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Book Review

Book Review: Free Trade versus Cultural Diversity in the Field of Audiovisual Services

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Christoph Beat Graber / Michael Girsberger / Mira Nenova (Hrsg.) (2004):

Free Trade versus Cultural Diversity in the Field of Audiovisual Services

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The relation between free trade and cultural diversity has been one of the most disputed issues in the negotiations concerning the liberalisation of international markets for audiovisual media in the World Trade Organization (WTO). Cultural diversity it not only en vogue as part of one's self-understanding of cultural identity but also a tremendous market. The positions on how audiovisual media should be addressed and regulated vary from the extreme position of the notorious *exception culturelle* to that of absolute liberalisation with plenty of nuances in between. The present publication contributes with articles written in English, French and German to this discussion by providing an analytical interdisciplinary background as well as stakeholder positions in the ongoing Doha trade talks.

The first chapter of the book by GAETANO ROMANO on 'Technologische, wirtschaftliche und kulturelle Entwicklungen der audiovisuellen Medienmärkte in den letzten Jahren' starts not only out by discussing from an sociologist point of view different concepts of cultural identity and cultural diversity in the realm of major technological and economic changes of the last decades in the markets for audiovisual media, but also by trying to get rid of three major myths: the myth about globalization as homogenization, the myth about the existence of national cultures and the myth about the almighty of mass media. According to GAETANO ROMANO the so called globalization was born as an effect of a revolution of communication technology. As long as communication occurs decentral and unplanned, globalization and homogenization will not coincide. Seeing that communication does not end at national borders, for ROMANO there is no scope for single national cultures. The question remains, which media products or services are fit for the globalized market. His system theory based answer refers on the knowledge of a functional distinguished global society e.g. the individualistic orientation to career, romantic intimate love, small family values etc. which compete with traditional cultures – if there are any – but not with national cultures. As mass media has only strengthening effects traditional cultures are not threatened by them but by modern time.

In Chapter 2 on 'Audiovisual Media and the Law of the WTO' CHRISTOPH BEAT GRABER provides detailed accounts of the WTO law as far as audiovisual media are concerned. As GRABER wrote his professorship on the subject 'Trade and Culture in the Law of the WTO' there is little wonder that his background analysis is quite elaborate and enriched by some useful references. After a short historical overview GRABER starts with an assessment of the proposals related to audiovisual services submitted by the United States, Brazil, Switzerland, Japan and Canada. In all these submissions it becomes obvious that: "there is still a wide gap separating the countries with strong export interests and from those wanting to protect their domestic industries for cultural and/or economic reasons" (p. 19). Succeeding an overview on the currently relevant agreements, examining that it is possible that certain aspects of the same governmental measure are subject to GATT and GATS (the author does not deal with the TRIPs-Agreement) GRABER proceeds by undertaking a typology of measures of national audiovisual policy. Measures like subsidies, restrictions of market access and national treatment like import quotas, duties, exhibition quotas (cinema screen quotas or television quotas), dubbing restrictions, licensing requirements, taxes (taxes on revenues of cinemas, tele-

