Cultural Exceptions in Multinational Trade: Analysing NAFTA to Conceptualise TTIP

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Introduction

'Culture', as understood through mechanisms of cultural industry, has been a source of contention in trade since the early 20th century. Though influenced by numerous factors—including economic and political systems, rapidly changing technology, power and wealth, cultural imperialism, semantic differences, histories and methods of cultural production and globalization—at the heart of this debate is whether or not *cultural* goods and services should be treated differently than 'regular' goods and services because of their connection with language, cultural history and cohesion, traditions and abilities for expression.

Also important in the discourse on culture in trade is how culture is defined, particularly in the global agreements and conventions, such as the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade and Services (GATS) and by global organisations such as the World Trade Organisation (WTO). This essay will analyse two trade agreements between the United States (US) and other countries—the North American Free Trade Agreement (NAFTA) and the Transatlantic Trade and Investment Partnership (TTIP). NAFTA and the bilateral trade agreement it superseded, the Canada-US Free Trade Agreement (FTA), both contained 'cultural exemptions' (interchangeable with the term 'cultural exceptions'), which puts certain protections on cultural goods and services as defined in NAFTA.

The concept of cultural exception traditionally forms the basis of French cultural policy. As Bartsch (2014) notes, 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', introduced by Max Horkheimer and Theodor Adorno from the Frankfurt School, has challenged the separation of economic and cultural considerations in this debate since the 1940s (p. 2). This idea of cultural industry first became part of international trade law with the adoption of the Canada-US FTA and was preserved in NAFTA, much to

dissatisfaction of the US. The historical and cultural notion of 'French exceptionalism', or the idea that the French way of life and approach to politics and policy is exceptional and does not need to conform to normal rules or principles, manifests in many different forms, but applied to trade was first introduced in GATT negotiations in 1993 ('TTIP and the Cultural Exception', 2014; Collard, 2010). However, the conflicts between trade and cultural values go back much further than that. Sauvé and Steinfatt (2010) state that these conflicts date back to the 1920s when a number of European countries introduced quotas in order to protect their film industries from a sudden influx of films from the US (p. 323). Regardless of when the issues first began to arise, a pattern in the disagreements became clear, as countries in different areas of the world were taking steps to protect their cultural industries from US domination and cultural hegemony.

The purpose of this essay is to understand the history of the debate around cultural exceptions in FTAs, dissect the arguments for and against cultural exceptions, analyse the outcomes and implications of the cultural exception in NAFTA and examine the negotiations around the cultural exception in TTIP. Ultimately, this essay will answer why cultural exceptions in FTAs are so important to certain states and how the importance of cultural exceptions has and will continue to shape the negotiations around TTIP.

Research for this essay has been conducted through secondary sources on the history of the debate around culture and trade; trade in the audiovisual industries; the French and Canadian cultural exceptions; negotiation motivations and results in NAFTA; the various agreements, conventions, organisations, committees, etc. having to do with culture and global trade; and multiple aspects of TTIP including its dispute settlement mechanisms, lack of transparency in negotiations, general concerns of citizens and politicians, proposed benefits and potential impacts on culture. Complementary to the main topics of this essay, research was also carried out through secondary sources on cultural policy methods and theories,

cultural imperialism, the globalisation of culture, as well as economic and political theories. It is important to note that the issues surrounding the topic of culture and trade far exceeds the limits of this essay, due to rapidly changing technology that influences cultural behaviour and consumption and current trade agreements like TTIP being negotiated behind closed doors. These areas—rapidly changing technology and how it affects cultural consumption; global laws trying to regulate what 'culture' is and how it is dealt with in multinational trade; and how globalisation, neoliberalism and cultural imperialism affects non-US/European countries—deserve close attention in continued and future research into trade and culture.

Chapter one of this essay provides an insight into the beliefs around culture and fundamental differences between those who advocate for a cultural exception and those who are against it. In chapter two, the history behind the 'culture in trade' debate is discussed. Chapter three covers the history, outcomes and implications of NAFTA and chapter four provides an introduction to TTIP and how the cultural exception has been addressed within negotiations. Chapter five analyses the review of literature and the future of the cultural exception in multinational trade.

Understanding Culture in International Trade – Review of Literature

Chapter 1 – Understanding Culture in International Trade

Culture and the arts are important to nations and their citizens for numerous and varying reasons. Usually discussed is cultural heritage and cohesion, language and tradition preservation, representation and participation, as well as a sense of belonging, the ability to bring people together and as a source of wellbeing. The concept of art and culture as a regenerative force in cities and urban areas, as well as arts and culture in the tourism industry has focused attention on the monetary value of arts and culture. Indeed, the very act of discussing art and culture within local and global economies as the 'cultural industries' highlights the importance placed on the economic activity around arts and culture.

In an increasingly globalised world, expedited by technology and trade liberalisation, culture, categorised as both products and services, has become an important part of economic strategies for many countries. The concept behind a 'cultural exception/exemption', is that culture should be treated differently than other products or services in global trade because of the unique role it plays, including those listed above like cultural cohesion, language preservation and a sense of belonging (Bartsch, 2014; Osborne, 2004; Miller, 2005). The United States (US) is and has been strongly opposed to the idea of cultural exception, instead favouring liberalisation and free trade of all products and services in the same way, standing behind the market-oriented, *laissez-faire* and neoliberal ideologies that guide US cultural and other policies (Sauvé and Steinfatt, 2000; Yúdice, 2003; Gómez and Muñoz Larroa, 2014). These two beliefs have been separated into two camps—'free traders', which favours total deregulation of protective policies, and 'exceptionalists', which believes that countries should have the right to conduct national policies aiming to support domestic cultural industries (Frau-Meigs, 2001). There are prominent leaders in the two camps: the free traders being led by the US and the exceptionalists being led by France and Canada.

In this essay, how culture is viewed and treated within global trade will be examined from the perspective of the countries leading these two opposing points of view. France and Canada spearheading the campaign for protection of cultural industries in global trade provide context in the history of negotiations between the two camps and its manifestations in trade agreements such as NAFTA. France being the leading country on this issue within the EU provides historical context, but also serves as an example of what can be expected in the negotiations around TTIP. Therefore, the argument of free traders will be explained through the views and actions of the US and the argument of exceptionalists will be explained through the views and actions of Canada and France (as a leading force within the EU), especially as they have manifested in NAFTA and how they might affect TTIP negotiations.

Beliefs Around Culture, Fundamental Differences

As Gómez and Muñoz Larroa (2014) discuss, US documents on culture provide an overview of the country's general perspective on state non-intervention in cultural production. This is founded in the intention to guarantee the right to free expression laid out in the First Amendment (p. 179). The US applies its tacit or implicit cultural policy in policies that emphasise the dominant role of private companies and the market as mechanisms of economic coordination (Cowen, 2006; Gómez and Muñoz Larroa, 2014). These deeply-rooted beliefs and methods of cultural policy shape why the US insists that cultural products should be included like any other merchandise in trade laws and negotiations.

The US does not have a Ministry of Culture and very few arts organisations receive funding directly from the government. The pervading ideology behind funding for the arts in the US is that to justify its existence or practice, an arts organisation, artist or even art form, must prove itself by surviving in the market. Proponents of the US free market ideology as it applies to cultural policy state that because of the competitiveness of artists and arts

organisations for funding and popularity, creativity is fostered. As Cowen (2006) states, 'the [US] model encourages artistic creativity, keeps the politicization of art to a minimum, and brings economics and aesthetics into a symbiotic relationship' (p. 3). This attitude is reflective of the general views of capitalism and neoliberalism as it applies to other aspects of life and business in the US. It is easy then to understand how this view similarly comes across in the US's view on cultural products and services in trade and its opposition to its trading partners' protection of cultural industries. In contrasting this belief with that of France and other European countries, Osborne (2004) states that the US's neoliberalism would suggest that cultural expression does not belong in the marketplace at all. He goes on:

> For the arts, the alternative has been to maintain a relatively marginalised existence supported by gifts from corporations, foundations and the wealthy. A system similar to a marginal and elitist cultural plutocracy evolves. This philosophy is almost diametrically opposed to the tradition of large public cultural funding found in most of Europe's social democracies (2004).

Many of Europe's social democracies, including that of France, value the arts and culture and subsidise them so that all can have access to and participate in them. Countries that support a cultural exception worry that in an increasingly neoliberal and globalised world, local cultures will be affected and local cultural producers will be taken over by large multinational corporations (MNCs) (Chalaby, 2016). These concerns bring up issues in cultural imperialism (of which the US has been accused for decades), monopolisation, cultural diversity and representation. These concerns highlight why most regulations and contestation around culture in trade has historically focused on the audiovisual industry, including film, media and television and, with rapidly changing technology, is expanding to include streaming services and other internet platforms.

