

# Global watch on culture and digital trade

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## GLOBAL TRADE FACING NEO-MERCANTILISM: CULTURAL ISSUES

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Since March 2018, the Sino-American trade showdown has resulted in tariff escalation rooted both in China's mercantilist policy and in the nationalist and unilateralist shift taken by the Trump administration. The trade and political confrontation between the two great economic powers has repercussions on a large number of international affairs, as revealed by the external trade action of the European Union (EU) and the place of culture in new economic partnerships.

### The place of culture in the EU trade negotiations

In the context of a neo-mercantilist confrontation between the United States and China, the promotion of an open international economy remains at the core of the EU trade policy and its ambitious agenda. The latter favours the multiplication of bilateral trade and investment partnerships with countries or regional groupings in Latin America, Asia, the Caribbean and the Pacific.

Over the last decade, the EU has concluded a series of major bilateral or interregional preferential trade agreements with South Korea (2010), Central American countries (2012)<sup>[1]</sup>,

[1] Costa Rica, Guatemala, Honduras, Nicaragua, Salvador.



Colombia, Ecuador and Peru (2014), Canada (2016), a group of Southern African Development Community countries (2016)<sup>[2]</sup>, Vietnam (2016), Japan (2017), and Singapore (2018). In June 2019, the EU concluded a trade agreement with MERCOSUR, which brings together Brazil, Argentina, Uruguay and Paraguay. However, this agreement has not yet been ratified and entered into force due to its controversial nature and the strong reluctance expressed by several EU member states. Finally, the EU is currently (re)negotiating a bilateral trade agreement with Australia, New Zealand, Mexico, Chile and Indonesia, as well as an investment agreement with China. In this current issue, the aim is to analyze the place of cultural goods and services in the economic partnership with Japan and MERCOSUR, as well as in trade negotiations with Australia and New Zealand.

## Agreement between the EU and Japan

In the case of Japan, the agreement contains a "cultural exception" which exclusively covers audiovisual and broadcasting services. Audiovisual services are explicitly excluded from the following fields: "investment liberalization" (Article 8.6), "cross-border trade in services" (Article 8.14), "electronic commerce" (Article 8.70), "subsidies" (Article 12.3). Broadcasting services are excluded from the application of the sub-section on telecommunications services (Article 8.41). Furthermore, in Chapter 8 dealing with "Trade in services, liberalization of investment and electronic commerce", the paragraph 2 of Article 8.1 specifies that "for the purposes of this Chapter, the Parties affirm their right to adopt within their territories regulatory measures necessary to achieve legitimate policy objectives, such as [...] the promotion and protection of cultural diversity". Besides, Chapter 18 on "Good regulatory practices and regulatory protection" mentions that "nothing in this section shall affect the right of a Party to define or regulate its own levels of protection in pursuit or furtherance of its public policy objectives in areas such as [...] cultural diversity".

Regarding Chapter 14 on "Intellectual Property", article 14.8 defines copyright and other rights for authors, performers, producers of phonograms, broadcasting organizations. Article 14.12 stresses that "the Parties agree to continue discussion on adequate protection for the use of phonograms for all communication to the public".

[2] The Southern African Development Community gathers the following countries: Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini (formerly Swaziland).



In article 14.13, the Parties state that “the term of protection for rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after the author’s death”. Moreover, the term of protection for rights of performers “shall be no less than 50 years after the performance”. Finally, in article 14.16, the Parties recognize “the importance of promoting cooperation between their respective collective management organisations” and they agree to promote “the transparency of collective management organisations”.

In addition, article 2.10 of Chapter 2 on “Trade in Goods” states that each Party “shall grant duty-free temporary admission into its customs territory” for the following goods: “professional equipment, including equipment for the press or for sound or television broadcasting, cinematographic equipment [...] advertising films and recordings.

Finally, in Annex II “Reservations for Future Measures”, reservation n°11 stresses that “the EU reserves the right to adopt or maintain any measure with respect to broadcast transmission services”. On its side, “Japan reserves the right to adopt or maintain any measure relating to investments or the supply of services in broadcasting industry”. In reservation n°19, the EU reserves “the right to adopt or maintain any measure” with respect to: (a) libraries, archives, museums and other cultural services; (b) entertainment services, theatre, live bands and circus services ; (c) news and press agencies.

It is worth noting here that no reference to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions appears in the agreement between the EU and Japan and no Protocol on Cultural Cooperation is included, unlike the trade agreements with South Korea, CARIFORUM or Central America. A key reason is the highly developed level of Japanese cultural industries and the international commitments of Japan, since the latter is not Party to the UNESCO Convention.

## Agreement between the EU and MERCOSUR

For information purposes, the European Commission published 29 unfinished texts of the chapters and annexes of the Trade Part of the agreement between the EU and MERCOSUR following the agreement in principle announced on 28 June 2019.



These texts may undergo further modifications including as a result of the process of legal revision of the agreed text. The agreement has not yet been ratified at EU and Member States levels.

So far, with respect to cultural sectors, the exceptions incorporated in the agreement between the EU and MERCOSUR have strong similarities to those contained in the agreement between EU and Japan. In this view, in the chapter on "Trade in Services and Establishment", the Parties stress that this chapter applies to measures of the Parties "affecting trade in services and establishment, with the exception of [...] audiovisual services" (Article 1). In the sub-section 6 on e-commerce, the Parties mention that this section shall "apply to measures that affect trade by electronic means", but the provisions of this section "shall not apply to [...] broadcasting services and audio-visual services" (Article 42). In addition, they recognize the principle of technological neutrality in electronic commerce.

Regarding the chapter on "Intellectual Property", the agreement incorporates both similar and different provisions to those included in the agreement between the EU and Japan. In this respect, article X.10 defines copyright and related rights for authors, performers, producers of phonograms, broadcasting organizations, but It is interesting to note that article X.14 states that "each Party shall provide a right in order to ensure that a remuneration is paid by the user to the performers and producers of phonograms, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public".

With respect to the terms of protection, there are also differences between the two agreements. In this view, "the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and not less than for 50 years or, where the domestic legislation of the Party so provides, for 70 years after the author's death". Moreover, article X.17 on "Cooperation on collective management of rights" stresses explicitly the digital environment. The article focuses on the promotion of cooperation, transparency and non-discrimination of collective management organizations, "in particular as regards the revenues they collect, deductions applied to such revenue, the use of the royalties collected, the distribution policy and their repertoire, including in the digital environment".



## EU trade negotiations with Australia and New Zealand

As regards the bilateral negotiations with Australia and New Zealand, six negotiating rounds have been held since their launch in June 2018. The EU directives on both negotiations have several similar points. With respect to "Trade in Services, Foreign Direct Investment and Digital Trade", the EU stipulates that "in line with Article V GATS (General Agreement on Trade in Services), the Agreement should have substantial sectorial coverage and should cover all modes of supply. The Agreement should have no a priori exclusion from its scope other than the exclusion of audiovisual services". In addition, the EU directives stress that "the Agreement should reaffirm that it does not prevent the EU, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as [...] the promotion and protection of cultural diversity".

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