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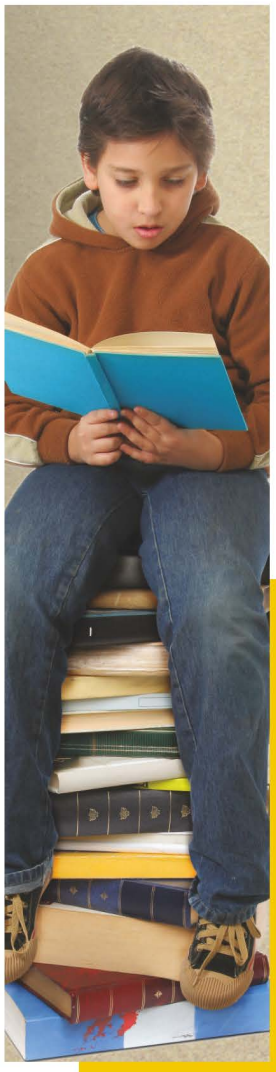

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RESEARCH FOR THE CULT COMMITTEE - CULTURE AND EDUCATION IN CETA

STUDY

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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

CULTURE AND EDUCATION

RESEARCH FOR CULT COMMITTEE - CULTURE AND EDUCATION IN CETA

STUDY

Abstract

This paper assesses the treatment of education and culture in the EU-Canada Comprehensive Economic and Trade Agreement (CETA). The CETA marked (for the EU) significant changes in negotiating modalities in the fields of services and investment, involving a shift in the manner in which the Parties undertake negotiated market opening commitments under the Treaty (from a GATS-type hybrid list to a negative list approach). Notwithstanding such changes, both Canada and the European Union have secured under the CETA negotiated outcomes fully aligned to – and wholly consistent with - those achieved by both Parties in their preceding trade and investment agreements at the bilateral, regional or multilateral levels. The CETA marked no change to the long-held policy of both Parties to retain full policy immunity by eschewing substantive disciplines and market opening commitments in matters of culture and publicly-funded education services.

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EXECUTIVE SUMMARY

This study responds to a request by the European Parliament's Committee on Culture and Education (CULT) for an analysis of the treatment of culture and education services in the recently-concluded EU-Canada Comprehensive Economic and Trade Agreement (CETA).

The CETA marked (for the EU) significant changes in negotiating modalities in the fields of services and investment. This involved a shift in the manner in which the Parties undertake negotiated market opening commitments under the Treaty, from a WTO-GATS-type positive or hybrid list approach to a NAFTA-type negative list approach. Notwithstanding such changes, both Canada and the European Union have secured under the CETA negotiated outcomes fully aligned to – and wholly consistent with - those achieved by both Parties in their preceding trade and investment agreements at the bilateral, regional or multilateral levels. Simply put, the CETA marks no change to the long-held policy of both Parties to retain full policy immunity by eschewing substantive disciplines and market opening commitments in matters of culture and publicly-funded education services. In the case of Canada, however, an absence of reservations targeting measures governing privately-funded education services suggests that CETA has generated a WTOplus outcome in liberalization terms. The EU, for its part, has sought to preserve full policy immunity in regard to future measures governing both publicly- and privately-funded education services.

In the case of audiovisual services (for the EU) and cultural industries (for Canada)[1], the CETA's preamble affirms both Parties' commitments as signatories of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Preamble further recalls the sovereign right of states to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.

Beyond the treaty's preambular provisions, both Parties have sought to preserve, including for purposes of future policy changes, full policy immunity in matters of cultural policy. They have done so through an explicit carve-out of the sector from the scope of the Agreement's chapters dealing with Subsidies (Chapter 7), Investment (Chapter 8), Cross-Border Trade in Services (Chapter 9), Domestic Regulation (Chapter 12) and Government Procurement (Chapter 19).[2]

In the case of education services, for which, unlike culture-related matters, no sector-specific exclusion exists under the CETA, the Parties have pursued a two-track approach. This has consisted of: (i) carving out from the ambit of the CETA's Investment and Cross-Border Trade in Services chapters activities carried out or supplied in the exercise of governmental authority, the latter being defined, as in the manner of Article 1.3(b) and

[1] In Article 1.1 of the CETA, the term "cultural industries" is defined as persons engaged in: (a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, except when printing or typesetting any of the foregoing is the only activity; (b) the production, distribution, sale or exhibition of film or video recordings; (c) the production, distribution, sale or exhibition of audio or video music recordings; (d) the publication, distribution or sale of music in print or machine-readable form; or (e) radio-communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services. The main difference between the EU and Canada in regard to the scope of their respective carve-outs for culture-related matters relates to Canada's decision to exclude the publishing industry (i.e. books, periodicals and newspapers) from the scope of CETA.

[2] The relevant provisions can be found in Articles 1.1, 7.7, 8.2, 8.9, 9.2, 12.2, 28.9 as well as Annex 19-7 and of the CETA.

(c) of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) and of all preferential trade agreements of which Canada and the European Union are Parties, as activities or services that are "not supplied on a commercial basis nor in competition with one or more service suppliers"; and (ii) lodging, where necessary, negative list reservations against specific treaty obligations allowing the maintenance of existing - or the introduction of new - non-conforming measures (i.e. measures that violate core treaty obligations) in the sector.

With both Canada and the EU driven by defensive negotiating impulses in the educational and cultural fields, the CETA represented a missed opportunity to deepen complimentary and non-binding forms of cooperation between the Parties with a view to facilitating the mobility of artists and their creations as well as students and researchers in parallel to the CETA. Such cooperation continues to take place outside of – and wholly disconnected from - a trade policy setting.

Moving forward, consideration should be given to anchoring deepened forms of cooperation in matters of culture and education around the newly created opportunities flowing from trade- and investment-led integration. The EU-CARIFORUM Agreement took innovative first steps in this direction. Significant confidence-building scope exists to do more in an area traditionally laden with adverse attitudes towards trade governance. A welcome step in this direction was taken through Article 16 of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, signed the same day as CETA.[3]

Taking concrete steps towards innovative forms of cultural and educational diplomacy to trade-led forms of economic rapprochement – for instance through the CETA-related launch of a transatlantic scholarship scheme promoting enhanced academic cooperation, mobility and mutual learning on issues of common interest to the Parties, could help build needed bridges with civil society and offer a concrete illustration of the benefits that the desire for deeper and closer ties embedded in preferential economic relations can make possible.

[3] http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/30

1. EDUCATION SERVICES IN CETA

1.1. Background considerations

Education plays a crucial role in fostering personal and social development. It also exerts a central influence on the process of economic growth. Cross-border trade and investment in education services, particularly at the tertiary level, has grown rapidly in recent years, fuelled by a combination of demographic changes, technological developments, national development aspirations and governmental reforms affecting the funding and provision of education (WTO, 2010).

The last few decades have seen far-reaching changes in the structure, governance and financing of public sector institutions, especially in higher education, take root in many parts of the world (OECD, 2004). The demand for education has paralleled the world economy's gradual shift towards increasingly service-centric development models and their concomitant need for more highly-skilled workforces. Private educational services have assumed greater prominence in such an environment, with growing numbers of for-profit institutions emerging alongside new types of private (not-for-profit) educational providers (Sauvé, 2002).

A related trend has been the increasing involvement of public universities in revenue-generating activities. While higher education in the OECD area continues to be heavily subsidised for domestic students, universities are increasingly expected to generate new sources of revenue. One consequence has been intensified competition to attract greater numbers of fee-paying students, especially international ones, a trend that fiscal retrenchment has accentuated in several countries in recent years.

Still, despite marked changes in the "market" for learning, governmental policies continue to play a dominant role in the educational sector. In most economies, education at the primary and secondary levels remains the province of the state. In the OECD area, for instance, it is estimated that on average 91 per cent of primary and 85 per cent of secondary school students are enrolled in public institutions. In higher (tertiary) education, where the inroads by private suppliers has in many settings been most pronounced, public institutions continue to train seven out of ten university-level students globally (WTO, 2010).

Given the centrality of education for human and social development, governments generally consider education, and especially primary and secondary education, as a basic entitlement. It is thus normally provided free of charge, or with a nominal fee, by public institutions, and on a not-for-profit basis. The latter considerations are particularly important to the present study, given the exemption (called a "carve-out" in trade parlance) found in all trade agreements, among which CETA, in respect of "services supplied in the exercise of governmental authority".

While statistics on international trade in education services are limited, various indicators suggest a rapid and sustained expansion of the sector, especially at the tertiary level. This is demonstrated by the increasing cross-border mobility of students, academics and researchers, institutions and programmes. Exports of educational services represent a significant source of income for many countries, a growing number of which have enacted trade and investment promotion policies explicitly targeting foreign (fee-paying) students and degree-granting foreign educational institutions. In Australia, for example, education exports ranked third in value (behind iron and coal) in 2014-15, generating $18 billion of

revenue over the period.[4] Several EU Member states – among them France, Germany and the United Kingdom, rank among the world's top hosts of foreign students. The "soft power" attributes of academic diplomacy have long been recognized as an effective means of projecting the political, economic and cultural influence of major exporting countries (Nye, 1990). While increasingly global in character, the above trends have been most pronounced in a number of first-moving English-speaking industrialized countries, notably the United States, the United Kingdom, Australia, and New Zealand, as well as in a rising cohort of emerging economies, among which Malaysia and Singapore, whose governments aspire to turn their countries into leading regional or global educational hubs.

An important feature of education services trade has been the increasing international mobility not only of students but also of programmes and institutions. Fuelling such mobility has been the innovative deployment of information and communication technologies, which has provided cost-effective means of delivering education services to ever larger (and more remote) student audiences. New institutional arrangements involving a greater and more diverse number of partners, ranging from educational institutions to corporations, have also created new commercial opportunities, such as the franchising and twinning of academic programmes.

Table 1 below describes the multiple channels through which education services are today supplied across borders, linking such services to the relevant modes of service delivery involved. The General Agreement on Trade in Services (GATS) distinguishes four distinct "modes" in which services can be supplied across borders. Such four modes of supply are: Mode 1 – Cross-border trade, such as an online course delivered over IT networks from country A to country B; Mode 2 – Consumption abroad, such as when a student from country A travels abroad to study in an educational institution located in country B; Mode 3 – commercial presence, such as when an educational institution from country A establishes a branch campus in country B; and Mode 4 – movement of natural persons (service suppliers), such as when a faculty member from country A travels temporarily to country B to deliver a class. Consumption abroad through student mobility remains the most common means by which trade in education services occurs. In recent years, such traditional trade has been increasingly complemented by new forms of cross-border supply, particularly via online education services as well as by commercial presence, including franchise/twinning arrangements between foreign educational providers and local institutions as well as through the launch of greenfield investment projects by foreign educational institutions.

Table 1: Correspondence between modes of supply and forms of education services traded internationally

Mode	Education examples/forms	Main feature
1. Cross-border supply (Mode 1)	Distance education Online education Commercial franchising/twinning of a course	Programme mobility
2. Consumption abroad (Mode 2)	Students abroad	People (student) mobility
3. Commercial presence (Mode 3)	Establishment of an educational institution or satellite campuses	Institution mobility

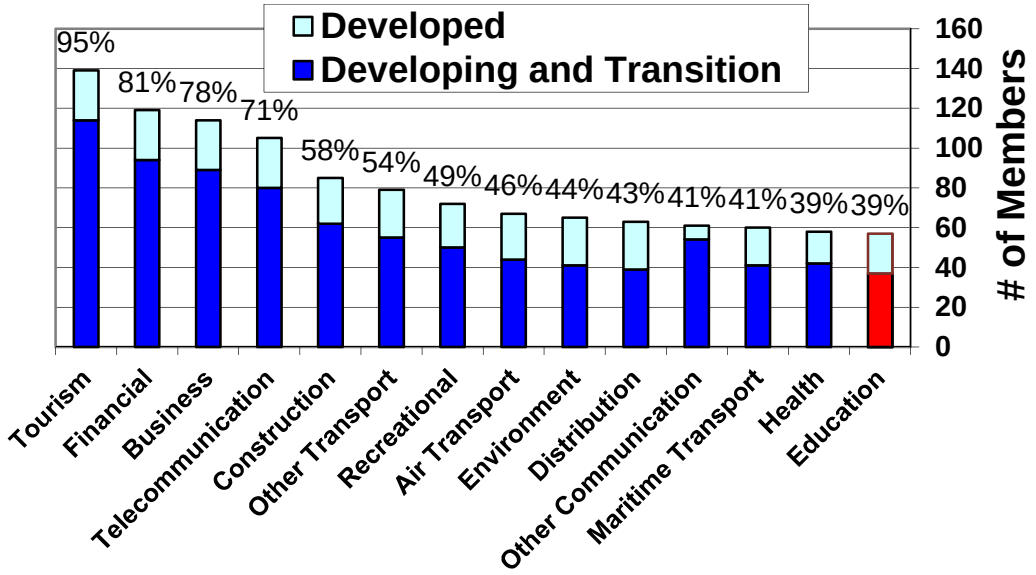
[4] http://monitor.icef.com/2015/08/australian-education-exports-reach-aus18-billion-in-201415/

	Branch campus, including joint venture with local institutions	
4. Presence of natural persons (Mode 4)	Professors, lecturers, teachers, researchers providing education services abroad	People (academic) mobility

Source: WTO (2010a) adapted from OECD (2004).

Despite these far-reaching changes, it is notable that a majority of WTO Members have not assigned a central role to trade and investment policy, negotiations or treaties in furthering the internationalization of education. As Figure 1 reveals, alongside health-related services, a sector with which education shares many "public good" attributes, education ranks last among the service sectors in which members of the World Trade Organization (WTO) have scheduled market access commitments[5] to date under the GATS. Less than a third of WTO Members, a majority of them recently acceding developing countries (confronting asymmetrical negotiating terms of entry) have scheduled commitments on selected privately-supplied educational services under the GATS. To the extent that most WTO Members, among them Canada and the EU, consider publicly-funded education to be excluded from the substantive remit of the GATS and of preferential trade agreements (PTAs) covering trade and investment in services, such an outcome is hardly surprising.