Audiovisual products have a long tradition of crossing borders and presenting particular views or ways of life, especially in the case of US exports of film and radio. Trade in audiovisual products, such as Hollywood films, television shows and TV formats is also an

amazingly lucrative business, especially for the US (Chalaby, 2016). According to the 2015 Service Profiles report by the WTO, the 2014 trade balance of US 'other commercial services', which include 'charges for the use of intellectual property' and 'personal, cultural and recreational services', was US$400,687,000. When combined with the other categories of commercial services, which are transportation and travel, exports for the US equalled US$687,605,000 in 2014. Imports in the same category equalled US$451,683,000, resulting in a net commercial service trade of US$235,923,000. The top two destinations for these exports were the EU and Canada (WTO, 2015b, p. 185; WTO, 2015a). Focusing more specifically on the media and entertainment industry in the US, SelectUSA, a government-wide programme housed in the International Trade Administration at the US Department of Commerce, reports that the media and entertainment market represents over a third of the global industry and is the largest market worldwide. It describes the media and entertainment industry as comprised of businesses that produce and distribute motion pictures, television programmes and commercials along with streaming content, music and audio recordings, broadcast, radio, book publishing and video games. SelectUSA also states that it expects the media and entertainment market to reach US$771 billion by 2019, up from US$632 billion in 2015, according to the 2014-2019 Entertainment & Media Outlook by PriceWaterhouseCoopers (SelectUSA, ND).

These statistics highlight the points of conflict in the debate around cultural/audiovisual products and services in global trade. The exceptionalists fear a US cultural or Hollywood takeover, in addition to increased difficulty for regional, small, independent filmmakers as well as for others working in the audiovisual industry. The free traders, specifically the US, view the audiovisual and wider cultural industries as a highly profitable business and an important aspect of free trade.

Audiovisual Industries as Culture in Global Trade

Though exceptionalists believe that culture should receive different treatment than other goods and services in trade, they too export TV programmes and formats films, and other audiovisual products and services. In 2014, Canada's 'other commercial services' exports equalled US$52,645,000, and when combined with the rest of the commercial services exports, equalled US$84,911,000 (WTO, 2015b, p. 39). However, as described later in the chapter on NAFTA, Canada imports far more cultural goods and services than it exports, especially with the US (though the US is the number one destination for commercial service exports). As a result, Canada's net commercial services trade was US$-21,056,000 in 2014 (ibid.). Looking at the same data set, France's 'other commercial services' exports equalled US$143,171,000, and the EU as a whole exported US$1,242,647,000, with the top two destinations for exports of both France and the EU being the EU and the US (ibid., p. 64 & 67). It is important to note that though exceptionalists export audiovisual products, though definitely not to the extent and scale that the US does, they do not advocate for the cultural exception in order to rival the US in their film and audiovisual exports. Instead, the motivations of exceptionalists are fuelled by the desire to protect their cultural goods and services at home to ensure diversity in and access to locally produced cultural goods. As Galperin (1999b) highlights, a goal of EU audiovisual policies of the 1990s was to unify EU countries' audiovisual markets. As a 1996 European Commission report acknowledges:

> The impact of the Single Market has not caused major changes in the television industry. Even though there has been a boost in demand for TV programs, supply of truly European products has been puny due to national markets' fragmentation: the main focus has been placed on satisfying national audiences rather than increasing circulation of European films (quoted in Galperin, 1999b).

Additionally, by insisting upon the cultural exception in multinational trade agreements, exceptionalists send a message to free traders about the value of arts and culture being too socioculturally important to be treated the same as non-cultural goods and services, but more

broadly, the value placed on ways of life outside pure market-driven and capitalist systems (Chao, 1996).

In order to more fully understand the nature of the debate between free traders and exceptionalists when it comes to audiovisual industries, one must analyse both the economic and cultural particularities. Galperin (1999a) provides an explanation of this double character of audiovisual products (see also Kirchschlager, 2014). He states that for better or for worse, cultural products have become an integral part of the globalised economy. The public-good character of audiovisual goods (minimal reproduction costs and 'non-depletability' in consumption) makes foreign sales attractive, but also exacerbates the advantage of producers from the countries, like the US, with large domestic markets (p. 628; Choi, 2008). On the other hand, audiovisual industries carry numerous sociopolitical implications. Cultural products reproduce cultural identity and forge social bonds. They also have political consequences because it is through cultural products and services that public discourse circulates in modern societies. These consequences raise questions of media access, diversity, ownership and content regulation (ibid.). The sociocultural implications of free trader ideology, that economic characteristics of audiovisual products drive producers toward audience maximisation strategies (seeking foreign audiences, reducing barriers to trade, etc.), raise numerous controversies about the inclusion of audiovisual industries in trade liberalisation agreements. Messerlin (2000) reiterates the political ties of the audiovisual industry and points out that the controversy over the dual nature of audiovisual products also has to do with the breadth of what is included in their definition. The audiovisual industries cover a wide range of services including motion picture production and distribution, motion picture projection, radio and television services and sound recording. Most of these services are closely associated with political power, both on a daily basis (radio or television interviews and news) and in their ability to create collective symbols (ibid.). In a chapter on

intellectual property and the redefinition of culture, Yúdice (2003) states that 'culture has become a grab bag into which all kinds of technological innovations are deposited as a means to protect the ownership claims of transnational corporations' (p. 218). These examples highlight the varied motivations and beliefs of free traders and exceptionalists in the argument of whether or not to treat cultural products and services the same as other goods and services within trade, as well as what should be considered 'culture'.

Cultural Protectionism versus Cultural Liberalisation – Arguments For and Against the Cultural Exception

Though the US and other free traders recognise that the arts and culture hold special meaning for individuals, communities and nations, they do not believe that exempting culture from trade or placing protectionary measures around it is fair. Free traders have a number of criticisms for the theory and methods of cultural exceptionalism. One such criticism is that by placing protective measures or barriers to trade around cultural products, that governments are limiting the freedom of choice of their citizens. This criticism is especially pertinent with the semantic change of calling cultural exception 'protecting cultural diversity'. Exceptionalists criticise free traders and claim that trade interfering with culture is an infringement on the sovereign right of national cultural expression and diversity. Free traders counter this argument saying that cultural diversity is just a smokescreen for protection, and argue that its opponents are trying to preserve the conventional ways of organising their cultural sector, depriving consumers of more choices (Choi, 2008; Sauvé and Steinfatt, 2000). In GATT negotiations between the US and EU, described further in Chapter 2.2, the US accused the EU, which vied for the cultural exception, of being motivated by economic protectionism rather than purely cultural reasons. The US went so far as to claim that restricting EU citizens from viewing US film and television programmes violated basic human rights and cited **Article 10(1)** of the **European Convention on Human Rights and**

Fundamental Freedoms, which guarantees freedom of expression and encompasses the right to receive information (Chao, 1996). This mirrors the overarching belief of most US citizens, that the right to free speech also guarantees free access to information (ibid.). In a similar vein, Yúdice (2003) points out that though exceptionalists use cultural diversity as a key reason for maintaining the cultural exception in trade negotiations, many do not propose a serious defense of their internal minority cultures and that under the cloak of protecting national culture, capital interests are closer to the true motivation. Similarly, there is a criticism that claims 'cultural diversity' is just a neoliberal-compatible premise that replaced the name for the term cultural exception, yet does not actually ensure cultural diversity (ibid., p. 223). The semantic change from 'cultural exception' to 'cultural diversity' is further discussed in Chapter 2.3.

In his book *Creative Destruction: How Globalization is Changing the World's Cultures* (2002), US economist Tyler Cowen notes that 'trade is an emotionally charged issue for several reasons, but most of all because it shapes our sense of cultural self' (p. 2). A proponent of the US cultural policy method, he goes on to say that trade tends to increase diversity over time by accelerating the pace of change and bringing new cultural goods with each generation (ibid., p. 15). Countering this, Galperin (1999b) states that there is little empirical evidence that supports the claim made by free trade advocates that trade liberalisation—even in the long run—creates a favourable environment to the development of domestic audiovisual industries. Free traders believe that any exemption in trade agreements undermines the ethos of free trade and the intention of agreements, especially in the nondiscrimination trade principles of most favored nation (MFN) and national treatment (NT). These mechanisms require that foreign and domestic products, services or nationals be treated equally (Choi, 2008). The cultural exception disallows these mechanisms for the cultural industries; free traders feel this is unfair. However, the ethos and mechanisms that

free traders say are being violated and undermined by exceptionalists are not only reducing barriers to trade, but also curtailing state support to the cultural industries, forsaking labour protections and rolling back safeguards (Yúdice, 2003; Dearn, 2016).

