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Essay:

The Return of the Cultural Exception and its Impact on International Agreements

Marlen Bartsch

Abstract: This essay examines the influence of the French concept of the “cultural exception” on European media policy and international agreements. After briefly reviewing the historical background of the cultural exception in France, the essay describes how demands for the cultural exception and those for diversity affect inter-/transnational agreements within the European Union and around the world. Special focus is placed on the current secret EU/US Transatlantic Trade and Investment Partnership Agreement (TTIP) negotiations that nearly failed because of France’s insistence that media and culture be exempted. The author argues that the concept of the “cultural exception” has been revived in recent years. However, due to the dual character of media (which is both a cultural and economic good), and the lack of a global media policy, the culture and trade debate will continue.

Keywords: cultural exception, cultural diversity, Transatlantic Trade and Investment Partnership Agreement (TTIP), Trans-Atlantic Free Trade Agreement (TAFTA), European Union, USA

Introduction

The secret negotiations between the United States of America (USA) and the European Union (EU) for a Transatlantic Trade and Investment Partnership Agreement (TTIP) nearly failed because of French restraints. France threatened to use its veto right if European media and culture were not exempt from the negotiation process. After reviewing dissenting opinions within the EU and incorporating US statements, the dispute has been solved. The debate regarding the distinction between culture and trade is reminiscent of the Uruguay Round negotiations that took place over twenty years ago.

The concept of the “cultural exception” traditionally forms the basis of French media policy and still plays an important role in international negotiations. The discourse on media as being either a product or a cultural good can be traced back

to the beginning of the 20th century. The philosophical concept of a “cultural industry” as introduced by Max Horkheimer and Theodor Adorno from the Frankfurt School (1947), challenged the separation of economic and cultural considerations from a critical perspective (Neuwirth, 2006, p. i). This idea of cultural industry first became part of international trade law with the adoption of the Canada-United States Free Trade Agreement (CUSFTA, 1988) (Neuwirth, 2006, p. 56). Canada’s battle for an exemption of cultural industries in CUSFTA is regarded as a “further milestone in the continuous debate about the treatment of culture within the international trading regime” (Neuwirth, 2010, p. 70).

The following essay focuses on the concept of “cultural exception” by briefly reviewing its historical background and evolution in France. It examines the impact of the cultural exception on international agreements, and demonstrates how the notion of cultural exception evolved into the less-restrictive one of “cultural diversity”. This is followed by a description of the TTIP with special focus on the dissenting opinions of the European Union and the USA, and the potential influence of the TTIP on media markets and policies. Finally, the essay tries to give an outlook on the role of the concept of “cultural exception”.

The main hypothesis of this essay is that the cultural exception has weakened, yet is currently undergoing a national and European revival. Instead of being supplanted by the concept of “cultural diversity”, both concepts coexist and integrate whenever a cultural exception is postulated. The term “cultural exception” is highly related to French cultural policy.

Historical Background of the Cultural Exception in France

After World War I, a nation-wide discussion about cinematography revealed an opposition to the intermingling of culture and industry within France (Mattelart, 2006, p. 46). The key aspects of the cultural exception are demonstrated through the encouragement of the dissemination of cultural goods and the development of a special broadcasting policy (Mattelart, 2006, p. 39). In France, the notion of the cultural exception emerged at the beginning of the 1960s amid the conflicting relationship between the USA and France (Hillenweck, 2004, p. 193). During the presidency of François Mitterrand, it was initially implemented as a matter of policy (Lescure, 2013, p. 1).

What does “cultural exception” mean? The concept conveys the idea that cultural goods, especially TV and cinematographic films, should not be subject to conditions of the free market; instead, these cultural goods play a key role in society as mediators of cultural values and identity (Hillenweck, 2004, p. 193). It aims to honor and protect the ethical, political and social dimension of culture, albeit the economic dimension should not be denied (Lescure, 2013, p. 5). According to Dauncey, the cultural exception is a special approach to culture which

“is based on and within the traditional framework of thinking on how France differs from other Western democracies” (Dauncey, 2010, p. 73).