Figure 1: Sectoral distribution of market access commitments under the General Agreement on Trade in Services



Source: Data supplied by the WTO Secretariat

The limited influence of trade policy in the educational sector is also broadly characteristic of the proliferating landscape of PTAs brokered in the Uruguay Round's aftermath (Roy, Marchetti and Lim, 2007; WTO, 2010; Sauvé and Shingal, 2011; Latrille and Lee, 2012). Nevertheless, so-called "WTOplus" advances obtain in the education sector in a number of instances, particularly within (North-South) bilateral agreements involving the world's leading exporters of education services: instances in which Parties to a PTA achieve deeper

[5] Market access commitments, which relate to the elimination of measures, both discriminatory and non-discriminatory in nature, that quantitatively restrict trade and investment in services, are governed by Article XVI of the GATS.

liberalization or agree on more encompassing rules than those in existing at the multilateral level.

As educational institutions have adapted to a globalizing world economy and engaged in sustained efforts at internationalization, demands for cross-border governance, including via trade and investment policy, have naturally grown (ref). For the most part, however, such governance has been chiefly pursued through novel and deepened forms of international cooperation between education ministries and academic institutions rather than through recourse to trade diplomacy (ref/examples). The influence of trade and investment law and policy in driving the past few decades' internationalization of education services has been and remains marginal, with governments and suppliers of education turning to alternative (and non-legally binding and enforceable) institutional settings and arrangements (examples) to reap the benefits of cross-border exchange in the sector. The trajectory of internationalization in education, like that of other fast growing service sectors such as health-related tourism, civil aviation or cultural exchanges, usefully recalls how trade and investment governance need not in all circumstances be the leading, necessary, most desirable or efficient policy anchor.

1.2. Definitions and boundaries: what is trade (and investment) in education services?

A key dimension of the public policy debate over the liberalization of trade in education services concerns the boundary between the market and the state. Although collective preferences differ markedly across nations in this regard, gaining a clearer sense of the education sector's perimeter warrants attention. Doing so can help determine where state action is likely to be predominant and accordingly translate into greater regulatory precaution at the negotiating table. It can also help identify those educational market segments that are more genuinely competitive in nature and where market forces and private operators, including those operating on a commercial (i.e. for profit) basis, can respond to the rising demand for specialized education and training.

Table 2 below offers a definitional breakdown of the education sector into five categories based principally on differing instruction levels. These are: (i) primary education services; (ii) secondary education services; (iii) higher education services; (iv) adult education; and (v) other education services. Such a breakdown is based on the Services Sectoral Classification List (Document MTN.GNS/W/120) that was adopted by (then GATT members) during the Uruguay Round of multilateral trade negotiations for purposes of establishing a common nomenclature[6] with which to schedule market access and national treatment[7] commitments under the GATS. Although WTO Members are not formally obliged to determine the sectoral scope of their commitments according to this classification, the vast majority of Members has done so, heeding a recommendation contained in the Uruguay Round negotiation's so-called "scheduling guidelines" (Document S/L/92).

The latter two categories in the CPC classification - adult and other education services - cover forms of education provided largely outside the formal education system. In the category of "higher education", a distinction is made between post-secondary education

[6] Although WTO Members are not formally obliged to determine the sectoral scope of their commitments according to this classification, the vast majority of Members has done so, heeding a recommendation contained in the Uruguay Round negotiation's so-called "scheduling guidelines" (Document S/L/92).

[7] National treatment commitments relate to the removal of measures that discriminate between like service and service providers on the basis of origin (nationality).

which leads to the award of a degree or its equivalent (i.e., other higher education) and studies which do not (i.e., vocational and technical education) and where private forms of supply are more prominent. The rapidly evolving nature of the education sector, with constant changes in the content of study programmes and qualifications, has significantly eroded the above boundaries, especially with respect to post-secondary education (i.e., higher education, adult education and other education).

Table 2: Defining Education Services

Sectoral Classification List	Relevant CPC No.	Definition/coverage in provisional CPC
5. EDUCATIONAL SERVICES A. Primary education services	921	Preschool education services: Pre-primary school education services. Such education services are usually provided by nursery schools, kindergartens, or special sections attached to primary schools, and aim primarily to introduce very young children to anticipated school-type environment. Exclusion: Child day-care services are classified in subclass 93321.
		Other primary education services: Other primary school education services at the first level. Such education services are intended to give the students a basic education in diverse subjects, and are characterized by a relatively low specialization level. Exclusion: Services related to the provision of literacy programmes for adults are classified in subclass 92400 (Adult education services i.e.).
B. Secondary education services	922	General secondary education services: General school education services at the second level, first stage. Such education services consist of education that continues the basic programmes taught at the primary education level, but usually on a more subject-oriented pattern and with some beginning specialization.
		Higher secondary education services: General school education services at the second level, second stage. Such education services consist of general education programmes covering a wide variety of subjects involving more specialization than at the first stage. The programmes intend to qualify students either for technical or vocational education or for university entrance without any special subject prerequisite.
		Technical and vocational secondary education services: Technical and vocational education services below the university level. Such education services consist of programmes emphasizing subject-matter specialization and instruction in both theoretical and practical skills. They usually apply to specific professions.
		Technical and vocational secondary school-type education services for handicapped students: Technical and vocational secondary school-type education services specially designed to meet the possibilities and needs of handicapped students below the university level.

Sectoral Classification List	Relevant CPC No.	Definition/coverage in provisional CPC
C. Higher education services	923	Post-secondary, technical and vocational education services: Post-secondary, sub-degree technical and vocational education services. Such education services consist of a great variety of subject-matter programmes. They emphasize teaching of practical skills, but also involve substantial theoretical background instruction.
		Other higher education services: Education services leading to a university degree or equivalent. Such education services are provided by universities or specialized professional schools. The programmes not only emphasize theoretical instruction, but also research training aiming to prepare students for participation in original work. In the last revision of the CPC, two new separate categories were created: (i) Post-Secondary non-tertiary education services (924) – which comprises of a general subclass (92410); and a specialised one (92420) which leads to a labour-market relevant qualification; and (ii) Tertiary education services (925) – which comprises of first stage tertiary (92510) leading to a university degree or equivalent; and second stage tertiary (92520) for advanced research qualifications, such as a doctoral degree.
D. Adult education	924	Adult education services i.e.: Education services for adults who are not in the regular school and university stem. Such education services may be provided in day or evening classes by schools or by special institutions for adult education. Included are education services through radio or television broadcasting or by correspondence. The programmes may cover both general and vocational subjects. Services related to literacy programmes for adults are also included. Exclusion: Higher education services provided within the regular education system are classified in subclass 92310 (Post-secondary technical and vocational education services) or 92390 (Other higher education services). In the latest iteration of the CPC, the category "Adult education" was removed and services previously classified therein were merged into a new category on "other education and training services and educational support services" (929).
E. Other education services	929	Other education services: Education services at the first and second levels in specific subject matters not elsewhere classified, and all other education services that are not definable by level. Exclusions: Education services primarily concerned with recreational matters are classified in class 9641 (Sporting services). Education services provided by governess or tutors employed by private households are classified in subclass 98000 (Private households with employed persons). In the latest version of the CPC, the new category "other education and training services and educational support services" (929) expanded the sector's coverage to: (i) Other education and training services (9291), which comprises of cultural education services (92911); sports and recreation education services (92912); other education and training services (92919); and (ii) Educational support services (9292) that are non-instructional such as educational consulting, counselling, evaluation and testing services; and organization of student exchange programmes.

Source: WTO (2010a).

1.3. A public services carve-out for education?

As discussed in the preceding section, the state remains in most economies the dominant allocator of educational resources in light both of the many positive externalities likely to flow from endowing a country with a richer stock of human capital and the inability of market operators to secure compliance with universal access aims on the basis of profit maximizing considerations.

The ubiquity of market failure in several key educational market segments, and notably the need for quality assurance of both educational institutions and providers, confers a central role to state intervention and regulatory oversight in the educational field. Such factors explain why most governments, notably in Canada and the EU, consider the provision of education services, particularly at the primary and secondary levels but also frequently at the tertiary level, as forming a core public policy responsibility in which no "like" competitors are likely to be present or capable of delivering quality services at a cost affordable to all. Such a rationale lends support to the inclusion in all trade agreements covering services of an explicit exemption (carve-out) for "activities or services supplied in the exercise of governmental authority" (often described as a "public services carve-out" whose aim has been, and remains, to exclude publicly-funded educational services from the scope of trade and investment agreements and afford governments full scope to regulate public education services as they see fit.

In all trade agreements covering services to which Canada and the EU are party, such a carve-out has been interpreted as affording the right to keep publicly-funded education services off the negotiating table and to provide the Parties with full policy autonomy regarding future regulatory measures. In the CETA, such a carve-out can be found in Articles 8.2b of the treaty's Investment chapter and in Article 9.2.2a of its chapter on Cross-Border Trade in Services. Such a carve-out is complemented by the fact that Article 9.2f and g (Scope) of the CETA chapter on Cross-Border Trade in Services stipulates that the Agreement does not apply to "procurement by a Party for goods and services purchased for governmental purposes and not with a view to commercial resale" nor to "subsidies, or government support relating to trade in services, provided by a Party".

Mirroring language found in the WTO-GATS, the CETA defines its public services carve-out as "any activity or service that is not supplied on a commercial basis, or in competition with one or more service suppliers." While education services supplied in the exercise of governmental authority may legitimately be considered as falling outside the scope of the CETA, thereby obviating the need to reserve non-conforming measures (i.e. measures that violate specific treaty provisions, see Section 1.4 below) under the Agreement's negative list approach, the CETA (like the GATS) does not define the terms "competition" or "commercial basis". There is of course no universally agreed model of governmental provision of education services, since collective preferences, national traditions and education systems differ across countries and may evolve over time. Similar considerations prevail in other service sectors that feature an important public service aspect, such as health services. The precise scope of the CETA's public services carve-out may thus have to be determined on a case-by-case basis should its boundaries be challenged in a trade or investment dispute.[8] It is notable that the first two and a half

[8] Similar questions have been raised on the scope of GATS Article I.3 (b) and (c). It should be noted however that under the GATS (but unlike CETA relying on a negative list approach), WTO Members maintain the right to make no commitments in a specific sector. When they do so, as Canada has for all education services, only a limited set of GATS disciplines apply, the most important of which being that of most-favoured nation (MFN)

decades of global (and preferential) services trade and investment governance has produced no legal challenge – and hence no jurisprudence – in this area.

The substantive remit of the public services carve-out naturally depends on how the twin - and legally cumulative - concepts of "supplied on a commercial basis" and "supplied in competition with one or more services suppliers" are understood. If a service is provided on a non-commercial basis but in competition with other suppliers or on a commercial basis but without competition, it would prima facie not be deemed a service supplied in the exercise of governmental authority and would therefore be subject to a treaty's provisions.
Reviewing this issue, several scholars acknowledge that some degree of ambiguity surrounds the question of the exact scope of this provision (Krajewski, 2001; Adlung, 2006). As noted above, it is noteworthy that not a single dispute has arisen under the GATS or any PTA regarding the scope of the public services carve-out. This suggests a general reluctance of governments to test the precise boundaries of such a politically sensitive area, all the more so given the vocal civil society concerns that have been expressed at the interface of trade and education policy (see Box 1.1 below).

Box 1: Public policy controversies at the trade and education interface

The inclusion of education in services trade and investment agreements is often regarded as symbolizing the transformation of education from a largely nationally-located and regulated public service into a globally governed tradeable commodity (OECD, 2002). Such fears closely parallel the commoditization fears present in debates over globalization, trade and culture.

The fact that governments make use of trade diplomacy to open certain market segments in the educational field has fuelled - and given an international dimension to - the wider debate over the privatization of education that has long given rise to conversations at the national level in various parts of the world. Voices within civil society and in educational circles – academics, students, trade unions - have expressed recurring concerns about the international trade regime's intrusion into educational affairs (Sauvé, 2002; Kelsey 2002, 2008).

Echoing oft-expressed fears over the impact of trade governance on public service delivery is the concern that the liberalization of education services could undermine the state's ability to regulate with a view to securing educational equity and quality. A further concern, of admittedly limited relevance to the CETA context, is that the OECD-centric nature of cross-border trade in education services might prevent developing countries from building strong national education systems in the manner that industrialized nations did a century ago (Altbach, 2002). That the global education market is clearly dominated by Western countries raises further concerns about the risk of seeing trade liberalization contribute to curricular, linguistic and/or cultural homogenization in the context of educational systems globally (Kelsey, 2008).

treatment (i.e. the obligation to extend any negotiated commitment on a non-discriminatory basis to all treaty signatories). WTO Members also enjoy wide flexibility to schedule specific commitments which restrict the scope of coverage of their commitments with any necessary limitations on market access and national treatment. A number of WTO Members, among which the EU, have limited the scope of their specific commitments to privately provided education services by, for example, excluding educational institutions that have government equity or which receive government assistance. There are many ways by which specific commitments can be conditioned so as to suit national policy objectives. Exercising scheduling flexibility to define the scope of coverage may be particularly pertinent to higher education, since public universities are increasingly engaged in commercial revenue generation activities and may not be fully dependent on government funding.

Critical assessments of trade agreements such as CETA typically find their origin in the broader context of a backlash against globalisation and the commercialisation that it brings to some activities previously insulated from the market. Claims of threats to the provision of public services, such as education or health services, or to services with strong public goods connotations, such as water or electricity distribution, are among the most commonly voiced concerns associated with contemporary trade policy instruments and with the very idea of services trade and investment liberalisation (WTO, 1998; OECD, 2002).