On the subject of diversity and identity, exceptionalists argue that the law of supply and demand is not enough to guarantee diversity and that, counter to the criticism of limiting choice, cultural exemptions and defense of cultural pluralism is a form of defending freedom of speech and choice (Frau-Meigs, 2001). According to Frau-Meigs, in conversations on the cultural exception during the 1980s and 90s, it was important for exceptionalists to show that they were not completely opposed to market liberalisation, but that liberalisation could not occur without taking into account different regional contexts and national expectations. Economically, this consists of protection from an overly powerful and fast invasion by US audiovisual products. Politically it consists of affirming exceptionalists' autonomy and their difference with respect to the US (ibid.). However, the US accuses exceptionalists in this regard as being concerningly paternalistic and nationalistic in wanting to limit outside cultural goods from entering their countries. García Canclini (2014) expresses frustration in this free trader retaliation, relating it to the wider argument for globalisation, saying that 'if someone even…questions not only the benefits of globalization but the premise that the only means to attain it is trade liberalization, he or she will be accused of wistfully yearning for an era before the toppling of an unbearable wall' (p. xxxvii). These circular arguments both have strengths and weaknesses, but have not yet resulted in a concrete decision on cultural goods and services in trade. In addition, both sides of the argument have hypocritical sticking points which have led to further disagreement and lack of understanding.

For many free trader commentators on GATT during the Uruguay Round in the 1990s, discussed in Chapter 2.2, the notion that the EU wanted to protect cultural identity was almost incomprehensible. Many questioned whether the EU was truly motivated by cultural

reasons in restricting audiovisual trade, and were instead convinced that the EU's insistence on a cultural exemption was really a guise for economic protectionism. Other opponents of the cultural exemption for audiovisual goods maintained that restricting EU citizens from viewing US film and television programs violated basic human rights (Chao, 1996). However, there is much hypocrisy in this argument as Chao (1996) and Miller (2005) both highlight that though the US criticises the EU and Canada for their protectionist measures of culture, the US's own treatment and regulation of its film and television industries reveals the same concern for cultural identity expressed by the EU. **Section 310(b)** of the **US Communications Act of 1934** imposes restrictions on foreign ownership of radio stations, broadcast television and telephone companies. Originally enacted out of fear for national security with foreign governments disseminating propaganda via radio or television, today section 310(b) has no relation to national security and is used to restrict the influx of foreign speech and programming in the US. In many respects, it acts as a protectionist device to shield the US telecommunications market from foreign influence and ownership (Chao, 1996). Commenting on the criticism of freedom of choice for EU consumers, Miller (2005) points out that foreign films in the US are essentially excluded and that there is minimal screen diversity due to the corporatisation of cinema exhibition. Miller states that the US has a 'culture blockade', extending from tariffs on imported CDs to bans on foreign owners of broadcast licenses, creating a deregulated media world that has delivered the most protectionist culture in world history (p. 94), importing less than 1 percent of worldwide cinematographic production (Frau-Meigs, 2001). Clearly, whatever their reasons, many states, including the US, value and promote forms of cultural protectionism.

Tying into the history of how the US rose to power in the audiovisual industry, the US has long been accused of imposing its beliefs, political ideologies and ways of life, essentially a constructed US culture, onto other nations. A main way that the US has achieved this—both

explicitly and implicitly—has been through the dissemination of films and other audiovisual goods. Miller (2005) points out that the source of Hollywood's power extends far beyond the history of cinema, to the cultural-communications complex that has been a component of capitalist exchange since the end of the nineteenth century. He also highlights that 'Hollywood' appears in nearly all descriptions of globalisation's effects as a signifier of a US-led struggle to convert the world to capitalism (ibid., p. 51). In his book focusing on the TV format trade, Jean Chalaby (2016) states that 'the geography of the TV format trade remains unequal, demonstrating that a more complex and interconnected world can go hand in hand with the economic dominance of a few nations' (p. 186). Miller (2005) mirrors this observation, stating that with ever-increasing homogeneity of ownership and control in the audiovisual industry, the capacity to dominate the exchange of ideas is strengthened. Both authors use the term cultural or media imperialism, something that the US has long been accused of. However, Tomlinson (1991) cautions about using the term 'cultural imperialism' due to being a complex concept with numerous and sometimes ill-defined meanings, which is often used to refer to a range of broadly similar phenomena. Regardless, many nations and cultures across the world feel the influence of the US in their everyday lives, from films to food (often referred to as 'McDonaldization', a term coined by George Ritzer in his 1993 book *The McDonaldization of Society*). Those outside the US are constantly aware of its presence, and most are not happy about it. The relationship between this global influence and the rise of the US film industry is inextricably intertwined, as explained in the next chapter on the history of culture in trade.

Chapter 2 – History of the Culture in Trade Debate

US Film Expansion and Takeover

US dominance in the cinema field goes back to at least the 1920s when countries in Europe and Central and South America were placing quotas on the number of US films allowed to be shown in regional theatres (Choi, 2008). Though Hollywood's capacity and power was growing in the early 20th century, other prominent film industries, notably that of France, maintained dominant control of local markets until the outbreak of World War I (WWI). For the four years of the war, European combatants had to virtually cease production. During this time, Hollywood stepped in to fill the vacuum and first penetrated world markets on a large scale in the 1920s (Cowen, 2002). Choi (2008) states that an equally, or perhaps more important, part of the story is the remarkable growth of US-based television, comparatively free from regulations. During the inter-war years, the American motion picture industry pressed the US Department of State to deal with European screen quotas (ibid.). Unsurprisingly, the lobbying group the Motion Picture Association of America (MPAA) was founded in 1922. Not only did WWI and World War II (WWII) turn out to be beneficial for the US film industry by rendering other film industries inoperable, but the anti-communist post-Cold War strategy of the US, spreading its pro-capitalist message across the world, aided its global influence. Films, television and radio became useful tools to the US government in its mission to spread US values around the world as a form of cultural diplomacy. Though it is beyond the scope of this essay, there has been a plethora of research done on US cultural diplomacy and the use of Hollywood films and radio programmes to achieve diplomatic goals (see Shaw, 2007; Singh, 2010; von Eschen, 2004). In addition to wartime circumstances and governmental instrumentation aiding in the development of the US film industry, private enterprise and businesses found it an influential way to market their products abroad. Joseph P. Kennedy, an eastern-establishment mogul, stated in 1927 that

'films were serving as silent salesmen for other products of American industry' and that 'Hollywood has become a tremendous influence upon the peoples of all the world' (quoted in Miller, 2005).

This long-standing tradition of the US exporting its culture via film and other audiovisual goods serve as a basis for other countries' accusation of cultural imperialism and for the need of the cultural exception. The influence and global market dominance of US audiovisual products has grown significantly over the past century and European countries in particular have cause for concern, as they are the principal destination of US entertainment products. In 1995, in the film industry alone, about 70 percent of all US exports of audiovisual services went to Europe (Choi, 2008). The US share of the European market rose from 56 to 78 percent over the 1990s (ibid.). Another major advantage that Hollywood has is a large US domestic market. Being able to recoup high fixed costs in the home market, it is very easy for US films to enter foreign markets at a marginal cost. This economy of scale benefits the US film industry over local films with smaller domestic markets. Additionally, the US film industry has been helped by its global marketing and distribution channels (Galperin, 1999a).

The quotas set up by European countries for US audiovisual products have been a point of contention for a number of years and were the beginning of what turned into the cultural exception spearheaded by France within the EU. To exceptionalists, quotas and the cultural exception in trade are ways to ensure that US culture does not overwhelm local cultures. To the US, they are barriers to trade. This argument has carried over into many different discussions throughout the 20th century and are documented in the following chapter.

Trade Agreements, Conventions and Organisations

There are a dizzying number of agreements, conventions, organisations and other rules that guide and govern global trade regulations, including those that relate to aspects of trade in culture, as summarised in Appendices C, D and E. The **World Trade Organization (WTO)** is the only global international organisation dealing with the rules of trade between nations ('What is the WTO?' ND). Regarding culture, it offers the baseline for assessing the current status of trade and negotiation for a freer flow of cultural products (Choi, 2008). Two agreements of particular importance to the culture and trade debate are the **General Agreement on Tariffs and Trade (GATT)** and the **General Agreement on Trade in Services (GATS)**. GATT was signed by 23 nations in Geneva, Switzerland on 30 October 1947 and took effect on 01 January 1948. It lasted until 14 April 1994, when 123 nations signed the **Uruguay Round of negotiations** which established the WTO on 01 January 1995.

