

Contents

Foreword	xI
Acknowledgements	xII
List of Figures and Tables	xIV
List of Acronyms and Abbreviations	xV

Introduction 1

1	The Research Question and This Publication's Approach	1
2	The Significance of the Coordinated Framework Proposed in This Publication	5
3	Limitations of This Publication	6
4	The Roadmap for This Publication	8

PART 1

Conceptual and Institutional Approaches to Culture

1	Concept of Culture	13
1	Introduction: an Ontology of Culture	13
2	Difficulty in Defining Culture	16
3	Background – Broad Concept of Culture in Sociology	17
3.1	<i>Anthropological Elements</i>	19
3.2	<i>Moral Elements</i>	22
4	Background – Concept of Culture in UNESCO	22
5	Bringing 'Culture' into the Trade Domain	24
5.1	<i>Critics – Confusingly Undefined or Ill-Defined Culture-Related Terminologies</i>	25
5.2	<i>Cultural Diversity and Cultural Identity</i>	29
5.3	<i>Is All Culture the Same? – Categorizations of Culture for the Debate on Trade and Culture – Is Literature Talking about the Same Thing?</i>	34
6	A Working Scope of Cultural Products in the Debate on Trade and Culture – Spectrum of Cultural Products	39
6.1	<i>Definition of Cultural Products</i>	39
6.2	<i>How to Measure Cultural Components in Cultural Products?</i>	42
6.3	<i>The 2009 UNESCO Framework for Cultural Statistics</i>	44

6.4	<i>Observations and Critiques on the 2009 UNESCO Framework for Cultural Statistics</i>	44
6.5	<i>Spectrum of Cultural Products</i>	54
7	Concluding Remarks	56
2	Treatment of Culture in UNESCO	59
1	Introduction	59
2	The History and Functioning of UNESCO	60
3	Overview of Culture-Related Standard Setting and Terminology in UNESCO	61
4	UNESCO Standard Setting Instruments for Removing Trade Barriers to Cultural Goods	66
5	2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions	67
5.1	<i>Laying the Foundations for the 2005 UNESCO Convention</i>	67
5.2	<i>UNESCO Universal Declaration on Cultural Diversity</i>	69
5.3	<i>Preparation Phase for the 2005 UNESCO Convention</i>	70
5.4	<i>Terminologies of the 2005 UNESCO Convention and Their Trade Implications</i>	71
5.5	<i>The Objectives of the 2005 UNESCO Convention</i>	76
6	Debatable Features of the 2005 UNESCO Convention in Relation to Trade	76
6.1	<i>Article 6 and Article 2.1 of the 2005 UNESCO Convention: Policy Space</i>	81
6.2	<i>Article 20 of the 2005 UNESCO Convention: Mutual Supportive, Complementary and Non-subordinate?</i>	84
6.3	<i>Article 16 of the 2005 UNESCO Convention: Facilitation of Cultural Exchanges with Developing Countries</i>	86
6.4	<i>Article 17 of the 2005 UNESCO Convention: Cooperation in Situation of Serious Threat to Cultural Expressions</i>	87
7	Comparison with the 1972 UNESCO World Heritage Convention	88
8	Concluding Remarks	92

PART 2

Interaction between Culture and Trade at Domestic, Multilateral, and Preferential Scales

3	Current Situation of Domestic Cultural Policies That Bear Trade Implications	97
1	Introduction	97

- 2 Economic Rationales for Government Interventions in Cultural Products 99
 - 2.1 *Economies of Scale in Producing Cultural Products That Lead to Homogenization of Culture* 100
 - 2.2 *Externalities Argument – Existence of Consumption Externalities?* 104
 - 2.3 *Public Goods Argument – Are All Cultural Products Public Goods?* 105
 - 2.4 *Option Goods, Merit Goods* 107
- 3 Overview of Tariffs in Cultural Products 107
- 4 Overview of Non-tariff Measures in Cultural Products by Key WTO Members 113
 - 4.1 *European Union* 114
 - 4.1.1 Television without Frontier Directive and Audiovisual Media Services Directive 115
 - 4.1.2 State Aid – Communication on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works 119
 - 4.2 *Canada* 123
 - 4.2.1 Broadcasting Act 125
 - 4.2.2 Television Broadcasting Regulations 1987 128
 - 4.2.3 Investment Canada Act 130
 - 4.3 *China* 133
 - 4.3.1 Revenue-Sharing with Joint Ventures, and Annual Quotas in Film Imports 136
 - 4.3.2 Designated Importers of Movies 137
 - 4.3.3 Content Examination 138
 - 4.3.4 Quantitative Time Requirement for Domestic Movies 139
 - 4.3.5 Tax Incentives 139
 - 4.4 *India* 140
 - 4.4.1 Higher Entertainment Tax on Foreign Films 140
 - 4.4.2 Tax Incentives 141
 - 4.5 *Korea* 141
 - 4.5.1 Screen Quota System 141
 - 4.5.2 Import Licensing 144
 - 4.6 *US* 145
 - 4.6.1 Communication Act of 1934 146
 - 4.6.2 US Congressional Activities 147
 - 4.6.3 Indian Arts and Crafts Act of 1935 149
- 5 Concluding Remarks 150