CETA critics have been heard alleging that the Agreement is nothing less than a tool of privatization, globalization, "commodification," and other assorted ills (Kelsey, 2002; 2008). Such statements generally belie significant misunderstandings about trade agreements and their modus operandi (OECD, 2002; WTO, 1998). No trade or investment agreement, including the CETA, can indeed be shown to entice – let alone mandate – countries to engage in the privatization of public services. Trade agreements allow Parties to maintain or designate monopolies for particular services if they so desire and CETA signatories continue to enjoy the right to decide which services they wish to keep public and universal in character and to subsidize them if so desired. Furthermore, contemporary trade and investment agreements, including the CETA, go to considerable lengths in reaffirming the sovereign right of governments to regulate in the public interest.

A paradox of the anti-trade (and investment) campaign is that much of it is rooted in the OECD area, where the share of services in employment and standards of living are highest, and where the benefits of pro-competitive regulatory reforms and of trade and investment liberalisation in services have arguably generated the greatest gains in consumer welfare and allocative efficiencies whilst preserving a high degree of social protection and the maintenance of public services in core sectors of economic life, notably in health and education.

Not surprisingly, the public policy debate on services has tended to centre not so much on disputing the economic case for open markets. The debate has rather focused on the respective roles that the market and the state, as both regulator and direct purveyor of services such as education and health, should be assuming, as well on the threat to national regulatory sovereignty allegedly posed by trade and investment rule-making. All are issues that elicit particularly strong feelings in the fields of education and culture. For this reason, the supply of dispassionate, evidence-based, analysis and stakeholder dialogue such as that promoted by European Parliament's Committee on Culture and Education, are much in need.

1.3.1. Supply on a "commercial basis"

Services or activities "supplied on a commercial basis" are covered by the CETA according to Articles 8.2 and 9.2.2a. A broad understanding of this term could be that it encompasses any service not supplied free of charge or on a not-for-profit basis to the consumer. Understood narrowly it could exclude only those services that are not supplied in return for a market price or supplied by entities that do not pursue profit maximizing aims (which is the case not only of publicly funded educational institutions but also of a large number of private (i.e. fee-charging) suppliers of education services operating through not-for-profit charters exonerating them from corporate taxation.

For an ordinary textual understanding of "supplied on a commercial basis", the meaning of "commercial" is crucial, because it is the central term of the phrase. The ordinary meaning of "commercial" relates to "commerce" which, according to MacMillan dictionary

means "the buying and selling of goods".[9] Another dictionary (Webster) states that commercial is a "[g]eneric term for most aspects of buying and selling." A similar meaning can be attributed to the French and Spanish terms[10] "commercial/comercial", which refer to the exchange of goods (or services) for money or a monetary equivalent. If "commercial" supply is a supply in return for a price, then it could be argued that services provided free of charge should not be considered a service or activity supplied on a commercial basis. A similar conclusion could be reached for services activities supplied on a not-for-profit basis.

1.3.2. Supply "in competition with one or more service suppliers"

To better gauge the likely scope of this notion, understanding the meaning of "competition" is central. According to the Free Dictionary, "competition" refers to "rivalry between two or more businesses for the same customers or market" or to "rivalry in the market, striving for customers between those who have the same commodities to dispose of". Similarly, one French dictionary describes the term "concurrence" as "compétition entre personnes, entreprises, etc., qui prétendent à un même avantage".[11] Competition therefore seems to refer to a situation in which one supplier targets the same customers or market segments or tries to realize the same advantage as one or more other service suppliers.

In order to establish when a service is supplied on a competitive basis, Krajewski (2001) suggested the usefulness of a two-step approach. First in his view is the question of whether two or more service suppliers or investors supply the same or a comparable service or engage in the same (like) activity. Second is the need to determine if the suppliers or investors are able to fully substitute for – or simply complement - each other. Service suppliers or investors are only "in competition" with each other if one supplier can substitute another supplier.

Applying the two-step test to primary education, Krajewski (2001) observed that public and private schools could be deemed to provide the same or a comparable service, since they are both providing students of a specific age cohort with a certain amount of general education. It could also be said that public and private schools target the same market: since every child can only go to one school, the loss of a service consumer by public school can be absorbed by private school. It could thus be argued that public and primary schools can provide services "in competition" with each other. However, it could also be argued that the services are not comparable, because public schools usually assume universal service obligations, while some private schools may not. Similarly, it could also be argued that public schools with a universal service obligation target the entire educational market while private schools focus chiefly only specific market segments, i. e. students whose parents are able and willing to pay higher tuition fees.

The above considerations suggest that the exact scope of "competition" envisaged under the public services carve-out hinges on a determination of when two services are alike (perfectly substitutable) and the identification of the relevant market. That no litigation has yet to test such boundaries complicates the analysis. It is simply unclear how the WTO's Dispute Settlement and Appellate Bodies or their PTA equivalents would approach these questions if they ever had to. Such lingering ambiguity may in part explain the level

[9] See http://www.macmillandictionary.com/thesaurus-category/british/general-words-for-the-activity-of-buying-and-selling

[10] The comparison between the English, French and Spanish versions of key treaty terms is relevant in view of their status as the three official languages of the World Trade Organization.

[11] Dictionnaire La Toupie, avalable at http://www.toupie.org/Dictionnaire//Concurrence.htm

of negotiating precaution that the CETA Parties have shown in the education sector by lodging a number of reservations aimed at preserving educational policy space over and above the treaty's public service carve-out described above.

1.4. CETA's negotiating modalities: implications for the education sector

The CETA marked an important change in the manner in which the European Union and its Member states conducted negotiations on investment and cross-border trade in services. Prior to CETA, all EU agreements covering trade in services mirrored the so-called "hybrid" approach to scheduling liberalization commitments first pioneered in the Uruguay Round negotiations that led to the adoption of the GATS. The CETA saw the EU shift gears and adopt the negative list approach that Canada has used in all PTAs consecutive to the 1994 North American Free Trade Agreement (NAFTA). The novelty of CETA for Canada lies in the fact that the Agreement produced a negative list inventory of non-conforming measures and sectors maintained at the provincial level, a degree of regulatory transparency never before practiced within the country's PTAs.[12]

While both negotiating approaches can be made to yield identical market opening harvests, the differences between the two approaches, notably in regard to regulatory transparency, and their underlying policy assumptions, bear noting. The GATS-hybrid approach allows governments to positively select, in a bottom-up manner, those sectors, sub-sectors and modes of supply in which they wish to schedule commitments, subject to the limitations to national treatment (for discriminatory measures) and market access (for measures restricting the level or quantity of competition in a given service market) inscribed therein. Such limitations need not necessarily be anchored in – and reflect – a county's existing laws or regulations.[13] The GATS approach further allows governments the freedom to remain unbound in sub-sectors and modes of supply where specific commitments are scheduled in a given sector. Finally, the GATS-hybrid approach affords governments the right to remain silent, i.e. to not schedule a specific sector altogether, thereby preserving full policy space with regard to future regulatory measures, an option Canada and the EU both exercised in the cultural field and which Canada also exercised in regard to education services (on the basis of the carve-out for publicly-funded education services deemed as services supplied in the exercise of governmental authority).

A negative list approach starts from the reverse, top-down, assumption that all sectors, subsectors and modes of supply are in principle fully open to competition on a non-discriminatory basis from the outset, such that Parties have to reserve in a transparent manner all existing non-conforming measures they wish to retain upon a treaty's entry into force (and at the level of non-conformity prevailing at the time of the treaty's entry into force) and indicate all sectors in which they wish to retain future policy immunity, i.e. preserve the right to introduce new non-conforming measures. Trade in services

[12] Prior to CETA, Canada's PTAs in services and investment featured a grandfathering clause binding non-conforming provincial measures at the level of non-conformity prevailing at the time of the entry into force of the country's PTAs, without however producing transparent negative lists of provincial non-conforming measures.

[13] In other words, WTO Members are free to inscribe national treatment and market access limitations in their GATS schedules that do not lock-in the regulatory status quo and can therefore be more restrictive than what domestic legislation allows. During the Uruguay Round, and in the PTAs to which they are Party, Canada and the EU, like other OECD member countries, have tended to schedule status quo commitments, i.e. commitments that bind existing measures, whereas a majority of developing and transition economies have made use of the flexibility afforded them to schedule status quo-less commitments.

agreements operating on the basis of a negative list typically feature two lists (Annexes) of reserved measures (so-called "reservation lists"): a first one for existing measures (which bind listed measures at their prevailing level of non-conformity) and a second one for future measures (i.e. sectors in which Parties do not wish to be bound by the Treaty's market opening provisions).

Agreements proceeding on the basis of a negative list approach aim to eliminate the "water" that may be present in GATS-type hybrid bindings. They do so by requiring that governments wishing to maintain various non-conforming measures - a sovereign right that is duly theirs under both negotiating modalities - do so at the level of non-conformity embedded in existing laws and regulations. Simply put, negative list agreements generate legally-binding commitments that reflect domestic laws and regulations as they are applied.

An important derivative difference between hybrid and negative listing is that the former approach does not bind specific laws and regulations, which the latter does, but rather a level of access (in the case of market access/quantitative restrictions) or a standard of treatment (in the case of national treatment limitations), regardless of prevailing domestic legal or regulatory norms. The fact that negatively listed reservations of essence describe applied non-conforming measures generates desirable gains in regulatory transparency, a particularly important attribute in sectors where impediments to trade and investment are wholly regulatory (i.e. non-tariff) in character.

1.5. What policy space has been retained in education services? Assessing the reservations lists of Canada and the EU

To understand the CETA impact on trade and investment in education services, it is essential to consider not only the scope of the public services carve-out discussed above but also to assess the nature of the non-conforming measures and sectors that both Parties' have reserved under their respective negative list Annexes: Annex I for existing non-conforming measures and Annex II for sectors in which the introduction of new non-conforming measures will be possible in the future. Both Parties' reservations, in the case of Canada at the federal and provincial levels, and in that of the EU at the level of the Community as a whole and at that of individual member states, can be found in Annex 1 of this Brief. This section closes with a short assessment of what both Parties' reservations reveal by way of policy preferences in the education sector.

1.5.1. Canada

An important consideration to bear in mind in assessing Canada's approach to education services under the CETA (as in all other trade agreements covering services to which the country is a Party) is that, under the terms of the Canadian constitution, education is a provincial prerogative. This partly explains the absence of Annex I reservations lodged at the federal level. The fact that Canada's Annex I on existing non-conforming measures features a single provincial measure (relating to prior residency requirements for music teachers in the Province of Manitoba) suggests that there is broad federal-provincial concurrence, rooted in past practice, that the Agreement's carve-out for services supplied in the exercise of governmental authority, found in Articles 8.2b and 9.2.2.a of the CETA, and complemented by additional carve-outs for subsidies and procurement under Article

9.2(f) and (g) afford adequate policy space in regard to publicly-funded education services throughout the country (and at all levels of service delivery).

As regards Annex II, Canada has lodged a single reservation, at the federal level, and covering both the CETA's Investment and Cross-border trade in services chapters, stipulating that the country (including its provinces) reserves the right to adopt or maintain any measure with respect to the supply of public education and public training to the extent that they are social services established or maintained for a public purpose. The narrow range of Canada's Annex I and II reservations in the education sector make clear that beyond publicly-funded services established or maintained for a public purpose, no other barrier to trade and investment is maintained at either levels of government regarding education services supplied on commercial (for profit) grounds by private suppliers.

1.5.2. The European Union

A cursory glance at the EU's Annexes I and II in education services under CETA reveals a significantly greater number of reservations. While this may possibly reflect the greater dose of regulatory precaution arising from the shift from hybrid to negative listing in which both the Commission and Member states had no prior experience, such an outcome is also broadly reflective of the greater diversity of educational regimes and practices characterizing the EU.

As regards Annex I measures, the EU has lodged a single reservation at the Community level affecting foreign investment in education services stipulating that any Member State of the EU, when selling or disposing of its equity interests in, or the assets of, an existing state enterprise or an existing governmental entity providing education services, may prohibit or impose limitations on the ownership of such interests or assets, and on the ability of owners of such interests and assets to control any resulting enterprise, by investors of Canada or of a third country or their investments. With respect to such a sale or other disposition, any Member State of the EU may adopt or maintain any measure relating to the nationality of senior management or members of the boards of directors, as well as any measure limiting the number of suppliers.

Annex I measures maintained by individual Member states focus exclusively on various restrictions to investment (including on forms of establishment) and cross-border supply maintained towards suppliers (both institutions and teaching staff) of privately-funded educational services. In the majority of cases, such limitations target higher (i.e. tertiary) privately-funded education services, though some Member state reservations also apply to primary and secondary education services.

The exclusive focus of Annex I reservations by member states suggests, as in the case of Canada, a high degree of comfort towards the policy space preserved for all types of publicly-funded education services by virtue of the CETA's public services carve-out.

The preservation of the above policy space is extended to future measures in Annex II reservations lodged at both Community-wide and individual Member state level. The EU has shown greater regulatory precaution than Canada in educational governance. It has done so by reserving (as Canada did) the right to adopt or maintain any measure with regard to the supply of all educational services which receive public funding or State support in any form, and are therefore not considered to be privately funded. Additionally,

and unlike Canada, with the exception of four Member states[14], the EU has reserved the right to adopt or maintain any measure with respect to the supply of privately-funded "other" education services, which means other than those classified as being primary, secondary, higher and adult education services. Community-wide Annex II reservations are complemented by a series of reservations lodged by twelve Member states[15] that reserve the right to maintain or adopt any new measure with respect to the supply of privately funded education services. Most such reservations target privately-funded higher education though some extend beyond tertiary education to primary and secondary educational services. Other Annex II reservations lodged by individual Member states focus on the preservation of future policy space with regard to limitations on cross-border supply, the nationality of Boards of Directors of educational establishments.