In literature and study of cultural exceptions, the Uruguay Round of negotiations is infamous and marks an important point in the history of the free trader versus exceptionalist argument. The Uruguay Round of negotiations started in 1986 and aimed to create new multilateral trade rules in services. After four decades of pushing trade liberalisation in goods, the focus shifted to the field of services and agriculture. Choi (2008) explains that this was because through multilateral negotiations, the average rate of tariffs on most products had been pushed to a low level, and that over time the service sector gained greater importance in the world economy. With the focus shifting to services as well as goods, the EU, led by France, argued for a cultural exemption of audiovisual trade, while the US wanted audiovisual trade included in GATT. Negotiations went on for seven years with issue of the cultural exception being something the two sides could not agree upon. A deal was reached only after the US conceded to exclude their audiovisual from MFN treatment, and the EU conceded that the audiovisual sector would not be taken outside of the new GATS. So, the

EU could continue to maintain the policy of discriminating against non-EU contents in its policy on audiovisual products and the US succeeded in negotiating that the audiovisual sector would not be carved out of the later service agreement (ibid.).

Creating **GATS**, which deals with trade in services, put the audiovisual sector centre stage. As a consequence of the Uruguay Round, GATS was created, and negotiators agreed that everything within its remit would be universal, meaning that there should be no exclusions for any sector. The final agreed upon outcome at the conclusion of the Uruguay Round was that coverage of GATS is universal, meaning that there would be no cultural exception. However, market access and national treatment of every service sector is to be negotiated, not automatically granted. Many countries have used this provision to limit the ability of GATS to affect certain aspects of their cultural industries, including the EU, which obtained an exemption to MFN treatment for its audiovisual sector (Kirchschlager, 2014; Choi, 2008). Messerlin (2000) discusses the continued controversies and difficulties for cultural trade within GATS including quantitative restrictions (quotas), subsidies, domestic regulations and rules of origin. Though it is beyond the scope of this essay, the limitations and difficulties within the framework of GATS and other global trade agreements are an integral part of the discussion in how issues of cultural trade should be handled in the future.

One of the quantitative restrictions that Messerlin (2000) discusses comes from the **Television Without Frontiers** (TWF) European Community (EC) Directive, adopted in 1989 and revised in 1997, a cornerstone of the EU's audiovisual policy. The Directive 'aims to ensure free movement of broadcasting services…and at the same time to preserve certain public interest objectives, such as cultural diversity…' (EUR-Lex, 2008). The Directive also imposes broadcast quotas based on film nationality. Though as Messerlin points out, the way in which GATS defines 'national origin' is vague and subject to interpretation, further highlighting an extension of the disagreement on how culture is defined as well as issues

faced with increasing globalisation. The **United Nations Educational, Scientific and Cultural Organization (UNESCO)** is a specialised agency of the United Nations (UN). Created in the aftermath of the two World Wars, UNESCO aims to contribute to peace and security by promoting international collaboration through educational, scientific and cultural reforms ('Introducing UNESCO', ND). In the early 2000s, spearheaded by France, Canada and other exceptionalists, UNESCO began work on a convention on cultural diversity. In October 2005, the **Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO 2005 Convention)** was signed by all UN member countries, with the notable exceptions of the US and Israel on the grounds that the final draft was inconsistent with the principle of trade liberalisation (Choi, 2008; Craufurd Smith, 2007). The UNESCO 2005 Convention seeks to protect cultural diversity, especially media/audiovisual goods, but also encourages an exchange of ideas (Craufurd Smith, 2007).

There are numerous more agreements, directives and organisations that deal with trade in audiovisual and cultural products and services and directly relate to how rules related to cultural trade were determined in NAFTA and are being negotiated in TTIP. It is beyond the scope of this essay to discuss all of them, but brief descriptions of many related entities can be found in the Appendices.

The French Cultural Exception

As evidenced thus far in this essay, France is and has been one of the leaders in the fight for the cultural exception. Stemming from the overarching idea of 'French exceptionalism', the French cultural exception, or *l'exception culturelle*, has been championing the exclusion of cultural goods and services from trade since the beginning of the 20th century on grounds that culture is a unifying force that allows expression of one's self and ways to connect with others (Collard, 2010). Also important to France is preserving the French language and state-supported arts and culture sector, which they feel is

intrinsically tied with French identity at home and abroad. French leaders, such as former Minister of Culture Jack Lang, have spoken out in support of the cultural exception, claiming that the law of supply and demand is not enough to guarantee diversity and that each population has the right to develop its distinctive culture, also expressing that without the cultural exception, US cultural takeover would be inevitable (Frau-Meigs, 2001). The French have played key roles in negotiations on GATT, GATS and the UNESCO 2005 Convention and have been butting heads with free traders, especially the US, for decades. As Frau-Meigs notes, since 1993, a shift in the stark opposition of free traders and exceptionalists has taken place. The double realisation has been that globalisation is the result of neoliberal policies and market forces, but also that it must be embodied in a societal vision (ibid.). This is well evidenced in the semantic adjustment from 'cultural exception' to 'cultural diversity'.

Free traders who opposed France's stance on cultural exceptionalism, accused the cultural exception of being a backward and elitist approach, as well as being protectionist and a contravention of freedom of expression and consumption (Frau-Meigs, 2001). The French argued that this was not at all the case, rather that the cultural exception allowed greater diversity because it worked to prevent a hegemonic takeover by US culture. This argument was best exemplified with the change of semantics in describing the exemption of cultural goods and services in trade. As Dauncy (2010) explains, whereas the discourses of 'cultural exception' negatively emphasised the need and desire of French culture to 'protect' itself from Americanising and globalising forces of international trade, 'cultural diversity' refocused the debate toward a more positive interpretation of the role of cultural policy. In the late 1990s/early 2000s, France began using this terminology consistently and featured the objectives of not only protecting France's national cultural heritage and democratising access to it, but also to encourage artistic creativity by fostering cultural diversity in its cultural policies (ibid.). Understanding the exceptionalist point of view and role in the history of the

cultural exception help frame the arguments and outcomes in NAFTA and the implications for TTIP.

Chapter 3 – The North American Free Trade Agreement (NAFTA) and Canada's Cultural Exception

Background of Canada-US FTA

Debates over cultural industries and free trade in North America date back to the 1989 Canada-US FTA. In general, Canadian goods received free access to the US market, and Canadian firms were able to benefit from much-needed economies of scale (Robert, 2000). In regard to culture, it took months of intricate negotiations and mutual threats before Canada succeeded in excluding cultural industries from the agreement. **Paragraph 1 of Article 2005** of the FTA states that 'cultural industries are exempt from the provisions of this agreement' though the following paragraph of the same article allows a party to take retaliatory measures 'of equivalent commercial effect' in response to cultural protectionism policies (Galperin, 1999a; Gómez and Muñoz Larroa, 2014; Mosco, 1990). As expected, the US condemned Canada's cultural protectionism, threatening that any attempt on Canada's part to hamper production, distribution, sale or exhibition of films or TV programmes would provoke US trade reprisal. On the Canadian side, critics focused on the retaliation paragraph stating that it created a loophole and rendered the cultural exemption ineffective (Yúdice, 2003; Mosco, 1990). It is important to put the US motivations for the Canada-US FTA into historical perspective to understand its actions in NAFTA and other trade agreements that came afterward. The FTA was promoted in the 1980s by the US Republican administration and President Ronald Reagan, who proposed a new relationship between the US and Canada. This tactic was especially designed to rehearse the US project to have more influence in the world economy (Mosco, 1990). In other words, the FTA was based on the commercial and political direction that the US would promote later on in GATT and in the Uruguay Round of the WTO, as well as in NAFTA.

Regardless of the loophole criticism in the Canada-US FTA, the Canadians were insistent upon a cultural exemption for their audiovisual products. An overarching reason is the difficulty that Canadian cultural producers have due to proximity—both cultural and geographical—with the US. Cultural proximity, as defined by Sauvé and Steinfatt (2000), includes similarity or difference in language, values, beliefs, institutions and behavioural patterns. The extent to which foreign cultural products can penetrate a market and exert an effect on domestic culture partly depends on the degree of cultural proximity between trading partners (ibid.). With the notable exception of Quebec, where language and cultural barriers coupled with strong provincial policies keep US imports lower, local Canadian productions have only a small share in most audiovisual markets. The issue of cultural proximity is compounded for Canadians with 80 percent of the population living within 100 miles of the American border (Galperin, 1999a). In sum, the heavy flow of US products into Canada's cultural markets, fuelled by similarities in language, genre preference, geographical closeness and viewing habits, explains Canada's protectionist agenda in trade negotiations. Despite the debate around its effectiveness or long-term viability, Canada sent a message to the US that culture was something it values differently than other products and services included in trade.

