Age', in L. Richieri Hanania and A.-T. Norodom (eds), *Cultural Diversity and Digital Technologies* (Teseopress, 2016), 209–236.

¹⁰⁸ Garner, supra note 55, at 163.

¹⁰⁹ K. Irion and P. Valcke, 'Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content', in E. Psychogiopoulou (ed), *Cultural Governance and the European Union* (Basingstoke: Palgrave Macmillan, 2015), 75–90; also S. Schunz, and R. Trobbiani, 'Diversity without Unity: The European Union's Cultural Diplomacy vis-à-vis the United States', *European Foreign Affairs Review* 24 (2019), 43–62. Stuart MacDonald and Erik Vlaeminck, 'A Vision of Europe through Culture: A Critical Assessment of Cultural Policy in the EU's External Relations', in C. Carta and R. Higgott (eds), *Cultural Diplomacy in Europe: Between the Domestic and the International* (Basingstoke: Palgrave Macmillan, 2020), 41–62.

¹¹⁰ Irion and Valcke, *ibid.*

terms of growth and innovation in the digital economy.¹¹¹ In terms of protecting vital interests, there is also a distinct focus on the protection of privacy, which is by all means critical, but may also lead to a tilted hierarchy of fundamental rights and an overlooking of other values.¹¹² The right to regulate, which is included in the EU FTAs and covers cultural diversity is certainly important but gives no guidance as to how to proactively address this objective except for the carve-out from international commitments. Overall, the bottom line of this chapter's cross-sectoral enquiry may be that indeed culture has been somewhat left behind in EU's external trade policies.

As Richieri Hanania has argued the digital economy could be employed to set up 'evolving measures and policies that most appropriately pursue the objective of cultural diversity in the digital context'.¹¹³ In this line, some authors have suggested that digital cultural cooperation should be more strongly integrated in the negotiations with EU trade partners making a better use of existing guidance in the field, such as the 2017 Operational Guidelines for the Implementation of the 2005 UNESCO Convention in the Digital Environment, the 2021 UNESCO Recommendation on the Ethics of Artificial Intelligence and different studies on the discoverability of cultural content¹¹⁴ that duly take into account the profoundly transformed media environment and the changed dynamics of cultural content creation, distribution, consumption, use and re-use.¹¹⁵ The authors also mention in this context the digital economy agreements, such as the DEPA, but in my opinion, while these offer a valuable platform for intensified regulatory cooperation on digital society issues, in terms of substance of the provisions culture is not well covered so far. Further in this vein of recommendations, it will be critical for the EU to translate its domestic initiatives to regulate online platforms, in particular through the Digital Services Act and Digital Markets Act into its trade policy and link this to cultural diversity issues, especially as the US has included provisions on 'interactive computer services' in its latest deals under the USMCA and the Digital Trade Agreement (DTA) with Japan that secure the application of Section 230 of the US Communications Decency Act,¹¹⁶ which insulates platforms from liability¹¹⁷ – a

¹¹¹ See e.g. M. Burri, 'Current and Emerging Trends in Disruptive Technologies: Implications for the Present and Future of EU's Trade Policy', Study for the European Parliament, EP/EXPO/B/INTA/2017/06, October 2017; also N. Henke et al., *The Age of Analytics: Competing in a Data-Driven World* (Washington, DC: McKinsey Global Institute, 2016); J. Bughin et al., *Digital Europe: Pushing the Frontier, Capturing the Benefits* (Washington, DC: McKinsey Global Institute, 2016).

¹¹² See in general K. Irion, M. Burri, A. Kolk and S. Milan (eds), *Governing European Values inside Data Flows*, special issue, *Internet Policy Review* 10 (2021); more concretely, see S. Yakovleva and J. Van Hoboken, 'The Algorithmic Learning Deficit: Data Protection, AI and Trade', in M. Burri (ed), *Big Data and Global Trade Law* (Cambridge: Cambridge University Press, 2021), 212–230; M. Burri, 'Interfacing Privacy and Trade', *Case Western Journal of International Law* 53 (2021), 35–88.

¹¹³ Richieri Hanania (2019), *supra* note 70, at 578; also Vlassis, Richieri Hanania and Kokinova, *supra* note 47.

¹¹⁴ Vlassis, Richieri Hanania and Kokinova, *ibid*.

¹¹⁵ See e.g. Burri (2019), *supra* note 107.

¹¹⁶ Section 230 reads: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider' and in essence protects online intermediaries that host or republish speech.

¹¹⁷ See e.g. E. Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review Reflection* 95 (2019), 33–46; E. Goldman, 'An Overview of the United States' Section 230

stance that is not shared by the EU.¹¹⁸ Overall, it appears that the EU's current approach to external trade policy may not be ideal but there are many paths open to improve it.

Internet Immunity', in G. Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford: Oxford University Press, 2020), 155–171; V.C. Brannon and E.N. Holmes, 'Section 230: An Overview', Congressional Research Service Report R46751, 7 April 2021; T. Bone, 'How Content Moderation May Expose Social Media Companies to Greater Defamation Liability', *Washington University Law Review* 98 (2021), 937–963.

¹¹⁸ See e.g. M. Burri, 'Fake News in Times of Pandemic and Beyond: Exploring of the Rationales for Regulating Information Platforms', K. Mathis and A. Tor (eds), *Law and Economics of the Coronavirus Crisis* (Berlin: Springer, 2022), 31–58.