Among Member states, only Sweden reserved the right to adopt or maintain any future measure with respect to educational service suppliers that are approved by public authorities to provide education.[16]

[14] The Czech Republic, the Netherlands, Slovakia and Sweden.

[15] Austria, Bulgaria, Cyprus, the Czech Republic, France, Italy, Hungary, Malta, Romania, Slovakia, Slovenia and Sweden.

[16] This reservation applies to privately-funded educational services suppliers with some form of State support, inter alia educational service suppliers recognized by the State, educational services suppliers under State supervision or education which entitles to study support.

2. CULTURAL INDUSTRIES IN CETA

2.1. Background considerations

The issue to what extent trade agreements, be they multi-or bilateral, should also apply to cultural products entered the trade agenda in earnest with the conclusion in 1987 of the U.S. – Canada Free Trade Agreement[17] (Shao 1995; Falkenberg 1995; Acheson & Maule 1999). It has not disappeared since, not the least due to the efforts of CETA's contracting parties: both Canada and the EU have been and remain – regardless of desiderata this Paper addresses below – champions of cultural diversity and, more specifically, of exempting (fully or partially) cultural products from the rules otherwise applicable to goods, services and investment (Ruiz-Fabri 2010; Hahn 2012). Their efforts led, inter alia and in chronologic order, to remarkably few bindings with regard to audiovisual and other culturally relevant services when concluding the WTO Agreement (WTO 2010b), the conclusion of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter: Diversity Convention, CCD),[18] and (as an intended consequence of the CCD) an ever growing number of cultural exceptions in FTAs (Barnier 2004; Wouters & De Meester 2007).

Before we address further how CETA reconciles the special quality of cultural products with more integrated and open markets, it seems worthwhile to take note of pertinent prior practice in multilateral and bilateral agreements.

2.1.1. A brief review of the treatment of cultural industries in trade agreements

To this day, no such thing as a "cultural exception" exists in WTO law: only cinematographic films are the subject of an exception (Ehring 2011; Hahn 1996) [19] However, this is not any longer reflective of the opinion that 'cultural industries' and their products should be subject to the regular trade law regime. Rather, the vast majority of states, including many of the biggest traders, now recognize that cultural products, in particular "audiovisual media[,] play a central role in the functioning of modern democratic societies and in the development and transmission of social values. They have major influence on what citizens know, believe or feel."[20] This is not the least reflected by the quasi-universal non-application of GATS rules to cultural services (WTO 2010b) (German 2004), the "efforts by some key participants in the [Doha Round] negotiations to create an a priori exclusion for such an important sector" from the negotiations[21] and the overwhelming adoption, on 20 October 2005, of the UNESCO Diversity Convention by 148 states, with only Israel and the United States voting against.[22]

While the dominance of the United States in popular culture has increased since the First World War (Jarvies 1992, van Harpen 1995), it is really since then that other countries have tried to ensure that American cultural products could not obtain a monopoly on their domestic "virtual" shelf space and would not be able to squeeze domestic cultural products

[17] http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf (25.11.2016).
[18] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, published at http://unesdoc.unesco.org/images/0014/001429/142919e.pdf (25.11.2016).
[19] Art. IV GATT.
[20] European Commission 2003, p. 3.
[21] See the Communication from the United States, Audiovisual and Related Services, S/CSS/W/21.
[22] Australia, Honduras, Liberia and Nicaragua abstained; the Convention came into force on 18 March 2007.

out of the market and the all-important "prime time". This entailed setting up quantitative restrictions, broadly speaking, that virtually guarantee a (rather high) minimum market share for local cultural products, possibly against the wishes of the consumers (Van den Bossche 2007). The most important pertinent state measures are measures regulating domestic content with regard to radio and television broadcasting content[23], market access restrictions stricto sensu[24], regulatory or licensing restrictions (allowing states to control access to radio or television broadcasting), measures restricting foreign investment and ownership and, last but not least, border measures impeding and limiting the import of foreign products (See Footer & Graber 2000; Graber 2004). In addition, states have consistently subsidized their domestic cultural industries.[25]

(a) GATT and other multilateral agreements on trade in goods

"Goods", while often created through a service, are distinct, visible and tangible products. The General Agreement on Tariffs and Trade 1994 (GATT) applies to all goods, including cultural goods, and to certain auxiliary services.[26] WTO Members are to grant all goods, including cultural goods, originating in one of their fellow Members most-favoured and national treatment under Articles I and III GATT, and are not allowed to impose quantitative restrictions (Article XI GATT) on them. Subsidies are prohibited, if and to the extent that they affect the interests of other states (to make a rather long story short) as enumerated in Article 6.3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM-Agreement) which is not the case if their effect is de minimis.

Article IV GATT is the only GATT provision that explicitly allows deviation of the anti-discrimination disciplines in favour of domestic cultural products. It allows internal quantitative regulations with regard to cinematographic films in the form of screen quotas, which may deviate from the national treatment obligation. Thereby, it allows to effectively shield domestic film producers from overpowering foreign competition (in particular from Hollywood), but leaves nevertheless the obligation to treat foreign partners indiscriminately (MFN, Art. I GATT) in place.

Domestic or regional content quotas for domestic cultural goods have to abide by the rules of GATT, in particular its Articles I and III GATT, unless they can be justified by an exception, such as, e.g. Article XX GATT. Despite there being no precedent for Article XX GATT also protecting cultural diversity,[27] it is noteworthy that the U.S. has not

[23] See Art. 16 and 17 of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ 2010 L 95, p. 1–24 and its predecessor, Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, amending Council Directive 89/552/EEC (Television without Frontiers), on the co-ordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 1989 L 298/23 of 17 October 1989 and OJ 1997 L 202/60 of 30 July 1997.

[24] Such as screen quotas for cinemas; rebates on box-office taxes for cinemas that show national films, or the prohibition on the dubbing of foreign films and on dubbing licenses, see Footer & Graber 2000, p. 124.

[25] All first world countries, including the U.S. have programmes for that very purpose.

[26] See e.g Art. III para. 4 GATT: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

[27] Arguably to the contrary: cf. the Panel and Appellate Body reports in Canada — Certain Measures Concerning Periodicals (WT/DS31). But see now the generous interpretation of the 'public morals' (which is protected by Art. XX GATT) in European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (WT/DS400).

systematically attacked the ubiquitous quota regimes that protect in particular local audiovisual products.

(b) GATS

Since the signing of the Canada – U.S. Free Trade Agreement (CUSFTA)[28] and the conclusion of the Uruguay Round, only print media have largely remained in the 'goods' camp; in particular recorded music, which used to be sold overwhelmingly as CDs, would seem to reach the vast majority of young consumers through streaming services and downloadable files: CDs and vinyl records are on their way to become 'niche'. Since the former products are invisible, without physical properties, i.e. services, and thus subject to GATS obligations, the old battles over whether local content rules for movies, TV-shows and music violate Articles I and III GATT may soon seem "so last century" (Gerardin & Luff 2004; Wunsch-Vincent 2003, 2006) that no self-respecting trade diplomat might press the issue.

While heavily influenced by its older and bigger sister GATT, GATS has a very different normative set-up. Members grant market access and national treatment only to the extent they have entered into specific pertinent commitments: absent such commitment, a Member is under no obligation whatsoever to grant foreign services (and service providers) the treatment enjoyed by their domestic counterparts. Furthermore, the general GATS obligation to grant most-favored-nation treatment looks only at first glance similar to the pertinent GATT situation: States were free, upon acceding the WTO, to register their continuance of (non-MFN) differential treatment in the Annex on Article II Exemptions (Article II para. 2 GATS).[29]

Very few Member states have entered commitments with regard to popular cultural service products, in particular audiovisual products.[30] This has allowed WTO members to stay clear of any obligation going beyond the status quo, provided they have made pertinent reservations with regard to MFN treatment (Article II GATS) and avoided to enter specific commitments with regard to national treatment and market access (Articles XVI, XVII GATS). As most Members have chosen that path, GATS-based restrictions for Member states' protective measures are few. As a consequence, the GATS has had no ascertainable impact on the cultural policies of WTO Members (Roy 2005; Hahn 2007)

In the Doha Development Round cultural products have been a non-issue. Canada[31], the European Union and others refuse explicitly to enter into negotiations to liberalize trade in cultural products and to move the network of preferential co-production agreements closer to the WTO state of grace which is MFN.[32]

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[28] http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf.

[29] Annex on Article 2 points at Article 9 para. 3 WTO.

[30] As of December 2001, 22 states had some commitment. Half of them in up to two sub-categories 2 Member states (US and Central African Republic) commitments in all subcategories just seven members have entered commitments in radio and television; cf. WTO 2010b.

[31] Communication from Canada — Canadian Initial GATS Sectoral/Modal/Horizontal Negotiating Proposals, WTO Doc. S/CSS/W/46, 14.3. 2001: "Canada will also not make any commitment that restricts our ability to achieve our cultural policy objectives until a new international instrument, designed specifically to safeguard the right of countries to promote and preserve their cultural diversity, can be established."

[32] See communication from Hong Kong China, Japan, Mexico, The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and United States — Joint Statement on the Negotiations on Audiovisual Services, WTO Doc. TN/S/W/49, 30.6.2005.

(c) The UNESCO Diversity Convention

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter: Diversity Convention, CCD)[33] has not bridged the tension between free trade and culture. One of its raisons d'être was to create a safe haven for protectionist measures aimed at ensuring cultural diversity, read: for allowing WTO Members to legally provide shelf-space for domestic productions in television programs and cinemas.[34] Stating explicitly that cultural goods transcend their economic value,[35] the Convention reaffirms the right of its signatories "to formulate and implement their cultural policies and to adopt measures to protect and promote" the diversity of cultural expressions within their territory. In doing so, States have to observe the "Guiding Principles" of the Convention[36], amongst which Human rights are just one consideration, together with, inter alia, the "Principle of openness and balance". A key provision is Article 6, according to which states may subsidize domestic and selected foreign other producers, set up local content thresholds and set up quotas.[37]

However, the Diversity Convention does not affect the WTO Agreement nor many other bi- and multilateral agreements dealing, e.g. with specific goods, foodstuff, intellectual property, fishery regimes, navigation, and so forth (Hahn 2006; Graber 2006; Voon 2007). The reason for this is the collision clause ("relationship to other treaties: mutual supportiveness, complementarity and nonsubordination") of Article 20, and in particular its paragraph 2, pursuant to which "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties" (Hahn 2006). Thanks to this exception, the Diversity Convention got the support of many states which otherwise would not have been prepared to subscribe to the draft versions circulating until the very end of the preparatory phase (UNESCO 2005; Hahn 2012).

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[33] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, published at http://unesdoc.unesco.org/images/0014/001429/142919e.pdf (25.11.2016).

[34] The legally safest way to reconcile local content rules with general WTO rules, a cultural exception within the WTO, having been prevented by the U.S. in 1994, France, Canada and other states embarked on developing an alternative solution for securing that their national audiences could be exposed to audiovisual offerings containing a significant percentage of domestic productions (Hahn 2010; Ruiz Fabri 2010; Obuljen & Smiers 2006; Voon 2007).

[35] Cf. para. 18 of the preamble: "cultural activities, goods and services conveying identities, values and meanings have both an economic and a cultural nature, and must therefore not be treated as solely having commercial value".

[36] These are 1. the Principle of respect for human rights and fundamental freedoms, 2. the Principle of sovereignty, 3. the Principle of equal dignity of and respect for all cultures, 4. the Principle of international solidarity and cooperation, 5. the Principle of the complementarity of economic and cultural aspects of development, 6. the Principle of sustainable development, 7. the Principle of equitable access, 8. the Principle of openness and balance.

[37] Article 6 ("Rights of Parties at the national level"): 1. … each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. 2. Such measures may include the following: (a) regulatory measures aimed at protecting and promoting diversity of cultural expressions; (b) measures that provide opportunities in an appropriate manner for domestic cultural activities, goods and services among the full range of cultural activities, goods and services available within the national territory with regard to the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used therefore;
(c) measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services; (d) measures aimed at providing public financial assistance; (e) measures aimed at encouraging non-profit organizations, as well as public and private institutions and artists and other cultural professionals, to develop and promote the free exchange and circulation of ideas, cultural expressions and cultural activities, goods and services, and to stimulate both the creative and entrepreneurial spirit in their activities; (f) measures aimed at establishing and supporting public institutions, as appropriate; (g) measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions; (h) measures aimed at enhancing diversity of the media including through public service broadcasting."

2.2. Previous cultural exceptions in bilateral agreements by Canada and the EU

The failure — within and outside of the WTO — of reconciling multilaterally the interests of liberal trade with the protection of cultural diversity stands in stark contrast to what has been possible in bilateral trade agreements.

2.2.1 Canada: The broad CUSFTA clause and its progeny

The first "modern" cultural exception can be found in the Canada – U.S. Free Trade Agreement (CUSFTA), concluded two years after the beginning of the Uruguay Round of Multilateral Trade Negotiations (Acheson & Maule 1999; Johnson & Schachter 1988).[38] There, the two champions of the respective camps — the U.S., home of the most successful cultural industry in the world, on the one hand, and Canada, free-trading but keen to protect cultural autonomy and societal distinctiveness, on the other hand — were able to find the compromise that was not possible 6 years later at the conclusion of the Uruguay Round. Canada got the U.S. to recognize that cultural products' relevance transcended the purely commercial sphere: according to Article 2005 CUSFTA, cultural industries are, in principle exempt from the provisions of the Agreement, except as specifically provided for.[39] According to Article 2021 CUSFTA, the term 'cultural industry' comprises

"(a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;

(b) the production, distribution, sale or exhibition of film or video recordings;

(c) the production, distribution, sale or exhibition of audio or video music recordings;

(d) the publication, distribution or sale of music in print or machine readable form; or

(e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;" [40]

The price tag for this exemption is directly attached in para. 2:

Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

In other words, the Agreement allows to apply proportional compensatory measures as a response to 'culturally motivated' trade restrictive measures that have undesirable commercial effects for the partner. Clearly, CUSFTA does not embrace the notion that culture is priceless, but rather allows, against costs, to protect cultural industries. The cultural exception CUSFTA-style offers the right to choose, for a price, cultural protectionism; it is, however, not a quasi-automatic shield for cultural industries.