By the time negotiations to incorporate Mexico into the FTA began, or to create NAFTA, it was clear that Canada was still unwilling to make concessions in terms of the cultural exception. However, the issue of cultural closeness was not felt to be as relevant to Mexico, with Mexico's chief NAFTA negotiator stating, in regard to the inclusion of cultural industries in the agreement, that the issue 'has little relevance for Mexico' and that, given Mexico's cultural heritage, 'there is no cause for concern' (quoted in Galperin, 1999a). To an extent, they had a point. US audiovisual products face not only language but also content and genre barriers in Mexico. At the time of NAFTA negotiations, Mexican communication policies were already headed toward deregulation and privatisation (ibid.). Knowing this

helps in understanding the differences between Mexico's and Canada's agenda over cultural industries in NAFTA including three factors: industry profiles, the changes in Mexico's communication policies and issues of cultural distance between Mexico and its northern neighbours (Glaperin, 1999b).

NAFTA – Motivations and Negotiation Outcomes for US, Canada and Mexico

Vincent Mosco considered the Canada-US FTA an agreement that, 'in itself…is a cultural product whose visions and language reflect the culture of [US] capitalism. Essentially, the FTA is a cultural export from the US to Canada, which, if successful, will be exported to other countries' (1990, p. 45). Gómez and Muñoz Larroa (2014) state that similarly, NAFTA puts very clear limits on the degree of integration of its member states since the treaty was conceived from an economic trading perspective sustained by neoliberal policies and orchestrated by US capitalist interests (p. 178). Returning to the point of difference between Mexico and Canada on the inclusion of a cultural exception, the Mexican government rejected the possibility of including such a clause in NAFTA because of the cultural distance from the US in language and genre preference (in the audiovisual industry). However, this stance contrasted with the opinions of Mexican academic and cultural groups that warned against the treaty's inclusion of provisions that could limit or endanger the domestic capability to defend, consolidate, and promote Mexican cultural identities (Gómez and Muñoz Larroa, 2014). In this regard, the attitude of Mexican academics and cultural groups reflect the beliefs held by the Canadian negotiators in NAFTA.

At the outset of the NAFTA negotiations, the pressure was enormous on the Canadian government to preserve the cultural exemption. As they had before and during the FTA negotiations, the Canadians argued that existing protectionist measures were necessary to ensure the survival of domestic cultural products (Robert, 2000). The main Canadian objective was clear—the cultural exemption obtained in the Canada-US FTA was not

negotiable and culture was not on the table—which meant that the FTA's exemption would be carried over in NAFTA without discussion. The US obviously saw the situation differently and did not wish to carry the cultural exception forward. The US concern was fiscal, but the greater fear was that the FTA cultural exception would send the wrong signal to the EU, who had already cited Canada's cultural exemption as a precedent for the European Community's Broadcast Quota (ibid., p. 87; Larrea, 1997). Though very much opposed by the US, due to other trade objectives, including wanting to create a Western Hemisphere trading bloc to rival that of the EU, the US acquiesced to the insistence of the Canadians and the cultural exemption from the Canada-US FTA was maintained in NAFTA, though only between Canada and the US. For Mexico, ultimately the belief that US culture would not impact Mexican culture and its audiovisual sector prevailed. Though warned by academics and cultural groups that Mexico would be opening up to competing with the world's most powerful audiovisual industry (that of the US), and that it could increase cultural penetration, translated in the potential imposition of the US way of life as a model for Mexicans, the Mexican government did not change its position. The Mexican government decided that within free trade relations between the US and Mexico that cultural industries would be included like any other good or service (Gómez and Muñoz Larroa, 2014). As a result, a double standard was applied—cultural industries were exempted from the agreement between the US and Canada, but Mexico allowed cultural industries to be governed by NAFTA provisions with few exemptions (Choi, 2008).

George Yúdice (2002) points out how 'NAFTA defined "culture" as a matter of *property,* through the inclusion of copyrights, patents, registered trademarks, phytogenetic rights, industrial designs, trade secrets, integrated circuits, geographical indicators, codified satellite signals, audiovisual production, etc.' (translated by and quoted in Gómez and Muñoz Larroa, 2014, p. 179). Although there are many provisions in NAFTA that address culture-

related issues, for Canada, the most important ones are **Article 2107** and **Annex 2106** (Robert, 2000). **Article 2107** defines cultural industries as being the publishing industry (books, magazines, periodicals, and newspapers), the film and video industry, the music recording industry, the music publishing industry, and the broadcasting industry (radio, television, cable, and satellite). **Annex 2106** stipulates that the FTA governs rights and obligations between Canada and any party with respect to cultural industries, except for **Article 302** of NAFTA on tariff elimination (Organisation of American States, 1994). Because **Annex 2106** states that the FTA's cultural exemption carries forward and applies to NAFTA, the 'loophole' allowing a party to take retaliatory measures of equivalent commercial effect in response to cultural protectionism policies also applies. Important to note, though not covered in this essay, is that as in the FTA, performing arts (such as theatre, opera, dance), visual arts and museums are not included and are thus not exempted from the NAFTA agreement (Glade, ND). However, newspapers and magazines are covered by the cultural exemption, the latter of which is discussed later as an example of NAFTA legal contestation between the US and Canada.

Different Beliefs Around Culture and its Roles – Arguments for and Against the Cultural Exception

The arguments against the cultural exemption in NAFTA mirror many of the general concerns that free traders have about protectionism and opposing free trade values. Opponents of the cultural exemption in NAFTA state that the very notion of exempting anything goes against the notion of free trade, meaning deregulation, elimination of barriers to trade and curtailment of state support (Yúdice, 2003). In support of their position that the cultural industries exemption is protectionism, the US can point to NAFTA's preamble, which states, in part, that its goal is to 'contribute to the harmonious development and expansion of world trade … reduce distortions to trade… foster creativity and innovation, and

promote trade in goods and services that are the subject of intellectual property rights' (Organisation of American States, 1994b). In the journal article 'Eliminate the Cultural Industries Exemption from NAFTA', Therese Anne Larrea states:

> The American government has good reason to consider the cultural industries exemption to be antithetical on each of the above enumerated points contained within the NAFTA preamble. It has every reason to consider the exemption clause as a barrier to free trade and one that violates the spirit of NAFTA (1997, p. 1133/1134).

Larrea also states that the cultural exemption 'flies in the face' of the national treatment principle that NAFTA was intended to implement, as stated in **Article 1703** that each country must provide nationals of another country treatment no less favorable than it accords its own nationals (ibid.).

Again, mirroring the general debate against cultural exemptions, opponents argue that the cultural exemption in NAFTA prohibits or 'protects' Canadian audiences from a culture to which they may want to be exposed and that they should have the right to enjoy whatever movies they want. Larrea states that this is in opposition to the **United Nation's Agreement on the Importation of Educational, Scientific and Cultural Material (Florence Agreement)**, which states that signatory nations 'continue their common efforts to promote by every means the free circulation of educational, scientific or cultural materials, and abolish or reduce any restrictions to that free circulation' (UNESCO, 1950). In direct response to the criticism regarding the Florence Agreement, Canadians and other exceptionalists would likely argue that enacting a cultural exemption works to ensure cultural diversity and could cite the **UNESCO 2005 Convention.**

After the long and tense negotiations around the cultural exemption in NAFTA, Canada ultimately succeeded. However, free traders criticised the exemption for not being effective. In the years since 1994 when NAFTA came into force, a number of lawsuits have been brought against Canada, including some dealing with cultural products. In fact, though not all having to do with culture, because of the dispute settlement system in NAFTA, in the

years following its inception, Canada has become one of the most sued countries in the world (Barlow, 2015). NAFTA has also had an effect on the cultural industries of the US and Mexico as explained below.

Outcomes and Effectiveness of the Cultural Exception in NAFTA

In 1995, US company Westinghouse Electric Corporation brought a complaint against the Canadian government before NAFTA arbitrators for blocking its subsidiary Country Music Television (CMT) from two million Canadian homes. Yúdice (2003) states that this case was resolved by creating a new, partly US-owned Canadian country music network. He states that 'not only was the cultural exemption clause ineffective, but it brought about a result even more characteristic of corporate transnationalisation—the merger of CMT and the Canadian broadcaster on whose behalf local viewership was blocked (ibid., p. 224). In this guise, a foreign company can have legal local status at the same time it is a part of a global enterprise, thus undermining the cultural exemption.

Though not related to the audiovisual industry, magazines and other publishing rights were included in the cultural exemption in NAFTA. In 1995, *Sports Illustrated*, a US magazine, challenged a Canadian 80 percent excise tax placed on electronic copies of its US magazine travelling across the border. Ultimately, the magazine had to shut down its Canadian operation, but its proprietors, New York City-based Time Warner Inc., openly urged the US government to take Canada to the WTO court (McDonald, 2003). Conflicting rules regarding culture in trade between the WTO and NAFTA has created much room for interpretation.