vision operators and video dealers as well as tax cuts for domestic industries), copyright-based cultural funds, ownership rules, agreements on cinematographic co-production, competition rules protecting free access to information and media pluralism (including access to major events, competition measures against media concentration and distribution privileges with its must-carry rules or reservation of transmission capacity) are examined in order to get a better insight into present and potential conflicts with the requirements of WTO law. As services are naturally without frontiers the solution found in the Uruguay Round was to create several specific commitments for market access and national treatment, Article XVII GATS. Following, the paper explores the range of flexibility of WTO law for countries not being able or not wishing to accept a higher level of trade liberalisation in the field of audiovisual media. Screen quotas (Art. IV GATT) are discussed, exemplifying in the case of South Korea an old tradition of world trade law treating cultural issues. Although the general exception of Art. XX Letter f) GATT and Art. XIV GATS show that already GATT 1947 recognize the bond between trade in culture and national identity, the exempting measures for the protection of artistic, historic or archaeological values are not applicable in the realm of trade in audiovisual media (p. 50). As a WTO member is only obliged to apply the principle of National Treatment to those sectors and divisions included in its individual list, members are free to specify any limitation or exclude any commitment in this area so far, Art. XVII GATS. Most of the WTO members have not included the audiovisual sector in its individual list. At the example of India, GRABER examines commitments and limitations in the only division of the audiovisual sector included in its list. Since Art. II, Paragraph 2 GATS enables WTO members to exempt certain measures from the Most-Favoured Nation Treatment (MFN), GRABER examines this procedure on the example of Switzerland. Among others, co-productions of movies and the European Convention on Cinematographic Co-production (ECCC) are excluded from the MFN obligation, although many definitions of the ECCC are quite questionable (e.g.: is an author who was born in Europe but is living in the U.S. an European or American author?). As the conflict between liberal trade and cultural policy could not be reconciled so far, GRABER cites the Uruguay Round a provisional compromise between net exporters and net importers of audiovisual media. Out of several proposals to develop disciplines in the realm of audiovisual media, the United States suggests to follow the way of the Agreement on Subsidies and Countervailing Duties (p. 57 f.). Although EC institutions decided on several occasions that licence fees do not involve State aid (e.g.: *PreussenElektra AG vs. Schleswig AG*, (2001) E.C.R. I-2099), WTO institutions may answer this question differently as in many countries the funding for public service broadcasters derives from licence fees. The digital revolution changed the methods of the creation, production and distribution of audiovisual programmes. For that reason on the national level there is a trend towards a technology-neutral regulation in this field (p. 58). To avoid conflicts with WTO law, governments should implement trade-restrictive measures in a transparent, non-discriminative and proportional way. Open questions are the classification of video games, since computer games can be played in groups linked with interactive digital TV services, 'knowledge and content management services' such as electronic programming guides (EPG) as well as a number of new services associated with electronic commerce (p. 59). A possible solution for the latter could be the distinction between goods and services suited to the economic purpose of the transaction. Not yet clear is the status of Art. VI GATS aside from Art. XVII GATS. Nevertheless, GRABER estimates that the working groups to develop "any necessary disciplines" according to Art. VI Paragraph 4 GATS will become highly relevant for the audiovisual sector. As the oligopolistic structure of the few multinational enterprises seems to induce a homogenisation

of the content in favour of mainstream movies and music, the first response to media concentration could be the development of a multilateral competition policy. As a second way, GRABER suggests a development of 'cultural diversity safeguard' to legitimize governmental measures such as "subsidies for art house films or for high quality television programmes," (p. 62). The proposal submitted by Switzerland and Brazil in this context was confronted by the lack of an accepted definition for cultural diversity or cultural identity. For a fair trade-off, claims for market access, national treatment and governmental measures have to be linked with claims of competition policy as well an agreement on a cultural diversity safeguard is needed.

In his essay entitled 'A UNESCO International Convention on Cultural Diversity', IVAN BERNIER presents the discussion within the UNESCO foreordained to develop an international instrument for the protection of cultural diversity. With the broad consensus among UNESCO to establish rights and responsibilities for all countries to preserve or implement national cultural policies the question arise: Does a draft convention truly fall under UNESCO jurisdiction? The US are concerned that such a new instrument could help France and Canada's attempts to remove cultural issues from the WTO. BERNIER does not seem to share this opinion as in this case the necessary support probably would not be sufficient (p. 66). The next chapter addresses the notion of cultural diversity regarding its two distinct realities of a concept centred on art and literature etc. and a concept referring to a more sociological and anthropological perspective on culture (p. 66 f.). The objective and content of the UNESCO Convention is according to BERNIER ineffective in challenging WTO regulation but to provide framework and discussion forum for all countries. Therefore, a linking to WTO would not be necessary to achieve the declared objectives. In the following IVAN BERNIER elucidates the long history of the debate on trade and culture since the time after the First World War (p. 68 ff.). Although having cultural diversity in the core of its work it was not until 1999 that UNESCO started the debate on culture, trade and globalization. On November 2, 2001 the General Conference adopted the UNESCO Universal Declaration on Cultural Diversity. On March 12, 2003, the UNESCO Secretariat released a document recommending the General Conference to elaborate a new standard-setting instrument on cultural diversity. BERNIER prefers the UNESCO International Convention on Cultural Diversity to that of INCP but sees them as complementary in the way that the INCP approach will in the end support UNESCO's approach. Unfortunately BERNIER gives little moment on the precise and concrete differentiation of the respective approaches and juridical problems concerning WTO.