This concept is implemented in France through linguistic and media policy measures, such as quotas for French-language songs on the radio; state subsidies in audiovisual media productions; and direct and indirect subsidies of the press. State intervention and the promotion of cultural values are regarded as a characteristic part of French culture (Hillenweck, 2004, p. 197; Machill, 1997, p. 91). In this context, the notion of “French exception” or, as it is currently called, the “French model”, is often used to examine spheres in which France is said to be exceptional. These include “the major role of the state; political and ideological polarization; citizenship and the republican model; and French 'universalism'” (Chafer & Godin, 2010, p. 2). The discourse also raises concerns about French identity (Chafer & Godin, 2010, p. 4). At the beginning of the 21st century, debate around the French exception became less prominent (Collard, 2010, p. 31), and the urge to enforce a cultural exception waned with the introduction of the Euro and economic liberalization in France (Collard, 2010, p. 27).

After the global economic and financial crisis, the French model was revived. It was presented as “a potential blueprint for Europe” and “a desirable alternative to the excesses of economic neo-liberalism” (Chafer & Godin, 2010, p. 4).

[...] the 'French model' has been enthusiastically endorsed by a variety of actors, from left-wing, 'sovereignist' republicans to Gaullist standard bearers, from trade-unionists to sections of the extreme right and the extreme left, from film-makers to medical staff, who for very different reasons warn against the dangers of liberalisation à l'anglo-saxonne (Chafer & Godin, 2010, p. 5).

Today, the notion of the “cultural exception” is conceived of differently by both the public and by persons engaged in the cultural sector, so much so that a “dangerous gap” has developed between these two groups (Lescure, 2013, p. 2). On the one hand, users want to have free access to cultural goods. On the other hand, producers, authors, and the like, endeavor to strengthen intellectual property rights. In order to shrink this disparity between the actions of the cultural industry and the expectations of the public, the French government assigned the former CEO of the French private channel *Canal+*, Pierre Lescure, to draft a solution in the form of a governmental report. The aim was to revive the concept of “cultural exception” with regard to the current developments in the ICT sector, as well as changes in media consumption habits. After approximately 200 hearings, round tables, and interviews, Lescure edited a final report of two volumes, including 80 proposals. In the report, he begins by arguing for the promotion of access to online information both quantitatively and qualitatively: The public should have access to a large number of cultural goods, which should be of high quality. Secondly, he advocates adequate remuneration for producers, artists, and others involved in the cultural sector, in addition to sufficient funding. Thirdly, intellectual property rights should be implemented to match the realities of digitalization (Lescure, 2013, pp. 5-6). Finally, his report, entitled *Mission: 'Acte II de l'exception*

culturelle' (Mission: 'Act 2 of the Cultural Exception'), underscores my hypothesis that the concept of the "cultural exception" is undergoing a national revival instead of being supplanted by the concept of "cultural diversity". In addition, I would like to point out the nationalist dimension: While the idea of diversity dominates European policy, the individual member states try to protect their own cultures (Barbato, 2008, p. 122). European protection measures have often been criticized by the US.

European and US Positions in the Culture vs. Trade Debate

In the 1920s and 30s, European states like Germany, Italy and France protected their film industries against US influences by offering subsidies (Mattelart, 2006, pp. 44-45; Graber, 2003, p. 124). The USA, however, declared its belief in the free flow of information as a core part of its international cultural policy (Mattelart, 2006, p. 53).

Since 1947, GATT (General Agreement on Tariffs and Trade) has regulated world trade, whereas cultural goods and products have generally been excluded. Article XI of GATT regulates state subsidies by approving screen quotas while prohibiting quotas on imports (Graber, 2003, pp. 124-125). This aims to solve the tension between the USA and European states like Germany and France, with regard to protection measures against the intrusion of US films in Europe. In the 1980s, the European Union started regulating the European audiovisual market, which was characterized by an increasing liberalization and internationalization. In a resolution from 1989, the US House of Representatives asserted that the quotas imposed by the European Directive, Television without Frontiers, violate GATT rules by insisting that TV programs are products which are subject to GATT (Graber, 2003, p. 131).