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[38] http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf.

[39] As in Article 401 (Tariff elimination), Article 1607:4 and Article 2006 et seq. CUSFTA.

[40] See now NAFTA Annex 2106 Cultural Industries: "Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access - Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada - United States Free Trade Agreement."

In one of Canada's recent Free Trade Agreements with Peru, the cultural exception is much broader. Pursuant to its Article 2205, nothing in this FTA,

shall be construed to apply to measures adopted or maintained by either Party with respect to cultural industries except as specifically provided in Article 203 (National Treatment and Market Access for Goods - Tariff Elimination).

No price tag was attached, making this a significantly stronger protection for Canadian cultural industries. As the latter are defined according to the CUSFTA prototype, Peru added specific reservations with regard to other cultural sectors it wanted to protect. For example, in Annex I concerning Cross-Border Trade in Services, Peru reserved inter alia the right that "[a]ny domestic artistic live performances must be comprised at least of 80 per cent of national artists. National artists shall receive no less than 60 per cent of the total payroll for wages and salaries paid to artists." With regard to future measures, Peru reserved in Annex II the right to adopt or maintain any measure relating to artisanal fishing and the right to adopt or maintain any measure giving preferential treatment to persons of other countries pursuant to any existing or future bilateral or multilateral international agreement regarding cultural related activities, including production and presentation of theatre arts, production and exhibition of visual arts and design, production, distribution and sale of handicrafts.[41] It also stated "for greater certainty" that the non-discrimination clauses in the investment chapters and the services chapter do not apply to government support programs for the promotion of cultural industries.

2.2.2. The EU practice: all culture matters, PTAs focus on audiovisual services

Article 167 (4) TFEU instructs the Union institutions to "take cultural aspects into account in its action under other provisions of the Treaties, in particular to respect and promote the diversity of its cultures" (Barbato 2008). The Union's trade agreements are, at least inter alia[42], based on Article 207 TFEU, and hence the Union institutions involved had to make sure that cultural aspects have been considered, in particular by protecting the EU's cultural industries from unintended consequences of greater market access for foreign competition. In contrast to Canada, the EU has systematically exempted audiovisual services only (and thus not other cultural goods and services) from the coverage of its PTAs[43], allowing it to continue with the quota system introduced in 1989, and now mandated by the Audiovisual Media Services Directive (AVMSD).[44] The reason for this focus on audiovisual services is the EU's understanding that only 'Hollywood' represents a threat to Europe's cultural industries and its cultural diversity (Herold 2010).

In a limited number of instances, the EU has either included cultural cooperation protocols in its trade agreements or concluded in parallel legally separate and independent agreements addressing increased cooperation with partners which address in detail increased cooperation in the audiovisual sector but also with regard to other cultural services.

[41] Annex II Reservations for Future Measures, Schedule of Peru.

[42] We do not wish to comment on the « mixity » of the EU DCFTAs, and of CETA in particular.

[43] See, e.g., Art. 95 of the Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part - Final act OJ 2002 L 352, 30.12.2002, p. 1–1450; See also Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, OJ EC 2002 L 276/45.

[44] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1.

- The EPA with the CARIFORUM[45] includes a Protocol III on cultural cooperation (Chaitoo 2008).[46]
- Both the Free Trade Agreement with Korea[47] and the Association Agreement with Central America countries (Panama, Guatemala, Costa Rica, El Salvador, Honduras and Nicaragua)[48] have cultural cooperation protocols annexed to them.
- Legally separate of the trade agreement concluded with these two countries[49], the EU concluded an Agreement on Cultural Cooperation with Colombia and Peru[50]; however the agreement has not entered into force (Psychogiopoulou 2014).

These agreements go further than excluding audiovisual services from the reach of a trade agreement. Rather, they include provisions on the cultural cooperation, dialogue and exchange.[51]

2.3. The treatment of cultural products in CETA

CETA is a 'deep and comprehensive' WTOplus Free Trade Agreement between the two champions of the 'trade and culture' debate. Thus, it comes as no surprise that the agreement pays significant attention to the subject matter and takes interesting approaches to reconcile the liberalization of trade and the preservation of cultural diversity, which means in practice the protection of the respective domestic cultural industries.

2.3.1. Expressing commitments to a special treatment in the CETA preamble

The preamble contains the first indication that the two contracting parties[52] are 'taking culture seriously'. There, they declare the "promotion and protection of cultural diversity"

[45] Council Decision of 15 July 2008 on the signature and provisional application of the Economic Partnership Agreement between the Cariforum states, of the one part, and the European Community and its Member States, of the other part, OJ 2008 L 289, 1-2; Economic Partnership Agreement between the Cariforum states, of the one part, and the European Community and its Member States, of the other part, OJ 2008 L 289, 3 – 1955. Cf. notice concerning the provisional application of the Cariforum-EC Economic Partnership Agreement, OJ 2008 L 352, 62.

[46] Economic Partnership Agreement between the Cariforum states, of the one part, and the European Community and its Member States, of the other part, OJ 2008 L 289, 3, at 1938.

[47] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 1, OJ 2011 L 127, 1; Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ 2011 L 127, 6.

[48] Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters, OJ 2012 L 346, 1; Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ 2012 L 346, 3.

[49] See Council Decision of 31 May 2012 on the signing, on behalf of the Union, and provisional application of the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354, 1; Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354, 3.

[50] Agreement on cultural cooperation between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, http://ec.europa.eu/assets/eac/culture/policy/strategic-framework/documents/agreement-cultural-colombia-peru_en.pdf (16 December 2016).

[51] Cf. the 2007 'Argumentaire' of the Commission on 'On the Title on Cultural Cooperation in future EU trade agreements', available at: http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134655.pdf.

[52] Technically, the correct number is thirty: currently 28 Member states, plus the EU and Canada.

as being a legitimate policy objective, mentioning this principle together with "public health, safety, the environment and public morals".[53]

Still according to the preamble, CETA preserves the contracting parties' "flexibility to achieve legitimate policy objectives, such as … the promotion and protection of cultural diversity". While the preamble does not explicitly state the purpose of that flexibility, the context and the explicit claim that policy space with regard to cultural diversity is being preserved would seem to imply that the flexibility invoked concerns the otherwise applicable rules of CETA. It is noteworthy that this expression of intent is placed in one sentence with the joint declaration that CETA preserves the 'right to regulate', a term that describes a fundamental tenet of state sovereignty having recently received particular attention in the context of investment law.

The preamble's statement that CETA does not affect the possibilities to pursue policies in favour of cultural industries otherwise incompatible with the operational parts of the agreement is reinforced by the restatement of Canada and the EU of "their commitments as parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions". In particular, the parties emphasize their respective "right[s] to preserve, develop and implement"[54] cultural policies, "to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support".[55] These claims are not abstract statements about the rights to pursue certain policies under general international (economic) law; rather, they are pointedly referring to the status quo post conclusion of CETA.

Whereas the UNESCO Diversity Convention is rather soft on hard obligations, preferring best efforts to specific obligations (Hahn 2006), it has been evident in the discussion above that it addresses a number of trade-restricting polices as advantageous (if not necessary) for protecting cultural diversity. Also, the preamble adds weight to the specific claim that financial support and regulatory measures may be appropriate to protect domestic industries from being eliminated by unfettered market forces.

2.3.2. Scope of the cultural exceptions: cultural industries vs. audiovisual services

Whereas CETA defines cultural industries[56] as encompassing

(a) the publication, distribution or sale of books magazines, periodicals or newspapers [...],

(b) the production, distribution, sale or exhibition of film or video recordings;

(c) the production, distribution, sale or exhibition of audio or video music recordings;

(d) the publication, distribution or sale of music in print or machine-readable form; and

[53] "RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;…"

[54] Emphasis added.

[55] "AFFIRMING their commitments as parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions [...] and recognising that states have the right to preserve, develop and implement their cultural policies, to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and to preserve their cultural identity, including through the use of regulatory measures and financial support…..

[56] Section A (General definitions), Article 1.1.

(e) radio-communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services,

no such definition is included for the term 'audio-visual service' that is used for the EU exceptions. However, the meaning of the term 'audiovisual [or audio-visual] service is well established in international trade law since the GATS negotiating and scheduling process. In a 'Services Sectoral Classification List', elaborated by the then GATT Secretariat,[57] 'audiovisual services' are listed under Communication Services (Sector 2) and include services relating to television and radio, motion pictures, and sound recording. Table 3 below shows the W/120 definition of the sector as summarized in a 2010 background note by the WTO Secretariat (WTO 2010b).

Table 3: Summary of the Classification of Audiovisual Services according to the W/120

2.D.	Audiovisual services
2.D.a.	Motion picture and video tape production and distribution services (CPC 9611) - containing CPC 96111 (promotion or advertising services), CPC 96112 (motion picture or video tape production services), CPC 96113 (motion picture or video tape distribution services) and CPC 96114 (other services in connection with motion picture and video tape production and distribution).
2.D.b.	Motion picture projection services (CPC 9612) - containing CPC 96121 (motion picture projection services) and CPC 96122 (video tape projection services).
2.D.c.	Radio and television services (CPC 9613) - containing CPC 96131 (radio services), CPC 96132 (television services) and CPC 96133 (combined programme making and broadcasting services).
2.D.d.	Radio and television transmission services (CPC 7524) - containing CPC 75241 (television broadcast transmission services) and CPC 75242 (radio broadcast transmission services).
2.D.e.	Sound recording (no CPC correspondence indicated)
2.D.f.	Other (no CPC correspondence indicated)

This overview reveals that many cultural products related to the listed 'audiovisual services' are not included, such as live concerts which happen to be classified as 'Entertainment Services'.[58] As CETA uses legal terminology developed elsewhere, these related services would not be covered by the term 'audio-visual service'. Accordingly, exemptions referring to this term would not include those 'related' services.

2.3.3. Operational Provisions

More specific operational exceptions – always with regard to audiovisual services for the EU, and cultural industries for Canada – from various CETA rights and obligations can be

[57] 'Services Sectoral Classification List – Note by the Secretariat', WTO Doc. MTN.GNS/W/120 (10 July 1991).
[58] Ibid, para. 7 et seq.

found in the chapters on subsidies, investment, cross-border trade in services, domestic regulations and government procurement.[59]

- Article 7.7 CETA renders the disciplines concerning subsidies and government support for audiovisual services and cultural industries inapplicable.[60] CETA's Chapter Seven contains rules that restrict the possibility to grant subsidies, in order to ensure that the competitive relationship between European and Canadian undertakings is not being distorted through public monies; however, no such limitation has been introduced with regard to Canadian cultural industries and European audiovisual services.

- Article 8.2 CETA renders the disciplines with regard to establishment and non-discriminatory treatment in the investment chapter inapplicable.[61] This means that CETA's Chapter Eight, which establishes limitations on the right of contracting parties to favour 'their own' when it comes to the permission to invest and with regard to how a an established foreign investor is to be treated do not apply to the EU audiovisual service sector or Canadian cultural industries.

- Article 8.9 CETA reaffirms specifically in the context of post-establishment protection of foreign investment what has been stated in the preamble, namely the "right to regulate … to achieve legitimate policy objectives", such as the promotion and protection of cultural diversity.[62]
- Article 9.2 CETA excludes audiovisual services (for the EU) and cultural industries (for Canada) from the scope of Chapter Nine on cross-border trade in services. A specific further exemption can be found under Reservation I-PT-141 dealing with the Cultural Heritage Act of Quebec. This means that the exempted services are not covered by the market opening for services otherwise brought about by CETA: with regard to the protected service sectors, the contracting retain the right, e.g., to limit market access or differentiate on the basis of origin.

- Article 12.2 CETA excludes cultural industries and their products from the scope of Chapter Twelve on domestic regulation. That means that CETA's rules on the contracting parties licensing requirements, licensing procedures, qualification requirements, or qualification procedures do not apply to the exempted cultural industries and products. Rather, the states remain free to regulate with regard to these subject matters as they deem fit.

- With regard to the rules on government procurement contained in Chapter Nineteen, i.e. procurement of goods, services or any combination thereof for governmental purposes[63], 'Annex 19-7 General notes' exempts procurement of works of art from local artists by Québec-based public entities and any measure

[59] Cf. Article 28.9 CETA.
[60] "Nothing in this Agreement applies to subsidies or government support with respect to audio-visual services for the European Union and to cultural industries for Canada."
[61] [Scope of Chapter Eight: Investment Paragraph 3: "3. For the EU Party, Sections B [Establishment of Investment, Articles 8.4. et seq.] and C [Non-discriminatory treatment, Articles 8.6 et seq.] do not apply to a measure with respect to audio-visual services. For Canada, Sections B and C do not apply to a measure with respect to cultural industries.
[62] Article 8.9 (Investment and regulatory measures): "For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."
[63] Cf. Art. 19.2 para. 2 CETA.

adopted or maintained by Québec with respect to procurement from cultural industries.

2.3.4 Reservations on specific cultural sectors, regulations and laws, and institutions in the annexes to the CETA

The Parties to CETA have added Investment and Services Annexes to the agreement: Annex I contains "Reservations for existing measures and liberalisation commitments", whereas Annex II addresses "Reservations for future measures"; finally, Annex III contains explanatory note with regard to financial services, and is not relevant for our discussion. In both Annex I and II the Parties have included several sectoral reservations. They are reprinted in the Annex and are discussed below.

2.4. Analysis of CETA provisions on culture

2.4.1 Cultural considerations in the CETA preamble

It would appear that the reference to the Cultural Diversity Convention is the first such linkage in a trade agreement. In doing so, EU negotiators have also implemented the multiple requests of the European Parliament[64] to give proper attention to the UNESCO Diversity Convention.