4	General Treatment of Culture in the Multilateral Trading System	153
1	Introduction	153
2	WTO Law Perspectives	153
2.1	<i>Overview of the WTO Legal Provisions and Culture-Related Legal Provisions in the WTO</i>	154
2.1.1	Overview of the WTO Legal Provisions	154
2.1.2	Culture-Related Provisions in the WTO	172
2.2	<i>Culture-Specific Provisions in the WTO</i>	199
2.2.1	GATT Article IV on Special Provisions Relating to Cinematograph Films	200
2.2.2	GATT XX (f) on Protection of National Treasures of Artistic, Historic or Archaeological Value	207
2.3	<i>Goods or Services? – Became an Irrelevant Question?</i>	211
3	Relation between the WTO Laws and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression	216
3.1	<i>Applicability of the UNESCO Convention to WTO Jurisprudence</i>	219
3.2	<i>WTO China-Audiovisuals Case and the UNESCO Convention</i>	222
4	WTO Negotiations Perspectives	224
4.1	<i>Audiovisual Services</i>	225
4.1.1	WTO Members' Positions	230
4.1.2	Advancing Technology and Classification Issues in Audiovisual Services	232
4.1.3	Subsidies for Audiovisual Services	235
4.2	<i>Traditional Knowledge and Folklore</i>	237
5	WTO Administration Perspectives – Governance and Surveillance Instrument for Trade and Culture in the WTO	240
5.1	<i>Current Situation</i>	240
5.2	<i>Utilizing Existing Mechanisms</i>	240
5.3	<i>Cooperation with Other Culture-Related Multilateral Institutions (E.g. UNESCO)</i>	243
6	WTO Accessions Perspectives – Cultural Concerns during the WTO Accession Process	244
7	Concluding Remarks	246
5	General Treatment of Culture in the Preferential Trade System	248
1	Introduction	248
2	Overview on PTAs Regarding Cultural Products	248
2.1	<i>Setting the Tone on Cultural Products in PTAs – NAFTA Model</i>	251
2.2	<i>Canadian Model</i>	254

- 2.3 *US Model* 256
 - 2.3.1 Negative List Approach 257
 - 2.3.2 Emphasis on Digital Products 260
 - 2.3.3 Unchanged Exclusion of Subsidies 262
- 2.4 *EU Model* 263
 - 2.4.1 General Exclusion of Audiovisual Services 264
 - 2.4.2 Protocol on Cultural Cooperation in PTAs Tied to the 2005 UNESCO Convention 266
 - 2.4.3 Relatively Liberal Approach in Recreation, Cultural and Sporting Services 272
 - 2.4.4 Standard Inclusion of Possibility of Prohibition or Restriction on Imports, Exports or Goods in Transition on the Grounds of Public Morality or the Protection of National Treasures 272
 - 2.4.5 Specificities in Individual EU PTAs 273
- 2.5 *Chinese Model – First Steps towards Long-Term Engagement* 274
- 2.6 *New Zealand Creative Art Model* 278
- 3 Overview on Investment Treaties and Protection of Culture 280
 - 3.1 *Southern Pacific Properties (Middle East) Limited v. Arab Republic Egypt* 282
 - 3.2 *Parkerings v. Lithuania* 284
 - 3.3 *Relevance of the ICSID Legal Approach for the WTO Cases* 285
- 4 Concluding Remarks 285

PART 3

Coordination between Culture and Trade

- 6 Ways Forward for Culture and International Trade Law
 - From Conflict to Coordination* 289
 - 1 Analytical Recapitulation of Previous Chapters 289
 - 1.1 *Conceptualization of 'Culture-Ness' in Cultural Products* 289
 - 1.2 *Institutional Challenge of UNESCO* 290
 - 1.3 *Striving for Efficacy of the National Cultural Interventions* 293
 - 1.4 *Institutional Capability of WTO on Cultural Issues* 299
 - 2 Specific Suggestions for Ways Forwards: Presenting Options 300
 - 2.1 *Dispute Settlement Approach* 304
 - 2.1.1 Classic – Dispute Settlement in the WTO 304
 - 2.1.2 Fresh Complement – Informal International Lawmaking 310

2.2	<i>Non-dispute Settlement Approach</i>	312
2.2.1	Monitoring	313
2.2.2	Negotiations	314
2.2.3	Institutional Coordination	315
2.3	<i>Plurilateral Agreement on Cultural Products</i>	316
2.3.1	Dispute Settlement in a Plurilateral Agreement on Trade and Culture	317
2.4	<i>Innovative Approach in PTAs</i>	317
2.4.1	Regional Option 1 – APEC	318
2.4.2	Regional Option 2 – Council of Europe	320
2.4.3	New Era of the Discussion on Trade and Culture? – The EU-US PTA	322
	Conclusions	323
	Bibliography	327
	Index	356