The term "cultural exception" was first discussed on an international level during the multilateral Uruguay Round negotiations of 1993. The negotiations aimed to extend GATT to include services and property rights in a General Agreement on Trade in Services (GATS). Cultural goods were added to the list of negotiable products as "the US felt that the EU was too protective towards its cinema and television production" (Collard, 2010, p. 24). The USA wanted to deregulate and liberalize the audiovisual sector, since film and other audiovisual productions are regarded as entertainment (Barbato, 2009, p. 244). France required an exemption on culture and cultural goods as per the definition of 'service' in the GATS. Even at the first meeting of the audiovisual media group, there was disagreement concerning a cultural exception (Barbato, 2008, p. 241). Whereas the EU, Canada, Australia, India and other countries, requested a special audiovisual policy to protect national cultural identity, the USA argued that cultural identity is difficult to define and that the promotion of cultural diversity and cultural protection measures only serve economic interests (Graber, 2003, pp. 133-134). French producers and others engaged in the cultural sector accused the USA of cultural

imperialism (Graber, 2003, p. 137).

In addition, EU member states had different opinions about an audiovisual media trade exemption. France ardently insisted on a cultural exception; the engagement of Belgium, Italy, Spain and Portugal was described as tentative; Germany and Denmark did not allot cultural competency to the European Union; and the UK wanted to deregulate (Barbato, 2008, p. 241). In September 1993, France threatened to obstruct the completion of the Uruguay Round if US requirements made their way into the final version of GATS (Graber, 2003, p. 134).

After much lively debate, the talks resulted in the liberalization of the publishing industry, theatre performances and an 'agreement to disagree' on the exclusion of audiovisual media. Legally, the media sector falls under goods and services within the scope of the WTO, but depending on the agreements between the parties, the media does not have to be part of bilateral negotiations. Member states of the WTO that also signed the International Covenant on Civil and Political Rights can rely on the diversity principle to defend their cultural policy measures. Treaty obligations, however, cannot be circumvented (Graber, 2003, p. 120).

After the Uruguay Round, negotiations of the Multilateral Investment Agreement and the Ministerial Meeting in Seattle (1999), were clouded by this culture vs. trade controversy (Neuwirth, 2006, p. 201). Since the end of the 1990s, the French and American press battled over cultural issues, with accusations of "cultural imperialism" or "living in the past by refusing to accept globalization" were exchanged by the opposing sides (Collard, 2010, p. 25). Because of such conflicts over how culture should be treated within the context of trade, the USA resigned from UNESCO. After its reentry in 2003, it came as no surprise that the USA did not sign the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

Why are audiovisual works, in particular, the subject of such heated debates? Since audiovisual media share the same characteristics (like non-rivalry and non-exclusion) with public goods, their effective functioning within markets is difficult (Graber, 2003, p. 62). Nevertheless, audiovisual media play a key economic, cultural and social role, since the audiovisual sector employs over one million EU citizens (European Commission, 2014). Also, television "remains the foremost source of information and entertainment in Europe" (European Commission, 2012). Content industries, including the audiovisual sector and other media producers, are not only "crucial to cultural diversity", but also "of paramount importance for the economy of the European Union" (European Commission, 2014). Bearing in mind that the Audiovisual Media Services (AMS) Directive aims to establish a single European market for audiovisual media services, it is certain that the European Commission and the European Parliament will endeavor to strengthen this sector. For instance, the European Parliament has continued to express its disapproval of a liberalization of the cultural sector within the WTO (Barbato, 2008, p. 250).

The measures laid out in the AMS Directive include the promotion of European and independent works in terms of transmission time, production, and access. Furthermore, the EU's MEDIA program supports the development and distribution of audiovisual programs, and the advanced vocational training of employees. The Council of Europe has also established the *Eurimages* fund to support co-productions and distribution of European films. The Organization for Economic Co-Operation and Development (OECD) also sets multilateral rules on electronic commerce or international investment. As special organizations within the United Nations Organization, the United Nations Educational and Cultural Organization (UNESCO) and the World Intellectual Property Organization, vie for the free flow of information, property rights and cultural diversity.