In the next article entitled 'Diversité culturelle et cinéma: une vision pour un pays en voie de développement' CHRISTOPHE GERMANN advocates for competition policies on a global level to increase cultural diversity. GERMANN initiates his essay written in French with some open questions like e.g. why the Martians are green, why there is this cultural dominance, how are the villages in Iran, what is the music of Arabian movies (p. 77). In a literally manner GERMANN appeals to the major problem: the market sharing in the field of audiovisual media. In certain countries the seven big, so called 'Majors', in Hollywood maintain up to 90 Percent of the market. Even in Europe the market share of American movies exceed 70 Percent in 2000 whereas in the United States European movies gain hardly 4.5 %. American movies are financed privately, which means without governmental support while European movies are subsidised on average 42 %, reaching 60 % in some countries (p. 78 f.). WTO rules, especially the GATS agreement are treating subventions and other governmental measures like the quota system be-

cause they distort the competition between national and international enterprises “National Treatment” (NT). Furthermore, the preferential treatment of international co-productions is challenging the ‘Most Favoured Nation’ (MFN) – principle. But despite the fact that GERMANN recognizes the WTO as a system of mutual concessions (as he takes notice of Swiss’ interest in the liberalization in the realm of the as well hot discussed liberalization of financial services) he appraises rightly the multilateral and unilateral negotiations in the realm of audiovisual media as a pressing menace to cultural diversity (p. 80 ff.). But also subventions and the quota system are criticized by GERMANN as particularly selective and inaccessible for the majority of developing countries (p. 97). Therefore alternative and complementary means are discussed in the following passage. A first step should be the introduction of a marketing tax. Secondly CHRISTOPHE GERMANN proposes a new balancing of international property rights and his apprehension of an excessive intellectual property right leads him to the formula $TMC = SPA = TMC$ (Trade Mark & Copyright = Stars, Print & Advertisement = Total Mono Culture). Thereby he refers on Art. 6 to 8 TRIPS allowing a certain flexibility regarding non-economic concerns. GERMANN succeeds by examining a not yet completely elaborated analogy to the problem of HIV/Aids in developing countries and the social responsibility of the pharmaceuticals industry (p. 100 f.). As the adaptation of WTO law is connected with remarkable transaction costs the spending could be regarded as illegitimated contemplating the effects on cultural diversity. Therefore, two new principles should be take into consideration: the ‘Cultural Treatment’ (CT) principle and the ‘Most Favoured Culture’ (MFC) principle expected to serve in the realm of cultural diversity as the ‘National Treatment’ (NT) and the ‘Most Favoured Nation’ (MFN) principle in the field of free trade. As the NT and MFN principles are based on the economic theory of comparative advantages the CT and MFC would be based on the fundamental tenet of cultural diversity (p. 102 f.). Concretely a ‘fair foreign direct investment’ (FFDI) in the local production of audiovisual media as well as an access to the distribution and marketing channels are suggested. In the following GERMANN elaborates his favoured concept fostering cultural diversity: measures on the base of competition law. Due to this he refers on the ‘essential facilities’ doctrine elaborated by the Supreme Court of the United States of America in *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912). According to this doctrine an illegal trade restriction and endeavour to gain a monopolistic position is examined on four yardsticks (antitrust liability): 1) essential facilities are controlled by a monopolist, 2) the competitor can not (practically or reasonably) duplicate the essential facilities, 3) the monopolist rejects to offer the essential facilities to the disposition of his competitors and 4) the disposition of the essential facilities is able to be achieved (p. 105). GERMANN succeeds with an short analysis of a potential horizontal application of Art. 10 European Convention on Human Rights and Fundamental Freedom which to him seems consequently (against the very predominant perception as the ECHR is aiming at the Member States). Self-regulation is considered as one of the most effective instrument for a short term to promote cultural diversity. Nevertheless, if the so called ‘Majors’ will fail to elaborate self-binding rules, the instruments described above should be applied. Finally GERMANN illustrates the relationship between the enormous spending in marketing and the content of cinematographic critiques in actual press. It should be based on quality and in conscious of the actual dysfunction of the market for audiovisual as well as of the power to make us believe that Martians are green.