In general, argue Gómez and Muñoz Larroa (2014), the audiovisual sector and the film sub-sector show continuous growth for the three NAFTA members, but that this performance is not necessarily an outcome of NAFTA. Growth among NAFTA signatories and within each country's sub-sectors is vastly uneven. It is important to question to what

extent the growth translates into economic development and reflects open access to cultural production in terms of cultural diversity (Gómez and Muñoz Larroa, 2014). Indeed, though there was evidence of growth in the audio visual sectors of the NAFTA countries, it is confined largely to huge communication conglomerates and a handful of Hollywood-based film distribution companies (ibid.).

Though critics of the cultural exemption in NAFTA state that it is ineffective and counters the ideals of free trade, its inclusion in NAFTA was hailed as a victory Canadians and for exceptionalists (Robert, 2000). It clearly struck a chord with the US as well, which issued a public statement about the cultural exemption in NAFTA and outlined that it was not to be a precedent set for future trade deals (ibid.). An allusion widely used to discuss the success of Canadians in obtaining the cultural exemption in NAFTA is the triumph of David over Goliath, with Canada's ability to triumph over the global power that is Hollywood and the US (Galperin, 1999a; Choi, 2008). This state of mind is what spurred negotiations in agreements like the **GATS** and the **UNESCO 2005 Convention**, and what has continued the debate around the cultural exception in trade into current trade agreements such as TTIP.

Chapter 4 – The Transatlantic Trade and Investment Partnership (TTIP)

Introduction and Arguments For and Against TTIP

In 2013, negotiations between the EU and the US began for a proposed trade agreement, the Transatlantic Trade and Investment Partnership (TTIP), with the aim of promoting trade and multilateral economic growth by reducing non-tariff barriers to trade (NTBTs). If passed, TTIP would be the largest ever bilateral trade agreement. Proponents of TTIP cite traditional beliefs about trade liberalisation when discussing benefits of the agreement. These include theories behind free trade 'maximising real economic welfare' through 'exchange between nations based on underlying differences of comparative advantage' (Larrea, 1997). It has been stated that TTIP has the potential to reach 850 million consumers and bring 0.5 percent growth in GDP to the EU, open new markets for European and US business and create jobs (Culture Action Europe, 2015a). However, critics of TTIP claim that free trade in general is a threat to jobs (as evidenced in other agreements like NAFTA) and raise concerns about lowering of regulatory standards in environmental, health and labour laws (ibid.).

For those who oppose TTIP and other FTAs, there are a number main concerns that raise red flags. The first being the lack of transparency in the negotiations. No documents on TTIP were published during the early stage of the negotiations and it has been only through leaks that drafts of text of the agreement have been released to the public (Culture Action Europe, 2015a). Additionally, Members of the European Parliament (MEPs) are not involved in negotiations, a fact that is often criticised as undemocratic (Bartsch, 2014). Another concern is the deregulation that reducing NTBTs create. Tariffs between the EU and US are already very low, meaning that reducing factors other than tariffs would include accepting the lowest common denominator of standards in labor, chemical safety, food and pharmaceutical laws so that goods and services may travel more freely between nations (Yúdice, 2003;

Greenpeace, 2016). Europeans who have access to public services fear privatisation by MNCs, especially in areas like healthcare, but also extending to public support of the arts.

One of the most pressing concerns for those who oppose TTIP is the inclusion of a corporate court system, currently called the investor-state dispute settlement mechanism (ISDS). ISDS is a legal system run entirely by corporate lawyers, which allows corporations to sue governments if they think legislation will impede future profits. This system exists within NAFTA, which is why Canada has been sued so many times (Barlow, 2015). ISDS has been put forward as the best method of settling disputes because it is easier and faster than dealing with different countries' legal systems, but opponents point out that bypassing state courts is highly undemocratic. Relating to the cultural exception, Bartsch (2014) points out that within ISDS it is conceivable that governments would have to justify their protection measures in front of international tribunals and that this could be an easy way of bypassing state laws.

TTIP and Culture

Aspects of TTIP, like ISDS, that do not deal directly with culture but could implicitly pave the way for huge changes in the cultural sector, are a fear of exceptionalists. As Mark Dearn, Senior Trade Campaigns Officer at War on Want, points out, a key element in TTIP is stopping state subsidies from being used to support certain industries, like those for the audiovisual industry (Dearn, 2016). Unsurprisingly, France has played a major role within the EU in pushing for a cultural exception in TTIP. Shortly before approving the EC's negotiation mandate, France forged an alliance with fourteen EU member states demanding an exception of audiovisual media (Bartsch, 2014). In May 2013, the European Parliament (EP) voted for the exclusion of culture and the audiovisual sector from TTIP negotiations. In June 2013, the Council of the EU agreed that audiovisual services would not be covered in the mandate given to the EC (Culture Action Europe, 2015a). In June 2015, a report

containing the EP's recommendations to the EC on the negotiations for TTIP was published. The opinions came from committees on various topics, including the Culture Committee, headed by German Green MEP Helga Trüpel. The Culture Committee reaffirmed the need to ensure that national subsidies schemes for cultural products will not be challenged by TTIP. The report also included recommendations to ensure full compliance with the UNESCO 2005 Convention, media freedom and media pluralism and the exclusion of audiovisual services from TTIP. The report was adopted on 08 July 2015 by 436 votes to 241 votes, with 32 abstentions (ibid.; European Parliament, 2015). Though it seems the cultural exception is safe within TTIP for now, exceptionalists still fear the implicit effects that TTIP could have on the cultural and audiovisual industries, including the power given to corporations via ISDS and the validation given to a market-driven, *laissez-faire*, 'Americanisation' of culture and ways of life.

Chapter 5 – Analysing the Future of the Cultural Exception

In reviewing the literature around topics concerning culture and trade such as the arguments of both exceptionalists and free traders, the history of the rise of Hollywood as a global power, the dual nature of audiovisual products and services and specific global entities dictating the rules on trade in culture, it is evident that the cultural exception has been a highly contested topic, influenced by a number of nuanced factors. Those on either side of the argument have impassioned reasoning for their beliefs backed by economic and sociocultural factors. As evidenced in the implicit fears expressed by exceptionalists involved in TTIP negotiations, there are a number of factors that could affect culture in the future of global trade. But what will be the future of the cultural exception?

Rapid Technological Changes and Effectiveness of Cultural Exceptions

An apt criticism in the opposition to the cultural exception is that the current method of imposing screen quotas is rapidly becoming impracticable and ineffective. Even before the dawn of internet streaming, satellite broadcasting made it very difficult for European governments to regulate US television shows being sent into European homes. Additionally, as online streaming of audiovisual products becomes more popular, fewer people are watching television and are instead turning to online platforms in which they can customise to their viewing preferences. As Galperin (1999a) states, technological innovations are expected to shift the industry from massive broadcasting to narrowcasting or customised television. This new global market structure could turn audience diversity into a competitive advantage comparable to economies of scale, but it is unclear whether or not this new orientation will be able to strike a better balance between economic integration and cultural diversity. However, this trend might be all the more reason for countries without economies of scale to advocate for the cultural exception. Choi (2008) points out the application of new technology to the audiovisual sector may only be at the beginning stage and that no one can

foresee the direction and pace of technological development. He suggests that future regulations in trade agreements and other entities around technology should be careful not to stifle the untapped potential of the audiovisual sector.

The effectiveness argument becomes more and more relevant as technologies change and cultural consumption and practice evolves. As evidenced in the 'loophole' clause and the cases brought against Canada within NAFTA, there is room for debate in whether the cultural exception is actually doing anything to protect the cultural industries or to ensure cultural diversity. The conflicting rules regarding culture in trade between different global agreements and organisations further complicates its effectiveness. However, Canada, on behalf of exceptionalists around the globe, certainly sent a message to the US regarding the importance of culture. This perhaps may be one of the cultural exception's most effective points.

Neoliberalism and Setting Standards

Mosco (1990) states that the Canada-US FTA was intended to be a trade format exported to the rest of the world. Though the FTA included the cultural exemption to the disapproval of the US, the aim of an example set for the future of trade deals and trade liberalisation is trying to be realised through TTIP. TTIP is being seen as the new gold standard for all future trade agreements. This means that all future trade deals, including with developing countries that do not currently have a say in how TTIP is being constructed to benefit those already with power and wealth, will likely be modelled on TTIP (World Development Movement, 2014). As the cultural exception is currently included in TTIP, this might be seen by exceptionalists as a good example to set for future deals. However, as Head of the Culture Committee on TTIP, MEP Helga Trüpel, points out, audiovisual services have only been *partially* excluded from negotiations and the Committee believes the generated exception does not go far enough (Trüpel, 2015). Trüpel would like to see a general safeguard clause for audiovisual media and claims that the current negotiating texts offers a

too succinct understanding of audiovisual services that does not include new digital offerings (ibid.). From those opposing a cultural exemption in TTIP, this will surely not be permitted to happen. It has been made clear that though the partial exemption in TTIP is in place and that culture outside of that is not part of current negotiations, it could be added at any time. As evidenced in the negotiations in TTIP, the cultural exception, especially relating to technology and the audiovisual sector, will continue to be a point of contention between exceptionalists and free traders.