CETA's preamble is an integral part of the text of the treaty[65]. While the preamble is not the place for operational provisions, the negotiators were well aware of the relevance of preambles for the understanding of many international treaties, including many WTO Agreements, in particular GATT, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Technical Barriers to Trade (TBT Agreement).[66] The highly technical expressions of attachment to the UNESCO Diversity Convention and the determination of cultural diversity as a non-economic value of the highest order show the will of the drafters to view these statements as binding and, in any case, as informing the whole of the Agreement (Contra Garcia Leiva 2015; Maltais 2014). As such it is, at least, a powerful integration of the well-established practice of both parties to support and protect their respective domestic cultural industries into the CETA, and will have to be considered in every scenario in which trade and cultural interests as defined by the parties may be in conflict.

However, there may be more to it. CETA Article 1.5 integrates the rights and obligations of the Parties under other Agreements into CETA[67]; this includes, inter alia, the UNESCO Diversity Convention and the general exception of Article XX GATT. The latter reads in relevant parts:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in

[64] See e.g. Cultural dimensions of EU external actions – European Parliament resolution of 12 May 2011 on the cultural dimensions of the EU's external actions (2010/2161(INI)), in particular para. 40 et seq.

[65] Cf. Art. 31 of the Vienna Convention on the Law of Treaties (VCLT): "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.

[66] See e.g. the Appellate Body's interpretation of Article 2.1 TBT Agreement as including criteria that cannot be found in the text of that provision, but that are reflective of the "balance set out in the preamble of the TBT Agreement between, on the one had, the desire to avoid unnecessary obstacle to international trade and , on the other hand, the recognition of the Members' right to regulate" (US – Clove Cigarettes, WT/DS406/AB/R, para. 94-96, 109).

[67] "The Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are party."

this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; x...]

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; x...]

Article XX does not address cultural diversity or the protection of cultural industries. The question may be asked, whether by "recognising that the provisions of [CETA] preserve the [...] the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity" in the preamble (and repeating this in Article 8.9 CETA[68]), CETA has integrated 'cultural diversity' in the select group of non-economic interests of the (imported) general exception of GATT. The text certainly does not say so, and by lacking to do so, allows a strong argument against such a view. But, of course, the wording is only the starting point for an exercise in interpretation.

Hence, it would seem that the negotiators left enough ambiguity for State parties and arbitrators, operating within the parameters of treaty interpretation pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), to arrive at the understanding that CETA has promoted the societal interest of 'cultural diversity' to the same relevance as 'health, safety, environment, public morals' that benefit from protection through Article XX GATT.

One further remark relating to the CETA model of the general exception seems worthwhile to address, albeit briefly, given the format of this study: 'public morals' has been interpreted by recent WTO Appellate Body jurisprudence rather broadly[69]: It has accepted the view that the "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation'".[70] In casu, it rejected the argument that the EU had to be consistent in its aim to advance animal welfare: one may understand this as indicating that if the EU and its population were of the opinion that seal pups needed particular protection, whereas chicken and pigs could be treated 'like animals', such an (arguably not fully consistent) ethical approach could represent the current state of affairs with regard to public morals, and would allow the EU to act on it pursuant to Article XX GATT. As CETA parties express an unequivocal commitment to the relevance of cultural diversity and emphasize their attachment to the UNESCO diversity convention, it would not seem a priori impossible for a CETA party taking measures to advance cultural diversity as 'a standard of right or wrong' expressed in EU and Member States' legislation, the UNESCO Diversity convention and not the least in CETA.[71]

[68] Article 8.9 CETA mentions the promotion and protection of cultural diversity, together with "public health, safety, environment, public morals", i.e. legal interests protected by Article XX GATT.

[69] Appellate Body Report, EC – Seals, para. 5.199 et seq.

[70] Appellate Body Report, EC – Seals, para 5.199, endorsing Panel Report, US – Gambling, para. 6.465.

[71] A risk attached to such an argumentation would be that CETA seems to distinguish cultural diversity from public morals.

2.4.2. The different scope of the culturally motivated exemptions

The fact that the EU side has explicitly exempted only audiovisual services from the disciplines of the CETA, whereas Canada remained attached to its well established post-CUSFTA-practice of exempting its cultural industries as defined in CETA Article 1.1 is noteworthy. Obviously, neither side was prepared to change its (successful) way of doing business. However, this difference in approaching the issue technically does not seem to be motivated by a different understanding of what is a cultural good or service (contra Maltais 2014; Garcia Leiva 2015).

The European Union and its Member States are parties to the UNESCO Diversity Convention. There, the definition of cultural goods and services is not limited to audiovisual services, and neither is the Union's or Canada's understanding. Pursuant to Article 4 para. 5 of the UNESCO Diversity Convention[72], the term 'Cultural industries' refers to industries producing and distributing cultural goods or services. The latter are being defined by Article 4 paragraph 4 as "those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services." In light of the broad definition of cultural content,[73] this definition clearly includes any artistic production in the broadest sense, but certainly also handicraft, folklore and the like. Arguably the catchment area of that definition is even broader encompassing also industrial goods (e.g. Porsche cars as embodying certain German cultural identities, Parisian fashion as expression of 'je ne sais quoi'), agricultural goods (e.g. Spanish wines and Polish vodka) and services (e.g. Italian cooking). In line with the UNESCO convention, the EU institutions share a broad view of what is a cultural product.[74]

However, neither the European Union nor Canada find it necessary to protect all of its producers of cultural products in the broad sense of the Diversity Convention in their trade agreements under the heading of "exceptions applicable to culture"[75]: Europe protects audiovisual services and their producers, whereas Canada's 'cultural industries' encompass in addition also its print industry. The reason for both parties opting for 'cultural exceptions' that do not cover all cultural products is in line with the CCD's recognition that states have more interests than the protection of all products that are testimony to a country's culture. Economic growth, justice, sustainable developments and many other policy goals are also of concern to them. Therefore Article 20 of the Diversity Convention only obliges its contracting parties to

[72] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted 20 October 2005, published at http://unesdoc.unesco.org/images/0014/001429/142919e.pdf (25.11.2016).

[73] See Article 4 para. 2 and 3 CCD: "2. Cultural Content: "Cultural content" refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.
3. Cultural expressions: "Cultural expressions" refers to those expressions that result from the creativity of individuals, groups and societies, and that have cultural content."

[74] See e.g. the Note by DG Trade on TTIP and Culture (16/07/2014) at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf (30.11.2016), and pertinent resolutions by the European Parliament.

[75] Article 28.9 CETA.

(a) [...]foster mutual supportiveness between this Convention and the other treaties to which they are parties; and

(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, [... to] take into account the relevant provisions of this Convention.[76]

This is what the CETA's parties have done. Europe views its audiovisual industry potentially threatened, in particular by the U.S. entertainment industry, whereas Canada's cultural industries are exposed to even bigger competitive pressures, notably those originating from its Southern neighbour. Indeed, they are endangering the very existence of Canadian print news.[77] In contrast, the Union organs are of the opinion that their print media are competitive and not under attack by an overwhelmingly bigger neighbour. Both partners embrace cultural diversity, but do not see the need to specifically exempt all industries capable of producing cultural products pursuant to the broad CCD definition. In that light, the decision of the Union institutions to focus their defensive energy on audiovisual services, whereas Canada chose a somewhat broader definition of its specifically protected industries seems tailored to the perceived risks.

2.4.3. The focus on services: what about cinematographic films?

Concerns have been voiced that the EU approach of focusing on services cultural goods would be left without sufficient protection, whereas the Canadian cultural exception was also addressing goods through its definition of 'cultural industries' (Maltais 2014; Garcia Leiva 2015; CFDC 2012).

It would seem, however, that these concerns seem unwarranted: leaving aside the publication, distribution and sale of goods and other print media which we addressed above, the support of the EU and its Member States for cultural industries that produce goods is largely effectuated through subsidies. It is difficult to imagine that those subsidies – clearly not 'prohibited subsidies' pursuant to Article 3 of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) – would create serious prejudice (cf. Article 5 (c) SCM-Agreement) to the interests of Canada, or, for that purpose, other WTO Members so as to give rise to legal and political pressures to abolish them.

With regard to cinematographic films, to the extent that the rules remain applicable to them[78], CETA Article 1.5 restates that their "rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are party" are preserved. That would include the provision of Article IV GATT which establishes a special regime for cinematographic films, allowing the continuation of internal quantitative

[76] Article 20 reads in full: "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination: 1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.
2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

[77] Cf. Canada — Certain Measures Concerning Periodicals (WT/DS31).

[78] This is far from clear: even in Cinemas the material presented is increasingly provided by telecommunication services. While in the majority of European cinemas, cinematographic films are still being used, the films are often provided for without charge. What is charged, is the showing of the film.

regulations relating to exposed cinematograph films in the form of screen quotas (Ehring 2011; Choi 2003).[79]

Hence it would seem that despite the parties sharing the broad, UNESCO Diversity-Convention-based understanding of cultural goods and services, they react to different perceived risks for their cultural industries. The slightly differentiated scope of the Canadian and European CETA 'cultural exception' follows from that differentiated view of risks and competitive exposures.

2.4.4. The complete exemption of Quebec from CETA's Government procurement disciplines with regard to art and cultural industries

As highlighted above, the Province of Québec has been completely exempted from the regular government procurement disciplines with regard to works of art from local artists and any public procurement "with respect to cultural industries." Insofar, Canada – for the benefit of its French-speaking province – receives a free pass that the EU and its member states do not. This discrepancy is a tribute to Quebec's commitment to cultural diversity. The other provinces of Canada, the European Union and its Member States did not share the concerns of Québec: they are prepared to apply the regular government procurement disciplines also to art and cultural industries. It is difficult so see the added value for Quebec other than communicating how serious this champion of cultural diversity takes the protection of all things related to culture.

2.4.5. The added value of the CETA Investment and Services Annexes

The Canadian reservation I-C-1 deals specifically with the Investment Canada Act. This piece of legislation is subject to a significant number of reservations.[80] With regard to culture, the Investment Canada Act allows the government to prevent an inbound investment, if it is not in the interest of Canada. In evaluating the Canadian interest, the competent authorities consider, inter alia, the compatibility of the investment with national cultural policies, taking into consideration the objectives of provincial cultural policies enunciated by the government or legislature of a province likely to be significantly affected

[79] Article IV GATT reads: "Special Provisions relating to Cinematograph Films:
If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:
(a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
(b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
(c) Notwithstanding the provisions of subparagraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of subparagraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;
(d) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination".

[80] Annex8-C (Exclusions from Dispute Settlement) reads "A decision by Canada following a review under the Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), regarding whether or not to permit an investment that is subject to review, is no subject to the dispute settlement provisions under Section F, or to Chapter Twenty-Nine (Dispute Settlement). For greater certainty, this exclusion is without prejudice to the right of a Party to have recourse to Chapter Twenty-Nine (Dispute Settlement) with respect to the consistency of a measure with a Party's reservations, as set out in the Party's Schedule to Annexes I, II or III, as appropriate". Annex 8-F contains a 'Declaration by Canada on the Investment Canada Act' dealing specifically with certain investment aspects.

by the investment.[81] The EU and its Member States do not have a similar legislation and have accordingly not included a parallel reservation.

With regard to future measures, the EU reserved "the right to adopt or maintain any measure with respect to broadcast transmission services" and made several reservations with regard to the supply of library, archive, museum, and other cultural services and with regard to the right to adopt or maintain any measure with respect to the supply of entertainment services, including theatre, live bands, circus and discotheque services, with some Member states adding "circus, amusement park and similar attraction services, ballroom, discotheque and dance instructor services, and other entertainment services" and cinema theatres as subjects of future regulations (see in detail in Annex II, infra).

It would seem that both the Union and its Member states, in an effort to leave no stone unturned, examined what could possibly be required in the future and made the pertinent reservations. Fundamentally, the compromise of focusing, on the one hand, on excluding audiovisual services from most commitments while, on the other hand, including 'cultural diversity' as a non-trade interest of the same rank as 'health, safety, environment, public morals' serves the protection of the EU's cultural diversity well: it excludes a priori the particularly endangered and relevant industry from the application of applicable CETA while injecting an overall obligation of taking cultural diversity seriously into the agreement.

2.5. The way forward

This study responded to a request by the European Parliament's Committee on Culture and Education (CULT) for an analysis of the treatment of culture and education services in the recently-concluded EU-Canada Comprehensive Economic and Trade Agreement (CETA).

The CETA marked (for the EU) significant changes in negotiating modalities in the fields of services and investment. This involved a shift in the manner in which the Parties undertake negotiated market opening commitments under the Treaty, from a WTO-GATS-type positive or hybrid list approach to a NAFTA-type negative list approach. Notwithstanding such changes, both Canada and the European Union have secured under the CETA negotiated outcomes fully aligned to – and wholly consistent with - those achieved by both Parties in their preceding trade and investment agreements at the bilateral, regional or multilateral levels. Simply put, the CETA marks no change to the long-held policy of both Parties to retain full policy immunity by eschewing substantive disciplines and market opening commitments in matters of culture and publicly-funded education services. In the case of Canada, however, an absence of reservations targeting measures governing privately-funded education services suggests that CETA has generated a WTOplus outcome in liberalization terms. The EU, for its part, has sought to preserve full policy immunity in regard to future measures governing both publicly- and privately-funded education services.

With both Canada and the EU driven by defensive negotiating impulses in the educational and cultural fields, the CETA represented a missed opportunity to deepen non-binding forms of cooperation between the Parties with a view to facilitating the mobility of students and researchers as well as of artists and their creations. Such cooperation continues to take place outside of – and quite wholly disconnected from - a trade policy setting.

[81] Emphasis added.