In ‘Hollywood’s Vision of a Clear, Predictable Trade Framework Consistent with Cultural Diversity’, BONNIE J.K. RICHARDSON defends in the first of three stakeholders positions the view of Motion Picture of America (MPAA) representing seven of the so

called “MajorsÅ” (The Walt Disney Company, Twentieth Century Fox, MGM, Paramount, Sony Pictures Entertainment, Vivendi-Universal and Warner Bros.). RICHARDSON argues against a dichotomy between ‘Hollywood films’ and ‘cultural films’ (p. 112). According to RICHARDSON, the United States are plenty of cultural diversity and stresses that culture does not necessarily refers to art or high culture. Relating to mass, Europe makes more movies than the United States and Asia surpass both by far. While some countries are specialized in products designed for local markets, Hollywood is specialized in movies with global appeal. RICHARDSON even emphasizes the advantage of movies making obvious what is universal among man (p. 113). As blockbusters cost about \$ 59 million to produce and another \$ 30 million to advertise, Hollywood is connecting international talent and capital. But as small budget movies like ‘My Big Fat Greek Wedding’ and micro-budget movies like ‘Blair Witch Project’ show, there is also an innovative independent film sector in the United States. RICHARDSON respects the worth of UNESCO’s work but he warns about a cultural instrument to carve cultural goods and services out of the WTO. If the cultural sector would be excluded from WTO obligations other sensitive sectors like textiles (employment), steel (defence) or agriculture (food security) could follow this example (p. 115). Despite of that, an international accepted definition of culture is hard to imagine (p. 116). In the following, RICHARDSON illustrates briefly how cultural goods and services are covered by the WTO and that there is sufficient flexibility to accommodate cultural concerns. GATT Article VI provides a special treatment for cinematic films, the General Exception of GATT Article XX f) enables governmental means in the cultural field, Article XVII GATS requires the Members to apply the principle of National Treatment (NT) to the sub-sectors and divisions of sub-sectors included in its individual list, Article II GATS makes Most-Favoured Nation Treatment (MFN) possible and subsidies are not prohibited by the GATS (p. 118). Therefore, according to RICHARDSON, a cultural instrument that opts culture out from trade rules would not solve problems but provokes anarchy. Hollywood’s purpose in the Doha Round is neither the removal of European local content quotas nor the elimination of the EC’s MFN exceptions nor the elimination of subsidies but to recognize that audiovisual goods and services are covered by the WTO law and to assure that countries should promise not to raise those restrictions in the coming time (p. 121). Before turning to the GATS MFN debate, RICHARDSON describes the US Government’s approach in the ongoing Doha Round. While the starting point was “standstill”, in the latter he requires the removal of at least two EC’s MFN exemptions (p. 122 ff.). As one of the current problems RICHARDSON identifies the differences concerning the treatment of goods and similar products dealt over digital networks. The principle of technological neutrality should therefore prevail (p. 124). Furthermore, film production subsidies could fall under the SCM or under the GATS Agreement. The separation of infrastructure from content and broadcast quotas are additional classification issues (p. 125). Summing up, RICHARDSON demands that WTO law should include all trade sectors and all countries. Opting culture out of the trade agreements would lead to anarchy of competing national law (p.127).