The implicit fears of globalisation and trade liberalisation, such as interference with subsidies and the ability for MNCs to skirt rules through ISDS, still persist for exceptionalists within TTIP negotiations. Underlying these fears is the hesitancy around the pervading Western ideologies of neoliberalism and market liberalisation. The cultural exception has been a message sent to neoliberal trade negotiations that some goods and services are beyond the market. Cultural goods and services are more than mere commodities, they are sociocultural, historical, cohesive and meaningful aspects of individuals' and communities' lives. Whether or not this rebellious message against neoliberal ideologies will be able to prevail is yet to be seen.

Globalisation and Cultural Diversity

Though most nations recognise the necessity of trading with the US, many resent the 'Americanisation' and double standards that come along with it. Examples such as the Canadian success of including the cultural exception in the Canada-US FTA and in NAFTA being hailed as 'David versus Goliath' illustrate the resentment toward US cultural hegemony by other countries. This may be a unifying point for exceptionalists, especially with the semantic shift from 'cultural exception' to ensuring 'cultural diversity'. As technologies, governments and their priorities, consumer patterns and global power relations continue to change, the argument for protecting cultural diversity is likely to adapt. Crauford Smith

(2007) points out that technologies such as the Internet rapidly evolving and growing more popular offer increased opportunities for the exchange of information and ideas, but also present different challenges to cultural diversity. For example, though the internet is used all over the world, it is dominated by a handful of languages. In consequence, many nations continue to argue that a system of global mass communication, one advocated by free traders, threatens the survival of particular languages and cultures (ibid.). Additionally, the hypocrisy of the US arguing against the cultural exception because it is protectionist and prevents freedom of choice in cultural goods and services may come under fire as exceptionalists realise the extent of the US's implicit protectionism under the guise of catalysing a free market system. Changes within government leadership may too shape the future of the cultural exception within trade, or indeed trade deals, like TTIP, in general.

Brexit

On 23 June 2016, the UK held a referendum in which, by a small margin, the people of the UK voted to leave the EU. The term to describe the UK referendum decision has been coined 'Brexit'. What unraveled in the days following the decision was uncertainty and chaos with Prime Minister David Cameron announcing his resignation, world markets plunging and the pound dropping to its lowest level against the dollar since 1985 (Gold, 2016). The future is certainly unknown for what effect this decision will have on many aspects of laws and regulations in the UK, including funding for the arts from EU sources and how trade in the cultural industries will be affected for the UK and its trading partners, which will have to be renegotiated (Russell, 2016). Too little is known at this time and it is beyond the scope of this paper to discuss what the future of UK trade will look like, but it is possible to make a few inferences based on what has been covered in this essay.

The Conservative UK government was largely supportive of TTIP and the UK is one of the largest importers of US cultural materials of any European country. Historically, the

UK has also favoured liberalised free trade proposals put forward by the US, as evident in the UK's opposition to France's request for tougher regulations around foreign film quotas in the TWF Directive negotiations (Chao, 1996). The cultural exception maintained in the GATT negotiations of 1993 were only successful because France spent time convincing other EU Member States that the cultural exception was in everyone's best interest to protect cultural diversity, and the EU, as a large negotiating bloc, was able to maintain the status quo around subsidies in culture and quotas. If the UK wants to ensure similar measures in future trade deals with the US, it will likely have a harder time doing so without the support of the EU. In addition, by being part of the EU, the UK was included in legislation that supported the argument of a cultural exception/cultural diversity, such as the Treaty on the Functioning of the European Union (TFEU) Article 167 that states that cultural aspects must be taken into account when negotiating trade deals. Similarly, by signing the 2005 UNESCO Convention, the EU is legally bound to promote cultural diversity. After leaving the EU, the UK will need to draft its own guiding documents or formulate agreements when it comes to negotiating future trade deals and deciding how it will handle the cultural industries in relation to trade.

Conclusion – The Fight Continues

This essay has reviewed the literature on the history and debate on cultural exceptions in FTAs, dissected the arguments for and against cultural exceptions, analysed the outcomes and implications of the cultural exception in NAFTA and examined the negotiations around the cultural exception in TTIP. Using this information as a framework, the future of the cultural exception was analysed and focused on aspects including technological changes, effectiveness of cultural exceptions, neoliberalism, globalisation, cultural diversity and how changes in global governance and structure, specifically that of Brexit, might affect the cultural exception. Based on this knowledge, one is able to answer the question posed of why a cultural exception is important to states on both sides of the argument. Free traders view cultural goods and services as a commodity that should be included in the free market. To them, this will allow greater access to cultural goods around the world. On the other hand, exceptionalists view cultural goods and services as more than mere commodities that should be included in trade negotiations. Cultural goods and services, including audiovisual goods and services, should be treated differently because they play unique roles in society like cultural cohesion, language preservation, history and a sense of belonging. Exceptionalists believe that the cultural exception is needed in order to allow for local producers of cultural goods to be able to create and local audiences to be able to participate in and consume cultural goods and activities without fear of US takeover. As evidenced by the long history of the debate and its continuation between free traders and exceptionalists, the argument around the cultural exception is likely to persist and adapt as technologies and governments change.

This issue is ongoing and will continue to develop as time goes on, as new technologies are invented and as trade agreements such as TTIP are created and negotiated. Important to this debate and areas for further research include how intellectual property is handled within FTAs, how neoliberal trade deals and the cultural exceptions within them will

affect developing countries and how multinational trade agreements might implicitly affect cultural policies and set the tone for future FTAs.

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Appendices

A. Acronyms and Abbreviations

EC – European Community

EP – European Parliament

FTA – Free trade agreement

GATT – the General Agreement on Tariffs and Trade

GATS – the General Agreement on Trade in Services

IP – Intellectual property

ISDS – Investor-state dispute settlement

MEP – Member of European Parliament

MFN – Most favoured nation

MNC – Multinational corporation

MPAA – Motion Picture Association of America

NAFTA – the North American Free Trade Agreement

NT – National treatment

NTBT – Non-tariff barriers to trade

TFEU – Treaty on the Functioning of the European Union

TRIPS – the Agreement on Trade-Related Aspects of Intellectual Property Rights

TTIP – the Transatlantic Trade and Investment Partnership

TWF – Television Without Frontiers

UK – the United Kingdom of Great Britain and Northern Ireland

US – the United States of America

UN – the United Nations

UNESCO – the United Nations Educational, Scientific and Cultural Organization

WIPO – the World Intellectual Property Organization

WTO – the World Trade Organization

WWI – World War I

WWII – World War II

B. Glossary

Article 10(1) of the European Convention on Human Rights and Fundamental Freedoms – guarantees freedom of expression and encompasses the right to receive information

GATT – the General Agreement on Tariffs and Trade was a multilateral agreement regulating international trade. It was negotiated during the United Nations Conference on Trade and Employment and took effect on 01 January 1948. It lasted until 1994 when the WTO was established [1]

GATS – the General Agreement on Trade in Services is a treaty of the WTO that entered into force in 1995 as a result of the Uruguay Round negotiations. The treaty mirrors the objectives of its counterpart, the GATT, but instead of for merchandise, the GATS extended the multilateral trading system to the service sector[2]

NAFTA – the North American Free Trade Agreement, an agreement signed by Canada, Mexico and the United States, creating a trilateral trade bloc in North America; came into force on 01 January 1994

Section 310(b) of the US Communications Act – Section 310(b) imposes restrictions on foreign ownership of radio stations, broadcast television and telephone companies.

TTIP – the Transatlantic Trade and Investment Partnership is a proposed trade agreement between the European Union and the United States; the agreement is under ongoing negotiations, which were planned to be finalised by the end of 2014, but will not likely be finished until 2020. A majority of the content in TTIP has been negotiated behind closed doors and contents of the proposals as well as reports on TTIP negotiations classified from the public.

TWF – Television Without Frontiers; the TWF Directive, adopted in 1989 and revised in 1997, imposes broadcast quotas based on film nationality; 'The Directive aims to ensure the free movement of broadcasting services within the internal market and at the same time to preserve certain public interest objectives, such as cultural diversity…'[3]

UK – the United Kingdom of Great Britain and Northern Ireland is a sovereign state in Europe consisting of four countries: England, Scotland, Wales, and Northern Ireland

UN – the United Nations is an intergovernmental organisation to promote international cooperation. It was established on 24 October 1945 after World War II and replaced the League of Nations. There are currently 193 United Nations member states.[4]

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[1] Text of the General Agreement on Tariffs and Trade (GATT): https://www.wto.org/english/docs_e/legal_e/gatt47.pdf, *WTO* website
[2] The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines - https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, *WTO* website
[3] Text of TWF Directive: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al24101
[4] *United Nations* website: http://www.un.org/en/index.html

UNESCO – the United Nations Educational, Scientific and Cultural Organization is a specialised agency of the UN; its purpose is to contribute to world peace and security by promoting international collaboration through educational, scientific and cultural reforms in order to increase universal respect for the rule of law, justice and human rights along with fundamental freedom proclaimed in the UN Charter. It has 195 member states and nine associate members.[5]

UNESCO 2005 Convention – the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is an international legal agreement and UNESCO convention adopted on 20 October 2005; the convention complements the previous UNESCO Universal Declaration on Cultural Diversity of 2001. It has 142 parties, which includes 141 states and the European Union. The United States is not a party to the 2005 Convention.