From 'Cultural Exception' to 'Cultural Diversity'

At the end of the GATT negotiations during the Uruguay Round (1986-1994), France's support of "cultural diversity" was interpreted as a shift in terminology (Hillenweck, 2004, p. 207) and a modification of the idea of "cultural exception" (Lescure, 2013, p. 168; Baasner, 2011, p. 1). According to Metze-Mangold, the promotion of cultural diversity was the only way out of the supposed 'blind alley' of the French concept of "cultural exception" (Metze-Mangold, 2007, p. 196). Whereas the term "cultural exception" was substituted by "cultural diversity" on an international level, in France the idea of an exception on cultural goods began to wane a few years later.

The concept of "cultural diversity" is regarded as less restrictive: It supports open-mindedness towards other cultures, while national identity is supported as well (Dagnaud, 2000, p. 163). The term refocuses cultural debates in a positive way as it uses a "more semantically neutral vocabulary" (Dauncey, 2010, p. 74).

The Maastricht Treaty (Treaty on European Union, 1992) was the first to implement cultural diversity on the European level, with respect to national identities. At the Seattle WTO Ministerial Conference of 1999, the European member states agreed – after many disputes – to support cultural diversity as a principle goal of European media policy (Graber, 2003, p. 141). The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) focused on this concept of "cultural diversity" and was encouraged by France's president Jacques Chirac. Today, cultural diversity is one of the core focus areas of the European Union (Barbato, 2008, p. 36) and shapes the process of political and economic unification within the EU (Barbato, 2008, p. 40). National measures that aim to protect cultural diversity have to be consistent with the European principle of liberty. Therefore, direct measures that support either the publishing and audiovisual sectors were judged to be illegal (Barbato, 2008, p. 115). On the other hand, the European Court has qualified the defense of cultural identity as being in the general public interest (Barbato, 2008, p. 193). According to Dauncey, cultural pluralism in the 2000s reflects a "commercial

understanding of the importance of cultural industries” and “an attempt to resist American globalization” (Dauncey, 2010, p. 75).

Lescure highlights the ability of the cultural exception to promote cultural diversity. He rejects charges of economic protectionism and a defensive concept of culture (Lescure, 2013, p. 15). This definition reflects the synthesis of the two concepts of “cultural diversity” and “cultural exception”. According to Barbato, cultural exception constitutes a sign of respect towards cultural diversity (Barbato, 2008, p. 230).

To conclude, the French initiative to protect national culture and industry has not weakened. France has supported internationalization in order to compete with other global players, yet this has necessitated an amplification of France’s vocabulary of concepts. The shift in terminology from “cultural exception” to “cultural diversity” reflects this expansion: Promoting cultural diversity includes the support of national cultures as well. As mentioned, the term “cultural exception” declined both internationally and in France and was substituted by “cultural diversity”. Presently, Lescure’s report for the French government, together with France’s stance in preparation for the TTIP negotiations, have shown a revival of the cultural exception.

Exception and Diversity in Trade? The Transatlantic Trade and Investment Partnership Agreement (TTIP)

The EU and the USA want to create the biggest trading bloc in the world. Both parties hope that a liberalized transatlantic free-trade area will benefit their economies and create jobs. This idea was already developed in 1995 and referred to as the Trans-Atlantic Free Trade Agreement (TAFTA). After Obama’s State Of The Union Speech in February 2013, the negotiations are denoted as TTIP.

Shortly before approving the European Commission’s negotiation mandate, France forged an alliance with fourteen EU member states demanding an exception of audiovisual media (analogue and digital). In addition, European film-makers signed the petition, ‘The cultural exception is non-negotiable’ (Petition, 2013). The European Parliament, which was also excluded from the secret negotiations, wanted a far-reaching negotiating mandate that clearly stipulates an exclusion of “cultural and audiovisual services, including those provided online” (European Parliament, 2013).