In the next article ‘Négociations commerciales – La position de l’Union européenne quant aux services aux services audiovisuels’, JULIEN GUERRIER expounds the standpoint of the European Communities. Aim of European trade policy is not the deregulation of services in trade but market access as services are the most dynamic economic sector in Europe. GUERRIER stresses also the importance of high quality services for developing countries and countries in development. After European demands and as duplication to the demands of third countries the offer of the European Union includes the

liberalization in the sectors of telecommunications, data processing, financial services, tourism, press agencies, shipping, post services regarding market access and National Treatment (p. 128). In the field of audiovisual services the large quantity of about 75% of non-European movies in Europe demonstrates the openness of the market. This is regarding to GUERRIER the free expression of consumer choice. But as almost all non-European movies are derived from the same source a diversification of he offers concerning non-European d'uvres should be considered. Europe stands for a worldwide recognized model of cultural diversity. Cultural products and services differ from others but beside from the part of creation they need to be shown to the audience being international today. Europe's priority therefore is to maintain the political means for the European Union and its member states to preserve and foster cultural diversity (p. 130). The European Union did not make any commitment in the audiovisual sector and insisted on several exemptions to the 'Most Favoured Nation' (MFN) – principle. The European directive 'Television without frontiers', the MEDIA programme are and should remain part of European cultural policy. Out of the many demands to the European Union in the audiovisual sector there are more asking for a consolidation of the actual level, according to the EU trade negotiator. In the European offer published on April 29, 2003, there are no commitments regarding market access in the field of audiovisual services and the exceptions to the MFN-principle to promote national and European cinematographics, screen quotas and co-productions with third-countries. GUERRIER explains this with the strong bound of European citizens to their local identity and culture. As very important, GUERRIER cites the interests of countries in the process of development. That is why we can not claim for cultural diversity while opposing the demands of Asia, Africa and Latin America to get market access to the European Union. As the application of the MFN principle would favour the dominant producers, new ways are to be explored. As a solution GUERRIER sees here the way of bilateral co-operations, co-productions and festivals with third countries. The European trade negotiator ends up by stressing the utmost importance of cultural diversity not only for Europe as a "collective preference" (p. 132).

In the last contribution, MARC WEHRLIN explains in his essay 'Verhandlungsstrategien der Schweiz', how the Swiss Government prepared itself defending its interests as a country with extremely segmented media markets and a small media industry. Firstly, WEHRLIN stresses that Swiss did not make any commitment and insisted on MFN exceptions in the field of audiovisual services. As the authors before, WEHRLIN emphasises the special quality of culture for every society, needed to be protected and promoted by a governmental regulatory framework (p. 133). After describing the way of how governmental officials and civil society was integrated in finding an common position regarding GATS, three important terms are discussed: local content, cultural diversity and service public. Local content does not refer on national culture but to culture created by artists living in a certain country, cultural diversity does not refer only on defensive protection but on exchange and service public means the necessity to have also in a free and open media world some providers not being depended on the market (p. 134). WEHRLIN, convinced that we are not seeing the movies we like but those which they want us to see describes in the following how the new Swiss Filmgesetz (film law) promoting a wide range of cineastic offers could be in conflict with GATS. Local content can conflict with the principle of National treatment (NT), cultural diversity with the principle of "Most Favoured Nation" (MFN). WEHRLIN explains some other conflicting rules but is convinced that the cultural market of Switzerland is open and liberal (p. 135). Switzerland has not adopted an anti WTO attitude concerning audiovisual services. Despite of that, there

will be no offers in the Doha-Round in this field as GATS does not seem ready for further liberalization. According to WEHRLIN, the draft UNESCO International Convention on Cultural Diversity should bridge the conflicts between trade and cultural policy (p. 136 f.) neglecting the problem of conflicting jurisdiction between WTO law and MEAs.

An annex with the relevant legal texts completes the present publication.

A more broadly cultural approach might have produced a more exciting basis for lawyers, lobbyists, government representatives and opinion leaders. Unfortunately, not all of the evident juridical problems are dealt with but with its very short volume, the book provides a welcome *tour d'horizon* and basic knowledge enriched by many helpful footmarks in a field gaining enormous importance in recent years in the law of the WTO.

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