Uruguay Round – the 8th round of multilateral trade negotiations conducted within the framework of GATT, spanning from 1986 to 1994, which led to the creation of the WTO; to date, the largest trade negotiation ever, with 123 countries taking part; brought about the biggest reform of the world's trading system since GATT was created after WWII[6]

WIPO – the World Intellectual Property Organization is one of the 17 specialised agencies of the United Nations; created in 1967 'to encourage creative activity, to promote the protection of intellectual property throughout the world', WIPO currently has 188 member states, administers 26 international treaties, and has its headquarters in Geneva, Switzerland.[7]

WTO – the World Trade Organization is an intergovernmental organisation that regulates international trade; the bulk of the WTO's current work comes from the 1986-94 negotiations called the Uruguay Round and earlier negotiations under GATT, which it effectively replaced; the TWO officially commenced on 01 January 1995.

[5] *UNESCO* website: http://en.unesco.org/
[6] 'The Uruguay Round', *WTO* website: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm
[7] *WIPO* website: http://www.wipo.int/portal/en/index.html

C. International rules on the circulation of cultural goods and services

(From Choi, 2008, p. 243)

1. Article IV of GATT 1994
Screen quota

2. *Articles of II, XCI, and XVII of GATS*
MFN treatment for all services and service suppliers of all members, irrespective of whether commitments have been made; market access; or national treatment

3. NAFTA Article 2106 and Annex 2106, Canada-US and Canada-Mexico
Exemptions related to measures concerning cultural industries; annexes I and II for Mexico (specifically concerning audiovisual) Cultural industries exempt from provisions of this agreement, except as specified.

4. OECD Code of Liberalization of Current Invisible Operations
For cultural reasons, support for the production of printed films for cinema may be maintained provided that it does not significantly distort international competition in export markets

5. Agence de la Francophonie, Final Declaration of the Moncton Summit (1999)
Affirm the right of states and governments to freely define their cultural policies.

6. Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character (UNESCO, Beirut, 1948)
Customs agreement regarding imports that covers the following categories of materials: films, filmstrip microfilms, sound recordings, glass slides, models both static and moving, wall charts, maps, and posters.

7. Agreement on the Importation of Educational, Scientific and Cultural Materials (UNESCO, Florence, 1950)
Designed to remove customs tariffs and other obstacles that impede exchanges not only of visual and auditory material, but also of several other categories of material; it also provides for duty-free entry of very diverse items.

8. Protocol to the Florence Agreement, adopted in Nairobi in 1976
Protocol extends exemption from customs duties to various groups of material not covered by the agreement.

9. Recommendation Concerning the International Exchange of Cultural Property (UNESCO, Nairobi, 1976)

Facilitating the legal circulation of collectors' objects among museums and other cultural institutions by exchanges, loans, etc.

10. European Convention on Transfrontier Television (ETS no. 132, 1989, in force 1993) and Protocol Amending the Convention on Transfrontier Television (ETS no. 171)
Legal framework for the free circulation of transfrontier television programs in Europe, through minimum common rules.

11. Resolution of the European Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25, January 1999, Concerning Public Service Broadcasting Official Journal no. C 030 of 05/02/1999.
Supporting the role and funding of public service broadcasting; broad public access; the benefits of new audiovisual and information services and technologies, and quality public programming and services.

12. European Council Resolution of February 8, 1999, on fixed book prices in homogeneous cross-border linguistic areas (1999/C 42/02)
Emphasizing the importance of a balanced assessment of the cultural and economic aspects of books, the resolution promotes cultural development and diversity in Europe, and cultural benefits to the consumer

13. Bilateral cultural cooperation agreements
Cultural and technical cooperation is exempted from customs duties.

D. Timeline of Global Trade Agreements, Conventions & Organisations, relating to NAFTA and TTIP

1886 – **Berne Convention** (Convention for the Protection of Literary and Artistic Works)

1948 – **GATT** signed

1948 – **Beirut Agreement**

1950 – **Florence Agreement** (Agreement on the Importation of Educational, Scientific and Cultural Materials) and accompanying **Nairobi Protocol** (1976)

- Seek to remove customs charges on the import of certain educational, scientific and cultural materials and prohibit the imposition, again in relation to specific cultural goods, of discriminatory internal charges
- Florence Agreement also contains an early example of a 'cultural preservation' clause; the reservation to the Agreement allows, solely in relation to trade between the US and another party, either side to suspend the operation of the Agreement where the scale of imports under the Agreement threatens 'serious injury to the domestic industry…producing or directly competitive products.'[8]

1961 – **Rome Convention** (Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations) signed

1966 – **International Covenant on Economic, Social and Cultural Rights**

- UN - Article 27 provides for the rights of 'ethnic, religious or linguistic minorities…to enjoy their own culture, to profess and practice their own religion, or to use their own language[9]

1971 – **Berne Convention** signed by more countries

1971 – **Geneva Convention** (Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms

1974 – **Trade Act of 1974**

1986-1994 – **Uruguay Round of negotiations**

1988 – US becomes party to the Berne Convention

1988 – **US-Canada FTA**

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[8] Craufurd Smith, Rachael, 2007; UN, Agreement on the Importation of Educational, Scientific and Cultural Materials ('Florence Agreement') 1950, and Nairobi Protocol, 1976, available at: http://www.unesco.org/culture/laws/florence/html_eng/page4.shtml.

[9] Craufurd Smith, Rachael, 2007

1989 – **Television Without Frontiers (TWF) Directive**

1992 – **Article 128 of the *Maastricht Treaty***

1994 – **NAFTA** comes into force, 01 January 1997

1995 – Official commencement of the **WTO**

1995 – **GATS**

2005 – **UNESCO Convention** on the Protection and Promotion of the Diversity of Cultural Expressions

2007 – TWF Directive becomes the **Audiovisual Media Services Directive (AVMSD)**, the main regulating EU-wide law for the sector

E. Other Important Rules, Agreements, Conventions and Treaties relating to culture and trade

Beirut Agreement – (1948) Eliminated duty and licensing costs for educational audiovisual imports, but not for texts designated as cultural or popular

Berne Convention – the Berne Convention for the Protection of Literary and Artistic Works is an international agreement on copyright, first accepted in Berne, Switzerland, in 1886. First version signed on September 1886, by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the United Kingdom. With the WIPO's Berne revision on Paris 1971, many other countries joined the treaty. On 01 March, the US Berne Convention Implementation Act of 1988 was enacted, and the US became a party to the Berne Convention.[10]

Maastricht Treaty – the Maastricht Treaty (formally, the Treaty on European Union or TEU) was signed on 07 February 1992 and was undertaken to integrate European countries into the EU and reflected the serious intentions of all counties to create a common economic and monetary union; it was the first treaty to implement cultural diversity on the European level, with respect to national identities (Bartsch, 2014)[11]

MEDIA Programme – the MEDIA programme of the EU is designed to strengthen the European film and audiovisual industries by providing support for the development, promotion and distribution of European works within Europe and beyond; The first programme began in 1987, and the most recent programme was the MEDIA 2007 program that ran from 2007-2013 with a budget of €755 million[12]

TiSA – the Trade in Services Agreement is a proposed international trade treaty between 23 Parties, including the European Union and the United States. The agreement is based on GATS and aims at liberalizing the global trade of services such as banking, healthcare, e-commerce, telecoms, licensing and transport.[13]

TRIPS – the Agreement on Trade-Related Aspects of Intellectual Property Rights is an international agreement administered by the WTO that sets minimum standards for many forms in intellectual property (IP) regulation as applied to nationals of other WTO Members; negotiated at the end of the Uruguay Round of the GATT in 1994.[14]

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[10] Text of the Berne Convention for the Protection of Literary and Artistic Works: http://www.wipo.int/treaties/en/text.jsp?file_id=283698
[11] Text of the Maastricht Treaty: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0026
[12] EC. (ND) 'MEDIA Programme': http://eacea.ec.europa.eu/media/index_en.php
[13] European Commission. (2016). 'Trade in Services Agreement.' http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm
[14] TRIPS: Text of the Agreement: https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm, *WTO* website