The then president of the European Commission José Manuel Barroso tried to reassure French and European film-makers that culture would be protected, but the exclusion of an entire sector would limit the scope of negotiations. He added that the EU has “offensive interests” in the audiovisual sector (Barroso, 2013). The US government warned the EU against acquiescing to French demands. William Kennard, the US ambassador to the EU, said in an interview with *The Financial Times* that there “will be a price to pay”, and that “if it’s not a clean mandate, it will increase the pressure on our side to do the same” (Spiegel, 2013).

Because of the resistance from some European member states and the US, media does not fall under the cultural exception. As a compromise (and at least to get the negotiations started), audiovisual works are not part of the current negotiations. But, as emphasized by the European Commissioner for Trade, Karel de Gucht, they can be added at any time.

Nevertheless, important aspects of the media sector – like the protection of intellectual property rights and data protection – can remain on the agenda of the TTIP negotiations. Recently, in a resolution on the USA's NSA program, Members of the European Parliament (MEP) warned that their approval of the final TTIP agreement may be endangered if “blanket mass surveillance activities” are continued. They also added that “the protection of the privacy of individuals in relation to the processing and dissemination of personal data remain governed by Article XIV of the GATS” (European Parliament, 2014, p. 74). While the MEPs are not involved in the negotiations – a fact that is often criticized as undemocratic – this resolution reveals their dissenting opinion as representatives of European citizens.

Other aspects, like anti-dumping measures, can also have an important impact on European media systems. Graber mentions the difficulty in evaluating the “real price” of audiovisual media products, which are characterized by high fixed costs and deep marginal costs (Graber, 2003, p. 181).

One of the most controversial points of the TTIP is the investment protection, which includes an investor state dispute settlement. This idea of solving disputes in an easier and faster way is criticized, because US companies investing in the EU could bypass European courts. It is conceivable that governments would have to justify their protection measures in front of international tribunals. This could be an easy way of bypassing national laws. On the one hand, it would be particularly difficult to reconcile anti-trust policies, which differ from state to state, with a liberalized free trade area, and the wish to protect cultural values and identity on the other. The former German Minister for Economic Affairs, Rainer Brüderle, warned that US internet giants would not have to account for European rules of competition. He called for strict transatlantic rules of competition which could shatter media companies like Google that operate as monopolies (Schaal, 2014). Should the inclusion of digital media in the TTIP (which aims to encourage market liberalization) be the solution in implementing policy measures against global media players?

If audiovisual media were included in the TTIP, there are some aspects which should be kept in mind:

1. The entertainment industry is the second largest source of US exports. Fiscal advantages for global players could lead to their intrusion into European states which have not enacted protection measures for their own audiovisual industries.
2. The focus of EU media policy could shift from the promotion of cooperation with audiovisual

industry professionals in third countries¹ to the USA.

3. Media concentration could evolve. As Graber has shown, notwithstanding technological innovations and increasing consumption possibilities, audiovisual content is primarily provided by only a few multinational US companies (Graber, 2003, p. 71). These global players could also benefit from an increasing protection of property rights that could be part of the TTIP negotiations.
4. The cultural dimension of audiovisual media services “as vectors of identity, values and meaning“ (UNESCO Universal Declaration on Cultural Diversity, Art. 8) could diminish, so that media creations could be regarded as mere products. Books and other products of cultural character are already imported duty-free since the signing of the Florence Agreement on the Importation of Educational, Scientific and Cultural Materials (1950) by UNESCO.
5. Global media groups could benefit from externalities of small production companies. Positive externalities (e.g. the benefits of big media companies (third parties) in the production of art house movies), or negative externalities prove that the market does not allocate all resources efficiently (Graber, 2003, p. 65).

While the TTIP may include threats to European media systems, there are some factors which make the influence of the TTIP less absolute:

1. States continue to support media competition with subsidies and screen quotas, whenever laws regulating competition seem to be insufficient. Subsidies that encourage the export or use of national products are already prohibited according to Article 3 of the Agreement on Subsidies and Countervailing Measures (Graber, 2003, p. 233).
2. The prohibition of import restrictions according to Article XI of GATT also applies to quota limits on the import of audiovisual media (Graber, 2003, p. 247).
3. Several European member states have implemented special measures against media concentration, and for the protection of media pluralism.
4. The WTO principle of National Treatment (Art. III GATT, Art. XVII GATS, Art. 3 TRIPS) prohibits unequal treatment of foreign products or services in relation to national ones (Graber, 2003, pp. 150-151).
5. An elimination of customs duties can increase the global exchange of cultural products, so that even small countries' national economic growth can benefit.