Moving forward, consideration should be given to anchoring deepened forms of regulatory and policy cooperation in matters of culture and education around the newly created opportunities flowing from trade- and investment-led integration. The EU-CARIFORUM Agreement took useful (and precedent-setting) first steps in this direction through a dedicated Protocol on cultural cooperation (Chaitoo, 2008; Sauvé and Ward, 2009; ITC, 2009). Scope exists to do considerably more in this area with a view to reducing the oft excessive distance between trade, academic and cultural forms of diplomacy.

Associating innovative forms of cultural and educational diplomacy to trade-led forms of economic rapprochement – for instance through the CETA-related launch of a transatlantic scholarship scheme promoting enhanced academic cooperation, mobility and mutual learning on issues of common interest to the Parties - could help build needed bridges with civil society. It would also offer a concrete illustration of the tangible progress that preferential economic relations can make possible.

This paper has shown that the CETA protects publicly-funded education and cultural diversity in ways that render concerns regarding reduced regulatory sovereignty in both areas as a consequence of increased trade between Canada and the European Union unnecessary. Regrettably, the Parties did not include a roadmap for the maintenance and development of deepened forms of transatlantic cooperation in matters of education and culture.

It would seem that, belatedly, the Parties realized that. In the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part, signed the same day as CETA[82], Article 16 on “Promoting the diversity of cultural expressions, education and youth, and people-to-people contacts” addresses, albeit in a somewhat general fashion, such concerns. It reads in relevant parts:

1. The Parties take pride in the long-standing cultural, linguistic and traditional ties that have built bridges of understanding between them. Transatlantic ties exist at all levels of government and society and the impact of this relationship is significant across Canadian and European societies. The Parties shall endeavour to encourage these ties and to seek new ways to foster relationships through people-to-people contacts. The Parties shall endeavour to use exchanges through non-governmental organisations and think-tanks that bring together youth and other economic and social partners to expand and deepen these relations and enrich the flow of ideas for the solution of common challenges.

2. Recognising the extensive academic, educational, sport, culture, tourism and youth mobility relationships that have developed between them over the years, the Parties welcome and encourage continued collaboration in expanding these linkages, as appropriate.

3. The Parties shall endeavour to foster the diversity of cultural expressions, including through the promotion, as appropriate, of the principles and objectives of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

4. The Parties shall endeavour to encourage and facilitate exchanges, cooperation and dialogue between their cultural institutions and professionals in this sector as appropriate.

[82] http://www.consilium.europa.eu/en/meetings/international-summit/2016/10/30/

It is to be hoped that sooner, rather than later, such hortatory or “best-endeavour” commitments can become operational measures. Taking concrete steps towards innovative forms of cultural and educational diplomacy to trade-led forms of economic rapprochement – for instance through the CETA-related launch of a transatlantic scholarship scheme promoting enhanced academic cooperation, mobility and mutual learning on issues of common interest to the Parties, could help build needed bridges with civil society and offer a concrete illustration of the benefits that the desire for deeper and closer ties embedded in preferential economic relations can make possible.

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ANNEXES

ANNEX 1: CETA PROVISIONS RELEVANT TO EDUCATION AND CULTURE

1. Definition of cultural industries in Chapter One:

General Definitions and Initial Provisions, Section A (General definitions), Article 1.1:

Cultural industries means persons engaged in:

(a) the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine-readable form, except when printing or typesetting any of the foregoing is the only activity;
(b) the production, distribution, sale or exhibition of film or video recordings;
(c) the production, distribution, sale or exhibition of audio or video music recordings;
(d) the publication, distribution or sale of music in print or machine-readable form; or
(e) radio-communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services;

2. Exceptions included in various chapters of CETA

Article 7.7 (Exclusion of subsidies and government support for audio-visual services and cultural industries)
Nothing in this Agreement applies to subsidies or government support with respect to audio-visual services for the European Union and to cultural industries for Canada.

Article 8.2 xScope of Chapter Eight: Investment]

2. With respect to the establishment or acquisition of a covered investment, Sections B and C do not apply to a measure relating to:

(b) activities carried out in the exercise of governmental authority.

3. For the EU Party, Sections B [Establishment of Investment, Articles 8.4. et seq.] and C [Non-discriminatory treatment, Articles 8.6 et seq.] do not apply to a measure with respect to audio-visual services. For Canada, Sections B and C do not apply to a measure with respect to cultural industries.

In Section D on investment protection, the first provision, reads

Article 8.9 Investment and regulatory measures
1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

Article 9.2. Scope xof Chapter Nine on Cross-Border Trade in Services]

[...]

This Chapter does not apply to a measure affecting:

(a) services supplied in the exercise of governmental authority;
(b) for the European Union, audio-visual services;
(c) for Canada, cultural industries;
(f) procurement by a Party of a good or service purchased for governmental purposes, and not with of a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article 19.2.2 (Scope and coverage); or
(g) a subsidy, or other government support relating to cross-border trade in services, provided by a Party.

Article 12.2 Scope

2. This Chapter does not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures:
[...]
(b) relating to one of the following sectors or activities:
(i) for Canada, cultural industries [...]
(ii) for the EU Party, audio-visual services and, as set out in its Schedule to Annex II, health, education, and social services [...]

Chapter Twenty Eight, Article 28.9

The Parties recall the exceptions applicable to culture as set out in the relevant provisions of Chapters Seven (Subsidies), Eight (Investment), Nine (Cross-Border Trade in Services), Twelve (Domestic Regulation) and Nineteen (Government Procurement).

ANNEX 19-7 General notes

1. This Chapter does not cover procurement:

[...] (i) by Québec entities of works of art from local artists or to procurement by any municipality, academic institution or school board of other provinces and territories with respect to cultural industries. For the purpose of this paragraph, works of art includes specific artistic works to be integrated into a public building or a site;

2. This Chapter does not apply to:

[...] (b) any measure adopted or maintained by Québec with respect to cultural industries.

This Chapter does not apply to a measure affecting:

(a) services supplied in the exercise of governmental authority;
(b) for the European Union, audio-visual services;
(c) for Canada, cultural industries;
(f) procurement by a Party of a good or service purchased for governmental purposes, and not with of a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of Article 19.2.2 (Scope and coverage); or
(g) a subsidy, or other government support relating to cross-border trade in services, provided by a Party.

ANNEX 2: RESERVATIONS IN EDUCATION SERVICES

List of non-conforming measures in education services reserved by Canada and its provinces and the European Union and its Member states under CETA

2. Annex I Reservations (Existing non-conforming measures)

2.1. Canada - Federal

None

2.2. Canada - Provincial

Manitoba
Sector: Education Sub-Sector: Other education services Industry Classification: CPC 9290 Type of Reservation: National Treatment Level of Government: Provincial - Manitoba Measures: The Manitoba Registered Music Teachers' Association Incorporation Act, R.S.M. 1990, c. 100 Description: Cross-Border Trade in Services No person may be admitted as a member of the Association and thus use the title "Registered Music Teacher" unless that person can demonstrate six months' prior residence in Manitoba.

2.3. European Union - EU-wide

Sector: Health, social and education services
Sub-Sector:
Industry Classification: CPC 92, CPC 93
Type of Reservation:
National treatment
Senior management and boards of directors
Market access
Level of Government: EU level - National - Regional
Measures: As set out in the Description element
Description:
Investment
Any Member State of the EU, when selling or disposing of its equity interests in, or the assets of, an existing state enterprise or an existing governmental entity providing health, social or education services, may prohibit or impose limitations on the ownership of such interests or assets, and on the ability of owners of such interests and assets to control any resulting enterprise, by investors of Canada or of a third country or their investments. With respect to such a sale or other disposition, any Member State of the EU may adopt or maintain any measure relating to the nationality of senior management or members of the boards of directors, as well as any measure limiting the number of suppliers.

For purposes of this reservation:

1. any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of the sale or other disposition, prohibits or imposes limitations on the

ownership of equity interests or assets or imposes nationality requirements or imposes limitations on the numbers of suppliers described in this reservation shall be deemed to be an existing measure; and

2. "state enterprise" means an enterprise owned or controlled through ownership interests by any Member State of the EU and includes an enterprise established after the date of entry into force of this Agreement solely for the purposes of selling or disposing of equity interests in, or the assets of, an existing state enterprise or governmental entity.

2.4. European Union - Member States

Austria
Sector: Education services Sub-Sector: Higher education services Industry Classification: CPC 923 Type of Reservation: Market access Level of Government: National Measures: University of Applied Sciences Studies Act, BGBl I Nr. 340/1993, § 2 University Accreditation Act, BGBL. I Nr. 168/1999, § 2 Description: Investment and Cross-Border Trade in Services The provision of privately funded university level education services in the area of applied sciences requires an authorization from the competent authority, the Council for Higher education (Fachhochschulrat). An investor seeking to provide an applied science study program must have his primary business being the supply of such programs, and must submit a needs assessment and a market survey for the acceptance of the proposed study program. The competent Ministry may deny an authorization where the program is determined to be incompatible with national educational interests. The applicant for a private university requires an authorization from the competent authority (the Austrian Accreditation Council). The competent Ministry may deny the approval if the decision of the accreditation authority does not comply with national educational interests.

Bulgaria
Sector: Education services Sub-Sector: Primary and secondary education services Industry Classification: CPC 921, CPC 922 Type of Reservation: National treatment Market access Level of Government: National Measures: Public Education Act, art. 12 Law for the Higher Education, paragraph 4 of the additional provisions Description: Investment This reservation applies to the provision of privately funded primary and secondary education services, which may only be supplied by authorized Bulgarian enterprises (commercial presence is required). Bulgarian kindergartens and schools having foreign participation may be established or transformed at the request of associations, or corporations, or enterprises of Bulgarian and foreign natural or legal entities, duly registered in Bulgaria, by decision of the Council of Ministers on a motion by the Minister of Education, Youth and Science.

Foreign owned kindergartens and schools may be established or transformed at the request of foreign legal entities in accordance with international agreements and conventions and under the provisions above.
Foreign high schools cannot establish subsidiaries in the territory of Bulgaria. Foreign high schools may open faculties, departments, institutes and colleges in Bulgaria only within the structure of Bulgarian high schools and in cooperation with them.

Czech Republic

Sector: Education services
Sub-Sector: Higher education services
Industry Classification: CPC 92390
Type of Reservation: Market access
Level of Government: National
Measures:
Act No. 111/1998, Coll. (Higher Education Act), § 39
Act No. 561/2004 Coll. on pre-school, basic, secondary, tertiary professional and other education (the Education Act)
Description:
Investment
Establishment in the EU is required to apply for state approval to operate as a privately funded higher education institution. This reservation does not apply to secondary technical and vocational education services.

France

Sector: Education services
Sub-Sector: Privately funded primary, secondary, and higher education services
Industry Classification: CPC 921, CPC 922, CPC 923
Type of Reservation:
National treatment
Market access
Level of Government: National
Measures: Code de l'éducation, Arts. L 444-5, L 914-4, L 441-8, L 731-8, L 731-1 to 8
Description:
Cross-Border Trade in Services
Nationality of a Member State of the EU is required in order to teach in a privately funded educational institution.
However, nationals of Canada may obtain an authorization from the relevant competent authorities in order to teach in primary, secondary and higher level educational institutions.
Nationals of Canada may also obtain an authorization from the relevant competent authorities in order to establish and operate or manage primary, secondary or higher level educational institutions. Such authorization is granted on a discretionary basis.

Greece
Sector: Education services Sub-Sector: Higher education services Industry Classification: CPC 923 Type of Reservation: National treatment Market access Level of Government: National Measures: Constitution of Hellas, art. 16, par. 5 and Law 3549/2007 Description: Investment Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. However, Law 3696/2008 permits the establishment by EU residents (natural or legal persons) of private tertiary education institutions granting certificates which are not recognized as being equivalent to university degrees.

Italy
Sector: Education services Sub-Sector: Higher education services Industry Classification: CPC 92 Type of Reservation: Market access Level of Government: National Measures: Royal Decree 1592/1933 (Law on secondary education) Law 243/1991 (Occasional public contribution for private universities) Resolution 20/2003 of CNVSU (Comitato nazionale per la valutazione del sistema universitario) Decree of the President of the Republic (DPR) 25/1998 Description: Investment An economic needs test is applied for the opening of privately funded universities authorized to issue recognized diplomas or degrees based on a three year program. Main criteria: population and density of existing establishments. Only Italian juridical persons may be authorized to issue state-recognized diplomas.

Malta
Sector: Education services Sub-Sector: Higher education services Adult education services Industry Classification: CPC 923, CPC 924 Type of Reservation: National treatment Market access Level of Government: National Measures: Legal Notice 296 of 2012 Description: Cross-Border Trade in Services Service suppliers seeking to provide privately funded higher or adult education services must obtain a license from the Ministry of Education and Employment. The decision on whether to issue a license may be discretionary.

Slovak Republic

Sector: Education services
Sub-Sector: Higher education services
Industry Classification: CPC 92
Type of Reservation: Market access
Level of Government: National
Measures: Law No. 131 of 21 February 2002 on Higher Education and on Changes and Supplements to Some Laws
Description:
Investment
Establishment in a Member State of the EU is required to apply for state approval to operate as a privately funded higher education institution. This reservation does not apply to secondary technical and vocational education services.

Slovenia

Sector: Education services
Sub-Sector: Primary education services
Industry Classification: CPC 921
Type of Reservation:
National treatment
Market access
Level of Government: National
Measures: Organization and Financing of Education Act (Official Gazette of Republic of Slovenia, No. 12/1996) and its revisions, art. 40
Description:
Investment
Privately funded elementary schools may be founded by Slovenian natural or legal persons only. The service supplier must establish a registered office or branch office.

Spain

Sector: Education services
Sub-Sector: Higher education services
Industry Classification: CPC 923
Type of Reservation: Market access
Level of Government: National
Measures: Ley Orgánica 6/2001, de 21 de Diciembre, de Universidades.
(Law 6 / 2001 of 21 December, on Universities), art. 4
Description:
Investment
An authorization is required in order to open a privately funded university which issues recognized diplomas or degrees; the procedure involves obtaining the advice of the Parliament. An economic needs test is applied, main criteria are population size and density of existing establishments.