The promotion of culture and trade

The concepts of “cultural diversity” and “cultural exception” are highly relevant to media policy: Whereas “cultural diversity” refers to media pluralism acting against the homogenization of cultures, the term “cultural exception” is associated with the exclusion of audiovisual works within international agreements. This serves to protect national culture and identity. However, the term ‘exception’ is always seen to be less open-minded and part of a more restrictive vocabulary. That said, both concepts currently play an important role internationally, with the idea of the “cultural exception” having declined in significance; evolved into one of cultural diversity; and then revived in France and Europe. Today, when the “cultural exception” is referred to, it implies an integration of both concepts.

¹ This intention was declared in the Cannes Declaration on EU audiovisual cooperation (2008).

Culture and cultural diversity (including media) need to be respected by the European Union (Article 151, Treaty of Nice). In summary, many agreements, treaties, conventions, etc. account for it, although there is no general, single body that regulates international media. The concept of cultural diversity, which forms part of various international agreements and intergovernmental organizations (e.g. UNESCO, WIPO), is intrinsically tied to the constitution of a single European market (Barbato, 2008, p. 231). The support of media pluralism and diversity is fixed in EU media policy. The subsidiarity principle, in particular, guarantees the respect of the cultural diversity (Barbato, 2008, p. 294).

On the other hand, Barbato claims that the European Union supports cultural diversity in order to create European cultural identity (Barbato, 2008, p. 418). Diversity is regarded and exploited as vector of cultural and political unity (Barbato, 2008, p. 507). The importance of national decision-making is declining. Chafer and Godin point out that the state “has nevertheless lost its monopoly on decision-making to global markets, decentralized local authorities and the EU” (Chafer & Godin, 2010, p. 6).

Concepts of culture and trade were once regarded as mutually exclusive (Neuwirth, 2006, p. 483). However, multilateral regulations, especially those of the WTO, have combined to set a general legal framework for these concepts. But interpretative uncertainties caused by an “asymmetry or lack of equilibrium between the three agreements” (GATT, GATS, and TRIPS) (Neuwirth, 2006, p. 161; p. 182), make for a distinction between culture and trade that is difficult to implement in practice: Do measures to support pluralism within program offerings and different art house producers serve cultural or economic goals? In addition, an excessive supply of foreign cultural products as a result of free trade cannot be considered an intrusion upon a nation’s culture (Graber, 2003, p. 114). The questions are: At which point does cultural diversity threaten national cultural identity, and when does the cultural exception policy come into play to secure national interests? Is the promotion of cultural diversity conducive to the simultaneous development of a national identity that is different from traditional cultural values?

In conclusion, “cultural industries should receive special treatment” (Neuwirth, 2006, p. 504) and the culture vs. trade debate will go on. Currently, with regard to the TTIP negotiations, the term “cultural exception” has made its comeback in the international sphere. It does not only coexist, but has integrated with the idea of “cultural diversity” in support of the cultural character of media. The fact that there is no real international media policy is also an advantage, this works to the benefit of the promotion of the dual character of media (as cultural and economic goods), an openness to technological innovations and convergence, as well as the transformation of consumer habits.

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Author Marlen Bartsch is a doctoral student at the Institute for Media and Communication Studies at the Freie Universität Berlin. Since 2013, she has held a scholarship at the Foundation of German Business (Stiftung der Deutschen Wirtschaft). She studied media and communication and French philology at the Freie Universität in Berlin and the Université Paul-Valéry in Montpellier, France. Over the course of her studies, she has learned Italian and Chinese. After earning her master's degree (Magister Artium), she worked at the Institute for Media and Communication Policy in Berlin as a research associate. Her research interests include media policy, media systems, and global players.
Email: Marlen.Bartsch@fu-berlin.de