2.5. Annex II Reservations (Future measures)

2.5.1. Canada- Federal

Sector: Social services
Sub-Sector:
Industry Classification:
Type of Reservation:
Market access
National treatment
Most-favored-nation treatment
Senior management and boards of directors
Description:
Investment and Cross-Border Trade in Services
Canada reserves the right to adopt or maintain a measure with respect to the supply of public law enforcement and correctional services, as well as the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

2.5.2 Canada – Provincial

None

2.5.3 European Union – EU-wide

Sector: Education services
Sub-Sector:
Industry Classification: CPC 92
Type of Reservation:
Market access
National treatment
Performance requirements
Senior management and boards of directors
Description:
Investment and Cross-Border Trade in Services
The EU reserves the right to adopt or maintain any measure with regard to the supply of all educational services which receive public funding or State support in any form, and are therefore not considered to be privately funded.
The EU, with the exception of CZ, NL, SE and SK, reserves the right to adopt or maintain any measure with respect to the supply of privately funded other education services, which means other than those classified as being primary, secondary, higher and adult education services.
Where the supply of privately funded education services by a foreign provider is permitted, participation of private operators in the education system may be subject to concessions allocated on a non-discriminatory basis.
National complementary reservations may be found in the schedules of reservations applicable in AT, BG, CY, CZ, FI, FR, IT, MT, RO, SE, SI, and SK.

2.5.4 European Union – Member states

Austria
Sector: Education services Sub-Sector: Higher education services Adult education services Industry Classification: CPC 923, CPC 924 Type of Reservation: Market access National treatment Description: Investment and Cross-Border Trade in Services Austria reserves the right to adopt or maintain any measure with regard to the supply of privately funded higher education services. Austria reserves the right to prohibit the cross-border supply of privately funded adult education services by means of radio or television broadcasting.

Bulgaria
Sector: Education services Sub-Sector: Industry Classification: CPC 921, CPC 922, CPC 923 Type of Reservation: National treatment Market access Description: Investment and Cross-Border Trade in Services Bulgaria reserves the right to adopt or maintain any measure restricting the cross-border supply of privately funded primary and secondary education services. Bulgaria reserves the right to adopt or maintain any measure with respect to the supply of privately funded higher education services. Existing Measures: Public Education Act, art. 12 Law for the Higher Education, paragraph 4 of the additional provisions Vocational Education and Training Act, art. 22

Cyprus
Sector: Education services Sub-Sector: Industry Classification: CPC 921, CPC 922, CPC 923, CPC 924 Type of Reservation: Market access National treatment Performance requirements Senior management and boards of directors Description: Investment and Cross-Border Trade in Services Cyprus reserves the right to adopt or maintain any measure with respect to the supply of privately funded primary, secondary, higher, and adult education services.

Czech Republic
Sector: Education services Sub-Sector: Industry Classification: CPC 921, CPC 922, CPC 923, CPC 924 Type of Reservation: Senior management and boards of directors Description: Investment and Cross-Border Trade in Services In the Czech Republic, the majority of the members of the board of directors of an establishment providing privately-funded education services must be nationals of the Czech Republic.

Finland
Sector: Education services Sub-Sector: Industry Classification: CPC 921, CPC 922, CPC 923, CPC 924 Type of Reservation: Market access National treatment Performance requirements Senior management and boards of directors Description: Investment and Cross-Border Trade in Services Finland reserves the right to adopt or maintain any measure with respect to the supply of privately funded primary, secondary, higher, and adult education services. Existing Measures: Perusopetuslaki (Basic Education Act) (628/1998) Lukiolaki (General Upper Secondary Schools Act) (629/1998) Laki ammatillisesta koulutuksesta (Vocational Training and Education Act) (630/1998) Laki ammatillisesta aikuiskoulutuksesta (Vocational Adult Education Act) (631/1998) Ammattikorkeakoululaki (Polytechnics Act) (351/2003) Yliopistolaki (Universities Act) (558/2009)

France (and all EU Members)
Sector: Social services Sub-Sector: Industry Classification: CPC 933 Type of Reservation: Market access National treatment Performance requirements Senior management and boards of directors Description: Investment France reserves the right to adopt or maintain any measure with respect to the supply of privately funded social services other than services relating to Convalescent and Rest Houses and Old People's Homes.

Hungary

Sector: Social services
Sub-Sector:
Industry Classification: CPC 933
Type of Reservation:
Market access
National treatment
Performance requirements
Senior management and boards of directors
Description:
Investment
Hungary reserves the right to adopt or maintain any measure with respect to the supply of privately funded social services

Italy

Sector: Education services
Sub-Sector:
Primary education services
Secondary education services
Higher education services
Industry Classification: CPC 921, CPC 922, CPC 923
Type of Reservation:
Market access
National treatment
Description:
Cross-Border Trade in Services
Italy reserves the right to require establishment and to restrict the cross-border supply of privately funded primary and secondary education services.
Existing Measures:
Royal Decree 1592/1933 (Law on secondary education)
Law 243/1991 (Occasional public contribution for private universities)
Resolution 20/2003 of CNVSU (Comitato nazionale per la valutazione del sistema universitario)
Decree of the President of the Republic (DPR) 25/1998

Malta

Sector: Education services
Sub-Sector:
Industry Classification: CPC 921, CPC 922, CPC 923, CPC 924
Type of Reservation:
Market access
National treatment
Performance requirements
Senior management and boards of directors
Description:
Investment and Cross-Border Trade in Services
Malta reserves the right to adopt or maintain any measure with respect to the supply of privately funded primary, secondary, higher, and adult education services.

Romania

Sector: Education services
Sub-Sector:
Industry Classification: CPC 921, CPC 922, CPC 923, CPC 924
Type of Reservation:
Market access
National treatment
Description:
Investment and Cross-Border Trade in Services
Romania reserves the right to adopt or maintain any measure with respect to the supply of privately funded primary, secondary, higher, and adult education services.

Slovak Republic

Sector: Education services
Sub-Sector:
Industry Classification: CPC 921, CPC 922, CPC 923 other than CPC 92310, CPC 924
Type of Reservation:
Market access
National treatment
Senior management and boards of directors
Description:
Investment and Cross-Border Trade in Services
EEA residency requirement for providers of all privately funded education services other than post-secondary technical and vocational education services.
An economic needs test may apply, the number of schools being established may be limited by local authorities.
In the Slovak Republic, the majority of the members of the board of directors of an establishment providing education services must be nationals of the Slovak Republic.
Existing Measures:
Act 245/2008 on education
Act 131/2002 on Universities, arts. 2, 47, 49a
Act 596/2003 on State Administration in Education, art. 16

Slovenia

Sector: Education services
Sub-Sector:
Primary education services
Secondary education services
Higher education services
Industry Classification: CPC 921, CPC 922, CPC 923
Type of Reservation:
Market access
National treatment
Senior management and boards of directors
Description:
Investment and Cross-Border Trade in Services
Slovenia reserves the right to require establishment and to restrict the cross-border supply of privately funded primary education services.
The majority of the members of the board of directors of an establishment providing privately funded secondary or higher education services must be Slovenian nationals.

Sweden
Sector: Education services Sub-Sector: Industry Classification: CPC 92 Type of Reservation: Market access National treatment Senior management and boards of directors Description: Investment and Cross-Border Trade in Services Sweden reserves the right to adopt or maintain any measure with respect to educational services suppliers that are approved by public authorities to provide education. This reservation applies to privately funded educational services suppliers with some form of State support, inter alia educational service suppliers recognized by the State, educational services suppliers under State supervision or education which entitles to study support.

ANNEX 3: RESERVATIONS ON SPECIFIC CULTURAL SECTORS, REGULATIONS AND LAWS, AND INSTITUTIONS IN THE ANNEXES TO THE CETA

3.1. Annex I Reservations by Canada – Federal (Existing non-conforming measures)

Sector: All
Sub-Sector:
Industry Classification:
Type of Reservation: Market access; Performance requirements; National treatment; Senior management and boards of directors
Level of Government: National
Measures: Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.); Investment Canada Regulations, S.O.R./85-611
Description: Investment

1. Except as set out in paragraphs 3 and 7, the Director of Investments will review a direct "acquisition of control", as defined in the Investment Canada Act, of a Canadian business by an investor of the European Union if the value of the Canadian business is not less than CAD $1.5 billion, adjusted in accordance with the applicable methodology in January of each subsequent year as set out in the Investment Canada Act.
2. Notwithstanding the definition of "investor" in Article 8.1(Definitions), only investors who are nationals of the European Union or entities controlled by nationals of the European Union as provided for in the Investment Canada Act may benefit from the higher review threshold.
3. The higher threshold in paragraph 1 does not apply to a direct acquisition of control by a state-owned enterprise of a Canadian business. Such acquisitions are subject to review by the Director of Investments if the value of the Canadian business is not less than CAD $369 million in 2015, adjusted in accordance with the applicable methodology in January of each subsequent year as set out in the Investment Canada Act.
4. An investment subject to review under the Investment Canada Act may not be implemented unless the Minister responsible for the Investment Canada Act advises the applicant that the investment is likely to be of net benefit to Canada. This determination is made in accordance with six factors described in the Act, summarised as follows:

(a) the effect of the investment on the level and nature of economic activity in Canada [...];
(b) the degree and significance of participation by Canadians in the investment;
(c) the effect of the investment on productivity, industrial efficiency, technological development and product innovation in Canada;
(d) the effect of the investment on competition within an industry in Canada;
(e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of a province likely to be significantly affected by the investment; and [83]
(f) the contribution of the investment to Canada's ability to compete in world markets.

5. In making a net benefit determination, the Minister, through the Director of Investments, may review plans under which the applicant demonstrates the net benefit to Canada of the proposed acquisition. An applicant may also submit undertakings to the Minister in connection with a proposed acquisition that is the

[83] Emphasis added.

subject of review. In the event of noncompliance with an undertaking by an applicant, the Minister may seek a court order directing compliance or any other remedy authorised under the Investment Canada Act.

6. A non-Canadian who establishes or acquires a Canadian business, other than those that are subject to review, as described above, must notify the Director of Investments.
7. The review thresholds set out in paragraphs 1 and 3, do not apply to an acquisition of a cultural business.
8. In addition, the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity, which are normally notifiable, may be subject to review if the Governor in Council authorises a review in the public interest.
9. An indirect "acquisition of control" of a Canadian business by an investor of the European Union other than a cultural business is not reviewable.

[...]

12. The review thresholds set out in paragraphs 1 and 3, do not apply to an acquisition of a cultural business.
13. In addition, the specific acquisition or establishment of a new business in designated types of business activities relating to Canada's cultural heritage or national identity, which are normally notifiable, may be subject to review if the Governor in Council authorises a review in the public interest.
14. An indirect "acquisition of control" of a Canadian business by an investor of the European Union other than a cultural business is not reviewable.

3.2. Annex I Reservations by Canada – Provincial (existing non-conforming measures)

Sector: Recreational, cultural and sporting services
Sub-Sector: Cultural goods and property
Industry Classification: CPC 963
Type of Reservation: National treatment; Market access
Level of Government: Provincial - Québec
Measures: Cultural Heritage Act, C.Q.L.R., c. P-9.002
Description: Investment

1. A heritage cultural property may include a heritage document, immovable, object or site. After obtaining the opinion of the Conseil du patrimoine culturel, the Minister of Culture and Communications may classify all or part of any heritage property the knowledge, protection, enhancement or transmission of which is in the public interest.
2. Authorisation from the Minister is required when a person, natural or legal, wishes to sell or give away a classified heritage document or object to a government or department or agency of a government, other than the Gouvernement du Québec, a natural person who is not a Canadian citizen or permanent resident or to a legal person that does not have a principal place of business in Québec. Classified heritage property in the domain of the State may not be sold, conveyed by emphyteusis or given away without the Minister's authorisation. In other cases of alienation, prior written notice is required.

3.3. Annex I Reservations by the European Union (EU-wide and Member States)

None

3.4. Annex II Reservations by the European Union (EU-wide and Member states)

Sector: Communication services
Sub-Sector: Telecommunication services
Industry Classification:
Type of Reservation: Market access, National treatment

Description: Investment and Cross-Border Trade in Services
The EU reserves the right to adopt or maintain any measure with respect to broadcast transmission services.
Broadcasting is defined as the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but does not cover contribution links between operators.

Sector: Recreational, cultural and sporting services
Sub-Sector:
Industry Classification: CPC 9619, CPC 963 , CPC 964 other than CPC 96492
Type of Reservation: Market access; National treatment; Most-favoured-nation treatment; Performance requirements; Senior management and boards of directors

Description: Investment and Cross-Border Trade in Services
The EU, with the exception of AT reserves the right to adopt or maintain any measure with respect to the supply of library, archive, museum, and other cultural services. LT reserves the right to adopt or maintain any measure requiring the establishment of suppliers and restricting the cross-border supply of these services. In AT and LT, a licence or concession may be required to provide these services.

CY, CZ, FI, MT, PL, RO, SI, and SK reserve the right to adopt or maintain any measure with respect to the supply of entertainment services, including theatre, live bands, circus and discotheque services.

In addition, the EU, with the exception of AT and SE, reserves the right to adopt or maintain any measure requiring establishment and restricting the cross-border supply of entertainment services, including theatre, live bands, circus and discotheque services.
BG reserves the right to adopt or maintain any measure with respect to the supply of the following entertainment services: circus, amusement park and similar attraction services, ballroom, discotheque and dance instructor services, and other entertainment services.

EE reserves the right to adopt or maintain any measure with respect to the supply of other entertainment services except for cinema theatre services.

LT and LV reserve the right to adopt or maintain any measure with respect to the supply of all entertainment services other than cinema theatre operation services.

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